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. 2019-181

NOVEMBER TERM, 2019

Kelly A. Hurlbut* v. Timothy Hurlbut**	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	
	}	DOCKET NO. 102-4-17 Frdm
		Trial Judge: Thomas Carlson

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

Wife appeals and husband cross appeals the family court's division of property in its final divorce order. We affirm.

The family court made the following findings in its decision. The parties met in Montreal in 1990 and were married in April 1994. They lived together in St. Albans, except for a year-long separation in 2012, until their final separation in April 2017. They have a daughter together and jointly raised wife's son from a prior relationship. Daughter and son are now adults.

Wife is fifty-two years old and is a citizen of both the United States and Canada. She had a kidney removed in 2005 due to cancer. Since 2006, she has suffered from autoimmune conditions including fibromyalgia, weakness, pain, anemia, and risk of blood clots. She indicated at trial that she wished to continue residing in Vermont to be close to her medical team in Burlington. Despite her illness, wife worked until 2012 or 2013 as a school behavioral intervention specialist. She held that position for about ten years. Her hourly wage was modest but the job provided health insurance for the family. Wife previously worked at various retail, office, and manufacturing jobs. Her highest annual earnings totaled approximately $19,000. Wife has a high school education. The court found that wife did not show that she was completely unable to work and imputed income to her of $15,000 per year.

Husband is sixty-six years old. He has Ménière's disease, which is triggered by stress and causes extreme dizziness, headaches, and vomiting if he does not immediately rest. It also causes hearing problems. Husband also had prostate cancer in the past. Husband is an attorney and has a successful law practice in St. Albans. In 2016 he earned $433,000, and in 2018 he earned $300,000.

Three weeks before they married, the parties signed a premarital agreement in husband's law office. The parties disputed how long they discussed the agreement before it was signed. The agreement stated that it "has been a precondition to marriage since the first discussion thereof."

The agreement stated that husband had supported wife during the three-and-a-half years prior to their marriage, that husband's assets were substantially greater than wife's, and that he had a much greater earning capacity. The agreement provided that in the event of divorce, the parties would be entitled to retain marital assets equivalent to the value of their respective premarital assets. Of the remaining marital estate, wife would receive one-third and husband would receive two-thirds. The agreement stated that neither party would be entitled to maintenance, but if a court decided to award maintenance, the value of that award would be deducted from the property award of the party receiving maintenance. The agreement stated that "[b]oth parties agree and acknowledge the respective party presently owns and come into the marriage with the property delineated in Exhibit A." However, no Exhibit A was attached.

Husband arranged for wife to meet with another attorney to review the agreement on the day it was signed. Wife met with the attorney for about an hour. The attorney expressed concerns about the fairness of the agreement if the marriage was to last for a long time. The attorney also encouraged wife to understand what husband's current assets were because there was no Exhibit A attached to the agreement. After meeting with the attorney, wife signed the agreement along with husband. Next to the reference to Exhibit A, husband wrote: "Exhibit A is not presently attached. The assets owned and value thereof is left to the proof of the parties if it ever becomes an issue." Both parties initialed this addition.

Applying the test set forth in Bassler v. Bassler, 156 Vt. 353, 361-62 (1991), the court concluded that the premarital agreement governed the division of the parties' property but that the maintenance provisions were not enforceable. The court found that the parties had reasonably disclosed their assets prior to signing the agreement, wife entered into the agreement freely and voluntarily, and the agreement's division of property was not unfair to wife. It therefore awarded wife $924,156, which represented one-third of the marital estate after the value of husband's premarital assets was deducted. The court found that enforcement of the provisions regarding maintenance would be unconscionable due to the length of the marriage, wife's illness, and the disparity between the parties' incomes and earning capacities. It accordingly awarded wife an additional $130,000 in property in lieu of maintenance. In total, wife received $1,055,818, or 31.5% of the marital estate. Wife appealed and husband cross appealed.

We review the family court's decisions regarding property division and maintenance for abuse of discretion. Gravel v. Gravel, 2009 VT 77, ¶¶ 16, 23, 186 Vt. 250. "A disparate property division is not 'facially inequitable,' and will not be reversed as long as the family court makes adequate findings that are supported by the evidence." MacCormack v. MacCormack, 2015 VT 64, ¶ 17, 199 Vt. 233 (quoting Wade v. Wade, 2005 VT 72, ¶ 20, 178 Vt. 189). "On appeal of factual findings, the evidence must be viewed in the light most favorable to the prevailing party, and only if a finding is clearly erroneous will it be overturned." Narwid v. Narwid, 160 Vt. 636, 636 (1993).

We first address wife's claim that the court should not have enforced the premarital agreement's provisions governing property division. In Bassler, we held that a premarital agreement is enforceable when each spouse has made a fair disclosure of finances, the agreement was entered into voluntarily, and the substantive provisions of the agreement are fair to each spouse. 156 Vt. at 361. An otherwise valid agreement may not be enforced if it "would leave a spouse a public charge or close to it, or . . . provide a standard of living far below that which was enjoyed both before and during the marriage." Id. at 362 (quotation omitted).

Wife first argues that the court erred in finding that there was a fair disclosure of finances prior to the agreement because husband did not provide wife with a list of his assets. Contrary to

wife's argument, "fair disclosure" does not necessarily mean that a spouse must provide a comprehensive financial statement of income and assets with exact dollar amounts. See In re Estate of Thies, 903 P.2d 186, 190 (Mont. 1995) (affirming district court's determination that there was fair disclosure where evidence showed wife knew husband had residence, two cars, personal belongings, and retirement account); In re Lopata's Estate, 641 P.2d 952, 955 (Colo. 1982) ("Fair disclosure is not synonymous with detailed disclosure such as a financial statement of net worth and income."); see also Friezo v. Friezo, 914 A.2d 533, 549 (Conn. 2007) (collecting cases from numerous jurisdictions interpreting "fair and reasonable" standard to "not require financial disclosure to be exact or precise"). The court found that wife knew that husband owned his law practice, vehicles, a home in St. Albans, a camp on Butler Island in Lake Champlain, and some land in Smugglers Notch. It found that wife did not know the actual value of these assets but knew that they had significant value. This evidence was sufficient to support the court's finding that husband provided wife with sufficient information concerning his net worth prior to the agreement. As the court noted, wife did not claim that the exact value of the assets would have made a difference to her or that husband concealed any assets.

Wife also argues that she did not enter the agreement voluntarily because she did not know the actual value of husband's assets at the time of execution. As discussed above, the court found that wife understood that husband had substantial assets and that their precise value was not material to her at the time she signed the agreement. The court also found, based on wife's testimony, that she freely signed the agreement despite the attorney's warnings about the fairness of the agreement because she loved husband and wanted to get married. The court's findings are supported by evidence in the record.

Wife further claims that the court erred in finding that the substantive terms of the agreement concerning property division were not unfair to wife. The court analyzed the statutory factors for property division and concluded that if there had not been a premarital agreement, it would have awarded husband the value of his premarital assets and split the remainder of the marital estate approximately equally, giving wife approximately $1.33 million, or forty percent of the overall estate. Under the agreement, wife would receive $924,156 in property division (not considering any deduction from the property division under the agreement for any spousal maintenance awarded to wife). The court found that this amount was not unconscionable, particularly since it did not include spousal maintenance. We agree. The agreement will not leave wife a public charge or anywhere close to it. Instead, wife will receive nearly $1 million in assets. The income and interest from these assets, together with some earned income, should provide wife with a relatively comfortable standard of living that will not be so far below what she enjoyed during the marriage as to render the agreement unconscionable. See Stalb v. Stalb, 168 Vt. 235, 243 (1998) (holding that antenuptial agreement that left wife with almost $500,000 in assets did not place wife "in such a disadvantageous position that we can say that enforcement of the antenuptial agreement is unconscionable"). We therefore affirm the court's conclusion that the agreement was enforceable as to the property division.

Finally, wife argues that the family court abused its discretion by awarding her only $130,000 of property in lieu of maintenance. The court explained its reasoning for doing so in detail. First, to determine whether the waiver of maintenance in the agreement was enforceable, the court analyzed whether wife would be entitled to maintenance under the statute, and if so, how much. It found that wife was entitled to maintenance and that an appropriate award would be $2500 to $3000 per month for ten years. The court concluded that "the agreement with respect to maintenance is simply too far removed from any semblance of fairness contemplated by the maintenance statute" and concluded that the maintenance portion of the agreement was void as against public policy.

Instead, the court awarded property in lieu of maintenance worth $130,000. The court acknowledged that $130,000 was significantly less than a present valuation of ten years of maintenance at $2500 to $3000 per month, but stated that the discount reflected the value of having the lump sum immediately and the possibility that maintenance could terminate due to death or be modified for other reasons. It stated that the amount was "not precise figuring" but was intended to allow husband to retain his law practice and real estate, as he had requested, while giving income-producing assets to wife and minimizing the possibility of future disputes about the parties' incomes and assets.

The court had discretion to award property in lieu of maintenance, Cabot v. Cabot, 166 Vt. 485, 500-01 (1997), and we will only overturn its decision if there is no reasonable basis to support it. See Jenike v. Jenike, 2004 VT 83, ¶ 8, 177 Vt. 502 ("On appeal, the party claiming error in a property and maintenance award must show that no reasonable basis exists to support the award."). The court's explanation for its decision was reasonable. As the court implicitly recognized, there was a significant possibility that an order of maintenance could be subject to modification or termination in the relatively near future, because husband was at retirement age, had health issues of his own, and planned to sell half of his business. Providing property in lieu of maintenance would eliminate the need for future proceedings and give wife the benefit of having cash in hand. These were reasonable considerations and we therefore affirm the award.

We turn to husband's cross appeal. Husband first argues that the court's valuation of his law practice at $750,000 was too high and artificially inflated the value of the assets awarded to him. He claims the court should have accepted his valuation of $410,000. Husband's valuation was derived from a proposed buyout agreement between husband and his younger law partner. The agreement contemplated that at some point in the future, the partner would purchase the real estate portion of the business from husband. The purchase price would be calculated based on the earnings from the real estate portion of the practice and did not account for the corporate, probate, and estate planning portions, which husband planned to retain. The court found the price formula did not accurately reflect the value of husband's law practice as a whole because the real estate business only accounted for half of the gross income of the practice and the formula did not factor in the value of free office space and equipment to which husband was entitled under the agreement.

Wife offered a valuation prepared by a certified public accountant who specializes in business valuations. The accountant valued the business at $793,000 in December 2017 and $758,000 in December 2018. The accountant's valuation was based on all of the practice income. The court noted that the valuation formula in husband's buy-out agreement resulted in a similar value as that determined by the accountant if the total law office income were considered. The court therefore concluded that husband's practice, including all portions of the business and the value of office equipment, was worth $750,000.

Husband argues that the court should have used his proffered valuation because the executed contract between him and his law partner was the best evidence of the value of the firm. The best method for valuing a closely held business "will necessarily depend on particular facts and circumstances," Goodrich v. Goodrich, 158 Vt. 587, 590 (1992), and the court may choose a value that is "within the range of evidence presented." Mansfield v. Mansfield, 167 Vt. 606, 608 (1998) (mem.). Here, the court was presented with competing valuations and explained its reasoning for choosing the higher amount. Its findings are supported by the record and we therefore will not disturb its decision.

Husband further argues that the court erred in treating his law practice as both a marital asset and a source of income in determining whether maintenance was required. This argument

lacks merit. Vermont law permits a marital asset to be viewed as a source of income for purposes of determining the amount of maintenance. See Mayville v. Mayville, 2010 VT 94, ¶ 10, 189 Vt. 1 ("Consistent with the statutory language, we have routinely held that in determining the amount of maintenance, the family court can consider the income available to the obligor from assets distributed as part of the property award."). We have rejected the argument that this constitutes impermissible "double dipping." Id. ¶¶ 12-13. Accordingly, it was not error for the court to consider the income in assessing the need for and amount of maintenance.

We also reject husband's claim that the court should have removed the law practice from consideration as a marital asset and instead ordered that if husband sold the practice, he had to pay wife half of the proceeds. The family court acted within its broad discretion in finding a current value for the law practice and dividing the estate accordingly. See Mansfield, 167 Vt. at 608 (explaining that family court has wide discretion in distributing marital property in divorce).

Finally, husband claims that the court erred by failing to give him credit for approximately $130,000 he paid to wife in temporary spousal maintenance while the divorce was pending. The asserted basis for husband's request for this credit below was the premarital agreement's provision that required any award of maintenance to be deducted from the property award. The court held that provision to be unenforceable as a matter of public policy, a decision that husband does not challenge on appeal. Husband cites no other authority requiring the court to deduct the temporary maintenance he paid from wife's share of the final property division. We therefore decline to disturb the decision on this basis. Husband also argues that the court did not give him credit for $35,000 in cash advances paid to wife in its final property division. This argument is without merit. The decision makes clear that the court took the advances into account when it calculated the parties' respective property awards.[*]

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Karen R. Carroll, Associate Justice

[*] The parties have filed a Stipulated Motion for Partial Lifting of Stay to enable them each to receive $25,000 from their joint Edward Jones account. The motion is granted.