

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2015-326

FEBRUARY TERM, 2016

Nicola Weaver	}	APPEALED FROM:
	}	
v.	}	Superior Court, Addison Unit,
	}	Family Division
	}	
David Weaver	}	DOCKET NO. 138-7-09 Andm

Trial Judge: Barry D. Peterson, Acting
Superior Judge, Specially
Assigned

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

Defendant appeals the court's order resolving his motion to modify spousal maintenance. On appeal, defendant argues that the court erred in requiring him to pay maintenance in excess of what the record evidence established he was able to pay. We reverse and remand.

The parties were divorced in August 2011 after a long marriage during which they had four children. The divorce order provided that defendant was obligated to pay wife \$2916 a month in spousal maintenance based on his annual income of \$101,688. The divorce order granted plaintiff sole legal rights and responsibilities to the parties' children. In June 2015, the court modified custody and granted sole physical and legal rights and responsibilities to defendant over the parties' two minor children.

In response to defendant's motion to modify maintenance, in September 2013, the court reduced defendant's monthly maintenance obligation to \$2500 retroactive to July 2013 based on defendant's testimony that his income had been reduced because he lost a major client.

In October 2014, defendant filed another motion to modify spousal maintenance based on the fact that he had become unemployed. The court held a hearing on the motion over three days. At the hearing, defendant conceded that in the context of the earlier 2013 modification proceedings, he failed to disclose that he had received a payment in excess of \$200,000 in September 2013 in a settlement from the lost client. In response, the court set aside the September 2013 modification order and reinstated maintenance for the period between July 2013 and October 2014. That decision has not been appealed. Therefore, we consider only defendant's maintenance obligation from October 2014 onward.

In support of his motion to modify, defendant testified that after he lost his job, he was receiving unemployment compensation benefits of \$1889 a month. He explained that although he was also receiving some residual payments from former clients, his unemployment

compensation was reduced by these amounts. Defendant stated that for a time after the divorce, he lived in a home purchased and owned by his parents. The property was purchased by his parents for \$105,000, and defendant testified that he made investments in the home to improve it. Defendant testified that the town lists the value of the home at \$201,600. He stated that nonetheless if the home were sold, after taxes, there would not be any profit gained. He stated that he now lives with his new wife and her children, and they split expenses. He testified that with the settlement of \$200,000 he made \$337,000 in 2013, but none of it remained by the time of the hearing. Plaintiff testified that without maintenance payments, she had insufficient funds to meet her expenses and had incurred credit card debt.

Based on the foregoing facts, the court concluded that the loss of defendant's job amounted to a change of circumstances. The court found that plaintiff continues to lack sufficient income to provide for her reasonable needs and is unable to support herself at the standard of living established during the marriage. The court found that defendant was collecting unemployment compensation benefits of \$436 per week that were scheduled to end three weeks after the final hearing. The court found that although defendant was receiving some residual payments from former clients, these amounts did not increase his income because his unemployment compensation payments were reduced by these amounts. The court found that defendant owes \$50,000 and \$14,000 in delinquent federal and state income taxes, but did not consider these debts in its calculation of defendant's available income. The court did not credit defendant's testimony regarding the value of the home his parents purchased, and found that if sold, the home "should generate a significant return of the defendant's share of the investment." The court found that defendant's unemployment was "a temporary situation" and that it expected defendant would be able to meet his needs and provide maintenance. Thus, the court modified maintenance to \$1500 a month. The order states "[t]his Temporary Spousal Maintenance Order shall be scheduled for a review in four months." After the court denied defendant's subsequent motion to reconsider, defendant filed this appeal.

Maintenance may be modified "upon a showing of a real, substantial, and unanticipated change of circumstances." 15 V.S.A. § 758. In setting the amount of maintenance, the court is directed to consider several relevant factors including, among other things, "the financial resources of the party seeking maintenance," the standard of living during the marriage, and "the ability of the spouse from whom maintenance is sought to meet his or her reasonable needs while meeting those of the spouse seeking maintenance." 15 V.S.A. § 752(b)(1), (3), (6). The trial court has discretion in modifying maintenance, and we will uphold the decision "unless the discretion was erroneously exercised, or was exercised upon unfounded considerations or to an extent clearly unreasonable in light of the evidence." Mayville v. Mayville, 2010 VT 94, ¶ 8, 189 Vt. 1 (quotation omitted); Stickney v. Stickney, 170 Vt. 547, 549 (1999) (mem.) (explaining that court has broad discretion in determining amount and duration of maintenance, but "discretion is not unlimited").

Defendant argues that the court's order requiring him to pay \$1500 a month in maintenance was error insofar as his income, before payment of any expenses, was \$1889 a month. We conclude that the court failed to adequately explain its order setting maintenance at \$1500 a month for a period in which defendant's income was only slightly above that amount. While the trial court is entitled to discretion in resolving a motion to modify maintenance, its findings must be sufficient for this Court to determine "what was decided and why." Richard v. Richard, 146 Vt. 286, 287 (1985), superseded by statute on other grounds. Here, the court found

that defendant was involuntarily unemployed, and was receiving income of \$436 a week in unemployment benefits. Yet, the court imposed a maintenance obligation of \$1500 a month.

A maintenance award may be justified where the obligor spouse's reported income appears to be insufficient to meet expenses and a maintenance payment if the court finds either that the expenses are not reasonable or that the obligor's income is greater than reported. In this case, the court did not make either finding. Defendant testified that he shared family expenses with his new wife and his expenses totaled \$4,543 a month. The court did not make specific findings on the reasonableness of defendant's expenses. Further, the court alluded to other possible sources of income for defendant, but made no particular findings on availability or amount. The court noted that in September 2013 defendant received a lump sum of \$200,000 as a settlement. The court did not, however, make findings on how this money was spent, or how much remained at the time of the hearing on this motion to modify.

The court also made some findings regarding the home that defendant's parents purchased and where defendant resided following the parties' divorce. The court found that defendant had invested \$75,000—presumably from his settlement—in the home. The court did not credit defendant's testimony that the house would not produce a profit if sold, and found that if sold the home would “generate a significant return.” There were no definitive findings, however, on the home's worth or defendant's ability to receive income from it. Further, the court alluded to the fact that defendant was likely to be working again soon, but failed to fully explain whether it was imputing income to defendant and on what basis. See Kohut v. Kohut, 164 Vt. 40, 44 (1995) (holding that court could impute future income from past earnings).

On remand, the court should consider all of the statutory factors and the evidence on defendant's income and explain its decision. The court should also be mindful of the fact that while maintenance is meant to “equalize the standard of living of the parties for an appropriate period of time,” it may also “serve to compensate the homemaker for contributions to family well-being.” Stickney, 170 Vt. at 549. In this case, the original maintenance award was, at least in part, compensatory. Therefore, even if defendant is entitled to some reduction in his maintenance obligation, he is not necessarily entitled to have the obligation terminated. See id. (explaining that where maintenance is compensatory, change in obligor's finances does not eliminate entitlement to award); see also Miller v. Miller, 2005 VT 122, ¶ 27, 179 Vt. 147 (questioning family court's authority to terminate compensatory part of maintenance award).

Finally, we note that although the court termed this a “temporary spousal maintenance order,” this was a final order insofar as it fully resolved defendant's pending motion to modify. A final award may be modified only upon a showing of a “real, substantial, and unanticipated change of circumstances.” 15 V.S.A. § 758. This is a jurisdictional threshold that must be met before maintenance can be further modified. See Braun v. Greenblatt, 2007 VT 53, ¶ 10, 182 Vt. 29 (explaining that maintenance may be modified only after the statutory jurisdictional threshold is satisfied and this requirement cannot be waived by parties); Taylor v. Taylor, 175 Vt. 32, 39 (2002) (recognizing that parties may “in appropriate circumstances” agree on events that will be considered changed circumstances for purposes of modifying maintenance, but will be subject to court's review); see also deBeaumont v. Goodrich, 162 Vt. 91, 96-97 (1994) (rejecting notion that court could create an “‘automatic change’ provision” that would allow a modification of custody without requisite finding of changed circumstances). Therefore, the court erred in

setting the matter to be automatically reviewed in four months without the requisite finding of changed circumstances.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice