

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-279

FEBRUARY TERM, 2002

Lattie F. Coor	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Ina Fitzhenry Coor	}	
	}	DOCKET NO. S244-87 Cndm
	}	
	}	Trial Judge: Linda Levitt
	}	
	}	

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

Defendant ex-wife appeals the family court's order denying her motion to modify the maintenance award established in the parties' divorce order. We affirm.

The parties were divorced in 1988 following twenty-four years of marriage. At the time of the divorce, defendant was an assistant professor of psychology at the University of Vermont, where plaintiff ex-husband served as president. In addition to receiving over half of the marital assets, defendant was awarded monthly maintenance in an amount increasing to \$3000 in the year 2000 and continuing until she remarried, cohabited, retired, or reached sixty-five years of age. In 1990, defendant filed a motion to modify the maintenance award based on her inability to obtain employment. The family court denied the motion in 1995, following the filing of defendant's supplemental motion in 1991 and plaintiff's cross-motion to modify in 1993. Meanwhile, in 1994, defendant moved to North Carolina. She earned approximately \$13,000 in 1995 as a fund raiser and \$16,000 in 1996 from her interior decorating business.

In November 1996, a truck struck the rear of the vehicle defendant was driving, causing her to sustain a back injury. In May 1999, defendant filed a motion to modify, claiming that she was unemployable due to a head injury that she suffered in the 1996 collision. At the hearing on the motion, defendant testified, and a psychiatrist whom defendant had seen on eight or ten occasions beginning in January 2000 testified by telephone from North Carolina. Following the hearing, the family court denied the motion, concluding that defendant failed to demonstrate that she had suffered any permanent injury in the 1996 collision that prevented her from being employed. The court declined to accept the psychiatrist's opinion that the collision caused defendant's cognitive limitations, noting that defendant had failed to provide the psychiatrist with important facts - including her true age and her history of alcohol dependency - that may have led him to rethink his opinion. On appeal, defendant's principal argument is that the family court abused its discretion by rejecting the opinion of her psychiatrist and concluding that she failed to prove that injuries she suffered in the 1996 accident made her unemployable. She also argues that the court abused its discretion by confining her area of expertise to teaching psychology, by assuming that the marital property had been evenly divided and that she had been given the opportunity to be self-supporting, and by allowing husband's counsel to present evidence that was obtained through collusion with a North Carolina attorney.

We conclude that defendant has failed to present any basis for overturning the family court's order denying her motion to modify maintenance. At the hearing on her motion, defendant relied primarily on the opinion of her psychiatrist to

support her claim that she could not work as the result of injuries suffered in the 1996 collision. On direct examination, defendant's counsel solicited the psychiatrist's opinion that the collision had altered defendant's ability to function and cope on a day-to-day basis. The psychiatrist testified that, although defendant did not lose consciousness in the collision, he believed that she sustained a "subtle head injury" resulting in her having problems staying focused and paying attention. His opinion was based, in part, on testing by a clinical psychologist showing that defendant has problems with auditory and visual attention and on a 1998 MRI indicating an advanced degree of brain atrophy for a 48-year-old person.

The psychiatrist conceded on cross-examination, however, that reports from the testing had assumed incorrect or incomplete information and that he had been unaware until only days earlier of important facts concerning defendant and her medical history that would have been important to the type of diagnosis he was making. He stated that he had relied on incorrect medical records in assuming that defendant was in her late forties rather than her late fifties. He also stated that he was unaware that defendant had suffered from alcohol dependency in the past and had been seeing a psychologist in Vermont. Moreover, he indicated that he had assumed that defendant had been functioning as a clinical psychologist up until the time of the accident. The psychiatrist acknowledged that all of this information would have been important in making an assessment as to whether the 1996 accident had caused the cognitive limitations suggested by the testing. He further acknowledged that the reports on the MRI and the clinical testing he had relied on did not factor in defendant's alcohol dependency and incorrectly assumed that defendant was 48 years old rather than 58 years old. Finally, he conceded on cross-examination that he was not a specialist in diagnosing brain injuries. In response to the court's queries, the psychiatrist stated that the MRI most probably would have been read differently by the radiologist if it had been known that defendant was ten years older and had a history of alcohol dependency, and further that a different reading by the radiologist would have changed his opinion on the test results. The psychiatrist indicated that he still believed that defendant had suffered a head injury in the 1996 accident, but he conceded that questions concerning age and alcoholism made it a more difficult call.

Given this testimony, the court concluded that defendant failed to demonstrate that she had suffered a permanent injury in the 1996 car accident that prevented her from working. The evidence, or lack thereof, supports the court's decision. Given our standard of review, she misses the mark when she complains that the court abused its discretion by ignoring the testimony of her expert and instead relying on information "garnered" by plaintiff's counsel. It was defendant's burden to demonstrate that she was entitled to a modified maintenance award because of a real, substantial and unanticipated change of circumstances. See Mancini v. Mancini, 143 Vt. 235, 239 (1983). The court denied her motion, not based upon any evidence submitted by plaintiff, but rather based upon the testimony of her own expert that he had been deprived of information concerning defendant that would have been important in assessing whether the accident caused the cognitive limitations indicated by the testing. Given that testimony, the court acted well within its discretion in denying her motion. See Stickney v. Stickney, 170 Vt. 547, 548-49 (1999) (mem.) (family court has broad discretion in determining amount and duration of maintenance awards).

We find no merit to defendant's remaining arguments. It is not entirely clear what defendant is getting at when she states that the court abused its discretion in confining her area of expertise to teaching psychology at the college level, but, in any case, the argument is not salient to the basis for the court's denial of her motion - that she failed to demonstrate she suffered a permanent injury in the 1996 collision affecting her ability to work. Her next argument seeks to revive questions concerning the fairness of the original property division. Despite her protests to the contrary, these arguments are not relevant to determining whether the court abused its discretion in concluding that defendant failed to meet her burden of proof concerning her motion to modify. Finally, defendant's vague arguments alleging collusion between an unnamed North Carolina attorney and plaintiff's counsel fail to cite any statute or rule of conduct that was violated. Nor is there any indication that plaintiff objected to the admission of evidence based on this argument, or that any evidence was improperly admitted.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)
Specially Assigned