

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-401

MAY TERM, 2003

Jennifer Swing	}	APPEALED FROM:
	}	
	}	Windham Family Court
	}	
v.	}	
	}	DOCKET No. 339-10-00 WmDm
Kirby Wilton	}	
	}	Trial Judge: David Suntag
	}	
	}	

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

Husband appeals from a final order of divorce. He contends the trial court erroneously: (1) divided the principal asset of the marital estate; (2) declined to award him maintenance; and (3) based the division of the marital estate on improper considerations. We affirm.

Husband and wife were married in May 1984, moved to Vermont in 1995, and separated in February 2001. They have two children, who were fifteen and eleven years old at the time of the divorce proceedings. The parties stipulated to shared legal and physical parental rights and responsibilities. Both parties are in their mid-forties and the court found that both are in good health, except for husband' s alcoholism. Although wife has some college credit, she does not have a college degree and her employment has been largely clerical. At the time of the divorce hearing, she was employed in a health care clinic earning about \$18,000 per year. Husband attended college for a number of years, ultimately obtaining a degree in biology in 1984. The court found that wife supported husband for several years while he was in school. Husband had held a variety of jobs, including a position for four years in California as an air quality inspector earning up to \$37,000 per year. He was currently employed as handyman/carpenter earning about \$21,600 per year.

The parties did not own their own home during the marriage or accumulate any substantial assets, other than wife' s inheritance from her mother' s estate in 1997 which she placed in an investment account. The account had a value of about \$400,000 at the time of the divorce proceedings, which produced interest income of about \$1200 per month. The court found that the parties had split this income since the separation, and that husband had also received additional funds from the investment account for a total of \$40,700.

Noting that wife had been paying all of the expenses for the children, and renting a home from her father, the court found that she could meet her monthly expenses by combining her monthly income from salary with the \$1200 per month income from the investment account. The court found that husband' s current income was adequate to meet his expenses, and that his current lifestyle was equivalent to that maintained during the marriage. The court thus awarded husband \$32,000 from the investment account, in addition to that which he had previously received, and awarded the balance of the account to wife. The court found that this would enable husband to finance a larger residence or seek more lucrative employment, while preserving a sufficient principal to maintain the current interest income for wife. The court declined husband' s request for maintenance in lieu of a substantial portion of the investment account. The final order of divorce issued in July 2002. The court denied a subsequent motion to amend the judgment or order a new trial. This appeal followed.

Husband first contends the court abused its discretion in awarding wife the great majority of the parties' major asset, the investment account. We review the trial court's division of the marital estate with deference. The court enjoys broad discretion in dividing the marital property, and we will uphold its decision absent a showing of abuse or withholding of this discretion. Weaver v. Weaver, 173 Vt. 512, 513 (2001) (mem.). Under 15 V.S.A. § 751(b), the trial court may consider a variety of factors in equitably dividing the property, and the weight accorded each factor lies within the court's discretion. Semprebon v. Semprebon, 157 Vt. 209, 215 (1991). Here, the record discloses that the court carefully reviewed and applied the pertinent statutory factors in fashioning the property division. Principal among these were the court's findings that wife's income was not adequate to meet her reasonable needs without the interest income from the investment account; that husband's income was adequate to meet his needs, and that his education and employment history enabled him to earn substantially more than he was currently earning, and to acquire future capital; that wife had contributed to husband's education and earning capacity, and that although husband had recently spent several years home-schooling one of the parties' children and taking care of the home, on balance his alcoholism and failure to seek other employment had offset his contributions; and that overall the respective merits of the parties favored wife.

Husband takes issue with a number of the court's findings in this regard. He contends the finding that he could reasonably earn more income was refuted by his testimony that when he moved to Vermont he was unable to find jobs similar to the air-quality inspector job he had in California. The court's finding, however, was not that husband had failed to seek identical employment, but that his general educational level and employment skills supported a finding of underemployment, and this finding was supported by the evidence. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (court's findings will be upheld unless clearly erroneous). Husband also contends the court undervalued his contributions to the marital estate through home-schooling, child care, and housework. The record shows that the court recognized these positive contributions, but found that they were not substantial and were more than offset by other factors. We cannot say that the court abused its discretion in according differential weight to these factors. See Semprebon, 157 Vt. at 215. Husband further contends the court overemphasized his problems with alcohol, but again the record evidence supports the court's finding that husband's alcohol problems contributed significantly to the divorce, and the fact that he did not engage in domestic abuse or incur DUI charges is not a substantial mitigating factor which the court was obligated to consider.

Nor, finally, does the award of a much higher percentage of the investment account to wife necessarily imply an abuse of discretion. In Harris v. Harris, 162 Vt. 174, 182-84 (1994), the case on which husband principally relies, we held that the court abused its discretion in awarding a small percentage of the marital estate to the wife where the court had relied largely on the fact that the property had been acquired from the estate of the paternal grandfather, to the exclusion of other relevant factors. Here, the court carefully balanced all of the relevant statutory factors in light of the record evidence. Accordingly, we discern no abuse of discretion.

Husband further contends that the court erred in determining that he had received about \$40,000 from the investment account subsequent to the separation. Although husband disputed wife's claim that certain expenditures and benefits that accrued to husband, including a \$3600 tax refund, originated from investment account funds, the court's finding is supported by other testimony and exhibits, and therefore must be upheld. See Kanaan, 163 Vt. at 405 (court is in unique position to assess credibility of witnesses and weigh evidence, and its findings will be upheld unless clearly erroneous).

Husband next asserts the court abused its discretion in failing to award him maintenance in lieu of a substantial portion of the investment account, in order to equalize their monthly income. The court's finding that husband's income was adequate to meet his current needs, that it was equivalent to the modest lifestyle the parties enjoyed during the marriage, and that husband's earning capacity exceeded wife's amply supported the court's decision. See Johnson v. Johnson, 155 Vt. 36, 40 (1990) (trial court has considerable discretion in ruling on maintenance, and party challenging decision must show that there is no reasonable basis to support it); 15 V.S.A. § 752(a) (court may order maintenance if it finds that spouse lacks sufficient income to provide for reasonable needs, and is unable to support himself or herself at standard of living established during marriage). We discern no abuse of discretion.

Lastly, husband contends the court erred in noting wife's future intent to pay for the children's college education. We have held that the court may not order child support beyond the age of majority absent an agreement between the parties. Knowles v. Thompson, 166 Vt. 414, 422 (1997). The court did not provide for such support here, nor does the reference to the children's future educational needs appear to have been a significant factor in the court's division of the

marital estate. Accordingly, we discern no error.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned