

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-083

MARCH TERM, 2007

Bruce Youngbluth	}	APPEALED FROM:
	}	
v.	}	Washington Family Court
	}	
Elisabeth Youngbluth	}	DOCKET NO. 370-9-03 Wndm
	}	
	}	Trial Judge: M. Kathleen Manley

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

Husband appeals the property division in the family court’s final divorce order. On appeal, husband claims that the trial court erred in: (1) determining the fair market value of real property, (2) excluding business income in wife’s assets, (3) estimating husband’s future income, (4) failing to sanction wife or discount her award to offset her pre-divorce spending, and (5) awarding part of his military pension to wife. We affirm.

The parties were married on October 14, 1989, and separated on October 7, 2003. They have two sons together, who were eleven and twelve at the time husband filed for divorce. Wife has two daughters from a previous marriage. Both parties are in their forties and in good health.

Husband spent his entire career in military service, attaining the rank of Major in the Marine Corps. During more than twenty-years of service, husband’s primary job was as a helicopter pilot, but he also worked as a training instructor, manager and intelligence officer. At the time husband filed for divorce, the parties were living in Northfield, Vermont, where husband was teaching at Norwich University.

While in Northfield, the parties began to plan for husband’s upcoming retirement from military service. Husband was required to retire from the military on July 1, 2005. Husband prepared a business plan and the parties purchased a Subway franchise. They also bought a commercial building in downtown Northfield—half to house the Subway and half of which they leased out. Shortly after the Subway opened in September 2002, husband was deployed to Korea and wife began running the franchise.

Following a two-day contested divorce hearing in May 2005, the trial court issued a final order, which granted wife sole legal and physical responsibilities for the parties’ sons. The court awarded wife 60% of the marital assets, explaining that wife’s greater share was balanced by a awarding only six years of rehabilitative maintenance and only a 35% marital share of husband’s military pension. Pursuant to the court’s division, wife received the marital home, the Subway franchise and the commercial property. To equalize, the court ordered wife to pay husband a cash award.

Although husband does not contest the court's overall division, he argues that the family court erred in valuing several assets awarded to wife and, thus, awarded her much more than the stated 60% share of the marital property. The family court has authority to equitably divide marital property. See 15 V.S.A. § 751 (outlining factors for family court to consider in fashioning division). "The trial court has broad discretion to consider the statutory factors and fashion an appropriate order, but it must provide a clear statement as to what was decided and why." Turner v. Turner, 2004 VT 5, ¶ 7, 176 Vt. 588 (mem.). We accord the trial court wide deference in this regard because "it is in a unique position to assess the credibility of the witnesses and weigh the evidence presented." Id. ¶ 5.

First, husband claims that the trial court undervalued the marital home and the commercial property housing the Subway franchise. Concerning the marital home, husband testified that the home's value was \$242,000. Wife testified that the home was worth \$175,000. Wife's expert testified that the appraisal value of the home on February 11, 2004 was \$175,000 and that market values had increased since then. Based on this evidence, the trial court found the fair market value was \$207,000. There was ample evidence to support the court's valuation, and this finding was not clearly erroneous. Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (court's valuation will be upheld if supported by findings, which are supported by evidence). The court's value is supported by both wife's testimony regarding the value of her home, and the testimony of wife's appraiser. Alberelli v. Alberelli, 152 Vt. 46, 48 (1989) (owner competent to testify regarding the value of her real property).

Husband also contends that the trial court erred in determining the value of the commercial property at \$144,000. At trial, wife presented an appraisal from February 2004 that valued the marital property at \$144,000. The appraiser testified that the property had likely not increased much in value since the appraisal. Husband testified that the property was worth \$197,000. The court found that the appraiser's value was most accurate, relying in part on wife's testimony that there was not a high demand for commercial property in the area. Again, we conclude that the court's decision was within its discretion. Husband's assertion that the court relied on outdated information is not supported by the evidence. Cf. Cleverly v. Cleverly, 151 Vt. 351, 354-55 (1989) (error to rely on an appraisal three years old). Although the appraisal was a year old, the court's valuation was supported by both the appraiser's valuation as well as the appraiser's and wife's testimony concerning how little commercial property values had changed since the appraisal was performed. Kanaan, 163 Vt. at 410-411 (accepting two-year-old appraisal where expert testified concerning what happened to valuation in intervening time).

Second, husband argues that the trial court abused its discretion by excluding income produced by the Subway franchise in its award to wife. Both parties agree that the Subway franchise had net profits every year beginning in 2003 and that the profits were increasing. In its first year, the franchise disclosed net profits of \$5,600, \$12,169 in the second year and \$9,000 in the first quarter of the third year. Husband argues that the court should have attributed these profits to wife as income. We conclude that the trial court properly considered the evidence concerning the profits in its award. The trial court noted that profits had not been taken from the corporation and were kept on hand for repairs or equipment replacements. Thus, the court did not directly credit wife with income, instead the court factored such future income into its award for rehabilitative maintenance. The court awarded only six years of maintenance, reasoning that as the business grows and provides more income wife would become self sufficient. See Delozier v. Delozier, 161 Vt. 377, 381-82 (1994) (explaining that family court has broad discretion to award maintenance and may consider future earning capacity).

Third, husband contends that the trial court erred in estimating his post-retirement employment income. Husband testified that he expected to begin working in the civilian world at \$12 per hour. The trial court concluded that based on husband's military training and experience he "has a variety of skills that will enable him to locate lucrative employment in the civilian sector." The court noted that husband has worked at several high-responsibility jobs including as a pilot, a college instructor, a manager and an intelligence officer. Consequently, the court concluded that husband's estimate of his post-military earnings was "exceedingly low based on [his] skills, education and prior income with the military." The court found husband was capable of finding employment at \$3,000 per month. We conclude that this finding is supported by the evidence. Given husband's historical income and his own testimony that a helicopter pilot would earn approximately \$3,000 per month, there was ample evidence to support the court's conclusion, and we will not disturb it.

Fourth, husband maintains that wife improperly accessed and spent joint funds prior to the final hearing and that these expenditures should be deducted from her award. Husband urges us to sanction wife for violating the temporary order by withdrawing money from their joint account. The family court found that wife did not use any business funds or marital accounts inappropriately and declined to sanction wife. The power to punish for contempt is discretionary, and as long as the trial court's decision has a reasonable basis, we will not interfere. Brooks v. Brooks, 131 Vt. 86, 93 (1973). In this case, the court's decision was based on evidence in the record that although wife moved funds from one account to another, she did not commit any malfeasance.

Finally, husband claims that the trial court erred in awarding wife a portion of his military pension as part of the property division. Husband raised this issue for the first time in his motion to reconsider following trial. Thus, we conclude that husband did not preserve this issue for appeal. Alberelli, 152 Vt. at 49. Even if properly preserved, it appears that the court did not err in treating husband's military pension as marital property. Federal law allows the division of a military pension. See 10 U.S.C. § 1408. In addition, under Vermont law, pension rights acquired during the course of a marriage are subject to equitable distribution. See Milligan v. Milligan, 158 Vt. 436, 439 (1992). As such, we conclude that the trial court properly considered husband's pension a marital asset, subject to equitable distribution.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice