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. 2018-159

DECEMBER TERM, 2018

Danielle Vardakas v. Scott Ducko*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 449-7-16 Cndm
		Trial Judge: Kirstin K. Schoonover

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

Husband appeals a final divorce order. On appeal, husband argues that the court abused its discretion in declining to set aside the parties' stipulation and in its discovery rulings, and that several findings are not supported by the evidence. We affirm.

The court found the following. The parties were married in 2006 and lived in Philadelphia. They have one son, who was born in August 2008. In 2008, the parties moved to Vermont. Because the parties had limited financial resources, wife's mother bought a house and allowed the parties to live there with her. The property is titled in wife's mother's name and she paid for it with the proceeds from the sale of a condominium that she owned. She did not require the parties to pay rent and did not have a lease agreement with them. The parties are both involved in art and dance and had modest incomes. The parties relied heavily on wife's mother's financial generosity. In April 2011, wife's mother purchased a condominium in Florida and began living there in the winter. The parties started to help pay for utilities at wife's mother's home once wife's mother began wintering in Florida. The parties gave wife's mother money when they could. In 2014, wife gave her mother $18,000 to pay off the home equity loan on the house. The parties also contributed financially toward a kitchen renovation on the home.

Wife owns and manages a yoga studio where she is an instructor. Husband also worked for the studio, teaching yoga at times and offering other types of support, but the majority of the income was from wife's work. Husband was not paid a salary, but wife paid all the bills. Most of the income produced by the studio was derived from wife's work. She looked after both the studio finances and the parties' personal finances. Husband had access to all the accounts.

The parties had a volatile relationship and throughout the marriage argued a lot. Following a heated argument in which wife hit husband, husband decided to leave the relationship; in June 2015, he moved to New Jersey. He intended to open a new yoga studio there. In August 2015, the parties signed a marital settlement agreement (MSA). Neither party was represented by counsel, but wife hired an attorney to draft the MSA based on the parties' negotiations. The lawyer did not provide wife with independent advice regarding the merits of the agreement. The main areas of dispute were how to value and divide the yoga studio and the terms for parent-child

contact. The parties for months argued about the value of the business. Wife alleged that it had no value without her. They initially negotiated giving husband $5,000, then $10,000. Before the MSA was signed, an accountant valued the studio at $110,000. Wife testified that she showed husband the MSA in advance in May 2015. Husband contended that he did not see it until the day before signing it on August 14, 2015. They agree that wife traveled to New Jersey and met with husband. Prior to signing, husband negotiated with wife to change several terms of the MSA as drafted. The changes centered on the amount of money husband was to receive as property division and the amount of parent-child contact husband would have with their child. Husband negotiated increasing from $10,000 to $25,000 the amount due to him within seven days of completing the agreement and negotiated for an additional $13,000 to be paid to him in August 2016. The parties had assumed, without reference to the child-support guidelines, that husband would be required to pay $500 a month in child support. They added a term to the MSA delaying his payment of child support until September 1, 2017, which would save him an additional $12,000. This provided husband with a net gain of $50,000, approximately half of the $110,000 valuation of the studio. In addition, husband negotiated for parent-child contact of eight weeks annually—four more weeks than reflected in the original MSA draft. Finally, the parties agreed that husband could use the brand name of the yoga studio and that wife would teach at his yoga studio in New Jersey. The MSA provided that the parties retained the vehicle and the bank accounts in their name and they divided the time on a time share they owned. The parties had no other assets, retirement accounts, or savings to divide. At the time of separation, they were both debt free.

Wife made the $25,000 and $13,000 payments due under the MSA and husband accepted them. Husband lived with his mother in New Jersey. He used the money to open his own yoga studio in New Jersey. By the time of the final hearing, husband had accrued $21,000 in debt.

After signing the MSA, wife did not immediately file for divorce. The parties tried to be amicable with each other and for Christmas 2015 husband gave wife a diamond ring. They engaged in sexual relations at least once during the period of separation. Husband alleged that the parties reconciled, but the court found based on the evidence that there was no reconciliation.[1]

While the parties were separated and before wife filed for divorce, she transferred money to her mother. She did this at times to ensure she had money for certain business expenses and at times to pay her mother back for the financial assistance she had received. In May 2015, wife deposited $40,000 in her mother's account. Part of it was used to pay husband pursuant to the MSA. Wife gave the remainder to her mother, who used it to pay for subdividing the lot on which her home, where the parties had lived, stood so that wife could live in the home and her parents could build a separate house next door.

In July 2016, wife filed for divorce, attached the MSA, and sought to waive the final hearing. Husband opposed wife's motion and moved to set aside the MSA on the grounds that it was inequitable, he had not been represented by counsel, and the parties had reconciled. During discovery, the parties disputed whether the property owned by wife's mother, particularly the subdivided parcel, was marital property and the extent to which husband could seek discovery about wife's mother's finances in connection with the property where the parties made their marital home and the subdivision rights relative to that property. The court held several hearings on the

[1] The MSA contains a clause explaining that it will not be invalidated by reconciliation between the parties without a written agreement. There was no such written agreement.

discovery disputes and combined its final hearing on the motion to set aside the MSA with a final hearing on the merits in the divorce.

In a written order, the court concluded that there were no grounds to set aside the MSA. The court concluded that, to the extent it was relevant, the parties had not reconciled. Further, the court concluded there was no evidence that husband was coerced into signing the MSA. The court concluded that the terms of the MSA were equitable, and that husband was not entitled to maintenance given that it was a mid-length marriage and the parties had relatively similar incomes. The court also concluded that the parent-child contact provisions of the MSA were in the child's best interests. Because, pursuant to a child-support order, husband began paying child support in January 2017—eight months earlier than the parties had contemplated in the MSA—the court awarded husband $4000, representing money he would have saved had he delayed beginning child support payments for the full two years. In addition, the court granted husband half of a coin collection held by the parties and not mentioned in the MSA. Husband appeals the order, raising several challenges.

I. Discovery Rulings

We begin with husband's arguments concerning the court's discovery rulings. Some factual background is helpful to understanding these issues. In response to husband's motion to compel, the trial court issued an initial discovery order on October 14, 2016, stating that wife must respond to discovery requests if relevant to the motion to set aside the parties' stipulation. Husband filed additional motions related to discovery seeking to compel and for sanctions. Following a hearing, the court issued a discovery order on December 16, 2016, requiring wife to provide information about (1) the parties' timeshare, (2) a coin collection in wife's possession, (3) the current value of loans on vehicles, (4) the price of a hot tub wife purchased, (5) wife's assets at the time of the marriage, (6) records of loans or credit card debts dating back to December 16, 2016, (7) two years of records for bank accounts held jointly by the parties, and (8) sizeable payments made to the mortgage holder for the residence the parties lived in. The court set a hearing on husband's motion to set aside the MSA.

Husband then issued a subpoena and notice to depose wife's mother regarding the financing and payment of mortgage loans on her home, where the parties lived during the marriage. Wife's mother retained counsel and moved for a protective order. The court held a hearing on February 22, 2017 and heard testimony regarding the discovery dispute and whether to set aside the MSA. On February 27, 2017, the court granted the protective order, explaining that the information that husband sought was not relevant. The court explained that any payments made by wife to her mother were relevant and were subject to disclosure pursuant to the court's December 16, 2016 order. However, information about mother's property was not relevant given that neither husband nor wife had any legal or equitable interest in that property. The court explained that husband was free to refile if he could provide legal authority for husband's claim that the parties had a potential legal interest in the property.[2]

[2] In its discussion, the court also suggested that the December 16, 2016 order resolving various outstanding motions concerning discovery disputes constituted a "discovery order," and that the proper way for husband to obtain additional discovery beyond that specifically identified in that order would be to file a motion to amend the discovery order. The court also admonished husband for not first conferring with wife's counsel prior to filing a motion to compel discovery. We do not read the court's February 27, 2017 order granting wife's mother a protective order as dependent on either of these considerations.

In that same February 27, 2017 order, the court granted husband's motion to expand discovery, directing both parties to produce copies of personal and business bank accounts for the last three years, and requiring wife to provide an accounting of a particular payment of $23,754.

In response to husband's motion to clarify the February 2017 order granting wife's mother a protective order, the court explained that husband could seek information from wife's mother "upon a showing of legal authority" for the claim that he had a property interest in wife's mother's property.

On appeal, husband makes five arguments related to discovery rulings, and one concerning the trial court's exclusion of his expert witness. This Court applies a deferential standard of review to trial-court decisions regarding discovery and will not disturb them "absent an abuse of discretion." Pcolar v. Casella Waste Sys., Inc., 2012 VT 58, ¶ 11, 192 Vt. 343.

First, husband argues that the trial court erred in granting wife's mother's motion to quash her deposition subpoena. The strength of this argument turns on the strength of husband's claim that the parties had some interest in wife's mother's property by virtue of the fact that some marital dollars can be traced to payment of the mortgage or home equity loan attached to that property. As set forth more fully below (in connection with husband's challenge on the merits), assuming that some marital dollars can be traced to payments toward the mortgage over the course of the parties' marriage, this fact alone is insufficient to establish a marital interest. Absent any legal basis for asserting a marital interest in wife's mother's property, and some evidentiary proffer to support the claim, the trial court did not abuse its discretion in quashing husband's subpoena.

Second, husband argues that the court erred in allowing wife's mother to testify as a witness for wife after rebuffing his attempt to depose her. The court's ruling declining to allow husband to depose wife's mother was based on the subject matter about which husband sought to depose her. Had husband sought to depose wife's mother on relevant matters, he was free to ask the court for such permission.

Third, husband argues that the trial court erred in ruling that he could not seek third-party discovery without seeking permission from the court and conferring with wife. We don't find any actual orders to this effect. The February 21, 2017 order discussed the December 16, 2016 order concerning discovery issues and stated:

> If defendant discovers grounds for more discovery, defendant's remedy is not to issue a subpoena to circumvent the Discovery Order but to move to amend the Discovery Order based on information obtained through the discovery process. Moreover, if defendant seeks additional discovery, the court does not condone defendant's failure to first confer with plaintiff's counsel to make a good faith effort to resolve any discovery issues and to avoid filing unnecessary motions as required by V.R.C.P. 26(h).

The actual order issued by the court on February 27 contains no general limitations on third-party discovery, and the court's more specific limitation on husband's ability to depose wife's mother is supported by the court's analysis on the merits. Moreover, given husband's focus on the equity in wife's mother's property, the order was consistent with 15 V.S.A. § 751(b)(8)(C) (providing that third party to divorce is not subject to subpoena to provide documentation or testimony concerning that party's assets, income or net worth, unless that relates to party's interest in instrument that is vested). Moreover, any confusion about the significance of the court's February 27, 2017

statement that husband should seek to amend the December 2016 order rather than circumvent the order with a subpoena to a third party was answered by the court's April 2017 order in response to husband's motion for clarification. In that order, the court acknowledged that the December 2016 order had not addressed third-party discovery, and explained that the court's February 27, 2017 order simply states that if husband seeks additional discovery, he should comply with the discovery process—something he had allegedly failed to do in several ways. Husband does not identify any third-party discovery (other than the deposition of wife's mother concerning the property) he was prevented from completing on account of a court order.

Fourth, husband argues that the court erred in limiting the financial information husband could get "from both wife and third-party sources" about how wife separated business and personal expenses and how much the parties had paid during the marriage toward the equity on the property owned by wife's mother. In his brief, husband does not associate this argument with any specific court order, making review challenging. In its February 27, 2017 order, the trial court considered husband's request to discover all bank statements dating back to 2008 showing substantial payments made to the mortgage, taxes, insurance, and/or home-equity line of credit on wife's mother's property, copies of all checks drafted on the accounts, disclosure of the whereabouts of $23,754.68 that wife withdrew in November 2016 when she closed the account, and five years of business-account statements and documentation reflecting categorization of business and personal expenses. The court granted the motion with respect to personal and business bank accounts statements going back three years, and ordered wife to account for the $23,754 payment. The court's decision not to allow discovery of account records going back five years, and records regarding payments to the carrying costs of the property back to 2008 was not an abuse of its discretion. To the extent that the requested records related to the income from wife's yoga business, the court could reasonably conclude that the relevance of the business records from more than three years earlier was limited. Likewise, the court could conclude that any sums contributed by the parties toward wife's mother's expenses going back more than three years—to a period when the marriage was still intact—were of limited significance.[3]

Finally, husband argues that the court erred in proceeding with a final divorce hearing following the evidence concerning his motion to set aside the settlement agreement without allowing the parties to seek updated discovery. As set forth below, the parties had ample notice that the completion of the evidence concerning the predivorce stipulation and the final hearing on the merits would be heard together. Husband had months to seek updated discovery, and to solicit the court's help if necessary. The court did not abuse its discretion in going forward with the scheduled hearing.

II. The Motion to Set Aside the Postnuptial, Predivorce Stipulation

Next, we turn to husband's argument that the court abused its discretion in denying his motion to set aside the MSA. When the parties enter an agreement in anticipation of divorce and one or both parties challenge the stipulation before a final hearing, "the court may reject the stipulation even if the challenging party fails to demonstrate grounds sufficient to overturn a contract." Pouech v. Pouech, 2006 VT 40, ¶ 22, 180 Vt. 1. The court must examine "all of the circumstances surrounding execution of the stipulation" to determine if the agreement is equitable

[3] To the extent that husband suggests that the trial court issued an order quashing a third-party subpoena to anyone other than wife's mother, he fails to identify the order and the argument is inadequately briefed.

in light of the statutory standards and factors. Id. ¶ 23. The court has discretion in deciding if the agreement is fair and equitable and we review under an abuse-of-discretion standard. Id.

Husband contends that the agreement is inequitable because it fails to account for all of the marital property. Husband asserts that the parties had an equitable interest in the property owned by wife's mother because they had made payments towards the line of credit on the house and that the subdivision right purchased by wife's mother was marital property because wife provided her mother with some portion of the money to purchase it. Husband also contends that money wife transferred to her mother during the parties' separation, the increased value of wife's yoga studio, and the debt associated with husband's yoga studio are marital property.

We consider these items in turn, beginning with the property owned by wife's mother. The evidence supports the court's finding that the parties did not have an interest in either the house or the subdivided lot owned by wife's mother. Property that is not titled in the name of the marital partners may be considered marital property when the property was titled in someone else's name "to deprive one's spouse of a fair portion of the marital assets." Nevitt v. Nevitt, 155 Vt. 391, 400 (1990); see Nuse v. Nuse, 158 Vt. 637, 638 (1991) (mem.) (upholding trial court's finding that husband had equitable interest in property titled in his fiancée's name based on finding that husband titled in fiancée's name to "hinder efforts of his spouse to obtain a fair property distribution"). Here, based on the evidence, the court found there was no such intent. Wife's mother bought the property with her own funds well before the parties' separation, and there was no evidence that wife transferred money to her mother to hide it from husband.

In addition, the court did not abuse its discretion in finding that although the parties at times gave money to wife's mother, including after they signed the MSA, these payments were merely a reflection of the parties' gratitude for all of the financial assistance wife's mother had provided over the years. Cf. Bassler v. Bassler, 156 Vt. 353, 358 (1991) (concluding that court did not abuse its discretion in finding that there was agreement between husband's mother and parties that payments would lead to ownership of property). Husband points to wife's mother's testimony that wife agreed to pay for the development rights to subdivide wife's mother's property. This testimony does not equate to an agreement that wife would own that property or the subdivision rights. The court's decision is supported by the evidence and not erroneous.

There is no merit to husband's claim that the money wife paid to her mother during the period of separation was marital property that the MSA failed to distribute. When the parties executed the MSA they considered the fact that wife's yoga studio produced income and they considered the property held by wife at the time. The court found that the valuation was reasonable, and the agreement was equitable.

Finally, the trial court did not err in failing to divide any increase in the value of wife's yoga studio or the debt incurred by husband's yoga studio during the period of separation. We reject husband's claim that the court was expressly required to value these assets at the time of the final hearing. The court recognized, and we agree, as we have repeatedly stated, that the value should ordinarily be assessed as of the time of the final hearing. Although it did not determine the exact value at the time of the final hearing, the court found that the parties' valuation at the time of separation and their execution of the MSA was reasonable. Because the threshold issue in this case was whether to enforce the parties' pre-divorce agreement, the court did not err in evaluating fairness from the vantage point of the parties' entry into that agreement.

Moreover, the court explained that even if there were no MSA it would be equitable to assign any increase in the yoga studio's value to wife since any increases in its value post-

separation were due solely to her efforts. This determination was within the court's discretion. It is true that property acquired during a period of separation is marital property that can be divided by the trial court. How to equitably divide that property is within the trial court's discretion. See Nuse, 158 Vt. at 638 (concluding that trial court "acted within its discretion in refusing to subtract the debt to appellant's mother in view of its finding that the money provided was more a gift than a loan"). And, in deciding whether to award maintenance or to incorporate the parties' agreement into the final divorce order, the court must consider "whether the agreement was fair and equitable in light of the relevant statutory factors and the parties' circumstances at the time of the hearing." Lourie v. Lourie, 2016 VT 57, ¶ 13, 202 Vt. 143. Two of the statutory factors relevant to the equitable distribution of assets are the party through whom the asset is acquired and the contribution of each spouse to the depreciation or appreciation in value marital assets. 15 V.S.A. § 751(b)(10), (11). The court found that in light of these factors it was equitable to assign the change in value of either business to the party who owned the business because the degree to which the parties' businesses grew or declined during the period of separation was related to each person's own work.

III. Evidentiary Ruling Concerning Husband's Expert

In a January 29, 2018 order, the court excluded testimony husband proffered concerning the value of the lot adjacent to the marital home. The court explained that the property was solely titled to wife's mother, that husband did not contend and presented no evidence to prove that wife's mother's ownership was a sham to hide assets, and there was no evidence of any written or oral agreement to give either wife's mother's home or the subdivided lot, which had been part of that property, to wife. Given the state of the record, the court concluded that the value of the lot (as opposed to the amount of money wife contributed to help pay for the subdivision) was irrelevant. For the reasons set forth above, this conclusion was well within the trial court's discretion.

IV. Challenges to Findings

Husband argues that several of the court's findings are not supported by the evidence. Billings v. Billings, 2011 VT 116, ¶ 11, 190 Vt. 487 ("The family court's factual findings stand on appeal if supported by any credible evidence in the record . . . ."). We agree that one finding is not supported by the evidence, but conclude it was harmless. The court erroneously stated that a ring husband gave wife during the separation period had belonged to wife's mother, but the evidence indicates that husband bought the ring. This error played little-to-no role in the court's decision and was accordingly harmless. See Mills v. Mills, 167 Vt. 567, 569 (1997) (mem.) (explaining that where finding is not essential to court's decision, error is harmless).

The other findings husband challenges are the court's statement that in the marriage the parties "accumulated no assets, no retirement, and no savings" and could not pay their 2013 taxes and that had husband worked at a $12 an hour job, he would have earned an equivalent income to wife's. As to the tax payment, husband asserts that the bank statements show that the parties gave wife's mother $15,000 around the time the 2013 taxes were due. Regarding the statement about the parties' assets, he points to evidence to contradict this finding, including that the parties made other transfers to wife's mother, had a savings account for their son, owned a timeshare in Mexico, and paid for a renovation on the home. Finally, he argues that wife's income is much higher than what the court found, implying that her stated net income fails to account for substantial personal expenditures funded through the yoga studio. The court's statements were supported. Although the parties had some minor assets, including vehicles and the time share, the court's statement that there were no major assets, retirement accounts, or savings was an accurate reflection of the record. Further, the testimony at trial supports the court's finding that wife's mother paid the parties' 2013

taxes. Although there may have been countervailing evidence from which a factfinder could infer that wife's net income from the yoga studio was higher than represented, wife's social-security statement supports the court's findings regarding her income. See Mullin v. Phelps, 162 Vt. 250, 260 (1994) ("A finding will not be disturbed merely because it is contradicted by substantial evidence; rather, an appellant must show there is no credible evidence to support the finding." (quotation omitted)).

V. Challenges to Court's Reasoning/Conclusions

Husband contends that the court erred in calculating how much he was due as an offset for the lower-than-expected avoided costs arising from an agreed-upon delay in his payment of child support. The trial court found that under the MSA the parties agreed husband would receive $50,000 overall, representing about half of the value of the yoga studio. To effectuate this, wife paid husband $25,000 and $13,000, totaling $38,000. The additional $12,000 was provided to husband by allowing him to delay paying child support, which the parties assumed would be $500 monthly for twenty-four months. In fact, husband, per a child-support order, began paying child support after sixteen months so the court found he should receive an additional $4000 from wife for the eight months he did not benefit from the delayed-payment provision.[4] Husband contends that he was only actually obligated to pay wife $350 per month and therefore his savings from delaying payment of child support was only $5600 ($350/month times sixteen months). Given that the parties had intended for husband to receive a total of $50,000 in consideration in the MSA, $12,000 of which was attributed to delayed child-support payments, he was entitled to an additional $6400 to get the benefit of his bargain in the MSA.

We disagree. From September 1, 2015 until January 2017, husband had no determined child-support obligation. The parties were free to agree that husband should pay wife $500 per month, and that deferring the onset of those payments benefitted husband in the amount of $500 per month without regard to whether, had one of the parties filed for divorce in September 2015 and had wife sought child support, the court would have ordered payment of $500 per month. (The MSA on its face does not recite a specific amount of child support due.) Husband "saved" $8,000 during this period by the parties' logic. The court ordered wife to pay husband $4,000—being the balance required to give husband the benefit of his bargain concerning property division, which the trial court understood to be an additional $12,000 in consideration above and beyond the cash payments. The court's reasoning was within its discretion.

There is no merit to husband's argument that because wife paid husband $25,000 for the settlement from the parties' joint account, she should be credited with paying husband only $12,500 because half of the account was already husband's. The MSA resolved how much

[4] We note that parties cannot bargain away child support as part of a divorce settlement. See Bergman v. Marker, 2007 VT 139, ¶ 13, 183 Vt. 68 ("[T]he child's right to child support cannot be waived by a parent's action or inaction."). Parties to a divorce cannot, by stipulation, withdraw the interests of their children, who are not parties to the contract, from the continuing jurisdiction of the court. White v. White, 141 Vt. 499, 503 (1982). These decisions underscore the paramount importance that our society places upon the support and care of children through child-support obligations, a policy codified in Vermont in 15 V.S.A. § 650. The trial court's calculations were not undertaken for the purpose of honoring the parties' delay of child-support payments; rather, the court sought to ensure that husband received the benefit of his bargain as to property division given the parties' shared but erroneous assumption that they could delay the commencement of husband's child-support obligation.

husband was to receive of the marital property. Wife gave him money from the marital estate as agreed.

VI. Challenges to Conduct of Final Hearing

Finally, husband argues that he was denied due process because the court conflated the final hearing on the motion to set aside the MSA with a final divorce. We conclude there was no error. The notice provided that it would be a final divorce hearing, and at the outset of the hearing, the court explained that the parties were there regarding the motion to set aside the marital settlement agreement and for a contested divorce. As husband states the court explained that husband could present further evidence if the MSA were set aside, but given that the court did not set aside the MSA, there was no reason to present further evidence.

Husband also argues that he was prejudiced because the court limited his cross-examination of wife. "The extent of cross-examination is largely within the discretion of the trial judge, however, unless abuse of discretion is shown." State v. Young, 139 Vt. 535, 539 (1981). At the end of the final day of hearing, the court granted husband fifteen minutes to cross-examine wife. Husband objected that he needed additional time. The court explained that the matter had been pending for over year and that wife's direct testimony was limited and lasted only thirty minutes. The court acted within its discretion in limiting cross-examination of wife given the circumstances of the case.

Affirmed.

BY THE COURT:

_____
Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice