

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-276

SEPTEMBER TERM, 2004

Dawn Keith	}	APPEALED FROM:
	}	
	}	Windsor Family Court
	}	
v.	}	
	}	DOCKET NO. 305-8-01 Wrdmd
Bradford Keith	}	
	}	Trial Judge: Amy Marie Davenport
	}	
	}	

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

Husband appeals from the family court= s final divorce order. He argues that the court abused its discretion in dividing the marital estate. We affirm.

Husband and wife were married in 1984. They have two minor children. At the time of their divorce, wife was forty-eight, and husband was forty-five. During most of the marriage, husband worked in the insurance business; wife was a homemaker. In 1997, the parties moved to Vermont, where husband continued to work in the insurance business. In 1997 or 1998, husband entered into a business partnership with one of wife= s friends, Sophie Jones. The partnership, called Maple Leaf Partners, purchased two properties in Norwich, Vermont B two lots on New Boston Road, and 96.5 acres on Kerwin Hill Road. Ms. Jones provided \$895,000 for the purchase of the properties; husband= s role was to develop, subdivide and sell the lots. Ms. Jones withdrew from the partnership in 2000, and her investment was converted into mortgages on the properties. Ms. Jones held a \$330,000 mortgage on the New Boston Road lots, and a \$400,000 mortgage on the Kerwin Hill property; she retained the right to foreclose on the properties if the mortgages were not paid by July 31, 2003. Between June 2001 and December 2002, both lots on the New Boston Road were sold. After paying off Ms. Jones= mortgage, husband received \$15,298 for one of the lots, and \$61,000 for the second lot.

In 2001, wife filed for divorce. After a trial, at which husband appeared pro se, the court issued its final divorce order. The court found that the parties had the following marital assets: the Kerwin Hill property, which the court valued at \$450,000, with a net equity of \$50,000; a tractor worth \$15,000; a dump truck worth \$10,000; a snowmobile worth \$2,000; a Jeep worth \$6,000; \$20,000 in escrow funds; \$9,527 in a retirement fund; and \$366 in bank and investment accounts. The court rejected husband= s assertion that the assets held by Maple Leaf Partners were not marital assets. As the court explained, although Maple Leaf Partners had initially been a valid partnership, it ceased to be a partnership when Ms. Jones withdrew. The court found that husband had sold one of the lots on New Boston Road while divorce proceedings were pending. Husband did not notify wife of this sale, nor did he obtain her permission, or provide her with any portion of the money that he had received. Overall, the court found that husband had received \$74,000 from the Maple Leaf entity since he separated from wife. The court determined that \$40,000 of this amount was fair compensation for his labor since June 2001 (\$20,000 per year). The court attributed the remaining \$34,000 to profit and return on the investment of marital funds. The court found that wife was entitled to an equal share of the profits from all the properties.

The court divided the marital assets as follows. Husband received the tractor, dump truck, and snowmobile, worth a total of \$27,000; he also received the \$366 in his bank accounts, half of the escrow fund, and half of the retirement fund.

Thus, he received \$42,129 in marital assets. Wife received her Jeep, as well as half of the escrow fund, and half of the retirement fund, for a total value of \$20,763. The court found that wife was entitled to an additional \$34,000 as her share of the Maple Leaf profits and an additional \$10,500 to equalize the personal property distribution. It therefore awarded her the Kerwin Hill property, with an estimated equity of \$50,000. The court noted, however, that it appeared unlikely that wife would realize this amount after paying off the mortgage and after the expenses for the realtor and closing costs were deducted.

In reaching its conclusion, the court rejected wife's proposal that husband retain responsibility for selling the Kerwin Hill properties by placing them on the market through a realtor, and then equally dividing the proceeds. The court expressed concern that this approach would only result in more litigation. The court explained that husband was still looking for ways to try to get more money out of the properties even though the date of foreclosure was imminent. It explained that leaving husband in charge of selling the property, when there was little probability that he would receive any proceeds from the sale, was not a workable solution. The court stated that if husband were in agreement with the proposal, it would view the situation differently, however, it was apparent from husband's proposal that he did not agree.

The court also made findings as to the parties' debts. It found that the parties jointly owed wife's brother \$7,800, and thus, each party should assume half of this debt. Wife's brother had also given husband \$50,000 to pursue day trading on the internet. The court rejected husband's assertion that this debt should be shared based on his assertion that he had used the money to pay household bills, and Maple Leaf expenses. Instead, the court credited wife's testimony that, although she knew about the e-trading account, she did not know that husband was withdrawing funds from the account to pay for Maple Leaf expenses or household bills. The court concluded that the e-trading account was a separate business deal between husband and her brother, and husband should be solely accountable for this obligation should wife's brother seek repayment. The court also held husband responsible for Maple Leaf's debts, with one small exception. Pursuant to wife's request, the court awarded her permanent spousal maintenance of \$1 per year. Husband appealed.

Husband argues that the court abused its discretion in ascertaining the value of the Kerwin Hill property, and awarding this asset solely to wife. He maintains that the evidence does not support the court's finding as to the property's value. Moreover, he asserts that the parties had agreed that he would sell the property, and he was entitled to rely on a statement by the court that this proposal appeared fair. According to husband, based on the court's statement, he justifiably believed that he did not need to introduce any evidence as to the property's value because its value would be determined by the market price. Husband also argues that the court made mathematical errors in its distribution.

The trial court is authorized to equitably divide and assign marital property, and it may consider various statutory factors in making its decision. Cabot v. Cabot, 166 Vt. 485, 500 (1997); 15 V.S.A. ' 751. The court has broad discretion in considering these factors and we will uphold its decision unless its discretion was abused, withheld, or exercised on clearly untenable grounds. Semprebon v. Semprebon, 157 Vt. 209, 215 (1991). We have noted that the distribution of property 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). On review, we will uphold the family court's findings of fact 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, 157 Vt. at 214. The party claiming an abuse of discretion bears the burden of showing that the trial court failed to carry out its duties. Field v. Field, 139 Vt. 242, 244 (1981).

We find no abuse of discretion in the trial court's valuation and distribution of the marital estate. First, the court's finding as to the value of the Kerwin Hill property is supported by the evidence. See Kanaan v. Kanaan, 163 Vt. 402, 407 (1995) (observing that family court's ability to find a proper valuation is limited by the evidence put on by the parties and the credibility of that evidence). Although wife's expert, a certified appraiser, did not conduct a formal appraisal of the property, he testified that based on his inspection of the land, his review of the limited access to the property, and his thirteen years of experience, the fair market value of the parcel was between \$386,000 and \$482,500, with an average value of \$435,000. The expert testified that he arrived at the same result using a per-lot value. Husband testified that the property had been purchased for \$350,000, and he had invested an additional \$60,000 in the property since its purchase, mainly in litigation toward improving access. This testimony offers additional support for the valuation offered by wife's expert. Husband points to a magistrate's finding in an interim child support order

estimating the value of the property at \$600,000. Husband did not present any evidence to this effect at trial, nor does he assert that this finding was in any way binding on the family court. Thus, the family court's finding as to the property's value is supported by the evidence.

We find no merit in husband's argument that he was entitled to assume that the property's value would be determined by its sale, and therefore, he did not need to present any evidence on this issue. Although the court informed husband that wife's proposed distribution of the marital assets appeared fair, it cautioned both parties that it had not yet heard husband's testimony, and its view might change. Indeed, during husband's cross-examination of wife's expert, the court informed husband that the only relevant issue was the proper value to be attributed to the property, and his questions should therefore focus on this inquiry. Husband, not the family court, is responsible for his decision not to present evidence as to the property's value.

We also reject husband's argument that the court abused its discretion by rejecting the parties' agreement as to the sale of the Kerwin Hill property. The trial court found that no such agreement existed. It appears that wife wanted to put the Kerwin Hill property on the market, and sell it through a real estate agency at its fair market value. Wife proposed that husband use his best efforts to sell the land as soon as possible. Wife asked for fifty-percent of the net proceeds of the sale, after payment of the mortgage, with an additional \$18,500 paid to her from husband's share of the proceeds to equalize the distribution of assets. Husband proposed that he sell the property, and that the proceeds from the sale be used to pay off the \$57,800 debt to wife's brother, with any remaining money split evenly. At trial, however, husband stated that he did not agree that all of the Kerwin Hill land should be put on the market, and stated his intention to continue improving the property before selling it. The evidence undermines husband's assertion that the parties had reached an agreement as to the disposition of this asset. Thus, the cases on which husband relies are inapposite. See, e.g., Boisclair v. Boisclair, 2004 VT 43, & 5, 15 Vt. L. Wk. 158 (mem.) (A Pretrial agreements are contracts, and as such they are presumed to be fair, formal, and binding.@ ); Damone v. Damone, 172 Vt. 504, 511 (2001) (A A pretrial agreement to distribute property is a contract, which the court can set aside only for grounds sufficient to set aside a contract.@ ) (quotations omitted); Plante v. Plante, 148 Vt. 234, 236 (1987) (although no formal stipulation as to custody arrangement was entered into the record, it was clear from record that parties had reached an agreement and, more importantly, family court was aware of this agreement; under these circumstances, court needed to notify parties of its rejection of their agreement so that they could make a meaningful evidentiary presentation on custody issue). We find no abuse of discretion in the court's treatment of this asset.

We turn next to the court's findings regarding the distribution of the marital estate. Husband argues that the court erroneously found that wife was entitled to \$34,000 as her share of the Maple Leaf profit. He states that he did not make any profit from Maple Leaf because he was obligated to repay wife's brother. Additionally, husband asserts that the court should have subtracted the parties' joint debt before determining the level of disparity in the personal property distribution.

First, as noted above, the court held husband responsible for repaying the \$50,000 debt to wife's brother. The court based its finding on wife's testimony, which it found credible. The court explained that, to the extent that husband had misused funds loaned by wife's brother to pay Maple Leaf expenses, he should be solely responsible for repaying this debt. 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. See Cabot, 166 Vt. at 497 (citing Kanaan, 163 Vt. at 405). Husband's contention that the money he received from Maple Leaf should be used to repay this debt is without merit.

We also reject husband's assertion that the court erred in making its distribution. Despite the court's potentially confusing explanation, we read its order as awarding wife the Kerwin Hill property to compensate her for the unequal award of personal property (\$10,500 less to wife than to husband) and to compensate her for the profits husband has received from the investment since the date of separation that were not shared with wife, which court found to be \$34,000. Thus, the court awarded wife the property with an estimated equity of \$50,000, recognizing that wife would probably not realize that amount from the sale of the Kerwin Hill property. The court's award is equitable.

We find no merit in husband's assertion that the court's award was based on an unfair and unreasonable characterization of him, or that the court somehow took advantage of him as a pro se litigant. The court considered the statutory factors in making its distribution, and, as discussed above, it equitably divided the parties' assets. Finally, we

reject husband's argument that the family court deprived him of his livelihood by awarding Kerwin Hill solely to wife. As the family court found, husband is an experienced insurance agent who has also earned income as a forensic expert, and through various other jobs. More importantly, the Kerwin Hill property was a marital asset subject to division by the court. See 15 V.S.A. ' 751(a) (A All property owned by either or both of the parties, however and whenever acquired, shall be subject to the jurisdiction of the court.@ ). We find no abuse of discretion.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned