

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-099

NOVEMBER TERM, 2007

Laura A. Billado	}	APPEALED FROM:
	}	
v.	}	Franklin Family Court
	}	
James E. Billado	}	DOCKET NO. 295-10-05 Frdm

Trial Judge: Linda Levitt

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

Husband appeals from the family court’s final divorce order, which incorporated the parties’ pre-trial stipulation. He argues that the family court erred by finding that he had sizeable assets, failing to consider the circumstances surrounding the execution of the pre-trial agreement, and refusing to set aside the agreement because it was obtained under fraudulent and unconscionable circumstances. We affirm.

Husband and wife began living together in 1999. Husband operated a roofing business that had been in his family for generations and wife began working as his bookkeeper. The parties married in 2003 and separated in July 2005. Wife continued to act as a bookkeeper for husband’s business until the latter part of 2005. In September 2005, the parties executed a final stipulation concerning the distribution of the marital estate. Wife’s attorney prepared the agreement; defendant chose not to hire an attorney. Among other things, the agreement provided that husband would receive the marital home and the roofing business, and he would pay wife \$50,000 representing her interest in the roofing business. The stipulation noted that each party had the opportunity to seek the advice of counsel prior to executing the agreement. In January 2006, prior to the final divorce hearing, husband moved to set aside the stipulation. He argued that the stipulation was unconscionable and inequitable because, unbeknownst to him, wife had been stealing money from the business in her role as bookkeeper.

After a final hearing in January 2007, the court denied husband’s request and issued its final divorce order, incorporating the parties’ agreement. It found as follows. Wife was responsible for the business’s finances between 1999 and 2005, while husband solicited and bid on jobs and worked at job sites. Wife paid the bills, issued checks, deposited funds into various business accounts, and balanced the books. She withdrew money from the accounts to pay household expenses and to pay her own personal expenses. She regularly gave husband cash to

use as he pleased. Husband spent the money on food, entertainment, and trips. Husband did not do any banking and he asked wife to do it for him. The court found that although it was difficult to ascertain, it appeared that husband and wife received over \$100,000 yearly from the business.

The court found that wife had not engaged in any deceptive activities while acting as bookkeeper. It explained that wife left a paper trail of her withdrawals from the business, and never concealed them or pretended that a withdrawal for one purpose was in fact for another. Wife admitted that she occasionally forged husband's signature on the back of a check at husband's request because husband had neither the time nor the interest to sign the check himself. Although husband was not interested in overseeing the daily bookkeeping entries, he knew which parts of his business were making money and which were not. He knew when taxes were being paid and when they were not.

The court found that both parties treated the various business accounts as personal accounts, withdrawing funds at will to fund their lifestyle. They withdrew money from each other's money market accounts to pay personal and business expenses. The court found the fact that wife had inappropriately withdrawn \$78,000 from one account and \$16,000 from another and forged husband's name on \$12,000 worth of checks showed poor bookkeeping practices, not fraud. It explained that husband had turned a blind eye to the poor bookkeeping practices because he, as well as wife, received the financial benefit of such practices. The court also found that the parties failed to report income, failed to pay their taxes and tried to hide money from the IRS. The business owed about \$100,000 in back taxes and penalties, and wife owed back taxes on her unreported income. The court found that in 2004, the business had sales of \$900,000. Sales had steadily increased since 1999, although 2005 was not as profitable due to the trucking part of the business. It found that the value of the business assets easily exceeded \$500,000, although there were liens on the real estate. Assets included a warehouse, assessed at \$413,000, tractor trailer trucks, other vehicles, a crane, and tools.

Based on these and other findings, the court concluded that, looking at the circumstances surrounding the agreement as well as the factors set forth in 15 V.S.A. § 751, the parties' final stipulation should not be set aside. It found that the one statutory factor that undercut the fairness of the agreement was the shortness of the marriage. The other statutory factors were either neutral or they supported the agreement. As it explained, pursuant to the agreement, husband retained his business, a substantial asset and source of income if operated correctly. He also kept his home, boat, snowmobile, four wheeler, and vehicle, among other sizable assets. Husband had a greater ability than wife to acquire assets and income in the future, and wife left the marriage with fewer assets than husband. More importantly, the court concluded, the \$50,000 payment to wife resolved what might have been a contested hearing about the value of the business and of wife's interest in it. While a court might have found that wife's interest in the business was in name only and had no value, the final stipulation resolved that issue in a way that, at the time, was acceptable to both parties, and which the court found was fair. Husband appealed from the court's order.

On appeal, husband asserts that the court erred by failing to consider the circumstances surrounding the execution of the parties' agreement, specifically: the fact that wife had counsel while he did not, the fact that the agreement was signed shortly after he learned that wife was having an affair, and the fact that he relied on wife for all things financial. Additionally, husband

maintains that there is no evidence as to the current value of, or debt encumbering, the assets that he was awarded, and without evidence of these values, there is no way to know if the agreement is fair. Husband also challenges the court's findings that (1) it appeared that husband and wife received over \$100,000 yearly from the business; (2) the value of the business assets easily exceeded \$500,000, although there were liens on the real estate; and (3) the business assets included a warehouse assessed at \$413,000, tractor trailer trucks, other vehicles, a crane, and tools. Finally, husband argues that wife acted fraudulently in withdrawing funds after the parties separated, and the court erred in concluding otherwise.

As the family court recognized, when one party in divorce proceedings challenges a pre-trial stipulation before the final divorce hearing, the parties should be given an opportunity to present evidence on the fairness of their stipulation. Pouech v. Pouech, 2006 VT 40, ¶ 19, 180 Vt. 1. The court has discretion in deciding whether to accept the stipulation or reject it on grounds that it is inequitable in light of the factors set forth in 15 V.S.A. § 751. Id. In reaching its conclusion, the family court should consider all of the circumstances surrounding execution of the stipulation. Id. ¶ 23. The court is not obligated to reject a stipulation, however, merely because the agreement does not divide the marital property precisely in the manner that it would have had the agreement not existed. Id. “Rather, the question is one of fairness and equity viewed from the perspective of the standards and factors set forth in our divorce statutes.” Id. 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 v. Semprebon, 157 Vt. 209, 214 (1991). We will affirm the court's conclusions where supported by its findings. Mason v. Mason, 2006 VT 58, ¶ 9, 180 Vt. 98.*

The court did not abuse its discretion in incorporating the parties' stipulation into the final divorce order. First, it is evident from the record that the court evaluated the circumstances surrounding the execution of the agreement and the factors set forth in 15 V.S.A. § 751 in deciding if the agreement should be set aside. The court noted that wife was responsible for the finances, and that husband had decided to sign the agreement without obtaining counsel. Indeed, husband acknowledged in writing that he had been given the opportunity to obtain counsel before signing the agreement. The court was simply not persuaded that the stipulation was unfair. It rejected husband's assertion that wife acted fraudulently in withdrawing money from the business, finding instead that wife's actions were consistent with the way in which the business was operated. While husband testified that he was unaware of wife's actions, that he did not receive the benefit of these withdrawals but rather survived on \$6000 per year, the court was unpersuaded. We will not disturb the court's assessment of the weight of the evidence or the credibility of witnesses on appeal. Kanaan v. Kanaan, 163 Vt. 402, 405 (1995). The court did not err in rejecting husband's assertion that the agreement should be set aside because wife committed fraud.

The court similarly did not err in concluding that the agreement was equitable. As the court found, husband was awarded his business, which the record showed had approximately

* We note that husband cites an incorrect standard of review in his brief, and he incorrectly asserts that the family court is barred from drawing reasonable inferences from the evidence.

\$900,000 in sales in 2004. There was evidence that the parties funded their lifestyle through cash withdrawals from the company, and evidence that at least \$100,000 was withdrawn from the business for the parties' personal expenses between January 2004 and October 2005, and likely much more than that. Husband testified that he had business assets including a tractor, crane, truck, dump truck, generators, metal brakes, miscellaneous hand tools, and other materials, as well as a business shop in the Town of Milton. Husband also had personal assets such as a home, a motorcycle, four-wheeler, snow machine, tractor, boat, and Civil War collection. He was awarded all of these assets under the parties' agreement. While husband is correct that no direct evidence was presented to show that the shop was actually assessed by the town at \$413,790, any error in this regard is harmless. Whatever the precise value of this asset, or of any of the assets listed above, it was not inequitable for husband to pay wife \$50,000 while husband retained essentially all of the assets in the marital estate, including his business, which was capable of generating \$900,000 in sales, his business shop, and the marital home. The court also found that husband had a much greater earning capacity than wife. Moreover, as the court explained, by voluntarily agreeing to the \$50,000 figure, the parties obviated the need for a contested hearing over the value of the business and the value of wife's interest in it. See Mason, 2006 VT 58, ¶ 16 (recognizing court's policy in favor of voluntary agreements to divide marital property). The agreement was equitable, and the court acted well within its discretion in incorporating it into the final divorce order.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice