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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-492

APRIL TERM, 2003

Maureen Young v. Richard Young	}	APPEALED FROM: Washington Family Court DOCKET NO.226-7-02 WnFa Trial Judge: Mark J. Keller & M. Patricia Zimmerman

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

Wife appeals the family court' s orders vacating a prior final relief-from-abuse order, reopening the abuse proceeding for the taking of further evidence, and ultimately denying her request for relief. We conclude that the family court abused its discretion in setting aside the prior order and reopening the matter for further evidence under V.R.C.P. 60(b); accordingly, we reverse the court' s judgment and reinstate the initial final relief-from-abuse order, as amended and modified.

On July 6, 2002, wife obtained a temporary ex parte relief-from-abuse order based on her complaint alleging that husband had abused her. Both parties appeared pro se before the family court on July 11. After taking testimony from the parties, the court concluded that husband' s conduct of grabbing wife' s hair, demeaning her, and acting in a threatening manner constituted abuse against both wife and the parties' minor children. That same day, the court issued a final relief-from-abuse order. On July 15, the court granted wife' s motion to amend the order by allowing the children to attend the wake of husband' s father, who apparently was near death. On July 23, the court denied wife' s motion to amend the order to require husband to attend to certain financial matters, stating that such issues needed to be resolved in divorce or separation proceedings. On July 30, the court granted husband' s request to amend the final order to provide that if husband obtained counseling the court would review the provision of the order prohibiting contact with his children. On August 6, in response to another motion to amend from wife concerning husband' s financial responsibilities, the court ordered that a child support hearing be set. Later in the month, the parties reached an agreement regarding these matters.

On September 3, wife filed a motion to modify, asking the court to order husband to stop stalking her. On September 12, husband, now represented by counsel, filed motions to vacate the final abuse order and hold a new hearing. A motion hearing was held on September 19 before a new family court judge. At the hearing, the court granted husband' s motion to reopen the matter to take additional evidence. Later that same day, the parties and husband' s attorney reached an agreement concerning a number of matters stemming from wife' s motion to modify. The court incorporated much of the parties' agreement into an amended relief-from-abuse order issued on September 19.

Wife then obtained counsel to represent her at the reopened merits hearing on her request for relief from abuse. At that October 10 hearing, the family court explained that it had granted defendant' s motion to vacate and reopen under V.R.C.P. 60(b) because the prior family court judge had not responded to husband' s request for counsel at the first merits hearing. The second judge noted that it was her practice to grant continuances to parties who make timely requests for counsel. The merits hearing then proceeded, with wife and husband testifying. Following wife' s testimony,

husband provided testimony on direct examination, at which point the court stated that it was prepared to rule on wife' s request for relief. The court determined that wife was not entitled to relief because husband' s conduct had not risen to the level of domestic abuse under the law.

On appeal, wife argues that the first judge' s final relief-from-abuse order was a final judgment, that husband' s motion for a new hearing was untimely filed, and that the second family court abused its discretion in vacating the initial final order and reopening the proceeding for further evidence. Wife also argues that, even if the second judge acted within her discretion in vacating the prior order and reopening the proceeding, she misapplied the law in determining that wife was not entitled to relief. We agree with wife that the court abused its discretion in reopening the initial final relief-from-abuse order.

The only basis stated by the second judge for reopening the prior judgment was that the first judge had not responded to husband' s request for counsel. The record does not support this rationale as a basis for granting husband' s motion to reopen. At the initial final hearing on wife' s request for relief from abuse, both parties appeared pro se. The court explained the procedure and then allowed wife to proceed with her testimony as to what happened and why she was entitled to relief. See Rapp v Dimino, 162 Vt. 1, 4 (1994) (Vermont' s abuse-prevention statute is intended to provide inexpensive and uncomplicated proceedings that allow abused family member to obtain immediate relief without need for counsel, advance pleadings, or a full-blown evidentiary hearing). When the court gave husband an opportunity to respond, he first stated: " I don' t know if this could be postponed to get a lawyer." But rather than follow up this comment by requesting a continuance or asking the court directly if the proceeding could be delayed until he obtained a lawyer, he proceeded with his version of what happened and answered other questions posed by the court. The court eventually granted wife her request for an abuse-prevention order. At no point during the hearing did husband make it clear to the court that he did not want to proceed without first obtaining an attorney. It may be that the second judge would have probed further to determine whether husband really wanted the hearing postponed so that he could obtain counsel, but the first judge' s failure to do so was an insufficient basis for the second judge to take the extraordinary measure of vacating the initial final order and rehearing the case. Cf. Altman v. Altman, 169 Vt. 562, 564 (1999) (mem.) (court did not abuse its discretion in rejecting party' s argument under Rule 60(b) that he should be excused from filing timely notice of appeal because of his pro se status).

Nor has husband demonstrated any other basis for granting his motion to vacate the final order and reopen the matter. For the most part, the reasons husband gives for vacating the final relief-from-abuse order " for example, the court' s finding of abuse with respect to the children " are nothing more than challenges to the first judge' s rulings " matters that could have been raised in a timely appeal. Motions under Rule 60(b) are not intended as a substitute for a timely appeal. See Donley v. Donley, 165 Vt. 619, 619-20 (1996) (mem.) (Rule 60(b) may not be used to remedy failure to appeal abuse-prevention order).

Husband contends, however, that even if no basis existed for granting his motion to vacate, the first judge' s finding of abuse was not a final judgment because the series of motions filed by both parties following the July 11 final relief-from-abuse order stayed the time period for filing a notice of appeal. See V.R.A.P. 4 (listing types of motions that terminate running of appeal period). We disagree. Although the first three motions to amend were timely filed and may have served to delay the time from which the thirty-day appeal period commenced, no motion within any of the categories set forth in Rule 4 was timely filed so as to postpone the onset of the thirty-day appeal period beyond the July 30 amended order. Wife' s September 3 motion to modify did not fall within any of the Rule 4 categories, and, in any case, was not filed within ten days of the most recent amended judgment. In short, at the time husband filed his motion to vacate, there was a final judgment from which he had failed to file a timely notice of appeal.

Further, we find unavailing husband' s argument that the first judge' s final relief-from-abuse order was intended only to calm the parties down and not meant to be a final judgment. The fact that the judge informed husband that if he received counseling he could return to the court in a few weeks to seek modification of the order with respect to the children does not suggest that the order was temporary or interim in nature. The first judge issued a final relief-from-abuse order, and husband neither filed a timely appeal of, nor demonstrated a sufficient basis for reopening, that order.

The family court' s September 19, 2002 and October 10, 2002 orders granting husband' s motion to reopen and denying wife' s request for relief from abuse are vacated. The court' s July 11, 2002 final relief-from-abuse order, as amended

and modified by subsequent orders, including the September 19, 2002 amended final relief-from-abuse order, is reinstated.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned