

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-048

AUGUST TERM, 2005

Sharon M. Schmidt	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
Raymond Allen Schmidt	}	DOCKET NO. F 722-9-01 Cndm
	}	

Trial Judges: Ben W. Joseph
Mark J. Keller

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

Husband appeals from a family court order denying his motion to modify spousal maintenance. He contends the evidence and law fail to support the court=s conclusion that the reduction in wife=s monthly expenses resulting from her cohabitation with another man did not amount to a substantial change of circumstances. We affirm.

The facts and procedural history may be summarized as follows. The parties were divorced in April 2002, following a twenty-five year marriage. The parties= stipulation incorporated in the final divorce decree provides that husband shall pay spousal maintenance of \$3000 per month to wife until she reaches the age of 65. In February 2004, husband moved to modify spousal maintenance, asserting that wife had begun to cohabit with her partner during the preceding month, thereby reducing her monthly expenses. The parties stipulated to the material facts at a hearing in June 2004, and the court (Judge Keller) issued a decision in August 2004, finding that although wife=s financial position had changed, the change was not substantial. Accordingly, the court denied the motion. The court subsequently granted husband=s motion for new trial to afford the parties an opportunity to present evidence. The court (Judge Joseph) held a new hearing in October 2004, and issued a second decision the following December. The court again acknowledged that wife=s expenses had been somewhat reduced, but found that her overall financial security had not substantially improved, and therefore again denied the motion. This appeal followed.

Husband contends the court improperly focused on wife=s Afinancial security@ rather than changes in her income and, in a related vein, improperly focused on differences between a cohabitation and a marriage relationship and its effect on wife=s financial security. We note at the outset that our review is limited. The threshold determination of changed circumstances is discretionary with the trial court. Taylor v. Taylor, 175 Vt. 32, 36 (2002). AThere are no fixed standards for determining what meets this threshold, and . . . evaluation of whether or not any given change is substantial must be determined in the context of the surrounding circumstances.@ Pigeon v. Pigeon, 173 Vt. 464, 466 (2001) (mem.) (quotations omitted). A[W]e will not disturb the trial court=s discretionary determination unless the discretion was erroneously exercised, or exercised upon unfounded considerations or to an extent clearly unreasonable in light of the evidence.@ Taylor, 175 Vt. at 36.

Viewed in light of this standard, we discern no basis to disturb the court=s decision. We have recognized, of course, that Athe obligor spouse can bring a motion to modify if . . . a remarriage substantially reduces the need for maintenance.@ Id. at 39. Cohabitation is also routinely recognized as grounds for such a motion. See id. at 34 (citing

standard provision reducing or terminating spousal maintenance upon cohabitation of recipient spouse). In such cases, however, we have viewed remarriage or cohabitation as relevant Aonly to the extent it bears on the >financial security= of the recipient spouse.@ Id. at 38 (quoting Coor v. Coor, 155 Vt. 32, 35 (1990)).

Here, the record disclosed that wife and her partner began to cohabit in February 2004, and that her partner sold his home and bought a one-half interest in wife=s home with the proceeds, allowing them to refinance the mortgage at a lower principal and interest rate. The net result was to reduce wife=s mortgage obligation from \$1200 per month to about \$650. Wife and her partner also share monthly property taxes, home insurance, and utility payments.

Despite wife=s reduction in monthly household-related expenses, the trial court concluded that wife=s financial security had not substantially improved. The court noted that she and her partner were not sharing income, that her annual income of \$17,000 had not increased, and that she continued to live solely on a combination of her income and husband=s spousal maintenance payments of \$36,000 annually, for a total of \$53,000. Husband=s income, in the meantime, had increased from \$117,000 at the time of the divorce to \$130,000. The court also noted that wife=s cohabitation with her partner was of relatively short duration (six months at the time of the court=s original order, ten months at the time of the second order), and that the partner had no obligation to support wife.

Thus, the record and the court=s findings reveal that, contrary to husband=s contention, the court fully recognized that wife=s mortgage payment had decreased by about \$550 per month, and that she was sharing certain other monthly expenses, but that her overall financial circumstances or Afinancial security@ had not substantially changed relative to husband, whose annual income continued to be vastly greater than wife=s and, in fact, had increased by \$13,000 annually since the divorce. Accordingly, we discern no error in the court=s finding that wife=s financial security had not substantially changed. Nor did the court err in considering the length and overall circumstances of wife=s cohabitation relationship as it affected her current and future financial security. As noted, it is not the fact of remarriage or cohabitation, but its impact on the recipient spouse=s financial security that is relevant, Taylor, 175 Vt. at 38, and we discern no error in the court=s noting in this regard that the cohabitation at that time was of relatively short duration, that wife had no access to her partner=s income, and that her partner had no legal obligation to support her. To be sure, the fact that wife=s partner became a co-owner of their residence and co-signer on the mortgage is evidence that cuts the other way, a fact that may not have been sufficiently appreciated by the trial court. See Miller v. Miller, 2005 VT 122, & 19 (to constitute changed circumstances, cohabitation must demonstrate some indicia of permanency). Nevertheless, we do not believe that this evidence, standing alone, undermines the court=s overall conclusion or requires reversal of the judgment. See Osmanagic v. Osmanagic, 2005 VT 37, &5, 16 Vt.L. W. 122, 123 (we will disturb family court=s findings only if, viewing record in light most favorable to judgment, and excluding effect of modifying evidence, there is no credible evidence to support the findings).*

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

* Appellee=s pending motion for permission to file a short reply brief in response to the supplemental brief filed by appellant after oral argument is granted.