

*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. 2009-071

**OCT 8 2009**

OCTOBER TERM, 2009

Karen Shappy	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
	}	
Dana Shappy	}	DOCKET NO. 223-3-08 Cndm
		Trial Judge: Matthew I. Katz

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

Husband appeals the family court's final divorce order, challenging the court's property division and spousal maintenance decisions. Husband argues that (1) the court's property division was inequitable because wife received all of the parties' assets and husband received all of the debt, and (2) the court abused its discretion in granting wife one dollar in spousal maintenance. We affirm.

The court found the following. The parties had been married for more than twenty years when they separated. They have two grown daughters. Wife initially stayed home to raise the children, but returned to work part time several years ago. After the separation, wife began working full time and currently earns \$37,000 per year. Husband owns a roofing business. Husband does not take a salary from the business, but instead simply uses money from the business for personal expenses. Indeed, in 2007, husband paid \$62,000 in personal bills out of the company account. At trial, husband's actual earnings from this business were contested. While the accounting shows earnings for the business of \$27,000, the court specifically rejected this amount. There was testimony that some company revenue did not appear on the company's books because customers paid husband directly, and husband cashed these checks to use for personal expenses. In addition, the parties maintained a standard of living similar to or higher than the standard of living that the parties had when husband was employed and received a salary of around \$80,000. Given this information, the trial court found that husband earns \$100,000 a year from his roofing business. The parties' main asset is the marital home that has net equity of \$171,000. In addition, the parties each have an IRA account, own a camper and several cars, trucks, and motorcycles, and husband co-owns another small business with his daughter. The court found that the parties also have significant credit card debt that has developed through personal and business use.

In a written order, the trial court made the following division of property. The court awarded wife the marital home, a car, a motorcycle, the camper, a timeshare, and her IRA. Husband received the rest of the vehicles, a timeshare, his roofing business, his interest in his daughter's business, and his IRA. In addition, the court made husband responsible for the parties' debt, because it found that husband incurred a larger portion of the debt, in part for his

business, and because husband controlled the family finances. The court also awarded wife spousal maintenance of one dollar per year so that she could seek indemnity in the form of maintenance if husband defaults on the debts and causes creditors to collect the debt from wife.

Husband first argues that the trial court's property division was an abuse of discretion because the court granted wife all of the parties' assets, while making husband responsible for all of the debts. "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. On appeal, the burden of demonstrating an abuse of discretion lies with the party claiming that the trial court failed to carry out its duties. Id. By statute, the court is directed to "equitably divide and assign" marital property by considering several factors including the length of the marriage, the health of the parties, the parties' income, the parties' opportunities for future acquisition of income, and whether the property settlement is in lieu of maintenance. 15 V.S.A. § 751. "[E]quality is not necessarily equity, when the circumstances of the parties are taken into account, as they must be." Daitchman v. Daitchman, 145 Vt. 145, 151 (1984).

Husband's argument is essentially that because wife received a greater portion of the marital assets, the court's decision was inequitable. Husband asserts that the trial court failed to make appropriate findings to support its unequal division of property, citing Dreves v. Dreves, wherein we remanded the court's property division because the wife received a small fraction of what the husband did and the court "offered no explanation for the large disparity." 160 Vt. 330, 333-34 (1993). We conclude that in this case the court did not abuse its discretion. While husband is correct that wife received a larger portion of the marital estate and the parties' main asset, the marital home, husband exaggerates the court's order by stating that he received none of the parties' assets. Husband received several assets, including a timeshare, vehicles and his IRA. In addition, this situation is unlike Dreves in that the court explained the reason for the imbalance in this case based on its analysis of the statutory factors. The property division properly took into account husband's higher income and greater earning potential, and that the division was in lieu of maintenance. See Trahnstrom v. Trahnstrom, 171 Vt. 507, 509 (2000) (mem.). The property division is best explained by the court's decision to award wife the equity in the marital home in lieu of maintenance. There were certainly grounds for a maintenance award in this case given husband's higher income, the length of the marriage, and wife's inability to meet her needs independently. See 15 V.S.A. § 752. Indeed, as part of the temporary order, wife was receiving \$900 a month in maintenance, and wife requested a higher monthly payment at trial. Instead of requiring husband to make monthly maintenance payments to wife, the court explained that it was better to give wife a larger division of the property so that the parties could "have as little involvement with the life of the other as can be fairly arranged." The court was within its discretion in choosing to divide the assets in this fashion.


In addition, the court found that husband has a higher income and a greater potential for future acquisition of income. While husband disputes the court's estimation of his income, the court's findings are supported by evidence, and we will not disturb them on appeal. See Dreves, 160 Vt. at 333 (viewing trial court's findings in light most favorable to the prevailing party). Because husband's income is derived from his own small business and he does not pay himself a salary, there was little evidence of husband's actual income. The court determined husband's income based on the testimony of the company's reported profit, as well as on the information that husband often accepted payments directly and used company funds to pay personal bills. "The court's ability to specify a value is limited by the evidence before it, and it sometimes must

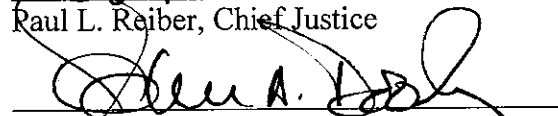
use approximations.” Mills v. Mills, 167 Vt. 567, 568 (1997) (mem.). In this case, the court’s decision was based on the evidence that was available, and was not erroneous.

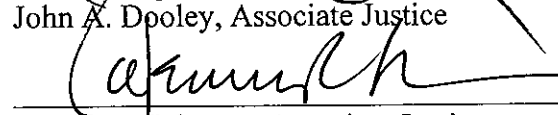
Husband next contends that the court erred in awarding wife maintenance of one dollar per year. “The trial court has considerable discretion in ruling on maintenance, and the party seeking to overturn a maintenance award must show that there is no reasonable basis to support it.” Johnson v. Johnson, 155 Vt. 36, 40 (1990). Husband argues that instead of awarding wife all of the equity in the marital home, the court should have awarded him some of the equity and given wife some maintenance. While this option was available to the family court, the court did not abuse its discretion in choosing to “settle the rights of the parties,” 15 V.S.A. 751(a), in the manner that it did. See Johnson, 155 Vt. at 43 (explaining that maintenance and property division are closely related and trial courts have broad discretion in fashioning awards of both); see also Grow v. Wolcott, 123 Vt. 490, 490 (1963) (explaining that this Court must affirm “if the action [the trial] court took was one of the discretionary courses open to it”).

Affirmed.

BY THE COURT:

  
\_\_\_\_\_  
Paul L. Reiber, Chief Justice

  
\_\_\_\_\_  
John A. Dooley, Associate Justice

  
\_\_\_\_\_  
Denise R. Johnson, Associate Justice