THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0530, In the Matter of Edward J. Gibbons and Deborah A. Gibbons, the court on March 27, 2009, issued the following order:

The petitioner, Edward J. Gibbons, appeals an order of the family division awarding alimony to the respondent, Deborah A. Gibbons. He argues that the trial court erred in: (1) finding a substantial change in circumstances nine months after the final divorce hearing; (2) applying RSA 458:19, I, and II; (3) in imputing income to the respondent; and (4) finding that the respondent was involuntarily unemployed. We affirm.

We review an order on a motion to modify a support obligation for an unsustainable exercise of discretion. In the Matter of Arvenitis & Arvenitis, 152 N.H. 653, 654 (2005).

The parties' final divorce hearing was held in August 2007; the August 24, 2007 divorce decree denied the respondent's request for alimony, finding that she had no need for it as she had income at that time of $4,479 per month. The respondent subsequently sought an award of alimony in February 2008. At a hearing on the alimony request, the trial court received evidence that the respondent had been suspended by her employer and thus was receiving no income from employment. The respondent argued that although the suspension was based upon her wrongful receipt of workers' compensation payments, she did not know that she was not entitled to the payments and subsequent to her suspension had arrived at an acceptable repayment schedule with her employer. The trial court found that the respondent was in need of alimony and found that a six-month award would be sufficient time for her to resolve her legal issues with her employer or to obtain other full-time employment. In calculating the alimony award, the trial court also imputed income to her.

The petitioner first argues that the trial court erred in finding a substantial change in circumstances. See Laflamme v. Laflamme, 144 N.H. 524, 527 (1999) (to obtain order modifying support obligation, party must demonstrate substantial change in circumstances since initial award making current award either improper or unfair). A substantial change in circumstances must be neither anticipated nor foreseeable. In the Matter of Arventitis & Arvenitis, 152 N.H. 653, 656 (2005). The trial court found that there was a substantial change in circumstances due both to the petitioner's increase of approximately $1650 per month in income and the respondent's loss of income. The trial court further found that the respondent did not have sufficient liquid assets to pay for the

living expenses of her two youngest children and herself. These findings are supported by the record.

The petitioner also argues that the trial court erred in applying RSA 458:19, I, and II (Supp. 2008). In support of this argument, he contends both that he did not have the ability to pay alimony and that the respondent had the ability to work. In its order, the trial court cited the significant increase in the petitioner's income to support its finding that the petitioner had the ability to pay the temporary alimony. To the extent that the petitioner argues that this increase was due to special circumstances and therefore temporary, we note that the award of alimony was also limited to six months. The trial court also found that the respondent had a continuing need to provide a home for the parties' two children as their primary caregiver, but that she also had the ability to work and imputed income to her. It was within the court's discretion to find that the respondent's ability to seek new full-time employment was related to the need for her to resolve the issues with her employer. The trial court also found that some representations made by the parties in their affidavits were inaccurate. The record before us supports the trial court's findings.

The petitioner next argues that the trial court erred in imputing income to the respondent when assessing her need for alimony but not for child support purposes and for utilizing different income and rental income amounts when calculating the petitioner's child support and alimony obligations. Whether a party is underemployed is generally a question for the fact finder, whose decision will be affirmed on appeal unless unsupported by the record. See In the Matter of Sarvela & Sarvela, 154 N.H. 426, 435 (2006). Only when the court determines that a parent is voluntarily unemployed or underemployed within the meaning of RSA 458-C:2, IV (a), may it then, in its discretion, impute income to the parent for child support purposes. In the Matter of Rossino & Rossino, 153 N.H. 367, 370 (2006). In this case, the trial court found that the respondent's loss of income was not voluntary. Accordingly, it could not impute income to her for child support purposes.

We turn then to the trial court's imputation of income for purposes of alimony calculation. Strictly construed, the petitioner's argument that the imputation of income must be consistent in the calculation of child support and alimony would compel a conclusion that the trial court erred in imputing income to the respondent. Given the different statutory treatment of imputation of income for the two awards, we disagree. RSA 458-C:2, IV(a) addresses only the issue of child support. RSA 458:19, which addresses the calculation of alimony, contains a much more limited restriction on the imputation of income. See RSA 458:19, IV(e) (Supp. 2008). In the absence of specific language that would require identical imputation of income for purposes of calculating child support and alimony, we decline to so limit the trial court's discretion.

For the same reason, we reject the petitioner's argument that the trial court erred in including in his income for child support purposes the net rental income that he received from his condominiums and apartment, while considering his gross rental income for calculation of his alimony obligation. RSA 458-C:2, IV specifically provides that gross income for the purposes of child support includes "net rental income." RSA 458:19 contains no such restriction but rather allows the court in calculating alimony to consider the amount and sources of each party's income, the property awarded under RSA 458:16-a and the opportunity of each for future acquisition of income. In the absence of a specific limitation imposed by the legislature concerning the treatment of rental income, we conclude that given the facts in this case, the trial court sustainably exercised its discretion in calculating its alimony award.

The petitioner's final argument is that the trial court erred in finding that the respondent was involuntarily unemployed in its determination of alimony because the respondent's unemployment was caused by her own voluntary conduct. In support of his argument, the petitioner cites Noddin v. Noddin, 123 N.H. 73, 76 (1983), wherein we held that a petition for modification of a support obligation would be denied if the change in financial condition was due to fault or voluntary wastage or dissipation of one's talents and assets. In Noddin, the defendant was arrested for stealing trade secrets; after losing his position, he sought modification of his existing support obligations. In this case, the trial court heard evidence that the respondent had been placed on unpaid administrative leave due to her wrongful receipt of workers' compensation benefits. The respondent testified that when she learned that she was not entitled to certain benefits, she reached agreement with her employer to repay those benefits. She further testified that she was seeking reinstatement to her position. Given the testimony presented, the trial court could have found that the respondent's suspension was not due to her knowingly wrongful acts. Because modification of support decrees is an exercise of the court's equity powers and trial courts are awarded broad discretion in exercising those powers, we affirm the decision of the trial court in this case to award short-term alimony to the respondent.

The petitioner's motion to strike and disregard respondent's brief is denied. The only issues considered by this court are those addressing the award and calculation of alimony.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk