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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-202

NOVEMBER TERM, 2017

Joanne Blaney (Bergeron)	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
v.	}	Family Division
	}	
	}	
John T. Blaney	}	DOCKET NO. 203-10-14 Ledm
		Trial Judge: Thomas Z. Carlson

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

Wife appeals the family court's order denying her request to modify spousal maintenance. We affirm.

The parties were married in 2001 and divorced in April 2013. They have one child, a son who is now seventeen years old. They separated in August 2012 after husband filed a relief-from-abuse complaint against wife alleging that she had stopped taking her medication, was acting irrationally, and had thrown his clothes and possessions out of the house and into a dump cart. After the relief-from-abuse order was granted, wife filed for divorce in Franklin Superior Court. The final divorce hearing was held on April 18, 2013. On April 17, wife moved to continue the hearing on the ground that she could not proceed without legal representation. She acknowledged that she had received notice of the hearing date one month prior. The court denied the motion. Wife did not attend the final hearing.

In its final order, the court found that wife, who was then forty-nine years old, was in reasonably good physical health despite a prior neck injury that required fusion surgery. However, wife suffered from mental health issues that had significantly affected the marriage. She had stopped taking her medication, resulting in bizarre behavior and false accusations that husband had abused her. The court found that wife did not appear to be employed and stated that "[g]iven her current mental health struggles it does not appear likely she will be able to earn sufficient income to meet her needs."

Husband, who was fifty-eight, had been employed for thirty-eight years as a maintenance worker at a local factory, where he made approximately $43,000 annually. He received a lifetime annuity of $4100 per month as the result of the death of his first wife in an automobile accident. The parties enjoyed a relatively high standard of living during the marriage. They owned horses and an expensive camper. Their son attended horse shows and was a competitive snowboarder. Despite their significant income, the parties owned few assets and had amassed considerable debt. Wife managed the marital finances, which were in disarray. At the time of the divorce, the parties owed more than $38,600 in credit card debt and were behind on mortgage and camper payments.

The marital residence was worth $130,000 but was encumbered by two mortgages totaling $149,000. The court found that the parties would not be able to sustain the standard of living they enjoyed during the marriage because they were living beyond their means.

In the final divorce order, the court awarded sole legal and physical rights and responsibilities of the son to husband. The court awarded the marital home and camper to husband along with the associated debt, and ordered husband to pay all of the credit card debt incurred up to the date of separation. The court ordered husband to pay wife maintenance of $1200 per month for four years. It found permanent maintenance to be unwarranted due to the relatively short eleven-year marriage and the health and ages of the parties. Neither party appealed the final order. In October 2014, the case was transferred to Lamoille Unit after wife wrote to the court alleging that husband was in a relationship with a Franklin Superior Court employee.

The four-year period of spousal maintenance expired in May 2017. In March 2017, wife moved to make the maintenance award permanent. She stated: "There has been no change in circumstances to justify termination of the current spousal maintenance. I continue to have the same disability and although I have been able to work minimally, the prospect of being employed long-term with my disability is not good." The family court denied the motion, explaining that modification of a final award of spousal maintenance requires a showing of a real, substantial, and unanticipated change of circumstances, and wife had expressly alleged that the circumstances had not changed.

Wife moved for reconsideration, arguing that by "no change in circumstances" she meant that there was no justification to discontinue maintenance. She argued that she had been awarded supplemental security income benefits for her disability in January 2015. She claimed that prior to then, she was able to work more hours, but was now limited to fifteen hours per week. Without the spousal support, she claimed, she would not be able to afford her living expenses and expenses for her son. She argued that husband had a substantial income and claimed that he had underreported his assets to the court.

The court denied the motion to reconsider. It noted that the final divorce order was based on the court's finding that wife was unlikely to be able to earn adequate income to meet her needs. At the time the divorce order was issued, wife was apparently unemployed and suffering from mental illness and some physical disability. The court had considered these factors in fashioning the maintenance award. The court therefore concluded that wife's allegation of ongoing disability was not a change in circumstances sufficient to modify the original maintenance order.

Wife appeals the court's denial of her modification request. Section 758 of Title 15 permits the court to modify a maintenance award "upon a showing of a real, substantial, and unanticipated change of circumstances." Wife, as the party seeking the modification, has the "heavy" burden of showing a change in circumstances. Wardwell (Clapp) v. Clapp, 168 Vt. 592, 594 (1998). The determination of whether changed circumstances exist falls within the discretion of the family court. Taylor v. Taylor, 175 Vt. 32, 36 (2002). "[W]e will not disturb the trial court's discretionary determination unless the discretion was erroneously exercised, or was exercised upon unfounded considerations or to an extent clearly unreasonable in light of the evidence." Id.

There was no abuse of the family court's discretion. The court accurately noted that the final divorce order took wife's mental illness and existing physical disability into account. The maintenance award was based in part upon wife's unemployment at the time and her likely inability to earn sufficient income while she struggled with her mental health issues. Despite these issues, the court concluded that permanent maintenance was not appropriate. Wife's income and

ability to work do not appear to have significantly changed since the order. If anything, she seems to be in a slightly better position now than she was then: she has been awarded disability benefits and therefore has some steady monthly income to supplement her limited wages, and she is no longer required to pay child support.

Nor was there a change in circumstances on the basis that husband has greater income than wife and may have repaid some or all of the marital debt, as these circumstances were not unanticipated. The final divorce order considered husband's greater income and earning potential in fashioning the maintenance award. It also noted that he was nine years older than wife and, as a result of the property division, was saddled with significant debt, at least some of which was attributable to wife's poor management of the marital finances. The order clearly contemplated that husband would eventually pay off the debt. Wife has failed to show that husband's resulting higher net income constituted a substantial or unanticipated change in circumstances.

Wife also argues that the maintenance award should have been modified because she now has increased visitation with her son and is incurring more expenses on his behalf. Again, wife fails to show that this is a substantial or unanticipated change in circumstances. The order contemplated additional visitation with wife in the future. Implicit in this was an expectation that wife would incur some additional expenses when her son stayed with her. Wife's vague allegations are insufficient to show that her expenses have significantly increased as a result of the increased visitation. Husband continues to have sole legal and physical rights and responsibilities and remains legally responsible for the bulk of the costs associated with raising their son. We therefore find no error.

Finally, wife claims that husband's girlfriend brings additional income into husband's household and that the parties' son now wants to live with her full time. She argues that these facts constitute changed circumstances. Contrary to the assertions in her brief, wife did not present these arguments to the family court in the first instance. She therefore has failed to preserve them for appeal. See Gravel v. Gravel, 2009 VT 77, ¶ 12, 186 Vt. 250. We also do not address wife's various challenges to the 2013 divorce order. She did not timely appeal that order, and we therefore lack jurisdiction to review it. Casella Constr., Inc. v. Dep't of Taxes, 2005 VT 18, ¶ 3, 178 Vt. 61 ("The timely filing of a notice of appeal is a jurisdictional requirement.").

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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Karen R. Carroll, Associate Justice