

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

**ENTRY ORDER**

**SUPREME COURT DOCKET NO. 2001-489**

**MAY TERM, 2002**

	}	APPEALED FROM:
	}	
Mary Palermo	}	Windham Family Court
	}	
v.	}	DOCKET NO. F143-5-99WmDm
	}	
Stephen G. Palermo	}	Trial Judge: David A. Howard
	}	
	}	

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

Defendant Stephen Palermo appeals the family court's order reducing his child support and maintenance obligations from \$2400 per month to \$1900 per month, claiming that the court abused its discretion by not ordering a greater reduction in payments. We affirm.

The parties were divorced following a twenty-year marriage that produced four children, all of whom were minors at the time the final divorce order was issued on December 7, 1999. The final order was reached by stipulation of the parties. Under the stipulation, plaintiff Mary Palermo agreed to give up any claim to defendant's one-third interest in his family's grocery and real estate businesses located in Ocean City, New Jersey. In return, defendant agreed to: (1) pay off the mortgages on the parties' Vermont home, which was awarded to plaintiff, who assumed primary physical rights and responsibilities for the children; (2) pay plaintiff monthly maintenance in an amount equaling the difference between \$2400 and his child support obligation under the guidelines, which was \$1332 per month at the time of the final hearing (in other words, \$2400 in combined child support and maintenance); (3) pay plaintiff \$2000 per year in monthly installments toward a retirement fund; and (4) maintain a \$250,000 life insurance policy in his name for the benefit of plaintiff and the children.

In July 2000, plaintiff filed a motion for contempt and enforcement based on defendant's failure to keep up with the support payments and pay off the mortgages on the family home, as required by the final order. Before a hearing was held on plaintiff's motion, defendant filed a motion to modify his support obligations, alleging that his income had been cut in half because of competition from a new grocery store that had opened near the family business and because of an environmental contamination problem at the business location. On August 31, 2001, following a contested hearing, the family court issued its decision granting defendant's motion to modify. The court determined that defendant's reduced income constituted a change of circumstances, and that even though defendant was aware of the pollution problem and increased competition before the date of the final divorce order, he could not have anticipated the extent to which his income would be affected. After analyzing wife's needs and husband's ability to pay, the court reduced husband's combined support obligation from \$2400 per month to \$1900 per month, but extended the payments from July 2007 to July 2010 to ensure that plaintiff would receive the same amount of money she would have received under the original order.

On appeal, defendant's principal argument is that the family court abused its discretion by imposing a support obligation that, together with his other financial obligations under the final order, exceeded his monthly gross income. We reject this argument, which is based on calculations that are not supported by the court's findings or the evidence. The court

found that defendant's reduced income from the grocery business, which operated only about six months of the year, was \$35,000 to \$40,000. Defendant also claimed unemployment during the off months each year, which amounted to \$8,806 in 2001. The court also found that the family business provided unreported cash distributions to family members, but it could not place an exact figure on the amount given. Plaintiff testified that, during the marriage, the parties had accepted between \$17,000 and \$27,000 in unreported income each year from the business. On the other side, the court's order requires defendant to make \$1900 in monthly support payments and \$1724 in monthly payments connected with the mortgages on the marital home, the premium on his life insurance policy, and his contribution toward plaintiff's retirement. Thus, defendant's gross income (exclusive of unreported income and assuming the \$40,000 figure) exceeds his court ordered obligations by approximately \$443 per month (\$4067 minus \$3624). The family court has not required defendant to make payments that exceed his monthly gross income, as he claims.

Defendant protests in his reply brief, however, that even if his obligations under the court order do not exceed his gross income, the court still abused its discretion by requiring him to pay such a high percentage of his income to plaintiff. We find defendant's argument unavailing for several reasons. First, defendant has a history of obtaining substantial unreported income from the family business, and there is no reason to believe that this practice has discontinued. Although the court could not put a dollar figure on how much unreported income defendant was getting, the evidence supports the court's finding that the business is supplying family members with additional income. Second, the grocery store is in business only about six months of the year. Although defendant has duties in connection with the business that extend beyond the months of operation, there is little doubt that he could make \$10,000 to \$20,000 in additional income, as the trial court found, by working year-round. Third, the court also found that defendant's rent, food, and utilities are paid through the family business. Defendant lives rent free in the same three-bedroom, two-bathroom apartment above the grocery store that his family lived in during the marriage. His groceries are charged to the store, which carries the charges as uncollected debts. He has a new truck at his disposal, compliments of the business. Thus, defendant's basic expenses are largely taken care of by the family business.

Fourth, it is important to keep in mind that the entire \$1724 in non-support monthly payments that the final order requires defendant to make to plaintiff are part of the stipulated property settlement, and that, as the trial court found, "plaintiff specifically gave up any claim in the family business in exchange for the maintenance arrangement and the marital residence and other property conditions." Defendant failed to make the mortgage payments within the six-month time frame established under the parties' stipulated property settlement, and now he is claiming that those continued payments make it impossible for him to pay plaintiff the amount of maintenance she bargained for before agreeing to a property division favoring defendant. Plaintiff is entitled to be paid the property component of defendant's obligations (the \$1724), even if defendant has to sell off assets to make those payments. See *Milligan v. Milligan*, 158 Vt. 436, 440 (1992) (court has discretion to order one party to liquidate marital property to meet other parties' needs); cf. *Clapp v. Clapp*, 163 Vt. 15, 23 (1994) (court has power to order divorce party to reduce debt load to ensure maintenance payments).

Defendant's support obligations (the \$1900) are less than half of his gross income, even excluding the unreported income available from the family business. His maintenance obligation serves not only to correct the inequality in income resulting from the divorce, but also to compensate plaintiff "for contributions to family well-being not otherwise recognized in the property distribution." *Stickney v. Stickney*, 170 Vt. 547, 549 (1999)(mem.). Plaintiff was nineteen and defendant twenty-two when they were married. Plaintiff has only a high-school education. She was the primary care giver during the marriage, raising the parties' four children. Notwithstanding her role during the marriage, her limited education and work experience, and the long-term duration of the marriage, plaintiff agreed to accept a temporary maintenance award and no share in the family businesses in exchange for the marital homestead and modest payments toward her future security. "The change in defendant's finances does not erase plaintiff's entitlement to such compensatory maintenance." *Id.*

Given these considerations, the family court acted well within its discretion in setting defendant's support obligation at \$1900 per month. Regarding plaintiff's needs, the court found that her role during the marriage did not leave her in a position to obtain employment that would even come close to providing her the lifestyle she enjoyed while she was married, and that defendant's support and mortgage payments had allowed her to live on a modest budget. With respect to defendant's ability to pay, the court cited his income, his benefits from the family business, and his ability to generate more income. There is no abuse of discretion. See *Clapp*, 163 Vt. at 20 ("the family court has broad discretion in

determining the amount of maintenance, and we will reverse only if there is no reasonable basis to support the award"); Davis v. Davis, 121 Vt. 242, 244 (1959) (court has same wide discretion with respect to modification petitions as it has in original actions concerning maintenance and child support).

Defendant also argues that the family court abused its discretion by imputing income to defendant and by requiring him to liquidate assets. The court did neither, but rather determined that defendant's current income was sufficient to pay the modified support obligation, and that, if necessary, he could obtain additional income by seeking year-round work or liquidating assets. For the reasons stated above, we find no abuse of discretion.

Finally, we decline to consider defendant's argument, raised for the first time in his reply brief, that the court erred by failing to establish separate amounts for maintenance and child support. See Agency of Natural Res. v. Glens Falls Ins. Co., 169 Vt. 426, 435 (1999) (arguments not raised in opening brief are waived on appeal).

Affirmed.

BY THE COURT:

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice