

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. 2020-148

DECEMBER TERM, 2020

Michelle Ross v. Stuart Robinson*	}	APPEALED FROM:
	}	
	}	Superior Court, Grand Isle Unit,
	}	Family Division
	}	
	}	DOCKET NO. 21-5-18 Gidm
		Trial Judge: Samuel Hoar, Jr.

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

Husband appeals pro se from the trial court’s final divorce order. He essentially challenges the court’s assessment of the weight of the evidence. We affirm.

The court made the following findings. Wife filed for divorce after an approximately fifteen-year marriage. Wife was sixty-nine years old at the time of the court’s order; husband was seventy-one. There are no minor children of the marriage, although at some point, husband adopted wife’s two adult sons. Wife has advanced degrees in veterinary medicine and human physiology. She retired from the U.S. Army in January 2008 after a distinguished career. Before her retirement, she was diagnosed with breast cancer. Consequently, she received a 100% disability award from the Veterans Administration in addition to her Army pension. After her retirement from the Army, wife worked for a small medical consulting firm until November 2018. Considering her age and health, the court did not expect that she would return to gainful employment. Her reasonably foreseeable income was limited to her pension, VA benefits, and Social Security.

Husband is a lawyer who spent most of his career in Maryland. He opened his own practice when the parties moved to Vermont in 2008 but his practice never generated an income. Instead, it operated perennially in the red, subsidized by a combination of wife’s income, husband’s disability payments, and an inheritance from husband’s cousin. Husband has cardiac issues that limit his ability to work. The court did not expect husband to return to gainful employment. His reasonably foreseeable income was limited to Social Security.

As indicated above, the parties moved to Vermont in 2008. They purchased a farm in Grand Isle using funds from the sale of wife’s house and husband’s office building; they also had a substantial mortgage. The farm did not generate income and the expense of upgrading the property outweighed any increase in property value. The parties did not add measurably to their retirement assets after 2008. Each brought retirement investments to the marriage and each contributed minimally but equally to those investments during the marriage.

At the time of separation, the parties' assets were the farm, their retirement accounts, several brokerage accounts totaling less than \$65,000, and various bank accounts totaling just over \$82,000. The court found that, just before the parties separated, husband unilaterally withdrew \$130,000 from the parties' joint bank accounts. This led to the separation and divorce; it also led wife to transfer a joint brokerage account into a trust to prevent further invasions. Before husband plundered the joint account, the court found that the parties' spending and investment patterns were consensual. By implicit agreement, they contributed equally, as they were able, to maintaining the household and to the minor increases in the value of the marital estate.

After the parties separated, wife ran the farm using her sole income. She later sold the farm with the court's approval. The net proceeds, valued at \$682,693, were held in escrow. The parties also received a large tax refund during the pendency of these proceedings, which was placed in wife's attorneys' trust account and used to pay maintenance to husband. The court found that since the parties separated, each had accumulated debt to support their respective households and in husband's case, to continue subsidizing his law practice. The court held the parties responsible for their own post-separation debts.

Based on wife's financial affidavit and testimony, the court found her reasonable living expenses were approximately \$7500 per month. It deemed some of wife's expenses unreasonable and decreased them accordingly. Wife had \$11,918.80 in monthly income. Husband provided no evidence from which the court could discern his reasonable living expenses. The court looked at the debt he incurred since this case began and his bank-account withdrawals, which together totaled approximately \$140,000. The court attributed a substantial portion of husband's negative financial position to his continued operation of his law practice at a substantial loss. Husband reported total losses in 2016 and 2017 of more than \$140,000, while in 2018, he lost roughly \$30,000. The court found nothing to show that husband's practice changed markedly, either on the income or expense side, in 2019. Thus, in the absence of evidence to the contrary, it found a strong inference that husband continued to experience similar losses in the nearly two years since the inception of this action. It further inferred that the \$2250 in temporary monthly maintenance that husband received, when added to husband's Social Security income, had been sufficient to meet husband's reasonable living expenses. This did not include any subsidy for husband's law practice. The court found that, once the parties separated, wife could not reasonably be expected to continue supporting that losing endeavor. Husband's law practice was not part of his reasonable living expenses.

The court found that since their separation, the parties had divided their personal property to their mutual satisfaction. Thus, there was no personal property for the court to allocate to each party.

Finally, the court found that wife had incurred more than \$75,000 in attorney's fees, not including the fees for trial. It found these fees reasonable and necessary to protect wife's reasonable interests in this case. The court explained that much of the work had been required to respond to husband's excessive and even vexatious discovery and motion practice. It determined that husband's conduct contributed significantly to the accumulation of what should otherwise have been much lower fees.

Based on these and other findings, the court evaluated the factors relevant to property division, limiting its discussion to those factors that weighed most heavily in its considerations. It determined that each party should receive approximately half of the net value of the marital estate.

The court reasoned that, during their almost fifteen-year marriage, each party contributed in their own way to the acquisition, preservation, and appreciation of assets. While wife's financial contributions were substantially greater than husband's, the court found that this appeared to have been by agreement. It found nothing in the parties' conduct or relative contributions that warranted a significant departure from a roughly equal division of assets. Both parties were reasonably healthy, with no issues that were immediately life-threatening or that otherwise suggested a need to depart from a roughly equal division of assets. The court divided the parties' bank accounts equally and credited wife with an additional \$65,000, representing her share of the money that husband had plundered from the joint bank account. It equalized the parties' investment assets. It awarded each party the retirement accounts in his or her name. It divided the proceeds of the farm sale equally. It held each party responsible for their post-separation debts.

The court next concluded that husband was entitled to a maintenance award as he lacked the resources to provide for his reasonable needs. Based on its consideration of the statutory factors, the court awarded husband \$3000 per month in permanent maintenance for nine years. The court found this award more than sufficient to allow husband to meet his demonstrated reasonable needs while also allowing wife to meet her reasonable needs. The source of these payments was wife's retirement benefits, which would continue until her death. The court found that, after maintenance terminated, husband could meet his needs through his share of the marital assets.

The court noted that both parties suggested post-trial that the court award a lump sum distribution of property in lieu of maintenance. While the court agreed this approach would be preferable, the parties submitted no evidence from which it could determine an appropriate discount rate and reduce the stream of maintenance payments to present value. It advised the parties that if they could agree upon a discount rate, they could jointly move for relief from judgment and the court would make the present value calculation.

Finally, the court awarded wife "suit money" under 15 V.S.A. § 606, concluding that equity demanded it. It found that husband had the means to contribute given his property award and it noted that, because husband had been pro se for much of the litigation, he had been spared the direct cost of his litigation conduct. Wife's costs, on the other hand, had been significantly increased due to husband's conduct. The court concluded that the parties should share the litigation costs roughly evenly and husband must contribute \$40,000 to wife's fees. Husband filed a motion for reconsideration, which the court denied. This appeal followed.

We begin with our standard of review, which disposes of many of husband's arguments on appeal. The trial court has broad discretion in dividing 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). As we have repeatedly emphasized, property distribution 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). The court also has broad discretion in determining an appropriate maintenance award. Chaker v. Chaker, 155 Vt. 20, 25 (1990).

The court's findings will stand 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). It is the exclusive role of the trial court to assess witness credibility and weigh the evidence. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (explaining 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).

Husband makes numerous arguments on appeal, many of which are overlapping, difficult to decipher, or appear to rely on evidence outside the record. With respect to the court's property division, husband complains that wife submitted an unsigned financial affidavit into evidence, apparently in connection with temporary maintenance proceedings. He acknowledges that he did not raise this objection below and suggests that we apply the doctrine of plain error. Husband characterizes the information provided in this document as "fraudulent and inaccurate." He also claims that the court erred in dividing the parties' bank accounts and erred by failing to value the parties' personal property. He provides his own view of the evidence and describes the result he would have like to have received, including using marital assets to pay his attorney's fees and cover his debts.*

We find no error. Husband waived his objection to wife's financial affidavit by failing to raise it below. See Deyo v. Kinley, 152 Vt. 196, 200 (1989) ("This Court has consistently held that where the aggrieved party fails to make a specific objection, including a clear statement of the matter to which he objects and the grounds of the objection at trial, the issue is not preserved for consideration by this Court on appeal." (quotation omitted)). Application of the plain-error doctrine is not warranted here. As we have explained, "[t]his Court considers plain error in civil cases only in limited circumstances, i.e., when an appellant raises a claim of deprivation of fundamental rights or when a liberty interest is at stake in a quasi-criminal or hybrid civil-criminal probation hearing." Follo v. Florindo, 2009 VT 11, ¶ 16, 185 Vt. 390 (citations omitted)). As in Follo, this case does not implicate either circumstance. See id. ¶¶ 15-16 (rejecting argument that Court should engage in plain-error review of claims that expert testified improperly at trial or that opposing counsel made improper statement in closing argument); cf. Varnum v. Varnum, 155 Vt. 376, 382-87 (1990) (applying plain-error review where mother claimed violations of her federal and state constitutional rights to the free exercise of religion in parental rights-and-responsibilities proceeding). We reject as baseless husband's assertion that wife committed a fraud on the court and his related contention that the court should have considered "multiple levels of fraud and deceit" in making its property award. The court did not find that wife engaged in fraud and deceit and we leave it to the trial court to evaluate the credibility of witnesses and weigh the evidence.

* Husband also challenges several pretrial rulings. He states that he would have liked more time to make changes to his finances before being served with the court's interim order and asserts that the timing of the order violated his due process rights. This argument is frivolous and we reject it. Husband also argues that his claims for arrearages in temporary maintenance were ignored. He does not cite to any motions where such requests were made. It is not clear if he is arguing that he should have been awarded more in temporary maintenance or if he is arguing that wife did not pay as ordered. As to the first argument, the court found in its decision that the temporary maintenance award had been sufficient to meet husband's needs. Husband offers no evidentiary support for his latter claim. See also Joseph v. Joseph, 2014 VT 66, ¶ 15, 197 Vt. 109 (holding that final divorce order "extinguishes the right to enforce an arrearage arising under a temporary order that has not been included in the final order or otherwise reduced to judgment").

We find no error in the court's decision to proceed with the final hearing and decline to rule on husband's numerous motions, particularly in light of the almost two years it took to bring this case to trial and the trial court's finding that husband engaged in vexatious motion practice, causing wife to incur excessive attorney's fees. Husband offers no substantive challenge to the court's attorney's fee award, moreover, beyond labeling the fees "excessive." The court found the fees reasonable and we find no basis to disturb its decision.

Husband also complains that the court failed to expressly assess the value of the personal property retained by each party and credit him for what he appears to claim was a lopsided division in wife's favor. He cites to his own exhibit in support of this assertion. The court found that the parties agreed to the distribution of personal property including vehicles, artwork, and other items. Wife testified to this effect and further stated that husband kept most of the personal property; husband appears to concede that the division of these assets was by agreement. Husband fails to show that the way in which the court divided the marital assets, including bank accounts and personal property as agreed to by the parties, resulted in an award that was inequitable or that significantly deviated from the court's intent to award each party roughly half of the marital estate. The court acted within its discretion in concluding that wife was entitled to recoup half of the amount that husband initially plundered from the bank account, notwithstanding the fact that he replaced some of these funds. Wife testified that she had written checks against this account to pay for household expenses and that the small amount husband returned was of little assistance; she had to scramble to find money to cover the checks. The court could reasonably conclude that awarding wife half of the originally plundered sum was fair under all of the circumstances, including the urgent steps wife had to take following husband's action, the fact that wife had to continue to pay interest on the large home equity loan that was the source of these funds, and the fact that wife continued to pay the bills for the marital home during the separation period, which accrued to husband's benefit when the property was sold. As stated above, property distribution is not an exact science and, therefore, all that is required is that the distribution be equitable. Lalumiere, 149 Vt. at 471. The court's award was equitable here.

We thus turn to husband's arguments concerning maintenance. Husband argues that the court should have modified its maintenance award, apparently right after issuing it. He makes various allegations about wife's health, which are at odds with the court's findings and which do not appear to be based on evidence in the record. He refers to a 2007 doctor appointment that he allegedly attended with wife and claims the information he obtained at this appointment represented "new health developments" that warranted modification of the maintenance award and the way in which such money is paid. Husband asserts that maintenance should have been awarded as a lump sum payment considering wife's health. Husband further claims that a lump sum award was appropriate because wife failed to account for use of the disability payments received during the marriage and other funds. He asserts that he needs more money each month to meet his needs. He again argues that the court should not have credited wife's financial affidavit.

The 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 civil marriage." 15 V.S.A. § 752(a); Chaker, 155 Vt. at 25. The maintenance must be in the amount and for the duration the court deems just, based on the consideration of various nonexclusive factors. See 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.

In this case, husband simply wars with the court's exercise of its discretion. The court considered the statutory factors and provided reasonable grounds for its decision. With respect to wife's health, it found that wife appeared to be in reasonable health and her health issues were not immediately life-threatening. Wife's testimony supports these findings. The court explained why it did not award maintenance in a lump sum. It specifically informed the parties that if they could agree on an appropriate discount rate, it would make the requested calculation. No such request was submitted. As to the disability funds, the court found that wife ran the household and wife

testified that the portion of the disability funds that she received from husband were used for household expenses. We are unpersuaded by husband's assertion that the use of his disability funds during the marriage somehow renders the court's maintenance award unreasonable. Husband's claim that he needs more money and his challenges to wife's financial affidavit go to the court's assessment of the weight of the evidence. While husband may disagree with the court's conclusions, he fails to demonstrate any error. See, e.g., Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.) (explaining that arguments which amount to nothing more than a disagreement with court's reasoning and conclusion do not make out a case for an abuse of discretion). We find no basis to disturb the court's maintenance award.

Finally, husband argues that the court erred in denying his motion to alter and amend. He presents his view of the evidence and appears to assert that the court should have credited his position. As previously stated, we leave it to the trial court to weigh the evidence and assess the credibility of witnesses and we do not reweigh the evidence on appeal.

We have considered all of the arguments discernable in husband's brief and consider them all without merit.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice