

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-036

AUGUST TERM, 2008

Kevin Barrup	}	APPEALED FROM:
	}	
v.	}	Orleans Family Court
	}	
Tammy Barrup	}	DOCKET NO. 239-12-04 Osdm

Trial Judge: Christina C. Reiss

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

Husband appeals from a final divorce order. On appeal, husband claims that the court erred: (1) in valuing husband's interest in a closely held corporation, Barrup Farms, Inc.; (2) in valuing husband's small business, KRB Trucking; (3) by relying on testimony from a prior proceeding; (4) by failing to find wife in contempt of court orders; and (5) by not awarding husband attorney's fees. We affirm.

The court found the following facts. The parties were married in 1986 and separated for the last time in December 2004. There were no minor children at the time of the parties' separation. Husband brought assets of \$86,000 into the marriage. Although husband has high blood pressure and takes medication, the court found that both parties were in relatively good health and were able to work. Husband works for the family business, Barrup Farms, Inc., a closely held corporation of which the sole shareholders are husband and his parents. He is the president of the company and currently has a monthly salary of \$6,500. Husband also owns a trucking business called KRB Trucking, and a car wash business. During the marriage, wife worked as a bookkeeper for Barrup Farms and KRB Trucking. She also worked in the home full time as a caregiver for children for part of the marriage. She is currently employed as a shift supervisor at a pharmacy and earns an hourly wage of \$8.30. The court found that she had greater earning capacity as a bookkeeper. At the time of the final divorce, the parties' major assets included: husband's shares in Barrup Farms; husband's two small businesses, KRB Trucking, and a car wash business; the marital residence; a second residence; an unimproved lot; retirement accounts; three life insurance policies; vehicles; and some personal property including a motorcycle, and several snowmobiles and Seadoos.

Following two days of hearing, the court issued a final order. The court divided the parties' assets in the following manner. The court awarded husband all of his interest in Barrup Farms. The court also awarded husband 60% and wife 40% of the value of KRB Trucking and

the car wash business. Wife received the proceeds from the sale of the marital home, and husband received title to the second home and the undeveloped property. The court divided the retirement accounts 70% to wife and 30% to husband. Husband received the life insurance policies, and both parties were awarded the motor vehicle in their possession. In addition, the court awarded wife spousal maintenance of \$12,000 per year until wife reaches the age of 62.

Husband first argues that the court erred in valuing his shares in Barrup Farms. Husband owns a 24% interest in Barrup Farms, and his parents own the remaining shares. The shares may not be sold, offered for sale, pledged, or transferred, except in certain circumstances. The parties stipulated that the fair value of husband's interest in Barrup Farms at the time of the final hearing was \$257,150. However, they disputed how this fair value should apply to determining the value for distribution purposes. Husband presented expert testimony that this value should be discounted because husband holds a minority interest in the company and because there is no available market for husband's shares. Husband's expert testified that there was no standard for discounting minority ownership, but suggested that 15% was common for a minority interest discount and that 35% was an industry standard discount for minority and marketability. In contrast, wife's expert opined that no discount should be applied for husband's minority interest because Barrup Farms is controlled entirely by family and the family acts harmoniously. In addition, wife's expert testified that no marketability discount is necessary because husband's parents are willing buyers for the shares. The court found the testimony of wife's expert credible and valued husband's interest in Barrup Farms at \$257,150, without any discount.

On appeal, husband contends that the court erred in failing to discount the parties' stipulated "fair value" for his minority interest and for the lack of marketability of the shares. We conclude that the court's valuation was "within the range of evidence presented at trial" and not an abuse of discretion. Kasser v. Kasser, 2006 VT 2, ¶ 27, 179 Vt. 259. As we have observed, valuing closely held stock is difficult and depends on many factors. Id. ¶ 28. Husband argues that a minority interest in a closely held corporation should always be discounted because of the lack of control and marketability. We have not required a court to apply a minority discount in all cases, although we have recognized that such a discount is reasonable in many situations. In this case, the court's valuation was based on the credible testimony of wife's expert, who testified that a discount was not appropriate for several reasons. Although husband's expert recommended a discount, the court found the testimony of wife's expert to be more persuasive. "We defer to the family court's findings because that court is in a unique position to assess the credibility of witnesses and weigh the persuasiveness of the evidence." Id. ¶ 19. The court's valuation of husband's interest in Barrup Farms is supported by credible evidence in the record; therefore, we will not disturb it on appeal.\*

Next, husband contends that the court abused its discretion in valuing his trucking business, KRB Trucking. Both parties also presented expert testimony concerning KRB Trucking. Wife's expert testified that the business was worth between \$104,000 and \$156,000

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\* We are not persuaded by husband's assertion that the family court erroneously equated a highly liquid asset—the retirement funds—with his interest in Barrup Farms, which is not liquid. Although the court indicated that it was awarding wife more of the retirement account to compensate, in part, for husband's shares in Barrup Farms, the court did not indicate that it was directly equating the two assets. In fact, in awarding husband his interest in Barrup Farms, the court acknowledged that this interest did "not represent readily accessible funds." The court's decision was equitable in light of the circumstances and not an abuse of discretion.

based on general valuation rules. Husband asserts that his expert testified that the business was worth \$68,000, the value of the business's only assets—its trucks. Based on this testimony, the court found that KRB Trucking had a fair market value of \$130,000. Husband argues that the court erred in concluding that his expert did not offer a value for the business, and in relying solely on the testimony of wife's expert because the expert had not done a thorough individualized evaluation of the business. We find no abuse of discretion. The court agreed that the value of the business's trucks was \$68,000, but explained that husband's expert had not testified as to the business's worth as an enterprise. In addition, the court acknowledged that while wife's expert had not done a thorough evaluation of the business, neither had husband's expert. In the absence of such testimony from either party, the court concluded that the testimony of wife's expert was more credible because it included not just the value of the trucks, but included other considerations such as husband's discretionary earnings. The court's finding was based on credible evidence and not an abuse of discretion. See *id.* ¶ 28 (allowing the trial court to exercise discretion in valuing business and relying on expert testimony).

Husband also claims that the court erred as a matter of law by considering inadmissible testimony in its findings. A brief procedural history is necessary to understand the facts behind this claim of error. The parties initially commenced their final divorce hearing before Judge Van Benthysen in March 2006. Before the matter was fully heard, however, the judge was deployed to Iraq, and the parties agreed to begin the final hearing again. At the recommenced hearing, the parties initially stipulated to the admission of husband's testimony from the previous hearing, but husband objected to the admission of the rest of the transcript, including the testimony of his parents. The parties dispute whether there was ever a stipulation to enter the entire transcript as evidence. Husband filed a motion to amend the final divorce order, pointing to the court's findings that recounted husband's mother's testimony that on occasion cash transactions at Barrup Farms were not recorded on the company's books. Husband claims that the court erroneously relied on this statement in valuing Barrup Farms. In response, the court explained that its recollection was that the entire transcript was admitted without objection. The court also explained, however, that, in any event, there was no evidentiary rule precluding the admission of the transcript, that husband had waived any objection by relying on the testimony in his own filings, and that no prejudice resulted to husband due to the admission of the statements.

We conclude that—even assuming that husband did not stipulate to introducing the transcript in its entirety—any error in admitting the statement from the first hearing was harmless. The court specifically explained that it gave “little weight to [the testimony by husband's mother concerning the cash sales] in the absence of any means of determining the amount in question.” As is evident from this statement and the remainder of the court's discussion on Barrup Farms, the statement by husband's mother did not influence the court's valuation of Barrup Farms. The court relied on the parties' stipulation of the business's fair value and wife's expert's testimony regarding the business's value. Because no prejudice resulted from the court's mention of husband's mother's testimony, we conclude that any error in mentioning the testimony was harmless.

Husband next claims that the court abused its discretion by failing to find wife in contempt and to sanction her. Again, some factual background is helpful to understanding husband's argument. There has either been a restraining order or a probation condition prohibiting contact between the parties during much of their separation. The orders have focused on wife and her behavior. For example, wife was convicted of domestic assault and unlawful mischief following an incident at husband's home. In addition, wife violated an abuse-

prevention order and violated a no-contact provision of her probation after repeatedly contacting husband. Husband asserted that wife had violated the relief-from-abuse orders many times, and requested that the court find wife in contempt. In its final order, the court found that “both parties engaged in physical and verbal aggression towards the other and that both parties shared in the destruction of the marital relationship,” but that “[wife] was more often the aggressor and has been more extreme in her aggression.” The court explained, however, that rather than find wife in civil contempt, the court would include wife’s behavior in its “determination of the respective merits of the parties.”

On appeal, husband chronicles wife’s violation of relief-from-abuse orders and failure to comply with court orders and contends that the court abused its discretion in failing to find wife in contempt and to sanction her for these violations. We conclude that the court did not abuse its discretion. “[T]he power to cite and sanction for civil contempt lies within the discretion of the trial court . . . .” Thompson v. Thompson, 171 Vt. 549, 550 (2000) (mem.). The purpose of civil contempt is to compel a party to comply with a court order. Id. In this case, the court declined to find wife in contempt and instead factored wife’s conduct into its division of property. Given the context, this was a reasonable decision and not an abuse of discretion. See Hixson v. Plump, 167 Vt. 202, 208 n.2 (concluding that it was within the court’s discretion to forego the “serious sanction” of contempt and instead enforce an earlier judgment by ordering that monthly payments be made on it).

In a related claim, husband contends that the court erred by allocating wife close to half of the marital estate even though she had a greater degree of marital fault, she contributed little to the marital estate, and she was in better health. In dividing the marital assets, the court may consider the factors enumerated in 15 V.S.A. § 751. The trial court has wide discretion in formulating a property award, and we will not reverse if there is a reasonable evidentiary basis for the court’s decision. Atwood v. Atwood, 143 Vt. 298, 300 (1983). In this case, we conclude that the court considered all of the statutory factors, including wife’s noncompliance with court orders and husband’s high blood pressure, and that the court’s division was reasonable and equitable in light of all the circumstances. Contrary to husband’s assertion, the court found that both parties were in relatively good health. See 15 V.S.A. § 751(b)(2) (directing the court to consider “the age and health of the parties” in making a property settlement). Although the court acknowledged that husband has some health problems, the court found that they were exacerbated by the divorce proceeding, which would be ending, and did not influence his ability to work. As to the rest of the factors, the court explained that some favored a greater distribution to wife, including the fact that husband had greater earning capacity and a “significantly greater opportunity for the acquisition of capital assets and income through his ownership interests” in the three businesses. See id. § 751(b)(8) (directing the court to consider “the opportunity of each [party] for future acquisition of capital assets and income”). In addition, the court explained that it was awarding wife a larger portion of the marital estate in lieu of maintenance. See id. § 751(b)(7) (directing the court to consider “whether the property settlement is in lieu of or in addition to maintenance”). Other factors favored a greater distribution to husband, including husband’s greater contribution to the marital estate and to the acquisition of assets. See id. § 751(b)(10),(11) (directing the court to consider “the party through whom the property was acquired,” and the contribution of the parties to the estates). In addition, as already mentioned, the court found that wife had a greater degree of marital fault. See id. § 751(b)(12) (directing the court to consider “the respective merits of the parties”). Given the court’s thorough analysis of all the statutory factors and considering that different factors favored both husband and wife, we conclude that the court did not abuse its discretion in awarding wife close to half of the marital

estate. See Myott v. Myott, 149 Vt. 573, 579 (1988) (explaining that the family court has broad discretion in dividing marital property and that its “distribution must be equitable, not necessarily equal”).

Finally, husband argues that the court abused its discretion by declining to award him attorney’s fees. In its final order, the court found that “[n]either party made a request for attorney’s fees at the final hearing or their post-hearing filings.” Husband filed a motion to amend, arguing that he made numerous requests for attorney’s fees and that the court abused its discretion in failing to award them. In its order responding to husband’s motion to amend, the court explained that attorney’s fees were not warranted in this case because husband had greater income than wife and the ability to pay his fees. The court further explained that there was no reason to award husband fees because “the parties are similarly situated in terms of their current financial circumstances and their future prospects,” and that both parties caused delays in the divorce proceeding.

We conclude that the court did not abuse its discretion in declining to award husband attorney’s fees, regardless of whether husband ever made such a request. An award of attorney’s fees in a divorce is a matter of discretion, and the decision to award fees depends on the parties’ ability to pay. Willey v. Willey, 2006 VT 106, ¶ 25, 180 Vt. 421. Given the relative income and resources available to the parties, the court did not abuse its discretion in declining to award husband attorney’s fees. See id. ¶ 26 (explaining that the decision on fees “is an equitable one”).

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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Denise R. Johnson, Associate Justice