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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-040

AUGUST TERM, 2017

Cheryl Pelton	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
v.	}	Family Division
	}	
	}	
Gary Pelton	}	DOCKET NO. 225-6-08 Wrdm
		Trial Judge: M. Kathleen Manley

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

Wife appeals from the trial court's modification of husband's spousal maintenance obligation. She argues that there was no change in circumstances because husband voluntarily retired. We affirm.

To place the current dispute in context, we must recount the history of these proceedings. The parties divorced in April 2010 after a thirty-three-year marriage. At the time, wife was 54 and husband was 58. Wife was awarded the marital home and husband was awarded the bulk of the parties' liquid assets. Before and during the marriage, husband worked for the federal government; he earned a significantly higher salary than wife. Husband elected a retirement plan known as the Federal Civil Service Retirement System. Under this plan, husband is not entitled to Social Security benefits based on his federal employment and his right to Social Security from other employment is curtailed. He does, however, receive a higher monthly pension payment. To equitably distribute husband's retirement, the court considered that it contained sums that were not ordinarily available for distribution, i.e., Social Security. It awarded wife a 50% interest in the marital portion of husband's retirement plan, calculated using the coverture fraction. The court found it unnecessary to evenly equalize the parties' Social Security income through some further maintenance obligation, finding that wife would indirectly receive some of the benefit of any salary increases that husband would receive between the date of the final divorce order and his retirement. The court noted that husband enjoyed his job and he did not expect to retire in the foreseeable future. The court found it likely that the parties would retire around the same time, despite their age difference.

The court determined that wife needed maintenance to live at the marital standard of living and that the maintenance award should also dovetail with the parties' retirement options. The court concluded that a substantial spousal maintenance payment was appropriate to offset some of the differential between the parties' current incomes, and to allow both parties to continue to save for retirement. It ordered husband to pay wife $1000 in monthly spousal maintenance until husband turned 67 or retired, whichever occurred later.

Husband voluntarily retired in January 2013. He paid no maintenance to wife from that date through March 2015. Wife moved to enforce the final divorce order. Husband opposed the motion and moved to terminate his maintenance obligation. In a May 2015 order, the trial court granted wife's motion to enforce. It found that the final divorce order unambiguously required husband to continue paying maintenance to wife until he turned 67, even if he retired before that time, and that husband violated this provision. As of March 2015, husband was $27,000 in arrears, and the court entered judgment for wife for this amount.

The court subsequently held a hearing on husband's motion to modify and it made the following findings on the record. Husband argued that his retirement, which was earlier than expected, constituted a change in circumstances. Wife responded that husband chose to retire, knowing of his spousal maintenance obligation. The court credited husband's testimony that he enjoyed his job and wanted to continue working. Certain aspects of his job changed, however, which led husband to retire. Husband did not move to modify his maintenance obligation until April 2015. In the interim, husband moved to Maine and began spending considerable amounts of money, including purchasing a home on 55 acres, paying off his truck, furnishing the house, and paying expenses for his girlfriend and her children, two of whom were minors. Husband's girlfriend and minor children moved with husband to the Maine house. The girlfriend did not work and she did not contribute anything to monthly expenses aside from a cellphone bill and a small contribution for food. Husband had used almost all the liquid assets awarded to him in the divorce. At the hearing, husband claimed that due to his monthly expenses, he could not afford to pay anything to wife. The court found it difficult to get a handle on husband's monthly expenses because he duplicated certain expenses and included payments for items, such as maintenance and payments for his truck, that he was not actually making.

While the court found it a close decision, it ultimately determined that husband had shown "a real, substantial, and unanticipated change in circumstances" since the final divorce order. 15 V.S.A. § 758. Husband intended to continue working and he had not deliberately retired to reduce his income. Instead, his job changed in a way that made it compelling for him to retire. Husband was fully vested when he chose to retire. The court rejected husband's assertion, however, that he should no longer pay any spousal support, finding that this would be grossly unfair. The final divorce order emphasized that wife should receive additional funds because she had fewer opportunities than husband to develop her earning potential and to contribute to retirement. Wife was entitled to $1000 per month and the final divorce order clearly contemplated that husband would pay her this sum until he turned 67 or retired, whichever was later. In an effort at fairness, the court reduced husband's maintenance obligation to $429 per month, which represented the difference between the $1000 owed and the pension payment that wife was receiving. The court found that this effectuated the intent of the final divorce order. The court made its order retroactive to May 1, 2015, and it calculated husband's arrearages as of that date. It ordered husband to pay wife $500 a month, with a small portion of this payment going toward arrears until husband turned 67, at which point all of the payment would go toward arrears. Husband was ordered to make this payment until his debt to wife was satisfied. Wife appeals.

Wife argues that the court erred in finding "a real, substantial, and unanticipated change of circumstances" here. Citing Shaw v. Shaw, 162 Vt. 338, 340 (1994), and similar cases, she argues that husband's motion to modify should have been denied given his voluntary decision to retire.

To be entitled to modification, husband had the "heavy" burden of showing that "a real, substantial, and unanticipated change of circumstances" occurred since the date of the final divorce order. 15 V.S.A. § 758; see also Mayville v. Mayville, 2010 VT 94, ¶ 8, 189 Vt. 1. There are "no

fixed standards . . . for determining what meets the threshold." Taylor v. Taylor, 175 Vt. 32, 38 (2002).

> We evaluate whether a change is substantial in the context of the surrounding circumstances, and we will not disturb a trial court's decision on whether to modify spousal maintenance unless the discretion was erroneously exercised, or was exercised upon unfounded considerations or to an extent clearly unreasonable in light of the evidence.

Mayville, 2010 VT 94, ¶ 8 (quotations and citations omitted). We conclude that the court acted within its discretion here.

Wife relies on Shaw, where we held that "[v]oluntary termination of employment without good reason by an obligor spouse will disqualify the spouse for modification." 162 Vt. at 340. We concluded in Shaw that a husband, who was fired after the parties' divorce for acts committed well before the divorce, had not voluntarily lost his employment, and that his loss of employment constituted changed circumstances. Wife also cites Gil v. Gil, 151 Vt. 598, 599 (1989), where we agreed with the trial court that no changed circumstances existed where "any decrease in [the husband's] income level due to recent hard times for his business was 'self inflicted and could be overcome by continued devoted efforts to the business.' " We similarly held in Cliche v. Cliche, 140 Vt. 540, 542 (1982), that a husband's voluntary decision to quit one of his jobs "because he wanted more time to himself" did not justify modification of his stipulated-to maintenance payments. Wife cites other cases in a similar vein.

We agree with wife that under most circumstances an obligor's voluntary decision to resign his or her employment would not constitute changed circumstances sufficient to modify an existing support obligation. In this case, however, the court essentially found that husband acted in good faith in deciding to retire and that he had justifiable reasons for doing so. As set forth above, it determined that husband's job changed in a way that made it compelling for him to retire and that he had not deliberately retired to reduce his income. These findings are supported by husband's testimony, which the court found credible. While we agree with the trial court that this is a close case, we defer to the trial court's credibility assessments and its assessment of the weight of the evidence. See Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). The court's decision ensures that wife will receive the $1000 per month called for in the final divorce order until husband turns 67, and it is consistent with the intent of that order.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice