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. 2017-441

JULY TERM, 2018

Mollie Gray* v. Elliot Gray	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 660-9-16 Cndm
		Trial Judge: Kirstin K. Schoonover

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

Wife appeals a final divorce order issued by the superior court, family division. She challenges aspects of the court's property award, its rejection of her request for spousal maintenance, and its parent-child contact order. We reverse the court's decision not to award any spousal maintenance and remand the matter for the court to make further findings on, and reconsider, wife's maintenance request; in all other respects, we uphold the court's order.

The parties, who are both in their mid-forties and in good health, met in college and moved to Vermont in 1995, at which time wife was earning approximately $40,000 a year working as a general manager for a telephone equipment and supply company. Husband's work history has primarily been with Morgan Stanley, initially as a stockbroker, but later in a staff support role. The parties lived for four or five years in a condominium that wife bought in 1999. They married in 2003, at which point an inheritance that father had received from his grandfather in 1991 was worth $1 million. They have three children, born in July 2004, August 2006, and March 2013, respectively. Wife stayed home as the primary caregiver for the children, while father worked at Morgan Stanley, where he was earning approximately $50,000 at the time of the parties' divorce. In 2008, the parties moved into the marital home, which was sold after they separated in September 2016. Funds from the sale were placed in escrow pending resolution of the parties' divorce.

By the time the parties separated, they had spent husband's inheritance on a lifestyle that included private schools for their children and private club activities. In August 2009, husband discussed with wife their quickly declining funds, which had been reduced in part by the economic downturn at that time. By the fall of 2014, the parties' unsustainable lifestyle was unraveling. Within the next year, the parties sought financial help from their parents. The two sets of parents met with the parties in December 2015. Husband's parents wanted the parties to reduce their spending in various ways, including sending the children to public instead of private schools and moving into a more modest residence. Wife's parents wanted husband to find a better paying job so that the parties did not have to radically change their lifestyle. In the end, the two sets of parents agreed to each give the parties $2000 a month while husband looked for a higher paying job. The marriage began to fall apart in February 2016 when husband was not able to find more lucrative work. In the spring of 2016, both sets of parents stopped giving the parties $2000 per month. In

September 2016, wife moved to St. Louis, Missouri with the children to be closer to her parents. That same month, she filed for divorce. With money that they had placed in a trust, wife's parents bought a house for mother and the children to reside in and a car for her to use. They also paid for private schools for the children.

In November 2016, following a contested hearing, the family division granted wife's request for temporary legal and physical rights and responsibilities and approved her taking the children with her to St. Louis. A final divorce hearing was held over two days in June 2017. In its September 21, 2017 final divorce order, the family court: (1) granted wife sole legal and physical rights and responsibilities; (2) established a parent-child-contact schedule that, among other things, gave father three consecutive weeks with the children in Vermont in July; (3) evenly divided between the parties a real estate tax prebate as well as the money held in escrow from the sale of the family residence and a tax withholding refund, totaling approximately $207,000, less deductions to repay certain expenses; (4) divided husband's Morgan Stanley 401K totaling approximately $70,000 and his Morgan Stanley Defined Benefit pension evenly by QDROs; and (5) denied wife's request for spousal maintenance.

Wife appeals, raising several issues. In particular, she challenges the trial court's failure to treat husband's former interest in a family property as marital property, its refusal to treat several promissory notes wife executed in favor of her parents as marital debt, its denial of her request for spousal maintenance, and its parent-child contact order.

1. The Brookside Property

Wife argues that the family court erred by not making findings on the value of what she claims is the parties' largest asset—a summer camp called Brookside—and not awarding her any interest in that property. Husband's parents bought Brookside in 1969 before husband was born. As husband and his brother grew older, the parents gradually transferred ownership of Brookside to their sons to keep the property in the family. By 2008, husband and his brother each owned a fifty percent interest in Brookside as tenants in common. The court found that the parents continued to provide money to help their sons pay the bills for the property, but that the sons incurred some of the expenses. In January 2016, husband's family decided that husband and his brother would both transfer their interests in Brookside back to the parents. The transfer was completed in April 2016.

According to wife, Brookside was a marital asset, there was uncontroverted evidence that husband's one-half interest in the property was worth $271,865, and the court erred in failing to make any findings as to its value and in failing to account for the property in its property division. In wife's view, the court's expressed intent to evenly divide the marital property was negated by its failure to value Brookside. Wife relies on decisions in which this Court has held that when a party to a divorce fraudulently transfers property to a third person without consideration in order to remove the property from the marital estate and insulate it from claims by the other spouse, the property may be treated as part of the marital estate. She contends that husband's transfer of his interest in this case was such a fraudulent transfer, and contends that the bases cited by the court in support of its decision not to award her any interest in Brookside do not support that decision.

The trial court's conclusion that husband's transfer of his interest in the property to his parents did not amount to a fraudulent transfer is supported by its findings, which are in turn supported by the evidence. The family division distinguished the cases involving fraudulent transfers and property division upon divorce, explicitly finding that that is not what occurred in this case. The court found that: (1) husband conveyed his interest in Brookside back to his parents

before the parties contemplated filing for divorce; (2) the decision of husband's family to transfer Brookside back to the parents was made months before husband knew of wife's intention to file for divorce; (3) the decision was initiated by husband's parents to ensure that the parties' dire financial situation did not create a risk of losing the property in bankruptcy and to improve the chances husband's brother would receive financial aid for his son to attend college; (4) the property was initially transferred into husband's and his brother's names for estate planning purposes, with the parents remaining essentially in control of the property; and (5) the transfer of the property back to the parents was not done to reduce wife's share in the marital estate.[1]

Wife argues, however, that the reasons expressed by the family court do not support its decision not to award her either an interest in Brookside or an equivalent offset in other marital assets. According to wife, the court erroneously concluded that husband transferred Brookside back to his parents before the parties contemplated filing for divorce and that there was no indication the parties ever contributed toward the maintenance of Brookside. Further, wife argues that the court abused its discretion by implicitly authorizing a transfer of property aimed at defrauding creditors with respect to a potential bankruptcy. In wife's view, given the circumstances of this case, the court abused its discretion by not awarding her an interest in Brookside or an equivalent offset of other marital assets.

We disagree. There was testimony that husband's parents continued to pay most of the bills for maintaining Brookside even after the property was transferred to their sons. There was also testimony that the husband's family began talking about transferring Brookside back to the parents as early as January 2016, many months before the parties' separated, due to concerns about husband's finances and his brother's need to obtain financial aid for a child going to college. In contrast to the cases relied upon by wife, in this case the family court found that the transfer of Brookside back to the parents was not an attempt to deprive wife of part of the marital estate. Compare Nevitt v. Nevitt, 155 Vt. 391, 399-400 (1990) (affirming family court's decision to set aside agreement which court found husband forced upon wife one month before he filed for divorce to prevent her from obtaining interest in marital homestead), and Clayton v. Clayton, 153 Vt. 138, 142-43 (1989) (affirming family court's disregard of agreement aimed at depriving wife of marital assets), with Kasser v. Kasser, 2006 VT 2, ¶ 18, 179 Vt. 259 (upholding family court's finding that husband's contributions to children's trusts prior to divorce were bona fide and not done with purpose to deplete marital estate).

Husband's parents purchased Brookside before husband's birth and have continuously been involved in maintaining and/or financing the maintenance of the property. The transfer to

[1] Although the family division clearly concluded that husband's conveyance of the property back to his parents was not a fraudulent transfer, some confusion arises from its decision because immediately following its analysis on this point, the court wrote, "Accordingly, the Court does find that Father's transferred interest in Brookside is a marital asset, and does not award the Mother any interest in it." We surmise that the absence of a "not" in this sentence is a clerical error, as the finding that the interest in Brookside now titled to father's parents "is a marital asset" makes no sense in light of the preceding discussion culminating in the court's conclusion that father's transfer of his interest to his parents was not a fraudulent transfer. But our resolution of this issue does not depend on this assumption. Even if the court considered Brookside to be technically part of the marital estate notwithstanding its finding of a bona fide transfer of the property back to the parents before the parties separated, the court's expressed intent to divide the marital property evenly clearly did not include Brookside; its decision was clear that wife was not entitled to any interest in the property or adjustment in her share of the property division to account for the property, and it provided a sufficient rationale to support this determination.

their sons took place over time, beginning before the parties married and for no consideration, as part of the parents' estate planning. The family court found that the property was transferred back to the parents due to concerns about the sons' finances, and not to deprive wife of a portion of the marital estate. See Putnam v. Putnam, 166 Vt. 108, 117 (1996) (stating that, when evidence is conflicting, trial court determines credibility of witnesses and persuasive effect of evidence, and that trial court's determination will stand if supported by credible evidence). Under these circumstances, we find no error in the court's decision not to award wife an interest in Brookside or an equivalent offset in the martial estate.

2. Wife's Promissory Notes to Her Parents

Next, wife argues that the family court abused its discretion by refusing to credit as marital debt three promissory notes concerning monies she allegedly owes to her parents for supporting her and the children during an extended period before and after the parties' separation. The three notes, one of which was unsigned, total $339,000. The notes are mainly for expenses related to wife's move to St. Louis. The costs include, among other things, airfare, establishing a new residence, tuition for the children's private schooling, rent for the home the parents purchased for wife's use, and car payments for the car they gave her. The family court did not find it reasonable to treat the promissory notes as marital debt that husband was obligated to help pay. The court noted that wife had established in St. Louis an unsustainable lifestyle beyond the parties' means. Finding that wife's parents voluntarily supported this otherwise unsustainable lifestyle, the court treated the expenses covered by the promissory notes as gifts rather than loans. Wife argues that this was error, given the facts that she executed promissory notes to repay the money, that she listed the notes on her financial affidavit, that both she and her father testified as to the validity of the notes, and that husband failed to offer testimony or evidence disputing their validity. She further argues that the court erred in finding that she was the beneficiary of a trust holding title to the house and vehicle she received from her parents, when the only testimony was that the house was purchased by a trust in father's name.

The first two promissory notes admitted during the first day of the final divorce hearing were signed the day before the hearing. The third note admitted on the second day of the hearing was unsigned. The notes appear to require repayment for a list of all of wife's parents' expenses during the previous three years associated with wife and the parties' children, including the $2000 per month that wife's parents paid to the parties before the parties separated. Yet, there was no indication that wife's parents ever discussed with husband that the $2000 monthly payments would be considered loans to be repaid. Nor was there any evidence that wife's parents had ever obtained repayment of any of the monies provided or set up a repayment schedule for the monies to be repaid. Cf. Paine v. Buffa, 2014 VT 10, ¶ 22, 195 Vt. 596 (concluding that family court acted within its discretion in treating marital home as marital property unencumbered by monies provided by mother's parents for purchase of land and construction of home, where "there was none of the ordinary indicia associated with a typical loan and mother's parents never demanded repayment until the divorce was set for a contested trial"); Nuse v. Nuse, 158 Vt. 637, 638 (1991) (mem.) (concluding that family court acted within its discretion in refusing to subtract alleged debt to appellant's mother from value of appellant's home, where it found that money provided was gift rather than loan). Tellingly, when asked, wife was unable to state how much she was paying in rent and car payments she claimed were owed to her parents. In short, the court acted within its discretion in declining to count as marital debt promissory notes that appeared to be generated solely for the divorce hearing and that did not reflect a true expectation that wife would actually be required to satisfy them.

3. Spousal Maintenance

Wife argues that the family court abused its discretion by refusing to award her spousal maintenance, even if only in a nominal amount. According to wife, none of the reasons given by the court in support of its decision to deny spousal maintenance justify that decision.

The family court "may" order either rehabilitative or permanent maintenance to a spouse who lacks sufficient income or property to provide for his or her reasonable needs and is either unable to support himself or herself through appropriate employment at the standard of living established during the marriage or is a custodian of a child of the parties. 15 V.S.A. § 752(a). Any maintenance order must be in an amount and for a period of time as the court deems just, considering all relevant factors, including the financial resources of the requesting party, the party's ability to meet his or her needs independently, the extent to which a child support order contains a sum for the custodial spouse as custodian, the standard of living established during the marriage, the age and health of each spouse, the length of the marriage, and the statutory spousal maintenance guidelines range. Id. § 752(b). As we have explained, "spousal maintenance is intended to correct the vast inequality of income resulting from the divorce, and to equalize the standard of living of the parties for an appropriate period of time." Strauss v. Strauss, 160 Vt. 335, 338 (1993) (citations omitted). Spousal maintenance not only serves to reduce the financial impact of a divorce, but it may also serve to compensate a homemaking spouse who lost future earning capacity while increasing that of the working spouse. Delozier v. Delozier, 161 Vt. 377, 382 (1994). By contrast, the purpose of rehabilitative maintenance "is to assist the recipient-spouse in becoming self-supporting." Strauss, 160 Vt. At 339.

Here, in denying wife's request for spousal maintenance, the family court first noted that the parties, having spent husband's inheritance during their marriage, will not be able to continue the standard of living established during the marriage based on their own earning capacities. See Cabot v. Cabot, 166 Vt. 485, 500 (1997) ("Although the [family] court must consider the standard of living established during the marriage, we cannot conclude that the Legislature intended courts to ignore economic reality in these situations."). The court then stated that although it could not consider wife's parents' considerable resources, it could consider the benefits wife derives from the parents' trust, which includes the residence and vehicle made available to wife.[2] Cf. Collins v. Collins, 2017 VT 70, ¶ 32, __ Vt. __ (concluding that although family court was correct to exclude from the marital estate trust assets that included husband's parents' residence, where husband was living, it could consider, when dividing marital property, trust benefits derived by husband). The court noted that husband was couch-surfing at the time of the final hearing and would need to find suitable housing for himself and the children when they visit. The court concluded that ordering spousal maintenance would impoverish husband and force him to live at a significantly lower standard of living than that enjoyed by wife.

Wife argues that the parties are not on equal footing, with husband earning $50,000 per year while she acts as the custodial parent for the parties' three minor children while earning $12.50 an hour working part-time for her brother. She contends that spousal maintenance is appropriate because she lacks sufficient income or assets to provide for her reasonable needs. She challenges the court's finding that husband would be impoverished by a spousal maintenance award, noting his family's acknowledgment that he could live at Brookside. She emphasizes that any gifts from her parents cannot be considered a legal obligation that diminishes husband's responsibility to pay spousal maintenance in appropriate circumstances, which she asserts exist

[2] The court made no finding that wife was the actual beneficiary of any trust, but did find that wife was benefitting from this trust established by her father.

here. See Ely v. Ely, 139 Vt. 238, 239-40 (1981) ("[T]he prospect of a gift, absent some legal obligation to make it, is neither a resource of the donee nor a factor diminishing a spouse's duty of support."). She further argues that compensatory maintenance is appropriate in this case because she worked as a traditional homemaker throughout the borderline long-term marriage. Husband responds that the family court's denial of a spousal maintenance award under the circumstances here—where wife was living in luxury compared to his circumstances—was well within its discretion. See Golden v. Cooper-Ellis, 2007 VT 15, ¶ 47, 181 Vt. 359 ("The family court has considerable discretion in ruling on maintenance, and the party seeking to overturn a maintenance award must show there is no reasonable basis to support the award to succeed on appeal.").

In its brief discussion of wife's request for maintenance, the family court, after noting that neither party will be able to maintain the standard of living established during the marriage, cites the benefits wife was receiving from her parents and compares her living situation to that of husband's. That assessment is insufficient for this Court to make an informed review of the family court's decision denying a maintenance award in these circumstances. As noted above, § 752(a) allows a maintenance award if the requesting spouse lacks sufficient income or property to meet their reasonable needs and either is unable meet through appropriate employment the standard of living established during the marriage or is the custodian of a child of the parties. Any maintenance award must be in an amount and for a duration that the court finds to be just, given all relevant factors, including the statutory factors set forth therein. 33 V.S.A. § 752(b).

Here, the court neither discussed the threshold criteria, which appear to be satisfied, nor the statutory factors listed in § 752(b). Rather, as noted, the court relied primarily on the facts that wife's needs were being met by her parents and that any maintenance award would impoverish husband. Regarding the former fact, the court could consider benefits wife was deriving from her parents, but it also had to consider other relevant factors, including wife's ability to meet her reasonable needs independently and husband's ability to meet his own reasonable needs while also meeting those of wife. The court found that husband was making $50,000 per year and that wife, the custodial parent of the parties' three children, planned to start a part time job earning $12.50 an hour. But there are no findings or discussion of the parties' reasonable expenses with respect husband's ability to pay maintenance. Thus, there is no support for the court's conclusion that a maintenance award would impoverish husband. Moreover, insofar as the court's denial of spousal maintenance was based on the fact that wife is currently the beneficiary of her parents' largesse, the court made no findings to support its denial of even nominal spousal maintenance in light of the fact that wife's parents are under no legal obligation to continue to support her and could accordingly stop doing so. Nor did the court conduct a guidelines calculation as one of its considerations. In short, we decline to affirm the court's decision not to award wife maintenance based solely on its finding that wife's reasonable needs were being met at the time by her parents and its unsupported conclusion that any maintenance award would impoverish husband. Accordingly, we remand the matter for the court to consider the appropriate factors and re-examine wife's request for maintenance.[3]

4. Parent-Child Contact

Finally, wife argues that the family court abused its discretion by ordering summertime parent-child contact that she claims suited husband's preferences rather than the children's best

[3] Following the family court's decision, the parties stipulated to husband paying wife child support in the amount of approximately $1000 per month pending a child support order. As of the date of this entry order, a final child support hearing has not been held.

interests. The court adopted husband's request that he have the children for three consecutive weeks in July, beginning, in alternating years, the first or second week of that month. Wife advocated for two weeks in Vermont immediately after the end of the St. Louis school year in early June followed by a third week in St. Louis. She contended that father's schedule would disrupt the children's summer activities in St. Louis. The court concluded that it would be in the children's best interests to have three consecutive unstructured weeks with husband in Vermont. Each party provided reasons for their respective preferences—wife wanting to be able to structure summer activities for the children in St. Louis—and husband wanting to have the children in Vermont for unstructured time after Vermont schools let out and the water was warmer. The court acted well within its discretion in giving husband parent-child contact during three consecutive weeks of unstructured time in July in Vermont.

The superior court's decision not to award wife maintenance is reversed and the matter is remanded for the court to make additional findings and reconsider whether to award maintenance; in all other respects, the court's September 21, 2017 order is affirmed.

BY THE COURT:

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
Karen R. Carroll, Associate Justice