THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0313, In the Matter of Donald L. Bayly and Judith A. Bayly, the court on April 24, 2006, issued the following order:

Having considered the briefs and the record submitted on appeal, we conclude that oral argument is unnecessary for the disposition of this appeal. The appellant, Judith A. Bayly, appeals and the appellee, Donald L. Bayly, cross-appeals the final decree entered in the parties' divorce. In addition, the appellant appeals the trial court's order deferring to the Internal Revenue Service the decision as to which party is liable for the joint debt to that agency. We affirm.

"We afford trial courts broad discretion in determining matters of property distribution, alimony and child support in fashioning a final divorce decree. We will not overturn the trial court's decision absent an unsustainable exercise of discretion." In the Matter of Crowe & Crowe, 148 N.H. 218, 221 (2002) (citation omitted).

The appellant first argues that the trial court erred by awarding her only $3,000 per month in alimony. She argues that this amount is insufficient to cover her reasonable needs. The appellee, in his cross-appeal, counters that, to the extent that the court based its alimony award upon the appellant's alleged disability, the award was erroneous because the appellant failed to present expert witness testimony to prove her medical ailments.

RSA 458:19, I (Supp. 2005) authorizes the trial court to award alimony when: (1) the party in need lacks sufficient income, property or both to provide for such party's reasonable needs; (2) the party from whom alimony is sought has the ability to meet reasonable needs while meeting the needs of the party seeking alimony; and (3) the party in need is unable to be self-supporting through appropriate employment at a standard of living that meets reasonable needs.

The record supports the trial court's alimony award. There was evidence in the record to support a finding that the appellant lacked the income and/or property to meet her own needs and lacked the ability to be self-supporting through appropriate employment to meet her reasonable needs. The record shows that the parties were married and lived together for approximately twenty-seven years. The record further showed that the appellant had not had full-time employment since 1994 and that she earned less than $1,000

annually as an emergency medical technician or an emergency medical technician instructor. Moreover, she testified that she had attempted to find other work, but had been unable to do so.

Further, there was considerable testimony from both parties to support a finding that the appellant was in poor health. The appellee testified that he could not "even count the number of times or remember the number of times that [he is] up three o'clock in the morning taking [the appellant] to the hospital or taking off work early, getting out meetings to come and take her to the hospital." He testified that the appellant most often had to go to the hospital "because she's out on a lonely road somewhere and the police find her unconscious and call an ambulance and take her to the hospital." The appellant testified that she suffered from numerous ailments, including polycystic ovary syndrome, diabetes, asthma, sleep apnea and the aforementioned seizure disorder.

The court itself observed that the appellant "has an extremely difficult time walking, talking and breathing" and that "[s]everal times, the hearing had to be suspended in order for [her] to collect herself physically." "In addition," the court noted, "emergency medical technicians were summoned several times to assist her after her court appearance."

We reject the appellee's contention that the appellant was required to prove that she was in ill health by producing expert witness testimony. distress. "We have long recognized that expert testimony is required only where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." In the Matter of Gronvaldt & Gronvaldt, 150 N.H. 551, 554 (2004) (quotation and brackets omitted). In this case, the trial court could reasonably have found that the appellant was in poor health without the need for expert testimony.

There was also evidence in the record to support a finding that the appellee had the ability to pay alimony. This evidence included the appellee's amended financial affidavit and his W-2 form from tax year 2004.

We disagree with the appellant that the amount of the alimony award was insufficient to meet her reasonable needs. In determining the amount of alimony to be awarded, a trial court must consider the length of the marriage; the age, health, social or economic status, occupation, amount and sources of income, the property awarded under RSA 458:16-a, vocational skills, employability, estate, liabilities, and needs of each of the parties; [and] the opportunity of each for future acquisition of capital assets and income. RSA 458:19, IV(b) (2004). Further, the court may consider the economic contribution of each party to the respective estates, as well as non-economic contributions to the family unit. RSA 458:19, IV(d) (2004).

The trial court here awarded long-term alimony of $3,000 per month until the appellant remarried or died or for twelve years from the date of the court's order, which is when the appellee will reach retirement age and the appellant will be entitled to receive social security retirement benefits as his spouse or former spouse. "Implicit in the court's alimony award was a consideration of the length of the marriage, the [appellee]'s earning capacity, . . . the needs of the parties," as well as their considerable debt. In the Matter of Sutton & Sutton, 148 N.H. 676, 680 (2002). Based upon the evidence in the record, we conclude that the trial court sustainably exercised its discretion in awarding the appellant $3,000 per month in alimony.

The appellant next asserts that the duration of the alimony award was inadequate. She asserts trial court erroneously failed to award her lifetime alimony. The trial court ordered the appellee to pay alimony until the appellant remarried or died or for twelve years from the effective date of the court's order. The court explained that it found the duration of the award to be reasonable "given the fact that the [appellee] shall reach retirement age at that point and the [appellant] shall be entitled to receive social security retirement as the spouse or former spouse of the [appellee]." We hold that this was a sustainable exercise of discretion.

The appellant next contends that the trial court erred by failing to require the appellee to provide her periodically with documentation showing that he continued to maintain life insurance naming her as the beneficiary and to maintain health insurance for her. We hold that the trial court sustainably exercised its discretion in this regard.

The appellant next asserts that the trial court erroneously failed to allocate the parties' joint debt to the IRS. As the appellant has failed to demonstrate that this decision "was clearly untenable or unreasonable to the prejudice of [her] case," State v. Lambert, 147 N.H. 295, 296 (2001), we conclude that it was a sustainable exercise of discretion.

The appellant finally argues that the trial court erroneously failed to order the appellee to pay her legal fees. "An award of attorney's fees must be grounded upon statutory authorization, an agreement between the parties, or an established exception to the rule that each party is responsible for paying his or her own counsel fees." DePalantino v. DePalantino, 139 N.H. 522, 525 (1995) (quotation and ellipsis omitted). We have previously recognized that an exception may exist in divorce cases. Id. at 526. In such cases, the trial court has the discretion to award a party attorney's fees when "the trial court has found need on the part of one party and ability to pay on the part of the other." Id. (quotation omitted).

"We review a denial of attorney's fees with deference to the trial court's decision and we will not overturn that decision absent an unsustainable exercise of discretion." Jackson v. Morse, 152 N.H. 48, 54-55 (2005).

We cannot conclude that the trial court unsustainably exercised its discretion when it denied the appellant's request for $12,000 in attorney's fees. Given that her attorney represented the appellant on a pro bono basis, the trial court reasonably could have found that the appellant did not need to have her attorney's fees paid by the appellee.

Contrary to the appellant's assertions, an award of attorney's fees under this exception is not an award of fees to a prevailing party. Rather, it is an award based upon the financial need of one party to a divorce and the ability to pay of the other. See DePalantino, 139 N.H. at 526. For this reason, the appellant's reliance upon cases developed in the prevailing party context is misplaced.

Affirmed.

Broderick, C.J., and Dalianis, Duggan, Galway and Hicks, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
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