

*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. 2019-031

AUGUST TERM, 2019

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| Robert Tourangeau* v. Phyllis Tourangeau | } | APPEALED FROM:   |
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|  | } | Superior Court, Chittenden Unit,   |
|  | } | Family Division  |
|  | } |  |
|  | } | DOCKET NO. 5-1-15 Cndm   |
|  |   |  |
|  |   | Trial Judge: Barry D. Peterson, Acting<br>Superior Judge, Specially Assigned |

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

Husband appeals the family division’s decision denying his motion to modify spousal maintenance for failing to make the threshold showing of changed circumstances. We affirm.

The parties were married from April 1973 until January 1982 and then again from June 1982 until their divorce was finalized in June 2015. Their marital settlement agreement, which was incorporated into the final divorce order, required husband to pay wife \$1000 per month in spousal maintenance from June 2015 until either party died or wife reached the age of sixty-eight, in May 2022. In August 2017, wife filed a motion to enforce husband’s spousal-maintenance obligation. In February 2018, after wife served notice of her motion to husband by publication and husband failed to appear for a hearing on her motion, the family division granted wife’s motion for enforcement and contempt.

In May 2018, husband filed this motion to modify spousal maintenance, stating that he had been terminated from his employment and could not longer meet his support obligation. The parties agreed to bifurcate the hearing on the motion to first address whether husband had met his threshold burden of demonstrating a real, substantial, and unanticipated change of circumstances. See 15 V.S.A. § 758 (providing that court may modify maintenance obligation, regardless of whether it is based on stipulation or agreement, “upon a showing of a real, substantial, and unanticipated change of circumstances”). Following an October 2019 evidentiary hearing at which only husband testified, the family division denied father’s motion, concluding that husband had failed to show changed circumstances that would warrant further consideration of his motion.

Husband’s testimony at the hearing reflected the following. From the time of the divorce until March 2017, husband earned, in addition to his monthly military pension and disability award, approximately \$60,000 to \$70,000 per year as an automotive sales manager from a base salary of \$800 per week plus commissions. Since ending his twenty-two-year military career in 1993, husband worked in car sales over a period of years for several employers, who would often bring him in at a higher salary as an expert (particularly with respect to Sprinter vans) and then, after he had set up a sales program, let him go and hire “a young kid” to take over the program. Shortly after he was

terminated from his most recent job in March 2017, husband, then sixty-two, applied for and received monthly social security benefits of \$1551. At the time of the hearing, husband was still looking for employment, but he stated that he was a “kind of a snowbird at this point.” He indicated on his 813A form that he was retired, by which he meant that he was drawing social security benefits. Husband had turned down offers of employment as a car salesman, which would have paid him approximately \$400 per week plus commissions, for an annual salary of up to \$40,000.

At the conclusion of the evidentiary hearing, the trial court concluded that husband’s retirement was not a substantial change of circumstances. The court noted that husband was collecting \$1551 in social security benefits and had voluntarily chosen not to accept employment from which he could have earned up to \$40,000 as a car salesperson. Stating that there was no evidence as to how husband’s social security benefits would be affected if he continued working, the court concluded that husband had failed to show the requisite change of circumstances because he had voluntarily chosen not to accept employment “that could potentially have risen and kept his earnings at approximately where they were” at the time of the divorce. In a brief written decision following the hearing, the court stated that it could not find changed circumstances because husband had not provided specific evidence as to what he could have earned if he had accepted the positions offered to him. In denying husband’s motion to reconsider, the court reiterated that husband had voluntarily chosen to be unemployed.

An unanticipated change of circumstances is a threshold requirement for modification of spousal maintenance, and the burden is on the moving party to establish the requisite change. See Herring v. Herring, 2011 VT 38, ¶ 6, 190 Vt. 19. Evaluating whether “any given change is substantial must be determined in the context of the surrounding circumstances.” Taylor v. Taylor, 175 Vt. 32, 36 (2003). The trial court’s “threshold determination of changed circumstances is discretionary,” and “no fixed standards” exist for “determining what meets this threshold.” Id. “We review a trial court’s decision whether to modify maintenance deferentially, and will not disturb its ruling unless the discretion was erroneously exercised, or was exercised upon unfounded considerations or to an extent clearly unreasonable in light of the evidence.” Zink v. Zink, 2016 VT 46, ¶ 9, 202 Vt. 10 (quotation omitted).

Here, we conclude that the family division acted within its discretion in denying husband’s motion to modify based on its conclusion that husband had failed to make the threshold showing of changed circumstances. The record supports the court’s determination that husband had voluntarily foregone employment opportunities and that he had failed to show that his potential income from all sources at the time of his motion was substantially less than his income from all sources at the time of the parties’ divorce.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice