THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2013-0763, In the Matter of Todd Treadwell and Theresa Treadwell, the court on September 30, 2014, issued the following order:

The petitioner, Todd Treadwell, appeals post-divorce orders of the circuit court awarding the respondent, Theresa Upstill (formerly Theresa Treadwell), an arrearage of $12,255.60 in military pension payments, and $2,000 in attorney's fees. He argues that, in correcting an error in an earlier order that had established Upstill's share of his monthly pension payments (military pension division order), the trial court erred by failing to apply the correction retroactively to the arrearage. He further argues that the trial court erred by awarding attorney's fees. We affirm.

The record in this case establishes the following facts. The parties were married from April 25, 1992, until December 12, 2006. For the entirety of the marriage, Treadwell served in the United States military. For approximately seventeen months of that period, however, he was not on active duty, but served in either the Army National Guard or Army Reserve.

The parties' stipulated divorce decree awarded Upstill "50% of any of [Treadwell's military] pension which has become of any value during the marriage pursuant to a QDRO to be prepared by [Treadwell's] attorney and submitted by [Upstill]." At the time of the divorce, Treadwell's military pension rights had not yet vested. The decree also provided that "[a]ny party that unreasonably fails to comply with this decree or other court orders . . . shall be responsible to reimburse the other party for whatever costs, including reasonable attorney's fees, that may be incurred in order to enforce compliance."

Treadwell retired from the military effective January 1, 2011, and began receiving his pension. Upstill learned of the retirement when she was notified that the health insurance for the parties' children had been cancelled. According to Upstill, Treadwell refused to provide a QDRO or other appropriate order that would authorize the United States Defense Finance and Accounting Service (DFAS) to pay a portion of the pension to her. In October 2011, after the DFAS rejected Upstill's application to receive a portion of Treadwell's pension for failure to provide a QDRO or other clarifying order, Upstill filed a motion with the circuit court requesting that it issue an appropriate order.

In December 2011, Upstill submitted the military pension division order as a proposed order. The language of the proposed order specifically awarded

Upstill "a percentage of [Treadwell's] disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is 176 months of marriage during [Treadwell's] creditable military service, divided by [Treadwell's] total number of months of creditable military service." Treadwell filed a response in which he asserted that Upstill was not entitled to any share of the pension under the language of the decree because, at the time of the divorce, the pension had no value; he did not argue in the response that the proposed order was incorrect because the parties were married for less than 176 months of his creditable military service. By notice of decision dated February 16, 2012, the trial court issued the military pension division order.

On February 20, 2012, Treadwell filed a motion to correct the military pension division order, arguing that the parties were married for only 161 months of his creditable military service. According to Treadwell, in claiming that the parties had been married for 176 months of creditable military service, Upstill incorrectly included months during which he was not on active duty.

By notice of decision dated June 8, 2012, the trial court denied the motion to correct the military pension division order, stating that it was "convinced, based upon the evidence presented, that the military pension division order is correct as drafted. If the court is mistaken, it is confident that the [DFAS] will inform the parties of any necessary revisions and/or modifications in due course." Treadwell did not appeal this order. However, on June 18, 2012, Upstill filed a motion requesting that the court keep the case open so that it might determine any arrearage Treadwell owed her for pension payments he received between January 1, 2011, and the date DFAS would begin paying her under the military pension division order. The trial court granted the motion.

Upstill began receiving pension payments in September 2012. On September 26, 2012, Treadwell requested that the trial court hold a "status hearing." He asserted that he had contacted DFAS to provide "an interpretation of why the court calculation incorporating military reserve and national guard time as part of the retirement calculation is in error," and requested a status hearing to provide DFAS's "feedback" so that the court might correct the military pension division order and calculate any arrearage due Upstill. Although Upstill did not object to a status conference, she objected to the request to correct the military pension division order, and asserted that she was owed an arrearage of $12,255.60 for pension payments between January 2011 and August 2012. She further requested an award of attorney's fees pursuant to the divorce decree for the fees she had incurred to enforce her right to pension payments.

The trial court granted the request for a status hearing, and held a status hearing on September 6, 2013. At the hearing, Treadwell again asserted that the trial court had improperly included time during which he was not on active military duty in the military pension division order, resulting in an overpayment to Upstill of approximately $60 per month. He requested that the trial court, in

calculating the arrearage, both deduct the "overpayments" that Upstill had received since September 2012, and apply the correct formula to determine the amount she should have received between January 2011 and August 2012. In support of the argument, he submitted his own April 12, 2010 application for retirement, which he claimed was not available when the trial court considered his earlier motion to correct the military pension division order, and in which he listed his dates of military service and calculated his total active creditable service. He did not, however, submit evidence of any "feedback" from DFAS that he had suggested he would offer in his motion for a status hearing. Upstill countered that the June 8, 2012 order denying the motion to correct the military pension division order was res judicata. She further argued that Treadwell had obstructed her right to pension payments under the decree, and requested an award of $7,365 in attorney's fees.

Following the hearing, the trial court issued an order finding that Treadwell owed Upstill $12,255.60 in pension payments. It further found that Treadwell had "delayed payment of the amount at issue unreasonably," and awarded Upstill $2,000 in attorney's fees. After crediting Treadwell for $1,062 in child support that the parties agreed he had overpaid, the trial court ordered that he pay Upstill a total of $13,193.60 within ten days.

Treadwell moved for reconsideration. In support of the motion, he submitted for the first time a letter from DFAS, dated October 4, 2013, stating that the military pension division order was incorrect, and that Treadwell had performed creditable military service for only 158 months, not 176 months, of the parties' marriage. The trial court granted the motion in part, ordering that going forward, Upstill would be paid in accordance with the October 4, 2013 DFAS letter, but that the arrearage order and attorney's fee award would remain in place. This appeal followed.

We first address whether the trial court erred by failing to apply the correction to the military pension division order retroactively to the arrearage. The trial court has broad discretion to correct errors in its orders prior to the entry of final judgment. See State v. Haycock, 139 N.H. 610, 611 (1995). Likewise, the trial court generally has discretion in marital cases to apply modifications to its orders retroactively. Cf. In the Matter of Birmingham & Birmingham, 154 N.H. 51, 58 (2006) (trial court has discretion to apply modifications to child support and alimony orders retroactively to the date that the adverse party receives notice of the requested modification). To establish that the trial court unsustainably exercised its discretion, Treadwell must show that its decision was clearly untenable or unreasonable to the prejudice of his case. See, e.g., In the Matter of Duquette & Duquette, 159 N.H. 81, 86 (2009).

We assume, without deciding, that the trial court's 2012 order denying the motion to correct the military pension division order was not a final judgment on the merits. The military pension division order simply effectuated Upstill's right,

pursuant to the divorce decree, to "50% of any of [Treadwell's military] pension which has become of any value during the marriage." Despite Treadwell's knowledge by April 2010 that he would retire, and his obligation under the decree to prepare a QDRO, he failed to disclose to Upstill that he was retiring or to prepare a QDRO, thus requiring her to seek the military pension division order in the first instance, and depriving her of any pension from January 2011 until August 2012. Moreover, Treadwell failed to submit the April 2010 retirement application, upon which he relied to show that the parties had not been married for 176 months of creditable military service, until the September 6, 2013 hearing, and failed to submit the DFAS letter, which in fact established that the military pension division order was incorrect, until he moved for reconsideration.

We note that the trial court would have been within its discretion, on these facts, not to reopen the record and accept the DFAS letter. See Smith v. Shepard, 144 N.H. 262, 265 (1999). Upon this record, we cannot say that its decision to allow the DFAS letter into evidence, but to provide prospective relief only, was clearly untenable or unreasonable to Treadwell's prejudice. Duquette, 159 N.H. at 86.

We next address whether the trial court erred by awarding attorney's fees. We defer to the trial court's decision to award attorney's fees, and will not overturn its decision absent an unsustainable exercise of discretion. In the Matter of Mason, 164 N.H. 391, 399 (2012). Treadwell argues that the trial court's decision was an unsustainable exercise of discretion because he was successful in obtaining prospective relief. He further asserts that the trial court's order failed "to provide the proper legal standard upon which fees may be awarded," and suggests that the basis for the award – that he "delayed payment of the amount at issue unreasonably" – does not fall within a recognized exception to the American rule. See id. (articulating exceptions to the American rule authorizing an award of attorney's fees). Finally, he argues that Upstill's request for fees included items that were not recoverable, that it was he who had requested the status hearing to determine the arrearage, and that he was entitled to await the trial court's decision before making any payments to Upstill.

The divorce decree in this case expressly provides that "[a]ny party that unreasonably fails to comply with this decree . . . shall be responsible to reimburse the other party" for reasonable attorney's fees incurred in enforcing it. We construe the trial court's decision to award attorney's fees because Treadwell "delayed payment of the amount at issue unreasonably" as awarding attorney's fees pursuant to this provision, and not pursuant to any of the recognized judicial exceptions to the American Rule. As noted above, Treadwell's actions in this case deprived Upstill of any pension payments from January 2011 until August 2012, thereby causing a substantial arrearage to accrue. To the extent Treadwell argues that the fee request included items that were not recoverable, we note that the trial court awarded only $2,000 of Upstill's $7,365 attorney's fee request, and that Treadwell has failed to demonstrate that the items of which he

complains were necessarily included within the $2,000 that the trial court awarded. Upon this record, we cannot say that the trial court's decision to award Upstill $2,000 in attorney's fees was clearly untenable or unreasonable to Treadwell's prejudice. Duquette, 159 N.H. at 86.

Affirmed.

HICKS, LYNN, and BASSETT, JJ., concurred.

Eileen Fox,
Clerk