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2023 VT 42

No. 22-AP-259

Kerry-Ellen Rock	Supreme Court
v.	On Appeal from Superior Court, Chittenden Unit, Family Division
James D. Rock	May Term, 2023

Megan J. Shafritz, J.

Evan Barquist and Kristen J. E. Connors of Montroll, Oettinger & Barquist, P.C., Burlington, for Plaintiff-Appellee,

Erin Miller Heins of Langrock Sperry & Wool, LLP, Burlington, for Defendant-Appellant.

PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **COHEN, J.** Husband appeals from the final divorce order issued by the family division of the superior court. He argues that the court erred in declining to enforce the parties' premarital agreement concerning property division. He also challenges a condition imposed by the court pertaining to his contact with the parties' minor daughter and argues that the court erred in denying his motion for a new trial. We conclude that the court's findings and conclusions are supported by the record and that it acted within its discretion, and therefore affirm.

I. Facts

¶ 2. The family court made the following findings in its order. Wife and husband met in 1990. At the time, wife was twenty-one and husband was thirty-five. Wife had a high-school

degree and worked at an insurance company. Husband had attended college at the University of Vermont and earned a master's degree in business administration from St. Michael's College. He then worked for his father's plumbing business, which he purchased from his father in 1990.

¶ 3. After the parties dated for several years, wife raised the issue of marriage. Husband insisted on a premarital agreement. The agreement, which was drafted by husband's attorney, stated that each party waived any interest in property owned by the other party at the time of the marriage, as well as any interest in property acquired by the other party during the marriage. It stated that any joint purchases or investments made by the parties "shall be divided between the parties based on the percentage of the contribution made by each party to the value of the property." The agreement provided that on January 1 of each year, the parties would determine the percentage of after-tax income each party had contributed to their collective income for the previous year, and would use that figure to pay a corresponding percentage of living expenses during the following year. It also provided that each party waived any claim for spousal maintenance.

¶ 4. Wife consulted with an attorney, who advised her not to sign the agreement because it was too one-sided. She decided to sign because she was in love and wanted to get married. The parties signed the agreement in December 1994. They married in June 1996. Both parties testified that they put the agreement in a drawer and did not think about it.

¶ 5. In 1996, husband purchased his childhood home from his mother, and the parties began residing there. The following year, husband executed a quitclaim deed conveying the residence to himself and wife as tenants by the entirety.

¶ 6. Wife continued to work at the insurance company after the parties married. She had earned her sales license and began selling policies to customers. She also attended night classes at Champlain College, eventually earning an associate degree in business administration.

¶ 7. In 1999, husband's employees quit to start a competing company, which threatened to put him out of business. Husband testified that his company was nearly bankrupt at that time. Husband told wife that she needed to quit her job and come work for him to save the business.

¶ 8. Wife began running the office while husband dealt with customers and performed the field work. Wife worked from 7 a.m. to 5 p.m. five or six days a week. She handled paperwork and performed bookkeeping and accounting tasks. Over the next eight years, the parties rebuilt the company into a successful business, increasing annual sales from $300,000 to over $1 million.

¶ 9. Wife was not paid any wages during her first two years working for the company. In subsequent years, husband and his accountant would determine at the end of the year how much wife needed to be paid to cover federal payroll tax and other employment taxes. A check would be made out for that amount for husband to sign, and he would then deposit it in his investment account. Wife never received a weekly paycheck from the business. Her Social Security statements showed that she earned between $7000 and $11,000 a year from 2001 to 2006, and had no income in 2007. Wife testified that she worked long hours to support the business because she viewed it as a joint project that would eventually benefit and improve both parties' lives.

¶ 10. Husband received $1000 per week from the business. When the business began generating net profits at the end of the year, wife or the business's bookkeeper issued checks to husband for the profits, which ranged from $250,000 to $300,000 annually. Husband deposited the checks into his investment account, which he maintained separately from the parties' other accounts. Based on wife's pay structure and contributions to the business, the court found that wife reasonably believed these profits belonged to her as well. Husband created separate pension accounts for himself and wife, which were managed by husband and his investment advisor. The parties also had conventional IRA accounts.

¶ 11. In 1997, husband built a commercial building in Williston to house the plumbing business. He also leased space to other corporate tenants. The building is owned by a limited

liability company (LLC) formed in 2003, of which husband is the sole member. In addition to wife's work for the plumbing business, wife prepared leases and other documents, collected rents, and worked with tenants for the LLC. She did not receive income for this work. Following the parties' separation, husband paid a bookkeeper $40 per hour for similar services.

¶ 12. The parties had a joint checking account that wife used to pay household bills. Husband's paychecks were deposited into this account. Wife did not receive income from the business, so she did not contribute to household expenses. The parties never attempted to calculate their percentage share of household expenses as expected by the premarital agreement. The joint checking account was linked to husband's investment account, which husband maintained solely in his name.

¶ 13. In 2007, husband sold the plumbing business for over $930,000 and deposited the proceeds in his investment account. Husband wished to retire and travel the world. Wife stopped working, and the parties traveled to Asia, Africa, and other locations. They lived off the income from husband's investment account and the rents collected from the LLC. Their average monthly income was $12,000 to $15,000.

¶ 14. During the 2008 financial crisis, husband's investment account lost approximately $1 million in value. Husband worked to rebuild the account through careful investment strategies. The account was worth over $2 million at the time of the divorce.

¶ 15. The parties' only child, a daughter, was born in 2012. Husband wanted to see the United States, so the parties bought a motorhome in 2015 and traveled around the country for four years. The motorhome was purchased under both parties' names using a mortgage on the marital residence. When daughter began elementary school, the parties began spending more time in Vermont. They sold the motorhome in 2019 for $230,000. The proceeds were deposited into husband's investment account. The court found that this was not a gift from wife to husband but rather a continuation of husband's practice of controlling the parties' finances.

¶ 16. The parties disagreed over how best to parent their daughter, and these tensions were exacerbated by the COVID-19 pandemic. In August 2020, wife moved out of the marital home with daughter and filed for divorce. Husband moved for partial summary judgment, arguing that the court was required to enforce the premarital agreement in dividing the marital assets. In response, wife moved to set aside the agreement as unconscionable. Alternatively, she argued that the parties had abandoned it by acting inconsistently with its terms during the marriage. The court denied husband's motion, concluding that the relevant material facts were disputed, and deferred ruling on wife's motion until after the final evidentiary hearing.

¶ 17. After a two-day hearing in December 2021, the court issued a final divorce order. The court first addressed the premarital agreement. The agreement contemplated that the parties would maintain separate property and contained a list of husband's separate assets at the time of marriage, which included the plumbing business. However, the court found that over the years the parties had consolidated all their assets, other than the marital residence and the LLC, into a single investment account and associated checking account. Although the investment account was held in husband's name, its growth was due in part to funds earned by wife and profits from the business, to which wife had made significant contributions, and therefore it was not simply husband's property. The court found that it did not have sufficient evidence to determine what portion of the investment account was traceable to separate property owned or acquired by husband. Because the mortgage to the LLC was apparently funded from the investment account, the court found that wife had contributed to the LLC as well, making it a joint asset. The marital residence was also joint property because although husband purchased it with his own funds, he subsequently conveyed to himself and wife as tenants by the entirety. The court found that it could not enforce the provision requiring the parties to divide jointly held assets by the percentage of the contribution made by each party, as husband had not presented evidence to support such a determination.

¶ 18. The court went on to conclude that the premarital agreement as a whole was unenforceable because the parties had waived its terms by failing to follow any of the provisions concerning separate and joint property. Alternatively, the court found that the agreement was unconscionable because it would prevent wife from receiving spousal maintenance to which she would otherwise be entitled by statute, and thus leave her with a standard of living well below what she experienced during the marriage.[1]

¶ 19. The court then analyzed the statutory factors governing property division and concluded that an equal division of the marital assets was equitable due to the length of the marriage and the parties' respective contributions to the marital estate. Although wife was eligible for spousal maintenance, the court determined that an award of property instead of maintenance was appropriate due to husband's age and retirement status. It therefore awarded husband the LLC, the marital residence, and 41% of the investment account, and awarded wife the remaining 59% of the investment account.

¶ 20. The court gave wife sole legal parental rights and responsibilities over all areas except for education and religion, for which the parties had agreed to share responsibilities. Wife was awarded primary physical custody of daughter. Pursuant to the parties' temporary agreement, husband had been caring for daughter on Tuesday nights and every other weekend. The court found that it was in daughter's best interests to gradually increase contact with husband to the point where each parent had equal contact. However, it required husband to participate in family therapy with daughter as a precondition to expanded contact. This appeal followed.

[1] In analyzing whether the agreement was unconscionable, the court focused on the spousal-maintenance provision because it had already determined the property-division provisions were unenforceable due to husband's failure to provide supporting evidence.

II. Enforceability of Premarital Agreement

¶ 21. Husband's primary argument on appeal is that the court erred in failing to enforce the parties' premarital agreement. Husband argues that the agreement was procedurally and substantively fair both at the time it was entered and at the time of divorce, and therefore ought to control the division of property in this case.

¶ 22. A premarital agreement is enforceable when each spouse has made a fair disclosure of finances, each spouse enters into the agreement voluntarily, and the substantive provisions of the agreement are fair to each spouse. Bassler v. Bassler, 156 Vt. 353, 361, 593 A.2d 82, 87 (1991). Absent a showing of fraud or unconscionability, the parties are generally bound to the terms of a premarital agreement. Padova v. Padova, 123 Vt. 125, 129, 183 A.2d 227, 230 (1962).

¶ 23. However, as with any other contract, the parties may waive enforcement of certain provisions of a premarital agreement. See Gamache v. Smurro, 2006 VT 67, ¶ 7, 180 Vt. 113, 904 A.2d 91 (explaining that premarital agreement is contract that is interpreted according to usual rules for contracts); Tschider v. Tschider, 2019 ND 112, ¶ 25, 926 N.W.2d 126 (affirming trial court's determination that parties waived provision requiring them to create joint investment account). The parties may also agree to abandon the agreement entirely. Geraci v. Geraci, 155 So. 3d 1194, 1195 (Fla. Dist. Ct. App. 2014) (recognizing that "abandonment of an antenuptial agreement is a factual possibility"); In re Marriage of Christensen, 543 N.W.2d 915, 918 (Iowa Ct. App. 1995) (explaining that premarital agreements "can be abandoned in the same manner as any contract"). This is known as an "agreement of rescission," and it terminates the contract as a whole. Restatement (Second) of Contracts, § 283; see also Davenport v. Crowell, 79 Vt. 419, 65 A. 557, 561 (1907) (stating that "agreement to rescind [a contract] may be shown by such circumstances, or by such a course of conduct, as clearly indicates that the intention of the parties was that it should so operate").

¶ 24. Such an agreement "need not be expressed in words." Restatement (Second) of Contracts § 283 cmt. a. "[A] party may rescind a pre-nuptial agreement by engaging in a course of conduct which clearly evidences an intent to abandon its terms." In re Marriage of Burgess, 462 N.E.2d 203, 204 (Ill. App. Ct. 1984). "This might occur by a commingling of marital or non-marital property or by conduct which shows an intent to ignore the agreement and treat non-marital property as marital property." Id.

¶ 25. Whether the parties have abandoned an agreement through their conduct is a question of fact for the trial court to decide. See Patton v. United States, 74 Fed. Cl. 110, 118 (2006) (stating whether parties abandoned contract was "a question of fact that may be shown by a written contract, verbal agreement or by acts and conduct" (quotation omitted)). We review factual findings for clear error. See Randall v. Hooper, 2020 VT 32, ¶ 6, 212 Vt. 216, 234 A.3d 971 ("We review factual findings for clear error and conclusions of law de novo.").

¶ 26. The evidence in this case supports the court's determination that the parties abandoned the protections of the premarital agreement by acting inconsistently with its terms throughout their long marriage. The agreement contemplated that the parties would (1) maintain the assets they each owned at the time of marriage separately; (2) acquire separate assets during the marriage; and (3) if they acquired jointly held assets, divide them based on their respective contributions to the acquisition of those assets. It also contemplated that the parties would pay living expenses in proportion to their income; separately pay their individual debts; and file separate tax returns or, if filing jointly, allocate tax funds and liabilities according to their respective incomes. It also required wife to be compensated for any work she did for the business entirely through wages.

¶ 27. The parties did not follow any of these provisions. First, they failed to maintain separate property. By the time of the divorce, none of the assets listed in the 1994 agreement existed. Instead, the parties' major non-retirement assets other than the marital home and the LLC

had been transformed into a single investment account. Although the investment account was titled in husband's name, husband grew the account by adding wife's salary checks each year, as well as the annual profits from the business, to which wife had contributed significantly in terms of her services. Husband also added $230,000 in proceeds from the sale of the parties' motorhome, which had been titled in both of their names. The investment account therefore contained both parties' assets.

¶ 28. Husband argues that it was error for the court to find that wife had contributed anything to the business profits, and therefore to the growth of the investment account and the LLC, through her office work. He contends that the term "contribution" in the agreement means monetary contributions only. When interpreting a premarital agreement, like other contracts, we strive to give effect to the parties' intent as expressed in the language of the agreement. Gamache, 2006 VT 67, ¶ 7 ("The intention of the parties at the time the contract is formed governs interpretation."); see also Southwick v. City of Rutland, 2011 VT 105, ¶ 5, 190 Vt. 324, 30 A.3d 1298 ("Our goal when interpreting contractual provisions is to give effect to the intent of the parties as it is expressed in their writing."). "When the plain language of the writing is unambiguous, we take the words to represent the parties' intent, and the plain meaning of the language governs our interpretation of the contract." Southwick, 2011 VT 105, ¶ 5.

¶ 29. The term "contribution" appears in several parts of the agreement. In paragraph 3.b, the agreement states that all purchases or investments made jointly by the parties "shall be divided between the parties based on the percentage of the contribution made by each party to the value of the property." In paragraph 4, the agreement states that in the event of divorce or separation, any jointly owned property "shall be divided between the parties based upon the respective pro rata contribution for any property jointly owned." It also states that the party with the "larger percentage of equity contribution" in the marital home would have first option to purchase the home. In paragraph 7, the agreement discusses the treatment of "[a]ny funds or

property contributed by a party" to trusts or accounts for their children. Finally, in paragraph 11, the agreement states that if wife were to work for the business, the parties agreed that her "efforts . . . will be compensated by salary or wages drawn from the business and that all such efforts will have been met by extra monetary contribution."

¶ 30. Viewed in context, the term "contribution" is plainly intended to encompass more than simply monetary contributions. Paragraph 7 of the agreement contemplates that contributions may be made in the form of funds or property, indicating a broader meaning. Paragraph 11 of the agreement qualifies the term "contribution" with "monetary," language that would be unnecessary if that is what "contribution" already meant. We therefore agree with the family court that the term "contribution" includes any contribution of value, whether cash, tangible or intangible property, or services.

¶ 31. This interpretation is consistent with the ordinary meaning of the term "contribution," which is "the giving or supplying of something (such as money or time) as a part or share." Contribution, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/contribution; see also Contribution, Black's Law Dictionary (11th ed. 2019) ("Something that one gives or does in order to help an endeavor be successful."). It is also consistent with our case law, which recognizes that a spouse in a divorce or an unmarried cotenant in a partition action may be credited for "sweat equity" contributions to the value of jointly owned property. See Wynkoop v. Stratthaus, 2016 VT 5, ¶ 29, 201 Vt. 158, 136 A.3d 1180 (holding that trial court acted within discretion by crediting co-lessee for sweat equity contributions to value of property in deciding partition action); Mizzi v. Mizzi, 2005 VT 120, ¶ 7, 179 Vt. 555, 889 A.2d 753 (mem.) (allowing party to recover the costs of physical labor in construction of family home in divorce). Wife's services to the plumbing business and LLC were contributions within the ordinary meaning of the word as it is used in the parties' agreement.

¶ 32. Husband also claims that because the investment account and LLC were titled solely in his name, they were separate property, and wife waived her interest in them under paragraph 12 of the agreement. This argument is unpersuasive. The family court has jurisdiction over "[a]ll property owned by either or both of the parties, however and whenever acquired," and legal title is "immaterial" for the purposes of property division. 15 V.S.A. § 751(a); see also Mizzi, 2005 VT 120, ¶ 6 (noting that § 751 "instructs courts not to rely on title alone in dividing marital property"). While parties may contract to make certain property separate from the marital estate, in this case husband waived the protection of the separate-property provisions of the agreement by commingling wife's funds with his own in the account. He then apparently used these mixed funds to provide a mortgage to the LLC. Having failed to actually segregate his assets from wife's, or to provide a specific accounting of the source of the funds, husband did not prove that these assets were his separate property and abandoned his rights under those provisions of the agreement.

¶ 33. The agreement did contemplate that the parties would acquire jointly held assets, and provided that such assets would be divided on a pro rata basis. But the parties did not keep track of their respective contributions to the investment account and, in turn, the LLC. Husband provided no evidence demonstrating what portion of the investment account was traceable to his contributions, making it impossible for the family court to divide the assets as provided by the agreement.

¶ 34. Similarly, while husband initially acquired the marital home with his own funds, he then conveyed title to himself and wife as tenants by the entirety. The legal effect of this transfer was to give both husband and wife an undivided whole interest in the home. See RBS Citizens, N.A. v. Ouhrabka, 2011 VT 86, ¶ 8, 190 Vt. 251, 30 A.3d 1266 ("A tenancy by entirety differs from a joint tenancy in the entirety of title as well as seizin of each grantee in the whole estate; they have but one title and each owns the whole." (quotation omitted)).

¶ 35. The parties also acted inconsistently with the other major provisions of the agreement. They never divided living expenses as contemplated by paragraph 5 of the agreement. They filed joint tax returns and apparently did not apportion their tax liabilities or any refunds based on their respective incomes. They paid each other's debts using the investment account.

¶ 36. The parties also failed to comply with paragraph 11's requirement that wife be compensated entirely through wages for any work for the plumbing business. Wife was not paid at all during the first two years that she worked for the business. She did receive wages in later years, but as the family court found, "these were not wages as commonly understood, reflecting an arms-length agreement to the benefit of both employer and employee."[2] She was instead paid an amount calculated by the parties' accountant to maximize tax benefits for the parties and the business. She did not actually receive these funds, which were deposited into the investment account. Wife's compensation structure was different from other employees, who were paid at a higher rate and on an hourly basis. The court found that this clearly demonstrated an intent to treat wife differently than a regular employee and to disregard the agreement.

¶ 37. Finally, the parties also did not strictly comply with paragraph 8 of the agreement, the waiver-of-spousal-maintenance provision. That provision required each party to purchase disability insurance at their own expense if a policy existed through their employer. Before they sold the plumbing business, the parties had disability insurance, but it was paid for by the company. They did not maintain insurance afterward, even though wife was still of working age and the provision stated that it "shall be construed to provide income in the event of a substantial change in circumstance in one party's ability to support himself or herself," and that spousal maintenance

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[2] This finding is supported by the court's unchallenged findings that wife worked ten hours a day for five to six days a week, or fifty to sixty hours a week. She was nominally paid $7000 to $11,000 annually for this work, which amounts to $2.69 to $4.23 per hour. In contrast, an employee hired by the parties in 2001 to assist wife with the office work was paid $8 to $9 per hour.

would not be available despite such a change in circumstances. Here, as elsewhere, the parties failed to maintain the strict separation between their finances that was contemplated by the agreement.

¶ 38. By failing to follow the provisions of the premarital agreement, or to hold each other accountable for failing to do so, the parties effectively agreed to abandon it.[3] See Restatement (Second) of Contracts § 283 cmt. a ("Sometimes mere inaction on both sides, such as the failure to take any steps looking toward performance or enforcement, may indicate an intent to abandon the contract."); In re Marriage of Zimmerman, 714 P.2d 927, 929 (Colo. App. 1986) (affirming trial court's determination that by failing to maintain separate property and instead investing their assets into their joint business, parties had abandoned antenuptial agreement). We therefore affirm the family court's conclusion that the agreement was no longer in effect and did not control the division of property in this case. Because we affirm on this basis, we do not address the court's alternative ruling that the agreement was unconscionable.

III. Property Division

¶ 39. In the absence of the premarital agreement, the distribution of the parties' property was controlled by 15 V.S.A. § 751. That statute requires the court to equitably divide marital property and sets forth twelve factors that the court may consider in its determination. Id. § 751(b); Jakab v. Jakab, 163 Vt. 575, 585, 664 A.2d 261, 267 (1995). Husband argues that the court should have given greater weight to two of the statutory factors, namely, "[t]he party through whom the property was acquired," and "[t]he contribution of each spouse in the acquisition, preservation,

[3] The premarital agreement contained a provision stating that it could only be rescinded in writing, as well as a severability clause. The circumstances here demonstrated that the parties abandoned these provisions along with the other provisions in the agreement. See Restatement (Second) of Contracts § 283 (explaining that agreement of rescission terminates all obligations under contract); see also, e.g., Pollard v. Southdale Gardens of Edina Condo. Ass'n., Inc., 698 N.W.2d 449, 453 (Minn. Ct. App. 2005) ("Because a nonwaiver clause may be modified by subsequent conduct, the mere presence of a nonwaiver clause does not automatically bar a waiver claim.").

and depreciation or appreciation in value of the respective estates." 15 V.S.A. § 751(b)(10)-(11). He contends that all the parties' assets originally derived from the plumbing business, which husband owned prior to the marriage, and that he was solely responsible for the growth of the investment account.

¶ 40. "The family court has broad discretion when analyzing and weighing the statutory factors in light of the record evidence." Wade v. Wade, 2005 VT 72, ¶ 13, 178 Vt. 189, 878 A.2d 303. The court is not required to assign a specific weight to each factor but must simply explain "what was decided and why." Molleur v. Molleur, 2012 VT 16, ¶ 15, 191 Vt. 202, 44 A.3d 763 (quotation omitted). Property division "is not an exact science and, therefore, all that is required is that the distribution be equitable." Casavant v. Allen, 2016 VT 89, ¶ 15, 202 Vt. 606, 151 A.3d 1233 (quotation omitted).

¶ 41. The court acted within its discretion here. It analyzed each of the § 751(b) factors, including the two identified by husband. Because this was a long-term marriage lasting over twenty-four years, the court found it appropriate to begin with an equal division of assets. See Lee v. Ogilbee, 2018 VT 96, ¶ 30, 208 Vt. 400, 198 A.3d 1277 (explaining that because "long-term marriages are essentially an economic partnership," courts often find a fifty-fifty division of property to be equitable). The court recognized that husband was the original source of some of the parties' assets, but found that the LLC and the money in the investment account derived from the parties' commingled funds. The parties had jointly lived off the proceeds from those assets for the past decade. It found that husband was responsible for the growth of the investment account through savvy investing and that he purchased and developed the commercial building owned by the LLC. However, the court also found that wife had made significant nonmonetary contributions to the marriage through her unpaid and undercompensated work for the businesses and her management of the household. The court ultimately concluded that the fact that husband was the original source of many of the assets from which the parties' wealth grew was balanced by its

decision to award wife property in lieu of the substantial spousal maintenance to which she would otherwise be entitled. It therefore determined that an equal division was the most equitable result.

¶ 42. The court's explanation is clear and is supported by its findings. While husband disagrees with the result, he has not shown an abuse of discretion. See Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571, 980 A.2d 799 (mem.) (explaining that arguments which amount to nothing more than disagreement with court's reasoning and conclusion do not make out case for abuse of discretion). He essentially asks us to reweigh the evidence on appeal, which we will not do. See Cabot v. Cabot, 166 Vt. 485, 497, 697 A.2d 644, 652 (1997) ("As the trier of fact, it was the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence.").

¶ 43. Husband argues that the court erred in finding that wife would be entitled to spousal maintenance because she waived that right in the premarital agreement. As explained above, the parties through their conduct effectively agreed to abandon the agreement in its entirety, including the spousal-maintenance provision. Husband also argues that the court erred in its analysis of the maintenance to which wife would be entitled under 15 V.S.A. § 752. The court's assessment of a potential maintenance award was theoretical; the court underwent the analysis to explain why it viewed the premarital agreement as unconscionable. Because the court went on to award property in lieu of maintenance, we need not address husband's arguments concerning the specific amount of maintenance to which wife would theoretically be entitled.

IV. Parent-Child Contact

¶ 44. Next, husband challenges the court's requirement that he participate in family therapy with daughter as a precondition to expanding his parent-child contact. A parent-child contact decision "must serve the best interests of the child, after consideration of the factors set forth in [15 V.S.A.] § 665(b)." Lee, 2018 VT 96, ¶ 15. The family court has wide discretion in decisions concerning parent-child contact, and we will not disturb such decisions unless the court

exercised its discretion "upon unfounded considerations or to an extent clearly unreasonable upon the facts presented." Weaver v. Weaver, 2018 VT 38, ¶ 15, 207 Vt. 236, 186 A.3d 1119 (quotation omitted).

¶ 45. Again, we see no abuse of discretion here. Under Vermont law, "[t]he court may impose conditions on visitation if clearly required by the child's best interests." Miller v. Smith, 2009 VT 120, ¶ 5, 187 Vt. 574, 989 A.2d 537 (mem.). The court's parent-child contact decision flowed from, and was based on, its assessment of the § 665(b) factors and daughter's best interests. The court found that both parents loved daughter and were able to meet her needs, and that she was well-adjusted to both of their homes. However, wife was better able to provide guidance and meet daughter's medical, emotional, and developmental needs. Husband expected daughter to be engaged in self-improvement at all times. He would not allow her to participate in extracurricular activities such as ice skating or ballet that she wanted to try, and instead signed her up for activities that he preferred. He did not allow her to attend playdates or spend the night at friends' houses. During the pandemic, he had forced daughter to play piano for two to three hours a day, even though she preferred to play outside and would cry at the piano. He criticized daughter's weight and appearance, causing daughter distress. After the separation, wife engaged daughter in counseling to help her deal with anxiety and handling her emotions. Husband opposed counseling and made daughter tell wife that she did not want to attend. Wife did not believe that these were daughter's true wishes and continued the counseling. The court did not fault husband for wanting daughter to be successful in life, but it found that husband's approach could be heavy-handed and insensitive.

¶ 46. The court found that it would be beneficial to daughter to gradually expand husband's contact schedule until both parents spent approximately equal time with her. See 15 V.S.A. § 650 (declaring that "it is in the best interests of [the] minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical

harm or significant emotional harm to the child or a parent is likely to result from such contact"). However, it found that father's controlling behaviors and negative comments to daughter had a detrimental impact on the child, and that father did not appear to recognize the impact of his behaviors. It therefore found that it was in daughter's best interests to require father to undergo family therapy with daughter for six months to help him gain insight into daughter's developmental and emotional needs and to allow daughter to express her feelings and preferences to father. The condition was reasonably targeted at addressing the issues identified by the court, and the court provided a clear explanation for imposing it. See Lee, 2018 VT 96, ¶ 17 (affirming court's imposition of gradually increasing parent-child contact schedule, coupled with alcohol-related conditions for father to follow, where court found conditions to be in child's best interests and conditions were reasonably structured to secure those interests). We therefore see no reason to disturb the court's decision on parent-child contact.

V. Rule 59 Motion

¶ 47. Finally, husband asserts that the court abused its discretion by denying his motion for a new trial. In the motion, which he filed three months after the final hearing, husband asserted that he had recently discovered a letter showing that after the parties executed the quitclaim deed conveying the marital home to himself and wife as tenants by the entirety, he sent the signed deed to his attorney and instructed the attorney not to record the deed until after his death. Husband argued that this meant the transfer was never completed and the marital home remained his separate property. The family court denied husband's motion, reasoning that husband could have obtained the evidence prior to trial, it was merely impeaching, and it was unlikely to affect the property division.

¶ 48. A Rule 59 motion "is addressed to the sound discretion of the trial court, and that court's ruling is not reversible unless it constitutes a manifest abuse of discretion." Chelsea Ltd. P'ship v. Town of Chelsea, 142 Vt. 538, 540, 458 A.2d 1096, 1098 (1983). To obtain relief under

Rule 59 based on newly discovered evidence, the moving party must show that the "evidence could not have been discovered before trial by exercising due diligence," that it "is material to the issue and is not merely cumulative or impeaching," and that the evidence "will probably change the result if a new trial is granted." Bonfanti v. Ayers, 134 Vt. 421, 423, 365 A.2d 268, 270 (1976); see also C. Wright & A. Miller, 11 Fed. Prac. & Proc. Civ. § 2808 (3d ed.) (listing same requirements).

¶ 49. As the family court found, husband failed to demonstrate why he could not have obtained the alleged evidence prior to the final hearing. He blamed his former attorney's office for the delay but did not explain why he could not have contacted them earlier. More importantly, the additional evidence was unlikely to have affected the outcome. If the court had determined that the premarital agreement controlled the property distribution, the terms of the agreement did not require the deed to be recorded to effectuate the conveyance.[4] And if, as the court ultimately concluded, the premarital agreement did not control the property distribution, the legal title to the property was not determinative of its disposition at divorce. See 15 V.S.A. § 751(a) (stating legal title "immaterial" for purposes of property division). The court therefore did not abuse its discretion in denying husband's Rule 59 motion.

Affirmed.

FOR THE COURT:

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Associate Justice

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[4] We note that an unrecorded deed still "operates to pass the assignor's interest to the assignee." Spaulding v. H. E. Fletcher Co., 124 Vt. 318, 323, 205 A.2d 556, 560 (1964); see 27 V.S.A. § 342 (providing that unrecorded deed is valid against grantor).