

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-422

MAY TERM, 2008

Thomas Davis	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Family Court
	}	
	}	
Debra Davis	}	DOCKET NO. F34-2-07 Wmdm

Trial Judge: John P. Wesley

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

Wife appeals from the family court's final divorce order. On appeal, she argues that the court abused its discretion in: (1) distributing the parties' assets because the court did not consider the value of the marital home held by husband's parents in a revocable trust; (2) denying wife's request for spousal maintenance, and (3) denying wife's request for attorney's fees. We affirm the court's property division and remand for further findings on wife's requests for maintenance and attorney's fees.

The record reveals the following facts. The parties were married in 1984 and separated in November 2006, after husband had an extramarital affair. The parties had two children during the marriage, both of whom had reached majority by the time of the final hearing. During their entire marriage, the parties lived in a home owned by husband's parents. In 1991, husband's father transferred ownership of the property to a revocable trust of which husband is the beneficiary. The parties agree that they paid rent to husband's parents during the first several years of their marriage and again from 2002 to 2004, but do not agree on whether they had an obligation to pay rent at other times. After husband filed for divorce in February 2007, his father sent a demand letter for debt owed to him by the parties, including past due rent over \$15,000. Husband continued to reside in the home after the parties separated and, since March 2007, husband has paid rent of \$500 each month. Both parties work full-time and earn an hourly wage. In addition, both parties have the opportunity to work overtime and receive bonuses from their employers. While the parties do not agree on their total expected earnings, because the amount of their future overtime and bonuses is unknown, the court found that their earning capacities were substantially equal. Both parties have retirement accounts, each of which the court found was valued at approximately \$35,000. In addition to the retirement accounts, the parties' other major asset is a life insurance policy, purchased by husband's parents, that has a cash value of \$10,462.73.

The court held a final hearing at which both parties testified. Wife requested a substantial portion of husband's retirement fund to compensate her for the value of husband's expectancy interest in the marital home. She also requested maintenance and attorney's fees, claiming that she did not have sufficient income to meet her reasonable needs. Husband requested an equal division of assets and liabilities, including the debt for past-due rent owned to his parents. He argued that his interest in the marital home was too uncertain to be divided as a marital asset.

On the day of the final hearing the court issued an order granting the parties a divorce. As to property division, the court granted each party their own retirement account and the vehicle in their possession. In addition, the court granted wife the life insurance policy, explaining that it was warranted given "the relative merits of the parties, as well as the advantage enjoyed by [husband] represented by the smaller housing costs relative to the quality of shelter associated with his expected continued use and occupancy of the former marital residence, held by his parents' trust." The court also assigned to husband any debt owed to husband's parents. The court did not directly address the issue of the home, but found that husband's expectation of inheritance was "as yet inchoate." The court declined to award spousal maintenance, explaining that the parties' respective earning capacities were "substantially equal." Wife appeals.

Wife first challenges the court's distribution of assets. Wife's argument is essentially that the court implicitly found that the home was a marital asset, and that the court's failure to compensate her for her portion of the equity in the home was error. We disagree that the court found the home was a marital asset. The court's only reference to the home was in the context of discussing the parties' indebtedness to husband's parents. The court concluded that any debt for past-due rent was husband's sole responsibility in part because the evidence of the amount of the debt was "too vague to support the establishment of a marital debt." The court further explained, "[t]o the extent such a claim could be maintained . . . the Court concludes it is likely they will either be forgiven, or offset against [husband's] expectation of an as yet inchoate inheritance, but one likely to be reasonably substantial." Contrary to wife's assertion, this observation is not a finding that the marital home was marital property to be divided between the parties. Although the court acknowledged that husband may receive an inheritance, the court also found that husband's expectation was still inchoate.

Wife relies on Chilkott v. Chilkott, 158 Vt. 193 (1992), to support her claim that husband's remainder interest in the trust is marital property and subject to distribution. We conclude that this case is distinguishable from Chilkott. In Chilkott, we explained that in deciding whether property is subject to distribution under 15 V.S.A. § 751(a), "property ownership ought not to be determined by the wooden application of technical rules of the law of property." Id. at 196 (quotation omitted). Thus, to determine if trust property is subject to distribution, the court should consider "whether the future interest is so remote that it has no ascertainable present value." Id. In reaching the conclusion in Chilkott that husband's remainder interest was ascertainable and subject to distribution, the court relied on the facts that the trust was irrevocable and "no longer inchoate." Id. at 197. Thus, even though the exact value was not certain, husband's expectancy interest could be ascertained. In contrast, husband's interest in this case, as the trial court found, is inchoate. The trust is revocable, and husband's realization of its value depends on several contingencies. Thus, the court did not err in concluding that husband does not have a present ascertainable interest in the property. Given this finding, the court did not err in declining to compensate wife for the value of this asset. See

15 V.S.A. § 751(a) (family court has jurisdiction to divide and assign property “owned by either or both of the parties”).

Wife’s related claim that she should receive some compensation for her contribution to improving the property and husband’s continued benefit from the property also fails. The court considered the home in its division of property. The court granted wife the value of the insurance policy based on the respective merits of the parties, *id.* § 751(b)(12), and the benefit that husband receives from continued use of the home, *id.* § 751(b)(6). In addition, the court assigned to husband any debt the parties owed to husband’s parents. These allocations adequately compensated wife for her contributions to home.

Next, we address wife’s argument that the trial court abused its discretion in denying her request for spousal maintenance. The court may award spousal maintenance “if it finds that the spouse seeking maintenance: (1) lacks sufficient income, property, or both . . . to provide for his or her reasonable needs; and (2) 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). The trial court has broad discretion in assessing the factors under the statute, and we will affirm unless there is no reasonable basis to support the court’s decision. *Buttura v. Buttura*, 143 Vt. 95, 99 (1983). The court declined to award spousal maintenance in this case, explaining that “the respective earnings capacities [of the parties’] established in the last several years . . . have been substantially equal for each party.”

Wife argues that the court’s findings are inadequate to support its decision because the court did not address her testimony that she was unable to meet her reasonable needs and was living at a lower standard of living than during the marriage. Husband counters that the trial court was not required to make specific findings because wife never requested them.

We have recently explained the standard of review when a final order does not contain complete findings of fact. Generally, the trial court is not required to issue fact findings if a party does not make a timely request to do so. V.R.C.P. 52(a). “If the court makes findings of fact—whether upon request or on its own initiative—the findings must be adequate to explain to the parties, and to this Court on appeal, how the family court arrived at its decision.” *Slade v. Slade*, 2005 VT 39, ¶ 5, 178 Vt. 540 (mem.); see *Maurer v. Maurer*, 2005 VT 26, ¶ 12, 178 Vt. 489 (mem.) (remanding for further findings where the trial court issued some findings on its own initiative, but the findings were inadequate to support the decision). In this case, even though wife did not make a request for findings pursuant to Rule 52(a), the trial court made some findings on its own initiative, therefore its findings “must meet the test of adequacy upon review.” *Maurer*, 2005 VT 26, ¶ 12.

We agree with wife that the court’s findings regarding maintenance are not sufficient because we cannot determine how the court applied the statutory factors and reached its decision. See *id.*, ¶ 16. The relevant inquiry under the statute is whether wife has sufficient income to meet her reasonable needs and whether she is able to support herself at the standard of living established during the marriage. *Bancroft v. Bancroft*, 154 Vt. 442, 445 (1990). The court did not address these factors. Instead the trial court simply stated that the parties had similar incomes. Although the parties’ incomes may be substantially equal, wife contends that she is unable to meet her reasonable needs due to higher expenses, and that her standard of living is much lower than during the marriage. Without an examination of this evidence, we cannot

assess how the court reached its conclusion to deny wife maintenance.\* See Maurer, 2005 VT 26, ¶ 16 (explaining that without findings pertaining to the statutory factors, this Court could not assess how the family court reached its decision). Thus, we remand for the family court to assess whether maintenance was appropriate in this case.

We reach a similar result on wife’s final argument pertaining to attorney’s fees. “An award of attorney’s fees in a divorce action is a matter of judicial discretion.” Lussier v. Lussier, 174 Vt. 454, 457 (2002) (mem.). In awarding fees the important considerations are the financial circumstances of the parties, and the needs and ability of the parties to meet their needs. Begins v. Begins, 168 Vt. 298, 305 (1998). The court declined to award attorney’s fees in this case, but did not provide any explanation for its decision. Because the court did not assess the relative needs of the parties or their ability to pay, we remand for further findings. See id. at 305-06 (remanding for determination of attorney’s fees where trial court did not assess parties’ respective financial need or ability to pay). The court should reconsider its initial decision in light of its findings.

Our remand on the issue of maintenance also requires that we reopen the property award to allow the trial court on remand to determine if a change in its maintenance decision, if any, requires a revision of the property division “because of the interrelationship of these two parts of the financial order.” Semprebon v. Semprebon, 157 Vt. 209, 216 (1991).

Reversed and remanded for further proceedings consistent with this opinion.

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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Brian L. Burgess, Associate Justice

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\* It is also impossible to determine whether the trial court intended part of the property division award to be in lieu of maintenance. The court awarded wife the life insurance policy, explaining that it was, in part, to compensate for husband’s advantage of having smaller housing costs relative to the quality of his shelter. **PC 2.** To what extent this money may have been intended to compensate wife for her diminished standard of living is impossible to determine from the court’s limited findings. The court’s discretion in distributing marital assets is broad; however, it must “provide a clear statement as to what was decided and why.” Dreves v. Dreves, 160 Vt. 330, 333 (1993) (quotation omitted). The court failed to do so in this case.