VERMONT SUPREME COURT
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Case No. 21-AP-256

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

APRIL TERM, 2022

Rebecca Wood* v. Ryan Wood

} APPEALED FROM:
} Superior Court, Rutland Unit,
} Family Division
} CASE NO. 3-1-20 Rddm
Trial Judge: David A. Barra

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

Plaintiff Rebecca Wood appeals from the final divorce order issued by the family division. We remand for the court to address plaintiff's motion to amend its finding concerning the parties' 2020 tax return, but otherwise affirm.

The family division found the following facts in its final order. Plaintiff and defendant are fifty-two and fifty-one years old, respectively. They were married in 1992 and have two adult children. Plaintiff graduated summa cum laude from Castleton State University with a bachelor's degree in education and has a certificate as a medical transcriptionist. She was employed at different times throughout the marriage as a teacher, a medical transcriptionist, and a patient coordinator. She also worked for the family's sugaring business.

In 2010, plaintiff experienced a medical event that she described as a seizure and was diagnosed with a frontal brain lesion. She continued to work as a medical transcriptionist for two years after her diagnosis. She testified that she had numerous disorders and mental-health diagnoses that affected her ability to work, but she did not provide evidence to show that she was disabled from employment.

From June 2019 to October 2020, plaintiff worked for an orthodontist's office for three days a week. She earned $2666 per month in this position. She was terminated for poor job performance, which she attributed to the stress caused by the divorce. At the time of the hearing, plaintiff was unemployed. She testified that she planned to move to Virginia to pursue a career as a realtor and expressed confidence that she could earn income after the divorce.

Plaintiff's gross income from employment was $31,209 in 2020 and $17,167 in 2019. However, the court found that plaintiff's bank statements showed other income from sources that she did not explain. Not including unemployment compensation, plaintiff received $48,296 in deposits from November 2020 to May 2021 that she did not disclose as income on her financial

affidavits. While she argued that about a third of this amount could be attributed to temporary spousal maintenance of $2500 per month paid by defendant, plaintiff had difficulty explaining where the rest originated.

Defendant worked as a diesel mechanic from 1993 to 2000. In 2000, with plaintiff's support, he joined Central Vermont Public Service, which later became part of Green Mountain Power, as a mechanic. In 2002, he became a lineman. He earned approximately $125,000 per year in this position. In the spring of 2019, the parties jointly decided that defendant would take a position with a different power company to increase his earnings so that they could both retire at the age of fifty-five. In 2020, defendant's gross income was $208,428.

The court found that defendant contributed more than plaintiff to the financial welfare of the family during the marriage. Plaintiff was the primary caregiver for the children and did most of the housework. Defendant earned most of the family income and took responsibility for the exterior maintenance of the home and property. He also did most of the work for the family sugaring business.

In November 2019, plaintiff moved out of the marital home without notifying defendant and took $10,000 of marital assets with her. Just before plaintiff moved out, defendant had found romantic text messages from another man on plaintiff's phone. Defendant remained in the marital home and paid for all expenses and upkeep. Plaintiff filed for divorce in January 2020.

One evening in February 2021, when plaintiff knew defendant would be away, she and a friend broke into the marital home, breaking two doors and a window. She ate defendant's food, smoked in the house, and created a mess. When defendant arrived, plaintiff had loaded a gun and placed knives on a bedstand, causing defendant to fear for his safety. Plaintiff claimed that she had to return to the home because she was being evicted from her apartment. She did not produce evidence of an eviction proceeding. The court found that plaintiff was behind on her rent at the time but had a place to live.

The parties' main asset was the marital home, which they sold along with the sugaring equipment for a net gain of $131,797. The parties owned various vehicles and a camper. The marital estate also included $68,475 from defendant's Green Mountain Power (GMP) 401(k) account, which he cashed out in April 2020 during the COVID-19 pandemic. Defendant used the money in part to purchase a new work vehicle, because his old vehicle needed extensive repairs. The marital estate also included defendant's GMP pension, the value of which was not in evidence, and an IBEW pension of unknown value, as well as tools worth $100,000, firearms worth $2500, and plaintiff's life insurance policy.

The court found that the parties' standard of living during the last several years of the marriage was based on defendant's average income of $125,000 per year. The court found that defendant's current income at his new job was not an accurate reflection of the parties' income during the marriage. The court concluded, based on plaintiff's current income and expenses and her stated intent to seek work as a realtor in Virginia, that plaintiff was able to meet her reasonable needs and support herself at or near the standard of living enjoyed during the marriage.

The court awarded plaintiff the proceeds from the sale of the marital home, the tools, her car, a snowmobile, a four-wheeler, and a tractor. It ordered the parties to split defendant's GMP

pension using the coverture fraction. It awarded defendant his truck and camper and the associated debts on those vehicles, as well as the IBEW pension. It ordered the parties to cooperate in filing a joint 2020 tax return. It denied plaintiff's request for spousal maintenance. Plaintiff filed a motion to alter or amend the judgment, which the court denied. This appeal followed.

Plaintiff's primary argument on appeal is that the court erred in denying her request for spousal maintenance. The family division may order a spouse to pay maintenance if it finds that the other spouse "(1) lacks sufficient income or property, or both . . . to provide for his or her reasonable needs; and (2) 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). "The family court has considerable discretion in ruling on maintenance, and the party seeking to overturn a maintenance award must show there is no reasonable basis to support the award to succeed on appeal." Golden v. Cooper-Ellis, 2007 VT 15, ¶ 47, 181 Vt. 359. We will uphold the family division's findings of fact if they are supported by the record. Kasser v. Kasser, 2006 VT 2, ¶ 16, 179 Vt. 259.

Here, the court found that the grounds for a maintenance award were not met because plaintiff had sufficient income to provide for her reasonable needs and could support herself through employment at or near the standard of living established during the marriage. These findings are supported by the record and, in turn, support the court's decision. Plaintiff is well-educated and worked during most of the marriage as a teacher and in clerical jobs. She earned $2666 a month working part-time in 2019 and 2020, before the stress of the divorce caused her termination due to poor performance. In addition to her wages, unemployment compensation, and maintenance, plaintiff's bank statements indicate that she received deposits totaling over $30,000 from November 2020 to May 2021. Plaintiff's bank statements showed that on average, her income met or exceeded her monthly expenses, supporting the court's determination that she was able to meet her reasonable needs at the time of the hearing. Moreover, the court awarded plaintiff most of the marital assets and a portion of husband's pension, which she could use to support herself or create additional income. See Cabot v. Cabot, 166 Vt. 485, 500-01 (1997) (stating family court "has discretion to make an award of property in lieu of maintenance"). Plaintiff testified at the final hearing that she expected to move to Virginia to become a realtor and was taking a course in preparation for that work. She also planned to develop other sources of income to maintain flexibility. Although plaintiff testified about her various medical conditions, she denied that she was disabled from working. She presented no medical evidence suggesting that she could not work.

Plaintiff argues that the court's finding that she received unexplained additional income was erroneous because she testified below that one of the deposits was a transfer from savings, and that others were merely loans from family and friends. Plaintiff also argues that an affidavit from a bank employee shows that some of the deposits were transfers from savings rather than outside income. Given the conflicting evidence about the source of the funds, the court had discretion to find plaintiff's hearing testimony not credible. See Chickanosky v. Chickanosky, 2011 VT 110, ¶ 14, 190 Vt. 435 ("In the highly fact-intensive context of a custody determination, we rely on the family court's determinations of fact and evaluations of credibility."). The court also had discretion to disregard the affidavit, which plaintiff submitted as part of her motion to alter or amend the judgment. The court denied her request to change its findings regarding her income because it found that plaintiff could and should have submitted the evidence prior to the issuance of the final order. To the extent that plaintiff is challenging the court's ruling on the

motion under Vermont Rule of Civil Procedure 59, we see no error. See Rubin v. Sterling Enters., Inc., 164 Vt. 582, 588-89 (1996) (recognizing that "[d]isposition of a Rule 59 motion is committed to the court's sound discretion," and finding no abuse of discretion in court's rejection of party's attempt to submit evidence in Rule 59 motion that could have been submitted at trial).

Having concluded that the threshold grounds for a spousal maintenance award did not exist, the court did not abuse its discretion in declining to award plaintiff maintenance. See Sochin v. Sochin, 2004 VT 85, ¶ 11, 177 Vt. 540 (mem.) (holding family court acted within discretion in denying spousal maintenance where record supported findings that wife was able to meet her reasonable needs and support herself at standard of living established during marriage). We therefore do not address plaintiff's arguments regarding the type or amount of maintenance to which she believed she was entitled.

Plaintiff next argues that the court erred in prohibiting her counsel from asking questions about defendant's new partner's employment and income. "Trial courts have broad discretion in making evidentiary rulings, and we will not revisit those rulings absent an abuse of discretion." Clark v. Bellavance, 2016 VT 124, ¶ 22, 204 Vt. 111. At the final hearing, plaintiff's counsel asked defendant whether his new partner, with whom he had lived for six weeks, was employed. Defense counsel objected, and the trial court sustained the objection, stating that the testimony was irrelevant to the issue of spousal maintenance. We see no abuse of discretion in the court's ruling. We have viewed the remarriage or cohabitation of a recipient spouse "as relevant to an ongoing maintenance obligation only to the extent it bears on the financial security of the recipient spouse." Taylor v. Taylor, 175 Vt. 32, 38 (2002). Here, however, defendant would have been the obligor spouse, and there is no indication that defendant was attempting to avoid spousal maintenance on the ground that he had to support his new partner. Under these circumstances, we conclude that the court acted within its discretion in excluding the testimony as irrelevant.

Plaintiff also contends that the court should have granted her request for attorney's fees. The family division has discretion to award attorney's fees as " 'suit money' based on the financial circumstances of the parties." Lalumiere v. Lalumiere, 149 Vt. 469, 473 (1988) superseded in part by statute, 15 V.S.A. § 751, as recognized in Casavant v. Allen, 2016 VT 89, ¶ 19 n.6, 202 Vt. 606; see 15 V.S.A. §§ 606, 607 (providing that parties and attorney may recover "suit money"). As discussed above, the court found that plaintiff had sufficient income to meet her reasonable needs at the time of the hearing and awarded her virtually all of the marital assets, as well as half of defendant's pension. Under these circumstances, the court acted within its discretion in denying her request for attorney's fees.[*]

Finally, plaintiff argues that defendant should pay her half the amount that he saved in income taxes by filing jointly. We interpret plaintiff's argument to be a challenge to the court's decision denying her motion to alter or amend the judgment pursuant to Vermont Rule of Civil Procedure 59(e). The trial court's decision on a Rule 59 motion will stand absent an abuse of discretion, which "will be found only when the trial court has entirely withheld its discretion or

[*] Appellant filed a motion seeking attorney's fees incurred in the course of the trial and this appeal. The motion is denied. Any request for attorney's fees must be raised in the trial court in the first instance. V.R.A.P. 39(f).

where the exercise of its discretion was for clearly untenable reasons or to an extent that is clearly untenable." Lent v. Huntoon, 143 Vt. 539, 552 (1983).

At the final divorce hearing, defense counsel stated that if the court awarded property in lieu of maintenance, "[defendant] is willing to assume that tax liability for a jointly filed tax return. If the ultimate order is that there's a sharing of assets and a spousal maintenance award, then this asset, too, should be split equally." Plaintiff's counsel stated that the parties had agreed that if plaintiff filed an amended joint tax return, "then the parties would split what is being saved equally." In its final order, the court found that "the parties testified and agreed on the record at trial that plaintiff would file an amended 2020 tax return, and the parties would file a Joint Tax Return for 2020 as soon as possible and share equally in any refund and/or debt of that return." In her Rule 59 motion, plaintiff argued that the court should "correct the finding regarding the filing of a joint 2020 tax return," because the parties had agreed to share one-half the parties' savings. Defendant objected that no such agreement existed. The court denied plaintiff's Rule 59 motion without addressing plaintiff's argument about the 2020 tax return. We are therefore unable to discern whether it disagreed with plaintiff's characterization of what was agreed at the hearing, or simply overlooked the issue. Accordingly, we remand for the court to address this issue only. See Parker v. Parker, 2012 VT 20, ¶ 15, 191 Vt. 222 (remanding custody order where this Court was "unable to fully discern the basis for the [family division's] decision from its limited findings and conclusions").

The matter is remanded for the family division to address plaintiff's argument that defendant must pay her half of the savings resulting from joint filing of the parties' 2020 tax return; the decisions below are otherwise affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice