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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-252

NOVEMBER TERM, 2003

Stephanie W. Hart	}	APPEALED FROM:
v.	}	Windsor Family Court
Jeffrey Hart	}	DOCKET NO 10-1-82 Wrdm
	}	Trial Judge: Amy M. Davenport

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

Wife appeals from a family court order denying her request for attorney=s fees incurred in opposing husband=s motion to modify a spousal maintenance award. She contends the court erred in denying the request, or in failing to hold a hearing to take further evidence on the parties= respective financial circumstances. We affirm.

The parties were divorced in 1982. The final judgment order required husband to pay spousal maintenance of $2000 per month until such time as wife either dies or remarries. In March 2002, husband moved to reduce or eliminate the maintenance award. The motion alleged that husband, who was 73 years old, had recently suffered a serious illness which had affected his ability to meet his obligations under the divorce judgment. He also later argued that wife=s longstanding cohabitation with another man had reduced her need for maintenance. Wife filed an opposition, as well as a request for an interim award of attorney=s fees incurred in defending against the motion.

The court deferred any action on the interim request for attorney=s fees until after a hearing on the merits, which took place in February 2003. Following the hearing, the court issued a written order denying the modification motion. The court found that husband=s retirement income amounted to about $80,000 per year, and that despite his illness husband continued to receive about $20,000 annually from his position as senior editor with a national magazine. The court also found that husband=s debts were currently lower than they were at the time of the divorce, because their children had all completed their college educations. Wife=s annual income from spousal maintenance and other assets was about $50,000. The court also noted that wife=s partner contributed $1160 per month to their living expenses, that wife had recently inherited $30,000 from her father= s estate, that she owned a home in Wilder unemcumbered by a mortgage, and that she was the co-owner of her partner=s home which was currently on the market for $350,000.

In denying the motion, the court concluded that husband had failed to demonstrate a substantial and unanticipated change of circumstances, noting that it was foreseeable his income would decrease somewhat upon retirement, that his illness had not significantly affected his income, and that wife= s cohabitation had not substantially reduced her need for maintenance. Accordingly, the court dismissed the motion. See Wardwell v. Clapp, 168 Vt. 592, 594 (1998) (mem.) (under 15 V.S.A. ' 758, a real, substantial and unanticipated change of circumstances must be demonstrated for court to modify spousal maintenance).

Shortly thereafter, wife filed a renewed motion for an award of attorney=s fees, asserting that she was entitled to such an award based on the disparity in income between the parties and the lack of merit for the modification motion. The motion was accompanied by an affidavit from her attorney and billing statements showing attorney= s fees in excess of $14,000, as well as exhibits from the merits hearing showing the parties= respective incomes. The court denied the motion without hearing in a brief entry order, finding that A [w]hile there is disparity in the parties= income, [wife] has sufficient income and assets to pay her own attorney= s fees.@ The court also found that husband had A brought his motion in good faith.@

This appeal followed.

An award of attorney=s fees in divorce proceedings is a matter of judicial discretion. Begins v. Begins, 168 Vt. 298, 305 (1998). The primary consideration in making such an award is the ability of the supporting party to pay and the financial needs of the party receiving the award. Harris v. Harris, 168 Vt. 13, 25-26 (1998). Viewed in light of these standards, and the record evidence, we discern no basis to disturb the court= s decision. Although, as the court acknowledged, there was disparity in the parties= incomes, the record amply supports a finding that wife=s income of $50,000 per year, plus contributions from her partner, her recent inheritance, and other assets provided wife with sufficient resources to compensate her attorney. See, e.g., Mullin v. Phelps, 162 Vt. 250, 269 (1994) (A Considering the relative resources of the parties, the order to pay costs and fees was reasonable.@). Contrary to wife=s suggestion, there is no presumptive right to attorney= s fees based simply on disparities in the parties= income. Nor was an award compelled by the court= s denial of the modification motion; although it lacked merit, the court found that the motion was brought in good faith, and nothing in the record suggests otherwise. Nor, finally, was the court obligated to take further evidence on the attorney= s fee issue where, as here, ample evidence concerning the parties= financial circumstances was adduced during the hearing on the merits. See Ely v. Ely, 139 Vt. 238, 242 (1981) (divorce and similar actions involving financial circumstances of parties obviate necessity of separate hearing on issue of attorney= s fees). We therefore discern no abuse of discretion in the court=s denial of the motion without a hearing.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Paul L. Reiber, Associate Justice