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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-129

DECEMBER TERM, 2001

Kurt Mansfield	}	APPEALED FROM:
v.	}	Rutland Family Court
Jayne Mansfield	}	DOCKET NO. F186-4-93 Rddm
	}	Trial Judge: William D. Cohen

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

Mother appeals the family court's and magistrate's orders granting father's V.R.C.P. 60(b) motion and retroactively applying a reduced child support obligation. We affirm and remand the matter to the magistrate pursuant to the family court's February 7, 2001 decision.

This case has a complex procedural history. Mother was granted sole physical and legal rights and responsibilities with respect to the parties' three minor children following their divorce in 1996. Father's child support obligation was set at approximately $528 per month. In 1997, mother filed a motion to modify child support, resulting in the magistrate's March 1998 order increasing father's support obligation to $883 per month beginning in January 1998. Neither party appealed that decision, but in December 1998, father filed a Rule 60(b) motion, claiming that the magistrate had mistakenly double counted his available income. The magistrate denied the motion, stating that father had failed to appeal the order, and that the claimed mistake was not a mathematical error but rather a request for a different calculation of income. Father appealed to the family court, which reversed the magistrate's order on the grounds that the magistrate had made a mathematical error in calculating father's income. In an October 1999 decision, the court remanded the matter to the magistrate for a recalculation of child support based on a correct calculation of father's income.

On remand, in a May 2000 order, the magistrate recalculated father's child support obligation at $489 per month and concluded that it should apply retroactively from January 1, 1998 to January 1, 2000, at which point it would be increased to $512 under new child support guidelines. Given the retroactive application of the revised award, the magistrate concluded that father had made overpayments under the prior order in the amount of $5,372. The magistrate gave him a $512 monthly credit from April 2000 to January 2001, thereby effectively absolving him of child support payments during that period. Mother appealed this order to the family court, which declined to review horizontally the October 1999 ruling by a different family court judge, but upheld the magistrate's order making father's revised child support obligation retroactive to January 1998. The court also remanded the matter to the magistrate to consider mother's arguments that the magistrate (1) had miscalculated the amount of child support payments actually made by father between January 1998 and April 2000; and (2) had failed to consider that father was no longer entitled to a child support adjustment for supporting a child by a previous marriage who had reached the age of majority. Although the matter was remanded to the magistrate, mother appealed the family court's decision to this Court. She argues on appeal that the family court's October 1999 order should be reversed because the court relied solely on what it perceived to be a mathematical error and failed to consider the grounds that the magistrate relied upon in denying father's Rule 60(b)

motion. Mother also argues that, assuming the revised child support order stands, the magistrate erred by retroactively applying the recalculated amount beginning in January 1998.

We first reject father's contention that mother cannot challenge the family court's October 1999 order because she failed to appeal it. The court's October 1999 order was not an appealable final judgment because it remanded the matter to the magistrate for further proceedings to determine father's revised child support obligation. See In re Burlington Bagel Bakery, 150 Vt. 20, 21 (1988) (to be final and appealable, order must end litigation and conclusively determine parties' rights, leaving nothing for court but to execute judgment); Morissette v. Morissette, 143 Vt. 52, 58 (1983) ("The test of whether a decree or judgment is final is whether it makes a final disposition of the subject matter before the Court.") (citation omitted); Ballard v. Baldridge, 209 F.3d 1160, 1161 (9th Cir. 2000) (order vacating prior judgment in response to Rule 60(b) and leaving case pending for further consideration is not final, appealable order); cf. In re Cliffside Leasing Co., 167 Vt. 569, 570 (1997) (mem.) (environmental court's decision remanding matter to town zoning board of adjustment was plainly not final disposition of subject matter). Accordingly, mother is not precluded from challenging that order following remand and further appeal to the family court.

By the same token, however, the family court's February 2001 order that mother appealed from was also not a final order because it remanded the matter once again to the magistrate to consider additional issues that needed further exploration. Nevertheless, we will suspend the normal rules and consider mother's arguments because they have been fully briefed and will surely come before us again if they are not resolved at this time. See Huddleston v. Univ. of Vermont, 168 Vt. 249, 251 (1998).

Mother first argues that the family court erred by failing to consider the magistrate's reasons for rejecting father's Rule 60(b) motion and by failing to review the magistrate's decision on an abuse-of-discretion standard. We find this argument unavailing. It is implicit in the family court's order that the court believed that the magistrate had abused her discretion by not correcting what the court considered to be a mathematical error grossly affecting the child support award. Further, we find no error in the court's decision to reverse the magistrate's ruling. Approximately nine months after the magistrate's decision to increase father's child support obligation from $528 per month to $883 per month, father filed a 60(b) motion informing the magistrate that she had mistakenly double counted his available income. See V.R.C.P. 60(b) (mistakes in judgments can be corrected, upon terms as are just, within one year after judgment). Mother has failed to show that the family court erred in concluding that father's income was double counted; indeed, her principal contention is that father should have noticed the mistake right away and sought reconsideration or filed a timely appeal. Relief from judgment under Rule 60(b) is, by its very nature, intended to balance fairness and finality, and thus is liberally construed to prevent injustice or hardship. See Tudhope v. Riehle, 167 Vt. 174, 178 (1997); Cliche v. Cliche, 143 Vt. 301, 306 (1983). Under the circumstances presented here, it was appropriate for the family court to correct the magistrate's mistaken calculation rather than to ignore an inflated child support obligation resulting from the error.

Mother argues, however, that even if the family court did not err in reversing the magistrate's denial of father's Rule 60(b) motion, the magistrate erred on remand by retroactively applying the recalculated child support obligation beginning in January 1998. According to mother, until the family court issued its October 1999 order granting father's Rule 60(b) motion, the magistrate's March 1998 order increasing father's child support obligation to $883 was valid and in full force. We find no merit to this argument. We have stated on numerous occasions that the "[m]odification of a child support order may take effect at any time on or after the filing date of the motion to modify at the discretion of the trial court." Harris v. Harris, 168 Vt. 13, 24 (1998); see Towne v. Towne, 150 Vt. 286, 288 (1988) ("sound policy considerations support the date of filing of a motion to modify as the earliest date for making retroactive modifications of [child support] obligations"); 15 V.S.A. 660(e) (child support order may be modified only as to future support installments and installments accruing after filing of motion to modify).

A Rule 60(b) motion is not, however, a motion to modify. The effect of granting a 60(b) motion is to set aside the judgment. See Smith v. Smith, 139 Vt. 234, 235 (1981) (overruled in part on other grounds). By its nature, this is retroactive action. Here, mother filed a motion to modify in June 1997, and the magistrate's March 1998 order increasing father's child support to $883 was made retroactive to January 1, 1998. Thus, the magistrate was not precluded from applying its recalculated award retroactively to January 1998, and mother has not demonstrated that the magistrate abused its discretion by doing so. Because the erroneous order required father to make inflated payments

beginning on January 1, 1998, it was appropriate to apply the corrected order retroactively from that date forward.

Finally, father argues that (1) mother has erroneously stated that he did not make the past child support payments as indicated in the magistrate's May 2000 order; and (2) the family court unevenly applied the law by considering, on the one hand, whether wife was entitled to a child support adjustment because father's son from a previous marriage had reached twenty-one years of age, and yet by failing to consider, on the other hand, whether he is entitled to a child support adjustment because the parties' oldest son has been living with him for some time. We find these arguments unavailing for several reasons. The age of father's son by another marriage and whether past child support payments had in fact been made were matters that the family court remanded for the magistrate's consideration before mother filed her notice of appeal. Apparently, the hearing on remand was scheduled but then canceled because of mother's appeal. These issues can be addressed at that hearing. As for the parties' oldest son living with father, the family court did not address that issue because only mother, and not father, appealed from the magistrate's May 2000 order. Moreover, only mother, and not father, has appealed to this Court from the family court's order. Because father has not cross-appealed, we decline to consider his arguments. See V.R.A.P. 4 (cross-appeal may be filed within thirty days of judgment or within fourteen days of first notice of appeal); see Cantin v. Young, 770 A.2d 449, 450 n.1 (Vt. 2000) (mem.) (declining to disturb "highly questionable" ruling because party failed to file cross-appeal).

Affirmed; the matter is remanded to the magistrate pursuant to the family court's February 7, 2001 decision.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice