

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

**ENTRY ORDER**

FILED IN CLERK'S OFFICE

NOV 18 2009

SUPREME COURT DOCKET NO. 2009-138

NOVEMBER TERM, 2009

Jean M. Carpenter

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APPEALED FROM:

v.

Franklin Family Court

Thomas Carpenter

DOCKET NO. 50-2-07 Frdm

Trial Judge: Mark Keller

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

Husband appeals the property settlement and spousal maintenance components of the family court's final divorce order. On appeal, husband argues that the court erred in: (1) valuing husband's recreational vehicle (RV) sales and services business; (2) including in the marital estate assets that were transferred to the parties' son before the divorce; (3) requiring husband to guarantee the student loans of the parties' adult children; (4) calculating husband's income from his RV business; (5) failing to consider income producing assets and the property settlement award in awarding maintenance to wife; and (6) awarding wife attorney's fees. Wife responds that the court's award was within its discretion. We affirm.

The court found the following facts. The parties were married in April 1986 and separated in August 2006. The parties have four children who were all above the age of majority at the time of the final hearing. Mother was the primary caregiver for the children when they were young. She worked as a hair stylist from the home and organized her schedule to be available for the children. She currently works full time at a salon. Husband operates his own business selling and servicing recreational vehicles. He also owns several pieces of real property, some of which are used as rental properties. Husband purchased two properties in 2006 and put himself and the parties' son, but not wife, on the deed. Husband and the parties' son also jointly hold a note with a present value of \$136,000. This note resulted from a sale of property that occurred shortly before the parties separated in the summer of 2006. Each party has a small retirement account.

Following a hearing, the court ordered the following division of marital property. The court awarded husband sole ownership of his RV business, which the court valued at \$455,000. The court also awarded husband title to the assets that husband had titled in his son's name—two properties worth \$155,000 and \$30,000, as well as the note worth \$136,000. Husband received title to three additional pieces of real property, including the marital home. Finally, the court gave husband ownership of the parties' snowmobile. After deducting a \$95,000 credit card debt, the value of assets awarded to husband totaled \$1,030,146. The court granted wife three income-producing rental properties, both parties' retirement accounts, wife's salon business and equipment, and her vehicle. After deducting wife's credit card debt of \$16,000, wife's share

totaled \$421,293. To equalize the division of assets, the court ordered husband to pay wife \$305,000.

As to income, the court found that husband's income is \$7,444 a month based on an average of husband's reported income on a financial statement in a loan application and husband's reported income to the court on Form 813. The court found that wife's annual income is \$29,830 (around \$2,486 per month) based on her 2007 tax return. Given the disparity in the parties' income, that it was a long-term marriage, that wife was responsible for caring for the parties' children when they were young, and that husband has a greater earning potential and opportunity to acquire assets in the future, the court granted wife spousal maintenance of \$1000 per month until February 2024. Husband appeals.

Husband first argues that the property division is inequitable because the court overvalued the major asset awarded to him—his RV business. Husband contends that the court's valuation was an abuse of discretion because it was based on the average of the company's assets from the previous few years and therefore relied on stale data.

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). As we have repeatedly stated, 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). We have recognized the difficult task that faces the trial court in valuing a small business because the court's ability to assign a correct value is limited by the evidence presented by the parties. See Kanaan v. Kanaan, 163 Vt. 402, 407 (1995). Thus, we will affirm the court's findings of the valuation if the court's discretion was exercised within the range of presented evidence. Id.

We conclude that the court's division was equitable in this case and find no error in the valuation. At trial, three people testified concerning the value of the business—husband's tax preparer, husband's bookkeeper and current live-in girlfriend, and husband. The trial court did not find any of the witnesses' testimony particularly useful in understanding the true value of the business. The court found the tax preparer credible, but not helpful because his opinions were based solely on information received from husband. The court found that the bookkeeper was biased because of her romantic relationship with husband and neither credible nor reliable. The court also did not find husband credible on the issue of valuation. Husband testified and presented tax returns for the business that reported a loss or a small profit for the previous three years. Husband presented the company's balance sheets from the previous few years and prepared exhibits demonstrating the business's worth as determined by the value of the company's assets minus its liabilities. In addition, the court had loan applications, which also reported the net worth of the company, but at a higher amount than on the balance sheets.

Because the court did not find the testimony of husband's witnesses credible, the court explained that valuation of the business was made difficult by the absence of any credible evidence on valuation and by husband's penchant for using business funds for personal expenses. The court also found that the business's value fluctuates dramatically depending on the number of vehicles on the lot. Therefore, the court concluded that the best estimate of the business's value was the average of the net worth reported on the company's balance sheets from the previous few years and husband's prepared exhibits. Although the court's valuation "necessarily

involved approximation,” the court explained its thinking and based its valuation on credible evidence, and, therefore, “[w]e conclude the result is within the range of the evidence and is adequately explained.” Kanaan, 163 Vt. at 408. This did not, as husband asserts, improperly result in a stale valuation. Cf. Cleverly v. Cleverly, 151 Vt. 351, 354-55 (1989) (holding that it is an abuse of discretion for the trial court to rely on outdated valuations of an asset). Averaging the balance sheets accounted for the fluctuations in the value of the business due to its seasonal nature as well as the uncertainty in value of the business due to the lack of credible evidence, and it was a rational method for calculating the business’s worth. See Mills v. Mills, 167 Vt. 567, 568 (1997) (mem.) (“The court’s ability to specify a value is limited by the evidence before it, and it sometimes must use approximations.”).

In a related claim, husband contends that the court lacked any evidentiary basis to include the business bank account in the overall value of the business. According to husband, this cash account is not an asset of the business. Husband also argues that even if the cash could be included in the value of the business, the account’s current value was much lower than the average used by the court. We conclude there was no error. The trial court was not persuaded by husband’s testimony that this bank account was not an asset of the company, and we find no reason to disturb the court’s finding on this issue. In addition, the amount of money in the account fluctuated greatly. Therefore, it was reasonable, as explained above, for the court to value the asset by averaging the account’s balance.

Husband’s next argument concerns the property that husband jointly owns with his son. According to husband, he only owns half of these properties and his son’s half should not have been included in the marital estate. We conclude that the court did not err in considering the full value of these assets as marital property. The family court has “the power to include within marital assets property which has been placed in other names to avoid distribution to a spouse.” Soutiere v. Soutiere, 163 Vt. 265, 271 (1995). When assets are transferred to a third party to “avoid distribution of the property at the time of the divorce,” this Court “will not condone such actions.” Nevitt v. Nevitt, 155 Vt. 391, 400 (1990) (explaining that court may consider property in marital estate when assets are transferred to a third party to avoid distribution at the time of the divorce). Given that son did not provide any consideration for the assets and that the transfers took place so close to the time of separation, it was within the court’s discretion to conclude that the transfer was done to deprive wife of her portion of the assets. Contrary to husband’s argument, our cases have not required filing of a companion case under the fraudulent conveyance act as a prerequisite to including assets placed in a third party’s name. See id. (including property husband owned jointly with his mother in the marital estate, without any case filed under the fraudulent conveyance act).

Husband next argues that the trial court erred in assigning him responsibility for guaranteeing the student loans of the parties’ children for which at least one parent co-signed. The court found that three of the parties’ children attended college on borrowed funds and that the parents co-signed some of the loans. Wife has a poor relationship with these three children, and husband offered to assume responsibility for the loans as he will be able to work with the children to pay the loans back. The trial court concluded that “[s]ince both parties agree that the children are to pay these loans neither parent will have a deduction for the loans although [husband] will be held solely responsible if the loans are not repaid by the children.” Although husband agreed to be responsible for the loans, he now claims error. It appears that husband’s objection is that the court has made him responsible for loans without assigning the amounts of the loans as liabilities to husband. We conclude that there was no error. It is clear from the court’s order that the parties’ intent and the court’s understanding was that the children will pay

these loans, not husband. Moreover, husband offered to be the guarantor on the loans because he is more likely than wife to be able to encourage the children to take responsibility for their debts.

Next, we address husband's argument that the court erred in calculating his income from the business. The court found that husband's tax returns were not an accurate representation of husband's income because many personal expenses were paid for out of company funds. See Kanaan, 163 Vt. at 405 (trial court's findings entitled to wide deference on review because it is "in a unique position" to assess the credibility of witnesses and weigh the evidence presented). Instead, the court relied on income that husband reported to the bank on loan applications, and the court averaged this with the income husband reported on his Form 813, which he submitted to the family court. The court had limited credible evidence before it, and we conclude that the court acted well within its discretion in basing its decision on the average of the evidence that it found most reliable. See Kohut v. Kohut, 164 Vt. 40, 44 (1995) (court did not abuse its discretion in using husband's past income to predict future earnings).

Husband also challenges the court's award of maintenance to wife because he claims that the court failed to consider wife's additional income from the rental properties awarded to her, the property settlement payments, and the unreported cash wife used from her hair salon business. The family court may award maintenance if the receiving party does not have enough income, through employment or otherwise, to provide for his or her reasonable needs at the standard of living enjoyed during the marriage. 15 V.S.A. § 752(a); Kohut, 164 Vt. at 43. The family court has discretion to consider the factors set forth in § 752(b) to determine the amount and duration of the award. Kohut, 164 Vt. at 43; see 15 V.S.A. § 752(b). The party challenging the award on appeal "must show there is no reasonable basis" for it. Kohut, 164 Vt. at 43.

We conclude that there was no abuse of discretion in this case because the additional items identified by husband do not alter wife's income to such a degree as to make the maintenance award unreasonable. As to the income from the rental properties, husband reported income from all rental properties at \$186.71 per month on his Form 813. Given that wife was not awarded all of the parties' real property, her income would be less than this amount. In any event, even crediting wife this whole amount, her monthly income would still be substantially less than husband's, and its exclusion in calculating wife's income did not result in error.

In addition, there was no reason in this case for the family court to deny maintenance to wife simply because husband was required to make a payment to wife to equalize the property settlement. Although a large property settlement may be made in lieu of maintenance, this is not generally true "unless it clearly appears that the property was above and beyond that awarded as an equitable distribution of the assets of the parties." Klein v. Klein, 150 Vt. 466, 475 (1988). The payment in this case simply equalized the parties' assets; it did not give wife a proportionately larger share of the marital estate in lieu of maintenance. Furthermore, given that this was a long-term marriage during which wife acted as the primary caregiver for the parties' children, and that wife's earning capacity is much less than husband's, the family court had an ample basis to award maintenance, even given the equalization payment. See id. at 475-77.


We also reject husband's argument that the court's award of maintenance was improper because wife routinely takes cash out of her business and therefore her income is higher than that attributed to her by the trial court. This assertion is contrary to the trial court's findings. The court found that before the parties' separation wife and other family members routinely took cash from the business to pay for personal expenses, but that after separation wife discontinued this process. This finding was supported by the evidence that wife's reported income was lower in

2005 and 2006 than in 2007. The trial court found that the 2007 reported income on wife's tax return represented the most accurate figure of wife's income. This finding is based on the evidence and not clearly erroneous.

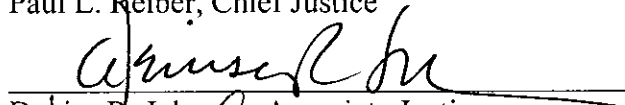
Husband's final argument is that the trial court erred in granting wife \$10,000 in attorney's fees. The trial court has discretion to award attorney's fees in a divorce action. Begins v. Begins, 168 Vt. 298, 305 (1998). "The needs of one spouse and the ability of the other to meet them are the primary consideration." Id. The trial court explained that given husband's greater income and financial flexibility, wife was entitled to an award of attorney's fees. Because the evidence supports the court's findings that husband has greater income than wife and that he has more liquidity of funds, there was no need for the court to make additional findings on the matter. See Nevitt, 155 Vt. at 399 (court did not abuse its discretion in awarding fees where need of receiving spouse was well-documented). We conclude that the court did not abuse its discretion in granting wife attorney's fees.

Affirmed.

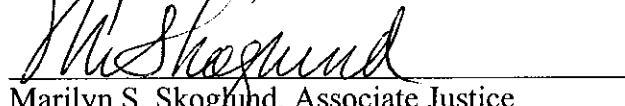
BY THE COURT:



Paul L. Reiber, Chief Justice



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice