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. 2018-231

DECEMBER TERM, 2018

Barbara Lalancette* v. Richard Lalancette	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Family Division
	}	
	}	DOCKET NO. 359-10-16 Rddm
		Trial Judge: Cortland Corsones

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

Wife appeals the family division's final divorce order, arguing that the court abused its discretion by awarding her an insufficient amount of maintenance. We affirm.

The parties were married for forty years and have two adult children. Wife is sixty-seven and husband is sixty-five. Wife worked for over two decades as the business manager of the parties' home-inspection company, which she co-owned with husband. Husband is a professional engineer. Over the past five years, wife earned an average of $91,000 per year in wages and business profits. Husband's annual wages and profits averaged $119,000 during the same period. Wife stopped working for the business around the time of the final divorce order. She receives $1635 per month in Social Security benefits. Wife reported monthly expenses of $7200, not including payroll and income taxes, and husband reported monthly expenses including payroll and income taxes of $5970.

The family court awarded each party approximately half of the marital assets. The parties agreed that wife's share of the company would be transferred to husband. To equalize the property division, the court ordered husband to pay wife $302,429, which represented approximately three-quarters of his retirement savings. Wife was awarded her own IRA worth approximately $80,000 as well. The court also ordered husband to pay wife $3200 per month in rehabilitative maintenance until he turned seventy. Once husband began receiving Social Security benefits, he was to pay wife spousal maintenance in an amount that equalized their Social Security incomes.

Wife moved to alter or amend the judgment. She argued that after the divorce, husband would receive her share of profits as the sole owner of the business, and the court should have included this additional amount in husband's income for purposes of calculating the amount of maintenance. She also argued that the court erred in awarding only rehabilitative maintenance and should have awarded a higher amount of maintenance under the guidelines in 15 V.S.A. § 752(b)(8). She further claimed that unlike her, husband would be able to earn additional income through consulting work after he turned seventy. Thus, she claimed, the court should have awarded permanent maintenance subject to modification if husband's income decreased.

The court declined to alter its findings regarding husband's future income. It explained, among other things, that imputing to husband the portion of the business profits previously distributed to wife would be speculative, given the lack of evidence regarding the business's reasonably expected future profits and how wife's departure might affect those profits. The court stated that it had departed from the guidelines in awarding a shorter period of maintenance due to husband's advanced age and expected retirement. It disagreed with wife's assertion that she would have no income beyond her Social Security benefits because she had continued to work for the company at least until the date of the final hearing and had the ability, skills, and experience to find a different job. It therefore refused to disturb the rehabilitative portion of the award. It also declined to designate any portion of the award as compensatory. However, it clarified that husband's payments to equalize the parties' Social Security incomes were to be considered as permanent spousal maintenance.

On appeal, wife first argues that the court erred in declining to impute additional future income to husband in determining the appropriate amount of maintenance. Her argument is based on the court's finding that the company will be able to hire a replacement general manager for $60,000 per year, or $31,000 less than wife earned taking into account both her salary and her share of the profits as reflected on her K-1. According to wife, husband will automatically receive the difference as additional profit income because he will be the sole owner of the business.

The record supports the court's conclusion that the alleged additional income was speculative. Both parties acknowledged the important role that wife played as the company's long-time general manager and the significant contributions she made to the success of their closely held business. It was reasonable for the court to infer that her departure could negatively affect future profits. See Tracey v. Gaboriault, 166 Vt. 269, 276 (1997) (affirming trial court's determination that husband's future income from parties' joint business was likely to decrease, primarily due to loss of wife's management contributions and uncertainty of future success of small, closely held business in which she had played integral role). Both parties also testified that the business had been less productive recently, partly because husband was physically unable to work as much as he used to. Further, husband testified that he intended to sell the business after the divorce, in which case he would no longer receive profit distributions. Under these circumstances, the court did not abuse its discretion in declining to impute the alleged additional income to husband.

Wife argues that the court erred in stating that "[t]here was no evidence that the K-1 earnings were actually based on business profit." The context of the court's statement makes clear that it was referring to the fact that the amount of business income designated by the parties on their income tax returns as K-1 earnings, as opposed to W-2 wages, appeared to be more dependent on Social Security requirements and other tax implications than the profitability of the business. Indeed, wife testified that trying to separate the K-1 distributions from wages was a "numbers game," and the evidence shows that the parties' wages and K-1 distributions varied widely from year to year. The court subsequently clarified that its decision not to impute additional income to husband was based on the uncertain future profitability of the company in general, rather than the way the parties allocated income on their tax returns. We therefore see no basis to disturb the decision below.[1]

[1] We recognize that the court did project future business profits to some extent insofar as its projection of husband's total annual income was based on the recent historical average of his salary plus his share of the business profits. The fact that the court's' analysis projected forward a portion of the business's recent profit experience does not mean that it erred in declining to impute forward the full amount of the profits in light of wife's departure from the business.

Wife also argues that the court erred in stating that the "business accountant" set the amount received by the parties as K-1 income, because she was the person who made that decision. Wife does not explain why this alleged error would justify reversing the maintenance award.

Likewise, it was not reversible error for the court to note that no expert testimony was presented regarding the expected future profits of the business after wife's departure. This was an accurate comment on the state of the record. It is clear from the court's discussion that the lack of expert testimony reinforced its conclusion that it was not clear how wife's absence would affect the business's profitability. We do not understand the court to have held that expert testimony beyond the parties' own testimony would have been required to establish likely future business profits. Moreover, with respect to its assessment of husband's future earning power, the court noted that husband had testified convincingly that he would start trying to sell the business once the divorce was final, and that the court's finding as to his likely earnings was consistent with husband's testimony about what he could earn as an engineer in his field. For these reasons, we conclude that the trial court's assessment of husband's future earning capacity did not rest even in significant part on the court's statement concerning expert testimony.

Next, wife contends that instead of rehabilitative maintenance, the court should have awarded a higher amount of permanent maintenance, subject to modification if husband's income decreased. She challenges the court's finding that she will be able to find another job that will allow her to eventually equalize the parties' standards of living.

The family court may award maintenance to a spouse who "lacks sufficient income or property . . . 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). "In a case where maintenance is appropriate, the court may award rehabilitative maintenance, permanent maintenance, or a blend of the two, as the circumstances of the case warrant." Weaver v. Weaver, 2017 VT 58, ¶ 15. The family court has "broad discretion in determining the duration and amount" of maintenance, and its award will only be set aside if there is no reasonable basis to support it. Chaker v. Chaker, 155 Vt. 20, 25 (1990).

In this case, the court awarded a blend of rehabilitative and permanent maintenance after considering the factors in § 752(b). The court found that the parties had a long-term marriage and wife had been the primary caregiver to the parties' children. However, she had worked at least part-time while caring for the children and had been in the work force full time since the early 1990s. The court found that her earning potential was not currently affected by any time she had spent caring for the children. Wife had a college degree and extensive work experience. She was in good health. The court found that she was currently able to work and had the skills and experience to earn $35,000 per year immediately. The court found this to be a reasonable starting salary because the parties' company was paying its current administrative assistant, who had fewer duties than wife did, $40,000 per year. It noted that when wife left the family business on a previous occasion, she was able to quickly obtain comparable work. The court acknowledged that wife was now older and would no longer enjoy the seniority or the profit income she had as a co-owner of the parties' business. However, it concluded that over four years, she should be able to work her way up to become self-sufficient and equalize the parties' standards of living.

The court's findings are supported by the record, and in turn provide a reasonable basis for the court's maintenance award. See Scott v. Scott, 155 Vt. 465, 470 (1990) ("For this Court to set aside the findings of fact, defendant must demonstrate that the findings are clearly erroneous."). In determining whether a maintenance award should be time-limited or permanent, "the most important factors" are "the length of the marriage, the role played by the recipient spouse during the marriage,

and the income that the recipient spouse is likely to achieve in relation to the standard of living established during the marriage." Tracey, 166 Vt. at 277. Here, although the marriage was lengthy, wife was not a traditional homemaker. She had a demonstrated ability to earn significant income and had successfully obtained well-remunerated employment outside the parties' company in the past. At the same time, the property settlement provided wife with substantial funds that she could use to pay off her mortgage and debts and reduce her monthly expenses. "Although there were no hard facts demonstrating unequivocally that in [four-plus] years wife would enjoy the standard of living achieved by the parties toward the end of their marriage, the court's maintenance award was reasonable in light of all the facts and circumstances of this case." Id. at 279.

We disagree with wife's contention that the amount of rehabilitative maintenance awarded by the court was inadequate. The $3200 maintenance payment, together with wife's Social Security income and the modest salary imputed by the court, would provide wife with a monthly income of approximately $7700. This slightly exceeded wife's monthly earnings during the previous five years and would be sufficient to cover her reasonable expenses.

Finally, wife argues that husband's actual retirement date is speculative and therefore the court should have awarded permanent maintenance subject to modification at husband's request when he stopped working. The court did not abuse its discretion in adopting a different approach. Wife testified that husband had always expected to retire by age seventy. Although she believed husband could keep working beyond that age, husband stated that he planned to sell the business as soon as possible and that he hoped to retire sooner. Husband had reduced his workload over the previous year and the court found that he could no longer work as efficiently as he did when he was younger. It was not unreasonable for the court to conclude based on this evidence that husband's capacity to earn significant income would cease when he turned seventy. As the court noted, at that point husband will be well past what is generally considered to be retirement age. Moreover, and significantly, the court did award permanent spousal maintenance here. Its order requiring the equalization of the parties' social security incomes was a permanent spousal maintenance order. Given the trial court's finding that husband would be able to draw his full social security benefit when he turned 66, PC 68, and given that the first phase during which husband has a higher spousal maintenance obligation to wife, lasts until husband turns 70, the court's spousal maintenance award is tantamount to an award of permanent spousal maintenance with an adjustment to account for husband's anticipated retirement. We therefore disagree with wife's contention that husband's retirement date was too speculative to support the court's decision.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice