NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions by email at: JUD.Reporter@vermont.gov or by mail at: Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801, of any errors in order that corrections may be made before this opinion goes to press.

2023 VT 33

No. 22-AP-097

Patrick LaRiviere	Supreme Court
v.	On Appeal from Superior Court, Rutland Unit, Family Division
Emily Shea	September Term, 2022

Howard A. Kalfus, J.

Patrick LaRiviere, Pro Se, Worcester, Massachusetts, Plaintiff-Appellant.

Antonietta Girardi Dutil of Facey Goss & McPhee, P.C., Rutland, for Defendant-Appellee.

PRESENT: Eaton, Carroll, Cohen and Waples, JJ., and Morris, Supr. J. (Ret.),[1] Specially Assigned

¶ 1. **CARROLL, J.** Husband appeals a final order granting wife ownership of the family dog in this divorce action. We affirm.

¶ 2. Husband filed for divorce in August 2021. The family division held a contested hearing in February 2022, which it conducted remotely. Both parties appeared and testified with the assistance of counsel. The parties stipulated to property and asset division and spousal support; the only contested issue was ownership of their dog, Zola. They did not object to the time allotted for the hearing nor to the court's suggestion that the parties divide the time equally. Husband

[1] Chief Justice Reiber was present for conference on the briefs but did not participate in this decision and was replaced with Judge Morris.

testified first. Husband was not asked on either direct or cross-examination about why he cut off contact between wife and Zola during their separation period. Husband's counsel did not seek redirect testimony following husband's cross-examination by wife's counsel. Wife then testified on direct, including testimony that husband had cut off her contact with Zola. Husband's counsel was present and made one objection to a question that called for wife to speculate about husband. When wife's counsel indicated that she had no further questions, the trial court responded, "[o]kay[,] and I guess it's the noon hour exactly," and that it was taking the matter under advisement and would issue a decision. Husband's counsel replied, "thank you, Judge." He did not indicate that he intended to cross-examine wife or elicit rebuttal testimony, or otherwise object to the court concluding the hearing.

¶ 3. In its final order and decree of divorce, the court found the following by a preponderance of the evidence. The parties married in September 2018 and separated in November 2020. They have no minor children. The parties adopted a dog together before their marriage, which they named Zola. They shared equally in the expenses and care for Zola until the spring of 2021. Each regularly spent time with Zola and maintained a strong emotional bond to Zola. However, wife's bond appeared to be deeper based on her testimony at trial. Zola appeared to be emotionally attached to both parties.

¶ 4. When the parties first separated, each agreed to have Zola every other week on an alternating basis. Husband moved to Massachusetts about three months later, at which time the alternating visits were extended to two-to-three weeks at a time. After another three months, in the late spring of 2021, husband unilaterally and without explanation cut off wife from contact with Zola.

¶ 5. Turning to the allocation of Zola, the trial court first noted that marital property, including pet animals, is allocated according to 15 V.S.A. § 751. The court cited Hament v. Baker, a case in which we held that pets are subject to the § 751 analysis, and which provided two

additional factors courts may consider when allocating pets in a divorce proceeding: "[1] the welfare of the animal and [2] the emotional connection between the animal and each spouse."[2] 2014 VT 39, ¶¶ 10, 13, 19, 196 Vt. 339, 97 A.3d 461. Applying the two Hament factors, the court found that husband and wife were each able to meet Zola's needs, including providing play time and medical care. The court found that each party had strong emotional bonds with Zola, although wife's seemed to be greater. It found that husband's unilateral and unexplained decision to cut off contact between wife and Zola was troubling and called into question his regard for Zola's emotional attachment to wife. Considering the above, it concluded that the two factors favored assigning Zola to wife.

¶ 6. Through counsel, husband moved for a new trial under Vermont Rule of Civil Procedure 59. Husband argued that the reason he did not explain why he stopped letting wife see Zola was because the court failed to give him an opportunity to do so. He conceded that he was not questioned on direct or cross-examination about why he cut off contact, but that he would have "afforded himself of the chance to explain this allegation" if he had been given the opportunity by the trial court. He asserted that his inability to either offer redirect testimony or to cross-examine wife disadvantaged his ability to put on his case.

¶ 7. The court denied the motion. It explained that the parties had agreed to the time allotted for each party to present their case and it was not the fault of the court if husband failed to reserve time to give redirect testimony. It concluded that failure to reserve time for redirect testimony was not grounds for a new trial or amendment to judgment. Husband appeals.

¶ 8. Husband, now pro se, argues that the trial court abused its discretion in how it conducted the hearing and by refusing to grant his motion for a new trial. He contends that the court misapplied the pet-allocation factors set out in Hament and authorized by 15 V.S.A. § 751(b)

---

[2] We additionally held that pets are not subject to enforceable joint-custody arrangements. Id. ¶¶ 18-19.

because the court's findings were not supported by the evidence and the findings were insufficient to award Zola to wife.

¶ 9. We conclude that husband failed to preserve objections to the way the court conducted the hearing, and that the court did not abuse its discretion in denying his motion for a new trial. We further hold that the trial court was within its discretion in assigning Zola to wife, and that the court's findings are supported by the evidence and the findings support its determination.

I. Procedural Arguments

¶ 10. Husband first contends that the trial court's mode and procedure for conducting the hearing deprived him of an opportunity to present testimony explaining the reason for cutting off wife's contact with Zola, a factor the court later relied on in allocating Zola. He argues that he was not afforded an opportunity to offer redirect testimony or to cross-examine wife, that wife never appeared on video, and that the court should not have credited wife's unsworn testimony.

¶ 11. "Contentions not raised or fairly presented to the trial court are not preserved for appeal." Bull v. Pinkham Eng'g Assocs., Inc., 170 Vt. 450, 459, 752 A.2d 26, 33 (2000); see also Damone v. Damone, 172 Vt. 504, 515, 782 A.2d 1208, 1216 (2001) (holding that testimony offered in apparent violation of evidentiary rules not preserved for review where party failed to preserve objection). Vermont Rule of Evidence 103(a)(1) "requires that for error to be predicated upon a ruling admitting evidence, a substantial right of a party must be affected and a timely objection or motion to strike must appear on the record." Damone, 172 Vt. at 514, 782 A.2d at 1216 (quotation and brackets omitted); see Hanson-Metayer v. Hanson-Metayer, 2013 VT 29, ¶ 39, 193 Vt. 490, 70 A.3d 1036 (holding that failure to timely object to unsworn testimony does not preserve issue for appeal).

¶ 12. Husband did not preserve objections to each claim of procedural error he presents on appeal. Husband failed to alert the court to his desire to offer redirect testimony or to cross-

examine wife.[3] To the extent wife did not appear by video, which wife disputes in her briefing, he failed to alert the trial court to that concern. Husband likewise made no objection to wife's unsworn testimony at the hearing. Accordingly, husband's procedural arguments fail. See Hanson-Metayer, 2013 VT 29, ¶ 39.

II. Rule 59(e) Motion for a New Trial

¶ 13. Husband next contends that the trial court abused its discretion when it denied his motion for a new trial or to amend judgment. He argues that the court's failure to give him an opportunity to testify about the reasons he cut off contact between wife and Zola was a mistake, and the court should have granted his motion to correct its mistake because husband was disadvantaged by it.

¶ 14. "The narrow purpose of Rule 59(e) is to allow the superior court to fix its mistakes immediately following the entry of judgment." Gregory v. Poulin Auto Sales, Inc., 2012 VT 28, ¶ 19, 191 Vt. 611, 44 A.3d 788 (mem.). "[A]ny supposed mistake in a judgment due to a party's own fault or neglect is 'outside the power of Rule 59(e) to correct.' " Id. (quoting N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 2008 VT 96, ¶ 45, 184 Vt. 303, 965 A.2d 447).

¶ 15. The trial court made no mistake. The parties were represented by counsel at the hearing. Counsel did not object to the terms presented by the court regarding the total time allotted for the hearing and for dividing their time. Husband's counsel never indicated that he wanted to reserve time to elicit redirect testimony, made a request to cross-examine wife, or objected at the appropriate moments during the hearing. In re Est. of Peters, 171 Vt. 381, 390, 765 A.2d 468, 475

[3] We note, however, that while "[t]he scope of cross-examination is generally within the discretionary control of the trial judge . . . [,] where the witness is a party, there is a right to cross-examine on any material matter whether covered by direct examination or not." Knight v. Willey, 120 Vt. 256, 261, 138 A.2d 596, 600 (1958) (citation omitted); see also Rich v. Chadwick, 139 Vt. 508, 509, 430 A.2d 1280, 1281 (1981) (same). While it is a better choice for the court to ask a party if they intend to present additional evidence, the time constraints imposed by the court, and agreed to by the parties, complicated that procedure here.

(2000) ("In order to preserve a claim of error in the introduction of evidence, the party opposing the introduction must make a timely objection or motion to strike." (quotation omitted)). The trial court was not required to divine husband's counsel's trial strategy. See Varnum v. Varnum, 155 Vt. 376, 390, 586 A.2d 1107, 1115 (1990) (stating that "Vermont Rule of Evidence 611(a) directs the court to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to avoid needless consumption of time" and explaining that even if time limits were too rigid, counsel failed to preserve objection (quotation omitted)). Without alerting the court to his intentions, husband deprived the court of an opportunity to consider them, and it was well within the court's discretion to deny his motion for a new trial. N. Sec. Ins. Co., 2008 VT 96, ¶ 44 ("The Rule 59(e) motion may not be used to raise arguments that could have been raised prior to the entry of judgment." (quotation and alterations omitted)).

III. Pet Allocation

¶ 16. Husband's final argument is that the court misapplied 15 V.S.A. § 751(b) and the pet-allocation factors in Hament because the evidence does not support the court's findings and its findings do not support its decision to assign Zola to wife. Specifically, he contends that the court's finding that husband offered no explanation for cutting off contact between wife and Zola is not an appropriate consideration under Hament. He asserts that the trial court should not have credited wife's testimony relating to her greater emotional attachment to Zola. Husband also maintains that the court should have found different facts before assigning Zola to wife, such as balancing what Zola's relative living arrangements would be and crediting him with being Zola's primary care provider.

¶ 17. "Section 751 of Title 15 gives the family [division] authority to order an equitable division of marital property after considering all relevant factors." Hament, 2014 VT 39, ¶ 7. The family division enjoys wide discretion when dividing property and must only "provide a clear statement as to what was decided and why" when "fashioning an appropriate order." Id.

(quotations omitted). This Court will affirm the family division's conclusions when dividing marital property unless it withheld its discretion or exercised it on clearly unreasonable or untenable grounds. Jakab v. Jakab, 163 Vt. 575, 585, 664 A.2d 261, 267 (1995). We review the family division's findings for clear error, which means we will not disturb them if they "are grounded in the evidence, even if substantial contrary evidence exists." Wade v. Wade, 2005 VT 72, ¶ 24, 178 Vt. 189, 878 A.2d 303.

¶ 18. Husband's arguments relating to the trial court's weighing of evidence and credibility determinations fail because this Court neither reweighs evidence nor makes credibility determinations. See Mullin v. Phelps, 162 Vt. 250, 261, 647 A.2d 714, 720 (1994) ("We reiterate that our role in reviewing findings of fact is not to reweigh evidence or to make findings of credibility de novo."). We do not disturb the court's finding that wife's emotional attachment to Zola was greater than husband's because that finding was based on its credibility assessment of her testimony. Likewise, we will not reweigh the trial court's findings concerning the parties' relative contributions to Zola's well-being. Such issues are squarely within the exclusive "province of the trial court." Lanfear v. Ruggerio, 2020 VT 84, ¶ 27, 213 Vt. 322, 254 A.3d 168. With respect to husband's argument concerning what facts the court should have found before assigning Zola, we stress that the family division enjoys broad discretion in determining how to divide marital property. Hament, 2014 VT 39, ¶ 7 (explaining that family division enjoys broad discretion in crafting property-division order, that it must consider "all relevant factors" but "need not specify the weight given to each [§ 751] factor," and instead must only "provide a clear statement as to what was decided and why" (quotation omitted)).

¶ 19. The trial court did not misapply 15 V.S.A. § 751(b) or Hament. As we held in Hament, pet animals are property under Vermont law and are therefore subject to § 751(b). 2014 VT 39, ¶ 10. We further held that few of the § 751(b) statutory factors apply to pet animals and that § 751(b) "permits the consideration of additional relevant factors." Id. ¶ 12. We outlined two

factors not in the statute that were appropriate for courts to consider in this context: "[1] the welfare of the animal and [2] the emotional connection between the animal and each spouse." Id. ¶¶ 12-13; see also 15 V.S.A. § 751(b) ("In making a property settlement the court may consider all relevant factors, including [the statutory criteria]." (emphasis added)). Contrary to husband's argument, nothing in Hament indicates that this Court intended to limit the family division's discretion to certain factors. Indeed, we explained that the court must consider all the factors it finds relevant, including any additional factors, and that it need not specify the weight it assigns to them but merely provide a clear statement about what it decided and why. Id. ¶ 7.

¶ 20. The trial court provided a clear explanation about what it decided and why. It correctly identified 15 V.S.A. § 751 and Hament as the appropriate authority to decide the question of assigning Zola. It set out the two pet-allocation factors and, quoting Hament, noted that the second factor, the emotional connection between each spouse and the pet, "run[s] in both directions." 2014 VT 39, ¶ 8. It found that both parties were able to meet Zola's needs, that each had strong bonds to Zola, but wife's bond to Zola appeared to be greater, and Zola appeared to have strong bonds to each party in turn. It then explained that husband's unilateral and unexplained decision to cut off contact between Zola and wife "call[ed] into question his regard for the emotional attachment that Zola feels toward [wife]." Even if we were to conclude that this finding does not neatly fit into either Hament factor—though it plainly relates to both—we would affirm the court's decision. As discussed, § 751(b) and Hament both permit the court to fashion an appropriate order based on "all relevant factors." We again stress that the trial court has considerable discretion in this posture and, absent entirely withholding its discretion or exercising it for clearly untenable or unreasonable reasons, we will affirm. For these reasons, the court did not err in awarding Zola to wife.

IV. Response to the Dissent

¶ 21. Finally, we take this opportunity to address the dissent. The dissent strays from the arguments briefed by the parties, the applicable standard of review, the plain language of the relevant statute, years of related case law, and the controlling case on the question of pet allocation.

¶ 22. To begin, the dissent misreads Hament as requiring trial courts to rigidly stick to the § 751(b) factors and the two additional factors we outlined in Hament when assigning a pet. Post, ¶ 28. Hament clearly explains that such decision-making is permissive and not mandatory, supported by citations to the extensive case law on the question of marital-property division. This is consistent with decades of case law, providing that the family division enjoys broad discretion in dividing property. See, e.g., LaFarr v. LaFarr, 132 Vt. 191, 193, 315 A.2d 235, 236 (1974) ("The division of property [under 15 V.S.A. § 751] is a matter of wide discretion in the trial court and it may decree such property as it deems just . . . . Unless it appears upon review that such discretion has been withheld or abused, the decree, as made, must stand."). To adopt a constrained view of the factors that a court may consider would upend vast swaths of substantial and well-established marital-property-division case law.

¶ 23. Moreover, the dissent mischaracterizes a single finding—husband's disregard for wife's emotional connection to Zola—as not fitting with Hament's emotional-connection factor and as "more akin to the best-interests-of-the-child factors enumerated in 15 V.S.A. § 665." Post, ¶ 28. The trial court was neither expressly nor implicitly engaging in a custodial best-interests analysis, which would be unlawful in this context in any event, and neither party contends as much on appeal. See Hament, 2014 VT 39, ¶ 10 ("In contrast to a child, a pet is not subject to a custody award following a determination of its best interests."). This focus is misplaced insofar as husband's disregard for wife's emotional connection to Zola is inherently a finding relating to Hament's factor regarding "the emotional connection between the animal and each spouse." Id. ¶ 13.

¶ 24. The dissent's opining on the question of how best to allocate a pet is beyond the scope of this appeal. Post, ¶ 27 n.4. Neither party raised the question the dissent focuses on, and the trial court did not consider it. Hament, including its language giving courts leeway to rely on any relevant factor in allocating a pet, entirely controls the question of Zola's allocation, and we are bound by it.

¶ 25. We affirm the family division's final order and decree of divorce.

Affirmed.

FOR THE COURT:

____

Associate Justice

¶ 26. **COHEN, J., dissenting.** I would reverse and remand on the grounds that the trial court's decision exceeded the scope of the factors identified in Hament v. Baker, 2014 VT 39, ¶ 13, 196 Vt. 339, 97 A.3d 461, for determining pet ownership in divorce proceedings. The court applied a best-interests standard appropriate when determining child custody but inappropriate for pet allocation.

¶ 27. "This Court has consistently ruled that pet animals are property," Hament, 2014 VT 39, ¶ 8, but "pets generally do not fit neatly within traditional property law principles," Morgan v. Kroupa, 167 Vt. 99, 103, 702 A.2d 630, 633 (1997). "Their long and intimate association with people gives rise to special concerns for their well-being and humane treatment." Hament, 2014 VT 39, ¶ 8. Despite generally having "little or no market value, . . . we spend generously to feed and care for" our pets, making the emotional value of their ownership the paramount concern when

considering pet allocation.[4] Id. However, a pet, unlike a child, "is not subject to a custody award following a determination of its best interests," and "the family division must assign it to one party or the other." Id. ¶ 10.

¶ 28. Although 15 V.S.A. § 751(b) permits a court to "consider all relevant factors" when allocating property, Hament makes clear that "the dog's welfare and its emotional relationship with the parties" are the factors a court must consider when allocating pet ownership. 2014 VT 39, ¶ 17. Based on the evidence, the court found here that "[b]oth parties are able to meet Zola's daily needs. Both are able and disposed toward playing with her, taking her to veterinary appointments and simply spending time with her." It further found that:

> there are strong bonds between [husband] and Zola and also between [wife] and Zola although [wife] seems to have a greater emotional bond to the dog. That [husband] would unilaterally and without explanation cease all contact between [wife] and Zola calls into question his regard for the emotional attachment that Zola feels toward [wife].

Such a consideration is more akin to the best-interests-of-the-child factors enumerated in 15 V.S.A. § 665, which include "the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent." 15 V.S.A. § 665(b)(5). With custody of a child, facilitating contact with the other parent is generally encouraged or required, along with meeting the developmental needs of the child as they adjust to their new normal. See 15 V.S.A. §§ 665(b)(2), (3), (5). A child who is anxious about not seeing their noncustodial parent as frequently as before the divorce, for example, would have additional emotional needs that the

---

[4] Some trial courts have found that a useful approach to pet allocation engages with the financial aspect of property division. Under Vermont law, the owner "of personal property shall be a competent witness to testify as to the value thereof." 12 V.S.A. § 1604. Each owner of the pet can testify as to the emotional or sentimental value of maintaining ownership of their pet, rather than simply the pet's fair market value. See Value, Black's Law Dictionary (11th ed. 2019) (defining "value" as "[t]he significance, desirability, or utility of something"). Providing some form of financial compensation to the party in a property-division proceeding who is not given ownership of the familial pet is appropriate in the interests of fair and equitable division of property and within the trial court's discretion.

custodial parent would need to meet in order to ensure the child's healthy development. See, e.g., Wright v. Kemp, 2019 VT 11, ¶ 20, 209 Vt. 476, 207 A.3d 1021 (affirming order "giving sole physical rights and responsibilities to mother, who had a healthy relationship with daughter and was better able to support daughter's emotional and therapeutic needs"). However, we have not identified this as an appropriate consideration in pet ownership, and it was error for the family division to import this standard when considering how to assign Zola.

¶ 29. A pet is more than a mere object in the eyes of the law, just as it is more than a mere object in the eyes of its owners. Pets are companions and sources of comfort and entertainment. However, a pet is still legally considered property, and it is inappropriate and an abuse of discretion to allow best-interests factors to seep into a property-division analysis beyond the two pet-allocation factors this Court has already indicated are appropriate.[5] See Hament, 2014 VT 39, ¶ 13. Whether or not husband has regard for the emotional connection between Zola and wife is irrelevant to the pet-allocation analysis. This Court already held in Hament that a property-division proceeding cannot end in shared ownership of a pet; it would be logically inconsistent to then rely on compliance (or lack thereof) with a shared-ownership agreement as evidence weighing in one party's favor in such a proceeding. Id. ¶ 6. Further, regard for the emotional connection between the pet and the other party is categorically unnecessary when considering pet ownership. Neither party would be able to effectively communicate to Zola that they understand her sense of loss over no longer having contact with the other party, and the trial court stated that the parties have equal ability to meet Zola's needs—easing any potential separation anxiety would have been an aspect of Zola's care with which the parties already grappled when they alternated possession.

[5] Although New York has decided to explicitly include a best-interests analysis for deciding ownership of pets, Vermont has not. See N.Y. Dom. Rel. § 236(B)(5)(d)(15) (McKinney 2021) ("[I]n awarding the possession of a companion animal, the court shall consider the best interest of such animal.").

¶ 30. The trial court impermissibly considered factors beyond the scope of Hament. I would therefore remand for the court to reconsider the evidence under the correct legal standard.

¶ 31. I am authorized to state that Justice Waples joins this dissent.

____

Associate Justice