

*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. 2009-342

APR 1 2010

MARCH TERM, 2010

Linda Hill	}	APPEALED FROM:
	}	
v.	}	Windsor Family Court
	}	
William Hill	}	DOCKET NO. 244-8-05 Wr dm

Trial Judge: M. Kathleen Manley

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

Husband appeals from the family court's modification of his spousal support obligation. He argues that the court erred in estimating his 2009 income and modifying his obligation temporarily rather than permanently. We affirm.

The family court made the following findings. The parties were divorced in December 2006 after more than twenty years of marriage. They have two children who are over eighteen. The parties stipulated to the distribution of the marital estate and to husband's maintenance obligation. By agreement and pursuant to the final divorce order, husband must pay wife \$3500 per month for six years beginning December 2006. Husband met his spousal support obligation for approximately one year. Without notice to wife, husband then began to make smaller and smaller monthly payments. This continued until November 2008 when husband filed a motion to modify his spousal support obligation. Husband asserted that due to current economic conditions, he could no longer pay wife what was owed.

Following two days of hearings, the court modified husband's obligation temporarily. It made the following findings. At the time of the divorce and the modification hearing, wife earned approximately \$12,000 per year cleaning houses; the remainder of her income was primarily derived from spousal support. Husband, on the other hand, worked as a distribution sales manager for Stingray powerboats. He received a salary of \$40,000 as well as commissions of ½ of 1% of his sales. Husband's employer also provided him with a car, gas, reimbursement for food and lodging while he was on the road (which was often), as well as other perks that offset husband's living expenses. Husband earned \$120,994 in 2005; \$114,520 in 2006; \$100,483 in 2007; and \$85,451 in 2008.

At the time of the hearing, husband projected that he would earn less than \$60,000 in 2009. The court rejected husband's projection, finding it based on an assumption that husband would not earn any more sales commissions that year. The court recognized that economic conditions had led to a downturn in sales, and that sales had been down by 35 to 40 percent in 2008. It agreed that husband's income had decreased. Given that husband's sales fluctuated from month to month, however, the court found it difficult to predict what husband might earn by the end of the year. For that reason, the court extrapolated from husband's projected earnings to date—\$48,400 as of August, 2009—and, presumably using the resulting average of \$6,050 per month, projected annual earnings of \$72,600. In doing so, it noted the numerous perks that husband received from his employer. While it did not include these in its

calculations, it observed that these perks were not available to wife. The court also found that husband had also sold an investment property in 2008 which generated significant income.

Turning to the parties' expenses, the court found that husband had a small amount of credit card debt, and he paid off his credit card balances every month. Additionally, in 2007, husband purchased a boat for \$37,000. He owed \$35,000 on a loan taken out to pay for the boat, and he was current on all of these loan payments. Husband also had expenses associated with the boat, including a \$3000 slip rental, insurance, storage, as well as repair expenses. Husband was current on all of his obligations except his spousal support. The court found discrepancies in husband's financial affidavit, noting that husband's claim that \$1100 per month was withheld in federal taxes seemed high. Husband also asserted that he was paying \$850 per month in rent when in fact he lived rent-free in his parents' home on Lake Winnepesaukee (husband's parents lived in an assisted living facility). After reviewing both parties' expenses, the court found that if it reduced wife's spousal support to \$1000 per month as husband requested, wife would be unable to meet her reasonable needs; wife's mortgage alone was almost \$900 per month. Without spousal support, the court found, wife could not afford to continue living in the marital home.

Based on the evidence, the court found that there had been a real, substantial, and unanticipated change in circumstances. It was not persuaded, however, that this was a long-term or a permanent situation where husband's income would decrease further or stay at its current level. The court found it too early to make such a prediction. Additionally, the court had significant concerns that if it granted a modification as requested by husband, wife would never receive the money that was anticipated to be paid to her under the terms of the parties' stipulation. As noted above, husband had made full payment for only one year out of the past three, and his total obligation was only six years. The court looked to the parties' intent underlying the agreement, including the fact that the support payments were designed to take wife to the age when she would begin receiving social security payments. The court found that reducing wife's spousal support would render her unable to make ends meet, let alone maintain the lifestyle that the parties had clearly enjoyed during the marriage or even approach that standard. Husband, in contrast, had been able to meet all of his reasonable needs, maintain a boat, live rent-free, and he was making every other payment except this one.

Thus, primarily due to the economic situation and the uncertainty surrounding its duration, combined with the fact that the parties were almost halfway through the period of spousal support payment, during which only one full year of full support had been paid, the court modified the amount of support on a temporary basis and deferred the remainder of the payment owed. Specifically, it ordered husband to pay wife \$2100 per month between January 2009 and July 2010, with payment of the difference (\$1400 per month) deferred until the obligation to pay support ceased or until further order of the court. The court indicated that if economic conditions did not improve, husband could file another motion to modify. Husband appealed from this order.

Husband first argues that the court committed clear error in estimating his 2009 employment earnings. He maintains that his evidence shows gross income of approximately \$15,000 for the first three months of 2009, and if that figure is multiplied by four, the result is approximately \$59,000. He argues that the court should have used this figure as his 2009 employment income. According to husband, based on this error, the court also underestimated the decline in his income since 2005.

Pursuant to 15 V.S.A. § 758, the court may modify a maintenance order "upon a showing of a real, substantial, and unanticipated change of circumstances." The court has considerable discretion in ruling on a motion to modify and we will not disturb its decision on appeal absent a showing that such discretion 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, 819 A.2d 684, 688 (2002). Husband fails to show that the court abused its discretion here.

The record shows that husband sought to decrease his spousal support obligation by 72%, seeking to pay wife \$1000 per month rather than the \$3500 previously ordered. The court rejected husband’s position. In reaching its conclusion, the court looked to all of the evidence, including the fact that husband had minimal living expenses, misstated or omitted expenses on his financial affidavit, and, except for spousal maintenance, was able to meet all of his financial obligations. Husband continued to maintain his lifestyle enjoyed during the marriage. Wife, on the other hand, was dependent on spousal maintenance to meet her reasonable needs, and husband’s proposed reduction would leave her unable to afford the marital home.

The court recognized that husband’s earnings had decreased, but was not required to predict husband’s 2009 salary with complete precision. The court attempted to estimate husband’s earnings based on the evidence presented. As the court stated, husband’s sales fluctuated from month to month. Thus, it was difficult to predict the amount of commissions he would earn through the end of the year. The court may have made a mistake in its calculations by treating husband’s proffered annual earnings of \$48,400, as projected in August, 2009, as his earnings only through August, thus skewing the court’s extrapolation of an additional four months’ earnings by some \$20,000 (\$60,000 rather than \$48,400).

We nonetheless affirm the family court’s decision. The court was asked to estimate husband’s salary in light of fluctuating monthly commissions. Husband’s projections about future commissions at the April 2009 hearing had proved inaccurate by the time of the September 2009 hearing. Husband also failed to include as income the money he had placed in his 401(k) retirement account, which was over \$1000 by mid-April 2009. Husband included expenses on his financial affidavit, such as rent, that were not actually being paid. He included a dubious monthly tax estimate on this form as well. As noted above, moreover, husband was still able to maintain his lifestyle, despite his dire predictions of a drop in salary. He paid all bills, but for the support owed to wife. In light of all of the evidence, we conclude that even if the court’s estimate of husband’s 2009 earnings was high, the court was within its discretion in temporarily reducing husband’s obligation by 40%, rather than the 72% requested. See Kohut v. Kohut, 164 Vt. 40, 43-44, 663 A.2d 942, 944 (1995) (Supreme Court has “never required mathematical exactitude in quantifying the amount” of a maintenance award). In fact, husband’s own estimate of his salary—up to \$60,000—would tend to support at most a 50% reduction in the support agreed to at the time of the divorce, before taking into consideration all of the other factors cited above. Assuming, which we do not, that the 10% difference between 40% and 50% should be generally accounted for, it appears well within the apparent disparity between some of the expenditures claimed by husband, such as for dockage, income taxes and IRA contributions, and his actual or necessary expenses. Husband has a high burden in showing abuse of discretion, and he failed to meet that burden here.

Husband’s second argument is equally without merit. Husband asserts that the court erred by reducing his support obligation temporarily rather than permanently. Essentially, he wars with the court’s exercise of its discretion, but fails to show that the discretion was erroneously exercised. The court provided ample grounds for its decision, set forth above, and we need not repeat them here. Indeed, we endorsed just such an approach in Lowery v. Lowery, 156 Vt. 268, 591 A.2d 81 (1991). As in Lowery, although the decline in husband’s income may have been sufficient to show a change of circumstances, the evidence, including the short-term nature of the maintenance award and the uncertainty of the future economic climate, “warranted a temporary adjustment only.” Id. at 274, 591 A.2d at 85. Husband is free to file another motion to modify should the economy continue to decline. Based on the evidence presented here, the court acted well within its discretion in concluding that wife

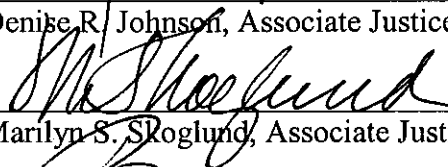
was entitled to the benefit of the parties' bargain at the time of the divorce, and that the circumstances warranted a temporary adjustment only.

Affirmed.

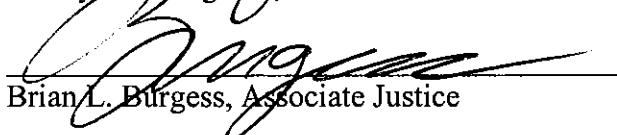
BY THE COURT:



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice