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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-137

NOVEMBER TERM, 2005

Christine Turner	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Armand Turner	}	
	}	DOCKET NO. 8-1-04 Cndm
		Trial Judge: Helen M. Toor

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

Wife appeals from the family court=s final divorce order. She argues that the court erred in valuing and distributing the marital assets. We affirm but remand the case so that the trial court can enter an order obligating husband to pay his share of the interest, if any, on a $86,716 marital debt.

Husband and wife were married for fourteen years. At the time of their divorce, wife was thirty-nine years old and husband was forty-one. Both are in good health. They have two children, one born in 1990 and the second in 1991. The parties agreed that wife would have primary physical custody of the children and the parties would share legal custody. The marital estate consisted of numerous parcels of real property, some of which were rental properties that provided monthly income to the parties. The parties also owned numerous vehicles and other personal property.

After a hearing, the family court issued an order dividing the parties= assets.[*] The court found that both parties had contributed equally to the acquisition and increased value of the marital assets. It thus concluded that the marital assets should be divided equally. The court rejected wife=s assertion that she should be awarded a greater share of the marital property due to husband=s alleged infidelity, one incident of abuse against wife, and alleged abuse toward the parties= son. The court reasoned that in the context of a fourteen-year marriage, none of these facts, regardless of their accuracy, constituted significant fault so as justify a change in the property distribution. Both parties sought to retain ownership of the marital home. The court awarded the marital home to husband, explaining that he had purchased the property from his father and built the home before the marriage. The court noted that no evidence had been presented regarding the effect moving would have on the children. The court made numerous findings regarding the value of the parties= assets, and, pursuant to the court=s order, wife received real property valued at $1,725,593; husband received real property worth $1,725,592. The court awarded wife $212,749 in personal property, and husband received $209,189.

Turning to the issue of maintenance, the court explained that wife had expressed a preference for property in lieu of maintenance, and the court agreed that it would be advantageous to provide wife with financial independence from husband. The court found that wife=s reasonable needs were $9000 per month, and it concluded that there were sufficient marital assets to allow each party to continue living the lifestyle that they had enjoyed during the marriage. To this end, the court awarded wife income-producing real estate, which provided a yearly income of $85,242. Wife stipulated that she could earn $25,000 per year. The court thus found that wife=s combined income of $110,242 was sufficient to cover her expenses. The court also noted that the value of the real property awarded wife was likely to increase substantially over time given the current real estate market, which would provide wife with a source of future income or retirement assets. Wife filed a motion for reconsideration of the court=s final order, which was denied with

one exception. This appeal followed.

Wife raises numerous challenges to the family court=s valuation of the marital assets, which we address in turn. She first argues that the court erred by finding that there was a $125,000 loan that encumbered three parcels of real property. In its order, the court deducted $41,666 from the value of each of the three parcels, two of which it awarded to husband and one to wife. Wife maintains that, because the loan did not actually exist, husband received a $41,666 windfall.

The family court has broad discretion in dividing the 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) (citations omitted). We will uphold family court=s findings of fact unless, taking the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, no credible evidence in the record to supports them. Semprebon v. Semprebon, 157 Vt. 209, 214 (1991).

The court=s distribution of this debt was within its discretion and was not exercised on clearly untenable grounds. As the family court found, the parties agreed that there was a loan of $125,000 that encumbered multiple properties. The court explained that neither party had submitted the loan documents, and it needed to allocate this debt in some fashion to determine property valuation. Wife had identified the three properties at issue as encumbered by a $41,666.67 mortgage, and the court expressly adopted wife=s allocation of this debt. Wife now argues that the court should have based its decision instead on husband=s testimony that the $125,000 loan would not be Adrawn down.@ The meaning of this phrase is unclear, but a review of the record indicates that husband did not unequivocally state that this debt did not exist. While the testimony is confusing, husband appears to state that a $125,000 Aequity take-out loan@ had been taken out but the funds had not been disbursed. Husband testified that he didn=t know if he would need the $125,000 but that A[i]f it comes along, I can use it. If it doesn=t, I can make do like I always do.@ The evidence presented on this issue is confused at best, but we cannot find that the family court committed clear error in relying on wife=s exhibit in allocating this debt.

Wife next argues that the family court overvalued a parcel of real property that it awarded her, referred to as 20 Conger Avenue. She asserts that the court failed to consider the true value of the parties= ownership in the property, which she argues was A1/2 + 3/5 of 25% interest.@ Although according to wife, this reduced ownership is Aclearly reflected@ on her exhibit 19, nothing is clear about her cited calculation. More importantly, as the family court found, both parties used the $76,000 value at trial as representing their equity in the property, and they relied on this figure in their post-hearing requests for property distribution. Wife maintains that it is apparent from the stipulated appraisal of the property that the $76,000 represents the fair market value of the entire property, not the value of the parties= fractional share. A review of the record does not support wife=s claim of error, howeverCthe appraisal lists the owners of the property as husband and wife, and it values the property at $76,000. Accordingly, we find no clear error in the court=s valuation of this property.

Wife next argues that the court devised an unfair ratio to distribute the prospective proceeds from the sale of a parcel of real property referred to as 14 Westview Court. The court held that, to maintain an equal distribution of the marital assets, wife would receive one-third of the sale proceeds while husband would receive two-thirds. Because the parties disagreed over the value of the property, the court indicated that if the proceeds from the sale exceeded its expectations (which was the appraised value of the property minus the debt), then the surplus would be distributed using the ratio set forth above. Wife argues that if there is a surplus, it should be divided equally to maintain an equal distribution of the property.

We reject this claim of error. First, there is no indication that this property has been sold for an amount greater than that found by the trial court. Moreover, even if the property did sell for more than its appraised value, an application of the ratio identified by the trial court would not render the overall distribution of assets inequitable. See Lalumiere v. Lalumiere, 149 Vt. 469, 471 (1988) (concluding a family court=s distribution of property is not an exact science and, therefore, all that is required is that the distribution be equitable). As such, the court acted within its discretion in dividing the proceeds of this asset.

Wife also asserts that the family court overvalued her personal property award. She maintains that the court should not have ascribed a value of $13,200 to the parties= Skidoos and trailer because the unrefuted testimony was that this property had a negative value of $6770. While this figure may have been proffered by wife in her post-hearing distribution request, husband stated that the property had value of $13,200 and wife attributed a similar value to the property at trial. The court=s finding is not clearly erroneous.

Wife next argues that the family court erred by failing to consider the value of an easement that it granted to husband across a parcel of real property that it awarded to her. Wife raised this argument in her motion for reconsideration and the family court rejected it. The court found that wife had not introduced any evidence at trial to establish the monetary value of the easement. While wife maintains that she did not request an easement at trial, the issue did arise. Husband testified that he would need an easement should wife be awarded this particular lot so that he could develop the adjoining lots. The trial court recognized husband=s request in its order. Under these circumstances, we cannot conclude that the court=s failure to attribute a value to the easement was unfair or that its failure to do so rendered the property division inequitable.

Wife next argues that the court erred when it ordered husband to pay his share of an $86,716 mortgage obligation within a year but did not require him to pay his share of the interest as well. We agree that husband should pay his share of the interest, if any, that accrues on the loan during the one-year period. We remand this issue to the trial court so that it may enter an order to this effect.

Wife next complains that she presented sufficient evidence of fault to justify an unequal distribution of the assets. The family court concluded otherwise, and we will not disturb its conclusion. It is for the family court, not this Court, to assess the credibility of witnesses and weigh the evidence. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (trial court=s findings entitled to wide deference on review because it is in unique position to assess the credibility of witnesses and weigh the evidence presented). For the same reason, we reject wife=s assertion that the family court erred by refusing to award her the marital home. The court determined that husband should have the home because he had purchased the land and built the house before the marriage. These findings are supported by the record, and we will not disturb the court=s assessment of the evidence on appeal.

Finally, we find no merit in wife=s assertion that the court erred by refusing to award her attorney=s fees. The trial court has discretion in deciding whether to award attorney=s fees. Cleverly v. Cleverly, 151 Vt. 351, 358 (1989). In this case, the court concluded that each party should bear his or her own costs as both parties were receiving properties worth significant amounts of money, and both were able to pay attorney=s fees. These findings are supported by the record, and the court did not abuse its discretion in rejecting wife=s request for attorney=s fees.

We turn now to wife=s arguments concerning maintenance. Wife argues that she was not actually awarded any Aproperty in lieu of maintenance,@ as stated by the family court, because she did not receive any marital property in excess of what she was already entitled to receive, i.e., half of the marital estate. She argues that the court should have analyzed her need for maintenance pursuant to the factors set forth in 15 V.S.A. ' 752, and it should have made findings regarding husband=s income. We find no error in the court=s award.

The family court may award maintenance, either rehabilitative or permanent, to a spouse when it finds that the spouse lacks sufficient income, property, or both, to Aprovide for his or her reasonable needs@ and the spouse is unable to support himself or herself Athrough appropriate employment at the standard of living established during the marriage or is the custodian of a child of the parties.@ 15 V.S.A. ' 752(a)(1)-(2); Chaker v. Chaker, 155 Vt. 20, 25 (1990). In this case, as noted above, wife requested an award of property in lieu of maintenance. The court found that there were sufficient assets in the marital estate to provide for wife=s reasonable needs, and thus no maintenance award was required. The court was not obligated to calculate husband=s income to reach this conclusion.

Husband correctly states that the court divided the equity in the marital property essentially equally, based on the parties= equal contributions to the marriage. If the court had not gone further, we would agree that wife=s maintenance needs were unmet. Cf. Klein v. Klein, 150 Vt. 466, 475 (1988) (when examining the extent to which spouse=s financial needs can be met from property award, maintenance statute was not intended to require that nonincome producing

property awarded to a party be used in lieu of maintenance Aunless it clearly appears that the property was above and beyond that awarded as an equitable distribution of the assets of the parties@). In this case, however, the court also awarded wife sufficient real estate to maintain an income level of $9000 per month and it provided her this Aincome stream@ in lieu of maintenance. In other words, the court essentially transferred a portion of husband=s income, acquired through his employment as a real estate developer, to wife. We have previously upheld a similar arrangement. See Cabot v. Cabot, 166 Vt. 485, 502 (1997) (finding no error in family court=s failure to award maintenance where wife received over $1.5 million in property settlement, mostly in cash, and the income stream that would be provided from the investment of this money, in combination with child support, would allow wife to enjoy a very comfortable standard of living).

If wife=s concern is that she is receiving less income than husband, she did not sustain her burden of proof on this point. She did not pursue this argument at trial but instead requested property in lieu of maintenance. We note that the court was plainly aware of the income generated by the rental properties. Evidence was also presented to show that husband=s business, AWT, Inc., had a value of $95,000, which was counted as part of husband=s personal property award. Husband testified at trial that he received approximately $36,000 per year in income from this business, although he had not been able to cash his paychecks due to insufficient funds. Wife fails to demonstrate that the court=s income-stream award is inequitable or that it otherwise fails to meet her reasonable needs. Pursuant to the court=s order, wife owns real property worth approximately $1,725,593, which, as the family court found, will likely substantially increase in value over time. At the same time, wife has been provided with an income of over $85,000 per year, which in addition to her stipulated employment income of $25,000 is sufficient to meet her reasonable needs. We find no error in the court=s award.

Affirmed but remanded for the trial court to enter an order requiring husband to pay his share of the interest, if any, on the parties= $86,716 mortgage obligation.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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[*] Husband asserted below that the parties had agreed to divide the marital assets equally; a written stipulation could not be located, however.