

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-313

MARCH TERM, 2003

Peter P. Mitrano	}	APPEALED FROM:
	}	
	}	
v.	}	Windsor Family Court
	}	
Virginia L. Kelly	}	DOCKET NO. F9-1-01 Wr dm
	}	
		Trial Judge: Paul F. Hudson

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

Father appeals the Windsor Family Court's decision to award mother \$5,354 in attorney's fees and its denial of father's motion for relief from judgment under V.R.C.P. 60(b). We remand the order on attorney's fees, stay collection of the award, and affirm the denial of father's Rule 60(b) motion.

The present controversy arises from our August 29, 2001 remand in Mitrano v. Kelly, No. 01-099. In that appeal, we affirmed the family court's dismissal of father's petition to enforce a Virginia custody decree because a New Hampshire court was properly exercising jurisdiction over the parties' custody dispute concerning their three minor children. See Mitrano v. Kelly, No. 01-099, at 2-3 (Aug. 29, 2001) (mem.). We remanded mother's cross appeal on attorney's fees to allow the trial court an opportunity to consider her request for fees under the family court's inherent authority to award attorney's fees in divorce proceedings. Id. at 3-4.

On May 27, 2002, the family court took evidence on mother's post-remand petition for attorney's fees. On the day of the hearing, father moved the court for relief from the judgment dismissing his custody enforcement petition under V.R.C.P. 60(b) – the same judgment father had unsuccessfully appealed to this Court. By order dated June 1, 2002, the court awarded mother \$5,354 in attorney's fees, and that judgment became final on June 14, 2002. In a separate entry order issued that day, the court summarily denied father's motion for relief from judgment. Aggrieved by the court's decisions, father timely appealed to this Court.

Father raises several reasons why we should reverse the family court's award of attorney's fees to mother. Father first argues that the court was without authority to award mother attorney's fees because Vermont follows the American Rule on attorney's fees. He next claims the court did not have sufficient evidence before it to grant mother her fee request. Finally, father claims that the court erroneously awarded mother fees associated with the prior appeal because mother did not comply with V.R.A.P. 39(f). We address each claim in turn.

Father first asserts that the court has no authority to award attorney's fees because Vermont follows the so-called American Rule, which requires each party to bear his or her own legal expenses absent a statute or contractual provision stating otherwise. Father correctly states the general rule, but he ignores our precedent allowing the family court discretion to award attorney's fees in domestic relations cases. See, e.g., Lussier v. Lussier, ___ Vt. ___, ___, 807 A.2d 374, 378 (2002) (awarding attorney's fees in a divorce action is a matter of judicial discretion); Harris v. Harris, 168 Vt. 13, 25 (1998) (family court magistrate has discretion to award attorney's fees in an action for child support even in absence of statutory authorization). Father's first attack on the award to mother must, therefore, fail.

Father next asserts that the record lacks sufficient evidence on which to base an award of attorney's fees. Specifically, father contends that the evidence mother used to establish father's current financial position was outdated. The key factors in determining whether to award attorney's fees in a domestic relations matter are "the ability of the supporting party to pay and the financial needs of the party receiving the award." Smith v. Stewart, 165 Vt. 364, 375 (1996). Notably, father does not claim that his financial position precludes him from being able to satisfy the award, nor does he identify as clearly erroneous any findings relating to his financial circumstances. Because father does not challenge the court's findings, those findings are binding on appeal. Bevins v. King, 147 Vt. 203, 206 (1986).

In any event, the court considered evidence of father's real property in Virginia, which was valued at approximately \$700,000, his home in New Hampshire worth approximately \$317,000, father's two Porsche automobiles, and his 1999 federal income tax return showing income from his law practice of \$154,735 with a net profit of \$24,628, among other evidence. Father did not offer any rebuttal evidence to persuade the court that his current financial circumstances differed from the circumstances suggested by mother's evidence. Because the court's findings have sufficient evidentiary support, and the findings support the conclusions, we reject father's claim that reversal is required because mother used stale information about father's financial circumstances. See LaMoria v. LaMoria, 171 Vt. 559, 561-62 (2000) (where findings are supported by credible evidence, Court will uphold legal conclusions if they have support in the findings).

Father also claims the court erroneously awarded fees related to the prior appeal in this matter because mother failed to follow the procedure set forth in V.R.A.P. 39(f) to recover such fees. We agree. In its conclusions of law, the trial court responded to father's V.R.A.P. 39(f)

argument by noting that the fees at issue under our remand in the prior appeal were fees associated with work done at the trial court only. Nevertheless, in Finding No. 3, the court found that the \$4,223 in fees for work by one of mother's attorneys included fees relating to work the attorney did in preparing and arguing the prior appeal. Under V.R.A.P. 39(f), a party seeking attorney's fees for work done on an appeal to this Court must file a motion in the trial court within fourteen days after we issue the mandate in the appeal. V.R.A.P. 39(f). In this case, mother filed her motion for fees long after the fourteen day period had lapsed. Therefore, mother was not entitled to an award for appeal-related attorney's fees. The record on appeal does not show how much of the \$4,223 award pertains to appellate work, however. We therefore remand the matter back to the trial court for a determination on the amount due mother after deducting work for the prior appeal.

Although we remand the issue of fees back to the trial court, we must address one final issue relating to the fee award. In her brief, mother claims the matter of attorney's fees is moot because the New Hampshire court subsequently awarded mother attorney's fees, including the fees at issue in the litigation here. Mother was granted an attachment against father's real property in New Hampshire to secure payment of the sums due from father under the New Hampshire order. In his reply brief, father does not contest the factual accuracy of mother's representations about the New Hampshire judgment, including the fact that the judgment awards mother the very same fees the parties disputed before the Windsor Family Court. He asserts that mother is not entitled to collect on two judgments in different jurisdictions for the same attorney's fees.* We agree, and in the interests of comity, we stay collection on the Windsor Family Court's judgment on attorney's fees (amended in accordance with this order) pending a determination of whether those fees, or a portion thereof, have been collected pursuant to the New Hampshire order.

We now turn to father's claim that the family court erred by denying his motion for relief from the judgment of dismissal. Presumably, father's argument rests on V.R.C.P. 60(b)(6), which allows the trial court to relieve a party from judgment for "any other reason justifying relief from the operation of the judgment." V.R.C.P. 60(b)(6). Whether to grant relief under Rule 60(b) is a matter committed to the trial court's discretion. Richwagen v. Richwagen, 153 Vt. 1, 3 (1989). Rule 60(b) provides relief in extraordinary circumstances only, and thus does not contemplate reconsideration of matters disputed and resolved at trial. John A. Russell Corp. v. Bohlig, 170 Vt. 12, 24 (1999). We therefore require the party seeking relief to demonstrate clearly and affirmatively that the trial court withheld or abused its discretion in ruling on the motion. Richwagen, 153 Vt. at 3-4. In this case, the trial court did not abuse its discretion by denying father's motion.

* Father moved to strike portions of mother's brief and printed case, claiming that they were "unsupported by the record below in the trial court and/or inappropriate." We deny father's motion insofar as he seeks to strike text relating specifically to the New Hampshire judgment on attorney's fees and mother's attachment of father's real estate to secure the judgment. We have not considered the remaining text father seeks to strike in reaching our decision, and therefore the motion is otherwise denied as moot.

Father argues that he is entitled to relief from judgment because this Court's entry order in father's previous appeal allegedly contains numerous factual errors which, according to father, led us to erroneously affirm the trial court's dismissal of his enforcement petition. Father had an adequate opportunity to seek correction of those alleged errors, however, by pursuing relief through a motion for reargument under V.R.A.P. 40 within fourteen days after we issued the entry order on father's appeal. See V.R.A.P. 40 (party may move Court for reargument if Court "has overlooked or misapprehended" points of law or fact "which would probably affect the result"). Father failed to take advantage of that opportunity. Father may not circumvent V.R.A.P. 40 by seeking relief in the trial court under V.R.C.P. 60(b). As we have noted on prior occasions, Rule 60(b) does not protect a party from ill-advised tactical decisions or counsel's "careless ignorance of the law." Rule v. Tobin, 168 Vt. 166, 174 (1998). Moreover, father's motion essentially restated the losing arguments he made to the trial court and this Court. Denying his motion for relief from judgment was not, therefore, an abuse of the court's discretion.

The family court's judgment awarding mother \$5,354 in attorney's fees is remanded for a recalculation of fees due mother as explained herein. Collection on the attorney's fee award in the family court is stayed pending a determination of whether those fees, or a portion thereof, have been collected pursuant to the New Hampshire order. In all other respects, the family court's order is affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)
Specially Assigned