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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-161

NOVEMBER TERM, 2017

Cathy L. Russell	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
v.	}	Family Division
	}	
	}	
Joshua P. Lemieux	}	DOCKET NO. 36-1-11 Rddm
		Trial Judge: Nancy S. Corsones

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

Husband appeals pro se from the trial court's denial of his request to enforce the parties' final divorce order and to modify his spousal maintenance obligation. We affirm.

To place the current dispute in context, we must recount the parties' history. The parties divorced in March 2013 following a twenty-five-year marriage. Both parties were forty-one years old and in good health. They have an adult son and a daughter who, in 2013, was almost eighteen. The court found husband solely at fault for the breakdown of the marriage, citing his numerous infidelities, dishonesty, criminal record, and treatment of wife. The parties lost their home to foreclosure after husband was fired from his job as a state trooper for driving under the influence. The marital estate consisted primarily of husband's retirement account. The court awarded wife 60% of the present value of husband's retirement account.

As part of the final divorce order, the court determined that wife could not meet her reasonable needs as established by the marital standard of living. Based on his current job as a salesperson at Alderman Chevrolet, the court found that husband could earn, on average, at least $2800 per month. Wife worked as a paraeducator, and the court found that she could earn approximately $1600 per month. Wife lived in an apartment and ran a significant deficit every month. Wife received food stamps and had VHAP insurance; the parties' daughter received Medicaid. Wife received no financial support whatsoever from husband beyond $130 in monthly child support, payment of car insurance and a car loan, and use of approximately $5000 from husband's deferred compensation account. Wife was the custodian of the parties' daughter and she could not support herself through appropriate employment. The court found that this was a long-term marriage, and that wife had been the primary caregiver and homemaker for long periods during the marriage. It determined that there was clearly a compensatory aspect to the maintenance award. The court ordered husband to pay wife $583.33 per month beginning March 1, 2013 and continuing until husband turned fifty-five or wife died, whichever occurred first. Husband was also ordered to pay child support.

Husband did not pay as ordered and, in June 2013, wife moved to hold him in contempt. In September 2013, the court granted wife's request for a wage withholding order for husband's

child support obligation. At a hearing on the contempt motion in July 2014, husband wrote a check to wife for the amount in arrears. In April 2015, husband left his job as a car salesman and began working as a real estate salesperson.

In March 2016, wife again moved to hold husband in contempt for failing to make payments. Following a June 2016 hearing, the court found husband in contempt. It ordered him to pay wife $4666.66 to purge his contempt within sixty days or it would assess attorney's fees and costs, as well as interest, and possibly a penalty. In late August, husband provided wife with an unsigned check for this amount. On the fifty-ninth day after the court's decision, husband provided actual payment to wife.

In August 2016, husband moved to modify his maintenance obligation and to enforce the final divorce order. Husband stated that he was placing his maintenance payments for July 2016 forward "in escrow." Wife opposed husband's motion.

Following a hearing, the court denied husband's motion. It explained that husband raised three basic issues. He sought enforcement concerning the parties' daughter's college education expenses, asserting that the parties verbally agreed, when their children were young, to share in the children's college education expenses, and that his maintenance obligation should be reduced to reflect those payments. He also argued that in 2013, wife improperly claimed tuition/fees as a tax deduction. Finally, husband asserted that there had been a real, substantial, and unanticipated change in circumstances, warranting a reduction in his maintenance obligation.

The court rejected husband's claims. First, it found no enforceable agreement to share in the children's college expenses, noting that it was not included in the parties' child support order. See 15 V.S.A. § 659(b) (stating that "if the parties agree, the court may include in the child support order an additional amount designated for the purpose of providing for postsecondary education" (emphasis added)); Milligan v. Milligan, 158 Vt. 436, 442 (1992) (holding that "property order cannot be used to create an obligation to support children beyond their minority," and court "has no power to order creation of an educational trust for use beyond the age of the majority"). Given the clarity of Vermont law on this subject, the court denied husband's claims with respect to the tax deduction and any form of offset relating to his voluntary payment of the children's college costs.

Turning to husband's modification request, the court noted that he produced no documentary evidence whatsoever to support any of his testimony regarding either his income or expenses. Husband testified that he ended his car salesman employment due to a mutual understanding. He claimed to have grossed $75,312 in 2013 and "about the same" in 2014. The court took judicial notice that in the March 2013 final divorce order, the court found that husband earned about $33,600 a year from his work at Alderman's. Husband testified that he now sold real estate and grossed $60,494 in 2016. He wrote off business-related expenses, and stated that his adjusted gross income in 2016 was $39,351. Husband had a girlfriend and said that he was paying expenses for his girlfriend's disabled child. Husband also testified that he believed that wife's income had increased, and that since she was remarried, the court should consider her new spouse's income in connection with his request for lowering his maintenance payments to $50 per month.

The court found that wife worked as a paraeducator at a high school in Virginia. Wife took on additional work at the school to supplement her income. The court also noted that husband had been found in contempt of court for nonpayment of his support obligations. Additionally, wife testified that husband had recently rescheduled a hearing in this case so that he could go on vacation to Disneyland.

The court found that husband failed to prove a real, substantial, and unanticipated change in circumstances. It explained that husband's maintenance obligation was premised upon husband earning about $33,600 a year. In fact, since the divorce, husband had earned a great deal more than that and continued to do so. The court was also unpersuaded that husband's assumption of payments for his girlfriend's child was a sufficient basis to reduce his court-ordered maintenance to $50 per month. The court further found that wife's remarriage could not be said to be unanticipated because she was only forty-one at the time of the divorce and it was foreseeable that she would remarry. Additionally, it found that the maintenance award was clearly compensatory in part and it was not conditioned on wife remaining single. Husband appealed from the court's order.

Husband asserts that the court erred in finding an absence of changed circumstances. He argues that wife's situation has improved since the divorce while his has not. He complains that the court "sought no findings of fact" with respect to wife's current financial standing and standard of living. Husband argues that the "reality of college expenses for the parties' daughter were not fully taken into account at the time of the divorce," and the parties had always agreed that they would pay for their children's education. He further asserts that the court was misled by wife's testimony concerning his trip to Disneyland. Husband also contends that the court was misled by wife's testimony as to why she had taken a deduction for tuition expenses. Husband maintains that wife committed perjury.

"A court may not modify a maintenance order unless it finds that there has been a 'real, substantial, and unanticipated change of circumstances.' " Mayville v. Mayville, 2010 VT 94, ¶ 8, 189 Vt. 1 (quoting 15 V.S.A. § 758). As the party seeking modification, husband bore a "heavy" burden of showing changed circumstances. Id. "[T]here are no fixed standards for determining what meets this threshold," and "courts must evaluate any alleged change in circumstances in light of the nature of the original maintenance award." Weaver v. Weaver, 2017 VT 58, ¶ 26. We review the court's decision for abuse of discretion. See Mayville, 2010 VT 94, ¶ 8.

At the outset, we emphasize that husband had no right to unilaterally stop paying maintenance to wife. Putting the money that he owed to wife "in escrow" is not a lawful option. Such conduct may subject husband to a third motion for contempt, and the imposition of sanctions, including an award of attorney's fees. This is particularly true given husband's refusal, almost from the outset of the parties' divorce, to pay maintenance and child support as ordered.

Turning to the merits, we conclude that the court did not err in finding an absence of changed circumstances here. First, we note that the court had no burden to elicit information from the parties as husband suggests. The burden was on husband, not the court, to show that changed circumstances existed. In arguing to the contrary, husband relies on language in a dissent that is inapposite here. See Kohut v. Kohut, 164 Vt. 40, 47 (1995) (Allen, C.J., dissenting) (addressing challenge to initial maintenance award, and arguing that "[w]hile the parties are responsible for introducing evidence on relevant factors, when a factor is clearly relevant to the proper implementation of the statutory scheme and the party fails to submit evidence on that issue, the resulting order cannot stand"). Husband failed to demonstrate that he was earning less than he did at the time of the final divorce order. The maintenance award was based on a finding that husband was earning $33,600 per year, and he testified that his gross earnings were more than twice that amount. Even after expenses, husband was earning more at the time of the modification hearing than at the time of divorce. Further, we agree with the trial court that husband's voluntary assumption of expenses for another person's child does not demonstrate a change in circumstances sufficient to warrant modification of his obligation to wife.

Husband correctly asserts that the court erred in finding that wife's remarriage was "foreseeable" simply given her age at the time of the divorce. See Zink v. Zink, 2016 VT 46, ¶ 11 (emphasizing difference "between a change that may be theoretically foreseeable at the time of a divorce and one that is actually factored into the parties' or court's assumptions in establishing a spousal maintenance order"). As noted above, the court also found that the maintenance award was clearly compensatory in part and it was not conditioned on wife remaining single. We conclude that any error in the court's statement about the foreseeability of wife's remarriage based on her age was harmless because husband failed to prove that there had been a change in wife's need for maintenance.

"Although a significant change in the finances of either spouse can warrant modification, an obligee's maintenance will not be automatically reduced merely because of that spouse's improved circumstances." Hausermann v. Hausermann, 2013 VT 50, ¶ 8, 194 Vt. 123 (quotation omitted) (emphasis added). Wife's remarriage "is relevant only to the extent that it improves her financial circumstances enough to substantially reduce the need for maintenance." Id. ¶ 9; see also Miller v. Miller, 2005 VT 122, ¶ 20, 179 Vt. 147 (reasoning that financial improvement resulting from remarriage of former spouse "cannot alone be changed circumstances" sufficient to modify maintenance award because "[m]aintenance recipients should normally retain the benefit of actions they take to live more economically"). Husband did not introduce any evidence that would support a reduction in his maintenance obligation based on wife's remarriage alone. In fact, the court's findings indicate that wife's financial circumstances are very similar to those present in 2013. She is working as a paraeducator and taking on extra work at the school to supplement her income. The court's findings support its conclusion that there has been no change of circumstances. This is particularly true given that a part of the maintenance award is compensatory in nature. See Weaver, 2017 VT 58, ¶ 28 (explaining that courts must apply "more stringent" test before modifying the compensatory component of permanent maintenance award, and movant must show "more than just an unexpected change in financial circumstances"); see also Hausermann, 2013 VT 50, ¶ 12 (explaining that "[w]hen maintenance is compensatory there is a limit to the extent that changes in financial circumstance can support downward modification" (quotations omitted)).

We reject husband's challenges to wife's credibility, including her testimony concerning a tax deduction. It is the exclusive role of the trial court, not this Court, to weigh the evidence and assess the credibility of witnesses. Cabot v. Cabot, 166 Vt. 485, 497 (1997). We also reject husband's arguments concerning an alleged agreement to pay the children's college expenses for the reasons identified by the trial court. We find no error in the court's denial of husband's motion.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice