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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-093

OCTOBER TERM, 2007

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| Catherine Miele | } | APPEALED FROM: |
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| v. | } | Windsor Family Court |
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| Floyd Miele, Jr. | } | DOCKET NO. 285-8-05 Wrdm |
| | | Trial Judge: Harold E. Eaton, Jr. |

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

Husband appeals from the family court's final divorce order. He argues that the court erred in distributing the parties' assets, awarding wife property in lieu of maintenance, and finding that his earning capacity was twice that of wife. We affirm.

Husband and wife separated in March 2005 after a twenty-one year marriage. They have two adult children. Husband is forty-four and wife is forty-two. Both are in good health, although husband has some back problems. Wife currently works as a supervisor at a bank earning $37,296 per year. Husband operates a construction business, Miele Builders, Inc. (MBI), which has been in existence since 1996 or 1997. MBI is an "S" corporation and husband is its sole shareholder. MBI's gross receipts over the past five years ranged from $180,000 to $344,000.

At the hearing, the parties provided no evidence as to the value of MBI other than husband's estimate of approximately $25,000 in a December 2005 financial affidavit. Husband failed to provide a schedule of tools or equipment owned by the business, and the court found the $25,000 value unreliable because it did not account for the receivables to MBI in the form of shareholder loans. The court explained that as the sole owner of MBI, husband was able to expense certain items, such as vehicles and equipment, to MBI. MBI has also paid for the mortgage on the marital home. In 2006, MBI paid for many of husband's personal expenses, and MBI allocated these payments at year's end to either business expenses or shareholder loans. Husband's use of the business to pay for personal expenses had the effect of increasing shareholder loans and decreasing his reportable income. Thus, while his income decreased after 2002, shareholder loans increased from approximately $14,000 to $87,000 between 2002 and 2005.

The court found that husband presented unreliable financial information, particularly concerning MBI. He filed three financial affidavits during the pendency of divorce proceedings that were inconsistent and reflected great variations in his reported income, assets, and expenses. The court found that these variances could be explained, in some measure, by husband's confusing but persistent practice of freely using corporate monies and accounts for personal use.

In light of the evidence presented at the hearing, the court was unable to determine any precise calculation of the marital estate. The most significant known asset was the equity in the marital home, valued at $210,427. The most significant unknown asset was the value of husband's business. The court explained that valuation of the business was made difficult by the absence of any expert evidence on valuation, or agreement of the parties as to value, and husband's penchant for using MBI funds for personal expenses. The court found that the most that could be determined with certainty was that each party had about $12,500 in personal property, each had a modest amount of cash available in bank accounts, and that both parties were gainfully employed. The two most significant factors distinguishing the parties' immediate circumstances were that (1) wife had retirement accounts totaling about $57,100, while husband had none; and (2) wife had about $16,115 in debts, while husband had about $113,493 in debts (which included a debt to the IRS for back taxes, debts for the children's student loans, and debts for various business and personal credit accounts).

In evaluating the parties' circumstances, the court found that husband's earning capacity was roughly twice that of wife, and that husband would have a greater earning capacity in the foreseeable future. The court recognized that husband had some problems with his back, but found that he had recovered reasonably well and that his back problems would not have any significant effect on his long-term earning capacity. Husband had demonstrated his ability to operate a successful construction business, showing gross annual receipts for the last five years ranging from $180,000 to $344,000. While the court found it difficult to precisely estimate husband's earning capacity, in several prior years his personal earnings had exceeded $75,000. His personal income was $87,893 for 2003, $78,470 for 2004, and negative $28,496 for 2005. In evaluating husband's earning capacity, the court gave greater weight to the 2003 and 2004 figures because husband's accounting for his business showed some peculiar trends—which he had not explained—for periods after wife filed for divorce. Wife, on the other hand, was earning $37,296 per year. She was at the top pay grade for her position, and this was the highest salary she had ever earned.

The court found that wife was entitled to receive spousal support given husband's greater earning capacity, the long-term nature of the marriage, and wife's contributions as a homemaker. In this case, however, the court concluded that the best way to help both parties meet their present and future needs was to award wife the marital home as a substitute for spousal maintenance, and award husband his business. While MBI's value was unknown, the court found that husband's ownership and control of the business should enable him to earn sufficient income. The court also noted that husband had failed to make payments to wife under the temporary divorce order for fuel, taxes, and mortgage and electric bills, and that the net effect of husband's actions was to lessen any disparity involved in awarding the marital home to wife. The court also awarded wife her retirement accounts, but ordered her to pay husband $24,000 from one of these accounts. Each party retained his or her loan obligations, and husband's obligations included any debts owed by MBI and any debt owed to the IRS. Each party retained his or her own bank accounts, and various items of personal property in their possession. Husband appealed from the court's order.

Husband argues that the court abused its discretion as a matter of law in awarding more than 100% of the net marital estate to wife and leaving him with a substantial negative award.

He also asserts that the court erred in awarding wife all of the equity in the marital home "in lieu of maintenance" without making any findings concerning the amount or duration of maintenance to which wife might otherwise have been entitled. Finally, husband argues that the court's finding that his earning capacity is twice that of wife's is clearly erroneous.

The family court has broad discretion in dividing the marital property, and we will uphold its decision unless its discretion was abused, withheld, or exercised on clearly untenable grounds. Chilkott v. Chilkott, 158 Vt. 193, 198 (1992). 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). As we have repeatedly stated, 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). The court's decision was equitable here.

First, husband's arguments rest on a mischaracterization of the family court's decision. As set forth above, the court was unable to determine the precise value of the marital estate given the evidence presented at the hearing. Husband presented conflicting and unreliable financial information, and he failed to provide a reliable value for MBI, a significant asset in the marital estate. Faced with a lack of reliable evidence and a marital estate composed of two primary assets—one of known value and one of unknown but significant value—the court acted well within its discretion in awarding wife the marital home, partly as property in lieu of maintenance, and awarding husband his business, including its debts, which would allow husband to continue earning sufficient income to meet his needs. The court acknowledged that wife was likely receiving a greater share of the marital estate, but found any disparity justified not only by the post-separation debts incurred by wife due to husband's failure to pay bills as ordered, but also by the fact that wife would otherwise be entitled to maintenance. Contrary to husband's assertion, the court's findings amply demonstrate the basis for its decision. See Cabot v. Cabot, 166 Vt. 485, 500 (1997) (while family court has discretion in dividing marital property, it must "provide a clear statement as to what was decided and why").

As husband recognizes, the court plainly has authority to award property in lieu of maintenance in making its property settlement. See 15 V.S.A. § 751(b)(7); see also Cabot, 166 Vt. at 500-01 (1997) (family court has discretion to make an award of property in lieu of maintenance). Section 751 does not require the court to make findings as to the amount of maintenance that would have been awarded but for the property distribution, and we reject husband's contention that the court erred by failing to make such findings. We similarly reject husband's assertion that the family court made its maintenance and property decisions in the wrong order. In Jenike v. Jenike, cited by husband, we stated that the statutory provision governing maintenance "contemplates that the family court will devise an equitable property settlement, taking into account the factors under § 751 . . . before it considers whether the financial circumstances of the parties justify an award of maintenance." 2004 VT 83, ¶ 10, 177 Vt. 502. That is exactly what occurred here. The court determined that wife was entitled to property in lieu of maintenance—one of the factors to be considered in devising an equitable property settlement—and it consequently denied her request for maintenance. The fact that the court recognized that wife would be entitled to maintenance but for its unequal property distribution does not mean that the court reached its decision "in the wrong order" as husband asserts.

Finally, we reject husband's assertion that the court erred in finding that his earning capacity was twice that of wife. See Semprebon v. Semprebon, 157 Vt. 209, 214 (1991) (On review, we will uphold family court's findings of fact unless, taking the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, there is no credible evidence in the record to support them). Husband's assertions largely go to the weight of the evidence, a matter exclusively within the province of the family court. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (trial court's findings entitled to wide deference on review because it is in unique position to assess the credibility of witnesses and weigh the evidence presented). As stated above, the court found husband's future earning capacity difficult to ascertain given the unreliable financial information that he presented and his consistent use of MBI funds and business accounts for personal expenses. The court acted well within its discretion in basing its decision on the evidence that it found most reliable—husband's annual income in the years prior to the initiation of divorce proceedings. Moreover, contrary to husband's assertion, the court did not find that husband's back injuries would have "no impact" on his future ability to work. The family court rejected the arguments that husband reiterates in this appeal concerning his physical problems and the vicissitudes of the building industry as compared to wife's steady job and income. As the court explained, husband's position overlooked the track record of MBI, which had been successful despite increasing loans to its sole shareholder, and the fact that even after his back injury, husband had years where he made approximately three times as much as wife. The court recognized that husband's back problems could require an adjustment in his business approach, but it was unpersuaded that his injuries would have any significant effect on husband's long-term earning capacity. The court did not err in reaching this conclusion. We have considered all of husband's arguments, and find them without merit.

Affirmed.

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