

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-534

DECEMBER TERM, 2007

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|-----------------|---|---------------------------|
| Janet Jennings | } | APPEALED FROM: |
| | } | |
| v. | } | Chittenden Family Court |
| | } | |
| Robert Jennings | } | DOCKET NO. 766-10-05 Cndm |

Trial Judge: Thomas J. Devine

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

Wife appeals from a final divorce judgment of the Chittenden Family Court, asserting that the court abused its discretion in failing to award her either spousal maintenance or property in lieu of maintenance. We affirm.

The undisputed material facts may be briefly summarized. The parties separated in September 2005 after a 46-year marriage. Husband was 70 years old at the time of the final hearing and wife was 66. They have one adult child.

The early years of the marriage were difficult. The parties had left school early and married young. Husband worked at various odd jobs, was periodically out of work, drank heavily, and abused his wife. Wife worked principally as a homemaker. Beginning in 1968, however, husband changed. He stopped drinking and abusing his wife, found steady construction employment, and eventually started his own construction business. The parties acquired a modest home in Colchester, which the court valued at \$182,000 free of any encumbrances. They lived a very modest lifestyle, taking few vacations and saving almost nothing for retirement. Husband forged a strong bond with his son. Wife was not close to the child, however, and her relationship with their son deteriorated to the point of almost total estrangement. The court also found that, during the latter years of the marriage, wife became emotionally abusive toward husband.

In 2000, husband closed his business and transferred most of the assets to his son for use in his own construction business. Despite failing health and a series of operations, husband continued to work part-time on certain jobs with his son. During the last year of the marriage in 2005, the son reportedly paid father \$1000 per week, later reduced to \$500 per week. At the time of the final hearing, however, the court found that these payments were “no longer

happening,” although the court surmised that husband might continue to receive some assistance from his son for living expenses.

Since the separation, husband had moved into a small apartment for which he pays rent of \$650 per month. Husband receives social security benefits of \$927 per month. Wife’s income is limited to social security of about \$340 per month. Neither income is sufficient to meet the parties’ respective monthly expenses. Indeed, the court noted that, since the separation, both parties had been relying heavily on credit cards to meet their basic living expenses, resulting in a total debt of about \$30,000. Husband’s deteriorating physical condition and operations have left him with a limited ability to continue to work construction. Wife had survived a bout of cancer but remained physically active and able to obtain some form of employment, although she had not sought work.

The court concluded that wife qualified for an award of spousal maintenance under 15 V.S.A. § 752(a), in that she lacks sufficient income or property to provide for her reasonable needs and cannot support herself through appropriate employment at the standard of living established during the marriage. The court declined to award maintenance, however, noting that husband’s monthly income of \$927, while larger than wife’s, was insufficient to meet his basic monthly budget of \$1272, and that given his age and poor health he lacked the ability to pay. The court determined, instead, to establish a property settlement in lieu of maintenance, finding that the parties’ sole asset was the equity in the marital home which amounted to \$150,000, after allowing for discharge of wife’s \$18,000 credit card debt, husband’s \$14,600 credit card debt, and accrued real estate taxes. Sale of the homestead was the only means to provide wife with additional income to meet her basic needs and to pay off the parties’ significant debts. In dividing this asset, the court carefully reviewed each of the statutory factors under 15 V.S.A. § 751(b), noting, inter alia, the extraordinary length of the marriage, the relatively poor health of both parties and their limited ability to earn significant future income, the relatively equal efforts of the parties to acquire the home and their respective contributions—monetary and non-monetary—to the marriage, and the parties’ respective fault and merits during the marriage, including husband’s early history of domestic abuse and wife’s later emotional abuse. Balancing these factors, the court concluded that wife would receive a 58% share and husband a 42% share of the proceeds of the sale, resulting in about \$87,000 to wife and \$63,000 to husband. This appeal followed.

Wife contends the court abused its discretion in declining to award any amount of spousal maintenance in light of its finding that she qualified under the criteria of § 752(a) as lacking sufficient income to provide for her needs or the ability to support herself at the standard established during the marriage. The family court enjoys considerable discretion in ruling on maintenance and this Court’s review is limited to determining whether there was any reasonable basis for the court’s decision. Golden v. Cooper-Ellis, 2007 VT 15, ¶ 47, 924 A.2d 19. Where the circumstances warrant, the court also has the discretion to make an award of property in lieu of maintenance. Cabot v. Cabot, 166 Vt. 485, 500-501 (1997). Contrary to wife’s assertion, the court here was not required to ignore husband’s limited financial resources, which were inadequate to meet his own modest needs, in order to provide assistance to wife. Rather, the court acted reasonably under the circumstances in determining to make an award of property in lieu of maintenance by liquidating the parties’ sole substantial asset, the equity in the marital home, and awarding wife the larger share. As the court here cogently observed, “this is not a

case involving vast inequality of income. This is a case involving two older people with one major asset and very limited incomes and very limited future opportunities to acquire assets.”

Although wife also asserts that the court “ignored” evidence that husband had received regular payments from his son, the court, in fact, found that husband was no longer receiving such payments, and that any future assistance was “speculat[ive]” and would “continue to wane.” Wife has not challenged these findings. Accordingly, we find no abuse of discretion.

Wife also contends the court erred when it “failed” to award property in lieu of maintenance, but the claim is plainly at odds with the court’s order and really amounts to an argument that the court erred in rejecting her request for 100% of the equity in the home through a “reverse mortgage” arrangement that would have allowed her to stay in the home and spend down the equity by conveying a portion of it each month to a bank or other lender. The court expressly considered and rejected such an arrangement, finding that the length of the marriage and husband’s substantial contributions entitled him to at least portion of the assets, albeit a smaller one. Although wife relies on the court’s finding that husband was significantly at fault for his physical abuse of wife during the early years of the marriage, the court also found that this was partially offset by husband’s sobriety and restraint during the last decades of the marriage, and by wife’s increasing emotional abuse. Fault is only one among many factors which the court may consider in dividing the marital property, and we will not disturb its decision absent a showing of abuse or withholding of discretion. Weaver v. Weaver, 173 Vt. 512, 513 (2001) (mem.). Wife has not made such a showing, and we therefore decline to disturb the judgment.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice