

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2009-0585

IN THE MATTER OF HEDDY H. PINARD and BERTRAND C. BERNARD

MEMORANDUM OF LAW SUBMITTED BY THE APPELLEE, HEDDY H. PINARD

I. The Newport Family Division did not abuse its discretion nor did it deny equal protection to either party when it properly and equitably devised a property distribution between the parties.

a. The Family Division did not commit an unsustainable exercise of discretion.

This Court affords trial courts broad discretion in determining matters of property distribution in fashioning a final divorce decree, and it will not overturn the trial court's decision absent an unsustainable exercise of discretion. In re Watterworth, 149 N.H. 442, 445 (2003) (citation omitted). In reviewing the trial court's decision, this Court must determine whether the record establishes an objective basis sufficient to sustain the discretionary judgment made. State v. Lambert, 147 N.H. 295, 296 (2001).

"In a divorce proceeding, marital property is not to be divided by some mechanical formula but in a manner deemed 'just' based upon the evidence presented and the equities of the case." In re Sarvela, 154 N.H. 426, 431 (2006), quoting In re Letendre, 149 N.H. 31, 35 (2002). In evaluating the evidence presented

and the equities of the case, the court must consider one or more of the statutory factors¹; however, the court need not consider all of them or give them equal weight. In re Sarvela, 154 N.H. at 431. Moreover, a trial court has "no duty to divide each asset equally"; rather, its only responsibility is to "look at the assets as a whole and propose an equitable distribution" of said assets. Dombrowski v. Dombrowski, 131 N.H. 654, 660 (1989).

In the case at hand, the Newport Family Division evaluated the evidence presented; it evaluated the equities of the case; and it considered the factors set forth in RSA 458:16-a(II). Specifically, the court considered the following statutory factors: the relatively short duration of the marriage; the age, health and employability of the parties, as well as their separate property, income and needs; the significant disparity between the parties' financial contributions to the marriage;

¹ The statutory factors the court considers when dividing the parties' property include the following: a) duration of marriage; b) age/health/social or economic status, occupation/vocational skills, employability, separate property, amount/sources of income, needs/liabilities of each party; c) opportunity of each party for future acquisition of capital assets/income; d) [related to minor children]; e) [related to minor children]; f) actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either/both of the parties; g) significant disparity between parties in relation to contributions to the marriage, including contributions to care/education of children and care/management of home; h) direct/indirect contribution by one party to help educate or develop the career of the other party and any interruption of either party's education or personal career opportunities for the benefit of the other's career or for the benefit of the parties' marriage or children; i) expectation of pension/retirement rights acquired prior to/during the marriage; j) tax consequences for each party; k) value of property that is allocated by valid prenuptial contract; l) fault of either party; m) value of any property acquired prior to the marriage and property acquired in exchange for property acquired prior to the marriage; n) value of any property acquired by gift/devise/descent; o) any other factor that the court deems relevant. RSA 458:16-a(II).

the interruption of either party's career opportunities for the benefit of the marriage; the value of property acquired prior to the marriage and property acquired in exchange for property acquired to the marriage; and the value of any property acquired by gift, devise or descent. App.², p. 3.

The court evaluated these factors in light of evidence supported by the record. Specifically, the court noted that the parties were married for approximately eight years. App., p. 1; T.,³ p. 4; The court recognized that the Appellee, Heddy Pinard ("Heddy") is 64 years of age and that the Appellant, Bertrand Pinard ("Bertrand") is 67 years of age and that both parties have physical limitations and health issues. App., pp. 1-4, 18; T. pp. 4, 62, 77, 91.

The court noted that Heddy worked at Osram Sylvania for 19 years prior to retiring in order to work at the parties' motel and also that Bertrand was not employed prior to the marriage due to his disabilities. App., pp. 1-4; T., pp. 7, 8, 77, 78. The court took into consideration the property owned by each party (e.g., Heddy's Bradford property and Bertrand's motorcycles, single-family home and Keene apartment building) as well as the value of Heddy's retirement fund and Bertrand's

² "App." refers to the 'Appendix to Brief of Bertrand C. Pinard, Appellant' filed by the Appellant.

³ "T." refers to the 'Transcript of Final Hearing Before the Honorable Bruce A. Cardello, Family Division Justice' that took place on June 1, 2009 at the Newport Family Division. Case No. 662-2008-DM-00194.

social security disability income and potential rental income. App., pp. 1-4.

Moreover, the court considered Bertrand's considerable and majority monetary contribution to the purchase of the parties' motel business, the fact that Heddy retired from her longstanding employment in order to work at the motel, and the fact that, during the marriage, Bertrand inherited his mother's Manchester home, valued at \$250,000. App., pp.3, 4. Because the evidence in the record supports the court's findings as set forth in its July 17, 2009 Order (Cardello, J.), and because the court properly applied the relevant statutory factors to the evidence, the Family Division did not abuse its discretion in devising a property distribution between Heddy and Bertrand Pinard.

b. The Family Division equitably divided the parties' property.

After evaluating the evidence, equities and statutory factors, it properly and equitably devised a property distribution between Bertrand and Heddy. New Hampshire RSA 458:16-a(II) states that "[w]hen a dissolution of marriage is decreed, the court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution of property, unless the court establishes a trust fund under RSA 458:20 or unless the

court decides that an equal division would not be appropriate or equitable after considering one of the [statutorily prescribed list] of factors."

If an unequal distribution of property is warranted, the court should make specific findings and rulings supporting its decision. Burse v. Bursey, 145 N.H. 283, 286 (2000). However, absent special circumstances, the court must make the distribution as equal as possible. In re Sarvela, 154 N.H. at 431. Among the special circumstances warranting unequal distribution are: (1) a short term marriage; (2) a party's exclusive premarital possession of an asset that continues after marriage; (3) a party's recent acquisition of an asset through a family relationship; (4) a party's need to provide a home for minor children; (5) the need to assure each party's future security; and (6) the fault of either party. Hoffman v. Hoffman, 143 N.H. 514, 520 (1999).

In the case at hand, the Family Division determined that Heddy "leaves the marriage with her own home (100K), vehicle (7.5K) and retirement (57K) with an approximate equity value of \$164,500." App., p. 4. The Family Division also determined that Bertrand has two motorcycles worth \$23,000 and a house he inherited from his mother during the marriage worth \$250,000. App., p. 4. The court noted that there is a \$50,000 debt on the inherited property and that said property is anticipated to

generate rental income for Bertrand. App., p. 4. The court also recognized that Bertrand put \$118,693.13 of his own money into the purchase of the parties' motel but that Heddy contributed her time and "sweat equity" into the purchase, as well as sacrificing additional years of income and increased retirement benefits. App., p. 4.

Moreover, in determining whether there existed special circumstances warranting an unequal distribution, the court recognized that the parties shared a short term marriage. App, p. 3, T., p. 47. Further, Heddy contributed to her retirement income for several years prior to the marriage and for only a short time during the marriage. App., pp. 2, 3; T., p. 36. The court also reiterated that, during the marriage, Bertrand acquired a significant asset through the inheritance of his mother's Manchester home. App., p. 4; T., p. 96.

After evaluating the evidence, equities and statutory factors, it properly and equitably devised a property distribution between Bertrand and Heddy.

II. The record amply supports the Family Division's findings.

- a. The Family Division applied the appropriate statutory factors to each party in fashioning its property division.**

Bertrand argues that the Family Division abused its discretion and/or denied equal protection of the law to Bertrand when it "le[ft] the wife with the same assets she had when she

married, while the husband has less than his pre-marital assets and the inheritance received during the marriage. . . ." As stated above, the trial court is not obligated to follow a mechanical formula when fashioning a property distribution between the parties. Letendre, 148 N.H. at 35. Moreover, the court need not consider all of the enumerated statutory factors or give them equal weight. Watterworth, 149 N.H. at 453. Most importantly, this Court will not overturn the trial court's decision absent an unsustainable exercise of discretion. Id. at 445.

While, in the case at hand, Bertrand alleges he is financially "worse off" after the marriage than he was "pre-marriage," the record adequately supported the Family Division's findings and rulings. The court recognized that Bertrand put in a significant financial contribution when purchasing the motel business. The court also recognized that Heddy put in a significant amount of "sweat equity" during the years of her service at the motel and that she gave up years of employment at her long-time employer.

The court did not have a duty to return Bertrand to his pre-marriage lifestyle or circumstances. While Bertrand argues that going into the motel business was Heddy's dream and not his dream, no one forced Bertrand into purchasing the business. It

was his choice to sell his rental properties and it was his choice to put his money into a motel business.

Bertrand argues that the Family Division "did not give him credit for the additional sums Bertrand dedicated to the business from his [inherited] property." App. Brief⁴, p. 13. He further argues that "[t]he court's decision to ignore the evidence of the 2007 tax return and the check registers means that Bertrand Pinard would not receive his entire capital investment out of the motel." App. Brief, p. 14. However, the Family Division heard the testimony from both Bertrand and Heddy and reviewed the parties' exhibits entered into evidence. Despite Bertrand's assertions regarding his capital investment, the court had discretion in weighing the evidence and measuring the credibility of the parties. See Cook v. Sullivan, 149 N.H. 774, 780 (2003) (This Court will defer to the trial court's judgment on such issues as resolving conflicts in testimony, measuring credibility of witnesses, and determining weight to be given evidence).

b. The Family Division did not abuse its discretion when it considered the potential lost income of Heddy in fashioning the parties' property distribution.

Bertrand argues that the Family Division abused its discretion when it 1) considered the fact that Heddy could have continued to work at her long-time employer had she not retired

⁴ "App. Brief" refers to the brief of the Appellant, Bertrand C. Pinard.

to run the motel with Bertrand; and 2) did not consider Bertrand's "income he would have had from other activities and investments, potentially a self storage business. . ." App. Brief, p. 16. The record in this matter supports the fact that Heddy was employed by Osram Sylvania Automotive Lighting for 19 years prior to retiring in order to run the motel, and that she made yearly wages of approximately \$33,000 when she retired. T., p. 7. There is also evidence in the record that Bertrand owned and rented a single family home and a multifamily unit prior to the marriage. T., pp., 8, 78. Although Bertrand may have wanted to purchase a storage unit business, he never did so. T., p. 82. He never earned any income from a storage unit business because one never existed.

The court had before it the fact that Heddy had concrete employment with concrete wages. It also had before it the fact that Bertrand may have wanted to purchase a storage unit business but he never made such a purchase. Instead, he purchased a motel. Moreover, Bertrand never presented evidence of "potential lost income" nor did he present evidence of income he "lost" from selling his rental units. As such, the Family Division was within its discretion to consider these facts when fashioning the parties' property distribution.

- c. The Family Division did not abuse its discretion when it considered Heddy's pension in fashioning the parties' property distribution.**

Bertrand argues that the Family Division erred "in ignoring the value of Heddy's pension. . ." and as a result "did not value the assets and divide them in an equitable manner." App. Brief, p. 21. However, contrary to Bertrand's assertion, the Family Division did consider Heddy's pension when calculating the division of property. The court recognized that "some small portion of [Heddy's] pension account did accrue for a short time subsequent to the marriage." App., p. 3. The court had discretion in deciding how to factor Heddy's pension into the parties' property division, and based on the record, it properly did so.

- d. The Family Division did not abuse its discretion when it considered Bertrand's inheritance in fashioning the parties' property distribution.**

Bertrand argues that the Family Division "should not have used the Gold Street property to equalize the financial assets." App. Brief, p. 22. Despite Bertrand's testimony that he took out a line of equity on this property to infuse into the motel business, the Family Division noted that "[h]e produced no documentation in support of these claims. . .and no checkbook registers produced by the Respondent established that he has in fact put in the money he claims to have put in." App., p. 3.

The Family Division was in the best position to resolve conflicts of evidence and to evaluate the credibility of the testimony. See Cook, 149 N.H. at 780. It is not this Court's role to substitute its findings for that of the trial court. Instead, this Court will determine whether a reasonable person could find as the trial court did. Id.; In re Wehringer's Case, 130 N.H. 707, 717 (1988). Here, the trial court reasonably evaluated the parties' assets and recognized that Bertrand's inherited property had a fair market value of \$250,000; it had a present debt of \$50,000; and it is anticipated to generate rental income for Bertrand. App., p. 4. As the court awarded the property to Bertrand, it properly considered its value when fashioning the property distribution. App., p. 4.

e. The Family Division properly divided the parties' property and properly enumerated its reasons for doing so.

Bertrand argues that the Family Division ignored "the debt of the motel business to Bertrand, while the business paid the debts to Heddy and her daughter." App. Brief, p. 25. The court took into consideration that both parties recognized they borrowed \$25,000 from Heddy's daughter after they purchased the motel business and that it was repaid App., p. 4, T., pp. 90, 91. The court also recognized that the mortgage on Heddy's home was discharged as a result of the parties refinancing a loan. App., p. 4, T., p. 90. Finally, the court considered that

Bertrand has not been repaid his purchase money that the parties used to purchase the motel. App., pp 3, 4.

After reviewing these special circumstances and the parties' available assets, the Family Division determined that Bertrand should receive preferential treatment in recovering some amount of his investment and awarded him the first \$50,000 of the net proceeds from the sale of the parties' motel business. App., p. 4. Doing this "balances both the significant disparity of [Bertrand's] initial financial contribution, the not insignificant contribution of labor by [Heddy], and the interruption of [Heddy's] career." App., p. 4. Any remaining balance following the sale of the motel "shall be divided equally between the parties." App., p. 4.

As stated above, if an unequal distribution of property is warranted, the court should make specific findings and rulings supporting its decision. Bursey, 145 N.H. at 286. The court properly made these findings and also properly determined that "Respondent's Request for Findings and Rulings Nos. 2-4, 6-7, 10-24, 25 (but denied as to "she wasn't interested"), 26-27, 28 (but denied as to "many"), 30-32, 33 (but denied as to amount), 34-35, 39-41, 44 (denied as to "his" refunds, it was hers), and 52-54 are Granted; Nos. 1, 5, 38, 42, 46, 47 and 55 are Denied; Nos. 8, 9, 29, 36, 37, 43, 45, and 48-51 are Neither Granted nor Denied." App., pp., 5, 12-15. See Magrauth v. Magrauth, 136

N.H. 757, 763 (1993) (if the parties to a divorce make specific requests for findings and rulings, the court should state its reasons and make specific findings and rulings supporting its decision).

- f. The Family Division was properly within its discretion when it ordered that Bertrand shall continue to operate and manage the parties' motel business and that Bertrand shall remain responsible for payment of all expenses for the business, including the marital home, until it is sold.**

The court properly took into consideration the parties' assets and marital contributions when it fashioned the parties' property distribution despite Bertrand's assertions that the court deprived him of his capital investment and placed upon him the risk of operating the motel. App. Brief, p. 27. Bertrand continues to fail to recognize that the court did indeed take into consideration Bertrand's capital investment when it fashioned the parties' property distribution. App., p. 4. The court also took into consideration Heddy's sweat equity and the fact that she gave up employment with her long-time employer in order to work at the motel. App., p. 3; T., p. 100.

Finally, the court took into consideration Bertrand's testimony that he wishes to keep the motel business up for sale and that he feels he can keep the motel going in light of financial stress and further that he believes he can find ways to keep the motel. T., pp. 107, 108. In light of this evidence

and despite Bertrand's allegations that Heddy "appears to be viewing her marriage to Bertrand Pinard as some form [of] employment", App. Brief, p. 27, the court properly and equitably fashioned a property distribution between the parties.

g. The Family Division properly considered the \$14,000 withdrawal Heddy made from the business account when fashioning the parties' property distribution.

Bertrand argues that Heddy's removal of \$14,000 from the business account "without an adjustment to the property settlement is unjust." App. Brief, p. 28. However, Bertrand ignores the fact that the court considered this withdrawal in determining an equitable property division. In its Order, the Family Division noted that Heddy gave \$7,000 of that money to her daughter in order to repay a valid business loan. App., p. 2; T., p. 17. This loan was also recognized by Bertrand. T., pp. 90, 91.

The court also recognized that approximately \$5,000 was paid to Heddy herself for repayment of federal tax refunds that were withheld due to Bertrand's benefits overpayment. App., p. 2; T., pp. 106, 107. Despite Bertrand's assertion that this should be a "wash" considering he took her out to dinner during the marriage, the court was within its discretion to weigh this evidence as it deemed appropriate.

III. Conclusion

In the case of Heddy and Bertrand Pinard, the Newport Family Division evaluated the evidence presented; it evaluated the equities of the case; and it considered the factors set forth in RSA 458:16-a(II). It thereafter properly and equitably devised a property distribution between Bertrand and Heddy. As the Family Division has broad discretion in fashioning the parties' property distribution, its orders will be upheld by this Court as long as the record amply supports the findings and rulings made by the Family Division. As set forth supra., the evidence presented in the record does, in fact, support the Family Division's findings and rulings.

The Appellee requests that this Court affirm the Family Division's Order in its entirety.

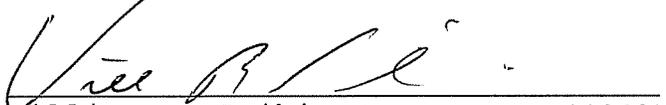
Respectfully submitted,

HEDDY H. PINARD, APPELLEE

By and through her Attorneys,

CLEVELAND, WATERS AND BASS, P.A.

Date: February 4, 2010 By:



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REQUEST FOR ORAL ARGUMENT

The Appellee requests fifteen minutes for oral argument, to be presented by William B. Pribis.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing MEMORANDUM OF LAW SUBMITTED BY THE APPELLEE, HEDDY H. PINARD, have been furnished by first class mail to Lanea A. Witkus, Esquire this 4th day of February 2010.

I further certify that the foregoing MEMORANDUM OF LAW SUBMITTED BY THE APPELLEE, HEDDY H. PINARD, conforms with New Hampshire Supreme Court Rule 16.



William B. Pribis