

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

**ENTRY ORDER**

VERMONT SUPREME COURT  
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-204

MAR 5 2009

MARCH TERM, 2009

Kimberlee J. Herring	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Family Court
	}	
	}	
Lee K. Herring	}	DOCKET NO. 122-5-05 Wmdm

Trial Judge: John P. Wesley

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

Husband appeals a final divorce order. On appeal, husband challenges the court's division of marital property and award of spousal maintenance to wife. We affirm.

The parties married in June 1980 and have four children. All of the children were above the age of majority at the time of the final hearing. Husband is a commercial truck driver and was the primary provider for the family during the marriage. The court found that he earned between \$55,000 and \$65,000 annually since 2001. Wife works as a self-employed housekeeper. The court found that her gross revenue is \$25,000 per year on average. During the marriage, the parties bought land and built a home in Marlboro. Prior to the final hearing, this property was sold and the proceeds comprise almost the entire marital estate. In August 2004, wife left husband after daughter revealed that husband had been sexually abusing daughter for over ten years. The court did not credit husband's denial of the abuse, finding by a preponderance of the evidence that defendant "engaged in a plan and scheme to exploit his daughter for his own sexual gratification, sexually molesting her on numerous occasions between the ages of six and sixteen."<sup>1</sup> The court awarded wife \$1,000 per month in maintenance. In addition, the court awarded wife two-thirds of the marital estate based on husband's fault in causing dissolution of the marriage through his abuse of daughter.

As an initial matter, husband argues that the trial court erred in not continuing the proceedings until his criminal trial was resolved. The trial court has discretion to grant a continuance and "[i]ts ruling must be upheld unless that discretion is exercised upon grounds clearly untenable, or to an extent clearly unreasonable." Cartin v. Cont'l Homes of N.H., 134 Vt. 362, 365 (1976). The court initially delayed the divorce proceedings and scheduled the final hearing after husband's criminal trial. Once that trial ended in a hung jury, the court proceeded with the divorce. The decision to proceed was not unreasonable. The divorce proceedings had already been substantially delayed, and it was unclear how much longer the criminal proceeding would take. That the court denied husband's counsel's request for a continuance was not error and was within the court's discretion.

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<sup>1</sup> Defendant was criminally charged with molestation of his daughter.

Husband claims the court erred in allowing the testimony of daughter and son, as they were not provided on wife's witness list. When the trial began, counsel for both parties admitted they had failed to provide the other with a witness list. The court's decision to go forward was not error. Further, husband was aware that his alleged abuse of daughter would be a factor at trial, and therefore he was not prejudiced by lack of any formal notification.

Husband claims error in the court's factual findings concerning the income of the parties, and claims that the court's award of permanent spousal maintenance to wife was error. The family court may award spousal maintenance if it finds that the spouse seeking maintenance "lacks sufficient income, property, or both . . . to provide for his or her reasonable needs." 15 V.S.A. § 752(a)(1). "A maintenance award will be set aside only if there is no reasonable basis to support it." Kasser v. Kasser, 2006 VT 2, ¶ 38, 179 Vt. 259. In this case, the court found that wife makes \$25,000 a year from her cleaning business. The court found that her monthly income, even when supplemented by a temporary support award of \$1,000 per month, is exceeded by her reasonable expenses of \$4,000 per month.<sup>2</sup> The court also found that husband makes between \$55,000 and \$65,000 annually. Husband claimed \$6,000 per month in expenses. The court found that the difference in the parties' earning capabilities supported an award of maintenance to wife until either party died or reached the age of sixty-five. In setting the amount, the court found that \$1,000 per month fairly adjusted the party's relative income.

Husband contends that the court's findings are not supported by the evidence because (1) the evidence indicates that the parties have approximately the same income, (2) there is no record evidence to support the court's finding that plaintiff's gross revenue from her self-employment is \$25,000, and (3) the court's estimation of husband's income requires him to work extensive overtime. We find no error. The court's findings concerning wife's earnings are supported by wife's testimony of her earnings and wife's income tax forms. In addition, husband's claim that the court's estimation of his annual income at between \$55,000 and \$65,000 unfairly requires husband to work extensive overtime is unsupported in the record. The documentary evidence submitted at trial confirms that husband's income history was in the range of the court's estimation. That this income included overtime was not disputed, but husband had worked overtime for the past several years and the court could reasonably rely on it as a continuing element of his ability to pay. Finally, husband argues that the court erred in comparing plaintiff's annual net income to husband's gross income. The court's conclusions regarding the parties' respective incomes were supported by the evidence presented, and there is no indication that the court's analysis was skewed as claimed by husband. Thus, we conclude that the court's findings related to the parties' incomes are supported by the record and that the court did not abuse its discretion in awarding maintenance of \$1,000 a month to wife after a twenty-four year marriage.

Husband also challenges the court's division of marital property. When dividing marital property, the court may consider several factors, including the parties' source and amount of income, employability, and respective merits. 15 V.S.A. § 751(b) (listing factors that may be considered by the court in dividing marital property). The court has broad discretion in dividing marital property and "we will uphold its decision absent a showing of abuse or withholding of this discretion." Weaver v. Weaver, 173 Vt. 512, 513 (2001) (mem.). We conclude that the court's decision in this case is supported by the record and not in error. The court explained that

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<sup>2</sup> Husband contends that wife's expenses are overinflated because the court incorrectly included wife's contribution to her children's higher education and she was under no obligation to assume this debt. Because wife's expenses exceed her monthly income, even without this contribution, we do not address this argument.

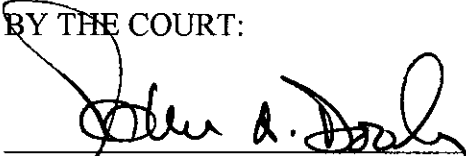
under most of the factors, an even split of the marital property would be equitable, but that wife was entitled to a larger share of the marital estate given husband's fault in dissolving the marriage through his sexual abuse of daughter. The weight to assign husband's fault is a question for the family court. Slade v. Slade, 2005 VT 39, ¶ 14, 178 Vt. 540. The court's decision to award wife two-thirds of the marital estate was well within its discretion. See Leonard v. Leonard, 150 Vt. 202, 203 (1988) (affirming court's award of "virtually all the marital property" to wife where husband committed lewd and lascivious acts on wife's child).

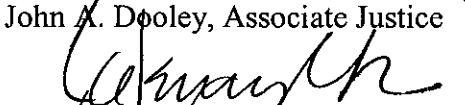
Husband argues that the court's division of property is erroneous because its findings as to the relative merits of the parties are not supported by the record. In the court's account of husband's history of drug dependency, husband seeks to correct the record by asserting on appeal that he was only in an out-patient treatment program once, not in a residential program "at least twice." Again, it is for the trial court to find the facts. However, any factual error was harmless because the court's consideration of fault was focused solely on husband's abuse of daughter and not any drug dependency.

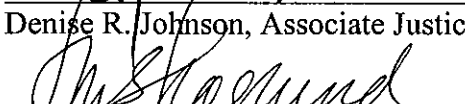
On a final note, we find no merit to husband's contention that wife violated the temporary order by disposing of marital property without notice to husband. The trial court did not find credible husband's assertion that he was unaware that wife was disposing of their personal property. The court credited wife's testimony that it was critical to dispose of the property because the sale of the marital home was imminent. Because the trial court is entitled to determine the credibility of the witnesses, we find no error. Dranow v. Gluck, 171 Vt. 530, 531 (2000) (mem.) ("The family court is entitled to weigh the evidence and decide the credibility of witnesses, as well as draw all reasonable inferences from the testimony.").

Affirmed.

BY THE COURT:

  
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John A. Dooley, Associate Justice

  
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Denise R. Johnson, Associate Justice

  
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Marilyn S. Skoglund, Associate Justice