

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-292

FEBRUARY TERM, 2004

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| | } APPEALED FROM: |
| | } |
| Angela Griffin | } Bennington Family Court |
| | } |
| v. | } DOCKET NO. 319-11-01 Bndmd |
| Stephen T. Griffin | } Trial Judge: David A. Howard |
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In the above-entitled cause, the Clerk will enter:

Husband appeals from the family court= s final divorce order. He argues that the court abused its discretion by unfairly distributing the marital property and by awarding excessive spousal maintenance. We affirm.

Husband and wife were married in 1990; they separated in 2001. They have three minor children, ranging in age from five years old to twelve years old. At the time of their divorce, husband was forty years old and wife was thirty-seven. Husband started his own business in 1997, and has earned approximately \$100,000 per year in net income since that date. Husband moved to New York City after the parties separated. Wife currently works part-time, earning \$972.00 per month. Before the parties separated, she had not worked outside the home since 1993. The parties= primary asset is the marital home, valued at \$425,000.

After a hearing, the trial court issued its final order distributing the marital assets. The court awarded husband sole ownership and possession of his business, including any equipment and materials. The court found that husband= s business had a value, although it could not arrive at an exact figure because the business had minimal assets and was A almost entirely dependent@ on husband= s individual skills. The court stated that it would consider its award to husband of his business in making its property distribution. The court assigned wife two-thirds of the net proceeds from the sale of the marital home, while husband received one-third. The court found this division equitable, particularly considering wife= s contribution to the growth of husband= s business by taking care of family matters while husband traveled for employment.

The court also awarded wife rehabilitative maintenance to allow her to reestablish her employment ability, and in consideration of her role as the homemaker and primary care provider during the marriage. The court found that the parties had enjoyed a very comfortable upper middle income lifestyle during the marriage, but would have to modify their lifestyle as a result of the divorce. The court found husband= s present income and income ability was \$110,000 per year, compared to wife= s monthly income of \$972. The court ordered husband to pay wife \$3000 per month for sixty months, and \$2000 for another sixty months, finding this amount reasonable considering the length of the marriage and the respective needs and abilities of the parties. Husband appealed.

Husband first argues that the court erred in awarding the greater share of equity in the marital residence (a known value) to wife to offset the award of the business (an unknown value) to husband. While husband acknowledges the court= s broad discretion in distributing marital assets, he argues that the court nonetheless erred by speculating as to the value of his business in the absence of any proof.

The trial court is authorized to equitably divide and assign marital property, and it may consider various statutory factors

in making its decision. Cabot v. Cabot, 166 Vt. 485, 500 (1997); 15 V.S.A. ' 751. The court has broad discretion in considering these factors and we will uphold its decision unless its discretion was abused, withheld, or exercised on clearly untenable grounds. Semprebon v. Semprebon, 157 Vt. 209, 215 (1991). 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).

We find the court's distribution of the marital assets equitable here. In dividing the marital estate, the court considered the factors set out in 15 V.S.A. ' 751. Contrary to husband's characterization, the trial court did not award wife a larger share of the marital estate to offset its award to husband of his ongoing business. Instead, as the trial court explained, it based its distribution on the values found in the factual findings. The court's findings indicate its recognition of wife's contribution to the marriage as a homemaker and the primary care giver for the parties' children, particularly considering husband's frequent traveling during the marriage. The court found that wife had contributed to the growth of husband's business. The court explained that husband's employment history provided him with the opportunity to be highly employable in the future, while wife had limited employment skills and lacked the ability to greatly increase her acquisition of capital assets in the near future. The court also recognized that the sale of the marital home would require mother and children to find a new place to live. While the court stated that it would consider husband's receipt of his ongoing business in distributing the marital assets, the court recognized that it could not ascertain the exact value of this asset. It did not speculate as to the asset's value in the absence of proof. Instead, it awarded the business to husband free and clear of wife's interest, recognizing that wife had played a role in the growth of the business as well.

Husband relies on dicta in Klein v. Klein, 150 Vt. 466 (1988), to support his assertion that the trial court erred by using an asset of unknown value to offset one of known value. In Klein, we rejected the argument that the trial court had abused its discretion in distributing marital property when it failed to ascertain the value of husband's law practice. We explained that neither party had offered any evidence as to the asset's value and wife's counsel had essentially waived the claim that the value must be considered in the property division during oral argument. Id. at 471. We went on to state that,

[g]iven the absence of proof, the trial court made the only determination that it could B that the law practice was property of undetermined value to be distributed to husband and to be considered for its income. This means that the income from the practice could be fully considered in assessing the appropriateness of an award of maintenance to [wife], but not considered in the property disposition.

Id.

We are not persuaded that Klein supports husband's argument that the trial court abused its discretion. Here, the court did not justify its award to wife on husband's receipt of his business, nor did the court assign a value to the business in the absence of proof. The record reflects that the court based its property distribution the factors set forth in 15 V.S.A. ' 751, and awarded wife a larger share of the marital estate based on its analysis of these factors. Among the statutory factors that the court may consider in distributing the parties' assets are the occupation, source and amount of income of each party; each party's vocational skills and employability; the contribution by one spouse to the earning power of the other; and the opportunity of each for future acquisition of capital assets and income. 15 V.S.A. ' 751(b)(3)-(5); (8). In light of these factors, the court did not abuse its discretion by considering that husband would receive his ongoing business free and clear of any interest of wife in distributing the parties' assets. As discussed above, the court's findings reflect its analysis of the factors set forth in 15 V.S.A. ' 751, and its findings are supported by the record. We find no abuse of discretion in its distribution of the marital assets.

Husband next argues that the court awarded excessive maintenance when considered in conjunction with the property distribution. He argues that the court did not consider that, by moving to New York and incurring greater living expenses, he was trying to improve his economic circumstances. He asserts that the court abused its discretion by awarding wife fifty percent of his adjusted gross income, in addition to sixty-seven percent of the proceeds from the only quantifiable marital asset. According to husband, the court failed to fashion a maintenance award based on the actual standard of living established by the parties.

The court may award maintenance, either rehabilitative or permanent, to a spouse when it finds that the spouse lacks sufficient income and/or property to provide for his or her reasonable needs and the spouse is unable to support himself or herself through appropriate employment at the standard of living established during the marriage. 15 V.S.A. ' 752(a); Chaker v. Chaker, 155 Vt. 20, 24-25 (1990). The maintenance must be in the amount and for the duration the court deems just, based on the consideration of seven nonexclusive factors. See 15 V.S.A. ' 752(b). Once the trial court finds grounds for awarding maintenance, it has broad discretion in determining the duration and amount. Chaker, 155 Vt. at 25. A maintenance award will be set aside only if there is no reasonable basis to support it. Id.

The court's maintenance award is supported by the evidence. In making its award, the court considered the statutory criteria set forth in 15 V.S.A. ' 752. The court found that the parties had been married for thirteen years and had enjoyed a comfortable lifestyle. The court recognized that husband could not pay wife an amount that would afford her the same lifestyle that the parties had enjoyed during the marriage without impoverishing him. The court found that wife lacked the employment skills and economic opportunities that husband possessed. The court acknowledged that husband's living expenses had increased, but stated that husband had chosen to move to New York City and incur its more expensive costs. The court indicated that it would consider husband's expenses, but if he needed to adjust his finances to allow wife a reasonable maintenance amount considering her expenses, he would need to do so. The court found the amount and payment it set out reasonable considering the length of the marriage and the respective needs and abilities of the parties. We agree. The court's award is supported by its findings, and husband has not established that the trial court abused its discretion in awarding maintenance.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice