

State of New Hampshire
Supreme Court

NO. 2016-0107

2016 TERM
SEPTEMBER SESSION

In the Matter of Melissa Allen
and
Lawrence Holdsworth

RULE 7 APPEAL OF FINAL DECISION OF THE
CLAREMONT FAMILY COURT

BRIEF OF PETITIONER/APPELLANT, MELISSA ALLEN

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

QUESTIONS PRESENTED. 1

STATEMENT OF FACTS AND STATEMENT OF THE CASE. 2

 I. Background. 2

 II. Tractor. 3

 III. Utility Bill. 7

 IV. Attorney’s Fees. 9

SUMMARY OF ARGUMENT. 10

ARGUMENT. 11

 I. Temporary Orders are Transitory, But Steep Standard for
 Modification of Final Decrees. 11

 II. Ms. Allen Owns the Tractor. 13

 III. Court Erroneously Abandoned Penalty Provision for Non-
 Payment of Utility Bill. 15

 IV. Ms. Allen Should Be Awarded Attorney’s Fees for Mr.
 Holdsworth’s Non-Compliance. 16

CONCLUSION. 16

REQUEST FOR ORAL ARGUMENT. 17

CERTIFICATIONS. 17

ADDENDUM. 17

TABLE OF AUTHORITIES

New Hampshire Cases

In re Costa,
156 N.H. 323 (2007). 11

Edwards v. Ral Automobile Grp., Inc.,
156 N.H. 700 (2008). 11

Fowler v. Fowler,
97 N.H. 216 (1951).. 11

Gray v. Kelly,
161 N.H. 160 (2010).. 11, 15

Guardianship of Phi,
157 N.H. 429 (2008). 11

Labbe v. Labbe,
137 N.H. 53 (1993). 12

Lally v. Flieder,
159 N.H. 350 (2009). 15

McSherry v. McSherry,
135 N.H. 451 (1992).. 12

Rollins v. Rollins,
122 N.H. 6 (1982). 11

Spellman v. Spellman,
136 N.H. 235 (1992). 12

In re Stapleton,
159 N.H. 694 (2010). 11

New Hampshire Statutes

RSA 458:16. 11

QUESTIONS PRESENTED

- I. Did the court err in finding that the tractor was awarded to Mr. Holdsworth?
Preserved: Objection to Motion to Assign Insurance Proceeds (Nov. 6, 2015); MOTION FOR RECONSIDERATION (Jan. 7, 2016).
- II. If the tractor was not awarded to Mr. Holdsworth, did the court err in revisiting and revising its final decree?
Preserved: Objection to Motion to Assign Insurance Proceeds (Nov. 6, 2015); MOTION FOR RECONSIDERATION (Jan. 7, 2016).
- III. Did the court err in not imposing a penalty, contained in the parties' divorce decree, regarding non-payment of outstanding utility bills?
Preserved: MOTION FOR RECONSIDERATION (Jan. 7, 2016).
- IV. Did the court err in not awarding attorney's fees for litigation regarding the tractor and the utility bill?
Preserved: MOTION FOR CONTEMPT (Nov. 6, 2015); MOTION FOR RECONSIDERATION (Jan. 7, 2016).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Background

Melissa Allen and Larry Holdsworth separated in 2013 after a one-year marriage. The proceedings included a temporary hearing and temporary order a few months later, and a divorce trial and final decree in November 2014.

Mr. Holdsworth had a pension from past employment, and came to the marriage with dogs, horses, a tractor, and personal property. Ms. Allen has owned and operated for many years a real estate brokerage and rental firm, which she retained in the divorce. As there were no children of the marriage, and most issues were stipulated, the court's attention was focused mainly on the cost and care of horses and dogs, equitable allotment of the rural marital home, disposition of the engagement ring, health insurance, and payment of a truck loan.

A year after the divorce, lingering property issues emerged in contempt allegations by both sides, prompting the Claremont Family Court (*John J. Yazinski, J.*), to hold a hearing and issue a post-decree order.¹

¹The temporary hearing occurred in November 2013, and is cited herein as "*Temp.Hrg.*" The divorce trial was held over two days in April and October 2014, and is referenced herein as "*Day 1*" and "*Day 2.*" The post-divorce hearing took place on November 13, 2015, and is cited as "*Post-Divorce Hrg.*"

II. Tractor

Mr. Holdsworth's father had given him a tractor (with several implements) which, by the time of the marriage, was leaking oil and had other troubles, and was probably worth about \$5,000. *Temp.Hrg.* at 11, 16; *Day 2* at 136, 154; *Post-Divorce Hrg.* at 12; HOLDSWORTH FOF&ROL ¶ L (Oct. 28, 2014) (not included in appendix).

At the time of the temporary hearing, Mr. Holdsworth had moved out of the marital home, but just next door about a mile away. He wanted the tractor immediately, but preferred to leave for later collection the remainder of his belongings; Ms. Allen worried that if he took the tractor, she would get stuck with the rest of his stuff. Moreover, she wanted to use the tractor for a few hours to clean up behind the horses. *Temp.Hrg.* at 7-11. Mr. Holdsworth complained that Ms. Allen had used the tractor without an air filter; as a compromise she suggested he take the tractor but first spread the manure. *Temp.Hrg.* at 19-21. The court quipped, "Well, this is the first time I'm going to write an order saying you can't operate the tractor without an air filter."

For pick-up, Mr. Holdsworth assured the court that because he's an "AAA-Plus member . . . [t]hey can come in, put [the tractor] on the flatbed, and remove it without a problem." *Temp.Hrg.* at 16.

In its temporary order, the court ordered, "[e]ach party is awarded the temporary use of . . . other personal property currently in his/her possession. [Mr. Holdsworth] is awarded the temporary use of the following specific items of personal property: his clothing and toiletries." PARTIAL TEMPORARY DECREE ¶9 (Aug. 28, 2013), *Appx.* at 1. In its narrative temporary order, the court additionally wrote:

The court held a ... [t]emporary [h]earing in this marital matter.... Ms. Allen was ... anxious to have Mr. Holdsworth remove a tractor from the property.... He shall be allowed to remove the tractor from the property based upon the availability of a trailer which he needs to obtain in order to remove the tractor.

ORDER (Jan. 9, 2014), *Appx.* at 7.

Pre-trial documents do not mention the tractor, and during trial, discussion of it was primarily the extent of its disrepair. *Day 2* at 136, 153-54. It was undisputed however, eleven months after the temporary hearing, that Mr. Holdsworth had collected neither the tractor nor his other stuff, and that the tractor was still at Ms. Allen's home. *Day 2* at 121-23, 134-36, 152-53, 171. Mr. Holdsworth offered as explanation:

Well, one, there's a significant amount of personal property. Originally, when I first moved out, I moved into a furnished house so I had no place to put it. I had no basement. It was kind of a ... winterized cottage is what I was living in. I had no place to put it. I had lost my job. I had no income. I had no way of, you know, now having put every – afford to put it into a storage unit.

Day 2 at 172. Given that restraining orders were in place, Ms. Allen preferred pick-up of personal property be performed by a third party. *Temp.Hrg.* at 26; *Day 1* at 53; *Day 2* at 118, 123, 134-35; FINAL DECREE ¶¶ 10, 19 (Oct. 28, 2014), *Appx.* at 8.

In its final order, the court did not specifically mention the tractor. Rather, the final decree has two residual clauses, providing:

Petitioner is awarded the following specific items of personal property: All items in her possession not specifically awarded to Larry.

Respondent is awarded the following specific items of personal property: See attached. Larry shall within 30 days of the effective date of this decree arrange for professional licensed movers to obtain his personal property from Melissa's residence.... If Larry fails to make the necessary arrangements within 30 days, he shall forfeit his interest in these items.

FINAL DECREE ¶10 (Oct. 28, 2014), *Appx.* at 8. Attached to the decree, as indicated by the "see

attached,” was a list, captioned “Larry’s Belongings,” which did not include the tractor. *Id.* at 10. Also of importance is a proposed decree submitted by Mr. Holdsworth, but not approved by the court, which provided:

Larry is awarded the tractor Larry’s father purchased for him. This tractor is currently in Melissa’s possession. Melissa has used the tractor while in her possession. She now maintains that the tractor is leaking oil. Melissa is ordered to spend the money necessary to fix the leak within the next 30 days. The repairs should be done at a licensed Kabota dealership. Thereafter, Melissa will cause the tractor to be delivered to Larry’s residence....

HOLDSWORTH PROPOSED FINAL DECREE (Oct. 28, 2014) at 8, *Appx.* at 18.

Sometime thereafter, the tractor disappeared from Ms. Allen’s property. Ms. Allen suggests that Mr. Holdsworth took it, testifying her neighbors told her they saw someone who looked like Mr. Holdsworth loading it onto what looked like Mr. Holdsworth’s truck. *Post-Divorce Hrg.* at 12. Mr. Holdsworth suggests that Ms. Allen was responsible for the disappearance. *Post-Divorce Hrg.* at 9.

Ms. Allen filed a report with the state police. *Post-Divorce Hrg.* at 11. An insurance claim was made, but denied because, although the court considered him the owner, he no longer lived there. *Post-Divorce Hrg.* at 9, 11-12, 16. Mr. Holdsworth thought he could do a better job and sought assignment of the claim, to which Ms. Allen objected. MOTION TO ASSIGN INSURANCE PROCEEDS (Oct. 7, 2015), *Appx.* at 31; MOTION TO HOLD IN CONTEMPT (Oct. 7, 2015), *Appx.* at 34; *Post-Divorce Hrg.* at 10. *See also* OBJECTION TO MOTION TO ASSIGN INSURANCE PROCEEDS (Nov. 6, 2015), *Appx.* at 39; OBJECTION TO HOLD IN CONTEMPT (Nov. 6, 2015), *Appx.* at 41; MOTION FOR RECONSIDERATION ¶¶ 2-5 (Jan. 7, 2016), *Appx.* at 45; *Post-Divorce Hrg.* at 16-17.

The question here, regardless of how the claim is pursued, is who owns the tractor.

Mr. Holdsworth argued that despite the residual clauses and list of belongings in the final

order, the temporary order made the tractor permanently his. MOTION TO ASSIGN ¶¶ 1-2. Ms. Allen argued that the temporary orders were not a permanent grant of ownership, that the final decree gave Mr. Holdsworth an opportunity to collect only listed personal property, that he failed to exercise the opportunity, and that the court cannot now revisit the decree. OBJECTION TO MOTION TO ASSIGN ¶ 4; MOTION FOR RECONSIDERATION ¶ 19; OBJECTION TO MOTION FOR RECONSIDERATION (Jan. 15, 2016), *Appx.* at 48.

In the post-divorce proceeding, the court ordered:

The Court awarded a Kubota tractor to Mr. Holdsworth. Prior to the removal of the tractor, it was stolen from Ms. Allen's property. She² submitted an insurance claim, but was denied. Mr. Holdsworth seeks assignment of any rights Ms. Allen may have to pursue insurance coverage for the tractor. Ms. Allen is ordered to sign whatever documents are necessary in order to transfer her rights to Mr. Holdsworth to pursue a claim for the tractor. She shall also disclose her insurance carrier and all correspondence between her and her insurance carrier concerning the tractor.

ORDER (Dec. 22, 2015) at 1, *Appx.* at 43. Ms. Allen has appealed that portion of the order saying that the tractor belongs to Mr. Holdsworth, and that Ms. Allen must assign its value to him.

²The record suggests it was Mr. Holdsworth, not Ms. Allen, who submitted the insurance claim. *Post-Divorce Hrg.* at 9, 11-12; MOTION FOR RECONSIDERATION ¶ 3 (Jan. 7, 2016), *Appx.* at 45.

III. Utility Bill

TDS is the telecommunications provider, in the area in which the marital home is located and which continues to be Ms. Allen's residence, for internet, cable, and telephone utilities. During the marriage Mr. Holdsworth's name was on the account, and at the time of the final hearing the outstanding bill, for \$650, had not been paid and had gone into collections. Consequently, Ms. Allen was prevented by TDS from establishing a new account at her location, or even learning the details of the existing account. *Day 2* at 119-20, 137; *Post-Divorce Hrg.* at 13, 15, 18; MOTION FOR CONTEMPT (Nov. 6, 2015), *Appx.* at 38; MOTION FOR RECONSIDERATION ¶¶ 7-14; *see generally* <<https://tdstelecom.com>>.

At the time of trial Mr. Holdsworth alternatively claimed he was unaware of the bill, *Day 2* at 202-03, or that he should not be required to pay it because he no longer lived there. *Day 2* at 201. Later he claimed he had already paid it. *Post-Divorce Hrg.* at 10, 15-16; UNMARKED EXHIBIT (showing check for partial payment to TDS in amount of \$229.06 dated December 22, 2014), *Appx.* at 54; OBJECTION TO MOTION FOR RECONSIDERATION at 3. During the "long going dispute," Ms. Allen gave Mr. Holdsworth notice he had not paid, but received no reply. *Post-Divorce Hrg.* at 13, 15.

Accordingly, in the divorce decree, the court ordered:

Larry shall pay the TDS bill within 30 days of the effective date of this decree or shall pay Melissa \$50.00 per day for each week it is not paid.

FINAL DECREE ¶14 (Oct. 28, 2014), *Appx.* at 8, 13.

Eleven months later, the bill had not been fully paid and was still in collections; Ms. Allen asked that the court-ordered penalty be imposed for the period of non-payment. MOTION FOR CONTEMPT (Nov. 6, 2015); MOTION FOR RECONSIDERATION. Mr. Holdsworth offered no

defense to the penalty, but finally paid the remaining balance shortly after the post-divorce hearing. OBJECTION TO MOTION FOR RECONSIDERATION (Jan. 15, 2016), *Appx.* at 48 (attachment showing \$349.91 balance received by collection agency from Mr. Holdsworth, December 7, 2015).

The court found Mr. Holdsworth had not paid the TDS bill, ORDER (Dec. 22, 2015) at 2, *Appx.* at 43, and calculated that the penalty would be “\$13,300.00 as of November 13, 2015,” the day of the post-divorce hearing.³ *Id.*

The court held, however, that such penalty would be “onerous.” *Id.* After Ms. Allen filed a motion for reconsideration, the court additionally wrote that it “finds the penalty provision regarding the TDS bill to be unconscionable and will not enforce it through an award in excess of \$13,000.” ORDER ON MOTION TO RECONSIDER (Jan. 28, 2016), *Appx.* at 53.

³The parties did not offer any calculation of the penalty. The court’s calculation of \$13,300, divided by \$50 per day, equals 266 days, but it is unclear how the court arrived at 266 days. There are more than 266 days between the effective date of the decree, January 21, 2015, and the November 13, 2015 hearing, and even more between the effective date and December 7, 2015, which is the day Mr. Holdsworth eventually paid the bill. Accordingly, the penalty should be somewhat greater than the court’s calculation.

IV. Attorney's Fees

The parties' divorce decree contains standard language regarding attorney's fees:

Any party that unreasonably fails to comply with this decree or other court orders ... may be responsible to reimburse the other party for whatever costs, including reasonable attorney's fees, that may be incurred in order to enforce compliance.

FINAL DECREE ¶21, *Appx.* at 14.

Ms. Allen employed an attorney to defend her ownership of the tractor and to resolve the unpaid portion of the TDS bill, and thus asked for attorneys fees. MOTION FOR CONTEMPT (Nov. 6, 2015), *Appx.* at 38; MOTION FOR RECONSIDERATION (Jan. 7, 2016), *Appx.* at 45. The court denied the request. ORDER ON MOTION TO RECONSIDER (Jan. 28, 2016), *Appx.* at 53.

SUMMARY OF ARGUMENT

Ms. Allen first sets forth the law regarding the transitory nature of temporary orders and the sanctity of final judgments. She then demonstrates that the family court, in post-divorce proceedings, twice modified its final decree – first by relying on the temporary order to find the tractor belonged to Mr. Holdsworth, and second by abandoning the penalty provision designed to ensure payment of the TDS bill. Ms. Allen then argues that she should have been awarded attorney’s fees to defend the decree.

ARGUMENT

I. Temporary Orders are Transitory, But Steep Standard for Modification of Final Decrees

In post-divorce proceedings the family court twice revisited settled orders. It erroneously construed the temporary decree regarding possession of the tractor, and modified the final decree regarding the penalty provision for non-payment of the TDS bill.

When we interpret court orders, the determining factor is the intent of the issuing court. As a general matter, a court decree or judgment is to be construed with reference to the issues it was meant to decide. While a trial court's construction of its own decree may be accorded deference on appeal, after the time for appeal from a judgment has passed, the trial court's post-judgment interpretation of the judgment is irrelevant to an appellate court's determination of the judgment's meaning. Neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.

Edwards v. Ral Auto. Grp., Inc., 156 N.H. 700, 705 (2008) (quotations and citations omitted).

Although temporary orders are enforceable during their pendency, *In re Costa*, 156 N.H. 323, 331 (2007), once a permanent order is issued, a temporary order is dissolved and superseded, *Fowler v. Fowler*, 97 N.H. 216, 217–18 (1951); *Rollins v. Rollins*, 122 N.H. 6, 9–10 (1982), and can no longer be relied on. *In re Stapleton*, 159 N.H. 694, 697 (2010); RSA 458:16. If a final order is not appealed or stayed, it becomes final and effective 30 days after it is rendered. *Gray v. Kelly*, 161 N.H. 160, 167 (2010); *Guardianship of Phi*, 157 N.H. 429, 437 (2008).

Further, temporary orders issued in divorce cases do not determine property rights.

It is not until the court conducts a full hearing on the merits ... that the court actually equitably divides the parties' property. It is only when a dissolution of a marriage is decreed that the court may order an equitable division of property between the parties.

Stapleton, 159 N.H. at 697 (quotations and citations to statute omitted) (denying husband's claim

that temporary order giving him “use” of pension precluded court from issuing final order awarding wife a percentage).

“There is a well established rule forbidding judicial modification of property settlements contained in divorce decrees.” *Labbe v. Labbe*, 137 N.H. 53, 55 (1993). The only exceptions are for “fraud, deceit, undue influence, or misrepresentation.” *Id.*; *McSherry v. McSherry*, 135 N.H. 451 (1992). A “change in circumstances” is insufficient to alter a property decree, *McSherry*, 135 N.H. at 453-54, and alleged later-discovered problems in a property distribution do not justify reformation. *Spellman v. Spellman*, 136 N.H. 235 (1992).

II. Ms. Allen Owns the Tractor

Despite the family court's ruling, the temporary order did not make the tractor the property of Mr. Holdsworth. The temporary order provided only that "[e]ach party is awarded the temporary use of ... other personal property currently in his/her possession," PARTIAL TEMPORARY DECREE ¶9 (Aug. 28, 2013), and that Mr. Holdsworth "shall be allowed to remove the tractor from the property based upon the availability of a trailer." ORDER (Jan. 9, 2014).

At the time of the temporary order, the tractor was in Ms. Allen's possession, so she was allowed to "use" it. Mr. Holdsworth was allowed to take the tractor into his possession, but he never did.

In its final order, the court provided a list of personal property that belonged to Mr. Holdsworth (on which the tractor does not appear), and awarded to Ms. Allen the residue – *i.e.*, "[a]ll items in her possession not specially awarded to Larry." FINAL DECREE ¶10 (Oct. 28, 2014). Thus the tractor is hers. Even if the final decree can be read to award the tractor to Mr. Holdsworth, because he "fail[ed] to make the necessary arrangements within 30 days, he shall forfeit his interest." *Id.*

In both its temporary and final orders, the court appears to have ruled that ownership of personal property would follow possession. Mr. Holdsworth had at least one, or possibly two, opportunities to take possession of the tractor. He never did, and thus ownership of the tractor became Ms. Allen's upon the effective date of the decree.

To the extent the court's post-divorce order relied on the temporary order giving Mr. Holdsworth use of the tractor, ORDER (Dec. 22, 2015), the court erred because temporary orders do not determine ownership. To the extent the court's post-divorce order altered ownership from

the final decree, *id.*, there has been no allegation nor evidence of fraud, deceit, undue influence, or misrepresentation which could justify such alteration.

Accordingly this court should declare that the tractor remains the property of Ms. Allen.

III. Court Erroneously Abandoned Penalty Provision for Non-Payment of Utility Bill

The TDS bill was a standard utility bill, *see Lally v. Flieder*, 159 N.H. 350 (2009), which the court ordered Mr. Holdsworth to pay. Given Ms. Allen’s rural location, and especially in light of the restraining order, establishing reliable connections was urgent. The court did not credit Mr. Holdsworth’s claims that he was unaware of the bill or had already paid, but appears to have believed his third explanation that he did not want to pay because he no longer lived there. *Day 2* at 201. To ensure payment, in its final decree the court included a penalty provision.

When the court later revisited the matter, it was correct in finding the penalty provision “onerous,” but that was its purpose. It was wrong, however, in finding the penalty provision “unconscionable,” because Mr. Holdsworth could have so easily avoided it or reduced it by timely paying the bill.

The court effectively modified its final order, but in the absence of any evidence, or even allegation, of fraud, deceit, undue influence, or misrepresentation – or even a change in circumstances. This is not a case in which a court has discretion to amend an interlocutory order. *See, e.g., Gray v. Kelly*, 161 N.H. 160, 167 (2010) (“trial court ... has the authority to revisit an earlier ruling on a motion to dismiss if it becomes aware that the ruling may be incorrect”). Here the decree had reached finality. Allowing the abandonment of penalty provisions invites non-compliance, and this court should reverse.

IV. Ms. Allen Should Be Awarded Attorney's Fees for Mr. Holdsworth's Non-Compliance

Ms. Allen has been forced to expend resources to defend unequivocal ownership of her tractor, and to collect TDS arrearages occasioned by no more than Mr. Holdsworth's wish to avoid paying. The parties' divorce decree provides that "[a]ny party that unreasonably fails to comply with this decree or other court orders" should pay "the other party for whatever costs, including reasonable attorney's fees, that may be incurred in order to enforce compliance."

Mr. Holdsworth unreasonably failed to comply, and this court should direct the family court to award Ms. Allen her attorney's fees.

CONCLUSION

For the foregoing reasons, this Court should declare the tractor the property of Ms. Allen, enforce the penalty provisions regarding the TDS bill, and award attorney's fees.

REQUEST FOR ORAL ARGUMENT

Melissa Allen requests that her attorney, Joshua L. Gordon, be allowed oral argument because the issues raised herein are common in family court litigation, and should reach published decision.

Respectfully submitted,

Melissa Allen
By her Attorney,
Law Office of Joshua L. Gordon

Dated: September 12, 2016

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on September 11, 2016, copies of the foregoing will be forwarded to Peter Decato, Esq.

Dated: September 12, 2016

Joshua L. Gordon, Esq.

ADDENDUM

1. ORDER (Dec. 22, 2015). 18
2. ORDER (on reconsideration) (Jan 28, 2016). 20