

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-088

AUGUST TERM, 2003

	}	APPEALED FROM:
	}	
Kevin Endres	}	Chittenden Family Court
	}	
v.	}	DOCKET NO. 42-01-02 CnDm
	}	
Joan Endres	}	Trial Judge: Linda Levitt
	}	
	}	

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

In this divorce action, wife appeals from an order of the Chittenden Family Court dividing the parties' property, claiming that the division is unequal and that the court failed to explain the basis for its valuation of certain real estate. We find no abuse of the court's discretion, and therefore we affirm.

The parties separated in December 2001 after almost thirty years of marriage. Because they had no children together, the central issue in the divorce related to their property. The parties owned four pieces of real property: the marital home, a commercial property in Milton, a camp also located in Milton, and a Florida condominium. The parties agreed that husband would keep the commercial property in Milton and the Florida condominium, although they disagreed about the value of those properties. They would sell the marital home and the camp in Milton, and wife would keep the proceeds. They also agreed that the proceeds of the sale would be treated as an offset against the value of the real property awarded to husband.

Because they disagreed about the value of the Milton commercial property and the Florida condominium, the parties presented evidence on that issue at the final hearing. Husband testified that the Milton property was worth \$200,000. Wife testified that two appraisals of the property had been done. One appraisal set the value at \$200,000 and the other at \$210,000. Wife suggested that the court split the difference and value the Milton commercial property at \$205,000.

As to the condominium, wife opined that it was worth \$130,000, and husband testified that it was worth only \$110,000. Husband indicated that his estimate accounted for a depressed real estate market in Florida during the 1990s and its gradual recovery. He also considered other recent sales of comparable properties. The court found that the total value of the real property awarded to husband was \$310,000.

In addition to their real property, the parties owned a number of bank, stock, bond, retirement, and trust accounts. Some accounts were held jointly and others were owned by each of the parties individually. Wife had an interest in five family trust accounts valued at approximately \$688,000. The value of the various accounts at the time of the final hearing, including wife's interest in the trusts, was approximately \$1.6 million. The parties agreed that wife would retain her interest in the five trusts and they asked the court to exclude the value of those trusts from the marital estate. Husband proposed that the court divide the remaining accounts roughly equally between the parties. Wife agreed, but she contended that money in two accounts held in her name should be excluded from the marital estate and treated like her trusts because the trusts were the source of the funds in those accounts. The court divided the accounts according to husband's proposal and rejected wife's request to exclude two of her bank accounts from the marital estate. In the end, the total value each party received from their various accounts, excluding the five trust accounts, was \$462,435 to wife and \$483,846 to husband. If the trusts are included in the marital estate, the breakdown would be \$1,150,873 to wife and

\$483,846 to husband.

On appeal, wife claims that the court's failure to exclude two of her accounts from the marital estate reduced the award she was entitled to by approximately \$50,000. We review her claim under the abuse-of-discretion standard because the family court has wide discretion in fashioning a property award in divorce proceedings. Milligan v. Milligan, 158 Vt. 436, 439 (1992). Unless it can be shown that the family court withheld, abused, or exercised its discretion on untenable or clearly unreasonable grounds, we will not disturb the property award on appeal. Id. Although the court must give weight to the parties' agreement on property distribution, it must independently determine that the division is equitable based on the evidence before it. Poulin v. Upham, 149 Vt. 24, 28 (1987); Lewis v. Lewis, 149 Vt. 19, 22 (1987). When considering an award, 15 V.S.A. § 751(a) allows the court to divide " [a]ll property owned by either or both of the parties, however and whenever acquired."

The difference in the awards to wife and husband depends on how one values the marital estate. The \$50,000 difference wife claims results from her view that the court should have excluded from the marital estate the value of two bank accounts she owned because the funds in those accounts came from trust income and the parties agreed to exclude the trusts from the marital estate. If the value of all accounts are considered, however, which § 751(a) permits, wife's award exceeds husband's by over \$600,000. There is simply no basis for us to conclude on this record that the court abused its discretion in dividing the parties' accounts. Indeed, wife does not even argue that the award is inequitable, she simply argues that the court should have divided the property according to the parties' agreement. As we noted above, the court is not bound by the agreement and its principal responsibility is to ensure that the division of property is equitable. The court's decision here meets that standard.

Wife next claims that the court failed to adequately explain its basis for valuing the real property awarded to husband consistent with his testimony. Although we require the court to "provide a clear statement as to what was decided and why," Richard v. Richard, 146 Vt. 286, 287 (1985), we do not require that the court explain why it rejected the testimony of one witness in favor of the testimony of another. In this case, the court had conflicting testimony from husband and wife about the value of the Milton and Florida properties. The court's findings on the value of that property demonstrates that it found husband's testimony more credible and reliable. "Given its unique position to assess the credibility of witnesses and weigh the evidence, we will not set aside the court's findings if supported by the evidence, nor its conclusions if supported by the findings." Begins v. Begins, 168 Vt. 298, 301 (1998). The court's valuation decision is based on evidence in the record. There was no error.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

