

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-124

SEPTEMBER TERM, 2017

Lynn Pelkey-Mahler	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
v.	}	Family Division
	}	
	}	
Kenneth A. Mahler	}	DOCKET NO. 119-4-16 Frdm

Trial Judge: Martin A. Maley

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

Wife appeals from the trial court’s final divorce order. She argues that: (1) the court was not properly constituted under 4 V.S.A. § 457; (2) the court arbitrarily limited the available time for the final hearing; and (3) the court erred in awarding her time-limited maintenance when the findings supported permanent maintenance. We affirm.

The parties were married in 2001; wife filed for divorce in April 2016. Wife was fifty-two years old at the time; husband was fifty-six. The parties have no children together. In September 2016, the court held a hearing on wife’s request for temporary spousal maintenance. The hearing was not concluded and a second hearing was held in October 2016. In late October 2016, the court issued an order awarding wife \$2000 per month in temporary spousal support retroactive to July 2016, when husband resumed his employment.

The court made numerous findings in its temporary order, including the following. This was a high conflict divorce. Husband was in good health. Wife had a variety of ailments that she claimed were debilitating although wife provided no medical documentation to support her contention. Wife was currently employed part-time at a nursing home, earning \$600 per month. She lived in her mother’s home and stated that she paid \$1200 in monthly rent, although she was several months in arrears. Wife cited various medical expenses for massages and reflexology, and she stated that she was on a restrictive diet. Her claimed monthly expenses appeared to exceed \$4500 per month. Husband was self-employed in the computer design business. For the first half of 2016, he was unemployed. He currently had a contract in Florida, which required him to travel to conduct his business. This resulted in substantial costs for transportation, housing, and meals. Husband was also required to maintain the marital home in Vermont. The parties’ joint income tax return reported wages of \$247,520, although it was not clear if this included a portion of wages from wife. The court found that husband’s reported net monthly income was approximately \$9500, and he listed monthly living expenses of \$6150.

The parties lived in Texas before moving to Vermont. They separated in Texas in July 2014, and a divorce action was filed there. The parties sold their house and agreed to a division of assets with wife receiving appropriately \$70,000. Then, the parties reconciled in 2015. The parties then moved to Vermont, purchased a house, and then separated again. Pursuant to a

temporary relief-from-abuse order, which was ultimately denied, husband was required to vacate the marital home. Wife then removed most of the furnishings from the residence; she packed husband's clothing into garbage bags and placed rat poisoning in the bags.

Turning to the parties' assets, the court found that they owned a home in Grand Isle that had approximately \$125,000 in equity. They each owned a vehicle. Husband listed savings of \$13,360. The parties did not list any retirement accounts in their financial statements. Husband did indicate that there was an IRA with an approximate value of \$100,000.

The court found it clear that the parties could not provide for their reasonable needs as measured by the marital standard of living. Wife's present financial situation was especially problematic given her limited income and alleged medical history. Husband did not have the financial resources to pay \$6000 in monthly support as wife requested. The parties had dissipated a substantial share of the marital estate during divorce proceedings in Texas and they had few remaining liquid assets. Additionally, husband experienced a prolonged period of unemployment after the parties separated. He had just found employment but it was a six-month contract. Not only was there insufficient income to meet both parties' needs, the court was not persuaded that wife needed \$6000 per month to support herself. Considering the applicable statutory factors, the court determined that \$2000 per month in spousal maintenance was appropriate. The court set the matter for a status conference to determine the amount of time necessary for a final hearing and to discuss any remaining discovery issues. The parties were notified that they would each have an hour to present their case at the final hearing. The court explained that the issues before it appeared straightforward and that it did not intend to retry the maintenance issues. No party objected.

A final hearing was held on January 31, 2017. The transcript reflects that two assistant judges sat with the trial judge, although they did not sign the final divorce order. In a March 2017 order, the court made numerous findings, many of which restate the information recited above. The court noted that wife had not testified at the final hearing because she called other witnesses, which left her with insufficient time to complete her case. Wife called her treating physician and a police officer, who responded to her allegations that husband had removed her belongings from her home. Rather than reset the matter again, the court allowed parties to submit proposed findings post-hearing to clarify their positions and to advise the court what each sought regarding distribution of the marital estate and spousal maintenance. Wife requested \$5000 per month in permanent maintenance.

The court found that wife was voluntarily underemployed during the marriage. It also noted that while husband was clearly not satisfied with wife's lack of consistent employment, he acquiesced to this arrangement at least until the parties' initial separation in Texas. The court concluded that wife had physical ailments that limited her ability to maintain strenuous prolonged activities. She continued to be voluntarily underemployed but the court found she could maintain employment. Additionally, the cost of her treatment appeared to be beyond what could be reasonably sustained given the parties' financial circumstances.

As noted in its prior order, the court found the parties highly conflicted with an extreme level of animosity toward one another. The court incorporated by reference its previous factual findings, presumably on this topic although this is not clear, and it discussed a recent example of husband's inappropriate behavior as well.

Based on these and other findings, the court divided the marital estate and ordered husband to pay wife \$2500 in monthly maintenance for five years. It found that wife clearly lacked sufficient income to provide for her reasonable needs and the parties did not have assets that could

be awarded to wife to support those needs. Additionally, wife could not support herself through employment at the standard of living established during the marriage. Her earnings would not likely exceed \$25,000 annually, and she was unlikely to acquire further education and training that would allow her to find employment that would increase her earning potential.

Although wife clearly needed support, it was not feasible for husband to meet those “reasonable” needs and meet his own needs as well. The court found that husband can maintain a salary in the range of \$100,000 annually, assuming he can maintain sufficient contracts. The court rejected as far-fetched wife’s claim that she needed several thousand dollars each month for uninsured medical and health expenses. The court thus rejected wife’s request for \$5000 per month in spousal support as not realistic considering all the factors, including the parties’ relative incomes and needs. It concluded that an award of \$2,500 per month for five years was appropriate. It found a permanent award inappropriate given the parties’ relative financial circumstances, including the uncertainty of husband’s career. Wife appealed from the court’s order.

Wife argues, for the first time on appeal, that the court was not properly constituted, and as a result, the judgment is void. Citing 4 V.S.A. § 457(f), wife asserts that because no assistant judges participated in the hearing on temporary maintenance, the assistant judges should not have been allowed to participate in the final hearing. According to wife, because the court incorporated findings from its temporary order, and because assistant judges sat for the final hearing, the court “improperly reconstituted” the court in violation of the statute.

We reject the premise of wife’s argument. Neither assistant judge signed the final order. Given that the superior judge alone signed that order, we do not infer that the assistant judges actually participated in the final hearing. We reject wife’s first claim of error.

Wife next argues that the court erred by limiting the final hearing to two hours. Wife acknowledges that the court has discretion to exercise reasonable control over the presentation of evidence to avoid needless consumption of time. See V.R.E. 611; see also Varnum v. Varnum, 155 Vt. 376, 390 (1990) (“[T]he power granted by Rule 611(a) includes the authority to set reasonable limits on the consumption of time in examining witnesses.”). She contends, however, that the court imposed unreasonable limits here. She also asserts that the court should have granted her motion to reopen to allow her to complete her testimony and to cross-examine husband. Wife suggests that she rushed through her testimony at the temporary-maintenance hearing because she was unaware that the court would later rely on it. She also maintains that she should have been given more time than husband because her case was more complicated than his.

As noted above, the court informed the parties that it did not intend to retry issues related to spousal maintenance and that the parties would each be given one hour to present their case. Neither party objected. By failing to object, wife waived her claim of error. See Bull v. Pinkham Eng’g Assocs., 170 Vt. 450, 459 (2000) (“Contentions not raised or fairly presented to the trial court are not preserved for appeal.”). As the court explained, the issues to be determined in this case were not complex and the parties had sufficient opportunity, taking into consideration all the hearings that took place, to fairly present their evidence. This was a second marriage for both parties; they had no children together; and there was not a significant amount of property to be distributed. At the temporary hearings, the court heard testimony from both parties relative to their financial circumstances, wife’s health concerns, and other issues related to the parties’ marriage and separation. The parties knew they had limited time available at the final hearing, and it was imperative that the parties make the best use of their limited time.

While wife might regret how she chose to spend her allotted time, she failed to object to the process below or make a proffer of additional evidence so that the court could determine whether additional time was warranted. On this record, the court did not abuse its discretion in setting a time-limit on the presentation of evidence or denying her motion to reopen. See, e.g., Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.) (explaining that arguments which amount to nothing more than a disagreement with court’s conclusion do not make out a case for an abuse of discretion). We note that wife was able to submit proposed requested findings to specifically set forth the relief she sought.

Finally, wife argues that the court erred in awarding time-limited maintenance. She argues that the findings support an award of permanent maintenance, or a combination of permanent and rehabilitative maintenance.

We reject this argument. The trial court may award maintenance, either rehabilitative or permanent, to a spouse when it finds that the spouse lacks sufficient income and/or property 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 marriage.” 15 V.S.A. § 752(a); Chaker v. Chaker, 155 Vt. 20, 25 (1990). The maintenance must be in the amount and for the duration the court deems just, based on the consideration of seven nonexclusive factors. See 15 V.S.A. § 752(b). Once the family court finds grounds for awarding maintenance, it has broad discretion in determining the 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.

Wife fails to make the necessary showing here. The court considered the relevant statutory factors in reaching its decision. It found that the parties could no longer attain the standard of living established during the marriage. See Gravel v. Gravel, 2009 VT 77, ¶ 27, 186 Vt. 250 (“While the reasonable needs of a party are determined in light of the standard of living established during the marriage, if the income of the parties is unable to support that standard of living, both parties must lower their expenses and adjust accordingly.” (citation omitted)). It determined that husband would likely to earn less going forward than he had in prior years, and that he was now forced to travel longer distances to secure contracts, thereby incurring greater costs. Based on husband’s current income level and anticipated expenses, the court found that husband could maintain a salary in the range of \$100,000 annually, which rested on the questionable assumption that he could maintain consistent contracts. The court found that husband had total monthly income of approximately \$9000, with expenses in excess of \$6000 per month before spousal support.

As to wife, the court found that she was voluntarily underemployed, and her earnings were not likely to exceed \$25,000 annually. The court did not find all of wife’s claimed expenses to be reasonable or realistic. For a five-year period, wife will now receive \$2500 of the \$3000 available to husband after paying his expenses. While wife believes that she is entitled to maintenance for a longer period, the court concluded otherwise. The court specifically rejected the notion of awarding permanent maintenance given the parties’ relative financial circumstances, including the uncertainty of husband’s career. As in Gravel, we conclude that “[t]he trial court intended to equalize the standard of living of the parties for an appropriate period of time, a purpose consistent with our decisions and the statute.” Id. ¶ 24. While wife disagrees with the court’s conclusion, she fails to show that it abused its broad discretion in determining an appropriate maintenance award.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice