

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-067

NOVEMBER TERM, 2006

Joan Reilly

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APPEALED FROM:

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v.

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Bennington Family Court

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Patrick Reilly

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DOCKET NO. 82-4-05 Bndm

Trial Judge:

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

Wife appeals the family court=s division of property between husband and wife, primarily with regard to the marital home. We affirm.

The evidence established that the parties had lived in the marital home together for the twelve years of their marriage and generally shared household expenses during that time. The home, which had been in wife=s family for several generations, was valued at approximately \$140,000 and had never had a mortgage on it.

Husband invested money and labor into improving the home and surrounding property in the time that he lived there. When the parties separated, wife remained in the marital home, while husband established a new household. In addition to the home, the primary marital assets included certain items of furniture and the parties' retirement accounts, valued at \$32,389.56 and \$7,795.01<sup>[1]</sup> for wife and husband, respectively.

In deciding on the division of marital property, the court considered that the marital home had been in wife's family for many years, but also noted that the ability to live in a home without a mortgage payment was a substantial financial benefit to the parties during their marriage, and that husband lost this benefit following the parties' separation when he was required to incur the cost of establishing a new household. The family court also examined the contributions husband had made to the marital home through the investment of money and labor. Applying the statutory factors listed in 15 V.S.A. ' 751(b) to this evidence, the court awarded the marital home and the majority of the furniture within it to wife. The court awarded husband \$12,000 of wife's 401(k) account, thereby equalizing the parties' retirement holdings, and awarded husband \$13,000 in cash to compensate him for contributions to the value of the marital home. The court acknowledged that wife likely would provide both aspects of this award by transferring a portion of her retirement savings to husband's retirement account. Accordingly, the family court required that wife include an additional offset to compensate husband for the withdrawal penalty he would incur when liquidating the \$13,000 he was entitled to as an immediate cash payment.

On appeal, wife raises a number of challenges to the family court's order. The family court has broad discretion in dividing marital property, so long as the division is equitable. Mills v. Mills, 167 Vt. 567, 568 (1997) (mem.) (citing 15 V.S.A. ' 751(a)).

First, wife questions the propriety of and rationale behind the \$13,000 cash award to husband. This award is supported by the court's finding that, while the home had been in wife's family for several generations, husband added to the value of the house through his labor and the investment of \$10,000 of an inheritance into improvements on the property. The award of \$13,000 in cash to compensate husband for his

interest in the home, where the parties resided together for twelve years, is neither inequitable nor an abuse of discretion.

Wife argues that the award is invalid because it purports to convey to husband property owned by a third party, that is, wife=s mother. (While the home was jointly titled to wife and her mother during the parties= marriage, after filing for divorce, wife transferred her interest to her mother, such that the home was exclusively in the mother=s name.) First, the family court=s order does not convey property to husband; rather, it orders a cash award to compensate husband for his interest in the marital property. Second, wife only transferred her interest in the home to her mother after the family court issued an interim order prohibiting all unilateral conveyances of any marital asset. Wife claimed not to understand the import of the interim order, but the family court found this denial lacking in credibility. The award to husband does not inequitably impede on the property rights of a third party.

Wife also seeks an explanation of the ten-percent Apenalty@ added to defendant=s cash award amount. The family court explained that, if wife transferred the entire settlement account from her 401(k) to husband=s 401(k) account, husband would incur a ten-percent penalty (i.e., \$1,300) on the \$13,000 he was entitled to as a cash award when he removed it from his account. Therefore, if wife chose that method of settling with husband she would be required to transfer a total of \$26,300 to husband. The court excluded the tax consequences of withdrawing money from husband=s retirement account, determining that they were too speculative. The inclusion of an equalizing ten-percent factor in the award to husband was supported and equitable.

Wife asks that we clarify a number of aspects of the divorce settlement, including the award of a number of paintings of the Titanic and a bedroom set to husband, ownership of the children=s savings accounts, certain burial lots, and the parties= separate bank accounts. The family court=s order did not award the Titanic paintings to the husband; rather, it concluded that the paintings were neither marital property nor the property of either party individually. The testimony established that they were on loan from husband=s aunt and had been returned to her. The testimony regarding ownership of the bedroom set was mixed; husband asserted that he

had purchased it from a family member and that it had little economic value, but high sentimental value. As the rest of the marital home where wife lived remained fully furnished, there was no error in making this award to husband. As indicated in the final order, the children=s savings accounts remain the property of the children. The family court did not address either the burial lots or the separate bank accounts in its order. Husband=s trial testimony was that he did not object to wife retaining ownership of both burial lots. Because the issue was not contested, it was properly excluded from the family court=s order. While wife does not specify the separate bank accounts to which she refers, there was conflicting testimony as to whether additional accounts existed. We may assume from the family court=s silence on the issue that it was not satisfied that any additional accounts existed to be divided, and this conclusion is supported by the evidence.

Finally, wife asserts that the family court erred in not granting her a continuance to better prepare her case. AA decision to grant or deny a continuance is a discretionary matter and will not be disturbed unless there is shown an abuse of discretion which causes prejudice.@ Finkle v. Town of Rochester, 140 Vt. 287, 289 (1981). Without any showing of how denial of the continuance prejudiced presentation of her case, we can find no error.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

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[\[1\]](#) Wife notes that \$7,795.01 represents the amount available to husband for a hardship withdrawal, and that his total balance in his 401(k) account was \$8,075.22. This comports with husband=s testimony at the final hearing. Even so, this discrepancy does not affect the equity of the property division.