

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-244

JANUARY TERM, 2018

|                                      |   |                                    |
|--------------------------------------|---|------------------------------------|
| Leander A. Decato* v. Jean A. Decato | } | APPEALED FROM:                     |
|                                      | } |                                    |
|                                      | } | Superior Court, Windsor Unit,      |
|                                      | } | Family Division                    |
|                                      | } |                                    |
|                                      | } | DOCKET NO. 410-12-14 Wrdrn         |
|                                      |   |                                    |
|                                      |   | Trial Judge: Robert P. Gerety, Jr. |

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

Husband appeals the superior court's final divorce order, arguing that the court's distribution of marital property was inequitable in that it left him in an untenable financial condition as compared to wife. We affirm.

The parties were married for approximately twenty-six years and had no children together. At the time of the final divorce hearing, husband was sixty years old and wife was sixty-three years old. Both parties had an eighth-grade education. During the marriage, husband worked as a propane delivery and service person, but at the time of the final hearing he was unemployed and collecting \$2074 per month in social security disability benefits, as well as \$308 per month in long-term disability benefits that will end when he reaches the age of sixty-five.

With minor exceptions, wife did not work outside the home during the marriage. Husband preferred that she remain home and assume responsibility for housekeeping duties such as cooking and cleaning. At the time of the final hearing, wife was earning \$3000 per month providing elder care services eight-to-twelve hours a day, seven days a week, but the court found that wife was not physically able to maintain this schedule and most likely would discontinue the work and collect social security benefits in two years when she reached sixty-five years of age.

The marital residence and a mobile home are located on approximately two acres of land in Hartland, Vermont. The court valued the land and residence at \$150,000, subject to a home equity loan with a balance of \$15,450, and the mobile home at \$15,700. During the marriage, the parties made several improvements to the marital property, including adding landscaping, repairing the foundation, building a twelve-foot-by-twenty-four-foot addition to the residence, and remodeling the living room. The parties also owned a two-acre parcel of land in Weathersfield, Vermont, with water, septic, and a driveway, which the court valued at \$75,000.

Husband had several retirement accounts that the court valued at approximately \$240,000. Regarding the marital debt, in addition to the home equity loan, the parties had a joint credit card with a balance of \$11,000, and husband had a credit card in his name with a balance of approximately \$9500. The credit cards were used for marital expenses before the parties separated. Husband also had a hospital bill of \$4500.

In distributing the marital property, the court examined each of the statutory factors set forth in 15 V.S.A § 751(b). Reviewing those factors, the court stated that: (1) this was a long-term marriage; (2) given the parties' age and health, neither party is likely to obtain full-time work or to increase their ability to earn income in the future; (3) husband's income was limited to his social security benefits, and in two years, wife's income would also be limited to social security benefits, which would be less than husband's benefits; (4) wife had an enormous emotional connection to the marital residence, which was her childhood home that she inherited from her mother; (5) during this long-term marriage, the marital assets other than the residence were purchased with funds generated by husband's employment, but wife contributed equally to the parties' ability to acquire those assets through her work as a homemaker; and (6) no party was more at fault than the other for the lack of communication and breakdown of the marriage.

Based on its review of those factors, the court awarded wife the Hartland property, including the mobile home, and husband the Weathersfield property. The court divided husband's retirement accounts equally between the parties and distributed the vehicles and other personal property. The order required husband to pay the credit card debt. The court acknowledged that its property distribution gave wife a larger percentage of the marital estate—approximately sixty-two percent—but stated that the respective awards would provide each party with the resources necessary to live in a reasonable manner, given their prospective incomes. The court declined to award wife any maintenance, stating that, given the property distribution, wife would be able to meet her reasonable needs but husband would not be able to do so if he were required to pay wife maintenance.

Husband appeals, arguing that the superior court abused its discretion in distributing the marital property, asserting that the court failed to consider the respective financial conditions in which the court's decision left the parties. In husband's view, the decision left him with no cash other than his retirement accounts, a minimal amount of income, a parcel of land with no residence, significant debt, and no ability to borrow money to obtain housing. On the other hand, according to husband, wife was given the marital residence and a potentially income-producing mobile home. Husband asserts that there is no support in the record for the court's speculation that wife will have less income than him in two years or for the court's finding that wife has emotional issues and panic attacks. According to husband, the court overvalued wife's homemaker services, considering that the parties had no children, and ignored his significant financial contributions toward obtaining the marital assets. Regarding the parties' respective merits, husband argues that the court should have found that that factor favored him, given his long-time abstinence from alcohol as a recovering alcoholic and incidents surrounding wife's drinking. Husband also contends that the court gave too much weight to wife's connection to the marital home.

“The trial court enjoys broad discretion in dividing the marital property, and we will uphold its decision unless that discretion was withheld or abused.” MacCormack v. MacCormack, 2015 VT 64, ¶ 17, 199 Vt. 233. Dividing marital property “is not an exact science”; hence, the trial court is required to make an equitable, but not necessarily equal, distribution. Casavant v. Allen, 2016 VT 89, ¶ 15, 202 Vt. 606 (quotation omitted). There is no specific formula for the court in assessing the nonexclusive statutory factors, and thus the court has “broad discretion in assigning weight to each one.” Id. “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, 2015 VT 64, ¶ 17 (quotation omitted). Findings are upheld if supported by any credible evidence. Casavant, 2016 VT 89, ¶ 21. “When evidence in the record supports different conclusions, we leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence.” Id. (quotation omitted). The appealing party has the burden to prove error. Id.

Husband's overall argument is that the superior court failed to consider the financial condition in which its property division left the parties. As we have recently noted, the condition in which the parties are left as the result of a divorce is not a factor set forth in 15 V.S.A. § 751(b). Id. ¶ 19. In any event, the court's order does not leave husband penniless, as he suggests. In addition to \$3400 in a checking account, husband received over \$117,000 in retirement accounts.

The principal issue, rather, is whether the court's property distribution is equitable in light of the facts and the relevant statutory factors, such that the court did not abuse its broad discretion in making the award. For the most part, husband essentially asks us to reweigh the evidence and reconsider those factors. This is not our role. Husband argues that the court's findings regarding the likelihood of wife earning less money than him within two years of the divorce are speculative. We disagree. Given that social security payments are a function of a person's lifetime earnings, or a fraction of a former spouse's lifetime earnings, we do not find the court's findings on that point to be overly speculative. See 20 C.F.R. § 404.331 (stating who is entitled to benefits as divorced spouse); id. § 404.333 (stating that former spouse's benefit is one-half that of insured spouse's benefit). Furthermore, although wife did not present medical evidence concerning her health, the court's findings regarding her health issues and inability to maintain her then-current work schedule were supported by wife's testimony which the court apparently deemed credible. The court was well within its discretion in assigning equal weight to wife's nonmonetary contributions during this long-term marriage. We decline to overrule the court's conclusion that wife contributed equally to the marriage as a homemaker based solely on the fact that the parties did not have children together. Likewise, we conclude that to the extent that the court's property division award left wife with a potential income-producing asset in the mobile home, the award was within the court's discretion, particularly given its supported finding that wife would have less access to income in retirement than husband. Finally, we find no basis in the record to reject the court's discretionary assessment that fault for the breakup of the marriage should not be assigned to one party over the other.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice