

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-097

SEPTEMBER TERM, 2002

	}	APPEALED FROM:
	}	
Peggy S. Zittritsch	}	Chittenden Family Court
	}	
v.	}	DOCKET NO. 148-3-99 Cndm
	}	
Theresa Marie Zittritsch	}	Trial Judge: David Jenkins
	}	
	}	

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

Theresa Zittritsch appeals from a family court order denying her motion to modify spousal maintenance. She contends the court abused its discretion in ruling that the remarriage of her former wife Peggy Zittritsch did not constitute a real, substantial and unanticipated change of circumstances. We reverse and remand.

The parties were married in May 1983 and have three children, who were fifteen, thirteen and nine years old at the time of these proceedings. In 1998, Terrence Zittritsch decided to undergo a sex change, and became Theresa. She moved out of the family home in 1999. An amended final order of divorce issued in August 2001. At the time of the order, Theresa was forty-two years old, in good health, and employed by I.B.M. with an annual salary of \$120,000. Peggy Zittritsch was forty-one years old, in good health, and employed part-time by Fletcher Allen Health Center earning approximately \$25,000 per year. The court awarded physical and legal parental rights and responsibilities to Peggy, and provided Theresa substantial visitation. The property division awarded Peggy the marital home, and each party was awarded her separate retirement and savings accounts, and car, leaving Peggy with a net estate of \$232,900, and Theresa a net estate of \$170,265. The court noted that allocating more of the assets to Peggy was warranted in light of the length of the marriage and Theresa's earning and investment advantages. While anticipating that Peggy would transition to full time employment, the court found that she would still require maintenance to meet her reasonable needs, and awarded \$2400 per month for one year, reduced to \$1050 per month until the emancipation of the oldest child or the end of his senior year in high school (whichever last occurs), and thereafter reduced to \$286 per month until the emancipation of the youngest child, or the end of his senior high school year (whichever last occurs). Under an earlier stipulated order, Theresa was required to pay child support of about \$1300 per month.

In June 2001, after the contested divorce hearing but before the final order, Theresa moved to modify spousal maintenance (which was \$1500 under the temporary order then in effect) based on Peggy's plans to remarry in July. The court addressed the motion at an evidentiary hearing in January 2002. Both parties testified, and Theresa introduced financial statements and other evidence of the parties' current financial circumstances. Theresa's basic argument was that Peggy's income had increased substantially with the remarriage (the evidence showed that her new husband earned over \$60,000 per year) and that Peggy's monthly expenses had decreased substantially, now that she was sharing household and other expenses. At the conclusion of the hearing, however, the court observed that remarriage is generally an anticipated consequence following divorce, and thereafter issued a brief entry order denying the modification motion on the ground that Theresa had failed to demonstrate a real, substantial and unanticipated change of

circumstances. See 15 V.S.A. § 758 (either party may modify maintenance " upon a showing of a real, substantial, and unanticipated change of circumstances"). This appeal followed.

Proof of a real, substantial, and unanticipated change of circumstances is a jurisdictional prerequisite to a modification of spousal maintenance, and the burden of proof rests with the party seeking modification. Gil v. Gil, 151 Vt. 598, 599 (1989). In considering the motion, the trial court must assess the parties' current circumstances in light of their circumstances at the time of divorce. Id. Furthermore, as the trial court here suggested, remarriage by itself does not automatically represent a change of circumstances. The issue is whether the remarriage has so altered the parties' financial circumstances that a real and substantial change has occurred. As we explained in Johnson v. Johnson, 155 Vt. 36, 42 (1990) (internal citations omitted): " Remarriage does not necessarily improve the spouse' s financial security, and therefore courts have held that remarriage does not automatically justify a termination of maintenance payments. Further, the paying spouse may seek a modification of the order if remarriage causes an increase in income so that a real and substantial change of circumstances is present."

Although the court here correctly observed that remarriage does not necessarily amount to a real, substantial and unanticipated change of circumstances, it failed to address the critical question of whether Peggy' s remarriage caused such a change in her financial status as to constitute a real and substantial change in circumstances. Accordingly, we remand the matter to the trial court to address this question.

Reversed and remanded.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice