

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0787, In the Matter of Kathleen A. Bird and Doyle K. Bird, the court on September 13, 2004, issued the following order:

The respondent, Doyle K. Bird, appeals an order of the trial court modifying the parties' divorce decree. He contends that the trial court erred in modifying both his contribution to the college expenses of the parties' two children and the tax exemptions to be claimed for the children. We affirm in part and reverse in part.

Trial courts have broad discretion to review and modify child support awards. See In the Matter of Breault & Breault, 149 N.H. 359, 361 (2003). Because they are in the best position to determine the parties' respective needs and their respective abilities to meet them, we will set aside a modification order only if it clearly appears on the evidence that the court's exercise of discretion was unsustainable. See id.

In its order, the trial court stated that it was "unable to make a finding of substantially changed circumstances sufficient to modify child support prior to the statutory three year period." Because its ruling concerning child support was not appealed, we do not review whether it clearly appears on the evidence that this ruling was sustainable. The court then went on to find that an equitable order required the respondent to contribute 100% of the annual \$10,000 parental contribution to the children's college expenses. See RSA 458:32 (1992) (court may revise and modify order made by it); In the Matter of Gilmore & Gilmore, 148 N.H. 111, 113-14 (2002) (noting distinction between child support and educational expenses).

The evidence presented included that the respondent had received significantly higher overtime wages than he had disclosed on his financial affidavit at the time of his divorce and in the next calendar year; the increases amounted to approximately \$1800 to \$2000 per month. The respondent asserts that his increase in overtime was attributable to increased security demands and military service caused by "the tragedy of September 11, 2001" and in 2002, "the military campaign in Afghanistan." Neither of these events and their resulting demands on police departments was reasonably foreseeable at the time of the parties' divorce. Even if we assume without deciding that a trial court must find a substantial change in circumstances to modify the allocation of education expenses in a divorce decree, the evidence presented compelled a finding of a substantial change in circumstances. See Giles v.

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Giles, 136 N.H. 540, 545 (1992) (substantial change in circumstances may be found where changes were neither negotiated nor reasonably foreseeable). Based on the record before us, we conclude that the trial court's exercise of discretion is sustainable. See Echo Consulting Services v. North Conway Bank, 140 N.H. 566, 569 (1995) (affirming decision of trial court where valid alternative grounds exist to reach result).

The respondent also contends that the trial court erred in modifying the assignment of the tax deduction for the parties' younger child. We agree. The petition for modification did not list this issue in either its statement or its prayer for relief. Because notice was not provided to the respondent that this issue might be raised at the hearing, the trial court erred in modifying this provision of the parties' divorce decree. See RSA 458:32 (upon motion and notice to adverse party court may modify or revise its orders and decrees).

Affirmed in part; reversed in part.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**

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