

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-541

DECEMBER TERM, 2003

	}	APPEALED FROM:
	}	
Jeannie Jackson	}	
	}	
v.	}	Essex Family Court
	}	
John Jackson	}	
	}	DOCKET NO 40-10-00 Exdm
	}	
	}	Trial Judge: Barb Zander

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

Husband John Jackson appeals from the trial court's final divorce order. He argues that the court abused its discretion by: (1) basing its award of spousal maintenance and child support on an unsupported estimate of his earning capacity; (2) unfairly limiting parent-child contact; and (3) awarding wife Jeannie Jackson the marital home without requiring that she refinance the joint mortgage indebtedness. We affirm.

Husband and wife were married in 1979. They have four children, two of whom are minors living at home. Husband is forty-nine years old and works as an emergency room doctor and as a family practice clinician in Manchester, New Hampshire. Wife is fifty years old and has not worked outside the home since 1984. The parties separated in 2000 and wife filed divorce proceedings.

In August 2002, the court issued its final divorce order. Pursuant to husband's motion for a new trial, the court issued several amended findings. The court awarded wife the marital home worth \$250,000 with net equity of \$97,000, and ordered her to make a good faith attempt to refinance the property to remove husband from liability on the mortgage beginning in January 2006, and annually thereafter. Wife received \$4000 per month in permanent maintenance and \$1369.50 in child support. Husband was awarded visitation with the children every third weekend, with the condition that he not be "on call" during any period of parent-child contact nor be away overnight. Husband appealed.

Husband first argues that the court erred in estimating his earning capacity at \$190,000 per year and basing its maintenance and child support awards on this figure. He asserts that the court's finding would require him to work an unrealistic number of hours per week.

"In awarding maintenance, the trial court must consider 'the ability of the spouse from whom maintenance is sought to meet his or her reasonable needs while meeting those of the spouse seeking maintenance" *DeGrace v. DeGrace*, 147 Vt. 466, 469 (1986) (quoting 15 V.S.A. §752(b)(6)). We defer "to the trial court's broad discretion in fashioning the award, and a party seeking to overturn a maintenance award must show that there is no reasonable basis to support the trial court's award of maintenance." *Id.* (alteration and internal citation omitted).

The court's finding that husband's estimated earning capacity was \$190,000 is supported by the evidence. First, as the court found, husband's total income could not be determined from the evidence in the record. Husband did not produce a pay stub nor did he testify as to his hourly rate of compensation or his 2002 annual salary. As the court explained, "[a]bsent better evidence of [husband's] historical earnings," it was "reduced to using his 'taxed medicare earnings' for 1995-2000, although it may be radically less than actual earnings." The record showed that in 2001 husband had gross

income and self employment income of \$190,671, taxable wages and self-employment income of \$183,736, and " taxed medicare earnings" of \$163,270. In 2000, husband' s taxable wages were \$104,557, total taxable income was \$248,937, and " taxed medicare earnings" were \$171,429. The court could not determine husband' s gross wages in 2000 because he did not submit his W-2s with his income tax form. The court found that, historically, husband' s work practice had been to work as many hours as were available to him. The court concluded that, based on husband' s practice of working more than one job, his fluctuating hours and salary, and his historical earnings, it was reasonable to assume that husband' s earning capacity exceeded \$190,000 per year. This finding is supported by the evidence.

Husband next argues that the court erred in limiting his parent-child contact to those times when he is not " on call" or working the evening shift at the emergency room. He argues that given the amount of maintenance and child support he must pay, he will always be working and won' t have any time for contact with the children. The 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) (citation omitted). The court' s visitation schedule is supported by its findings. As the court found, husband lives about two and one-half hours away from mother in a small one-bedroom apartment. He works long hours, and often works the overnight shift at the emergency room. As both children are minors, it was reasonable for the court to require husband' s presence during their visitation periods. We find no abuse of discretion.

Finally, husband argues that the court erred by not requiring wife to refinance the marital home until 2006. He asserts that the court failed to " settle the rights of the parties to the property," as required by 15 V.S.A. §751(a) and instead left him inextricably bound to wife through the mortgage on the property. This argument is without merit.

The trial court is authorized to equitably divide and assign marital property, and it may consider various statutory factors in making its decision. Cabot v. Cabot, 166 Vt. 485, 500 (1997); 15 V.S.A. §751. The court has broad discretion in considering these factors and we will uphold its decision unless its discretion was abused, withheld, or exercised on clearly untenable grounds. Semprebon v. Semprebon, 157 Vt. 209, 215 (1991). 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).

In this case, the court concluded that wife should retain the marital home. It rejected husband' s assertion that the home should be sold so that he could receive his half of the equity. The court explained that its property division left husband with all of the parties' liquid assets while wife' s property award, the marital home, was income consuming, rather than income producing. Moreover, the court explained, wife had provided the funds that enabled the parties to purchase the home. The court found that the home provided wife and the parties' children with shelter and stability. The court recognized that, given wife' s financial status, it was unlikely that she would be able to refinance the property but it ordered her to make a good faith attempt to do so beginning in January 2006. The court was not obligated to order the parties to sell the marital home if the property could not be refinanced. The court' s findings support its decision to award wife the marital home, and we find no abuse of discretion.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice