THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2012-0486, In the Matter of Dale Cloutier and Patrick Cloutier, the court on January 13, 2014, issued the following order:

The respondent, Patrick Cloutier appeals his divorce decree. He argues that the trial court erred in: (1) awarding an unequal distribution of the parties' assets to the petitioner, Dale Cloutier; and (2) ordering the payment of alimony in an amount and for a duration that exceeds both his ability to pay and the petitioner's needs. The petitioner has filed a cross-appeal arguing that the trial court failed to rule on motions that she filed prior to trial and that the court erred in its distribution of the parties' marital assets. We affirm in part and vacate in part.

The parties married in 1994 and separated in 2010. The petitioner was born in April 1955; the respondent was born in January 1964. They have two children; one child was born in September 1994 and the other was born in March 1999. After a four-day hearing on the merits, the trial court awarded "a greater than equal share of the marital estate" to the petitioner. The court also awarded to the petitioner "permanent alimony in the amount of $3500.00 per month for a period of 36 months; $2500.00 a month thereafter." The court ordered that the payments would cease upon the respondent's 65th birthday, the petitioner's remarriage or cohabitation with another in a relationship that resembled marriage or the death of either party. The decree also provided that there would be no cost of living adjustment to the payments.

We turn first to the parties' respective challenges to the trial court's distribution of marital assets. We afford trial courts broad discretion in determining matters of property distribution and alimony in a divorce decree. In the Matter of Brownell & Brownell, 163 N.H. 593, 596 (2012). Absent an unsustainable exercise of discretion, we will affirm the trial court's decision. Id.

In support of his challenge, the respondent argues that the trial court erred because "implicit in its award" was its attribution of fault to him for the breakdown of the parties' marriage. Because the respondent did not raise this issue in the trial court, it has not been preserved for appellate review and we therefore do not consider it. See, e.g., Starr v. Governor, 151 N.H. 608, 611 (2004) (appellant's claim that trial court erred in final order not preserved because appellant failed to raise issue in motion for reconsideration). To the extent that the respondent argues that the trial court erred in its treatment of the

"college account" in the parties' divorce decree, he also failed to bring this error to the trial court's attention. We therefore do not consider it.

The petitioner also appeals the trial court's distribution of assets. She cites the trial court's findings that the tax liability incurred by the respondent's company was "entirely of his own making," and that he "should be solely responsible for the payment of this liability" and argues that notwithstanding these findings the trial court "apparently included it because otherwise the property distribution it did make awarded Respondent a greater share of the marital estate." We have reviewed the record before us and agree with the trial court that the petitioner received a greater share of the marital assets. We find no support for her argument that the tax liability incurred by the respondent was included in the trial court's valuation of the marital assets. We note that, in its order addressing the parties' respective motions to reconsider, the trial court ruled in relevant part: "Respondent shall be responsible for payment of any tax liability issued by a taxing authority in connection with revenue generated through his business."

In support of its unequal division of the parties' assets, the trial court cited: "[T]he Respondent's earning capacity is greater than that of the Petitioner; the Respondent's greater ability to acquire capital assets in the future; and, the fact that the Petitioner has been and will continue to be the primary caretaker for the children for the foreseeable future." Each of these reasons is supported by the record. Because we conclude that the trial court sustainably exercised its discretion in distributing the parties' assets, we affirm this portion of the final order. See RSA 458:16-a (2004). In doing so, we note that the respondent has provided in his appendix a proposal that he submitted to the trial court which, under his calculation, awarded the petitioner sixty-four per cent of the assets. In support of his claim of error before us, he asserts that the trial court's order "made a property division that resulted in a split of approximately 61%/39% favoring the petitioner."

The respondent also argues that the trial court erred in awarding alimony in an amount and for a duration that exceeds his ability to pay and the petitioner's needs. RSA 458:19 (Supp. 2010) authorizes a trial court to award alimony if: (1) the party in need "lacks sufficient income, property, or both, including property apportioned in accordance with RSA 458:16-a, to provide for such party's reasonable needs, taking into account the style of living to which the parties have become accustomed during the marriage"; (2) the party from whom alimony is sought "is able to meet reasonable needs while meeting those of the party seeking alimony, taking into account the style of living to which the parties have become accustomed during the marriage"; and (3) the party in need "is unable to be self-supporting through appropriate employment at a standard of living that meets reasonable needs."

In determining the amount of an alimony award, a trial court must consider the factors enumerated in RSA 458:19, IV, which include: 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).

In this case, the trial court found: "the Petitioner is in need of alimony, that an award of alimony is appropriate in view of the parties' lifestyle, and, that the Respondent has the ability to pay alimony." The court also found that the respondent did not have the ability to pay the amount of alimony requested by the petitioner.

The record before us indicates that: (1) the parties had been married for eighteen years at the time of the final hearing; (2) the respondent had been the primary wage earner during the marriage; and (3) the final parenting plan provided that the parties' children would reside primarily with the petitioner and that their younger child would initially have no scheduled parenting time with the respondent. The trial court also found that: (1) the parties had agreed that the petitioner would cease employment outside the household after their first child was born; (2) she had worked outside the home on a limited basis in recent times; and (3) the respondent's "testimony regarding financial matters was simply not credible to any degree." Based upon the record before us, we find no error in the amount of alimony awarded by the trial court.

We note, however, that in this case, the petitioner will be eligible for full social security benefits when she attains the age of 66 years and two months. Because this may significantly increase her income, we vacate that portion of the trial court's order that would continue the alimony award beyond that time. Should the petitioner determine that she is in need of an extension of alimony at that time, she may file a petition to extend the alimony award.

In her cross-appeal, the petitioner argues that the trial court failed to rule on several motions that were pending at the time of the final hearing. When she raised this issue in her motion to reconsider, the trial court ruled in relevant part: "The issues raised by the pending motions are subsumed in the final order of the Court which are effective except as modified by the Order relative to the Respondent's motion to reconsider." On appeal, the petitioner identifies the outstanding motions as motions for contempt, to compel and for immediate expedited relief. She argues that the trial court erred by failing to rule on the motions and grant the requested relief, which included the award of attorney's fees. As the trial court explained, it considered the pending motions, including the requests for attorney's fees, in fashioning its final distribution of the parties' assets. Having reviewed the record before us, we sustain its ruling. See Shelton v. Tamposi, 164 N.H. 490, 501 (2013) (trial court's award of attorney's fees

reviewed under unsustainable exercise of discretion standard, giving deference to trial court's decision).

Having reviewed the record before us, we conclude that neither party shall recover any costs associated with this appeal.

Affirmed in part;
and vacated in part.

HICKS, CONBOY, and LYNN, JJ., concurred.

Eileen Fox,
Clerk