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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-193

JANUARY TERM, 2009

Edward G. Gyukeri, Jr.	}	APPEALED FROM:
	}	
v.	}	Addison Family Court
	}	
Jeanette Gyukeri	}	DOCKET NO. 34-2-07 Andm
		Trial Judge: Mark J. Keller

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

Husband appeals from the family court's final divorce order. He argues that the court abused its discretion in dividing the marital estate and in calculating maintenance and child support. We affirm.

The record indicates the following. The parties were married in 1995 and they have two minor children. Wife is thirty-eight years old and husband is forty-two. The parties separated in 2006, and husband later filed for divorce. Following a hearing, the family court made the following findings. At the time the parties married, husband was a registered nurse with a degree in nursing and psychology. Wife was a licensed practical nurse. In 1998, they moved to Connecticut to allow husband to obtain an advanced nursing degree. To complete the clinical portion of the program, the parties moved to Massachusetts. In 2001, they moved to Vermont for husband's employment. The following year, husband decided to become a traveling nurse and formed a company called Forty Winks. Wife acted as the company's bookkeeper. The company grossed an average of $200,000 per year. In this position, husband frequently stayed at his work location during the week and returned home on weekends.

Following the parties' separation, husband relocated to New York. He purchased a home there and he currently earns $145,000, with an additional $5000 in income from the military. Wife was diagnosed with multiple sclerosis in 1995. Although she returned to work after the birth of the parties' first child, she became unable to perform her work duties and applied for disability. Wife is now blind in one eye and suffers from muscle weakness. She receives disability and also works four hours per day at the local school cafeteria. Wife's annual income is $29,000 and the court found that she was working at an appropriate level considering her MS and parenting responsibilities.

The court found that husband's actions were the main force in the destruction of the parties' marriage. He had multiple affairs,he chose to work as a traveling nurse and was away during the week,and his drinking and anger aggravated the family unit. In 2005, he was arrested after illegally entering his girlfriend's residence and assaulting her male companion. He was convicted of simple assault and incurred $19,000 in legal fees. Husband now resides with his girlfriend, pays all of her living expenses, and provides her with gifts and trips. Husband also admitted to recently spending $5000 to raise the body of his vehicle several inches for his amusement.

The court found that husband had a greater ability than wife to acquire capital assets in the future. He had increased his income dramatically since marrying wife, which would not have been possible without wife's consent and efforts. Wife now had no long term reward for her efforts, while husband had an advanced degree, a lucrative position, and the potential to earn a high income in the future. The court found that wife came into the marriage with $60,000 in assets while husband had a nursing degree but no assets. The parties now owned two homes. Wife and the children lived in the Vermont home, which was worth $290,000 with $132,000 in equity. Husband owned a house in New York valued at $165,000 with $11,000 in equity. Wife owned a car with negative equity; husband owned two vehicles worth $10,000. The parties also owned a timeshare and a trailer, each worth $10,000. Husband had two bank accounts, each worth approximately $9000, a retirement account currently worth $1700 and another account worth $2300. Wife had two retirement accounts worth a total of $22,000. The court found that while husband had helped the parties' financial situation, he had also had a negative effect on the parties' finances. He was charged with a criminal offense, which cost the family $19,000 in legal fees. He had also liquidated certain retirement accounts totaling $34,000, some of which was invested in his New York home.

After examining the factors set forth in 15 V.S.A. §§ 751 and 752, the court concluded that wife should receive a disproportionate share of the assets and a reasonable maintenance award. As reflected above, husband had a much higher source of income, greater employability, and as a result, a greater opportunity to acquire capital assets in the future. Wife brought assets into the marriage, contributed to husband's education, training, and earning power, while unfortunately suffering a drastic loss in her own earning power. The parties had two children and both wanted the children to remain in the family home and in private school. Due to wife's limited income, husband's maintenance payments were necessary for this stability to exist. Husband had the ability to provide a substantial amount of support either at his current job or by going on the road as a traveling nurse. In light of these considerations, the court divided the parties' assets as follows. Wife was awarded sole ownership of the family home in Vermont, the personal property in the house, her vehicle, the timeshare, and her retirement and monetary accounts. Husband received sole ownership of the New York house, his personal property, his two vehicles, the trailer, and his retirement and monetary accounts. Husband was ordered to pay wife $3000 per month for ten years beginning in March 2008, and $2000 per month thereafter until husband turned sixty-two. Husband was also ordered to pay child support of $2232 per month. To arrive at this value, the court used an income of $150,000 for husband and $29,000 for wife. It also included wife's monthly maintenance in its calculation, and added as an extraordinary expense the tuition for the children's school and monthly counseling fees. Husband appealed from the family court's order.

Husband first challenges the court's property division. He maintains that the court based its decision solely upon the respective merits of the parties while ignoring the remaining statutory factors. He asserts that the court unreasonably concluded that he was the driving force behind the disintegration of the parties' marriage. According to husband, the court was biased in favor of wife, it made its determination as to how the parties' assets would be distributed prior to the close of evidence, and its award is so disproportionate as to warrant exceptional scrutiny by this Court. Husband also challenges the court's finding that wife entered the marriage with $60,000 in assets as clearly erroneous.

As husband recognizes, 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). We will uphold a 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. Semprebon v. Semprebon, 157 Vt. 209, 214 (1991). We have noted that 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).

Husband fails to demonstrate that the court's award was inequitable. The court adequately explained the basis of its decision to award wife a disproportionate share of the marital assets. We do not reiterate the court's findings here, but note that they are supported by the evidence. This includes the finding that wife brought substantial assets into the marriage. Wife testified at trial that she had been contributing to a retirement account for seven years prior to the marriage and had $57,000 or $80,000 at the most in her account. Given the findings made by the court, it was within its discretion in concluding that wife was entitled to approximately 75% of the marital estate while husband received 25%. See Wade v. Wade, 2005 VT 72, ¶¶ 17-23 (upholding family court's order awarding 90% of marital estate to wife where the court explained in detail why it had attributed great weight to two statutory factors—the party through whom the assets were acquired and the party that had contributed more to their preservation—in arriving at its decision); see also Kasser v. Kasser, 2006 VT 2, ¶¶ 30-31, 179 Vt. 259 (upholding family court's order awarding wife approximately 20% of marital estate following twenty-three year marriage, and noting that family court had considered the statutory factors in making its award, and made detailed findings to support its conclusions). While husband argues that the family court should have given additional weight to certain factors, such as the fact that he was supporting the family during the separation period, it is the role of the family court, not this Court, to weigh the evidence. Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). We will not re-weigh the evidence on appeal.

In deciding how to distribute the marital estate, the court properly considered husband's extra-marital affairs. See Weaver v. Weaver, 173 Vt. 512, 513 (2001) (mem.) (stating that the family court does not abuse its discretion by including a party's conduct during the marriage, including involvement in an extra-martial relationship, as one of the factors influencing a property award). Its finding that husband was largely responsible for the downfall of the marriage, due in part to multiple affairs, is also supported by the record. Even if the parties had

reconciled after husband's most recent affair, as husband asserts, it was reasonable for the family court to conclude that husband's actions were harmful to the marriage. In a similar vein, it was not unreasonable for the court to conclude that husband's decision to become a traveling nurse—voluntarily absenting himself from the household during the week—put a strain on the marriage.

The court did not deduct the legal fees incurred by husband in distributing the marital estate, as husband asserts. Nor did it deduct from husband's award the money that husband withdrew from the parties' retirement accounts. We thus reject husband's contention that he was "penalized" by receiving the equity in the New York home while at the same time being "credited" for the retirement money that he withdrew. We similarly reject his assertion that the court erred by failing to adopt wife's proposed distribution. Even if wife did in fact propose that husband receive 40% of the marital estate, as husband asserts, the family court was under no obligation to accept wife's proposal.

We similarly reject husband's assertions that the court was biased against him or that it pre-judged the case prior to hearing all of the evidence. The fact that husband disagrees with the result does not demonstrate bias. See Gallipo v. City of Rutland, 163 Vt. 83, 96 (1994) (stating that judicial bias cannot be demonstrated based on adverse rulings alone); Ball v. Melsur Corp., 161 Vt. 35, 45 (1993) (stating that "bias or prejudice must be clearly established by the record," and "that contrary rulings alone, no matter how numerous or erroneous, do not suffice to show prejudice or bias"). Moreover, the court's statements to counsel at trial, made as part of a discussion about whether the case could be settled, do not demonstrate that the court pre-judged the case. The court's decision amply demonstrates that it considered all of the evidence presented in reaching its decision. Husband disagrees with the way in which the court weighed the evidence but he has not shown that the court failed to carry out its judicial duty.

Finally, even if we closely examine the trial court's order, as husband suggests, we reach the same conclusion. See Hendrick v. Hendrick, 142 Vt. 357, 359-61 (1982) (stating that where distribution of marital assets weighed heavily in one party's favor, Supreme Court would examine transcript and family court's order "most closely," and reversing and remanding where family court failed to make sufficient findings to support its award). We recognized in Hendrick that "because a decree relative to property is final and not subject to modification . . . the wide discretion given to the trial court in this area must be tempered when the distribution reflects inadequate findings." Id. at 359 (quotation omitted). At the same time, we reiterated that this Court will not interfere with the family court's decision if "a reasonable evidentiary basis supports the court's findings and the findings are sufficient to support the conclusions of law." Id. (quotation omitted). As previously discussed, the court's award in this case was supported by adequate findings, and its findings are supported by the record. We thus find no abuse of discretion in its distribution of the marital estate.

Husband next challenges the family court's maintenance award. He argues that the court failed to take its property division into account in reaching its conclusion and it failed to properly consider the factors set forth in 15 V.S.A. § 752. According to husband, the court failed to evaluate wife's reasonable needs and the court's award has no reasonable basis. He also asserts that there is no evidence that wife's income suffered as a result of assisting him with his career.

The family court may award maintenance, either rehabilitative or permanent, to a spouse when it finds that the spouse lacks sufficient income and/or property to "provide for his or her reasonable needs" and the spouse 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); see also Chaker v. Chaker, 155 Vt. 20, 24 (1990). The maintenance must be in the amount and for the duration the court deems just, based on the consideration of seven nonexclusive factors. 15 V.S.A. § 752(b). Once the family court finds grounds for awarding maintenance, it has broad discretion in determining the duration and amount. Chaker, 155 Vt. at 25. A maintenance award will be set aside only if there is no reasonable basis to support it. Id.

The court identified reasonable grounds for its maintenance award here. The court found that based on wife's financial affidavit, she lacked sufficient income and property to provide for her reasonable needs or to maintain the middle class standard of living established during the marriage. It explained that both parties also wanted the children to have a stable lifestyle, remain in the marital home, and continue to attend private school. Due to wife's limited income, she needed maintenance payments from husband to allow such stability to exist. The court found that husband had a very well-paying job, and that he had the ability to provide a substantial amount of support. It also noted that husband's income currently allowed him to support his girlfriend, who was employed but paying no living expenses, as well as spend a substantial sum on raising his car up several inches. In her financial affidavit, wife identified monthly expenses of $6765.96 for herself and $3161.67 in monthly expenses for the children. Her total monthly income was listed as $2413.50. The court awarded wife $3000 per month for ten years and $2000 per month until husband turned sixty-two, which made up much of the difference between her monthly income and her monthly expenses. The court's award allowed wife to meet her identified needs, which the court found to be reasonable and necessary to maintain the standard of living during the marriage. It is evident that the family court considered the factors set forth in 15 V.S.A. § 752 in reaching its conclusion, including the fact that wife received the marital home as part of the property distribution.

In support of his assertions, husband relies on an income figure for wife different than that found by the family court. He misreads the family court's order as finding that wife suffered a loss in earning power due to her support of husband's education. The court did not make such a finding. It found that wife's earning power diminished due to her multiple sclerosis. The court similarly did not base its maintenance decision on fault or to punish husband, as husband asserts. As set forth above, the court implicitly found that that wife's needs were reasonable and based its decision largely on the expenses identified in her financial affidavit. We fail to see how the court erred by using wife's post-separation expenses as its guide. While husband apparently believes that wife's expenses are too high, the family court found otherwise and it did not commit clear error in doing so. Husband asserts that this maintenance award is inconsistent with other cases, but it is elemental that each case must be decided on its own facts. As already discussed, the family court here identified numerous reasons for its award, all of which are supported by evidence in the record. As with his prior claim of error, husband essentially seeks to have this Court reweigh the evidence and reach a decision different from that reached by the trial court. This we will not do. As we have often stated, "where a matter of judicial discretion is involved, a ruling of the trial court will not be set aside because another court, or even this Court, might have reached a different conclusion." Ohland v. Ohland, 141 Vt. 34, 39 (1982).

Finally, husband argues that the family court erred by including the children's private school tuition in the child support award. He asserts that the court should have addressed this expense as part of his spousal support obligation or as part of the property division.

We reject this argument. The fact that private school tuition may not "typically fall" within the definition of "extraordinary education[al] expenses" for purposes of child support, McCormick v. McCormick, 159 Vt. 472, 481 (1993), does not mean that it can never be included as an extraordinary educational expense. As husband acknowledges, both parties agreed that the children should remain in private school. The court was within its discretion including this expense as part of its child support calculation, as opposed to any other method of insuring that this expense was paid. Husband incorrectly suggests that he has been ordered to pay for the children's tuition twice. In the April 2008 entry order referenced by father, the family court merely explained that pursuant to the child support program, certain expenses, including educational expenses, were totaled and allocated proportionately. In this way, both parties were sharing the expense according to their monthly available income. The court noted that for consistency purposes, any other medical and education expenses should be paid according to the proportional share of the parties' income. The court did not order husband to pay the children's tuition twice. Finally, we do not see any error resulting from the fact that the inclusion of the private school tuition in the child support calculation increased the monthly "combined family expenditures" and increased father's child support obligation. That was the necessary and logical result of including this expense as part of the child support calculation.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice