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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-538

JUNE TERM, 2005

Susan L. Bradbury } APPEALED FROM:
}
}
v. } Bennington Family Court
}
Michael A. Nelson }
} DOCKET NO. 92-3-96 Bndm

Trial Judge: Nancy Corsones

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

Husband appeals pro se from a family court order denying his motion to modify spousal maintenance. He contends the court erroneously: (1) made findings concerning the parties' earning abilities inconsistent with the evidence; (2) commingled child support and spousal maintenance issues; (3) relied on an incorrect computation concerning the parties' property division; (4) relied on an incorrect premise in restructuring his payment schedule; (5) misapplied precedent; and (6) exhibited bias. We affirm.

The parties were married in 1986 and divorced in 1997. They had two children, born in 1987 and 1988. The divorce judgment incorporated an extensive separation agreement that awarded compensatory spousal maintenance to wife, who had worked as a homemaker throughout the marriage. In January 2002, husband moved to modify spousal maintenance. He had been self-employed for many years in a transportation consulting business, earning a substantial income, but claimed a reduction in annual income from about $225,000 to $120,000. He also had remarried and divorced, resulting in additional support payments, and had moved to Massachusetts and had another child with a third woman. Wife had also remarried and was living in Massachusetts. The court issued a written decision in August 2002, finding that the spousal maintenance provision from the original agreement of the parties, incorporated in the final order of divorce, was intended to acknowledge wife's significant contributions to the marriage and to redress wife's lesser share of the marital property. The court ordered a small reduction of husband's maintenance obligation to $2000 per month.

Two years later, in July 2004, husband filed a second motion to modify spousal maintenance, again claiming that his income had fallen below earlier levels due to changes in the consulting market, and that wife's earning ability and financial circumstances had improved. Following a hearing, the court issued a written decision, denying husband's request to reduce or eliminate maintenance, but ordering a restructuring of the payment schedule to defer and accrue a portion of the payments. The court denied a subsequent motion for reconsideration. This appeal followed.

Modification of a spousal maintenance order requires "a showing of a real, substantial, and unanticipated change of circumstances." 15 V.S.A. § 758. The burden of establishing that such a change has occurred is on the party seeking modification. Mayo v. Mayo, 173 Vt. 459, 462 (2001) (mem.). The trial court enjoys considerable discretion in ruling on maintenance, and the party challenging a court's decision must show that there is no reasonable basis to support it. Sochin v. Sochin, 2004 VT 85, ¶ 10. The factual findings underlying a court's maintenance decision must be upheld unless, taking the evidence in the light most favorable to the nonmoving party, and excluding the effect of modifying evidence, the findings are clearly erroneous. Wardwell v. Clapp, 168 Vt. 592, 595 (1998) (mem.).

Husband first argues that the court's findings concerning his earning ability are inconsistent with the evidence. Although husband established that changes in market conditions had caused his income to diminish since 2002, he also acknowledged that he had made no serious effort to explore shifting from self-employment to a salaried position. The court reasonably concluded that, with both his former and current families to help support, husband's decision to hope for improvements in the consulting market rather than to seek other employment opportunities did not justify a reduction in his maintenance obligation. See id. at 594-95 (court may consider party's minimal efforts to undertake new employment or decision to be underemployed in deciding whether modification of maintenance obligation is justified). Although husband cites his own testimony that he did not believe a salaried position would match his former income, the court's finding that the testimony lacked credibility, in light of husband's extensive business training and experience, was also reasonable. See id. at 595 (in ruling on modification motion, it is trial court's prerogative to weigh the evidence and credibility of witnesses, and determine if moving party has met its burden).

Husband next contends the court improperly ignored evidence concerning wife's improved earning capability and financial circumstances. Husband relies on evidence that wife had worked part time from 1998 to 1999, earning about $19,000 per year, as well as census data showing that income for women in Connecticut—where wife currently resides—is higher on average than in Vermont. The evidence and findings show that the court did not ignore wife's prior experience, but instead found that wife had not worked outside the home because she was required to care for a clinically depressed child, and that more recently she had applied for work but had not secured employment. Husband also claims the court ignored evidence that wife had realized a substantial gain on the sale of a home in Massachusetts. The court did not overlook the sale but rather found—based on the evidence—that the proceeds were used to purchase a replacement home in Connecticut. Accordingly, we discern no basis to conclude that the court overlooked material evidence or that its findings are clearly erroneous.

Next, we reject husband's claim that the court improperly relied on circumstances related to his child support obligation in denying the motion to reduce or eliminate spousal maintenance. The court's findings do not support the claim. Although the court properly noted wife's continuing child care duties with respect to her ability to work, the principal bases for its decision were its findings that the spousal maintenance award was based largely on wife's long-term contributions as a homemaker during the marriage and that the parties' respective financial circumstances had not changed sufficiently since 2002 to reduce or eliminate husband's maintenance obligation. We thus discern no error.

Husband also takes issue with a finding in the 2002 decision that the spousal maintenance award was based, in part, on an unequal distribution of the marital property in favor of husband. Husband contends the court (Judge Wesley) erroneously failed to account for certain tax liabilities that were assigned to husband. The earlier decision was not appealed, and therefore is final. Furthermore, as husband acknowledges, the court did not specifically make use of this earlier finding in the decision currently on appeal. Accordingly, we discern no error.

Husband further claims that the court erred in restructuring his monthly payment schedule to require payment of only $1000 of the $2000 maintenance award until the youngest child turns eighteen in June 2007, when husband's $1000 child support obligation terminates. Husband relies on a statutory provision in Massachusetts, which had acquired jurisdiction over child support when the parties relocated there, providing that child support may continue for a dependent child remaining at home and enrolled in an educational program until the child turns twenty-three. Even assuming that Massachusetts law continues to govern, husband remains free to seek a modification of the repayment schedule in the event that his child support obligation continues beyond the youngest child's eighteenth birthday.

Husband asserts the court erred in citing Stickney v. Stickney, 170 Vt. 547, 549 (1999) (mem.), in which this Court reversed a trial court order eliminating a spousal maintenance award used to compensate the spouse for contributions to the family during a fifteen-year marriage. Husband contends Stickney is inapposite because wife had regained the opportunity to work and husband had lost any advantages from wife's contributions. As noted earlier, however, the record evidence and findings do not support husband's claim that either husband's or wife's earning capabilities changed substantially during the two-year period between the 2002 order and the 2004 modification motion. Accordingly, we discern no error in the court's reliance on Stickney.

Finally, husband contends that he did not "receive just and fair consideration from the trial court," citing several examples from the hearing that he claims evidence a "predisposition" to reject his position. The trial judge is "accorded a presumption of honesty and integrity, with [the] burden on the moving party to show otherwise in the circumstances of the case." Luce v. Cushing, 2004 VT 117, ¶ 18 (quotations omitted). Husband contends that "it is possible" the trial court placed undue reliance on Stickney because, as the court informed the parties at the hearing, she had been one of the lawyers in that case. As noted, however, the court's reliance on Stickney was well-placed. Furthermore, nothing in the record suggests that the court's participation in the Stickney case exerted any undue influence here. Husband also contends the court exhibited bias in allowing wife's counsel to submit a post-trial memorandum after counsel had indicated she did not intend to file supplemental briefing. The record shows that the court had invited both parties to file supplemental briefs, and the court was not bound by counsel's initial statement indicating an inclination to rely on her earlier pleadings. Husband also contends the court exhibited bias in issuing its decision on the same day that husband filed a supplemental brief. As husband had given no indication to the court that he intended to file a post-trial brief, we discern no error or bias in the fact that the decision's issuance, two weeks after the hearing, coincided with the filing of husband's post-trial brief. Nor did the court exhibit bias in denying husband's motion for reconsideration as untimely or in rendering adverse rulings on several evidentiary issues. See Gallipo v. City of Rutland, 163 Vt. 83, 96 (1994) (bias is not demonstrated merely by a showing of adverse rulings, "no matter how erroneous or numerous"). Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice