

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-384

APRIL TERM, 2019

Caroline S. Lee v. Mark Ogilbee*	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Family Division
	}	
	}	DOCKET NO. 98-3-16 Wr dm
		Trial Judge: Elizabeth D. Mann

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

In this divorce action, father appeals a family division order following a remand from this Court regarding the division of marital property. Father argues that the court erred by (1) failing to award him half of the marital estate, (2) failing to use the value of equity in the parties' marital home as the date of the final hearing, (3) calculating the net value of the marital estate to include debts assigned to mother but not those assigned to father. We affirm.

The following background facts are recounted in this Court's prior decision, Lee v. Ogilbee, 2018 VT 96, and in the court's findings on remand. The parties were married in January 1995 and separated in December 2015. They have one child, born in 2010. Mother is a clinical therapist and father is an editor and writer. Father has suffered from alcoholism, and it has impacted the parties' marriage and his ability to parent.

Mother filed for divorce. Following a contested hearing, the court granted mother primary physical and legal parental rights and responsibilities and set up a parent-child contact schedule with alcohol-related conditions for father. The court divided the assets based on a 60/40 division in favor of mother based on its finding that mother made a greater contribution to the marriage. The court valued the parties' assets from the date of their separation. Father appealed the order as to parental rights and responsibilities, parent-child contact, and property division. This Court affirmed the family division's order regarding parent-child contact, but remanded for the family division to clarify its decisions not to split legal rights and responsibilities and regarding property division. This Court explained that the parties had a long-term marriage and that the trial court had not sufficiently explained its decision to award mother 60% of the marital estate. Therefore, we directed that the court "articulate why it awarded the spouse with the greater financial contributions and historically higher earning capacity a larger percentage of the parties' property." 2018 VT 96, ¶ 33.

On remand, the family division made additional findings and concluded that a 60/40 split of the marital estate in favor of mother was supported by its analysis of the statutory factors. The court found the following. At the beginning of the marriage, the parties lived in California, where mother had established a private practice. They moved to Vermont to allow father to accept a new

job. In making this move, mother sacrificed her career advancement. Mother was the primary wage-earner during the marriage. Father often worked part-time and was voluntarily underemployed. Sometime between 2008 and 2009 father began working as an independent contractor for Netflix. At the time of the final hearing, mother earned \$11,580 a month and father earned \$6933, plus a yearly credit of \$15,000 towards insurance costs. Although father had a flexible schedule, he did not handle a disproportionate amount of the home-related responsibilities. Father was involved in caring for the parties' child but was not the primary care provider. Mother took a few months of maternity leave after the birth of the parties' child and the child attended day care, except one day when she was with father. Although father contributed, mother maintained a disproportionate share of the responsibility for the household and care of the parties' child. Soon after the parties married, mother's parents paid off the student-loan debt of both father and mother and father's outstanding car loan. Mother on several occasions paid off father's credit card debt. Mother's income was used to support the family. The court valued most of the parties' assets as of the time of the final hearing. As to the marital home, the court took the parties' stipulated value and calculated the equity in the home based on the outstanding mortgage balance of the date of separation. The court explained that using the mortgage balance from the time of the final hearing would have unjustly benefited father by crediting to him mortgage payments made by mother during the parties' two-year separation. Following the court's order partially granting father's motion to reconsider, father appealed the property-division portion of the order.

Father first argues that the court erred in awarding him less than half of the marital estate. The family division has broad discretion to equitably divide the marital assets.¹ Molleur v. Molleur, 2012 VT 16, ¶ 15, 191 Vt. 202. 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). In reaching a decision, the court must consider the statutory factors, but is not required to specify the weight accorded to each. Molleur, 2012 VT 16, ¶ 15. These factors include: the length of the marriage, the parties' age and health, the parties' occupation, income and employability, the contribution of one spouse to the increased earning power of another, the parties' needs, liabilities and interests, the parties' opportunity for acquisition of future income or assets, the need to have the marital home awarded to the spouse with custody of minor children, the party through whom property was acquired, the contribution of each spouse to the marital estate, and the parties' merits. 15 V.S.A. § 751(b) (listing relevant factors for court to consider in dividing marital property).

The court acted within its discretion in this case. Its decision was based primarily on its assessment that several factors favored a greater distribution to mother. As set forth above, the court found that mother made sacrifices of her own career to assist father and contribute to his earning power by moving or taking different employment to benefit father. In addition, mother made a greater contribution to the marital estate, financially, as primary caregiver for the parties' child, and in maintaining the home. Finally, the court concluded that property was acquired through mother because her family paid of the parties' student loans and father's outstanding debt and mother several times paid off father's credit card debt.

Father argues that the court's assessment of the evidence was flawed and urges this Court to find that he made an equal contribution to the raising of the parties' child² and to maintaining

¹ There is no merit to father's assertion that the issue of whether he is entitled to half of the marital estate is a question of law that should be reviewed de novo.

² Father contends that the court erred in considering mother's contribution to child care in its property-division decision because this is not a statutory factor. We disagree. The statute directs the court to consider each spouse's contribution to "the acquisition, preservation, and

the household, that he was not voluntarily underemployed, and that mother did not make career sacrifices for father's benefit. 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). On appeal, this Court will not reweigh the evidence or make new determinations regarding the credibility of the witnesses. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (stating that trial court's findings entitled to wide deference on review because it is in unique position to assess the credibility of witnesses and weigh the evidence presented). The court's findings are supported and those findings in turn support the court's decision to award mother 60% of the marital estate.³

Father next contends that the court erred in valuing the parties' assets. In its initial order, the court valued the parties' assets from the date of their separation. This Court explained that "[a]bsent additional findings by the court indicating that the value of the parties' assets had not appreciably changed since separation, the date of the final hearing should have been used to value the retirement funds, equity in the marital home, and other marital property." Lee, 2018 VT 96, ¶ 28. On remand, the court valued the assets, other than the marital home, from the date of the final hearing. As to the marital home, however, the court took the stipulated fair market value of \$485,000 and subtracted the mortgage balance owed as of the date of separation. The court reasoned that it would be unfair to value the equity in the home as of the date of the final hearing when father was not entitled to the increase in equity of the property because mother made the mortgage payments during the separation period.

We conclude that the court acted within its discretion. In dividing marital property, the court must consider all property owned by the parties at the time of the final hearing, regardless of whether the property was acquired during or after the parties' separation, and value that property as close to the date of the final hearing as possible. See Golden v. Cooper-Ellis, 2007 VT 15, ¶ 10, 181 Vt. 359. The court then has broad discretion to equitably allocate the property. The court may find the date of the parties' separation relevant to its decision about distribution, especially if one party did not contribute to the other party's acquisition of assets after separation. See Russell v. Russell, 157 Vt. 295, 305 (1991) (concluding that using date of separation as numerator for coverture fraction to determine what portion of pension benefits were acquired during marriage "is most reflective of the functional end of marriage and will be a relatively easy benchmark to determine"). There must, however, be a clear explanation for the decision. Here, the court provided a sufficient explanation and acted within its discretion. The court used the parties' stipulated value of the home and calculated the equity to be split between the parties using the mortgage balance owed at the time of separation. The court reasoned that this was equitable

depreciation or appreciation in value of the respective estates, including the nonmonetary contribution of a spouse as a homemaker." 15 V.S.A. § 751(b)(11). This is broad enough for the court to consider each spouse's contribution to raising any children. See Felis v. Felis, 2013 VT 32, ¶ 28, 193 Vt. 555 (holding that court acted within its discretion in awarding mother a greater portion of marital estate for several reasons including her role as homemaker, including raising parties' children).

³ The record does not support father's contention that the court's decision was based on gender bias. The court considered appropriate factors in reaching its decision.

because the increase in equity was due to mother making consistent payments on the mortgage during the period of separation.⁴

Father also argues that the court failed to include the debts assigned to him in valuing the marital estate and therefore he received less than 40% of the marital estate. He claims that his debts were incurred during the marriage for the support and well-being of the family, including for his medical expenses, his living expenses, and materials for a tree house. The court found that at the time of the final hearing father had \$31,000 in credit card debt (a portion of which was incurred prior to the parties' separation), a \$20,000 debt for legal services, and a personal loan obligation of \$500. The court was not persuaded by father's assertion that his credit card debt was substantially related to the tree house. The court found that mother shouldered the majority of responsibility during the marriage, including the financial responsibility. The court further found that during the parties' marriage father did not contribute a significant amount to the family expenses, yet he incurred debts, which on several occasions mother paid off. In light of these findings, the court acted within its discretion in concluding that it was most equitable to assign father the debts in his name.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

⁴ The parties here stipulated to the value of the marital home. Absent such a stipulation, crediting one spouse with mortgage payments made since the time of separation to calculate equity in the home ignores other factors such as market fluctuation, which might also affect the equity as of the time of final hearing.