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. 2018-122

SEPTEMBER TERM, 2018

Joie Morris v. Zachary Morris*	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Family Division
	}	
	}	DOCKET NO. 112-4-17 Wrdm
		Trial Judge: Elizabeth D. Mann

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

Husband appeals the family court's award of spousal maintenance to wife in its final divorce order. We affirm.

Based on evidence presented at the final hearing, the family court found the following facts. The parties were married in June 2002 and separated in March 2017. They have no children. Husband is forty-seven years old and in good health. Wife is fifty-one years old and has significant health concerns including a diagnosis of bipolar disorder. Husband was aware of her condition when they married; however, it worsened during the marriage. Due to treatment of the mental disorder, wife has a speech impediment and impaired memory function. She also suffers from post-traumatic stress disorder due to childhood trauma. She attends weekly therapy sessions as well as regular appointments with a psychiatrist. She is currently prescribed seven medications for her psychiatric conditions, high blood pressure, and arthritis.

Husband works as a software developer and earns $133,000 annually. Wife worked in human services for twenty-five years and obtained her bachelor's degree in that field approximately ten years ago. Her last job was at a New Hampshire social services organization where she worked for fifteen years, including the first ten years of the parties' marriage. Wife was responsible for managing the organization's various programs, including overseeing homeless shelters in three counties and obtaining grant funds. However, due to personal issues, her work environment deteriorated. At the same time, she realized that the symptoms of her mental illness were interfering with her ability to perform her duties. She resigned and has not worked at a paid position since then. In 2013, she was deemed eligible for Social Security Disability Income, and she receives $1451 each month after deductions for Medicare Part A and Part D premiums.

Wife was able to volunteer significant hours for a state gubernatorial campaign in 2016 and thereafter for a museum in White River Junction. The court found that the demands of these positions were far less than those of a paid position. Wife had no set hours and worked the equivalent of a part-time position or less. Her supervisors were aware of her diagnoses and helped

to monitor them, instructing her to leave when they recognized the onset of manic episodes. She had not done any volunteer work for several months prior to the final hearing. The court found, based on wife's diagnoses, the accommodations made for her in her volunteer positions and her memory impairment, that she was not currently able to maintain gainful employment and would not be able to do so in future.

The parties enjoyed a comfortable standard of living during the marriage. Wife traveled to Scotland, Puerto Rico, Spain, and Costa Rica during the marriage. She also accompanied husband on business trips to England and California. Wife found that pottery was helpful in reducing her anxiety. She took lessons from a renowned local instructor, worked with a master potter in Spain for a week, and acquired her own pottery equipment. Husband purchased valuable musical instruments and also maintained a home office with a significant amount of computer equipment, including a separate laptop for loading music and burning CDs.

The parties agreed to sell the marital residence and divide the proceeds, which were expected to be around $170,000. In its final order, the court awarded wife sixty percent of the remaining marital estate, which consisted primarily of the parties' respective retirement accounts and was valued by the court at approximately $160,000. In addition, the court awarded wife maintenance. The court found that wife's disability rendered her unable to maintain gainful employment to meet her reasonable needs or maintain the standard of living enjoyed during the marriage. It found that wife's self-reported monthly expenses of $2645 underestimated her reasonable needs, as that figure included rent of only $550 per month for a "significantly substandard residence," did not factor in likely uninsured medical expenses for occupational therapy of $563 per month, and did not permit wife to take vacations, dine out, attend pottery instruction, or generally resume a standard of living established during the marriage. The court determined that the property distribution would not alter the vast disparity between the parties' incomes. It therefore awarded wife maintenance of $3853 per month for fourteen years.

On appeal, husband raises a number of challenges to the court's maintenance award. The spouse challenging a maintenance award "has the burden of showing that there is no reasonable basis to support" it. Quesnel v. Quesnel, 150 Vt. 149, 151 (1988). Maintenance is appropriate when the spouse seeking maintenance "lacks sufficient income, property, or both . . . to provide for his or her reasonable needs" and "is unable to support himself or herself through appropriate employment at the standard of living established during the civil marriage." 15 V.S.A. § 752(a)(1)-(2). The family court has broad discretion in deciding whether to award spousal maintenance and in determining the amount and form of such maintenance. Weaver v. Weaver, 2017 VT 58, ¶ 11.

We first address husband's argument that the court erred in finding that the parties were married for fifteen years. "On appeal, this Court does not disturb the findings of the trial court unless, viewing the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, a finding is clearly erroneous." Cabot v. Cabot, 166 Vt. 485, 497 (1997) (quotation omitted). At the final hearing, wife testified that the parties were married in June 2002, while husband testified that they married in June 2003. Neither party introduced the marriage certificate into evidence. The court noted that the Department of Health form submitted by wife when she filed for divorce listed the marriage date as June 9, 2002. The form, which is part of the family court file, was never amended. Accordingly, the court concluded that the parties married in 2002. The court's finding is supported by the record and is not clearly erroneous; when

faced with competing evidence on this point, the court simply found wife to be more credible. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (explaining that family court is in "unique position to assess the credibility of the witnesses and the weight of the evidence presented").

The court's finding that wife was unable to work is likewise supported by the record. The evidence presented showed that although wife had previously had a successful career in human services, her bipolar disorder had worsened over time and the electroconvulsive treatments she received had caused her speech and memory to become impaired. She also suffered from post-traumatic stress disorder and other physical ailments. She had been eligible for disability benefits since 2013. While she had performed some volunteer work after leaving her employment, it was part-time and less demanding than paid work, and she had not done any volunteering recently. These facts support the court's finding that wife was unable to support herself through employment.

Husband further argues that the court erred in finding that wife's disability income is $1451 per month because a May 2017 letter from the Social Security Administration stated that beginning in December 2016, wife's total benefit was $1609.50, from which $110 was deducted for medical insurance premiums. However, on wife's most recent financial affidavit, filed in January 2018, she stated that she receives a monthly benefit of $1641 from which the government deducts $189.40 for Medicare premiums, resulting in net income of $1451.60. The court did not err in accepting the figure provided in wife's financial affidavit, as the affidavit was filed more recently than the Social Security Administration letter and the court could conclude it was therefore likely to be a more accurate reflection of wife's current situation. The letter itself indicates that wife's benefits and deductions increased in December each year, suggesting that there may have been an increase in December 2017.

Husband also argues that the court should have used wife's gross benefit amount in calculating the difference between the parties' incomes. The court acted within its discretion in using the net benefit amount. Wife testified that the insurance deductions were mandatory, and neither wife nor the court included the cost of the Medicare premiums in calculating her monthly expenses. Thus, the net amount represented her actual income.

Next, husband claims that it was unfair for the court to award maintenance of $3853 per month where the parties' stipulated temporary maintenance order only required him to pay wife $750 per month. However, the court was not bound by the temporary order, which was designed to provide temporary relief while the divorce was pending and was not final. See Camara v. Camara, 2010 VT 53, ¶ 18, 188 Vt. 566 (mem.) (explaining that "temporary maintenance orders merge into, and are superseded by, the final order"); 15 V.S.A. § 594a. Indeed, the temporary order stated that neither party conceded that $750 per month was the correct amount of spousal support, and "the amount set forth in this order shall not prejudice either party in future proceedings."

Contrary to husband's argument, the evidence clearly demonstrated that wife had extremely limited financial resources and would need significant assistance to approach the standard of living the parties enjoyed during the marriage. Wife's reported monthly expenses of $2645 already far exceeded her disability income. The court credited wife's testimony that she would have to pay more to obtain adequate housing and that she anticipated additional uninsured

medical expenses of $563 per month for occupational therapy. In short, her reasonable needs were significantly greater than her current expenses of $2645 per month. As for discretionary spending, the evidence supports the court's findings that during the marriage, the parties traveled domestically and abroad, kept pets, dined out, and made charitable contributions. The court's maintenance award was designed to accommodate these additional expenses and make their standards of living more comparable, in keeping with the statute and our case law. See 15 V.S.A. § 752; Weaver, 2017 VT 58, ¶ 15.

Husband claims that the court's award must be reversed because it exceeded the guideline amount set forth in 15 V.S.A. § 752(b)(8) for a marriage of fifteen to twenty years. We disagree. Section 752(b)(8), which was enacted in June 2017 and is scheduled to sunset in July 2021, provides guidelines for the court to consider when awarding maintenance. See 2017, No. 60, §§ 2-3; 2017, No. 203 (Adj. Sess.), § 1. For a marriage of fifteen to twenty years, the guidelines recommend an award of 24% to 45% of the difference between the parties' gross income, for a period lasting 40% to 70% of the parties' marriage. The amount awarded by the court fell squarely within the guideline recommendation, as it constitutes approximately 40% of the difference between the parties' incomes. While husband is correct that the duration of the court's award exceeds 70% of the length of the parties' marriage, this does not constitute automatic error. The plain language of the statute makes clear that the guidelines are advisory only, not mandatory. See 15 V.S.A. § 752(b) (providing that "[t]he maintenance order shall be in such amounts and for such periods of time as the court deems just, after considering all relevant factors, including" guidelines in subsection (b)(8)); see also Jaro v. Jaro, 2018 VT 105, ¶ 19 (holding that guidelines are not presumptive and court need not justify departure from guideline range, although it should give guidelines due consideration). The court carefully considered all of the statutory factors and explained its reasoning for awarding maintenance in the amount and duration requested by wife. Namely, it found that due to wife's disability, she would be unable to meet her reasonable needs or maintain the standard of living enjoyed during the marriage, while husband was healthy and could expect to maintain his current income for at least fifteen more years. The court's award had a reasonable basis and was within its discretion.

Husband also contends that the court erred in excluding a printout from the Social Security Administration website showing the amount of monthly income a person may earn without losing disability benefits. However, any error was harmless. As discussed above, the trial court found that wife was unable to work at all. It was therefore irrelevant how much she could hypothetically earn while still receiving disability income. For this reason, we need not address husband's related argument that the court should have rejected wife's post-trial memorandum regarding the admissibility of the Social Security exhibit because it was untimely filed.

Husband's remaining claims of error likewise are without merit. He argues that the court should have provided for an adjustment to maintenance if the order does not go into effect by January 1, 2019, to reflect changes in federal tax law. This argument is mooted by our decision, and in any event, husband failed to preserve it by raising it below. See O'Rourke v. Lunde, 2014 VT 88, ¶ 17, 197 Vt. 360 ("Generally, issues that are not presented to the trial court cannot be raised on appeal."). He also claims that the court should have specified that maintenance terminates upon the death of the recipient spouse and erred in failing to identify whether maintenance was rehabilitative or permanent. Under Vermont common law, "the death of either party terminates a maintenance award." Weaver, 2017 VT 58, ¶ 18. And the critical question is

whether the court acted within its discretion in assessing the statutory factors in light of the evidence, whether it described its award of spousal maintenance as rehabilitative, permanent, or a mix of the two. See Klein v. Klein, 150 Vt. 466, 476 (1988) (recognizing that spousal maintenance award can be rehabilitative, permanent, or some mix of both). We therefore see no basis to disturb the decision below.

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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Beth Robinson, Associate Justice