Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-018

AUGUST TERM, 2010

Kevin Barrup	}	APPEALED FROM:
	}	
	}	
v.	}	Orleans Family Court
	}	
	}	
Tammy Barrup	}	DOCKET NO. 239-12-04 Osdm
		Trial Judge: Walter M. Morris, Jr.

In the above-entitled cause, the Clerk will enter:

Defendant ex-wife appeals the family court's post-judgment divorce order denying, in part, her motions for contempt and to enforce the original divorce order. We affirm.

The parties were divorced in November 2007. Plaintiff ex-husband appealed the final divorce order, which this Court affirmed in August 2008. See Barrup v. Barrup, No. 2008-036 (August 21, 2008) (unreported mem.). In October 2008, plaintiff filed a motion to enforce the final divorce order and find plaintiff in contempt for, among other things, not delivering to her items specified in that order. In January 2009, defendant filed another motion to enforce and for contempt based on plaintiff's failure to make a quarterly spousal maintenance payment. In May 2009, the family court held a hearing on these and other motions. On November 20, the court issued a lengthy order that, among other things, denied defendant's motion for contempt. On appeal, defendant argues that the court abused its discretion by modifying the property division in the final divorce order and by denying her motion for contempt.

Before considering defendant's claims of error, we first address plaintiff's jurisdictional argument that defendant's appeal was untimely filed. As noted, the family court issued its order on November 20. On December 7, intervenor Marilyn Barrup filed a timely motion to alter or amend the judgment under Rule 59(e) of the Vermont Rules of Civil Procedure. The court denied the motion on December 17. On December 23, defendant filed a notice of appeal. The appeal was timely filed insofar as "[t]he running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed . . . by any party" pursuant to specified rules, including V.R.C.P. 59. V.R.A.P. 4(b).

Regarding the merits of the appeal, the first issue concerns a snowmobile. The final divorce order stated that the parties own "a number of snowmobiles," including a "2002 Polaris 800," a "2002 Polaris 600," a "1992 Polaris," and a "1999 Polaris." In the section distributing personal property, the order stated that "[e]xcept as set forth herein, each party is awarded the personal property in his or her possession free and clear of any right, title or interest of the other party." The same section of the order stated that defendant is awarded "additional personal property," including a "2002 Polaris Sport XC snow machine and cover." At the May 2009 motion hearing, defendant acknowledged that she had a 2002 Polaris Classic in her constructive

possession and argued that the court in the final divorce order intended to also award her the 2003 Polaris Supersport in plaintiff's possession. For his part, plaintiff argued that the court did not intend to award her both of the newer snowmobiles. The court concluded that, on the record presented, it could not conclusively determine what the final order was intended to do with respect to distributing the various snowmobiles. Because defendant wanted the 2003 snowmobile, and plaintiff was willing to take either of the two newer snowmobiles, the court ordered the parties to trade snowmobiles.

Defendant argues on appeal that the court abused its discretion by "modifying" the property distribution in the final order and not awarding her both snowmobiles as intended in the final order. In defendant's view, there was simply a clerical error in the description of the snowmobile in the personal property section of the court's order, and the order plainly was intended to award her both of the newer snowmobiles. We agree with the family court that it is impossible to conclusively determine from the final divorce order what was intended in the final divorce order with respect to the various snowmobiles. Defendant argues that the snowmobile itemized in the final order and awarded to her could not have been the one in her possession because the order had already generally awarded her everything in her possession. That is not necessarily true. For example, the order also itemized the parties' cat and yet defendant acknowledges that the cat was always in her possession. The court may not have been aware of who was in possession of what snowmobile. Defendant also complains that requiring her to trade snowmobiles with plaintiff amounts to an improper amendment of the final property distribution. We disagree. The court was merely allowing the parties to have the snowmobile of their choice once it determined that defendant was not entitled to both snowmobiles. We find no abuse of discretion.

Defendant's second argument is that the court erred by denying her motion for contempt based on plaintiff having paid the quarterly maintenance payment that was the subject of the contempt motion. According to defendant, allowing plaintiff to avoid a finding of contempt by repeatedly not making required payments until after defendant is forced to seek court intervention will only invite plaintiff to continue to disobey the final order and force her to expend unnecessary litigation costs.

The court acknowledged that plaintiff's $3000 quarterly maintenance payment was late and not made until defendant filed her motion to enforce. Nevertheless, the court concluded that a finding of contempt was not warranted, given that the payment had been made. The court further indicated, however, that it would require plaintiff to pay defendant's costs and reasonable attorney's fees associated with the motion to enforce. Again, we find no abuse of discretion. As we recently stated in Miller v. Miller, 2008 VT 86, ¶ 31, 184 Vt. 464, "[c]ivil contempt is essentially a coercive measure designed to compel compliance with a court order, and as such the contemnor always retains the power to 'purge' or terminate the sanction through compliance." Here, the contempt sanction was never imposed because plaintiff "purged" himself of any potential contempt by making the payment before the motion hearing. Defendant claims that plaintiff has failed to meet his maintenance obligation since paying the January 1, 2009 payment, but the record is unclear on this point because the court elected to hear subsequent motions to enforce at a later hearing. The imposition of costs and attorney's fees may itself act as a deterrent to any future recalcitrance on plaintiff's part in paying maintenance. In this case, defendant did not seek prejudgment interest, but that too could act as a deterrent. In any event, if, in the future, it becomes apparent that plaintiff is alternately refusing to pay, and then paying, maintenance so that he can force defendant to seek court intervention and, at the same time, avoid a finding of contempt, the court may reconsider the maintenance payment schedule or

method or may use other means to enforce the final divorce order. At this juncture, however, we find no basis to overturn the court's decision not to find plaintiff in contempt.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Denise R. Johnson, Associate Justice

_____
Brian L. Burgess, Associate Justice