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

SUPREME COURT DOCKET NO. 2017-414

MAY TERM, 2018

Nicola Weaver* v. David Weaver	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
	}	Family Division
	}	
	}	DOCKET NO. 138-7-09 Andm
		Trial Judge: Samuel Hoar, Jr.

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

Wife appeals the superior court's decision, following remand from this Court, on husband's motion to modify spousal maintenance. We reverse the court's decision and remand the matter for further proceedings consistent with this opinion.

The parties' divorce has been the subject of multiple superior court decisions and appeals to this Court from those decisions. The instant thread concerns spousal maintenance. Following a marriage that produced four children and lasted approximately fifteen years before the parties separated, the superior court issued a final divorce order in August 2011 that, among other things,[1] awarded wife $2916 in monthly spousal maintenance. During that year, husband was on pace to earn approximately $100,000, while wife was working as a substitute teacher making approximately $18,000 a year. In considering spousal maintenance, the court stated that "this is essentially a long term maintenance case" in which wife sacrificed her career to raise the parties' children. In granting permanent maintenance, the court reasoned that wife was fifty years old, lacked sufficient income to meet her reasonable needs, and had very little hope of regaining her former earning capacity that she enjoyed before the marriage. The court also considered the fact that wife would have primary responsibility for the parties' children, which would require her to continue to sacrifice her ability to work full-time and to enhance her income. Because husband's career had been enhanced and wife's potential earning capacity diminished while she served as a homemaker during the marriage, the court concluded that there needed "to be some compensatory

[1] The final divorce order granted wife sole physical and legal rights and responsibilities over the parties' four children, subject to father's significant parent-child contact. In December 2011, shortly after the final divorce order issued, the court ordered the parties to share physical parental rights and responsibilities as the result of wife's interference with father's parent-child contact. In June 2015, the court modified custody and granted husband sole physical and legal parental rights and responsibilities over the two remaining minor children, subject to mother's significant parent-child contact. This Court recently issued an opinion upholding the superior court's restrictions on wife's contact with the parties' remaining minor child. See Weaver v. Weaver, 2018 VT 38.

[component of the] maintenance [award] as well." The court ordered husband to pay wife $2916 in monthly maintenance until either party died or wife remarried or reached full retirement age, but it did not specify how much of that maintenance award represented the compensatory component of the award.

In September 2013, in response to husband's motion to modify spousal maintenance due to his changed financial circumstances—namely, the loss of his principal client—the court reduced husband's monthly maintenance obligation to $2500, retroactive to July 2013. In October 2014, husband filed another motion to modify spousal maintenance based on the fact that he was unemployed. At the hearing on the motion, husband acknowledged that in the earlier 2013 proceedings he failed to disclose that he had received a payment in excess of $200,000 for the loss of the client that led him to file the first motion to modify. In response, the court set aside the September 2013 modification order, reinstated the original maintenance amount for the period between July 2013 and October 2014, and reduced husband's maintenance to $1500 per month beginning in October 2014. Husband appealed that order, and a three-justice panel of this Court reversed the order and remanded the matter because the court failed to explain how it arrived at its decision to set maintenance at only slightly below what husband was earning in unemployment compensation. Weaver v. Weaver, No. 2015-326, 2016 WL 562907, at *2 (Vt. Feb. 11, 2016) (unpub. mem.), https://www.vermontjudiciary.org/LC/unpublishedeo.aspx. We also instructed the court to be mindful that because the original maintenance award had a compensatory component, husband was not necessarily entitled to have his maintenance obligation terminated. Id. at *3.

On remand, the superior court, with a different trial judge presiding, reduced husband's maintenance obligation, retroactive to October 2014, to zero based on its determination that his expenses exceeded his income. This Court reversed that decision and remanded the matter a second time for further proceedings, concluding that the superior court erred: (1) by not making clear what amount of the original maintenance award was the compensatory component, which could be reduced only pursuant to a more stringent standard; (2) by not allowing wife to discover husband's wife's income for the purpose of determining husband's overall financial situation; and (3) by allowing husband to offset a maintenance overpayment against past or future child support obligations. Weaver v. Weaver, 2017 VT 58, ¶¶ 30, 37, 42 (Weaver II).

On remand, the superior court concluded that the compensatory component of the original $2916 monthly maintenance award was $574 and then reduced that amount to zero, retroactive to October 2014, based on its determination that husband was no longer reaping the benefits of wife's homemaking contributions during the marriage. The court further concluded, however, that, beginning in October 2016 when husband began a new job, he could afford to pay wife $600 in monthly maintenance. Wife appeals, arguing that the court erred: (1) in determining the compensatory component of the original maintenance award; (2) by misconstruing this Court's standard for determining when the compensatory component of a maintenance award can be reduced; and (3) by reducing husband's monthly maintenance going forward to one-fifth of the original amount.[2]

[2] Husband briefly argues that he cannot afford to pay the $600 in maintenance ordered by the court and he asks this Court to reduce the award to zero. We do not consider this request insofar as husband failed to file a cross-appeal. See Huddleston v. Univ. of Vt., 168 Vt. 249, 255 (1998) ("An appellee seeking to challenge aspects of a trial court's decision must file a timely cross-appeal, unless, of course, the party was content with the final order below, leaving nothing to appeal." (citation omitted)).

We first examine the superior court's determination of the amount of the compensatory component of the original maintenance award. The original divorce court found that wife had total household monthly expenses of $4500 and that she was receiving $1842 in temporary monthly spousal maintenance and $658 in child support, which, along with her salary as a substitute teacher, created a shortfall of $500 per month. In considering whether to award maintenance, the original divorce court examined the parties' respective needs, the wife's role during the marriage as the primary caregiver, and the disparity in the parties' future earning power. At one point, the court stated, "[s]o in addition to meeting [wife's] needs, there needs to be some compensatory maintenance as well." The court then stated that husband had the ability to pay a total of $2916 a month, considering that his temporary maintenance obligation of $1842 was based on his yearly gross income of $80,000 and that he was on track to gross $120,000. In concluding that $2916 per month was an appropriate amount, the court stated wife sacrificed her income-earning ability during the marriage to care for the parties' children, that the emotional difficulties from the breakup impaired wife's ability to work, and that wife is seven years older than husband.

Based on these findings and conclusions by the original divorce court, the superior court in this proceeding reasoned as follows. Because the original court determined that mother needed $2342 ($1842 in temporary maintenance plus an additional $500) to meet her reasonable needs, the compensatory component of the $2916 must have been $574 ($2916-$2342). This reasoning is flawed in that it suggests the compensatory component of permanent maintenance is a distinct type of permanent maintenance that is necessarily separate from a need-based permanent maintenance. We emphasized, however, in Weaver II "that compensatory maintenance is not an independent, judicially created category of maintenance but is instead a component of many permanent maintenance awards that is appropriate in long-term marriages." 2017 VT 58, ¶ 23. The compensatory component of maintenance could represent a sum in excess of the recipient spouse's needs, or could be used to address those needs in part or in whole. The amount of the compensatory component of a permanent maintenance award does not depend on the recipient spouse's needs, as the superior court's analysis suggests, but rather the compensatory component is an aspect of the permanent award in situations where the recipient spouse agreed to contribute to the marriage as a homemaker while foregoing future earning capacity, thereby enhancing the career prospects and earning capacity of the obligor spouse. Id. Thus, the superior court erred in determining that the compensatory component of the original award was that portion of the award that exceeded wife's needs at the time of the final divorce order.

The difficulty, though, lies in how to calculate that component of the maintenance award when the original divorce court did not indicate what part of its award represented the compensatory component of the award. See id. ¶ 30 (stating that when court orders permanent maintenance award with compensatory component, it "should identify what portion of the award is made on that basis"). There is no easy answer, and in fact we will never know for certain what portion of its award the original divorce court intended to represent the compensatory component of the award. There are some clues, however. In arriving at $2916, the original divorce court emphasized that wife had put aside her career to raise the parties' children, but also took into account wife's age in relation to husband and the fact that her ability to work was impaired temporarily as the result of the breakup. Another factor to consider is that this was a borderline long-term marriage.[3] See id. ¶ 23 (emphasizing that, in addition to considering recipient spouse's

[3] As stated above, the original divorce court took into account that wife would continue to lose earning power after the divorce because she had been awarded sole physical rights and responsibilities over the parties' children; however, as noted, as it turned out, the court ordered shared custody only a few months after the final divorce order issued.

role during marriage, most important factor in determining compensatory component of permanent maintenance award is length of marriage); Delozier v. Delozier, 161 Vt. 377, 383 (1994) (stating that although there is no precise point at which marriages are deemed long-term, permanent maintenances awards "are increasingly being made in marriages of fifteen years or more"). Finally, in the trial court's prior consideration of husband's motion to modify maintenance, as noted in Weaver II, the trial court appeared to indicate the entire maintenance award was compensatory. Considering these factors, and in the absence of a more substantial record of how the original award was constituted, we conclude that the compensatory component of the award represented one-half of the total award, or $1458 per month. We recognize that arriving at this amount is essentially our best estimate in light of the original divorce court's discussion in its decision and its consideration of the compensatory component in husband's motion to modify. A review of the original divorce order reveals that the court was equally concerned with both wife's financial needs and her contributions as a homemaker to husband's future earning capacity and intended to compensate her equally for both. It is fair, therefore, to conclude that the total maintenance award consisted of equal halves. The superior court having had one opportunity to address the issue, it makes no sense to remand the matter for the court to do the same thing again—examine the 2011 final divorce order and make its best estimate as to what portion of the award represented the compensatory component.

Next, we consider the superior court's determination that the compensatory component of the maintenance award should be reduced to zero as of October 2014 because husband was no longer benefitting from wife's sacrifices during the marriage. The court reasoned that the product of wife's nonmonetary contributions during the marriage was husband's expertise and increased earning capacity in the telecommunications field, but due to the changes in that field and husband's need to acquire skills in another line of work, husband is no long benefiting from wife's nonmonetary contributions during the marriage. In so reasoning, the superior court has misconstrued this Court's holding in Weaver II and appears to have disregarded the fact that a critical consideration in providing a compensatory component to a maintenance award is to reimburse the homemaking spouse for the diminished earning capacity resulting from that spouse's nonmonetary contributions to the household. In Weaver II, we set forth a rigorous standard for reducing the compensatory component of a permanent maintenance award: the obligor spouse must show "that he or she is no longer able to benefit from the recipient spouse's contributions because of a change of circumstances." 2017 VT 58, ¶ 23. We emphasized that husband's ability to pay is relevant to the compensatory component of maintenance "only if he can make an affirmative showing that he can no longer reap the benefits of that marital bargain because he is unable to work or because he has reached a reasonable age of retirement such that his income is no longer the result of that bargain." Id. ¶ 29. We stated that on remand the court could modify the compensatory component of the award "only upon an affirmative finding that husband's inability to pay was a product of an unexpected change that rendered him unable to reap the benefits of wife's contributions to the marriage." Id. We further stated that if husband retains "increased earning potential in part related to wife's contributions for which she is receiving a compensatory component of permanent maintenance, then wife is entitled to her portion of the bargain." Id. Further, to the extent husband is unable to pay that compensatory component, "it means a debt to wife accrues for the unpaid portion of maintenance which is compensatory in nature." Id.

The superior court's narrow application on remand of our holding in Weaver II does not withstand scrutiny. In Weaver II, we did not mean to imply, as suggested by the superior court's findings and conclusions, that an obligor spouse could reduce the compensatory component of a maintenance award based on the vicissitudes of the market—in which case, virtually any compensatory component of a maintenance award would be subject to modification. To be sure,

in Weaver II, we provided two extreme examples where the compensatory component might be reduced—a doctor who suddenly loses her eyesight and is no longer able to practice medicine or a machinist who can no longer do specialized work due to a new technology. Id. ¶ 27. The superior court relied upon this latter example in determining that husband was no longer benefitting from wife's nonmonetary contributions. This case, however, is a far different situation. This is not a situation where a sudden serious medical condition or a particular advent in technology deprived the obligor spouse of specialized work. Rather, this is a common situation where technological changes in the market required that husband make adjustments in applying his skills and experience to new work in a new field. Husband obtained the skills and experience as a result of wife's homemaking contributions during the marriage.

At the hearing on remand, husband acknowledged that his current job involved marketing and branding green technologies in the home industry. As his resume and current job description make clear, husband continues to apply the experience and skills he developed during the marriage in various positions. Indeed, he claims expertise in, among other things, account management, product launch and marketing, business development, competitive marketing positioning, and leadership and team building. To the extent that the superior court found no carryover of skills or experience to his current job, that finding is clearly erroneous. More importantly, the fact that husband's lack of technical knowledge in a changing telecommunications field required him to take a new direction and search for work in a new field is not the type of extreme situation, beyond being unable to work or reaching retirement, that would permit the court to reduce the compensatory component of the maintenance award. Accordingly, to the extent that husband did not pay the $1458 compensatory component arrived at above, that portion of the maintenance award accumulated as a debt husband owes to wife.

As for the final issue—whether the superior court erred in setting husband's maintenance obligation at $600 per month beginning in October 2016—the matter must be remanded in light of our determination of a $1458 compensatory component of the maintenance award that husband was and is required to pay. On remand, the court must calculate any arrearage and make a new determination of whether wife is entitled to any additional maintenance beyond the compensatory component of the original award.[4]

The superior court's October 31, 2017 decision is reversed and the matter is remanded for further proceedings consistent with this opinion.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

[4] In light of the remand on this issue, we need not consider wife's argument that the superior court understated husband's then-current annual income at $70,000 when the evidence indicated that it was over $76,000.