

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

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-515

JUL 20 2009

JULY TERM, 2009

Amy Godbout	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
	}	
Jeffrey Godbout	}	DOCKET NO. F373-5-06 Cndm

Trial Judge: Matthew I. Katz

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

Husband appeals from a family court order denying a motion to modify spousal maintenance. He contends the court erred in finding no substantial change of circumstances from (1) what it found to be a short term downturn in the economy, and (2) wife's cohabitation with another man. We reverse and remand.

The family court found the following facts based upon the pleadings and an in-chambers proffer by counsel as to what the evidence at a hearing would show. The parties were divorced in May 2007. The final order required husband to pay spousal maintenance of \$3000 per month for a period of five years. At the time of the divorce, husband's annual income from a homebuilding business was imputed to be at least \$120,000 per year. In June 2008, husband moved to modify spousal maintenance, claiming that, as a result of the general economic downturn in the Chittenden County area, he had built only one house in 2008 which resulted in a loss. His income through October 2008 at the time of the chambers conference was \$34,140 from carpentry and small renovation jobs, and husband did not expect it to exceed \$45,000 to \$50,000 for 2008. As a result, husband was four months in arrears in paying the maintenance. Wife was presently living with another man, an employee of her daycare business, who earned \$200 per week in salary.

Based on the foregoing, the court found that husband had shown only a "short term downturn" in the economy; that the "future course of that economy" could not be reliably predicted by one or two economic experts; and that "potentially short-term fluctuations in income should not be the basis for modification." The court further found an insufficient basis to alter the maintenance award based solely on wife's cohabitation with another man. Accordingly,

it denied the motion. Shortly thereafter, husband filed a motion for new findings and conclusions, again requesting modification of the award and a hearing. Husband again argued for a finding of changed circumstances warranting a modification based upon the “financial meltdown” in the housing and credit markets, but also cited authority for the court to make “adjustments” in a maintenance order to match the obligor’s “temporarily changed circumstances.” The court again denied the motion, finding that husband had failed to allege facts sufficient to justify a permanent reduction of maintenance, and rejected any short term “deferral” of alimony as not what husband had requested. This appeal followed.

The family court may modify a spousal maintenance order only upon a showing of real, substantial, and unanticipated change of circumstances. 15 V.S.A. § 758. The court’s ruling is discretionary and will not be disturbed absent a showing that it was “erroneously exercised, or was exercised upon unfounded considerations or to an extent clearly unreasonable in light of the evidence.” Taylor v. Taylor, 175 Vt. 32, 36 (2002). We have made it clear, moreover, that the trial court may “require the obligor to show underperformance [in expected income] over a substantial period of time to justify a downward modification in child support or maintenance.” Golden v. Cooper-Ellis, 2007 VT 15, ¶ 59, 181 Vt. 359. Thus, we held in Golden that the court acted well within its discretion in denying a modification motion filed within three months of the final divorce decree, particularly where husband’s income showed great volatility over time and exceeded on average the income figure on which the award was based. Id.

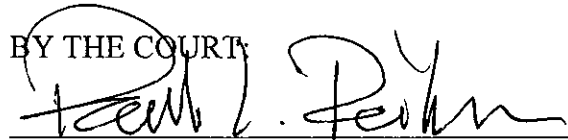
Although husband’s motion here was filed more than one year after the original maintenance award, we can not conclude that the court abused its discretion or acted wholly unreasonably in ruling that neither husband’s reduced income nor the economic downturn in general had been shown—at that point in time—to be sufficiently long term to warrant a permanent reduction of maintenance. We have also held, however, that a court may address precisely this circumstance—a severe short term reduction in income that does not necessarily warrant a permanent reduction—by either deferring or making a “temporary adjustment” to a maintenance award to match temporarily changed circumstances. Lowery v. Lowery, 156 Vt. 268, 274 (1991). The court here declined to address the deferral option, noting that it had not been requested in the renewed motion. The motion did, however, cite Lowery, as well as cases from other jurisdictions, for that express principle: that the court retained authority to adjust the maintenance award “to match the obligor’s temporarily changed circumstances.” We conclude, therefore, that the court should have considered whether the circumstances warranted a temporary adjustment to the maintenance award, and remand for that purpose only. See id. at 274-75 (reversing permanent modification of maintenance order and remanding for the court to consider a temporary adjustment).

Husband also contends the court erred in finding that wife’s cohabitation did not constitute a substantial change of circumstances warranting a modification. Remarriage or cohabitation is relevant to an ongoing maintenance obligation “only to the extent it bears on the ‘financial security’ of the recipient spouse.” Taylor, 175 Vt. at 38. The court here found that husband made no proffer of evidence to show that wife’s financial security had substantially improved as a result of the cohabitation. Husband has not shown that this finding was clearly erroneous. Stanley v. Stanley, 2007 VT 44, ¶ 13, 181 Vt. 527 (trial court’s factual findings will

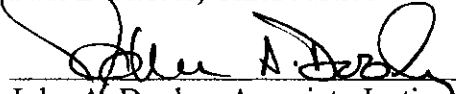
not be set aside unless clearly erroneous). Accordingly, we discern no basis to disturb the judgment on this ground.

Reversed and remanded for further proceedings consistent with the views expressed herein.

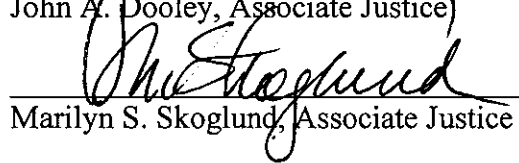
BY THE COURT:



Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice