

*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. 2019-365

JUNE TERM, 2020

Barbara Thrasher v. John Finity*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 766-12-18 Cndm
		Trial Judge: Thomas Carlson

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

Husband appeals the final divorce order entered by the family division of the superior court. He argues that the court abused its discretion by declining to award him spousal maintenance and awarding wife a greater share of the marital property. We affirm.

The following facts are not in dispute. At the time of the final hearing in September 2019, husband was sixty-six years old and wife was sixty-three years old. They were married for fourteen years. They met in 1998 and lived together in wife's home in Virginia for four years before marrying in 2005. Both wife and husband had adult children from a prior marriage; they did not have any children together. In 2012, the couple moved to Vermont. They separated in September 2018 after wife discovered that husband had been seeing another woman. Husband subsequently moved to Florida with his girlfriend.

When the parties married in 2005, wife was working full time for AOL as an executive assistant. Wife now works as an executive assistant for a technology company. During the marriage, her annual income ranged from \$72,000 to \$113,000, generally increasing over time. The court found that wife was justifiably worried about her job security due to recent layoffs by her employer, a European company with a substantially higher pay scale than Vermont employers. Wife will be entitled to Social Security income of \$2567 per month at age sixty-six and a half.

Husband worked as an information technology (IT) systems administrator and earned between \$61,000 and \$93,000 per year until 2012, when the parties moved to Vermont from Virginia. From then on, his annual income ranged from \$24,000 to \$73,000 due to periods of unemployment and the lower wages available in Vermont. At the time of the final hearing, he was unemployed. He received Social Security income of \$2256 per month and was eligible for pension income of \$215 per month. Husband expressed concern that due to his age and uneven employment record, he would have difficulty finding IT work. Husband had a modest side business installing countertops and had worked in the past for Home Depot, although there was no evidence of his income from these activities. The court imputed income of \$30,000 to husband based on his earnings while he lived in Vermont and his combination of experience and skills.

Wife brought substantial assets into the marriage, including home equity of \$140,000, a 401(k) account worth \$46,000, some stock options acquired through work, and a collection of antiques and furniture. Husband had a 401(k) account worth \$16,000 and owed a significant amount for back taxes. In 2010, wife inherited \$98,000 in cash and a Vanguard retirement account worth \$44,000 from her mother. Wife placed \$57,000 of the cash in her savings account. The rest went into the parties' joint account and was used for shared expenses. At some point during the marriage, husband received a \$33,000 lump sum from a former employer, which he used to purchase a \$16,000 motorcycle and to fund his retirement account.

In 2012, the parties purchased a home in Williston using \$154,000 in proceeds from the sale of wife's former home, an additional \$102,000 from wife's savings account, and a joint mortgage loan of \$134,000. The home is now worth \$420,500 and the mortgage balance is \$116,000, leaving the parties with \$304,500 in equity. The home appreciated in value by approximately \$30,000 during the marriage. Similarly, the parties' previous home in Virginia, which wife had owned prior to the marriage, increased in value by \$35,000 during the period when they lived there as a married couple.

The parties accumulated \$332,000 in additional retirement assets during the marriage for a total of \$394,000. Wife held an additional \$31,000 in the account she inherited from her mother. The Fidelity retirement account in husband's name was funded almost entirely by wife as an income tax management tool.

The court found that wife was very careful with money. Husband was not, as evidenced by his income tax liabilities at the time of marriage, his continuous spending even during periods of unemployment, and purchases he hid from wife such as a sailboat. Wife tried to protect herself by filing separate income tax returns for the first several years of the marriage, keeping her Virginia home in her name until it was sold, and maintaining a separate bank account in addition to the parties' joint account.

After considering the statutory factors in 15 V.S.A. § 751, the court awarded each party the retirement assets in his or her name. It awarded wife the marital home, including the mortgage liability, and directed her to pay husband \$32,500 in cash, which represented half of the appreciation in value of the Virginia and Vermont homes during the marriage. In sum, wife was awarded approximately 72% of the marital assets. The court denied husband's request for spousal maintenance of \$2000 per month. The court also awarded wife the personal property in her possession, except for certain furniture and tools it awarded to husband. This appeal followed.

Husband first argues that the court erred in denying his request for spousal maintenance. The court may order either rehabilitative or long-term maintenance payments if it finds that the spouse seeking maintenance "lacks sufficient income or property, or both, including property apportioned in accordance with section 751 of this title, to provide for his or her reasonable needs" and "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)(1)-(2). Rehabilitative maintenance, which husband seeks, "assists the recipient spouse in becoming self-supporting." Gulian v. Gulian, 173 Vt. 157, 163 (2001). The family court has broad discretion in deciding whether to award maintenance, Weaver v. Weaver, 173 Vt. 512, 514 (2001) (mem.), and we will affirm its decision unless no reasonable basis exists to support it, Jenike v. Jenike, 2004 VT 83, ¶ 8, 177 Vt. 502 (mem.). "The court's factual findings will stand unless, viewing the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, there is no credible evidence to support them." Sochin v. Sochin, 2004 VT 85, ¶ 10, 177 Vt. 540 (mem.).

Husband claims that the court left him to survive on an annual income that is less than half of wife's and that prevents him from enjoying the standard of living he had during the marriage. However, the court found that the parties' lifestyle was focused primarily on saving for retirement and keeping a nice home. It noted that husband would retain significant retirement assets as well as his Social Security and pension income under the court's property division, and husband was able to earn an additional \$30,000 per year to supplement his retirement benefits, giving him a comfortable income by any standard. Meanwhile, husband had presented virtually no credible evidence of his current expenses. The court concluded that under these circumstances, husband had not proven that he was not currently self-sufficient or was unable to support himself at the standard of living enjoyed during the marriage. Rather, it appeared that husband clearly could support himself if he chose to work.

The court's findings are not clearly erroneous. Beyond the disparity in the parties' incomes, husband provided almost no credible evidence to support his claim that he was currently unable to provide for his reasonable needs consistent with the standard of living of the marriage. Husband testified at the time the parties separated, he received half of the funds in their joint checking account, or approximately \$33,000. Since then, he had lived for periods with his son, daughter, and girlfriend, respectively. He did not indicate what, if anything, he paid to these individuals for living expenses. He submitted an unsigned, unsworn financial affidavit that reported no income from wages or Social Security, yet inexplicably claimed income tax withholding obligations of \$4500 per month. The affidavit also listed household, vehicle, and insurance expenses of \$1708 per month and personal expenses of \$1025, including \$500 in charitable contributions. It indicated that husband shared expenses but did not explain who he shared them with. On cross-examination, husband admitted that he was actually receiving Social Security benefits of \$2256 per month and was eligible for a monthly pension of \$215 that he had yet to apply for. He admitted that he could get a job if he chose. He also stated that he still had \$4000 from the parties' joint checking account and had been paying his living expenses by doing remodeling projects for his girlfriend, who did not expect him "to contribute to anything." The vague and conflicting information husband provided about his current expenses and living situation was insufficient to establish that husband was not self-supporting.

Husband also failed to show that with the property award, his retirement benefits, and imputed income, he would be unable to maintain the relatively modest lifestyle he enjoyed during the marriage. The parties saved a significant portion of their income in retirement accounts. At the time of separation, they had no credit card debt and held \$66,000 in cash. Other than husband's purchase of a motorcycle, to which wife agreed, and his secret purchase of a sailboat, to which she did not agree, there was little evidence that the parties engaged in lavish discretionary spending or had expensive habits. Although husband argues on appeal that the award left him without sufficient funds to purchase his own home or use for savings or recreation, husband's financial affidavit indicated that he had no credit card debt and nearly \$15,000 in savings, continued to contribute \$200 per month to his retirement account, and spent \$500 per month on charitable contributions. Given this conflicting information, the court's finding that husband had failed to prove that he was unable to support himself at the standard of living enjoyed during the marriage was not clearly erroneous. The court accordingly acted within its discretion in denying his request for maintenance. See Sochin, 2004 VT 85, ¶ 11 (affirming denial of maintenance to ex-wife where record supported findings that wife was able to meet reasonable needs and support herself at standard of living established during marriage).

We disagree with husband's claim that the court unfairly expected him to immediately begin earning additional income. First, the court's finding that husband was capable of earning modest wages to supplement his retirement income was not clearly erroneous. The record showed

that husband was in good health and had earned well over \$30,000 per year during the marriage, except for 2015, when husband's income was \$24,000. Husband had a variety of skills and experience that would permit him to start earning a decent income relatively quickly. He conceded that he could work and claimed to be actively looking for work around the country. This evidence supports the court's imputation of income to husband. Furthermore, the court did not, as husband incorrectly asserts, expect husband to begin earning the imputed income immediately. The court acknowledged that it could take some time for husband to find employment but found that its cash award would be sufficient to bridge any financial gap experienced by husband before he began earning income. Given the lack of information in the record regarding husband's current expenses, this finding was not clearly erroneous.

Because we conclude that the court acted within its discretion in determining that maintenance was not appropriate under § 752(a), we do not address husband's arguments regarding the factors set forth in 15 V.S.A. § 752(b), which govern the amount and duration of a maintenance award.

Husband next argues that the court abused its discretion in awarding wife the larger share of the marital property. The family court is required by statute to divide and assign marital property "equitably" and may consider various statutory factors in making its decision. 15 V.S.A. § 751(a)-(b). "Equitably" does not mean "equally," however. See Casavant v. Allen, 2016 VT 89, ¶ 15, 202 Vt. 606. "The family 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." Kasser v. Kasser, 2006 VT 2, ¶ 30, 179 Vt. 259. "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.

Husband contends that the court's decision to award each party the retirement accounts in his or her name was inequitable because it ignored husband's testimony that wife instructed him not to fully fund his retirement accounts, so they had less money in them than they should have. The court was free to decline to credit this testimony, which conflicted with wife's testimony that the parties had agreed that each would fund his or her own retirement account according to his or her appetite for risk, as well as evidence that wife funded the entirety of one of husband's accounts. See Kasser, 2006 VT 2, ¶ 19 ("We defer to the family court's findings because that court is in a unique position to assess the credibility of witnesses and weigh the persuasiveness of the evidence."). Furthermore, the court's award resulted in husband receiving approximately half of the total retirement savings accumulated by the parties during the marriage. We fail to see how this is inequitable.

Husband also claims that the court erred in awarding wife the marital home while requiring her to pay him only half of the appreciation in the value of the parties' marital homes during the marriage. He argues that the award failed to account for the length of the marriage, the lack of a maintenance award for husband where wife earns more than him, husband's expenses as a result of divorce, his lack of a residence, his contributions to household expenses and maintenance, and the improvements he made. Husband's argument lacks merit because the court's decision indicates that it considered these factors. See Wade v. Wade, 2005 VT 72, ¶ 23, 178 Vt. 189 (affirming decision awarding 90% of marital property to wife where court explained in detail reasons for disproportionate division).

The major factor relied upon by the court was "[t]he party through whom the property was acquired." 15 V.S.A. § 751(b)(10). It found that most of the marital assets were brought into the

marriage by wife in the form of funds she acquired prior to marriage, the inheritance she received during the marriage, and her income. Approximately \$256,000 of the parties' \$304,500 in home equity derived directly from wife's separate assets. The court found that although the marriage was moderately long, husband had little to do with the acquisition or preservation of marital assets and did not make some other uncompensated contribution such as raising the parties' children. It further noted that husband was not "left in the lurch" by wife, as husband was the one who left the parties' relationship.

The court found that the other statutory factors did not weigh in favor of either party. See *id.* § 751(b)(1)-(12). It found that the marriage did not involve the type of financial partnership present in many marriages. The parties kept their assets largely separate, except for the marital home in Vermont and a joint bank account to which wife contributed the greater share. The court found that wife currently had a significant income advantage, but the future of that job was in doubt. Husband and wife were each entitled to receive approximately \$30,000 in Social Security income and were capable of earning a similar amount in wages. The court also found that neither party contributed to the other's earning power. Instead, husband's continued spending through periods of unemployment reduced the parties' accumulation of assets over time.

In addition, husband's behavior prior to and during the divorce proceeding clearly informed the court's decision. See *id.* § 751(b)(12) (stating court may consider "merits" of parties in dividing marital property). The court found that husband had engaged in an affair and was undisciplined in his spending, even during periods of unemployment. After the parties separated, husband installed listening devices in the marital home, apparently hoping to gather information. The court further found that husband was dilatory in responding to reasonable discovery requests, requiring a motion to compel and court orders.

The above findings are supported by the record and are sufficient to support the court's conclusion that wife should receive the greater share of the marital estate. See *Wade*, 2005 VT 72, ¶ 23. Contrary to husband's assertion in his brief, the court's decision shows that it was aware of husband's contributions to the marital home. It recognized that husband periodically contributed to the joint account from which household expenses were paid and that he had installed bookshelves and countertops in the Williston home. However, the court had discretion to give greater weight to the factors that favored wife and to conclude that wife was entitled to receive the marital home, while awarding husband half of the appreciation in the home's value (as well as half the increase in the value of the Virginia home that accrued during the marriage). See *Casavant*, 2016 VT 89, ¶ 17 (holding family court did not abuse discretion in assigning greater weight to factors favoring wife and awarding her larger share of marital estate); *Jakab v. Jakab*, 163 Vt. 575, 585 (1995) ("The court need not specify the weight given to each factor, but is required only to provide a clear statement as to what was decided and why.").

Finally, husband argues that the court's award of personal property must be reversed because it failed to adequately explain its decision. At trial, wife submitted an annotated list of personal property that was divided into items she wished to keep and items "to be divided by the parties." Next to each item to be divided, wife indicated what she would be willing to give to husband and why. In a post-trial memorandum, husband stated that he did not want any of the items that wife indicated she wanted to keep, and asked the court to assign each party "half of the value of the personal property not otherwise designated." He did not provide an estimate of the value of any items, however. Husband later submitted an addendum listing specific items he wished to be awarded. The court assigned wife the items in her possession that she indicated she wished to keep. Of the items "to be divided," it assigned husband a brown leather chair, kitchen table and chairs, Craftsman tool storage chest, tools, a pressure washer, garage storage cabinets

and workbench, and—as agreed to by wife—a selection of tables, chairs, lamps, linens, kitchenware, and other miscellaneous items. The only item husband requested that the court did not award to him was a riding lawnmower, which wife indicated she wanted so she could maintain the large lawn surrounding the marital home. The court stated that its personal property award was based on the list provided by wife and husband’s post-trial memoranda. This was an adequate explanation in the context of the record and we see no reason to disturb it. See Molleur v. Molleur, 2012 VT 16, ¶ 15, 191 Vt. 202 (approving property division where “the court, both directly and indirectly, explained the basis of its decision and why it was equitable”).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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William D. Cohen, Associate Justice