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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-064

OCTOBER TERM, 2007

Ellen Flaherty	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Family Court
	}	
	}	
Anthony Flaherty	}	DOCKET NO. 243-9-04 Wmdm
		Trial Judge: Karen R. Carroll

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

Wife appeals the family court's final divorce order, arguing that the court abused its discretion by awarding her an insufficient amount of maintenance. We reverse and remand.

The parties were married in 1989 and separated in 2004. At the time of their marriage, they were living out of state, and husband had a five-year-old daughter from a previous marriage who was living with her mother. Defendant obtained sole custody of his then eight-year-old daughter in 1991. When the child moved in with the parties, she had significant mental health issues that needed to be addressed. The parties agreed that husband would continue working and wife would stay at home, acting the child's primary caregiver. In 1996, the parties moved to Vermont so that husband, who had been employed as a trainer in radiation protection at nuclear power plants, could work full-time at the Vermont Yankee Nuclear Power Plant. During this period, wife worked part-time while their daughter, whom wife adopted in 1998, was in school.

In recent years, both parties have had serious health issues. Husband had a major heart attack just before the parties married. Following a heart-related episode in 1997, he underwent triple bypass surgery and had both a pacemaker and defibrillator installed. In 2002, husband had another heart-related episode. In 1997, wife was diagnosed with fibromyalgia, an inflammation of the lining of the muscles and organs causing regular pain that is controlled through prescription medication. Since 1998, wife has been taking ever-increasing doses of a variety of pain-reduction medications, including narcotics with addictive side effects.

At the time of the divorce hearing, the parties had been married seventeen years. Husband was fifty-eight years old and wife was seven years younger. The marital residence, which had approximately $160,000 in equity at the time of the divorce, was the parties' principal asset. Their total assets were approximately $210,000, but they also had $140,000 in debts,

including an outstanding $90,000 mortgage. Following the hearing, the family court ordered the parties to sell the marital home and equally divide the equity in the home. The court allowed wife to keep what was left of the inheritance she received after her mother died in 2005—about $30,000. The court also awarded wife rehabilitative maintenance in the amount of $1200 per month until the marital house sold, $1000 per month after the sale of the house until husband retired, and $800 per month thereafter until husband turned seventy years old.

On appeal, wife argues that the family court abused its discretion by awarding her insufficient maintenance. Specifically, she contends that the court (1) made clearly erroneous findings and provided its own medical diagnosis to support its conclusion that she was capable of working part-time; and (2) abused its discretion by awarding her maintenance equaling only about thirteen percent of husband's annual income and by terminating the award upon husband reaching seventy years of age. Regarding the first argument, we disagree that any of the court's material findings were clearly erroneous or that the evidence presented at the hearing was insufficient to support the family court's conclusion that wife could work on at least a part-time basis. As for the court's finding that wife's expert "feels that her symptoms are not somatic," the expert hedged on the question of whether the pain wife experienced was symptomatic of a discernable underlying physical injury, stating that nobody could be sure of that. Both the expert and the court, however, acknowledged that wife actually felt pain, with the question being how much of the pain was derived from stress and other mental factors. Wife's expert also expressed uncertainty when asked whether wife had followed through on his advice that she exercise. The evidence suggested that wife was leading a sedentary lifestyle. There was also evidence to support the family court's finding that wife believed that her illness and drug use restricted her ability to function with respect to everyday life. Most importantly, given all of the evidence concerning wife's illness and activities, the court did not abuse its discretion in rejecting the opinion of wife's expert that she was incapable of maintaining employment. The court was not compelled to accept the opinion of wife's expert, see Goode v. State, 150 Vt. 651, 652 (1988) (mem.) ("While the trial court is required to consider and weigh expert testimony, it is not required to accept it even if the expert testimony is undisputed."), and nothing else in the record demonstrates that wife is incapable of working on at least a part-time basis, as the court concluded.

Notwithstanding our determination that the family court acted within its discretion in concluding that wife is capable of working on at least a part-time basis, we agree with wife that the record does not support the court's determination as to the amount and duration of the maintenance award. The relevant statute authorizes an award of rehabilitative and/or permanent maintenance when the recipient spouse lacks sufficient income or property to support herself at the standard of living established during the marriage. 15 V.S.A. § 752(a). We have held that "spousal maintenance is intended to correct the vast inequality of income resulting from the divorce, . . . and to equalize the standard of living of the parties for an appropriate period of time." Strauss v. Strauss, 160 Vt. 335, 338 (1993) (citation omitted). "In a long-term marriage, maintenance also serves to compensate a homemaker for contributions to family well-being not otherwise recognized in the property distribution." Id. at 338-39. The purpose of a time-limited rehabilitative maintenance award is to help the recipient spouse become self-supporting, id. at 339, but rehabilitative maintenance alone is not sufficient "unless the court can find, based on the evidence, that [the recipient spouse] will be able to support herself at the standard of living established during the marriage." Klein v. Klein, 150 Vt. 466, 476 (1988). The "most critical

factors" in determining whether permanent maintenance is required are "the length of the marriage, the role the wife played during the marriage, and the income the wife is likely to achieve in relation to the standard of living set in the marriage." Strauss, 160 Vt. at 340. We give considerable discretion to the family court to determine the amount and duration of a maintenance award. Klein, 150 Vt. at 472.

In this case, the family court examined the relevant factors contained in 15 V.S.A. § 751(b) and found, among other things, that (1) the parties had been married seventeen years, see Delozier v. Delozier, 161 Vt. 377, 383, 386 (1994) (noting that permanent maintenance is increasingly being awarded in marriages lasting fifteen years or more); (2) both parties had significant health problems; (3) wife was currently unemployed but could work at least part-time; (4) husband was making almost $100,000 per year; (5) wife had made substantial contributions to husband's education and career by staying home as the primary caregiver of her adopted daughter, who had significant mental and emotional problems; and (6) husband will accrue income and a pension through his employment while wife may not. Based on these and other facts, the court awarded wife between $1200 and $800 per month in maintenance over a twelve-year period until husband turns seventy. In response to mother's motion challenging the amount and duration of the maintenance award, the court stated that it was authorized to award permanent or temporary maintenance, and that it believed its award to be reasonable in light of wife's assets, her likelihood of future employment, and the disparity in the parties' ages.

Based on the record and the family court's own findings, we conclude that wife was entitled to at least some permanent maintenance as a matter of law. We also conclude that the court's findings are insufficient to support the amount of maintenance awarded. Although the court recognized that wife made significant long-term contributions to the marriage by staying at home with the parties' daughter while husband enhanced his future earning power, it is unclear how that contribution was reflected in the maintenance award. The court indicated that it was not awarding property in lieu of maintenance, and yet the court also stated that wife could use her share of the marital property to help her maintain the standard of living established during the marriage. Neither the factual nor legal basis of this reasoning withstands scrutiny. The bulk of wife's property award was her share of the equity in the marital home—about $80,000—and the remainder of an inheritance she received from her mother after the parties had already separated—about $30,000. Considering the length of the marriage and the fact that wife would need to use the award to pay for a place to live, the amount of the award was not substantial. Further, our maintenance statute was not intended to require the recipient spouse to use a property award in lieu of maintenance "unless it clearly appears that the property was above and beyond that awarded as an equitable distribution of the assets of the parties." Klein, 150 Vt. at 475. That is not the case here.

The court did not find how much wife should be expected to earn from part-time employment. Moreover, nothing in the record suggests that wife will be able to obtain an income that would allow her to maintain even the modest standard of living established during the marriage. Although the family court did not make specific findings concerning the parties' reasonable expenses or estimating father's income upon reaching retirement or seventy years of age, the evidence indicates that the court's maintenance award would neither overcome the vast inequality in the parties' financial circumstances and prospects nor compensate wife for her considerable nonmonetary contributions to the parties' well-being during the marriage.

Accordingly, the matter must be remanded for the court to reconsider its maintenance award based on the evidence and relevant factors, and to establish a new award based on those factors and specific findings comparing the parties' relative financial circumstances.

Wife independently objects to the maintenance award insofar as all maintenance terminates when husband reaches seventy years of age. Apparently, the family court viewed the maintenance award as purely rehabilitative, and the termination date was intended to mark the end of the rehabilitation period. We have analyzed that justification for the maintenance award above.

We recognize, however, that husband is unlikely to be working after reaching seventy years of age and that his income will be reduced accordingly, limited to a pension. To the extent that the reduced income is also justification for termination or reduction of maintenance, the record here was not adequate to determine the impact of husband's retirement on his ability to pay maintenance, because father failed to provide evidence of his pension. If the court requires additional evidence to ascertain husband's approximate income following retirement or to make other relevant findings, it may hold another evidentiary hearing. Our remand for the family court to reconsider its maintenance award compels us to reopen the property award as well. See Jenike v. Jenike, 2004 VT 83, ¶ 18, 177 Vt. 502 (mem.).

Reversed and remanded.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice