VERMONT SUPREME COURT
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Case No. 2021-086

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

DECEMBER TERM, 2021

Robert Erickson v. Nancy J. Erickson* } APPEALED FROM:
} Superior Court, Windsor Unit,
} Family Division
} CASE NO. 20-DM-00193
Trial Judge: Robert P. Gerety, Jr.

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

Wife appeals from the trial court's final divorce order. She argues that the court erred in enforcing the terms of a marital separation agreement, which was incorporated into a final separation order. We affirm.

The parties married in April 2008. In April 2017, the court issued a final order of legal separation that incorporated a marital settlement agreement executed by the parties. In that agreement, the parties divided their assets and waived any claim for spousal maintenance; they agreed that if either party moved for a divorce, the agreement would be incorporated into a final divorce order. They further agreed that the waiver of maintenance was permanent and irrevocable.

In June 2020, husband filed for divorce. Wife asked the court to incorporate only the property-division aspect of the martial separation agreement and she sought an award of maintenance. Wife asserted that she had experienced a change in circumstances since the date of the marital settlement agreement and that she was entitled to discovery about husband's current financial position and a hearing on her maintenance request. Husband moved to enforce the parties' agreement.

In a January 2021 order, the court granted husband's motion to enforce and denied wife's request. It explained that under Tschaikowsky v. Tschaikowsky, 2014 VT 83, 197 Vt. 303, the legal separation order was a final adjudication of all the issues between the parties, including property division and maintenance, and the order must be incorporated into the parties' final divorce order. The court explained that if the final separation order had contained a provision that was subject to modification on a showing of changed circumstances, a party could move to modify that order and the court would have jurisdiction to entertain such motion. The legal separation order here, however, contained no such provision, and the court consequently had no authority to order maintenance based on changed circumstances. See Arbuckle v. Ciccotelli, 2004 VT 68, ¶ 8, 177 Vt. 104 (recognizing that trial court cannot "modify a divorce decree by

awarding maintenance, where the original decree did not provide for maintenance," "even if the financial situation of one of the spouses would warrant it."). Given its conclusion, the court also denied wife's request for discovery related to husband's finances. It found the discovery request irrelevant to any issue in the case and not calculated to lead to the discovery of relevant information.

Following a trial, the court issued a final divorce order. It reiterated that the division of marital property and the question of maintenance had been previously adjudicated by the final separation order and it adopted these materials as the final order in the divorce action on all issues. This appeal followed.

Wife argues on appeal that she should not be bound by the final separation order with respect to maintenance and that Tschaikowsky, 2014 VT 83, does not hold otherwise. Wife also argues that she should be entitled to challenge the agreement before it is incorporated into a final divorce order. She asserts that Arbuckle, 2004 VT 68, is distinguishable because she is not asking the court to modify a divorce order to award maintenance; she is instead seeking maintenance prior to a final divorce order. Wife maintains that the court was required by 15 V.S.A. § 752 to hold a hearing to review issues related to spousal maintenance and that discovery was required to allow for this review.

We find these arguments unpersuasive. We agree with the trial court that this case is controlled by Tschaikowsky. In Tschaikowsky, the parties agreed on terms of separation that were formally incorporated into a final separation order. The court "granted the parties a final separation order without a hearing," which meant, under the rules, that the court had "found the terms of the separation agreement to be fair and equitable." Tschaikowsky, 2014 VT 83, ¶ 11 (citing V.R.F.P. 4(e)(1)). The husband subsequently moved for divorce and sought to enforce the terms of the agreement. We found the parties' agreement binding and enforceable as a matter of law and held that its terms could not "be modified except on grounds sufficient to overturn a judgment." Id. ¶ 4. We explained that the legal separation order was a final order and that "[o]nce an agreement is incorporated into a final judgment, it too is final." Id. ¶¶ 7, 8. We found our holding consistent "with public policy" and our long-recognized "interest in encouraging stipulations within the family court context." Id. ¶ 9. Any other conclusion, we emphasized, would rob legal separation "of virtually any legal significance" and "undermine our preference for stipulations, finality in final judgments, and general principles of contract law." Id. ¶ 10.

While it is true that the parties did not stipulate to waive maintenance in Tschaikowsky, Tschaikowsky holds that an agreement incorporated into a final separation order is binding and enforceable, consistent with our holding to the same effect for other types of final orders. See Pouech v. Pouech, 2006 VT 40, ¶¶ 20, 22, 180 Vt. 1 (recognizing that "[o]nce a stipulation is incorporated into a final order, concerns regarding finality require that the stipulation be susceptible to attack only on grounds sufficient to overturn a judgment" and contrasting this with situations where there is no final order and "parties have executed a stipulation in anticipation of divorce regarding maintenance or the division of marital property, but one or both of the parties challenge the stipulation before the family court has held a final hearing or incorporated the stipulation into a final divorce order"). We have not carved out an exception for final orders that reflect the parties' agreement as to maintenance. To the extent that mother argues that Tschaikowsky was wrongly decided, we reject that argument.

Mother cites to dicta in Tschaikowsky, where we addressed two hypotheticals posed by the trial court in support of its conclusion that a final separation order was unenforceable. The trial court questioned what would happen "if a party contracted a serious and debilitating illness after separation but before divorce." Tschaikowsky, 2014 VT 83, ¶ 12. We reasoned that a serious and debilitating illness "would provide grounds for assertion of a real, substantial and unanticipated change of circumstances that would allow the family court to change any existing terms for spousal maintenance to ensure fairness and equity at that point." Id. We made clear, however, that this circumstance was not present in Tschaikowsky, and thus, we did not actually decide this issue. Id. This language is dicta and is not binding here. See Pepin v. Allstate Ins. Co., 2004 VT 18, ¶ 16, 176 Vt. 307 (noting that "dicta . . . is not binding authority."). Our law holds, as the trial court found, that where there is no provision for maintenance in a final order, the court cannot later order maintenance upon a showing of changed circumstances. See Arbuckle, 2004 VT 68, ¶ 8. While Arbuckle involved the attempted modification of a final divorce decree, we emphasized the importance of "finality and stability" in family law cases and held that "neither the parties nor the court should be burdened by the inevitable uncertainty that would flow from a perpetually unresolved maintenance award." Id. ¶ 11 (quotation omitted). These principles apply equally here. The final separation order contained no maintenance award here that the court could modify.

Because the final separation order is binding and the parties waived maintenance, the court was not required to hold a hearing to review issues related to maintenance under 15 V.S.A. § 752(a), and discovery of the parties' financial situations was not needed. Because the court "granted the parties a final separation order without a hearing," moreover, "it naturally follows that the court found the terms of the separation agreement to be fair and equitable." Tschaikowsky, 2014 VT 83, ¶ 11.

As we recognized in Tschaikowsky, "a final order of legal separation . . . significantly alters the landscape of what the family court can do in a subsequent divorce," but "that is part of the analysis that parties must engage in for themselves when deciding to request a legal separation, with its particular benefits and costs, or proceed to an outright divorce." Id. ¶ 13. As in Tschaikowsky, "[t]he parties here presumably engaged in such an analysis when they filed for legal separation and are now bound by the consequences of the final order that they received." Id.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice