ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-376

APRIL TERM, 2009

Nicole Cormier	}	APPEALED FROM:
	}	
v.	}	Addison Family Court
	}	
Robert C. Cormier	}	DOCKET NO. 176-10-07 Andm
		Trial Judge: Mark J. Keller

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

Husband appeals from a final divorce order, challenging the family court's division of property and award of compensatory maintenance to wife. Husband argues that the court erred in: (1) awarding wife half of husband's military pension when part of it accrued prior to the marriage; (2) awarding wife nineteen years of spousal maintenance following a seventeen-year marriage; and (3) providing that spousal maintenance could not be modified "except under extreme circumstances." We strike the court's language pertaining to modification, and affirm in all other respects.

The following facts are not disputed. The parties married in April 1990 and separated in October 2007. They had two children together. Husband entered the military in September 1983 and retired on September 20, 2005. Due to husband's military career, the parties moved several times during their marriage. After retirement, husband worked for Suburban Propane until he was laid off in July 2007. He began working for the Department of Homeland Security in November 2007 and had this job at the time of the final hearing. Wife holds an associates degree in culinary arts and a bachelor of science degree. During the marriage, she supported husband's career by looking after the home and the children. At the time of the final hearing, wife was employed full time as a medical assistant.

Following an evidentiary hearing, the court found that husband makes $5,000 per month and wife makes $2,100 monthly. In dividing the marital property, the court awarded wife one half of husband's military pension with any future cost of living increase. The court found that wife lacks sufficient income to meet her reasonable needs and that wife contributed to husband's increased earning power by supporting him in advancing his career and by being a homemaker. Therefore, the court also granted wife spousal maintenance of $1,500 a month until defendant is sixty-two. In its order, the court stated "that the maintenance be considered compensatory and therefore should not be subject to modification except under extreme circumstances." Husband appeals.

Husband first argues that the court erred in granting wife half of his military pension. Husband contends that the family court had no authority to distribute that portion of husband's pension that accrued prior to the parties' marriage. In support, husband cites Callahan v.

Callahan, wherein we stated: "In a contested divorce, equity requires that the family court distribute only the part of a spouse's pension that accrued during the period of the marriage." 2008 VT 94, ¶ 15 (mem.). Husband's reliance on this statement is misplaced because it refers to pensions accrued following a divorce, not amounts accrued prior to marriage. The family court has authority to distribute "[a]ll property owned by either or both of the parties, however and whenever acquired." 15 V.S.A. § 751(a) (emphasis added). In Hayden v. Hayden, we concluded that it was error for the trial court to exclude as nonmarital property funds the husband contributed to a retirement account prior to the marriage. 2003 VT 97, ¶¶ 7-8, 176 Vt. 52. When a party enters the marriage with a retirement account or pension interest, that asset is considered marital property and subject to the family court's jurisdiction. See id. ¶ 8 ("Assets are valued for distribution purposes as of the date of the final hearing, regardless of whether acquired before or after the marriage."); see also Golden v. Cooper-Ellis, 2007 VT 15, ¶ 23 n.4, 181 Vt. 359 (rejecting formula for valuing pension that excludes amounts accrued prior to marriage because "[u]nder 15 V.S.A. § 751(a), marital property includes property brought into the marriage by either spouse"). While the family court may consider "the party through whom the property was acquired," 15 V.S.A. § 751(b)(10), in making its property settlement, this property is subject to the court's jurisdiction and equitable division. See Hayden, 2003 VT 97, ¶ 15 (instructing court on remand to consider factors in § 751(b) in deciding how to distribute funds placed in the husband's retirement account before the marriage). Husband retired from the military before the parties were divorced; therefore his entire military pension was subject to division, and the court did not abuse its discretion in awarding half to wife.

Husband next contends that the court erred in granting wife nineteen years of spousal maintenance following a seventeen-year marriage. Husband argues that there was no reasonable basis to award such a long period of maintenance because at the time of the divorce wife was gainfully employed, healthy and relatively young. Husband cites Delozier v. Delozier, 161 Vt. 377 (1994), in support, arguing that in that case this Court cautioned against awarding compensatory maintenance when the receiving spouse is relatively young and employable. We disagree with husband's characterization of Delozier. In Delozier, this Court reversed the trial court's award granting permanent equalized maintenance to the wife following a fourteen-year marriage. Id. at 386. Contrary to husband's assertion, Delozier did not reject awarding permanent maintenance to the wife, it simply stated that permanent equalization of the parties' income was not appropriate in that case because she was still young, in good health and able to work. Id.

We conclude that the court did not abuse its discretion in this case in awarding wife nineteen years of compensatory maintenance. The family court has broad discretion in crafting a maintenance award and the party challenging the award must demonstrate that there is no reasonable basis to support it. Sochin v. Sochin, 2004 VT 85, ¶ 10, 177 Vt. 540 (mem.). In considering the amount and duration of maintenance, the court considers several factors set out in 15 V.S.A. § 752(b), including the financial resources of the parties, the standard of living established during the marriage, the duration of the marriage, and the ability of the spouse seeking maintenance to meet her reasonable needs. In addition, in deciding whether maintenance should be compensatory, important factors are the "length of the marriage, the role the wife played during the marriage, and the income the wife is likely to achieve in relation to the standard of living set in the marriage." Strauss v. Strauss, 160 Vt. 335, 340 (1993). This is because compensatory maintenance

> reflects the reality that when one spouse stays home and raises the children, not only does that spouse lose future earning capacity by not being employed or by being underemployed . . . but that spouse

> increases the future earning capacity of the working spouse, who, while enjoying family life, is free to devote productive time to career enhancement.

Delozier, 161 Vt. at 382.

The court found that the marriage was long-term, that wife has substantially less income than husband, and that wife cannot meet her reasonable needs. In addition, the court found that wife worked as a homemaker, and supported husband so that he could advance his career, at the expense of furthering her own career. The court emphasized that maintenance was intended to "compensate [wife] for the years that she has given up so that her husband could improve his station in life." The award was not, as husband asserts, punitive; rather, the court made a reasonable decision based on all of the appropriate factors, and there was no abuse of discretion. See id. at 381 (emphasizing the family court's broad discretion in determining amount and duration of a maintenance award).

Husband's final argument is that the family court erred as a matter of law when it stated in the final order that spousal maintenance may not be modified "except under extreme circumstances." To modify an existing order, the statute requires a party to first demonstrate "a real, substantial, and unanticipated change of circumstances." 15 V.S.A. § 758. We have recognized that the court can define a change of circumstances in a divorce order when the order sets a reasonable benchmark, and the order is based on a stipulation of the parties. See Gazo v. Gazo, 166 Vt. 434, 440-41 (1997) (striking language in order that conferred jurisdiction if parent moved from the Waterbury area because the benchmark was not reasonable or based on a stipulation). In this case, these two factors are not met. It appears that the court's statement was in reference to the heightened standard for modifying compensatory maintenance once a change in circumstances is found. See Miller v. Miller, 2005 VT 122, ¶ 27, 179 Vt. 147 (questioning family court's authority to terminate compensatory part of maintenance award). Regardless of the family court's intent, however, we agree with husband that the court lacked authority to set a different standard for modification. We strike the language from the court's order; the statutory prerequisite of "a real, substantial, and unanticipated change of circumstances," 15 V.S.A. § 758, is the threshold requirement that must be met should either party seek to modify maintenance in the future.

The following language in paragraph 3 of the final order of divorce is stricken: "and therefore should not be subject to modification except under extreme circumstances." The remaining order is affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice