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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-096

NOVEMBER TERM, 2007

Terry Hopper Wilcox	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Family Court
	}	
	}	
William R. Wilcox, Jr.	}	DOCKET NO. F280-8-05 WnDmd
		Trial Judge: James R. Crucitti

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

Father appeals from a final divorce judgment of the Washington Family Court. He contends the court erred by: (1) failing to address the requisite statutory factors in awarding parental rights and responsibilities to mother; (2) crafting a visitation schedule unduly burdensome to the children; (3) dividing the marital assets without considering certain tax consequences relating to father's business; (4) awarding maintenance without an adequate basis; (5) declining to amend the final order to account for certain post-hearing payments; and (6) awarding mother a portion of her attorney fees. We affirm.

The parties were married in August 1993 and separated in April 2005. They have three children, aged nine, six, and three years old at the time of these proceedings. Following a five-day evidentiary hearing over a period of several months in late 2006, the court issued a final divorce decree in January 2007. The court awarded sole legal and physical rights and responsibilities to mother, and awarded father substantial visitation.[1] The court divided the marital estate roughly equally, awarding mother the marital home with an equity of approximately $136,000, father his one-half interest in a business which the court valued at $520,000, and half of the retirement accounts valued at $355,000 to each party, resulting in a net balance owed to mother of approximately $189,000, which the court ordered paid in four installments over four years. The court found that father's yearly salary of $130,000 was substantially greater than mother's potential yearly earnings as a teacher of $37,300, and awarded spousal maintenance of $4,500 per month for eight years. The court also ordered father to pay $12,000 toward mother's attorney's fees of $44,649, and referred mother's request for

[1] Father was granted visitation with the children every other week from Thursday afternoon to Monday morning and alternative weeks on Tuesday afternoons and Thursday after school to Friday morning. The order also provided that father would have the children on alternating Christmas and Thanksgiving holidays, alternating school vacations, and four weeks during the summer.

expert-witness expenses to a special master. The court denied a subsequent motion to alter or amend the judgment except for modifying the property division to reflect a $12,000 draw by mother on the retirement accounts. This appeal followed.

Father first contends the court failed to address the statutory factors under 15 V.S.A. § 665(b) or otherwise explain its reasoning in awarding mother sole parental rights and responsibilities.[2] See Nickerson v. Nickerson, 158 Vt. 85, 89 (1992) (court's decision must reveal how it weighed the various factors in awarding custody). Although the trial court here did not expressly cite each of the statutory factors in its analysis, we have held that this is unnecessary if "the findings as a whole reflect that the trial court has taken the statutory factors into consideration." Harris v. Harris, 149 Vt. 410, 414 (1988) (quotation omitted). Indeed, as we have repeatedly explained, the statute "imposes no specific requirement on how this consideration is to be manifested in the court's findings and conclusions." Id; accord Sundstrom v. Sundstrom, 2004 VT 106, ¶ 39, 177 Vt. 577 (mem.); Trahnstrom v. Trahnstrom, 171 Vt. 507, 507 (2000) (mem.).

While the court here did not cite to the specific factors under the statute, it nevertheless plainly applied the statutory factors in setting forth the reasons for is decision. Thus, the court readily acknowledged that, although the parties had quite different parenting styles and strengths, each had the ability to provide the children with love and affection, adequate food, shelter and medical care, and a safe environment, and each had the ability to meet the children's present and future development needs. See 15 V.S.A. § 665(b)(1)-(3). The court noted that the children's housing, school and community remained unchanged, and found that both parents had the ability to foster a positive relationship between the children and the other parent. See id. at § 665(b)(4)-(5).[3] The court placed significant weight, however, on the fact that mother had been the children's primary care provider throughout their lives while father had focused on his business. Id. § 665(b)(6); see Harris, 149 Vt. at 418 (while not determinative, fact that party has served as primary care provider is entitled to "great weight"); accord Bell v. Squires, 2003 VT 109, ¶ 19, 176 Vt. 557 (mem.). Furthermore, while the court acknowledged that father had taken a more active role in the children's lives since the separation and that the parties had shared equal custody under a temporary order, it also noted that they had continued to reside in the same residence during this time and that mother remained the more involved, nurturing parent and primary care provider. In addition, father's business continued to demand substantial time compared with mother's more flexible schedule. As summarized by the trial court: "Based upon the mother's more nurturing character, her role as the primary care provider for the children and her future work schedule, which will make her more available to the children, this Court entrusts the mother with sole legal and physical rights and responsibilities." Accordingly, we find no legal or factual support for father's claim that the court's findings were inadequate to support the custody award.

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[2] Although father's brief refers several times to the court's award of "legal" rights and responsibilities, it is apparent from his argument that he is challenging the award of physical rights and responsibilities as well.

[3] The court did not specifically address the children's relationships with others and the parents' ability to communicate and cooperate, id. § 665(b)(7)-(8), although it appears undisputed that the parties could not agree on a joint custody arrangement. In any event, father raises no particular issues under those factors on appeal.

Father next contends the court's visitation schedule is unduly burdensome to the children and thwarts the policy of maximizing contact with each parent. As in its award of parental rights and responsibilities, the court enjoys broad discretion in crafting a suitable parent-child contact schedule, and its decision will not be disturbed unless clearly unreasonable or erroneous in light of the record evidence. See Boisclair v. Boisclair, 2004 VT 43, ¶ 10, 176 Vt. 646 (mem.) ("The pattern of visitation adopted [by the trial court] will not be reversed unless the court's discretion was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented.") (quotation omitted), overruled on other grounds by Pouech v. Pouech, 2006 VT 40, 180 Vt. 1. Father's principal argument is that the court's visitation schedule requires several more transitions than the temporary schedule of one-week on/one-week off. As the court here noted, however, that schedule was in place while the parents, although separated, continued to reside together in the marital home and was unsuitable once the parents had separate homes and mother had sole custody. Father has not demonstrated that the new visitation schedule, which affords him long weekends with the children every other week and two days on alternative weeks, is patently unreasonable or burdensome, and we therefore decline to disturb it. Id. Father also claims that the visitation schedule "dramatically reduced" his contact with the children, but the order—under which the father is entitled to have the children about 40% of the time—does not support the claim.

Father next contends that the court erred in failing to reduce the value of his business to reflect the tax consequences of liquidating his share in the business to cover the $189,00 awarded to mother to equalize the property division. Father raised this issue for the first time in his post-judgment motion to alter or amend, requesting that the court direct father's business accountant to submit a tax analysis of the award and distribution and adjust the property division accordingly. The court denied the motion, finding no grounds for father's failure to submit the evidence during the hearing. Although father renews the claim here, there is no evidence to suggest that a liquidation of father's business assets would be necessary or even likely to satisfy the award. Cf. Cabot v. Cabot, 166 Vt. 485, 496 (1997) (potential tax consequences relevant where, due to the parties' "unusual financial situation," father could be forced to sell investments to repay debt, incurring substantial tax liability); Johnson v. Johnson, 158 Vt. 160, 165 (1992) ("[T]he tax status of assets in the hands of one of the parties should not affect their fair market valuation unless the decree necessitates their sale."). Accordingly, we find no error.

Father further claims that the court failed to establish an adequate basis for the award of spousal maintenance. Again, the record belies the claim. In awarding maintenance of $4500 per month for eight years, the court found that the marriage was relatively long-term (twelve years) and that, for most of that time, mother had focused all of her efforts on attending to the needs of the family, thereby allowing father to devote considerable time and energy to the growth of his business while also enjoying the benefits of the home and family maintained by mother. See Delozier v. Delozier, 161 Vt. 377, 382 (1994) ("compensatory maintenance" is proper where one spouse had sacrificed earnings or career to raise a family, thereby allowing his or her partner to both increase earning ability and enjoy family life). The court also found that the parties enjoyed drastically different earning potential, and that the maintenance award would allow mother to approximate the relatively comfortable middle-class lifestyle enjoyed during the marriage. See Strauss v. Strauss, 160 Vt. 335, 338 (1993) (purpose of maintenance is "to correct the vast inequality of income resulting from the divorce"); 15 V.S.A. § 752(b) (setting forth factors to be considered in awarding maintenance, including length of marriage, needs and financial resources of the parties, ability of the parties to meet their reasonable needs, and standard of living established during the marriage). Accordingly, the record and findings amply support the court's

decision to award maintenance. Father also claims that the court abused its discretion in the amount awarded because it results in somewhat less monthly income for father than mother. The court did not, however, conclude that precise equality of monthly incomes was required. Furthermore, the court was aware that father's monthly "draw" from the business was a conservative figure, excluding other business benefits such as vehicle and medical expenses. Thus, we find no abuse of discretion in the amount awarded. See Jenike v. Jenike, 2004 Vt 83, ¶ 8, 177 Vt. 502 (mem.) (party claiming error in maintenance award must demonstrate no reasonable basis to support it).

Father additionally claims that the court erred in denying his motion to alter or amend the judgment by crediting him for several post-judgment payments, including a $6,000 payment toward the mortgage of the marital home and the purchase of wood and fuel for the winter. The court denied the motion, observing that father had continued to live in the marital home for a period after the final divorce judgment, and therefore benefited from the payments. Father has not demonstrated that the court abused its discretion in denying the motion.

Finally, father asserts that the trial court failed to make the requisite findings, and abused its discretion, in awarding mother $12,000 of her attorney's fees, which totaled $44,649. The family court may award attorney's fees at its discretion in divorce cases "where justice and equity so indicate." Turner v. Turner, 2004 VT 5, ¶ 9, 176 Vt. 588 (mem.) (quotation omitted). The primary considerations in awarding such fees are the ability of the supporting party to pay and the financial needs of the receiving party. Id. Contrary to father's claim, the court here specifically referenced the parties' financial needs and resources, which were fully described in its earlier findings. See id. (recognizing that the nature of divorce proceedings, which invariably involve the financial circumstances of the parties, obviates the need for a separate hearing and evidence on a request for attorney's fees). The court's conclusion that father's litigation strategy and discovery tactics had greatly increased the fees incurred by mother was also supported by several specific findings in the court's decision. Furthermore, the award of $12,000, which was less than half of what mother had requested and about a quarter of her total fees, was eminently reasonable in light of the significant disparity in financial resources between the parties. Accordingly, we find no basis to disturb the award of attorney's fees, or the judgment as a whole.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice