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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-437

OCTOBER TERM, 2017

Jordan L. Many Fox King	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
v.	}	Family Division
	}	
	}	
Eric C. King	}	DOCKET NO. 327-10-14 Frdm
		Trial Judge: Thomas Z. Carlson

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

Wife appeals the family court's final divorce order, which awarded the parties' major asset—the marital home—to husband. We affirm.

The parties married in May 2010 and separated in October 2014. At the time of the final hearing in August 2016, wife was thirty-one and husband was thirty-four. The parties have one child together. Wife also has two children from a prior marriage, one of whom is autistic. Both wife and husband graduated high school. Wife is working toward an associate's degree in criminal justice. She worked for INS prior to the marriage, but left that employment after the parties married to care for the children. She is licensed as a personal trainer. Husband has an associate's degree. Approximately one year into the marriage, husband was laid off from his long-term employment at a pharmaceutical company. He was unemployed for a period of time, and eventually found work at a local manufacturer, where he earns $40,000 to $50,000 per year.

The primary marital asset was the parties' home, which they constructed just down the road from husband's parents' home in Swanton. The parties stipulated that the home was worth $402,400. Husband, who is an avid woodworker, acted as general contractor for the construction of the home. Husband's parents loaned the parties $30,000 to start construction of the home while the sale of their first home was pending. The parties repaid approximately $20,000 of this amount. Construction of the home was further funded by $110,000 withdrawn from husband's 401(k) account and approximately $200,000 from husband's parents. The family court found that the latter amount represented a loan, not a gift.

The home remains unfinished. In February 2015, after wife filed for divorce, the parties took out a $48,000 home equity loan for the stated purpose of finishing the home. Wife used most of the loan proceeds for other purposes.

Other than the home, the marital estate also included $18,613 in funds remaining from the home equity loan; $26,262 remaining in husband's 401(k) account; $629 in stock from husband's employer; $1411 in retirement savings accrued by husband during the marriage; husband's Toyota Camry, valued at $7882; approximately $4000 in fitness equipment; $1500 in lawn maintenance

equipment; several thousand dollars' worth of woodworking tools; and jewelry, electronics, stored construction materials, appliances, and furniture of "disputed but significant" value. Mother's late-model SUV was not included in the estate, apparently because it was leased for her by her current boyfriend. The court found that the parties had significant marital debt, including the amount owed to husband's parents for the construction of the house; the $48,000 home equity loan; $18,000 in credit card debt on cards used by husband; and a student loan of $9500 taken out by wife after the parties separated.

The court awarded the marital home to husband. It found that approximately $110,000 of the parties' equity in the home originally came from husband's 401(k) account, which he earned prior to the marriage. The court found no reason to award any of the funds from the 401(k) account to wife in light of the parties' short marriage and wife's unilateral depletion of the home equity loan proceeds. It also noted that the home was located close to husband's parents, with whom wife did not have a good relationship, and might have to be sold to repay the loan they made to the parties.

The court also assigned to husband the remaining amount in his 401(k), his retirement savings, and stock; his car; the lawn maintenance equipment, appliances, and stored construction materials; his tools; and his credit card debt. It awarded wife the remaining proceeds of the home equity loan, her jewelry, and her fitness equipment. It ordered the parties to divide the furniture and electronics by agreement. The court stated that its award "should not be construed as attempting to equalize the parties' respective shares of the property or to award marital property in any particular percentage allocation." The court also denied wife's request for spousal maintenance.

Wife subsequently moved for a new trial, alleging that she had just learned that husband consulted a member of the trial judge's former law firm about the divorce while the judge was still in practice. She argued the trial judge was therefore disqualified from the case. The motion was referred to the chief superior judge, who denied it after a hearing. See V.R.C.P. 40(e)(3) (stating that motion for disqualification of judge may be referred to Administrative Judge for Trial Courts, or chief superior judge). This appeal followed.

Section 751 of Title 15 requires the court to equitably divide and assign marital property, and sets forth twelve factors which the court may consider in doing so. The family court has broad discretion in considering these factors and fashioning its award. Semprebon v. Semprebon, 157 Vt. 209, 215 (1991). The family court "is not required to specifically address each factor, as long as findings are made that respond to the factors and the court makes clear the basis of its decisions." Hanson-Metayer v. Hanson-Metayer, 2013 VT 29, ¶ 52, 193 Vt. 490. The court's property settlement will stand unless it is demonstrated that the court's "discretion was abused, withheld, or exercised on grounds clearly untenable or to an extent clearly unreasonable." Victor v. Victor, 142 Vt. 126, 130 (1982).

Wife contends that the court failed to consider the statutory factors in 15 V.S.A. § 751. She argues that the court did not mention that she left her employment in order to care for husband and his uncontrolled diabetes; was physically abused by husband; was the primary caregiver for the parties' child as well as her older children; was responsible for work performed on the house at no charge by her ex-husband and brother; had a lower earning capacity than husband; was still working to finish her degree; and would have extra expenses in finding new housing for herself and three children.

We find no merit to these arguments. The court referred to § 751 at the beginning of its discussion and proceeded to consider each of the statutory factors, often using the statutory language. It was not required to cite the specific numbered subsection to which it was referring after each sentence, as the context was obvious. The court expressly considered wife's role as primary caregiver, her educational status, and her earning capacity, and found that these factors did not weigh in favor of either party. It recognized that wife's ex-husband and brother aided in the construction of the marital home, but did not find that these contributions weighed in favor of wife. The court addressed wife's immediate financial needs by deferring transfer of possession of the home for four months and awarding her the remaining cash from the home equity loan.

The court also considered the merits of the parties and found that this factor did not weigh in favor of either party. It specifically noted that wife "endured a lot during the years of [husband's] struggles with diabetes." The court was not required to list all of the allegations of wrongdoing made by either side in its decision. The record supports its general assessment of this factor, including wife's testimony regarding alleged physical abuse by husband, which was less conclusive than wife argues on appeal. For instance, wife testified that husband's abusive behavior was associated with his diabetic seizures. The court acted within its discretion in affording little weight to these factors.

Next, wife takes issue with the court's determination that the funds the parties received from husband's parents were intended as a loan, rather than a gift, thus reducing the marital equity in the house. The court relied on a number of factors in reaching this conclusion. It noted that the first $30,000 the parties received from husband's parents was undisputedly a loan, as evidenced by a receipt that wife drafted when the parties repaid $20,000 of that amount. Husband's parents then took out a loan of $191,000 secured by their own home to help fund construction of the parties' new house. Husband's mother kept a careful ledger of withdrawals for the construction project, which totaled about $245,000, plus interest payments of $11,500, although the court noted that this amount appeared to include other amounts paid for the parties' benefit. Husband's parents prepared a formal loan document for the parties to sign, but wife refused. Wife acknowledged that husband's parents never told her that the money was a gift. She also filed a financial affidavit in October 2014 stating that the home was encumbered by "mortgages/liens/attachments" worth $200,000.

Wife does not challenge these findings. Instead, she contends that the court should have given greater weight to conflicting evidence, including, among other things, the lack of a note or mortgage and husband's failure to list his parents' interest in the house on his financial affidavits. She argues that this case is like Paine v. Buffa, 2014 VT 10, ¶ 22, 195 Vt. 596, in which we upheld the trial court's determination that funds provided by the wife's wealthy parents for construction of the parties' home were a gift rather than a loan. There, as here, no formal note or mortgage was executed. The parents in that case also did not demand repayment until after the divorce was filed. Id. In this case, however, the court found other indicia associated with a loan, including: the parties had already received and partially repaid one loan from husband's parents; husband's parents attempted to formalize the second loan prior to the parties' separation; wife had listed the home as being encumbered by mortgage or loan obligations of $200,000 in her initial financial affidavits; and husband's mother kept careful track of individual withdrawals and interest paid. Further, husband's parents obtained the funds by taking out a mortgage on their own home, suggesting that they were in no position to make a gift of that size, as husband's mother testified. "We have consistently held that when the evidence is conflicting the credibility of the witnesses, the weight of the evidence, and its persuasive effect are questions for the trier of fact, and its determination must stand if supported by credible evidence." Putnam v. Putnam, 166 Vt. 108, 117 (1996)

(quotation and alterations omitted). The court's determination that the funds were intended to be a loan was supported by the record.

Wife also argues that the trial court failed to attribute any value to whole categories of items, including jewelry, tools, appliances, and stored construction materials. "The court's ability to value property is limited by the evidence put on by the parties and the credibility of that evidence." Gazo v. Gazo, 166 Vt. 434, 446 (1997). The little evidence presented regarding the value of these items was vague and mostly uncorroborated. The court acted within its discretion by declining to assign a specific numerical value to them.

We recognize that husband received approximately 87% of the marital estate.[1] Although this seems "facially disproportionate," the court carefully explained its decision. See Wade v. Wade, 2005 VT 72, ¶¶ 17-18, 178 Vt. 189 (affirming property settlement that awarded 90% of marital assets to wife, where wife provided all marital assets and supported family, and husband chose to earn little income). It relied most heavily on factor (10), "the party through whom the property was acquired," and factor (11), the contribution of each spouse to the acquisition, preservation, and depreciation of marital assets. 15 V.S.A. § 751. The court found that most of the marital assets came through husband, either because he acquired them before marriage or obtained them using the loans from his parents. Husband was the sole earner during the marriage and paid the family bills. The court noted that awarding the home to wife in order for the children to keep living there would be self-defeating because wife would likely have to sell the home anyway to repay the loan to husband's parents. Wife had also depleted marital assets by spending the home equity loan proceeds on discretionary items instead of finishing the house. The court was in the best position to judge the merits of the parties' arguments, and it clearly explained its reasoning. We therefore see no reason to disturb the decision below.

Finally, wife argues that the chief superior judge improperly denied her post-decision request for recusal and a new trial. We review the denial of a recusal motion for abuse of discretion. Chandler v. State, 2016 VT 62, ¶ 17, 202 Vt. 226.

The chief superior judge made the following findings after an evidentiary hearing. Prior to his appointment to the bench, the trial judge worked at a law firm. While the judge was still employed there, husband contacted another attorney at the firm to discuss potential representation in the divorce. The attorney met with husband for an hour and then referred him to his current attorney. Husband was charged a fee for the consultation with the first attorney, but there was no evidence that she took any action on his behalf or gave him any advice, other than the referral. There was also no evidence that the trial judge was aware of the consultation at any time before wife filed her motion for a new trial. The chief superior judge ruled that the minimal contact between husband and the first attorney did not support a conclusion that she served as a lawyer in the parties' divorce. The chief superior judge further ruled that even if the first attorney were to be considered as having served as husband's lawyer, the fact that the trial judge was once professionally associated with her did not raise any question about the judge's impartiality where there was no evidence that the judge knew of the contact.

[*] The table on page seven of the family court's decision is somewhat misleading, because it purports to divide the assets roughly equally. This would be the case if the $110,000 equity in the home, originally derived from husband's 401(k), were a loan, which it plainly was not. The text of the decision makes clear that the court intended to credit this amount to husband, resulting in a much greater disparity between the parties.

We see no abuse of discretion here. Canon 3(E)(1) of the Code of Judicial Conduct provides that a judge shall disqualify himself when "the judge's impartiality might reasonably be questioned," such as where "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter." The record supports the administrative judge's conclusion that wife failed to show that the judge's former associate "served . . . as a lawyer" in the divorce. Husband was at most a prospective client of that attorney, who did no work on his behalf in the case. Disqualification was not required under these circumstances.

The situation here is distinguishable from the case relied upon by wife, Velardo v. Ovitt. In Velardo, we held that the failure of an assistant judge who sat on a child custody case to disclose that the guardian ad litem representing the child was her sister and recuse herself from the case required reversal. 2007 VT 69, ¶ 29, 182 Vt. 180. Unlike Velardo, where the judge never ruled on the motion for recusal, the chief superior judge in this case denied wife's motion, and acted within his discretion in doing so. Id. ¶ 13. Velardo is also inapplicable because here, wife has failed to demonstrate that the trial judge had any actual knowledge of the contact between husband and the judge's former associate. A judge whose recusal is sought is entitled to a presumption of "honesty and integrity," and the moving party has the burden of showing otherwise. Klein v. Klein, 153 Vt. 551, 554 (1990). Wife failed to meet this burden. We therefore affirm the denial of wife's motion for disqualification.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice