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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-348

APRIL TERM, 2017

Denise McCarty	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
v.	}	Family Division
	}	
	}	
Michael McCarty	}	DOCKET NO. 150-4-14 Wndm
		Trial Judge: Kirstin K. Schoonover

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

Husband appeals the superior court's divorce order, arguing that the court abused its discretion in distributing the marital property, awarding wife rehabilitative maintenance, and requiring him to maintain insurance policies for wife's benefit. We affirm.

Wife filed for divorce in April 2014. In December 2015, the parties stipulated to the following facts, which the superior court incorporated into its decision. At the time of the stipulation, wife was forty-one years old and husband was forty-six years old. The parties met in 1995 and began cohabiting in 1996. They were engaged in 1997 and married in 2002. They have lived separate and apart since November 2008. There are no children of the marriage. Wife was diagnosed with diabetes in 2002 and is insulin dependent. She takes medicine daily to combat high cholesterol and glaucoma and to protect her kidneys. Husband is in good health.

At the time of the marriage in 2002, wife had a paralegal degree and an annual salary of $25,000. At that time, husband had degrees in computer information systems and business administration. He was employed by the Vermont National Guard full-time as an aircraft mechanic and was also an enlisted member of Air National Guard doing the same work for them on weekends. He earned $71,000 in 2002. In 2006, husband obtained a commission as a second lieutenant in the Air National Guard, which disqualified him from working in his enlisted position as an aircraft mechanic. He became a self-employed building contractor and worked as a reserve officer on weekends. In 2010, husband left Vermont for Maryland after obtaining employment as a civilian in the Maryland Air National Guard managing logistic operations and as a reserve commissioned officer in the Air Guard on weekends.

Regarding the real estate within the marital estate, the parties stipulated as follows. In 1991, husband purchased real property in Moretown for $65,000. In 1998, husband's parents lent him $45,000 to build a house on the property; the remainder of the cost was paid with husband's savings. After the marriage in 2002, the parties jointly obtained a $90,000 mortgage on the property. The proceeds were used to repay defendant's parents and to make improvements on the property. The property was listed in a town appraisal at $209,000 in 2008 and was privately

appraised at $330,000 in 2015. The house lacks electricity, which would cost approximately $70,000 to install.

In 1998, husband purchased a four-unit apartment building in Montpelier for $87,000. Wife assisted with property management of the building from the time the property was purchased. In 2010, the property sold for $97,000, which the parties regarded as marital assets. Husband paid all the costs of the property before the sale and received rent, and later mortgage payments through 2013.

Also in 1998, husband purchased a rental property in Waterbury for $55,000. Wife assisted with property management of the building from the time of the purchase. The property was appraised by the town at $134,000 in 2008. Wife received half of the gross monthly rent from the property after husband moved to Maryland. In 2011 the property was badly damaged by Tropical Storm Irene and became uninhabitable. The building remains uninhabitable. It was privately appraised at $70,000 in 2015.

In 2007, husband purchased a rental property in Moretown consisting of thirty-six and a half acres and a house. The purchase price was $400,000 and the parties jointly secured a $360,000 mortgage on the property. Wife assisted with property management of the building from the time of the purchase. In 2015, the property was valued at $290,000 and had a $260,000 mortgage.

In 2010, husband purchased a residence in Maryland for $130,000, using $90,000 borrowed from his sister and $37,000 from an equity line of credit on the marital residence. He renovated the Maryland residence, paying approximately $101,700 for materials and services. In 2015, the property was valued at $231,500, with a mortgage of $128,000. The parties also acquired two time shares, one in 2001 for $9600 and one in 2002 for $4900.

At the time of the parties' stipulation, wife was working for the State of Vermont, with an annual salary of approximately $53,000. Husband was employed as a civilian for the Maryland Air National Guard and was a captain in the Air National Guard, with an annual salary of approximately $97,000. Husband had a loss from his rental property of approximately $9000 and paid approximately $27,000 in expenses for expenses relating to the property, not including his Maryland home.

The parties also stipulated as follows: "The parties each have retirement accounts. They consent that the value of those accounts not be taken into account by the Court in determining an equitable distribution of property."

Following a divorce hearing held over two days in December 2015, the superior court made additional findings, none of which have been challenged on appeal, other than the court's finding that the parties had a relatively long-term marriage. The court found, among other things, that: (1) wife was twenty-one years old when the parties began living together and it was her first serious relationship; (2) the parties were engaged to be married in 1997, at which time both of them contributed significantly to the building of a log cabin on the property at 2003 Cobb Hill Road; (3) the parties built the house for their future together and designed it for their specific needs; (4) the parties commingled their funds when they were together; (5) at the time of the final divorce order, wife had a 401k with the State of Vermont worth $20,000 and Putnam funds worth $24,000; (6) at the time of the final divorce order, husband had a 401k worth approximately $100,000, Putnam funds worth approximately $70,000, a defined benefit pension that will pay him $1865 per month upon retirement, and a military pension that will pay him an additional $1300 per month upon retirement; (7) the marital home in Moretown was appraised at that time at $330,000, with a

$90,000 mortgage that included a $35,000 loan husband obtained to finance his Maryland residence; and (8) at the time, wife was residing in a small rental apartment and had to stretch her income due in part to her monthly medication costs for insulin.

In considering the property distribution criteria set forth in 15 V.S.A. § 751(b), the court stated that the following factors favored wife: (1) this was a relatively long-term marriage; (2) wife suffers from diabetes, which affects her eyes, requires work accommodations, and may impact her health to a greater degree as she ages; (3) husband has a higher education, a significantly greater income, and a better opportunity for advancement in his career than wife; (4) husband has a greater opportunity to acquire capital assets and income and greater retirement benefits[*] than wife; and (5) the respective merits of the parties slightly favor wife because of an abusive incident that was the trigger for their 2008 separation, which ultimately led to their divorce. On the other hand, the court stated that the following factors favored husband: (1) wife did not contribute to husband's purchase of the Montpelier and Waterbury rental properties or the undeveloped real estate in Moretown on which the parties built their marital home; and (2) although wife helped husband manage the rental properties, husband was the primary party to finance and maintain the properties.

Assessing these factors, the court awarded wife the marital home and its furnishings in Moretown, making her responsible for the mortgage on the property except for the portion attributable to the loan that husband took out to finance his Maryland residence. The court also awarded wife one of the time shares and a monetary judgment of $80,000, which would cover the expense of installing electricity in the marital home. The court awarded husband his Maryland residence, the Moretown rental property, the Waterbury property, and one of the time shares.

As for maintenance, the court concluded that wife lacked sufficient income to provide for her reasonable needs and to support herself at the standard of living established during the marriage. See 15 V.S.A § 752(a). Citing the statutory maintenance factors contained in 15 V.S.A. § 752(b) and noting that an award of $1800 per month would equalize the parties' incomes, the court awarded wife rehabilitative maintenance of $1000 per month for four years. The court also ordered husband to maintain any existing life insurance policies naming wife as beneficiary for a period of five years.

Husband sought reconsideration of the court's order, raising several arguments, including that the court made inadequate findings in support of its maintenance award. The court granted the motion to the extent that it expanded its findings concerning the standard of living established in the marriage, but otherwise denied the motion and confirmed its original property distribution

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[*] As noted, the parties "consent[ed] that the value of [their retirement] accounts not be taken into account by the Court in determining an equitable distribution of property." Although this stipulation clearly calls upon the court to ignore the values of the parties' respective 401k retirement accounts, it is not clear whether the parties intended this stipulation also to preclude the court's consideration of the fact that husband anticipated receiving the benefit of his defined benefit pension on retirement. Wife did not request an award of any portion of husband's pension benefits, but she did testify without objection that if the court accepted her proposed property division husband would have, in addition to other assets that she enumerated, "his pension that I'm not asking for." In his brief, husband suggests that the court ignored the parties' stipulation in considering husband's financially stronger position than wife in assigning her a greater portion of the marital property. However, he does not actually raise this as a claim of error on appeal or make any argument on the subject. Accordingly, we accept as proper the court's finding that husband has greater retirement benefits than wife.

and maintenance award. On appeal, husband challenges the property division award, the court's award of spousal maintenance to wife, and the court's order requiring husband to maintain existing life insurance policies benefitting wife.

I. Property Division

Regarding the first claim of error, husband contends that the highly disproportionate property distribution is not supported by the evidence or the court's findings. In so arguing, husband asserts that wife received eighty-two percent of the marital estate, that the court erred in treating the parties' marriage as long-term, and that the court did not give sufficient weight to his substantial premarital assets and the appreciation of those assets.

"The trial court enjoys broad discretion in dividing the marital property, and we will uphold its decision unless that discretion was withheld or abused." MacCormack v. MacCormack, 2015 VT 64, ¶ 17, 199 Vt. 233. The distribution of marital property "is not an exact science" and thus is not restricted by a "rigid formula." Id. (quotation omitted). The property division must be equitable, however, Lalumiere v. Lalumiere, 149 Vt. 469, 471 (1988), and a disproportionate award "justifies a close look," Daitchman v. Daitchman, 145 Vt. 145, 150 (1984). Nonetheless, "[a] disparate property division is not 'facially inequitable,' and will not be reversed as long as the family court makes adequate findings that are supported by the evidence." MacCormack, 2015 VT 64, ¶ 17 (quotation omitted).

For several reasons, we disagree with husband's contention that the court awarded wife eighty-two percent of the marital estate, and assigned him only eighteen percent.

First and foremost, we reject husband's argument that the court erroneously failed to credit him for the $101,702 he invested in materials and services to renovate his Maryland residence. Husband invested in the renovation of his Maryland residence during the marriage, from marital funds. In fact, the court found, and husband does not contest, that some of the funds he invested came from the proceeds of the Montpelier rental property, which was sold in 2010, years before the parties' divorce. The parties stipulated that these proceeds were marital property. Husband's investment to improve the Maryland residence is now reflected in that property. He does not claim to owe any third-party monies associated with those improvements. To credit him for his investment of marital funds would be to double-dip. The court did not err in assigning a value of $103,500 to the Maryland property based on the then-current equity in the house. Setting aside husband's claim for credit for the materials he invested in his house, by his own calculations, the property division is closer to sixty-eight percent for wife and thirty-two percent for husband.

Moreover, husband's accounting appears to include a mathematical error in valuing the marital home. The trial court found, and husband does not contest, that the value of the marital home is $330,000, and it is subject to $90,000 mortgage, inclusive of a $35,000 loan that husband used to finance acquisition of his Maryland residence. In his brief, husband assigns a value to the marital home, listed in wife's column, as $275,530. He then includes a separate line item debiting husband and crediting wife for the $35,000 husband was ordered to repay wife. The net value of the home, per the trial court's unchallenged findings, was $240,000. Husband may have adjusted that to $275,530 in recognition of the $35,000 indebtedness attached to the house for which he, and not she, is responsible. But then husband should not have credited wife for $35,000 in cash due from husband for that indebtedness. Husband essentially double-dipped.

Finally, husband's chart purporting to document the trial court's allocation of assets as between husband and wife is inconsistent with the trial court's findings in several respects. First,

it omits a number of items identified and valued in the trial court's decision and assigned to husband. This includes a tractor valued at $20,000, a saw mill valued at $7000, and vehicles worth nearly $15,000 more than the figure assigned by husband in his brief. Second, it attributes to husband less cash on hand than found by the trial court, and attributes to wife more cash on hand than found by the trial court.

With these considerations in mind, the trial court's property division granted wife somewhere between sixty-two and sixty-eight percent of the marital property, and granted husband somewhere between thirty-eight and thirty-two percent—in contrast to husband's estimate of eighty-two percent to wife and eighteen percent to husband.

We also reject husband's argument that the superior court erred by labeling the parties' marriage as a "relatively long term marriage." Husband points to the fact that the parties married in 2002 and began living separate and apart in 2008 and argues that, contrary to the trial court's finding, this was a short-term marriage.

Husband wants it both ways. He presumably wants us to disregard the parties' cohabitation from 1996 until their 2002 marriage, since they were not legally married at the time, but then also wants us to disregard the period when the parties did not cohabit even though they were legally married through that period. Cf. Wall v. Moore, 167 Vt. 580, 580-81 (1997). The superior court found that although the parties separated in 2008 and never were able to reconcile their relationship in a meaningful way, they continued to see each other off and on over the next seven years. It also noted at least some ongoing financial interdependence for a period, as wife received half of the proceeds of the Waterbury rental property until it became uninhabitable. Given the record as a whole, the court's statement that this was a "relatively long term marriage" is not clearly erroneous. Cf. Delozier v. Delozier, 161 Vt. 377, 383 (1994) (stating that "there is no precise point at which marriages are defined as 'long-term,' " but noting that courts at that time were increasingly awarding permanent maintenance "in marriages of fifteen years or more"); cf. Chaker v. Chaker, 155 Vt. 20, 26 (1990) (upholding award of permanent maintenance following ten-year marriage).

Finally, we do not agree with husband that the trial court failed to give proper weight to his significant premarital assets and his role in acquiring and preserving marital assets. Husband emphasizes his role in acquiring multiple properties before the parties married, paying for most of the home expenses, and paying for any shortfalls owed on the rental properties.

The superior court made specific findings noting husband's role in acquiring several of the properties, and expressly acknowledged that the fact that husband bought and paid to maintain the Waterbury and Montpelier rental properties, as well as the marital residence, was an important factor supporting husband's claims in the property division. But the court also identified a host of other statutory factors that supported a disproportionate property division to wife, including her health challenges, husband's disproportionate earning power and assets, and the merits of the parties. Our role on appeal is not to reweigh the evidence and make an independent judgment, but rather to determine whether the court's ruling was within its discretion. We conclude in this case that the court made detailed findings adequately explaining a property distribution that was within its broad discretion.

II. Spousal Maintenance

Husband also argues that the superior court abused its discretion in awarding wife rehabilitative maintenance in the amount of $1000 per month for four years. He argues that the court abused its discretion by awarding rehabilitative maintenance to a self-supporting spouse,

who is not a displaced homemaker. Because both husband and wife were earning more than they had during the marriage, husband argues that the trial court's maintenance award would allow wife to live a lifestyle beyond the standard of living established during the parties' marriage. He contends that wife was self-supporting and, though she wanted more income, she did not need it. Finally, he argues that the superior court abused its discretion in awarding rehabilitative spousal maintenance, requested by wife so she could go back to school and get a college degree, without any findings that doing so was likely to increase her earning power. We find no abuse of discretion.

The court may award either rehabilitative or permanent maintenance to a spouse in a divorce action if it finds that the spouse seeking the award lacks sufficient income or property to provide for his or her reasonable needs and cannot support himself or herself at the standard of living established during the marriage. 15 V.S.A. § 752(a). Any maintenance order must be "in such amounts and for such periods of time as the court deems just, after considering all relevant factors, including" the requesting party's financial resources and ability to meet his or her needs independently, the time and expense necessary to acquire sufficient education to enable the requesting party to find appropriate employment, the standard of living established during the marriage, the duration of the marriage, the age and condition of each spouse, and the ability of the spouse from whom maintenance is sought to meet his or her reasonable needs while meeting those of the requesting spouse. 15 V.S.A. § 752(b). The statute's "reference to reasonable needs should not be looked at in relation to subsistence," insofar as "[t]he critical comparison is to the standard of living established during the marriage." Strauss v. Strauss, 160 Vt. 335, 338 (1993). "Thus, spousal maintenance is intended to correct the vast inequality of income resulting from the divorce, and to equalize the standard living of the parties for an appropriate period of time." Id. (citation omitted).

"Once the trial court finds grounds for awarding maintenance, it has broad discretion in determining the duration and amount." Chaker, 155 Vt. at 25. We will set aside a maintenance award "only if there is no reasonable basis to support it." Id.

Husband is correct that wife did not give up her career during the parties' marriage in order to stay home and maintain the parties' household. But one need not be a "displaced homemaker" to be entitled to spousal maintenance. See 15 V.S.A. § 752 (identifying standard for spousal maintenance and listing factors for consideration).

Here, the superior court determined that wife lacked sufficient income to provide for her reasonable needs and to support herself at the standard of living established during the marriage. Id. § 752(a). Supporting this determination were the court's findings that during the marriage the parties had ample discretionary income that allowed wife to buy clothes and to go out to restaurants; that at the time of the divorce wife was living frugally in a small rental apartment and had very little money to spend on activities she had been able to do during the marriage, like shopping, dining out, and taking vacations; and that wife had to stretch her income to afford her monthly medication costs for insulin. In addition, the stated purpose of the spousal maintenance was to enable wife to return to school to get a degree. Wife testified that the schooling itself would cost $40,000 - $50,000, and that if she gave up her job so she could gether degree in two years, she would need $40,0000 per year in living expenses. These findings support the trial court's conclusion that wife was not able to meet her reasonable needs.

Moreover, the evidence and findings support the trial court's award of rehabilitative spousal maintenance. Wife testified that she had reached the ceiling of her earning potential, and that to increase her earnings she would have to go back to school and get a bachelor's degree. This

testimony supported the trial court's award of rehabilitative maintenance. On these facts, the trial court was not required to quantify the increased earning potential wife would likely realize from the extra schooling.

III. Life Insurance Requirement

Finally, husband challenges the superior court's order requiring him, for a period of five years, "to maintain any and all life insurance policies naming [wife] as beneficiary" and ordering that he "not cancel, terminate, or borrow against said policies . . . [or] change the beneficiary." Husband argues that this provision violates our prohibition against post-mortem maintenance stated in Theise v. Theise, 164 Vt. 577, 579-81 (1996).

We disagree. In Theise, the superior court had "ordered the husband to name the wife, to the extent of maintenance payments due her, as the beneficiary on an existing 'key man' life insurance policy in which one of the husband's corporations was the beneficiary." Id. at 578. We struck the provision because although "the court has the discretion to order a spouse to maintain an existing life insurance policy for the benefit of the other spouse," the court in that case "expressly stated that the provision was intended to protect and preserve the wife's maintenance award should the husband predecease her." Id. at 580. Here, in contrast, the court simply ordered husband to maintain wife as a beneficiary for a period of five years on any existing policy on which she was currently a beneficiary, which is precisely what we stated in Theise was permitted. The provision in this case was not tied in any manner to the maintenance award.

Wife did not cross appeal, but makes various requests for modifications to the final divorce order on the ground that deadlines for certain actions required in the final divorce order have been impacted by the pendency of this appeal, as well as for an award of statutory interest. Wife should bring any such requests to the trial court in the first instance.

Affirmed.

BY THE COURT:

_____
Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice

_____
Karen R. Carroll, Superior Judge,
Specially Assigned