

*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. 2019-363

APRIL TERM, 2020

Alison Wallis-Buxton v.	}	APPEALED FROM:
Garrison Buxton*	}	
	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 243-11-16 Wmdm

Trial Judge: John R. Treadwell

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

Husband appeals from the trial court’s final divorce order. He challenges the court’s award of primary physical and legal rights and responsibilities (PRR) in the parties’ child to wife and its division of the marital estate. We affirm.

The parties married in January 2006; wife filed for divorce in November 2016. Husband was 46 years old at the time of the court’s final order; wife was 45. Both parties have master’s degrees.

At the outset of their marriage, the parties lived in New York, where husband had established a design studio, gallery, and community space. Husband was primarily employed either as an artist or in related work. Wife worked as a caterer and arts consultant; she worked with Ad Hoc Arts, LLC, a company founded by husband and a friend, until the parties’ child was born. Wife received trust income that helped support the parties during the marriage. Husband had a large inheritance that he used to support the parties as well. The parties’ earned income was minimal.

In May 2010, the parties moved to a home in Londonderry, Vermont, owned by husband and his sister. Husband inherited this property before marrying wife; the home had long been in his family. In November 2013, the parties’ daughter H.B. was born. The court found that wife predominantly provided care for H.B. after her birth.

Wife moved out of the marital home in May 2017. She first moved to Middletown Springs, Vermont, and then to Rutland. Husband continues to live in the marital home, approximately 40 miles away. Wife relocated without consulting husband and the court found that, due to wife’s relocation, a 50/50 parent-child contact (PCC) schedule was infeasible. Wife primarily had H.B. during the weekdays; husband had H.B. on weekends. The parties could not communicate or coparent effectively. The court cited numerous examples of this, most of which involved wife acting inappropriately, including disparaging husband in front of H.B. The court also found that, toward the end of the marriage, wife kicked and punched husband and

threw things at him. Husband pushed wife out of the way. The court found that the post-separation merits slightly favored husband.

Wife's current source of income was dividends from her father's charitable remainder trust. She also worked with art galleries in Rutland. Husband worked as a freelance artist and engaged in digital design work and sign painting. Additionally, husband received payment for projects from a separate nonprofit organization called Ad Hoc Arts Org., Ltd., which was founded in July 2016, although this was contingent on entering into contracts. Since 2012, husband had also operated a booth at a local farmer's market.

As indicated above, husband inherited a substantial sum from his mother before the marriage; he had about \$600,000 left at the time of the marriage. His inheritance was spent down to support the parties' lifestyle, invest in Ad Hoc Arts, LLC, and improve the Londonderry residence. There was \$4000 left of this inheritance at the time of the court's final order. For the most part, the parties kept separate finances and bank accounts during the marriage.

The court explained that husband and a friend founded Ad Hoc Arts, LLC, prior to the marriage. Husband invested about \$150,000 from his inheritance into the business. After the friend was removed, wife became part-owner of the business. She owns 49% and husband owns 51%. Wife was primarily responsible for the business side of the company and husband was responsible for the art side. The LLC's present value was approximately \$15,000, primarily comprised of materials and supplies. The LLC was closely associated with the Welling Court Mural Project. As noted above, husband also ran Ad Hoc Arts Org., Ltd. Husband also bought a small sign business and associated equipment for \$15,000 during the pendency of the divorce, without notifying wife or obtaining her consent.

The court also made findings about real estate owned or partially owned by the parties, as well as personal property and debts. The court found that the parties lived beyond their means during the marriage and that they lacked the financial resources to maintain the same standard of living going forward.

Based on these and other findings, the court awarded primary legal and physical rights and responsibilities in H.B. to wife and divided the marital estate. We detail the court's reasoning below in conjunction with husband's arguments on appeal.

## I. PRR and PCC

### A. Trial Court's Ruling

We begin with the court's PRR and PCC awards. In reaching its conclusion, the court considered the statutory best-interest factors. See 15 V.S.A. § 665(b)(1)-(9). It found that parents loved H.B. and she was strongly bonded to both parents. Thus, the first statutory best-interest factor favored both parents equally. It similarly found that both parents could assure that H.B. received adequate care and lived in a safe environment, and both demonstrated an equal ability and disposition to meet H.B.'s present and future developmental needs. The court found H.B. fully adjusted to her present housing, school, and community and determined that this factor favored neither parent.

The court then considered the "ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent." *Id.* § 665(b)(5).

This factor favored husband. The court found that wife had engaged in a pattern of conduct denigrating husband in front of H.B. Husband also had some level of culpability. The court found it clear, however, that wife continued to express negative opinions about husband in front of H.B. and address matters with H.B. that were more properly raised directly with husband.

The court then considered “the quality of the child’s relationship with the primary care provider, if appropriate given the child’s age and development.” Id. § 665(b)(6). It found that the H.B. had spent the majority of overnights with wife and noted that husband did not seriously dispute wife’s assertion that she was the primary caregiver. The court found that H.B. was experiencing anxiety due to this divorce and that her young age and the parties’ record of care was relevant to this factor. It determined that this factor favored wife.

Turning to the remaining factors, the court found no evidence that other family members played a substantial role in H.B.’s life. It considered the parties’ “ability and disposition to communicate, cooperate with each other, and make joint decisions concerning the child[] where parental rights and responsibilities were to be shared or divided.” Id. § 665(b)(8). It found that the parties demonstrated no meaningful ability to communicate, cooperate, or make joint decisions regarding the child. It found that this factor favored neither parent. Finally, it found no significant evidence of abuse during the relationship and no evidence of abuse of H.B. See id. § 665(b)(9).

Based on its evaluation of these factors, the court concluded that wife should have primary legal rights and responsibilities. It found that wife had been primarily exercising these rights and responsibilities since H.B.’s birth and concluded that it was in H.B.’s best interests that wife continue to do so. The court reached the same conclusion as to physical rights and responsibilities, reiterating its conclusion that wife had been the primary caregiver and had been exercising these rights for H.B.

Turning to visitation, the court noted that it was limited by the reality of wife’s decision to move a substantial distance from the marital home. That prevented the court from issuing a week-on/week-off schedule that would be in the child’s best interests. Given the unavailability of that schedule, among other considerations, the court awarded PCC to husband two weekends per month with a week-on/week-off during the summer vacations; it also equalized vacation schedules.

## B. Husband’s Arguments on Appeal

With respect to the court’s PRR award, husband argues that the court failed to consider all of the evidence or adequately explain its decision. He focuses on the court’s determination that wife was the primary caretaker. Husband argues that the parties parented the child equally after their separation until wife began to interfere with his PCC. He asserts that, in evaluating this factor, the court failed to acknowledge that wife unilaterally gave herself the majority of overnights with the child through wrongful actions and willful contempt of the court’s orders. Husband recounts wife’s relocations and her enrollment of the child in a preschool without notice to him. He maintains that the court gave too much weight to this factor. Husband further argues that he is a competent and involved parent and that wife has demonstrated her parental unfitness. He expresses concern that wife will continue to try to alienate the child from him. He maintains that the court should have found that many of the best-interest factors favored him and it should have made a finding of abuse under 15 V.S.A. § 665(b)(9).

“When considering the trial court’s analysis and decision in awarding parental rights and responsibilities, this Court applies a highly deferential standard of review.” Hanson-

Metayer v. Hanson-Metayer, 2013 VT 29, ¶ 12, 193 Vt. 490; see also LeBlanc v. LeBlanc, 2014 VT 65, ¶ 21, 197 Vt. 17 (“The [trial] court has broad discretion in determining what allocation of parental rights and responsibilities is in a child’s best interests.”). “The court’s conclusions will stand where supported by the findings.” LeBlanc, 2014 VT 65, ¶ 21. Its “findings will stand if any reasonable and credible evidence supports them.” Hanson-Metayer, 2013 VT 29, ¶ 12 (quotation omitted). We leave it to the factfinder to evaluate the credibility of witnesses and weigh the evidence. In other words, the fact “[t]hat a different weight or conclusion could be drawn from the same evidence may be grist for disagreement, but does not show an abuse of discretion.” Knutsen v. Cegalis, 2011 VT 128, ¶ 13, 191 Vt. 546 (mem.).

Husband fails to show an abuse of discretion here. Essentially, he asks this Court to reweigh the evidence and reach a conclusion contrary to that reached by the trial court. That is not our role. The court’s findings are supported by the evidence and they support the court’s conclusion.

H.B. was five years old at the time of the court’s decision. The court found that since wife left the marital home in May 2017, H.B. was with her for 60%-70% of overnights. The court was aware of the circumstances surrounding PCC during the separation period. As it explained, the initial interim PCC order provided that contact would be as agreed by the parties. The parties could not agree, however, and the PCC order was modified in February 2019 following a hearing. Under the modified interim order, H.B. was to be with wife Monday afternoons through Friday mornings, or four nights a week. Husband had PCC Friday afternoons until Monday mornings, or three nights a week.

In recounting the history of PCC, the court found that H.B. had been with wife primarily on weekdays and some weekends, and that husband’s PCC had occurred primarily on weekends. It was reasonable for the court, in evaluating the child’s best interests, to consider the actual amount of time spent with each parent, regardless of the reasons underlying any variations from the modified interim schedule. The court also found that husband did not seriously dispute wife’s assertion that she had been the child’s primary caregiver.

We have held that “the quality of the child’s relationship with the primary care provider, if appropriate given the child’s age and development,” 15 V.S.A. § 665(b)(6), is a factor entitled to “great weight,” depending “upon evidence of the likely effect of the change of custodian on the child.” Hanson-Metayer, 2013 VT 29, ¶ 21 (quotation omitted). The court gave weight to this factor here, finding H.B.’s age and the record of care relevant here. It determined that wife had been primarily exercising legal and physical PRR for H.B., including facilitating therapy for the child and selecting schools. The court recognized that wife had not properly involved husband in these decisions but it concluded that, notwithstanding wife’s lack of cooperation, it was in H.B.’s best interests for wife to continue her primary role. The court acted within its discretion in evaluating this factor.

Husband’s remaining arguments similarly war with the court’s assessment of the weight of the evidence. The court was aware of wife’s behavior, including the fact that she had repeatedly disparaged husband in front of the parties’ child. It found that husband, too, had some culpability. It determined that the post-separation merits slightly favored him. The court did not find wife to be an unfit parent nor did it find any evidence of abuse toward the child. Instead, it found both parents loved H.B., were closely bonded to her, and could properly care for her. Its findings are supported by “reasonable and credible evidence.” Id. ¶ 12. The court adequately explained “how it weighed the § 665(b) factors” and concluded that its decision “satisfied the best-interests-of-the-child standard.” Lee v. Ogilbee, 2018 VT 96, ¶ 21, 208 Vt.

400. While husband “would rely on different evidence” or “interpret the evidence differently, . . . these are not grounds for reversal.” Hanson-Metayer, 2013 VT 29, ¶ 12 (quotation omitted). We note that the court’s order directs the parties not to disparage one another in front of H.B.

Husband next challenges the court’s PCC schedule. He cites the court’s observation that a week-on/week-off schedule would serve H.B.’s best interests and argues that the court should have imposed this schedule. Husband contends that there was no evidence to show that this schedule would not work. Husband also asserts that his weekend contact should have been through Monday on both of his weekends and that he should have been awarded the Monday holidays.

As stated above, the trial court has broad discretion in determining what course of action is in a child’s best interests. See Myott v. Myott, 149 Vt. 573, 578 (1988). The pattern of visitation adopted will not be reversed unless the court’s discretion “was exercised upon unfounded considerations or to an extent clearly unreasonable upon the facts presented.” Cleverly v. Cleverly, 151 Vt. 351, 355-56 (1989).

Husband fails to make the necessary showing here. Despite its observation about the benefit of a week-on, week-off schedule, the court acknowledged the reality that, regardless of wife’s failure to notify husband of her moves, the parties currently lived forty miles apart. The record indicates that the child was to start kindergarten in the fall. As she has primary rights, wife will decide where H.B. attends school, presumably in wife’s town. It was reasonable to conclude that a week-on/week-off schedule was not feasible given the distance between the parties’ homes. Such a schedule would have subjected H.B. to a lengthy commute to and from school each day. The court’s decision about Mondays, and holiday Mondays, was also within its broad discretion. We note that the court did provide for a week-on/week-off, schedule during the summer. The court did not abuse its discretion in crafting the PCC schedule.

## II. Property Division

### A. Trial Court’s Decision

We turn next to the court’s division of the marital estate. The court considered the relevant statutory factors in reaching its conclusion. See 15 V.S.A. § 751(b)(1)-(12). It noted at the outset that income was not “a form of marital property to be distributed between the parties.” Stalb v. Stalb, 168 Vt. 235, 244 (1998). It found that the evidence did not establish that wife had any interest in her father’s charitable remainder trust beyond the income stream. Thus, it considered the trust only as income. The court found that wife had greater employability and greater earning potential than husband. As stated above, husband spent significant sums from his inheritance to support the family, the marital home, and Ad Hoc Arts, LLC. Husband had inherited his one-half interest in the marital home before the marriage. The court found the source of these assets a significant and relevant factor in the property division.

The most significant marital assets were the marital home and a home that husband partially owned in Oklahoma. The marital home was valued at \$250,000, and husband owned one-half of the property. The court found that husband used \$125,000 of his inheritance to improve the property, and considering the factors in 15 V.S.A. § 751, it concluded that wife had no interest in the property.\* The value of the Oklahoma property was \$120,000. Husband

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\* This is incorrect as a matter of law. Pursuant to § 751, “[a]ll property owned by either or both of the parties, however and whenever acquired, shall be subject to the jurisdiction of the

owned one-half of the property. Again, considering the statutory factors, the court awarded wife had a one-half interest in husband's share of the property, or \$30,000. Husband was directed to pay wife \$5000 within three months of the court's order and the balance within two years. Turning to personal property, the court found it undisputed that there were various items in husband's possession that belonged to wife and that there were other items of marital property that should be awarded to her. It identified these items in its order.

Turning to the parties' business interests, the court reiterated that the parties' professional lives had been intertwined and were closely related to the arts. The court found it unrealistic to expect that the parties could cooperate meaningfully on artistic endeavors going forward. Their pleadings treated the various projects as property and thus, the court determined that they must be equitably divided. It awarded Ad Hoc Arts, LLC, and Ad Hoc Arts Org., Ltd., to husband, free and clear of any interest of wife. It awarded wife the parties' interest in the Welling Court Wall Mural Project and the associated social media page and website, free and clear of any interest of husband. The court ordered each party responsible for any debts that he or she incurred since separation. It found wife's credit card debt of \$13,273 to be a debt of the marriage and divided the debt equally. Husband was directed to pay his share in 32 monthly payments with a slightly larger final payment. The court did not award maintenance.

#### B. Husband's Arguments on Appeal

Husband argues that the court erred in: (1) ordering him to pay wife a share of the value of the Oklahoma property; (2) finding that wife had no beneficial interest in her father's charitable remainder trust and not factoring the income she received from this trust into the property award; (3) ordering the parties to split the credit card debt; (4) awarding wife the Welling Court Mural Project; and (5) awarding personal property to wife.

The trial court has broad discretion in dividing marital property, and we will uphold its decision unless its discretion was abused, withheld, or exercised on clearly untenable grounds. Chilkott v. Chilkott, 158 Vt. 193, 198 (1992). The party claiming an abuse of discretion bears the burden of showing that the trial court failed to carry out its duties. Field v. Field, 139 Vt. 242, 244 (1981). We have noted that the distribution of property is not an exact science and, therefore, all that is required is that the distribution be equitable. Lalumiere v. Lalumiere, 149 Vt. 469, 471 (1988).

Husband fails to show an abuse of discretion here. Again, husband's arguments largely turn on the trial court's assessment of the weight of the evidence. He questions why the Oklahoma property was not treated similarly to the marital home in the court's property award, noting that he inherited both property interests before the marriage. He states that his share in the Oklahoma property is indivisible and that it cannot be sold or financed to pay wife her share. He contends that he lacks the ability to pay wife this amount.

The trial court's decision is supported by the record. First, the court found that husband had spent \$125,000 of his inheritance to improve the marital home, which distinguishes it from the Oklahoma property. Both properties were marital assets subject to division. See 15 V.S.A.

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court.” Despite the fact that husband came to the marriage with the marital home and used a portion of his inheritance to improve it, it was marital property. However, given the court's finding that the Oklahoma property and the marital home were the parties' most significant marital assets, we presume the court intended to indicate that wife would not be receiving a “share” of the property. In addition, neither party contested this finding on appeal.

§ 751(a) (“All property owned by either or both of the parties, however and whenever acquired, shall be subject to the jurisdiction of the court.”). The court concluded, under the circumstances and based on the statutory factors, that wife was entitled to a share of one but not the other. Husband fails to show that this was inequitable. We note that the court was aware of husband’s financial circumstances and obviously determined that husband could afford to pay this sum. We also note that the court also found that husband spent \$15,000 of his inheritance during the separation period without providing notice or obtaining the consent of wife.

The court did not err in treating wife’s trust income as income rather than an asset to be equitably divided. Husband acknowledges that neither party presented any evidence as to wife’s interest in the trust but nonetheless contends that the court could have awarded some undefined beneficial interest to wife and factored this into its property division. We reject this argument. The court’s decision was consistent with our case law and with the evidence presented at the hearing. See Stalb, 168 Vt. at 244 (“Neither income capacity, nor the income itself, is property subject to equitable distribution.”).

As to the credit-card debt, husband complains that the debt was established only by wife’s financial affidavit. He contends that wife failed to show that the debt was incurred for marital purposes. He reiterates his assertion that he cannot pay this obligation. Again, the court’s decision is supported by the evidence. Wife testified that the debt was incurred pre-separation and the trial court credited her testimony. Again, the court was aware of the parties’ financial circumstances in reaching its conclusion and we do not reweigh the evidence on appeal.

Turning to the Welling Court Mural Project, husband asserts that this project was not “closely associated” with Ad Hoc Arts, LLC, as the court found, but was instead run entirely under the auspices of Ad Hoc Arts Org., Ltd. He states that this project is critical to the survival of Ad Hoc Arts and to his income and that he was the primary artist and organizer of the project. He again cites wife’s potential sources of income and asserts that the court provided no analysis to support its decision to take this project away from him.

We reject this argument as well. The court did not take this project from husband. The project, along with the LLC and the nonprofit, were marital assets subject to equitable division. The court awarded husband the LLC and the nonprofit and it awarded wife the more discrete project. While husband disagrees with the court’s conclusion, he fails to show that it was inequitable.

Finally, husband argues that the court erred in awarding wife the personal property she identified as hers. He argues that some of this property was business property, but he does not identify any particular item that falls in this category. Husband asserts that the court should only have awarded wife the personal property that they both agreed belonged to her or requested more evidence on this issue. Alternatively, he argues that the court should have awarded wife no personal property because she had tried to move her belongings from the marital home when she thought he would be out of town.

This claim of error is without merit. The court recounted the circumstances of wife’s move from the marital home, which was accomplished in several hours and involved the police coming to the home. It did not find that these circumstances now barred wife from retrieving additional personal items from the home. Instead, the court found it undisputed that husband possessed various items that belonged to wife and it awarded wife a list of items that she had identified as belonging to her. Wife testified that the items on the list belonged to her and the

court credited her testimony. It was not required to seek out additional evidence on this issue. We note, in any event, that husband does not identify any item in dispute and we will not search the record for error. See In re S.B.L., 150 Vt. 294, 297 (1988) (“It is the burden of the appellant to demonstrate how the lower court erred warranting reversal. We will not comb the record searching for error.”). We find no error in the court’s decision.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice