

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-047

AUGUST TERM, 2018

Charles Leamy* v. Denise M. Leamy	}	APPEALED FROM:
	}	
	}	Superior Court, Orleans Unit,
	}	Family Division
	}	
	}	DOCKET NO. 18-2-15 Osdm

Trial Judge: Howard E. Van Benthuyzen

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

Husband appeals from the trial court’s final divorce order. He challenges various findings and conclusions as unsupported by the evidence. We reverse the court’s spousal maintenance award and remand for additional findings. In all other respects, we affirm the court’s order.

Husband and wife married in February 2004; husband filed for divorce in February 2015. The court issued a final divorce order in October 2017 following three days of trial in January, March, and July 2017. It made numerous findings, including the following. Husband and wife met while working together at a Pennsylvania law firm; husband was an associate attorney and wife was a legal secretary. There is one child of the marriage, a daughter born in September 2004. Wife also has an older child from a prior relationship. In July 2010, the parties moved to Vermont. They separated in June 2012. They made several attempts at reunification and separated for good in March 2015. By agreement throughout the marriage, wife cared for the children while husband worked outside the home. Wife also engaged in intermittent part-time work.

Husband specializes in immigration law. He was the lead immigration attorney for Jay Peak until March 2015 when, he claimed, the EB-5 scandal disrupted his association with Jay Peak, which had a negative impact on his business. In an August 2015 financial affidavit, husband claimed to have zero income. Yet, the court found, husband’s adjusted gross income (AGI) for 2015 was \$230,486. The court found that, historically, husband had been a “high income earner.” His tax returns showed an AGI of \$204,576 in 2013 and \$267,369 in 2014. In 2016, his “profit and loss” statements reflected a net of \$120,388 “on a gross of \$216,678.” On a January 2017 financial affidavit, husband indicated that his monthly income was \$7865.61, or \$94,387.32 per year. Averaged over five years, the court found that husband’s annual income was \$226,776. Wife’s earned income was minimal. She engaged in part-time work for minimum wage.

Husband was reluctant to discuss his business relationship with Jay Peak or his practice during or after his association with Jay Peak. He repeatedly objected to discovery disclosures and questions at trial by invoking attorney-client privilege. When asked if his two disclosed bank accounts would reflect all of his 2016 earnings, husband replied, “I don’t know.” He similarly

professed ignorance when asked why a \$17,200 deposit in December 2016 exceeded his claimed gross receipts for that month.

Wife argued that husband hid a portion of his income by sending it to his mother. Wife testified that since 2015, husband had been sending his mother \$4000 regularly and that she witnessed husband writing such checks. She confronted husband, who did not deny it. Three \$4000 checks that husband had written his mother in January, April, and May 2017 were entered into evidence. Husband claimed that he sent the money as reimbursement for charges that he made on his mother's American Express card. Although husband's mother testified during the trial, husband did not question her about these alleged reimbursements. Wife similarly did not question husband's mother about this topic. Ultimately, the court found wife's testimony on this point to be persuasive given husband's reticence to either cooperate with financial discovery or to explain the payments in a convincing way, as well as husband's inability to explain discrepancies in his deposits and income. The court concluded that since March 2015, husband had, in fact, been secreting money with his mother to avoid sharing it with wife. Between March 2015 and May 2017, the court found that husband sent his mother \$104,000.

Husband began paying interim maintenance by order in July 2015. In January 2016, husband agreed to pay wife \$5667 in monthly maintenance. The court found that husband entered into this agreement months after the EB-5 scandal began. He paid wife under the agreement through February 2017 but then unilaterally reduced his payments, creating an arrearage. Husband moved to modify his maintenance obligation in January 2017. The court granted the motion effective July 1, 2017.

The court valued the marital home at \$205,000 with approximately \$62,000 in equity. Wife and the parties' child continued to live in the marital home during divorce proceedings. Up to the date of the final hearing, husband paid the mortgage, taxes, and insurance for the home.

Both parties' lifestyles had declined since they separated. During the marriage, they enjoyed an upper-middle-class lifestyle. Wife now lived frugally, and she could not afford to pay all of her bills. Husband continued to travel for work, and he could meet his expenses.

As noted, husband claimed an average monthly income of about \$7865. He testified that his monthly mortgage payment and temporary maintenance payment of \$5667 alone exceeded his average monthly income. The court found, however, that husband understated his monthly income by \$4000 (the money sent to his mother) and that he overstated his maintenance payments relative to what he had actually been paying by \$2667. The court thus found that husband's monthly expenses totaled \$10,387, while his monthly income was \$11,865, or about \$1500 more than his expenses. Wife's monthly income before maintenance or child support was about \$1200 per month against expenses of \$6673. Wife met her expenses through a combination of child support and temporary maintenance of \$5667. Each party had substantial unsecured debt. Both parties also claimed to have substantial tax debts. The court found that husband claimed to owe \$120,000, but he did not submit any documentation for this claim or explain its genesis. Wife established that she owed approximately \$4000 in unpaid state and federal taxes.

Based on these and numerous other findings, the court concluded as follows. It awarded wife the marital home, noting that she had also been awarded sole legal and physical rights in the

parties' minor child. The court concluded that the child's stability and best interests required that the home remain in wife's possession until the child graduated from high school or turned eighteen, whichever was later. At that point, the home would be sold and the parties would divide the proceeds, after expenses and fees, in inverse proportion to their gross incomes in 2021. The court explained that this disproportionate division favored wife as she had eschewed career goals since 2004 to be the primary caregiver for the parties' child. The court also noted husband's vastly superior earning power. Until the property was sold, the court ordered husband to continue paying the mortgage while wife paid the taxes, insurance, and maintenance/upkeep expenses.

The court divided other property as well. As relevant here, it ordered husband to pay wife half of the money that he had sent to his mother. It rejected husband's explanation for these checks, finding his testimony unsupported by a single American Express bill. It noted that husband had not asked about this subject while his mother was on the stand. Wife, on the other hand, had provided documentary evidence that on at least three occasions, husband made these payments. The court explained that wife's inability to gain more complete discovery from husband might have impaired her ability to provide more documentation. Wife testified credibly that she observed husband writing checks to his mother on many occasions, that she confronted him, and that he did not deny it. On the state of the evidence, the court concluded that husband was diverting his income to avoid its inclusion in the marital estate. It found that husband's actions showed a pattern of resistance to full discovery of his true finances, accounts, and circumstances. Accordingly, the court ordered husband to pay wife half of the money hidden with his mother, or \$52,000, before the expiration of the nisi period.

Turning to spousal maintenance, the court found that this was a medium to long-term marriage, lasting from 2004 to 2015. There was one child born of the marriage. Wife could not pay her bills or meet her and the child's basic needs, let alone approximate the marital standard of living. Wife worked part-time in minimum wage jobs and had a high school diploma, while husband had multiple degrees and was an attorney. The parties jointly agreed that wife would stay home during the marriage. Upon consideration of seven of the eight statutory factors, the court awarded wife \$2000 per month in permanent maintenance.

Finally, the court awarded attorney's fees to wife. It found that a noteworthy portion of wife's attorney's fees could reasonably be attributed to her efforts to obtain discovery that husband resisted. Husband had much greater income and ability to increase his property and financial assets; he could pay his attorney while wife could not. The court awarded wife her reasonable attorney's fees for the three-day trial.

The court issued several post-judgment rulings, one of which addressed many of the same arguments that husband now raises on appeal. As set forth in more detail below, the court rejected husband's motion for reconsideration, finding that husband essentially disagreed with the court's findings and conclusions when they ran counter to the outcome that he desired. The trial court also acknowledged that it had neglected to give sufficient consideration to the recently enacted eighth statutory factor relating to spousal maintenance and it reviewed the application of the guidelines to the facts of this case. See 15 V.S.A. § 752(b)(8). The court concluded that the maintenance guidelines did not provide for an equitable outcome given the huge disparity between the parties' education and career paths. Husband appealed.

Husband argues that the court erred in finding that he hid money with his mother rather than crediting his explanation for these payments. He also asserts that the court erred in finding that his annual income, averaged over five years, was \$226,776. He further challenges the court's findings as to when the EB-5 scandal began and his claimed tax debt. Additionally, husband challenges the court's disposition of the marital home, its award of permanent spousal maintenance to wife, and its award of attorney's fees to wife.

At the outset, we note that the trial court has considered and rejected these arguments, sometimes twice. As in his motion for reconsideration, husband essentially challenges the trial court's evaluation of the weight of the evidence and the credibility of witnesses. We do not evaluate the credibility of witnesses or reweigh the evidence on appeal. See Mullin v. Phelps, 162 Vt. 250, 261 (1994) (explaining that in reviewing findings of fact, Supreme Court does not reweigh evidence or make credibility findings de novo).

We also emphasize that the trial court has broad discretion in dividing marital property, and we will uphold its decision unless its discretion was abused, withheld, or exercised on clearly untenable grounds. Chilkott v. Chilkott, 158 Vt. 193, 198 (1992). The party claiming an abuse of discretion bears the burden of showing that the trial court failed to carry out its duties. Field v. Field, 139 Vt. 242, 244 (1981). On review, we will uphold the family court's findings of fact unless, taking the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, there is no credible evidence in the record to support them. Mullin, 162 Vt. at 260. We are mindful, moreover, that "the distribution of property is not an exact science and does not lend itself to precise mathematical formula." Ruhe v. Ruhe, 142 Vt. 429, 433 (1983). "We require only that the distribution be equitable." Id.

We thus turn to husband's specific arguments. As set forth above, the trial court credited wife's testimony regarding husband's transfer of money to his mother. It outlined the reasons why it found wife more credible on this issue than husband. It reiterated these reasons in denying husband's motion for reconsideration. While husband disagrees with the court's findings, he fails to show that they are clearly erroneous. Obviously, the court was not obligated to accept husband's testimony on this point, particularly given his failure to submit any American Express bills or to elicit any testimony from his mother in support of his position. We find no error in the court's finding that husband secreted money with his mother and that he should pay wife half of this money.

We thus turn to husband's assertions that the court misapprehended his income, beginning with the trial court's post-judgment ruling on this issue. In his motion to reconsider, husband argued in part that the court erred by looking at his AGI for 2013-2015 but then considering his 2016 profit-and-loss statements together with his gross receipts for 2016. Husband stated that his AGI for 2016 (not reflecting a deduction for alimony payments) was \$99,031 and that his projected AGI for 2017 was \$94,387.¹ Husband argued that comparing "apples to apples," it was evident that the court erred in looking at a five-year average rather than recognizing that he had suffered a "dramatic downturn" in his income and that "[a]ccurate data documents that downturn." Husband

¹ As noted, however, the trial court found that husband had understated his monthly income by \$4000 between March 2015 and May 2017.

maintained that the court's error was compounded by an erroneous finding regarding the onset date of the EB-5 scandal at Jay Peak.

In denying husband's motion to reconsider, the trial court explained that it had based its findings largely on husband's own exhibits. It stated that any projections resulting therefrom were based on the exhibits and the credible testimony associated therewith, and the reasonable inferences to be drawn from the testimony and exhibits. The court also rejected husband's assertion that it had misstated the public onset of the EB-5 scandal at Jay Peak. It noted that the testimony showed that this emerged as a factor impacting husband's income in 2015. It found that public reporting of the allegations involving the Jay Peak EB-5 program began in 2014 and continued through the divorce trial. While husband tried to show that the scandal devastated his business, the court did not find his testimony entirely credible. The court found that husband's testimony did not square with evidence that in 2015, he grossed \$230,486 and in 2016, \$216,678.² Nor did the court find husband's repeated assertions of attorney-client privilege availing to the extent he sought to use that claim as a shield against making financial discovery disclosures to wife. The court explained that after careful inquiry, it ultimately concluded that husband had overstated the impact of the EB-5 issue on his business. The court reiterated that husband's professed ignorance about certain financial issues had a negative impact on his credibility.

Husband largely reiterates these same arguments on appeal. First, we reject husband's assertion that the court clearly erred in its findings regarding the onset of the Jay Peak scandal. The court's findings are supported by credible evidence in the record. Wife testified that she believed that the scandal began in March 2015. Husband asserted in his first financial affidavit, dated August 2015, that he had no income. While husband argues that the court should have found that the scandal hit in 2016, we do not reweigh the evidence on appeal.

Nonetheless, we cannot ascertain how the court determined that husband's five-year average income was \$226,776, a value it later referred to as a three-year average. This number is not an average of the sums listed on the second page of the court's decision, nor is it an average of these sums plus the \$108,000 in income that husband under-reported between March 2015 and May 2017. It is certainly true, as the court found, that husband has historically been a "high income earner" with income generally over \$200,000, and that his income "is many times higher" than wife's income. Yet the court cited the \$226,776 average figure in its maintenance discussion, and we cannot discern the basis for this average.

Husband does not contest the court's reliance on his AGI for 2013-2015. The court apparently did not find husband entirely credible as to his 2016 income. It cited husband's testimony that he did not know if his bank accounts would reflect all of his 2016 earnings and his claimed ignorance regarding a large deposit in December 2016 that exceeded his claimed gross receipts for that month. We cannot discern, however, if the court therefore decided to rely on husband's 2016 Schedule C gross receipts as representing his 2016 income or on his 2016 profit-and-loss statements, or if it arrived at a different figure mindful of husband's credibility issues. If the court relied upon the Schedule C gross receipts as a proxy for income, without consideration of any properly claimed expenses, it must explain its basis for doing so. As set forth more fully

² The 2015 figure reflects husband's AGI; the 2016 figure is based on husband's Schedule C gross receipts. Husband's gross receipts for 2015 were \$384,565.

below, we remand for clarification of husband's income and further findings relating to spousal maintenance, or redetermination, if warranted. On remand, the court should also address this issue concerning husband's 2016 income to the extent it affects the spousal maintenance calculation. See Parker v. Parker, 2012 VT 20, ¶ 13, 191 Vt. 222 ("If the findings are inadequate, we must remand for additional findings.").

As to his alleged tax debt, husband argues that the court should have credited his evidence and found that the debt existed. He states that a January 2017 financial affidavit references this debt, and that his 2015 and 2016 tax returns document the amount owed. He also cites his testimony that his tax debt remained unpaid.

This debate is largely academic because in its post-judgment ruling the court treated the debt as if it did exist and specifically made an order as to how it should be paid. Thus, any error is harmless. The record shows that husband asked the court to grant him a lien or first claim in the amount of his outstanding tax debts against proceeds from the sale of the marital home. The court rejected his request. It noted that husband's tax debts related entirely to his law practice. While the court could not prevent taxing authorities from placing a lien on the property, it concluded that wife should not be penalized for husband's management of his law practice in which she played no role. Although neither party documented their claimed tax liabilities with specificity, the court stated that the equities in this case militated strongly against allowing either husband's or wife's tax lien to be paid out of the proceeds from the sale of the marital residence. Should any taxing authority place a lien against the marital property, the court explained, then the party benefiting from that lien must hold the other party harmless from the lien's effect. If husband's claimed \$120,000 tax lien, for example, caused wife to realize nothing from the sale of the residence, husband would still owe wife her proportionate share of the proceeds as provided in the final order.

Turning to the court's award of permanent spousal maintenance, husband argues that the court should have followed 15 V.S.A. § 752(b)(8), which identifies guidelines for the duration of maintenance based on the length of the marriage and the difference between the parties' incomes. He maintains that this was not a long-term marriage and that wife is young and has professional skills. Husband contends that he has substantial debt and lives in a small apartment. Husband reiterates his argument that the court miscalculated his income in making its maintenance award.

As we have explained, the trial court may award maintenance, either rehabilitative or permanent, to a spouse when it finds that the spouse "lacks sufficient income or property, or both, . . . to provide for his or her reasonable needs" and the spouse "is unable to support himself or herself through appropriate employment at the standard of living established during the civil marriage." 15 V.S.A. § 752(a)(1), (2); Chaker v. Chaker, 155 Vt. 20, 24-25 (1990). The maintenance must "be in such amounts and for such periods of time as the court deems just, after considering all relevant factors," 15 V.S.A. § 752(b), including those set forth in § 752(b)(1)-(8). When the court finds grounds for awarding maintenance, it has broad discretion in determining its duration and amount. Chaker, 155 Vt. at 25. "A maintenance award will be set aside only if there is no reasonable basis to support it." Id.

The court's threshold finding that wife is entitled to maintenance is supported by the evidence. As set forth above, the court found that wife, who was granted sole legal and physical rights and responsibilities to the parties' child, cannot pay her bills or meet her and the child's

basic needs. Wife worked part-time in minimum-wage jobs and had a high school diploma. The court explained that while wife might return to school at some future date, for the next five or more years, she must continue in her role as the child's primary caregiver. It also emphasized that wife had given up educational and career opportunities to care for the parties' child during the marriage. The court did not err in finding, as a threshold matter, that wife is entitled to maintenance.

As indicated above, the court ordered husband to pay wife \$2000 per month in permanent maintenance. It stated that husband's income "averaging \$226,000 gross per year since 2014, is many times higher than [wife's]." It found that husband had the ability to pay a reasonable monthly maintenance and that wife had a demonstrable and palpable need to receive it. Because, as discussed above, we cannot discern how the court arrived at its five-year average salary for husband and whether and how this calculation affected the court's calculation, we reverse and remand the court's maintenance award for additional findings. While we find it unnecessary to address husband's remaining arguments in light of our conclusion, we note that the question of whether the parties' marriage is characterized as medium- or long-term is not dispositive. See Weaver v. Weaver, 2017 VT 58, ¶ 23 n.5 ("When a court considers whether to award permanent maintenance with a compensatory aspect, the most important factor continues to be the length of the marriage," but that factor "should not be outcome-determinative, and there may be rare cases where a permanent maintenance award with a compensatory aspect would be appropriate even following the dissolution of a shorter-term marriage.").

We thus turn to husband's remaining arguments, all of which we find without merit. Husband challenges the court's distribution of the marital home as inequitable. He argues that he should not have to pay the mortgage as part of the property division. He also suggests that the value of the marital home should not be determined at a future date. These arguments simply war with the trial court's exercise of its discretion. The court explained the basis for its decision to award the marital home to wife. It acted within its discretion in ordering husband to continue paying the mortgage and in ordering the property to be sold in several years when the parties' daughter turned eighteen or graduated from high school. We note that the court did value the marital home at the time of its final divorce order and there is nothing inappropriate about dividing the actual proceeds of the sale in several years' time.

Finally, husband challenges the court's award of attorney's fees to wife. He argues that it is based on an error as to his income and financial circumstances. Husband asserts that he has no property and that he has substantial debt.

Husband again wars with the court's findings. As we have explained, the trial court has discretion to award attorney's fees in a divorce case "where justice and equity so indicate." See Turner v. Turner, 2004 VT 5, ¶ 9, 176 Vt. 588 (mem.) (quotation omitted); see also 15 V.S.A. §§ 606, 607. "The primary consideration in awarding attorney's fees is the ability of the supporting party to pay and the financial needs of the party receiving the award." Turner, 2004 VT 5, ¶ 910 (explaining that no separate hearing or particular evidence is generally necessary in deciding whether to award attorney fees given nature of divorce proceedings, and " '[i]n the usual, and vast majority of, cases such allowance borders on judicial routine, and is supported by evidence bearing on the circumstances of the parties generally' " (quotation omitted)). We note that the court did not rely on husband's average income in reaching its decision and that error has no bearing on its award of attorney's fees.

The court here found that a significant portion of wife’s attorney’s fees were attributable to husband’s resistance to providing discovery. It explained that husband was a skilled immigration attorney who remained capable of earning well over \$100,000 per year. Wife’s earned income was minimal, as was her ability to increase her income. The court was mindful, moreover, that its inquiry with respect to an award of attorney’s fees was “an equitable one,” Willey v. Willey, 2006 VT 106, ¶ 26, 180 Vt. 421, and not merely a question of relative incomes. The court’s findings are supported by the evidence, and the court acted within its discretion in concluding that justice and equity supported an award of attorney’s fees to wife.

Reversed and remanded for additional findings with respect to spousal maintenance; in all other respects, the court’s decision is affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice