THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0684, In the Matter of Allison Barry and Kevin C. Barry, the court on January 11, 2010, issued the following order:

The respondent, Kevin C. Barry, appeals a final decree of divorce from the petitioner, Allison Barry. He argues that the trial court erred by: (1) valuing the marital home based upon a 2004 tax assessment rather than a 2007 appraisal; (2) granting the petitioner three years to pay him the amount awarded under the property settlement; (3) not awarding interest on the property settlement during the three-year period; (4) awarding the petitioner alimony; (5) not awarding the parties equal shared custody of their children; (6) granting the petitioner final decision-making responsibility regarding the children; (7) not deviating from the Child Support Guidelines; and (8) granting the petitioner the right to claim two of the four children as tax dependents unless she cannot benefit from doing so. Finding no error, we affirm.

The trial court has broad discretion in determining matters relative to a divorce, and its discretion necessarily encompasses the resolution of contested issues of custody and visitation, child support, alimony, the distribution of marital property, and the conduct of proceedings before it. See, e.g., In the Matter of Goulart & Goulart, 158 N.H. 328, 330 (2009) (child support); In the Matter of Conner & Conner, 156 N.H. 250, 252 (2007) (management of judicial proceedings); In the Matter of Hampers & Hampers, 154 N.H. 275, 281, 283, 285 (2006) (custody, visitation, alimony and property distribution). The discretion of the trial court likewise extends to the assessment of the credibility and demeanor of witnesses, the assignment of weight to the evidence, and the resolution of conflicts in the testimony. See In the Matter of Peirano & Larsen, 155 N.H. 738, 747 (2007). Our review is generally limited to determining whether the trial court engaged in an unsustainable exercise of discretion, see id., or whether its determinations are unsupported by the evidence or tainted by legal error, see Goulart, 158 N.H. at 330; Hampers, 154 N.H. at 283.

"To show that the trial court's ruling was an unsustainable exercise of discretion, the [respondent] bears the burden of demonstrating that the ruling was clearly untenable or unreasonable to the prejudice of his case." In the Matter of Duquette & Duquette, 159 N.H. 81, 85-86 (2009). "This means that we review the record only to determine whether it contains an objective basis to sustain the trial court's discretionary judgment." Hampers, 154 N.H. at 281. "If the court's findings can reasonably be made on the evidence presented, they will stand." Id. at 285 (quotation omitted). The trial court "may accept or

reject, in whole or in part, the testimony of any witness or party, and is not required to believe even uncontroverted evidence." In the Matter of Aube & Aube, 158 N.H. 459, 466 (2009).

We address first the respondent's argument that the trial court erred by not valuing the marital home based upon the 2007 appraisal. The record reflects that the respondent's counsel executed a pretrial order unequivocally stipulating that the value of the parties' real estate was $191,000. Stipulations of attorneys in the course of litigation are generally binding upon their clients. See, e.g., Milliken v. Dartmouth-Hitchcock Clinic, 154 N.H. 662, 670 (2007); cf. Hogan Family Enters. v. Town of Rye, 157 N.H. 453, 457 (2008) (courts generally look with favor upon agreements by counsel in judicial proceedings). Moreover, pretrial orders are generally controlling upon the scope of issues to be proved at trial, see Welch v. Bergeron, 115 N.H. 179, 182-83 (1975), and modification of such orders is, within the discretion of the trial court, to be allowed only "with caution," Lynch v. Bissell, 99 N.H. 473, 478 (1955).

Here, although the respondent's counsel purported to file a "further pretrial statement" asserting that the real estate was in dispute, and that an appraisal was necessary, his prior counsel had already executed the pretrial order on behalf of the respondent, and the trial court had already approved it. Moreover, the pretrial order shows that the respondent was present at the pretrial conference at which it was approved. Finally, the respondent did not seek leave of the court to utilize the appraisal until almost nine months later, a little more than a month before the final hearing. Under these circumstances, the trial court did not unsustainably exercise its discretion by precluding the use of the appraisal at trial, and valuing the real estate at $191,000.

We next address whether the trial court erred by allowing the petitioner three years to pay the respondent the property settlement, and by not requiring that she pay interest on the award during that period. Although "a trial court should award a property settlement to be effected immediately where practicable," the trial court has discretion to order payment of a property award over time where circumstances such as "the obligor's ability to borrow and the threat of serious financial hardship for the obligor" render immediate payment impractical. In the Matter of Harvey & Harvey, 153 N.H. 425, 436 (2006) (emphasis added), overruled on other grounds by In the Matter of Chamberlin & Chamberlin, 155 N.H 13, 15-17 (2007).

In this case, there was evidence from which the trial court could reasonably have found that the petitioner lacks the ability to satisfy the property award in the short term, and that requiring satisfaction of the award immediately, or within the time sought by the respondent, would impose serious financial hardship upon the petitioner. Nor is a three-year period of

time within which to satisfy the award unreasonable under the circumstances of the case. See id.

The respondent claims that the trial court erred by not requiring the petitioner to pay him interest during the three-year period. He argues that interest is required because the housing market "has increased significantly in the past 12 years since the purchase of the marital home" and will continue to rise over the three-year period in which the petitioner is to pay him the property settlement.

Before a property division becomes final (meaning that the appeal process has been completed), a trial court has the inherent discretion to take the time value of money into account when equitably dividing marital assets. In the Matter of Aube & Aube, 158 N.H. at 462; see In the Matter of Nyhan and Nyhan, 147 N.H. 768, 771 (2002). "[A]ny increase in the value of a marital asset because of its time value [is] itself a marital asset subject to equitable distribution." In the Matter of Aube & Aube, 158 N.H. at 462. In this case, we cannot conclude that the trial court unsustainably exercised its discretion by declining to award interest on the property settlement. The trial court reasonably could have concluded that it was not necessary to award interest in order to achieve an equitable distribution of the marital assets. See In the Matter of Nyhan & Nyhan, 147 N.H. at 772.

We next address the respondent's argument that the trial court erred by awarding the petitioner alimony. The trial court has discretion to award alimony where:

> (1) the party in need lacks sufficient income, property, or both to provide for his or her reasonable needs, considering the style of living to which the parties have become accustomed during the marriage; (2) the payor is able to continue to meet his or her own reasonable needs, considering the style of living to which the parties have become accustomed during the marriage; and (3) the party in need cannot be self-supporting through appropriate employment at a standard of living that meets reasonable needs, or is the custodian of the parties' child[ren], whose condition or circumstances make it appropriate that the custodian not seek employment outside the home.

Hampers, 154 N.H. at 283; see RSA 458:19 (Supp. 2009).

At the hearing on the respondent's motion for reconsideration, his counsel did not dispute that the petitioner lacks the ability to provide for her

reasonable needs, conceding that "[i]t can be a given she has a need." Accordingly, we limit our analysis to whether the respondent is able to meet his own reasonable needs, and whether the petitioner cannot be self-supporting through appropriate employment, or is the custodian of the parties' children under circumstances making outside employment inappropriate. See Milliken, 154 N.H. at 670 (party bound by admissions of counsel during litigation).

Although the trial court acknowledged that the respondent's "finances will be tight," and reduced his alimony obligation from $125 to $100 per week accordingly, there was evidence from which the trial court could reasonably have found that he will be able to meet his reasonable needs. Specifically, the trial court noted that the respondent will have close to $22,000 of income available to support himself after satisfying his tax, insurance, alimony, and support obligations, and that this amount does not include overtime and per diem income which has been available to him throughout the parties' marriage. Likewise, the trial court could reasonably have found that the petitioner, who will maintain primary residential responsibility for the parties' children, one of whom was not yet in school full time at the time of the decree, cannot be self-supporting through suitable employment, and that it is proper that she not be required to seek employment outside the home at this time. Indeed, the record contains evidence from which the trial court could reasonably have found that the petitioner lacks the skills or ability to earn substantially more income than the amount she is currently earning in her equestrian business based out of the home, a business from which the children also benefit. Under these circumstances, we conclude that the trial court did not unsustainably exercise its discretion by ordering the respondent to pay $100 per week in alimony.

To the extent that the respondent argues that the record does not support the trial court's calculations, we observe that, while he has provided this court with the transcripts of the trial court hearings, he has not provided the exhibits from those hearings, including the parties' financial affidavits. "The trial court made its decision, including its findings of fact and rulings of law, based upon the testimony and exhibits presented at the hearing[s]." In the Matter of Johnson & Johnson, 158 N.H. 555, 563 (2009). "Within this context, trial courts are in the best position to determine the parties' respective needs and their respective abilities to meet them." Id. Having failed to provide this court with a complete record of the proceedings on appeal, the respondent has not provided an adequate record to review any allegation he may have that the trial court's alimony decision was unsupported by the record. See Sup. Ct. R. 13(2); Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004).

To the extent the respondent contends that the trial court erred under RSA 458:19, IV(c) by considering his part-time employment in awarding alimony, we disagree. The interpretation of a statute is a question of law, which we review de novo. In the Matter of Salesky & Salesky, 157 N.H. 698,

704 (2008). In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. Id. We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Id.

RSA 458:19, IV(c) provides, in relevant part: "In determining amount and sources of income, the court shall not consider a minor child's social security benefit payments or a second or subsequent spouse's income." The plain meaning of this statute precludes a trial court from including in the amount and sources of a party's income any income from a "second or subsequent spouse[ ]." The respondent's contention is based upon a misreading of the statute. Contrary to the respondent's assertions, the word "second" modifies the word "spouse," not the word "income."

We next address the respondent's arguments that the trial court erred by not awarding equally shared parenting time or joint decision-making responsibility. The trial court's determinations regarding parenting time and decision-making responsibility are supported by the recommendations and testimony of the guardian ad litem. While the respondent may have disagreed with such recommendations, it was within the discretion of the trial court to adopt them. See Aube, 158 N.H. at 466; Peirano, 155 N.H. at 748.

The respondent argues next that the trial court erred by awarding the maximum amount of support under the Child Support Guidelines. The record submitted on appeal does not, however, reflect that he raised this argument in the trial court. To the contrary, he specifically asserted that "[h]e is agreeable to be paying full guidelines for child support even if shared parenting is ordered." Although he claims that his counsel made this assertion in error, the trial court was entitled to rely upon it. See Milliken, 154 N.H. at 670. Because the record does not demonstrate that the respondent sought a deviation from the Child Support Guidelines in the trial court, we decline to address the argument on appeal. See Hampers, 154 N.H. at 287.

Finally, we address the respondent's contention that the trial court erred by allowing the petitioner to claim two of the parties' four children as dependents for federal income tax purposes unless she cannot benefit by doing so, and that, in the event the respondent claims the children allocated to the petitioner, the parties divide the additional tax benefit received by the respondent. The respondent has not, however, disputed the petitioner's assertion that, as a matter of federal income tax law, she would have been entitled to claim all four children as dependents absent the trial court's order allowing the respondent to claim two of them. See generally 26 U.S.C.A. § 152(c)(1)(b), (c)(4), (e)(1) (Supp. 2009) (parent having custody of child for more than half the year is generally entitled to claim child as dependent). Under these circumstances, we cannot conclude that the trial court unsustainably

exercised its discretion by allowing the respondent to claim only two of the children as dependents.

In light of this order, the petitioner's motion to strike the respondent's brief and to dismiss the appeal is moot.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk