

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-011

JUNE TERM, 2007

Deborah Moody	}	APPEALED FROM:
	}	
	}	
v.	}	Addison Family Court
	}	
Perry Lessing	}	
	}	DOCKET NO. 92-5-05 Andm

Trial Judge: Matthew J. Katz

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

Husband appeals an order of the family court dividing the couple's marital property. We affirm.

The parties do not dispute the basic underlying facts. When husband and wife first met in Los Angeles, California, husband was employed as a school teacher, and wife was employed as a technical writer. In 1989, the couple decided to move to the East; they married in 1990. Despite the move, wife was able to keep her position as a technical writer, telecommuting from home. She retained this position through the end of the marriage in 2005, earning in excess of \$65,000 per year. The couple had two children, born in 1992 and 1994, respectively. In 1994, husband's teaching job was eliminated by the school district where he was employed. This ultimately prompted the couple to decide that husband would stay at home with the children, while wife would be the primary wage-earner through her work as a technical writer. Husband continued to serve as the primary care-giver for the next seven years, and did not have employment outside the home during that time. During the course of the marriage, the couple received several monetary gifts from family members. Of these gifts, approximately \$1,092,889 came through husband's family while approximately \$64,430 came through wife's family. The couple jointly decided to invest these gifts in retirement funds while using the income that wife earned for their day-to-day living expenses.

The only contested issue in the divorce was the appropriate division of the marital property. Husband proposed that the property be divided based on its original source, that is, funds that husband brought into the marriage through his family would be returned to husband, while wife advocated for a "50-50" split in light of the couple's joint decision to live off of her income during the marriage while investing additional income into their retirement.

The court ultimately ordered an equal division of the marital property. In reaching this decision, the court examined the parties' contributions to the marriage, their career histories, their respective earning potential, their employment-based retirement savings, the value of the marital

home, and the parties' relative entitlement to the cash mutual funds in which they invested over the years. With respect to this last element, the court focused on the fact that the couple jointly decided to save the money received as gifts for their future, while living off of wife's income in the present. Applying the factors listed in 15 V.S.A. § 751(b), the court concluded that an equal split of the marital property was justified primarily by the length of the marriage and the parties' shared expectation and understanding that the cash mutual funds would support them in their retirement. The court based its decision in part on Harris v. Harris, 162 Vt. 174, 183 (1994), where we held that the parties' respective contributions to the marriage—both monetary and non-monetary—should be considered in dividing marital property, rather than focusing exclusively on the source of a couple's financial holdings.

On appeal, husband argues that the family court (1) ignored the substantial evidence that he was the primary care-giver for the couple's two children; (2) gave insufficient consideration to the source of the marital assets; (3) failed to make adequate findings of the parties' reasonable needs going forward after the divorce; and (4) erred in valuing husband's teacher's pension.

"The family court is authorized to equitably divide and assign marital property, and it may consider various statutory factors in making its decision." Kasser v. Kasser, 2006 VT 2, ¶ 16, 179 Vt. 259. Thus, "[t]he family court has broad discretion in dividing marital property, and we will uphold its decision unless its discretion was abused, withheld, or exercised on clearly untenable grounds." Id. ¶ 30. "[A]ll that is required is that the distribution be equitable." Id. The family court's findings will stand on review "unless, taking the evidence in the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable or credible evidence to support them." Creed v. Clogston, 2004 VT 34, ¶ 18, 176 Vt. 436. We review the family court's conclusions of law de novo. Miller v. Miller, 2005 VT 89, ¶ 10, 178 Vt. 273.

Husband asserts that the court erred in its evaluation of the parties' respective roles in and contributions to the marriage—specifically, that the court ignored substantial evidence of husband's contribution as the primary care-giver for seven years of the marriage. This allegation of error is without support. First, the court did acknowledge husband's work as a caregiver, finding that:

[W]hen the older boy reached school age, and the parties were living in a very rural part of the Adirondacks, [the couple] together reached the decision that it would be better for husband to stay home with [the first child], rather than sending him to daycare. Later on, they continued this arrangement, with the husband homeschooling [the first child], rather than sending him to what they together viewed as a poor public school and pay necessary daycare. When [the second child] came along, husband continued to stay at home and care for the boys.

Second, if the court did not emphasize husband's role to a greater extent, that is because, in suggesting that the estate be split equally, wife implicitly acknowledged that the parties made equal contributions to the marriage. Husband's position, by contrast, was premised on the notion that it was equitable to divide the marital assets unequally. For this reason, it is understandable that court would focus more on wife's contribution and, in particular, her monetary contribution during the course of the marriage. There is nothing in the logic or outcome of the decision to suggest that the

court ignored or devalued husband's contribution as the primary care-giver. The cases relied on by husband do not establish that the family court abused or withheld its discretion, or fashioned an inequitable award. See, e.g., Harris v. Harris, 162 Vt. 175, 184 (1994) (reversing family court order that awarded vast majority of marital property to husband largely because he was the original source of the assets); cf. Kasser, 2006 VT 2, ¶ 31 (affirming award of majority of assets to husband where husband brought assets into the marriage.). Along the same lines, contrary to husband's assertion, the family court gave adequate consideration to the source of the marital assets. The court simply disagreed with husband that an unequal distribution of those assets would be equitable in light of other the factors applicable in this case, namely, the couple's joint financial decision-making and the length of the marriage. The award in this case was well within the bounds of the court's discretion to determine what division was equitable.

Husband also argues that the family court made insufficient findings regarding the parties' respective financial needs following the divorce. In particular, husband argues that the trial court failed to explain why it was rejecting the testimony of his economist that wife's needs could be fully met under husband's proposed distribution. Husband points to no authority, however, requiring the family court to award wife only the minimum amount sufficient to meet her needs. Rather, the trial court's decision here was motivated by a desire to equalize the parties' financial opportunities going forward, in light of the manner in which they shared responsibilities and funds during their marriage. In short, husband and wife worked together to create financial opportunities for their family, and it is equitable to equally divide those opportunities now that the marriage is over. As concluded above, husband has not demonstrated that the award achieved an inequitable result.

Finally, husband asserts that the family court erred in valuing his teacher's pension. Specifically, husband argues that the court erred in relying on the testimony of an expert economist who valued the pension as of the date of the hearing rather than the date the parties separated, almost a year earlier. As a result, the value of the pension included income contributions that husband made following the parties' separation. As we held in Hayden v. Hayden, the family court should "consider the entire monetary value of . . . retirement accounts at the time of the final hearing as assets to be distributed between the parties," because, "[u]nder Vermont law, [a]ll property owned by either or both of the parties, however and whenever acquired, shall be subject to the jurisdiction of the court." 2003 VT 97, ¶ 8, 176 Vt. 52 (quotation and citation omitted); see also Golden v. Cooper-Ellis, 2007 VT 15, ¶¶ 11-12. It was not error for the family court to value husband's pension as of the date of the hearing.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice