THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0606, In the Matter of Stephen DePaula, Jr. and Robin DePaula, the court on August 5, 2008, issued the following order:

The petitioner, Stephen DePaula, Jr., appeals his decree of divorce from the respondent, Robin DePaula. He argues that the trial court erred in: (1) allowing testimony by two witnesses who were not disclosed on the respondent's pretrial statement; (2) awarding sole decision-making responsibility to the respondent; and (3) calculating his current income. We affirm.

We address first the petitioner's arguments that the testimony of Timothy Russell and Pam Shepard was improperly admitted. Superior Court Rule 192 provides that witnesses not listed on a party's pretrial statement shall be prohibited from testifying "[e]xcept upon motion for good cause shown." We review the trial court's decision to allow an undisclosed witness to testify upon a showing of good cause under our unsustainable exercise of discretion standard. Gulf Ins. Co. v. AMSCO, 153 N.H. 28, 32-33 (2005).

The record in this case reflects that Timothy Russell was disclosed on the petitioner's pretrial statement. Although the respondent did not also disclose him, she did list a "representative from the Henniker Police Dept." on her trial management conference statement. Moreover, the trial court noted that the petitioner, in his testimony, had left an impression that the Henniker Police Department had not acted fairly in its interactions with him and, thus, Mr. Russell's testimony was being allowed as rebuttal testimony. Cf. State v. Morrill, 154 N.H. 547, 560 (2006) (specific contradiction doctrine allows the introduction of otherwise inadmissible evidence to correct a misimpression). Upon these facts, we cannot conclude that the trial court unsustainably exercised its discretion by allowing Mr. Russell to testify.

With respect to the testimony of Ms. Shepard, the record reflects that certain events had occurred which were relevant to the petitioner's contention that he was in the best position to exercise decision-making authority with respect to the children's education, and that those events, according to the respondent, had occurred after the submission of pretrial statements. Moreover, the record reflects that the petitioner's counsel had communicated directly with Ms. Shepard regarding such issues, and that, although the petitioner's counsel denied receiving it, the respondent's counsel had sent the petitioner's counsel a letter indicating that she intended to call Ms. Shepard at

trial. Upon these facts, the trial court did not unsustainably exercise its discretion by allowing Ms. Shepard's testimony.

To the extent the petitioner argues that the testimony of Mr. Russell and Ms. Shepard was erroneously allowed because the respondent did not file a motion, see Super. Ct. R. 192, the record does not reflect that the petitioner argued before the trial court that the testimony was inadmissible in the absence of a formal motion. Nor did the petitioner argue in the trial court, as he does on appeal, that Mr. Russell's testimony was erroneously admitted as "expert" opinion evidence. "It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial." In the Matter of Hampers & Hampers, 154 N.H. 275, 287 (2006). Accordingly, we decline to address these arguments.

We next address the petitioner's arguments that the trial court erred by awarding the respondent sole decision-making authority and primary residential responsibility over the children. The trial court has wide discretion over matters of custody, its overriding concern being the best interest of the children. See id. at 281. Although the trial court may, in its discretion, accord weight to the recommendations of the guardian ad litem, the trial court is not bound by such recommendations. See id. The record in this case supports the trial court's decisions concerning custody.

The petitioner's final argument is that the trial court erred in calculating his income. The limited record before us includes the August 2007 order addressing pending motions, including the petitioner's motion for reconsideration of the divorce decree. In the order, the trial court stated: "The prior orders describe the problems that the Court has had in trying to determine how much money Stephen DePaula, Jr. earns and having the documentation to support the amount. The March 8, 2007 Order required a paystub be brought to the April 26, 2007 hearing, which Stephen DePaula did not do. If he had, many of the problems that were created would have been prevented. At the Court's instruction, his attorney filed a year-to-date paycheck the next day, however since the hearing was over there was no opportunity to explain the paycheck." It was the petitioner who effectively prevented the trial court from being able to determine whether the amount of alimony and child support awarded was equitable; accordingly he cannot be heard to argue on appeal that the award was inequitable. See In the Matter of Jones and Jones, 146 N.H. 119, 123 (2001). There is evidence in the record to support the trial court's finding at the time it was made. That the petitioner's annual income at the end of 2007 was an amount less than calculated as a result of the paystub he provided after the April 2007 hearing does not require reversal of the trial court's order; that subsequent information is not properly before us on appeal. See Lake v. Sullivan, 147 N.H. 713, 717 (2001) (on appeal, we consider only evidence presented to the trial court). Noting that its

order was based upon the petitioner's current income and further noting his reporting varying incomes, the trial court's order specifically required that "the parties exchange copies of their W-2s and other tax documentation relative to their earnings each year, and if there is more tha[n] a 10% change in his/her income, that child support be recalculated and that alimony be reviewed." Accordingly, to the extent that the petitioner argues that he has experienced a more than a 10% change in income since the time of the decree, any remedy lies with the trial court.

Affirmed.

BRODERICK, C.J., and GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk

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