THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2020-0299, In the Matter of Heather Birch and Michael Birch, the court on August 31, 2021, issued the following order:

The respondent, Michael Birch (husband), appeals the April 29, 2020 order of the Circuit Court (Leonard, J.) modifying the property division and child support orders in his January 6, 2016 decree of divorce from the petitioner, Heather Birch (wife). He argues that the trial court erred by: (1) modifying the property division based upon his misrepresentation; and (2) not deducting his reasonable and necessary business expenses in determining his self-employment income. We affirm in part and reverse in part.

The parties were married in 2005 and divorced in 2016. There are two children born of the marriage. Pursuant to the parties' agreed-upon divorce decree, each party received his or her own motor vehicles, retirement accounts, and bank accounts. The husband was awarded the marital home, which he had purchased from his mother prior to the marriage. He agreed to pay the wife $20,000 of the approximately $148,000 in equity in the home. He also agreed to pay $1,200 per month in child support once the wife moved out of the home. For health-related reasons, the wife continued to reside in the marital home for three years after the divorce. In 2019, the husband moved for an order requiring her to vacate the home. He also moved to modify child support. In response, the wife moved to modify the property division.

Following a hearing on the motions, the court noted that, under the terms of the decree, the husband received approximately eighty percent of the marital estate, while the wife received only twenty percent. The court credited the wife's testimony that, at the time of the divorce, the husband represented to her that he would provide her with financial assistance to purchase a home, and that she agreed to accept less than fifty percent of the marital estate based upon the husband's offer of financial assistance. The husband denied making any such offer. Although the wife provided no testimony as to the amount or nature of the financial assistance that the husband offered, the court ordered him to pay her $66,000 "to equalize the inequitable distribution." The court also ordered the husband to pay guidelines-level child support of $1,280 per month, based upon his income of $5,633 per month as a self-employed, independent contractor.

The husband first argues that the trial court erred in modifying the property division. "On appeal, we will affirm the findings and rulings of the trial court unless they are unsupported by the evidence or legally erroneous." In the Matter of Hoyt & Hoyt, 171 N.H. 373, 376 (2018) (quotation omitted). A property division will not be modified unless the complaining party shows that it is invalid due to fraud, undue influence, deceit, misrepresentation, or mutual mistake. Shafmaster v. Shafmaster, 138 N.H. 460, 464 (1994). The court found that the husband's representation at the time of the divorce "only later became evident as a misrepresentation," when the wife moved out of the marital residence, and he reneged on his promise. The husband's representation lacked any details as to the amount or nature of the financial assistance that he promised. We conclude that the husband's representation at the time of the divorce to "help [the wife] financially to purchase a home," without more, is an insufficient basis, as a matter of law, to modify the property settlement three years later, when he allegedly reneged on the promise. See DePalantino v. DePalantino, 139 N.H. 522, 524 (1995) (husband's misrepresentations regarding wife's eligibility to claim part of his pension benefits insufficient as a matter of law to justify modifying property division).

The wife argues that, even if the trial court erred in modifying the property division based upon the misrepresentation, there are valid alternative grounds to affirm the court's order. See Doyle v. Comm'r, N.H. Dep't of Resources & Economic Dev., 163 N.H. 215, 222 (2012) (when trial court reached correct result on mistaken grounds, we will affirm if valid alternative grounds support the decision). She argues that the trial court's decision may be affirmed under the mutual mistake doctrine. The husband counters that the wife failed to preserve this issue for our review because she did not raise it in the trial court. See In the Matter of Hampers & Hampers, 154 N.H. 275, 287 (2006) (party must raise issue in trial court to preserve it for appellate review). Even assuming, without deciding, that the issue is preserved, we conclude that the record does not support a claim of mutual mistake.

"Reformation of an instrument for mutual mistake of fact requires that the party seeking reformation demonstrate by clear and convincing evidence that (1) there was an actual agreement between the parties, (2) there was an agreement to put the agreement in writing, and (3) there is a variance between the prior agreement and the writing." Sommers v. Sommers, 143 N.H. 686, 689-90 (1999) (quotation omitted). In this case, neither party testified that there was an agreement to put the offer of financial assistance in writing. The husband denied making any such offer, and the wife testified that she felt no need to put the agreement in writing because she trusted him.

The husband next argues that the trial court erred in determining his self-employment income for child support purposes by not deducting his reasonable and necessary business expenses. We have held that, for child

support purposes, "self-employment income" means "self-employment income net of legitimate business expenses incurred for the purpose of earning that income." In the Matter of Woolsey & Woolsey, 164 N.H. 301, 306 (2012). To be deductible for child support purposes, however, the husband must show that such expenses were "actually incurred and paid," and "reasonable and necessary" for producing income. Id. at 307; In the Matter of Hampers & Hampers, 166 N.H. 422, 440 (2014).

At the hearing, the husband submitted a financial affidavit listing his monthly personal expenses and an IRS Schedule C listing his claimed business expenses for 2019. The expenses listed on the Schedule C included $7,677 for "[c]ar and truck expenses"; $2,396 for "phone/internet"; $1,928 for "office expense"; $1,411 for "[d]eductible meals"; $1,020 for "[p]arking"; $350 for "[t]ravel"; and $275 for "[t]axes and licenses." He testified that the car and truck expenses were "mostly mileage," which accounted "for the depreciation on the vehicle."

We have held that the determination of income under federal income tax law is of little relevance to the determination of income for purposes of child support. See, e.g., In the Matter of Maves & Moore, 166 N.H. 564, 569 (2014). In particular, we have noted that certain business deductions allowed under federal law, such as depreciation, are not necessary for producing income. See id. Although the husband testified that he claimed the listed expenses on his federal tax return, he did not provide any further testimony or documentation to show that they were "actually incurred and paid," and "reasonable and necessary" for producing income. See Woolsey, 164 N.H. at 307. We conclude that the evidence does not compel a finding that his expenses were actually incurred and paid, and reasonably necessary for producing income. Thus, the trial court did not err in determining his self-employment income for child support purposes.

Affirmed in part and
reversed in part.

HICKS, HANTZ MARCONI, and DONOVAN, JJ., concurred.

Timothy A. Gudas,
Clerk