Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-233

MAY TERM, 2018

Leslye W. Kenney v. Lawrence Kenney*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 802-12-15 Cndm
		Trial Judge: Mary L. Morrissey

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

Husband appeals a final divorce order in which the superior court, family division, distributed the marital assets, awarded wife maintenance, and ordered husband to pay a portion of wife's attorney's fees. We affirm.

The parties were married in September 1985 and were divorced by final order of the family court in April 2017. They have two children, who were in their mid-to-late twenties at the time of the final divorce hearing. Both parties are in their late fifties and in good health. Wife worked for the first two years of the marriage, but thereafter served as the primary caregiver and homemaker over the course of the marriage. For the most part, she was out of the workforce from 1987 until 2012, never earning more than $10,000 a year during that period. At the time of the final divorce hearing, she had been working for two years for the American Cancer Society, with an annual salary of $43,000. Husband is an entrepreneur who over the years has been involved in start-ups and other companies as an executive officer or consultant. From 1991 until 2007, defendant earned in excess of $100,000 per year. In nine of those years, he earned over $200,000, and in two of those years he earned over $300,000. In 2008, husband purchased a company called SynEcology and he took no income over the next five years. In 2014, he earned $125,745 as a consultant for a Japanese company. In 2015, when he left the Japanese company and became chief executive officer of Screen Retriever, a software designed to monitor children's internet activity, he earned $5782. Husband did not provide wife with documents related to his Screen Retriever business, which he continued to be involved in at the time of the final divorce hearing. Husband testified that he had not been able to take an income from Screen Retriever due to a lack of subscriptions.

The marital residence has been on the market since 2015, when it was listed for $1.1 million. Since the home was placed on the market, both parties have engaged in conduct that has impeded its sale. At the time of the divorce hearing, wife had moved out of the home and it was listed for sale by owner. There was evidence that there had been offers between $620,000 and $800,000.

Wife filed for divorce in November 2015. The final divorce hearing was held over four days between October 2016 and February 2017. Both parties were represented by attorneys. At

the conclusion of the hearing, the court awarded wife a substantial portion of the marital assets, part of which represented property in lieu of maintenance. The court concluded that wife was entitled to compensatory spousal maintenance because of her homemaker contributions over a long-term marriage, which negatively impacted her future earning power while increasing that of husband. The court granted wife an increased property award in lieu of maintenance because of husband's lack of income and concerns that a monthly maintenance award would result in continued litigation between the parties. The court determined that husband was underemployed even though he was "eminently employable" and capable of earning a substantial income.

Before distributing the marital property, the court examined each of the statutory factors set forth in 15 V.S.A. § 751(b). The court found that this was a long-term marriage during which husband had advanced his potential to acquire future assets, while wife's potential to acquire future assets had been negatively impacted as the result of her withdrawing from the workforce and acting as a homemaker. With respect to the parties' liabilities, the court determined that, apart from the $500,000 in loans against the marital residence and $89,000 remaining on a loan husband took out to finance SynEcology, the other outstanding loans were against life insurance policies that still had cash values over and above the amounts of the loans. As for assets, in addition to the equity in the marital home, three cars, and two time-shares, the court cited: (1) wife's retirement account and life insurance policies, valued at approximately $22,000; (2) husband's retirement accounts and life insurance policies, valued at approximately $450,000; and (3) a joint Charles Schwab account worth $10,000. The court awarded wife: (1) 90% of the proceeds from the sale of the marital home; (2) 100% of the retirement account and life insurance policies in her name; (3) $300,000 of husband's IRA or 75% of its then-current value, whichever was higher; (4) 75% of the balances of the other retirement accounts, or $95,376, whichever was higher; and (5) 75% of the cash value of the life insurance policies in husband's name. In addition to the remaining percentages of the above assets, the court awarded husband the two time-shares, valued at $12,500, not including a lien on one of them. As for the vehicles, the court awarded wife a Jeep and a Cadillac, and husband a Mercedes-Benz. Finally, the court ordered husband to pay wife $10,000 of her $18,193 itemized bill for attorney's fees that she submitted to the Court.

Husband filed a motion to amend the judgment, in which he challenged the court's assigned $10,000 value to the Charles Schwab account, the fairness of the allocation of monies in his life insurance and retirement accounts, the requirement that he pay wife $10,000 towards her attorney's fees, the credibility of a real estate agent who testified on wife's behalf, and the court's statement that husband did not dispute wife's employment status while she was raising the children. The court denied the motion, except for altering its decision to acknowledge that husband disputed wife's employment status during the years she was the primary caregiver for the parties' children.

In his pro se appeal, husband generally claims that wife's attorney lied during the proceedings and that the trial judge was biased. He cites as error: (1) the court's finding that the parties separated in July 2014; (2) the court's statement that a real estate agent credibly testified that husband acted in a bullying manner towards his wife and her during their interactions; (3) the wife's attorney's "false statements," including her hesitation in disclosing the name of a potential buyer of the marital residence, her statement that she was unaware husband was the CEO of Screen Retriever, which he claims was aimed at manipulating the court into ordering his deposition, her statement that wife did not eat ham because she is Jewish, and her complaint that husband was dominating hearing time; and (4) the court's demonstrated bias in engaging in "chummy personal conversations" with wife's attorney and not applying a "quid pro quo" in making evidentiary rulings.

None of these contentions cast doubt on the court's property distribution or maintenance award. "When findings are attacked on appeal, our role is limited to determining whether they are supported by credible evidence." Casavant v. Allen, 2016 VT 89, ¶ 21, 202 Vt. 606 (quotation omitted). "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 and alterations omitted) (stating that appellant has burden "to prove that the family court committed a reversible error"). The court acknowledged that the date of the parties' separation was disputed, but it concluded that the evidence favored wife's version of when the parties separated. Husband fails to cite any additional contrary evidence to undermine the court's finding and, further, fails to indicate what impact, if any, this finding had on the court's decision. With respect to the testimony of the real estate agent, it is within the province of the trial court, not this Court, to determine the credibility of witnesses. None of the statements by wife's attorney cited by husband demonstrate that the attorney presented false statements to the court. Regarding husband's deposition, husband's attorney indicated he had no objection to the deposition, which he recognized wife had a right to, and wife's attorney later acknowledged that she was mistaken in suggesting that husband had not disclosed his current employment status. Regarding the court's evidentiary rulings, the court does not admit or exclude evidence based on a quid-pro-quo principle, and husband has failed to cite to the record to demonstrate an abuse of discretion as to the admission or exclusion of any particular evidence. As for husband's claims of judicial bias, he failed to preserve this claim by seeking disqualification of the presiding judge. Id. ¶ 24 ("To preserve the issue of judicial bias, a litigant must seek to disqualify the presiding judge in the trial court."). In any event, husband has failed to cite instances in the record that demonstrate any bias on the part of the trial court. See Luce v. Cushing, 2004 VT 117, ¶ 18, 177 Vt. 600 (mem.) (stating that trial judge is "accorded a presumption of honesty and integrity, with the burden on the moving party to show otherwise in the circumstances" (quotation and alterations omitted)).

Husband devotes two paragraphs in his principal brief to challenging the divorce decree itself. He argues that: (1) there was no Charles Schwab IRA account valued at $350,000, as indicated by the court; (2) the other Schwab account referred to by the court did not contain $10,000; and (3) given his financial circumstances, the court abused its discretion by ordering him to pay $10,000 of wife's attorney's fees. Regarding defendant's first argument, the court did not refer to a Charles Schwab IRA account valued at $350,000; rather, the court referred in its final order to a "Charles Schwab account worth $10,000" and to "[Defendant's] IRA worth $350,000." In his motion to amend the judgment, husband did not indicate that the court had confused the accounts; rather, he argued that the Charles Schwab account was worth less than $10,000 and that $300,000 represented 81%, not 75%, of the value of husband's IRA. On appeal, husband does not cite to the record to demonstrate that the court confused the accounts. Regarding the Schwab account, the court acknowledged that there was conflicting evidence as to its value, but it determined that the most likely then-current value of the account was $10,000—the value indicated in husband's own financial affidavit. We find no basis to overturn that valuation. DeLeonardis v. Page, 2010 VT 52, ¶ 12, 188 Vt. 94 ("We will affirm the family court's valuation of assets if the court's discretion was exercised within the range of presented evidence."). In sum, husband has failed to provide this Court with a basis to overturn the court's property distribution or its award of property in lieu of maintenance. See id. ("[W]e afford the family court wide discretion in distributing the marital estate and will uphold the court's distribution unless its discretion was abused, withheld, or exercised on untenable grounds." (quotation omitted)).

Finally, we reject husband's argument that the court abused its discretion in ordering him to pay $10,000 of wife's attorney's fees. See Milligan v. Milligan, 158 Vt. 436, 444 (1992) (stating that trial court may exercise its discretion to award attorney's fees in divorce action). The trial court ordered husband to pay part of wife's attorney's fees based on the disparity of the parties'

earning potential. See Hanson-Metayer v. Hanson-Metayer, 2013 VT 29, ¶ 64, 193 Vt. 490 ("The primary consideration in awarding attorney's fees is the ability of the supporting party to pay and the financial needs of the party receiving the award."); Turner v. Turner, 2004 VT 5, ¶ 9, 176 Vt. 588 (mem.) (awarding attorney's fees is proper "where justice and equity so indicate" (quotation omitted)). In response to husband's motion to amend, the court acknowledged that wife received a significantly greater portion of the marital assets, but it concluded that, given husband's far superior earning capacity, requiring him to pay a portion of wife's attorney's fees was fair and equitable. On appeal, husband suggests that he is unable to pay the fees, but the record, including the court's unchallenged findings and conclusions concerning the marital assets, indicates that he has been awarded assets that will allow him to share in the cost of wife's attorney's fees. Accordingly, husband has failed to demonstrate that the court's order constitutes an abuse of discretion.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice