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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-166

FEBRUARY TERM, 2008

Susan Cresenzi	}	APPEALED FROM:
	}	
v.	}	Orleans Family Court
	}	
	}	
Francis Cresenzi, Jr.	}	DOCKET NO. 138-7-04 Osdm
		Trial Judge: Howard VanBenthuysen

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

Husband appeals pro se from the family court's final divorce order. He argues that the court's findings are unsupported by the evidence, and that its distribution of the marital assets was inequitable. We affirm.

The record indicates the following. The parties separated in July 2004 after a fifteen-year marriage. Wife is thirty-nine years old, as is husband. Wife has completed two years of college and works as a data coder, earning $2771 per month. At the time of the final divorce hearing, husband was employed by the State of Vermont as a computer specialist, earning $4348 per month. He indicated, however, that he was leaving that job to return to Florida, where he would be employed as a temporary employee earning $10 per hour. Both parties filed for bankruptcy in 2005. The parties have three children together, ages eleven, fourteen, and sixteen. By agreement, husband has sole physical rights and responsibilities for the children.

At the time the parties separated, they were living with a friend who owned a large house and public storage units in Lowell. The friend allowed the parties to store personal items in one of his locked commercial storage units without charge as long as the parties lived with him. When wife moved out in July 2004, she removed a number of items from the storage unit, mainly her own property and items of interest to the children. Husband decided to move out as well, at which point the friend advised him that he needed to remove his remaining belongings from the storage unit or pay a $90 monthly rental fee. Despite numerous requests by the friend, husband did not move his belongings. In the fall of 2005, the friend disposed of the items in the storage unit. Husband left other belongings with the friend as well, such as firearms, all of which disappeared. The family court found that while husband now complained that there were valuable items in the storage unit, he offered no credible explanation as to why he waited until the final divorce hearing to complain about his missing belongings. The court also found that husband failed to satisfactorily explain why he simply did not pay the monthly storage fee, given that he was earning approximately $50,000 per year.

After the parties separated, husband began camping on property that he and wife owned in Lowell. Wife surreptitiously removed a Harley Davidson motorcycle from the property, which was one of the primary marital assets, as well as some camping gear. Wife later returned the motorcycle, and the court found that the value of the camping gear was nominal.

The two main marital assets were the motorcycle and the ten acres of undeveloped land in Lowell. The court found that the parties had purchased their motorcycle in 2000, financing it at an exorbitant rate of interest. Husband had been paying $456 per month for the vehicle. Husband asserted that the motorcycle was worth $8000, citing NADA values. Wife estimated its value at $20,000. The court found that the current NADA value for the vehicle ranged from a low of $8705 to an average value of $11,450. The Kelley Bluebook set the retail value at $13,615. The court determined that the motorcycle was worth $12,532, the average of the $11,450 NADA value and the Bluebook value, and the parties had over $7100 of equity in the motorcycle. The court conducted a similar analysis to determine the value of wife's 2002 truck, which had over 100,000 miles on it. Husband asserted that the truck was worth $19,000, but neither NADA nor the Kelley Bluebook valued the vehicle that highly. Taking an average of the high and low values for the truck, the court found that it was worth about $11,800, which was approximately the amount that wife still owed on the vehicle. The court also found that husband had a small retirement account worth $5000, $1667 of which was accumulated before the parties separated.

Turning to the Lowell land, the court found that the parties paid $15,000 for it in 1996. They sold it for $13,000 in 1999 when they moved to Florida, but held the mortgage. The buyer defaulted on the payments, but neither husband nor wife formally filed or concluded a foreclosure action. The property was sold at a 2006 tax sale to the parties' friend. Testimony was presented that husband had redeemed the property, but the court found that it appeared he was again behind on the taxes. Wife testified that she believed the property was worth $35,000; husband opined that it was worth $10,000. The court found wife's testimony more credible, and valued the property at $35,000.

The court found that, theoretically, the total value of the marital estate was approximately $43,766. Yet it appeared that the Lowell land might be encumbered either by a lien created by unpaid taxes or by an unresolved default by a prior buyer and mortgagor. Either way, the court explained, and assuming that the property had actually been redeemed, it was less salable than it would be if it was unencumbered. The court also noted that husband was currently underemployed, making less than half of his previous salary. Nonetheless, given that husband had custody of the children, the court stated that it would make an equal distribution of the assets. It concluded that if the parties could salvage the Lowell property, it must be sold and the proceeds divided equally. Husband was awarded two-thirds of his retirement account, with the remaining one-third awarded to wife. The motorcycle was to be sold at fair market value or refinanced, with wife to receive $3550 as part of the final property allocation. Husband was also ordered to pay the children's school lunch debt, discussed in greater detail below. Husband filed a motion to alter and amend, as well as other motions, all of which were denied. This appeal followed.

Husband first asserts that the court should have punished wife for attempting to conceal marital assets. He also challenges many of the court's findings as clearly erroneous. He argues,

for example, that the valuation of the motorcycle and the truck were improper, noting that no party introduced the Kelley Blue Book into evidence and the court used the wrong NADA value for the truck. He also argues that the court erred in valuing the Lowell property. Husband further asserts that wife should not have been relieved from her obligation to pay for the children's school lunches. Finally, he asserts that the court's distribution was inequitable, and that the trial judge should not have denied his post-judgment motions.

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). 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). On review, 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, there is no credible evidence in the record to support them. Semprebon v. Semprebon, 157 Vt. 209, 214 (1991).

First, we reject husband's assertion that the court abused its discretion by failing to punish wife for taking some of his belongings. The record shows that the court evaluated the respective merits of the parties. See 15 V.S.A. § 751(b)(12). It found that both parties were nice people who were going through a difficult time. It explained that while the divorce had not brought out the best in either party, minor peccadillos, like insisting on the return of a $20 sleeping bag or selling a truck cap, were rather irrelevant. The court did not abuse its discretion in so concluding. We note, moreover, that husband's assertions about his friend's improper disposal of his belongings are properly raised against the friend in a separate proceeding, rather than in this proceeding.

Husband's remaining arguments are equally unavailing. The court's valuation of the Lowell property was not clearly erroneous. Wife was competent to testify to the value of this property, 12 V.S.A. § 1604, and she stated her belief that it was worth $35,000. The trial court found her testimony credible, and it is for the trial court, not this Court, to weigh the evidence and assess the credibility of 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); see also Jackson v. Jackson, 139 Vt. 548, 550 (1981) (husband, as owner of real property, was competent to testify to its value, and weight to be given to his testimony was question for the trier of fact).

The court's valuation of the motorcycle is also supported by evidence in the record. Wife testified that the value of the motorcycle was $20,000. Husband agreed at trial that the average value of the motorcycle on the retail market was $11,450 according to NADA. Husband valued the motorcycle at $8000, however, relying on a NADA value that the court found was outdated. The court found that the motorcycle was worth $12,532. While it may have been improper for the court to consult the Bluebook, its valuation of the motorcycle was within the range of evidence presented at the hearing. See Kanaan, 163 Vt. at 407 (family court's ability to find proper valuation is limited by evidence put on by the parties and credibility of that evidence).

As to wife's 2002 truck, the record shows that husband testified that the average trade-in value, according to NADA, was $16,100, and the average retail value was $19,025. He stated that the amount owed on the truck was approximately $14,000 as of November 2005, and he believed that wife had continued to make payments on the truck since that date. There was also evidence that the truck had over 100,000 miles on it. As noted above, the court valued the truck at approximately $11,800. Even if we agreed with husband that the court erred in its approximate valuation of the truck, we would not overturn the court's distribution of the marital estate. As reflected above, the parties had very few marital assets—a motorcycle, a truck, ten acres of land, and husband's retirement account. Out of these assets, husband received a motorcycle, two-thirds of his retirement account, and half of the proceeds from the sale of the Lowell land. Wife received her truck, half of the land sale proceeds, and a portion of the retirement account that was accumulated during the marriage. This distribution was equitable. Given our conclusion, it follows that the court did not err in denying husband's motion to alter and amend, which raised essentially the same issues as raised by husband in this appeal.

Finally, we reject husband's assertion that the court erred in ordering him to pay an approximately $90 bill for the children's school lunches. The family court did not improperly modify wife's child support obligations, as husband argues. As the family court explained, the parties had agreed that each would pay for the children's lunches during their week of custody. Wife, who had a lower income than husband, arranged for the children to receive low-cost subsidized lunches. Husband cancelled the reduced cost lunches, apparently out of pride. He then demanded that wife pay the resulting bill on the theory that she should have paid the higher lunch cost. The family court found that whatever the technical merit of this position, it was overwhelmed by the equity of the situation and the pettiness of the sum at issue. As the court explained, husband, having cancelled the lower cost option, could not now reasonably claim that wife should pay the balance due. The court's reasoning was sound, and it did not abuse its discretion in reaching its conclusion.

As to husband's request for costs, we direct his attention to Vermont Rule of Appellate Procedure 39. We do not address wife's request that we order husband to stop emailing her at work. Such a request must be made in the first instance in the family court, not this Court.

Affirmed.

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