

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2013-0765, In the Matter of Christopher Herring and Jennifer Bowen, the court on September 23, 2014, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm in part, vacate in part, and remand.

The petitioner, Christopher Herring, appeals final orders of the Circuit Court in his divorce from the respondent, Jennifer Bowen. He argues that the trial court erred by not allowing him to submit new evidence concerning the parties' changed financial circumstances following the close of the record, but prior to the issuance of the final decree. He also argues that the trial court unsustainably exercised its discretion by awarding the respondent approximately 80% of the marital property.

We first address whether the trial court erred by not allowing the submission of new evidence regarding the parties' changed financial circumstances. The record establishes that the parties submitted the case, following a three-day final hearing, on December 4, 2012. At that time, the petitioner was obligated to pay child support and alimony under a temporary order dated November 2, 2011.

By March 2013, the trial court had not yet issued a final decree. On March 15, the petitioner filed an emergency motion to modify the temporary order and to allow the submission of new evidence. He asserted under oath that he had been laid off in January 2013, that his severance income was to expire on March 25, and that he had not yet secured new employment. He requested that the trial court temporarily suspend his obligations to provide alimony, child support, and medical coverage, and that it consider evidence of his job loss in issuing final orders relative to property division and support.

The respondent objected, claiming that the petitioner had not complied with the temporary order, that he had not responded to her request for additional information regarding his employment termination and severance, and that he had not submitted any proof of his allegations. She requested that the trial court allow further discovery and an evidentiary hearing relative to the petitioner's job loss. The petitioner filed a response, objecting to a further hearing unless the court held it on an emergency basis and promptly issued its

final orders, and advising that the parties' mortgage lender had indicated that it was going to foreclose. He also alleged that the severance agreement contained a confidentiality provision, and requested that the trial court grant relief from that provision by ordering him to provide information to the trial court and the respondent regarding his termination and severance agreement.

The record does not reflect that the trial court ever ruled on the petitioner's emergency motion. On May 2, however, it granted an emergency motion filed by the respondent requiring that the petitioner cooperate with her in seeking a modification of the mortgage with the parties' lender. At that time, the property was scheduled for a foreclosure sale on May 9, 2013. The parties succeeded in modifying the mortgage and avoiding foreclosure.

On May 9, 2013, the petitioner filed a supplemental emergency motion to modify the temporary order and to allow the submission of new evidence. In that motion, he asserted under oath that documents submitted by the respondent during the loan modification process established that she had more than \$28,000 in her bank account and regular income, and that he was more than \$38,000 in debt. He further averred that while he had secured temporary consulting work on a single project that would pay \$12,000, he would only be paid when his work was accepted, and that he did not know when that would occur. He advised that "further discovery [was] pending between the parties on financial matters," that the trial court "may decide [that] further hearing is necessary to collect evidence on the change in financial circumstances," but that the trial court could issue a final parenting plan based on the evidence submitted at the earlier final hearing. He requested that the trial court again consider his loss of employment in issuing a final property division and support order, that it "bring forward the date of valuation on the marital assets to the date the Court last takes evidence on financial matters," and that it again order that he provide a copy of his severance agreement to the petitioner so that his compliance with the petitioner's discovery requests would not violate the agreement's confidentiality provision.

The respondent objected to the supplemental emergency motion. In her objection, the respondent alleged "[o]n information and belief" that the petitioner had signed his consulting agreement on March 5, 2013, that he had had more than two months to provide the work and submit an invoice for payment pursuant to the consulting agreement, and that he had become eligible to receive unemployment compensation of \$427 per week on March 23, 2013. She further asserted that the petitioner had not complied with her discovery requests. She objected to the trial court's acceptance of new evidence "without full compliance by the Petitioner with [her] reasonable discovery requests and . . . an opportunity for cross-examination," and requested that the trial court schedule an evidentiary hearing. As with the petitioner's March

15 motion to modify the temporary order and allow the submission of new evidence, the record does not reflect that the trial court ever ruled on the May 9 supplemental motion to modify and allow new evidence.

On September 15, 2013, more than nine months after the final hearing had concluded, and six months after the petitioner had advised the trial court that his employment had terminated, the trial court issued its final decree. In the decree, the trial court acknowledged that it had received pleadings stating that the petitioner had been laid off in January 2013, that he had been granted a severance package, that he was eligible for unemployment benefits and had obtained temporary consulting work, and that the respondent “objected to the admission of such evidence absent a further evidentiary hearing subsequent to the completion of additional discovery.” In ordering an unequal division of marital property in favor of the respondent, the trial court noted that it gave “the greatest weight” to “the significant disparity in favor of the petitioner relative to amount and sources of income and opportunities for the future acquisition of capital assets and income over time and each party’s reasonable needs and other liabilities.” The trial court further noted that its child support and alimony orders were “based upon the state of the evidence at trial.”

The petitioner moved for reconsideration, arguing that, under the circumstances, the trial court should have considered the new evidence concerning the loss of his job that had occurred shortly after the final hearing had concluded, and that had “completely upset the financial picture presented to the Court at the time of the final hearing.” He alleged that he remained unemployed and was “surviving on the good will and loans of others.” He requested that the trial court order a new hearing to consider the changed financial circumstances, and that it issue new orders on property division, child support, and alimony. The trial court denied the motion, reasoning that in issuing the final decree, it could “only consider information admitted into evidence at trial,” and that although it could consider subsequent events “in an action to bring cause forward, such information cannot be presented or considered by the court at this juncture.” This appeal followed.

The trial court has broad discretion in managing the proceedings before it. In the Matter of Conner & Conner, 156 N.H. 250, 252 (2007). Its discretion includes reopening the record and allowing the submission of new evidence, even when such evidence is submitted for the first time with a post-trial motion. See Smith v. Shepard, 144 N.H. 262, 265 (1999); Farris v. Daigle, 139 N.H. 453, 454-55 (1995); Palazzi Corp. v. Stickney, Comm’r, 136 N.H. 250, 254 (1992). Accordingly, the trial court erred to the extent it concluded that it could not consider evidence of post-trial changes to the parties’ financial circumstances simply because it was not presented at the final hearing.

We conclude that the trial court's decision not to reopen the record, under the unique circumstances of this case, was clearly unreasonable to the prejudice of the petitioner. Conner, 156 N.H. at 252. The trial court relied heavily upon the parties' financial circumstances as of December 4, 2012, more than nine months before the final decree, in dividing the marital property and ordering child support and alimony, despite having been presented with evidence some six months before the final decree that the parties' financial circumstances had changed significantly. Cf. Farris, 139 N.H. at 455 (finding that trial court unsustainably exercised its discretion by not reopening the record when the defendant submitted evidence on reconsideration casting doubt on the very basis for the trial court's ruling). Although evidence of post-final hearing changed circumstances may be admissible "in an action to bring cause forward," the trial court ordinarily has no authority to modify final alimony or support orders retroactively beyond the date that the adverse party receives notice of the motion. In the Matter of Birmingham & Birmingham, 154 N.H. 51, 58 (2006). Moreover, as the petitioner correctly observes in his brief, the trial court cannot modify a property division based solely on changed circumstances. McSherry v. McSherry, 135 N.H. 451, 453 (1992).

Because the trial court unsustainably exercised its discretion in declining to allow new evidence of the parties' changed financial circumstances, we vacate the property division, alimony, and support orders in this case. We affirm, however, the final parenting plan, which the petitioner has not appealed. We remand for an evidentiary hearing relative to the parties' financial circumstances since December 4, 2012, and for the issuance of new orders regarding property division, alimony, and child support. In light of this order, we need not address the petitioner's argument that the trial court erred by awarding an unequal division of property.

Affirmed in part; vacated in part; and remanded.

Dalianis, C.J., and Hicks, Conboy, Lynn and Bassett, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

2nd N.H. Circuit Court - Lebanon Family Division, 652-2011-DM-00125

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