

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-463

MAY TERM, 2004

	}	APPEALED FROM:
	}	
Joan Briggs	}	Chittenden Family Court
	}	
v.	}	DOCKET No. 44-1-99 Cndm
	}	
James Briggs	}	Trial Judge: Hon. Linda Levitt
	}	
	}	
	}	

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

Husband appeals from a family court order granting a motion to modify spousal maintenance. He contends the court abused its discretion in (1) failing to reduce the maintenance award to the amount that husband had requested, and (2) ordering husband to pay a portion of wife= s attorney= s fees. We affirm.

The parties were divorced in March 2001 after a thirty year marriage. The final stipulated divorce order provided that husband was to pay spousal maintenance to wife of \$1250 per month through December 2002, after which maintenance was to increase to \$3000 per month until husband attained the age of sixty-five (he was forty-nine at the time of the divorce), wife remarried, or either party died. The order provided that it was A anticipated@ that husband= s A total income,@ defined as A all earned and unearned income as defined for income tax purposes,@ for 2003 would be \$100,000. The order further stated that if husband claimed to be unable to pay maintenance at the \$3000 level, A it shall be [husband= s] burden to prove that he is entitled to a decrease pursuant to 15 V.S.A. ' 758,@ and that in such event

[a]ny property and/or non-income producing assets awarded to [husband] in this agreement or A reasonably acquired@ in the future, shall not be subject to sale, liquidation or mortgaging, or otherwise considered, in order to meet his bonafide income shortfall, however, [husband= s] spousal maintenance obligation shall be one of his primary obligations along with his basic and necessary living expenses and expenses to maintain employment. [Wife] reserves the right to argue what is A reasonable@ at a 15 V.S.A. ' 758 review.

The order also provided that if either party breached any provision of the order the breaching party would be responsible for the attorney= s fees incurred by the other party in enforcing his or her rights.

In January 2003, husband informed wife that he did not intend to pay the \$3000 monthly maintenance, and wife, in response, moved to enforce the order. In March, husband moved to modify the maintenance provision. Following a three-day evidentiary hearing, the court issued a written decision, concluding that there had been a substantial, material, and unanticipated change of circumstances warranting a modification of the maintenance award, and ordering that maintenance be reduced to \$2000 per month, and that husband pay \$3000 of wife= s \$6057 in attorney= s fees. The court= s ruling was based on three key findings. First, it found that husband= s expected net income in 2003 B principally from a private consulting business B would be about \$50,000, or between \$50,000 and \$55,000 if an additional \$5000 that husband expected to earn from a part time job were included or certain business deductions were excluded, rather than the \$100,000 level the parties had anticipated. Second, the court found that husband had purchased a number of items since the divorce that were not A reasonably acquired@ as provided in the divorce order, which

militated in favor of reducing the maintenance award to \$2000 per month rather than the \$1250 that husband had requested. Finally, the court determined that husband had violated the provision of the order requiring that he treat the maintenance provision as a A primary obligation,@ thereby entitling wife to a partial payment of attorney= s fees of \$3000. This appeal followed.

Husband contends the court abused its discretion in failing to reduce the maintenance award to \$1250 per month. He asserts that the ruling was based on two factual errors. First, he claims that the court erred in finding that his projected 2003 income was in the A mid-fifties@ rather than slightly over \$50,000 as he had claimed. Husband relies on a financial document that he had prepared for trial which projected his 2003 earned income to be \$48,841, and unearned income to be \$1714, for a total of \$50,555. Husband= s projection included \$2884 in commissions that he had earned from a part-time job as a loan originator, but excluded \$5000 of A additional@ commissions that he had testified he expected to earn in 2003. The court= s finding that husband= s income would be closer to the A mid-fifties@ with the addition of this income is not, therefore, clearly erroneous, and cannot be disturbed. See Stickney v. Stickney, 170 Vt. 547, 548 (1999) (mem.) (we review factual findings of the trial court in the light most favorable to the prevailing party, disregarding modifying evidence, and will not set aside the findings unless clearly erroneous). Although husband later testified that a rise in interest rates had reduced his expectations, the court was entitled to rely on husband= s initial projection in a market of rising and falling rates.¹

Husband also asserts that the evidence fails to support the court= s findings that certain of his assets were not A reasonably acquired@ under the divorce order, that he was indulging in a A lavish life style,@ and that he was not treating the spousal maintenance award as a A primary obligation@ as required by the order. The court= s finding was based on husband= s purchase, with his girlfriend, of a \$450,000 home using a cash gift from his sister for the downpayment and assuming a mortgage of \$360,000; a \$40,000 property across from the home to preserve the views; a \$25,000 used Acura with monthly payments of \$475; a BMW motorcycle, which he later sold; a \$4800 boat; and a \$7000 hot tub. The court noted that husband claimed that he could not cover his monthly expenses of \$5878, yet had not reduced his monthly expenses and had made no change in his A lavish life style@ even after his anticipated income was sharply reduced. The court concluded that these assets were not A reasonably acquired@ or retained under the divorce order for purposes of determining whether husband could afford the \$3000 maintenance award, and demonstrated that husband had not made spousal maintenance a A primary obligation@ as required by order.

With respect to the house and land purchases, husband argues that the court= s finding was erroneous because, after the divorce, he needed a place to live and set up his private office, and he shares the mortgage and tax payments, totaling \$3225, with his girlfriend. These arguments do not undermine the court= s reasoning that husband could have purchased a smaller house or condominium for less than half the price (wife continues to live in the marital home valued at \$130,000), and was under no obligation to finance the purchase of the \$40,000 property to preserve his views. With respect to the car, husband argues that the price was reasonable, but the court was entitled to conclude that a more modest car could have substantially reduced his monthly payments. As to the purchase of the boat and hot tub, husband argues that the court erred because they were purchased with the proceeds from husband= s sale of an interest in an airplane and a boat that he had been awarded in the divorce order. This does not undercut the court= s finding, however, that the \$7000 hot tub and \$4800 boat were not A reasonably@ acquired for purposes of determining husband= s ability to afford his maintenance obligation. Husband also notes that he later sold the motorcycle, but the court was entitled to conclude that the \$5000 net loss in the sale (it was purchased for \$16,000 and sold for \$11,000) was not reasonable.

We conclude, therefore, that the court did not clearly err in finding that these assets were not reasonably acquired under the order. The court= s finding supports, in turn, its conclusion that a \$1000 reduction of the maintenance award (to a \$2000 monthly obligation) was reasonable, and its further conclusion that husband had failed to comply with the requirement that he treat the maintenance award as a A primary obligation,@ thereby entitling wife to an award of attorney= s fees under the order. We thus discern no clear error or abuse of discretion warranting reversal of the judgment. Stickney, 170 Vt. at 548.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Footnote

¹. Husband also argues that the court violated the divorce order by suggesting that husband's income would be closer to \$55,000 if certain claimed business expenses were not deducted. He relies on the provision of the divorce order defining income as "all earned . . . income as defined for income tax purposes." We need not address this particular claim because, as discussed above, the evidence supported the court's finding that husband's projected 2003 income would be about \$55,000 if it included the additional \$5000 in projected commissions.