

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2004-422

FEBRUARY TERM, 2005

Carole (Gulian) Warner	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Family Court
	}	
George Gulian	}	DOCKET NO. 33-1-97 Wndm
	}	
	}	Trial Judge: Geoffrey Crawford

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

Husband appeals from a family court judgment granting wife's motion to modify spousal maintenance. Husband contends that, in finding a real, substantial, and unanticipated change of circumstances, the court erroneously: (1) failed to compare wife's circumstances at the time of the divorce with her circumstances at the time of the modification hearing; (2) relied on insufficient evidence; and (3) failed to consider the parties' standard of living at the time of the divorce. We affirm.

This is the second appeal in this divorce proceeding. The underlying facts are fully described in Gulian v. Gulian, 173 Vt. 157, 158-60 (2001), wife's appeal from the original divorce decree in which this Court reversed the judgment, and remanded for further proceedings, because the trial court had improperly conflated the spousal maintenance and child support awards. On remand, husband stipulated to payment of child support arrears based on the child support guidelines, and to continued payment of spousal maintenance at the amount (approximately \$1600 per month) and duration (nine years from the date of decree ) set forth in the original decree. Thereafter, wife moved to modify spousal maintenance based on a deterioration in her physical and mental health and resulting inability to work. Following an evidentiary hearing, the court issued a written decision, granting the motion, and increasing the maintenance award to \$3000 per month. The order provided that the increase in maintenance would be reduced by any amount of wife's earnings when she returns to work. The court later granted husband's motion to alter the judgment, finding that it had overlooked wife's interest income, and reduced the award to \$2650 per month. Husband's subsequent motion to reconsider was denied. This appeal followed.

Husband contends the court improperly failed to compare wife's circumstances at the time of the divorce with her circumstances at the time of the modification hearing in determining that she had demonstrated a real, substantial, and unanticipated change of circumstances. See Taylor v. Taylor, 175 Vt. 32, 36 (2003) (requiring court to find that there has been a real, substantial, and unanticipated change of circumstances under 15 V.S.A. § 758 before it can modify maintenance order); Gil v. Gil, 151 Vt. 598, 599 (1989) (in considering motion to modify spousal maintenance, court must assess parties' current circumstances in light of their circumstances at time of divorce). More specifically, husband contends the court failed to consider that wife's ill health existed at the time of the original decree and was taken into account in the original maintenance award.

The court's decision demonstrates, on the contrary, that it carefully considered the terms of the original 1999 decree, which had awarded spousal maintenance based, in part, on the assumption that wife's migraine headaches

limited her to working 30 hours per week for an income of approximately \$24,000 per year, but that with medication she would be able to work 40 hours per week, increasing her income to about \$27,000 per year. The court compared that situation to wife's current circumstances, in which she was currently not working as the result of increasingly painful and disabling migraine headaches and depression. The court found that wife's deteriorating physical and mental health, and resulting unemployment, represented a real, substantial, and unanticipated change of circumstances from those that existed at the time of the decree, when her migraines were not considered or expected to be so severe as to prevent her from working full time. Thus, the record does not support husband's claim.

Husband also contends the evidence failed to support the court's conclusion that there had been a real, substantial, and unanticipated change of circumstances. He renews his argument, raised below, that wife's health had not deteriorated, and that she had voluntarily stopped working, citing a series of letters from wife's treating physician stating that her prognosis for recovery was good, and employer records showing that until March 2002, when wife stopped working, she had regularly worked 30 to 40 hours per week. Husband also introduced the testimony of an expert medical witness, Dr. Miller, who testified that plaintiff's psychiatric history suggested the possibility that she was malingering. The court disagreed, finding that wife's migraine headaches had become increasingly painful and disabling, and had prevented her from working since March 2002; that wife had applied for, and been granted, social security disability income in October 2002; and that she had been hospitalized for depression in 2002. The court's findings are supported by the record evidence, including the testimony of wife's treating neurologist, who stated that the increasing frequency and severity of wife's headaches make it difficult for her to hold a job, and her treating psychiatrist, who denied that wife's illness was feigned or that she was malingering. Furthermore, the court specifically found that Dr. Miller's testimony was not persuasive, noting that she had not examined or met wife prior to her testimony. The trial court is best positioned to weigh the evidence and assess the credibility of witnesses, and we will not disturb its findings where—as here—they are supported by credible evidence, even if there is substantial conflicting evidence. O'Brien v. Black, 162 Vt. 448, 454 (1994). Accordingly, we discern no basis to disturb the court's findings and conclusion that wife had demonstrated a real, substantial, and unanticipated change of circumstances.

Finally, husband contends that, in finding a substantial change of circumstances, the court failed to assess wife's needs with reference to her standard of living established during the marriage and embodied in the terms of divorce decree. The court specifically found, however, that without additional maintenance wife would not be able to "maintain a lifestyle consistent with the family's prior middle class standard of living now that she is disabled from employment." The court further noted that although wife had been receiving social security disability income, it was insufficient to make up for her lost employment income, and that she had been forced to spend savings to cover expenses and support herself. Although husband maintains that the court erred in relying on wife's current reasonable expenses, rather than the expenses established at the time of the divorce in 1999, the difference was not substantial (about \$400 per month), and husband's income had increased from about \$ 70,000 per year at the time of the divorce in 1999, to over \$ 90,000 in 2003. Accordingly, we find no error. [\[1\]](#)

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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

Specially Assigned

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[\[1\]](#) In his reply brief, husband raises the additional claim that the court improperly considered college tuition costs for the parties' children in calculating wife's monthly expenses. Matters not raised in the original brief may not be raised for the first time in a reply brief. Bassler v. Bassler, 156 Vt. 353, 363 (1991). We therefore decline to address this argument.