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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-226

NOVEMBER TERM, 2008

John J. Cronin	}	APPEALED FROM:
	}	
	}	
v.	}	Franklin Family Court
	}	
	}	
Marie B. Cronin	}	DOCKET NO. 296-8-94 Frdm
		Trial Judge: Howard E. VanBenthuysen

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

Husband appeals the family court's order denying his motion to modify spousal maintenance and granting wife's motion to reinstate the previous rate of maintenance. On appeal, husband argues that the court erred in denying his motion without considering whether there was a change in circumstances. We reverse and remand.

The parties do not dispute the facts. Under the parties' final divorce order, husband was obligated to pay spousal maintenance of $1400 per month. After husband lost his job and gained new employment where he was earning $46,000 per year, the parties entered a stipulation in August 2004 whereby husband agreed to pay wife spousal maintenance of $1000 per month until July 31, 2010. In 2007, husband again lost his job. At the time his employment ended, husband was making $65,000 per year. In December 2007, the parties agreed that husband would pay $500 per month until he found new employment. On January 30, 2008, husband started a new job where he was earning $45,000. In April 2008, wife filed a motion to reinstate the 2004 obligation to pay $1000 in maintenance. Shortly thereafter, husband filed a motion to reduce or terminate his 2004 maintenance obligation. He argued that although it appeared he had an income similar to 2004, his situation was different because his disposable income was less due to fewer benefits, and because he does not anticipate pay increases as he did in 2004. In addition, he claimed that wife's income had increased so that she would have greater income than him if the maintenance obligation was reinstated. At the hearing, the parties agreed to submit exhibits instead of presenting evidence and testimony.

In a written order, the family court granted wife's motion, and denied husband's motion. The court explained that "[t]he key to resolving this dispute is to look at the actual bargains made by and between these Parties." The court reasoned that because husband is making a salary "reasonably similar" to the one he received when he agreed to pay wife $1000 a month in maintenance in 2004, there was no basis to alter the maintenance award. As to husband's argument that there was a change in circumstances due to his job loss and reduced net pay, the

court concluded that husband's argument was "moot under these facts" given "the bargain made by [wife] for a particular amount of rehabilitative maintenance." In addition, the court explained that because husband had since found a job at a rate of pay similar to that in 2004, the change of circumstances was "cured." The court therefore denied husband's request to modify maintenance and granted wife's motion to enforce the 2004 agreement. Husband now appeals.

"On motion of either party and due notice, and upon a showing of a real, substantial, and unanticipated change of circumstances, the court may . . . modify a judgment relative to maintenance, whether or not such judgment relative to maintenance is based upon a stipulation or an agreement." 15 V.S.A. § 758. A finding of changed circumstances is a jurisdictional prerequisite and the burden of proof rests on the party seeking modification. Gil v. Gil, 151 Vt. 598, 599 (1989). There are no fixed standards for determining if a change of circumstances has occurred. Braun v. Greenblatt, 2007 VT 53, ¶ 6, 182 Vt. 29. The family court has discretion to decide a motion to modify, and we will reverse only when there is no reasonable basis to support the court's decision. Root v. Root, 2005 VT 93, ¶ 18, 178 Vt. 634 (mem.).

Husband first argues that the family court abused its discretion in failing to even consider whether there was a real, substantial and unanticipated change in circumstances warranting modification under § 758. We agree. To the extent that the court felt it was unable to modify maintenance because the prior award was based upon a stipulation, the statute and our cases make clear that maintenance is subject to modification whether it is based on an agreement of the parties or a court order. 15 V.S.A. § 758; see Taylor v. Taylor, 175 Vt. 32, 39 (2002) ("Section 758 allows modification of stipulated maintenance awards under the same circumstances as court-imposed awards without an underlying agreement of the parties."). An agreement to provide maintenance does not divest the family court of its power to modify maintenance, and therefore such a request cannot be "moot," regardless of the previous bargain made by the parties. See Taylor, 175 Vt. at 39 (holding that maintenance provision in a stipulation could not act as a liquidated damages clause). While the court has broad discretion in determining whether the factual circumstances warrant modification, the court must consider the request, and the parties cannot waive the ability to seek modification simply because they previously stipulated to an amount. See Braun, 2007 VT 53, ¶ 10 (parties may not waive court's ability to modify). On remand, the court shall consider the current situation of the parties compared to their circumstances at the time of the 2004 stipulation to determine if there has been the requisite change in circumstances to warrant modification of maintenance. See Gil, 151 Vt. at 599 (in assessing a motion to modify, the court must look at parties' current circumstances compared to the time of the final order).

Reversed and remanded.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice