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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-207

MARCH TERM, 2007

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| Dawn C. Adamson (Dodge) | } | APPEALED FROM: |
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| | } | |
| v. | } | Chittenden Family Court |
| | } | |
| Jeffrey Dodge | } | |
| | } | DOCKET NO. F474-6-99 Cndm |
| | | Trial Judge: Brian J. Grearson |

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

Defendant ex-husband appeals the family court's affirmance of the magistrate's judgment requiring him to pay $7,500 in attorney's fees to plaintiff ex-wife's former attorney. We affirm.

This case stems from this Court's prior decision, which, in relevant part, reversed and remanded an order requiring defendant to pay $15,000 of his ex-wife's attorney's fees incurred in earlier post-judgment divorce proceedings. See Adamson v. Dodge, 174 Vt. 311, 325-26 (2002). Stating that the primary consideration in determining whether to award attorney's fees in a divorce action is the ability of the supporting party to pay and the financial needs of the recipient party, we remanded the matter for "the trial court to allocate attorney's fees on the basis of the relative capacities and needs of the parties, taking into account both father and mother's ability to pay." Id. at 326. In a January 6, 2005 judgment order, following hearings held in June and November 2004, the magistrate ordered defendant to pay plaintiff's former attorney—as a contribution toward his ex-wife's (hereinafter "wife") attorney's fees—$7,500 plus interest accruing at the statutory rate of twelve percent per annum. The order required defendant to pay $75 per month on the fifteenth of every month commencing on January 15, 2005, until the judgment is satisfied.

Following defendant's appeal, the family court affirmed the judgment, concluding that (1) wife's attorney's fees were reasonable; (2) the magistrate did not err in calculating wife's income based solely on her child support and maintenance awards, given the absence of any evidence that she had additional income; (3) the evidence supported the magistrate's finding that defendant had the ability to pay for part of wife's attorney's fees; (4) the magistrate's award was equitable; (5) the award did not discriminate against defendant's attorney; and (5) the magistrate did not err by ordering post-judgment interest at the statutory rate. On appeal to this Court, defendant raises numerous issues challenging the attorney's fee award.

Defendant first argues that the magistrate issued an impossible order. He points out that

twelve percent annual interest on $7,500 is $75 per month—the same monthly sum that he is required to pay—meaning that he can never pay off the principal of the debt at this rate. He further notes that the family court miscalculated when it stated that the debt would be paid off in approximately thirty-nine years if defendant paid $75 per month. He also asserts that the family court mistakenly indicated that the amount to be repaid is $7,500, which does not take into account that the award was made retroactive from the magistrate's decision. For the most part, these arguments exalt form over substance. The family court recognized that, if the minimum payments were made, the judgment would take an extraordinarily long time to pay off and would result in the payment of an excessive amount of interest. The court concluded, however, that this merely provided a clear incentive for defendant to make larger payments on the judgment. The judgment is not impossible. Defendant may increase the monthly payments to pay off the principal, if he so chooses.

Next, defendant argues that the trial court erred in awarding attorney's fees to wife's former attorney. He contends that the court failed to follow this Court's mandate that it consider the "relative capacities and needs of the parties, taking into account both father and mother's ability to pay." Id. According to defendant, the court's award must be reversed because wife did not testify and the court had no current information regarding her financial circumstances or her ability to pay. He also contends that the evidence does not support the court's conclusion that he had the ability to pay.

Regarding wife's financial circumstances, her attorney indicated at the June 2004 hearing that she was available, if necessary, to testify by telephone. Nevertheless, neither party, both of whom were represented by counsel, sought her testimony. Wife did not participate in the follow-up hearing in November 2004. Her former attorney testified as to the significant disparity in income between defendant and wife. She noted that defendant's income was over four times greater than wife's during the period when she was employed, and that as of last June she was in graduate school in Wisconsin. In its decision, the magistrate found that as of June 2004, wife was known to be a graduate student and was raising four minor children. Thus, the magistrate found no basis for attributing any income to her beyond the $56,000 per year that she received in child support and maintenance from defendant. The family court concluded that these findings were supported by the evidence.

On this record, we find unavailing defendant's argument that the attorney's fee award must be reversed because there was a lack of evidence regarding wife's financial situation. We have recently stated that we do not necessarily require the family court to take additional evidence on the relative financial positions of parties when those positions have been "subject to extensive judicial scrutiny during the hearing on the merits." Willey v. Willey, 2006 VT 106, ¶ 25, 912 A.2d 441. Here, there was evidence that wife was the caretaker of four minor children, and that she was attending graduate school in Wisconsin as late as June 2004 when the first of two days of hearings were held on the issue of attorney's fees. Further, the parties' finances had been subject to scrutiny during proceedings occurring over a period of years. At the child support hearing on April 30, 2003 following this Court's remand, additional evidence on the parties' respective financial positions was taken. In a November 2003 order in response to defendant's motion to reconsider financial information, the magistrate stated that the court had received more than sufficient evidence regarding

the respective financial circumstances of the parties, and that defendant's proffer for more discovery sought to rebut wife only on minor points not critical to the court's decisions. Upon review of the record, we conclude that the magistrate and the family court acted within their discretion in assessing wife's financial circumstances.

Further, as the family court concluded, the magistrate's detailed examination of defendant's financial circumstances is fully supported by the evidence. After carefully considering defendant's income (about $220,000 per year), his significant nondiscretionary expenses, and his other claimed expenses, the magistrate reduced the attorney's-fee award to $7,500 from the original award of $15,000. We agree with the family court that the evidence and the magistrate's findings support the magistrate's conclusion that defendant has the ability to pay the award, and that the award is equitable.

Moving on to defendant's remaining arguments, we find no merit to his assertion that the attorney's fee award was discriminatory to him or to his attorney in the sense that it prioritized the payment of wife's attorney's fees over the payment of his own attorney's fees. As the family court stated, the only motion before the court was wife's request for attorney's fees. Nor do we find any merit to defendant's argument that the court failed to consider his agreement to pay for the children's college education. None of the children had entered college, and there was no evidence in the record regarding this potential expense.

As for defendant's argument that the court subverted his 2001 bankruptcy petition by requiring him to pay for attorney's fees incurred during that period, he has failed to preserve that claim of error. Defendant contends on appeal, without any citation to authority, that requiring him to pay for attorney's fees incurred during the period in which he filed for bankruptcy violates federal bankruptcy law. But at the hearing before the magistrate on remand from this Court, defendant made no such claim. Defendant did note in his appeal to the family court from the magistrate's order that requiring him to pay for attorney's fees incurred before he filed for bankruptcy would amount to placing him in double jeopardy, but his memorandum of law accompanying the notice of appeal did not address any issue concerning bankruptcy. Nor do we find anything in the record indicating that defendant presented any documentation on remand in support of his bankruptcy argument. Indeed, the only information defendant provides on appeal is that he petitioned for bankruptcy in June 2001. In short, defendant failed to give the magistrate or the family court the opportunity to rule on any claim that requiring him to pay for part of his wife's attorney's fees incurred during the period in which he filed for bankruptcy violated federal bankruptcy law. See Pion v. Bean, 2003 VT 79, ¶ 45, 176 Vt. 1, 15 (contentions not raised or fairly presented to trial court are not preserved for appeal).

Finally, defendant's claims alleging unethical conduct by wife's former attorney are not at issue in this case.

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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Brian L. Burgess, Associate Justice