Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-243

APRIL TERM, 2019

Nicola Weaver* v. David Weaver	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
	}	Family Division
	}	
	}	DOCKET NO. 138-7-09 Andm
		Trial Judge: Helen M. Toor

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

Mother appeals from a July 10, 2018 trial-court order. The court issued a ruling on spousal maintenance, parent-child contact (PCC), and father's motion for contempt. Mother challenges the court's contempt ruling pro se. Mother, through counsel, challenges the maintenance ruling.[1] We affirm the court's contempt ruling, and we reverse and remand the maintenance ruling for additional proceedings.

The parties divorced in 2011 after an approximately fifteen-year marriage. They have four children together, including N.W. who will be eighteen in April 2019. The parties have filed over 200 post-divorce motions and pursued multiple appeals. This is at least their ninth appeal to this Court and, during the pendency of this appeal, mother has filed numerous additional motions with the trial court. This appeal concerns: the trial court's ruling, on remand, regarding spousal maintenance pursuant to Weaver v. Weaver, No. 2017-414, 2018 WL 2106377 (Vt. May 4, 2018) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo17-414.pdf [https://perma.cc/8FG5-YF78]; a PCC review as directed by Weaver v. Weaver, 2018 VT 38, ¶ 39; and consideration of father's April 2018 motion for contempt in which he alleged that mother was violating the PCC order. The court held a hearing on these issues in June 2018.

I. July 2018 Trial Court Order

The court made the following findings, beginning with a procedural history. Pursuant to a May 2017 order, mother was temporarily barred from having any contact with N.W. See Weaver, 2018 VT 38, ¶ 39. Mother was found in contempt of that order in 2017 and the court imposed a $100 prospective compensatory fine for future violations, which could be offset against any maintenance that father owed to her. We affirmed both orders on appeal but required a sixty-day review of the no-contact order. See Weaver v. Weaver, 2018 VT 56, ¶¶ 3, 4 (affirming contempt order and court's imposition of prospective fines to be offset from father's maintenance

[1] Mother's attorney is reminded of his obligation to include a table of contents in the printed case. See V.R.A.P. 30(a)(2)(B)(ii).

obligation); Weaver, 2018 VT 38, ¶ 39 (calling for review of PCC suspension order every sixty days). In April 2018, father filed another motion for contempt.

The court in the instant case found that notwithstanding the no-contact order, father had allowed N.W. to have contact with mother. Mother had not returned N.W. to father's care as directed and the court rejected mother's assertion that N.W. refused to return to father's home. The court found that mother, in emails, had clearly invited N.W. to come to her home at any time despite knowing that it was forbidden by a court order. Father provided evidence that mother violated the court order twenty-one times and mother did not convincingly refute that evidence. The court thus fined mother $2100 for her contempt.

The court next considered whether to continue the May 2017 order barring mother from contact with N.W. That order was based on mother's alienation attempts and her utter lack of compliance with earlier court orders. The court found that, given his behavior, father could not ask the court to enforce what he himself failed to respect. The court added that N.W. was almost eighteen and would soon make his own decisions about contact. Given this, the court returned PCC to a 50/50 split. The court also determined father's maintenance arrearage and his maintenance obligation going forward, a decision we address in detail below. This appeal followed.[2]

II. Mother's Pro Se Challenge to Contempt Ruling

We begin with mother's pro se challenge to the court's contempt ruling. Mother recounts her version of the history of these proceedings. She states that she and N.W. were confused about when N.W. could visit her and when he could not. Mother further argues that father did not comply with the order and that he left N.W. at her home without her permission. Mother disputes that she violated the order twenty-one times. Mother also complains that the court did not consider her ability to pay the fine.

"We review an order of contempt solely for abuse of discretion," Weaver, 2018 VT 56, ¶ 3, and we find no abuse of discretion here. The trial court's findings are supported by the evidence, and they support the conclusion that mother was in contempt of the May 2017 order. See 15 V.S.A. § 603(f) (identifying requirements for finding of contempt).

None of mother's arguments persuade us otherwise. There can be no confusion over an order that bars "all contact between mother and N.W." Weaver, 2018 VT 38, ¶ 31 (emphasis added); see also 15 V.S.A. § 603(f)(1) (stating that person may be held in contempt if he or she "knew or reasonably should have known that he or she was subject to a court-ordered violation"). The focus here is on mother's actions, moreover, and father's behavior does not absolve mother of her own contemptuous behavior. See 15 V.S.A. § 603(f)(2), (3) (providing that contempt finding is appropriate where person willfully fails to comply with court order). As to the number of times that mother violated the court's order, the court credited father's evidence over mother's and we will not reweigh the evidence on appeal. See Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). Finally, we note that the fine imposed here was compensatory, not coercive. Cf. 15 V.S.A. § 603(h)(4), (i) (discussing sanction of incarceration for failure to comply with purge conditions and finding of present ability to pay purge condition). We upheld the court's authority to impose this precise prospective sanction in Weaver,

[2] We note that father was initially the appellant in this case and mother was the cross-appellant, but father did not pursue his appeal.

2018 VT 56, ¶¶ 3-4, and we found this "sanction was not impermissibly punitive because mother could avoid the fines by complying with the May 2017 order." Id. ¶ 4. Even assuming arguendo that information about mother's ability to pay was required and that it was not already before the court given the nature of these proceedings, the fines will not be paid by mother out-of-pocket but instead will be used to offset what father owes mother in past maintenance. See id. (finding it appropriate for court "to order that any fines accrued by mother be offset from father's maintenance obligation; the court has discretion to impose the equitable remedy of setoff in such situations"). Thus, any error in not making findings as to mother's ability to pay would be harmless. We therefore reject mother's challenge to the court's contempt ruling.

III. Mother's Maintenance Challenge

We next consider the court's maintenance ruling. To understand mother's arguments on appeal, we must recount the multiple decisions on maintenance in detail. At the outset, however, we acknowledge that we did not clearly state in our remand ruling the dates pursuant to which the maintenance arrearage should be calculated, and it was not unreasonable for the trial court to conclude that they should be calculated as of October 2016. See Weaver, 2018 WL 2106377 at *4. Nonetheless, as reflected below, there has not yet been a final assessment of any maintenance obligation and arrearage as of October 29, 2014, the date that father's second motion to modify was filed. We therefore must remand this issue for additional proceedings to calculate the amount owed.

A. Prior Rulings on Maintenance

1. Trial Court Rulings on Father's First Two Motions to Modify

In the August 2011 final divorce order, father was ordered to pay mother $2916 in monthly spousal maintenance. See Weaver v. Weaver, 2017 VT 58, ¶ 2, 205 Vt. 66 (recounting procedural history). "[T]he award was intended to help [mother] meet her needs" but "it also had a 'compensatory aspect.' " Id. Father filed a July 2013 motion to modify maintenance. The court granted his request, reducing his maintenance obligation to $2500 per month, retroactive to July 2013. Id. ¶ 3.

In October 2014, father filed a second motion to modify, alleging that he was unemployed. Following a hearing, the court issued a July 2015 order finding father's unemployment was a substantial change of circumstances. The court reduced father's maintenance obligation to $1500 per month, retroactive to October 29, 2014, the day father filed his second motion. The court found that father had been unemployed since October 2014 but that his unemployment would be temporary and that he could likely pay the $1500 monthly going forward.

The court also found that father had failed to disclose that, at the time of his first motion to modify, he had been paid $202,692 to settle a claim for future lost earnings. Father admitted that, given this payment, his maintenance obligation should not have been modified as of July 2013. "Based on this new information, the court reinstated [father]'s spousal maintenance obligation at the original amount of $2916 per month for the period between July 2013 and October 2014." Id. ¶ 5.

The parties stipulated that father was current on his now set-aside maintenance obligation of $2500 per month from July 2013 through January 2015. Since February 1, 2015, father had paid $600 in maintenance. Reinstating the original maintenance award to July 2013 resulted in an arrearage of $416 per month for 15 months, or $6240, through the end of October 2014. As noted, the court found that father had paid $2500 per month in November and December 2014 and in

January 2015, and $600 in February/March 2015. Having found that father now owed mother $1500 per month, the court calculated the arrearage between November 2014 and May 2015 at $2400. Adding the two arrearages resulted in a total spousal arrearage of $8640 between July 2013 and May 31, 2015. The court stated that mother "shall have a judgment for this amount."

2. February 2016 Supreme Court Order

Father appealed the July 2015 order to this Court, arguing that the maintenance was excessive given his income. We reversed and remanded. See Weaver v. Weaver, No. 2015-326, 2016 WL 562907 (Vt. Feb. 11, 2016) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo15-326.pdf [https://perma.cc/JK8S-KDLF]. In our ruling, we recounted the procedural history above. We noted that no party had appealed the trial court's decision to reinstate maintenance for the period between July 2013 and October 2014. Id. at *1. We therefore considered "only [father]'s maintenance obligation from October 2014 onward." Id. We concluded that the trial court "failed to adequately explain its order setting maintenance at $1500 a month for a period in which [father]'s income was only slightly above that amount." Id. at *2. We explained that "[o]n remand, the court should consider all of the statutory factors and the evidence on [father]'s income and explain its decision." Id. at *3. We also cautioned that at least some portion of the maintenance award was compensatory, and thus, "even if [father] is entitled to some reduction in his maintenance obligation, he is not necessarily entitled to have the obligation terminated." Id.

3. Trial Court's August 2016 Order - First Remand Order

The court issued an August 2016 order on remand. It recounted matters that had been settled by prior proceedings, finding it undisputed that husband's arrearage between July 2013 through October 2014 was $6240 and that since October 2014, father had paid a total of $8100 in maintenance directly to wife with additional amounts garnished and paid over by his employer. The court found that "the evidence presented does not allow a precise calculation of these latter amounts."

The court found that as of October 2014, father was unemployed and his only source of income was unemployment benefits, beginning in mid-December 2014, of $436 per week; he also received residual checks from his prior employment but those were deducted from his unemployment benefits. Father remained unemployed until September 2015 when he found work paying $4583.33 per month. He also received residual checks of $880 per month, which would decrease to zero gradually over time. The court considered father's income against his reasonable expenses, which exceeded $5000 per month. It did not credit mother's protestations as to her dire economic circumstances, noting that she appeared to have been willfully underemployed for some time. The court also did not fully credit mother's assertion that she had no other resources.

The court concluded that in his current circumstances, father would not be required to pay maintenance in any amount. Even if the court's discretion was limited in some degree by the permanent maintenance characterization, the court found it would be inequitable to require father to pay maintenance. It reduced his obligation to zero, retroactive to October 2014. Based on its conclusion, the court determined that father was entitled to a return of the funds he paid for maintenance since October 29, 2014. That amount was at least $8100 and "how much more than that has been paid must be the subject of further calculation, by either the parties or, if they cannot agree, the court." The court found that wife could offset the $6240 she was owed for arrearages through October 2014 against this total and father was entitled to a judgment for the balance. The

court stated that father could offset the amount he owed against any child support payments due to mother. Mother appealed from this order.

4. December 2016 Child Support Order

A child-support order issued during the pendency of mother's appeal of the trial court's August 2016 decision. Child support modification was required given that, as of September 2016, father had sole physical rights for N.W. and mother's PCC was significantly reduced.

A magistrate ordered mother to pay child support to father and it entered judgment in father's favor for past-due child support and medical expenses. The magistrate also explained that the trial court had indicated in its August 2016 order that any overpayment of spousal support would be used to offset father's child support arrearages, if any. The magistrate found that father had overpaid $16,012.52 as of October 31, 2016. He owed no past-due child support because of the offset. The magistrate noted that the issue of overpayment of spousal maintenance and any repayment thereon should be by motion to the trial court.

5. December 2, 2016 Judgment Order

The following day, December 2, 2016, the trial court issued a judgment order, which provided as follows. Since October 24, 2014, father had overpaid maintenance in the amount of $8100 directly to mother. He had additional amounts garnished from his wages and paid over to wife. The court incorporated by reference the magistrate's calculations, including the determination that mother owed father a net amount of $16,012.52, which was all spousal maintenance overpayment as of October 31, 2016. The court also ordered mother to reimburse father for amounts garnished from his wages between October 31, 2016 and December 2, 2016, the date of the court's order. Based on the above, the court entered judgment in father's favor for $16,012.52. The court denied mother's request to make the December 2, 2016 judgment order "provisional" and contingent on the Supreme Court appeal she was then pursuing. The court indicated that if the Supreme Court reversed the maintenance decision on appeal, then mother should pursue relief under Vermont Rule of Civil Procedure 60.

6. Supreme Court's February 2017 Order

As noted, wife appealed from the trial court's August 2016 order. As relevant here, we found that the trial court "did not clearly determine how much of the award was compensatory and did not analyze [father]'s request for modification of the compensatory aspect of [mother]'s permanent maintenance using the proper framework." Weaver, 2017 VT 58, ¶14. We stated that, "on remand the court must make findings to determine how much of the award was compensatory in order to clarify whether the permanent award, including its compensatory aspect, is subject to modification under the appropriate change of circumstances considerations and, if so, to what extent." We then described the proper framework for considering requests to modify the compensatory component of maintenance. See id. ¶¶ 18-28.

7. Trial Court's October 2017 Order - Second Remand Order

On the second remand, the trial court concluded that the compensatory component of the maintenance award was $574 and then reduced that amount to zero, retroactive to October 2014, based on its determination that husband was no longer reaping the benefits of mother's homemaking contributions during the marriage. The court further concluded, however, that beginning in October 2016 when father began a new job, he could afford to pay mother $600 in monthly maintenance. See Weaver, 2018 WL 2106377 at *2. The court again attempted to

calculate maintenance arrearages. Pursuant to its ruling, the court determined that between October 29, 2014 and September 2016, father's maintenance obligation had been reduced to zero. From October 2016 forward, his obligation was $600 per month. Thus, as of October 30, 2017, the date of the court's decision, the court found father's total maintenance obligation came to $7800. As of October 2014, he owed $6240 in arrearages. Since that date through August 2016, father paid a total of $8100 in maintenance directly to mother with additional amounts garnished and paid over by his employer; the evidence did not allow a calculation of these latter amounts. Whether father had since paid or had withheld any further amounts also did not appear. The court directed the parties to confer and determine how much, in addition to the $8100 mentioned above, father had paid since October 29, 2014. Depending on father's total payments, either mother or father would be entitled to a judgment for the difference. Mother appealed.

8. Supreme Court's May 2018 Order

For various reasons, we concluded that the court erred in determining the compensatory component of maintenance and in reducing it to zero. We determined that "the compensatory component of the award represented one-half of the total award, or $1458 per month." Id. at *3. We found that father had not identified sufficient grounds to reduce the compensatory component of the maintenance award. "Accordingly, to the extent that [father] did not pay the $1458 compensatory component arrived at above, that portion of the maintenance award accumulated as a debt [father] owes to [mother]." Id. at *4. Mother's final argument was that the court erred in setting father's maintenance obligation to $600 per month beginning in October 2016. We stated that this question "must be remanded in light of our determination of a $1458 compensatory component of the maintenance award that [father] was and is required to pay." Id. We then explained that "[o]n remand, the court must calculate any arrearage and make a new determination of whether [mother] is entitled to any additional maintenance beyond the compensatory component of the original award." Id.

B. Order on Appeal: July 2018 Trial Court Order - Third Remand Order

This brings us to the ruling at issue in the instant appeal. In its July 2018 order, the trial court made the following findings with respect to maintenance. Based upon an obligation of $1458 per month, father owed mother $30,618 for the period between October 2016 and June 2018. The court noted that mother had provided an exhibit that dated back to 2015, but it found the earlier time period beyond the scope of the remand order. Father testified that mother owed him over $20,000 based upon his past overpayments, but he offered no proof of that amount. The court cited the December 2, 2016 judgment order referenced above, which stated that mother had been ordered to pay father $16,012.52. The court considered father's testimony as evidence that mother had not repaid this amount. It therefore subtracted this amount from the arrearage and found that father owed mother $14,605.48.

The court found that father was currently unemployed and seeking work. He had applied for, but was not yet receiving, unemployment benefits. Father received about $600 per month in commissions from a prior job. Mother's attorney agreed that given father's unemployment, no additional maintenance could be ordered at this time. The court thus awarded no additional maintenance beyond the compensatory amount of $1458 per month.

C. Mother's Motion to Alter and Amend

Mother moved to alter or amend the judgment, attaching numerous exhibits to her memorandum.[3] Mother focused on the $16,012.52 judgment order referenced by the court, which followed the December 1, 2016 child support order. Mother argued that given the subsequent rulings in this matter, there was no overpayment of maintenance and the $16,012 judgment in father's favor was no longer valid. Mother requested relief from the trial court under Vermont Rule of Civil Procedure 60. The court denied the motion. It explained that these issues should have been raised at the June 2018 hearing and mother identified no legal grounds for pursing them after the hearing.

D. Mother's Arguments on Appeal

Mother asserts that the court erred in choosing October 2016 as the month to begin its arrearage calculations. She argues that there has never been a final decision issued with respect to father's October 2014 motion to modify. She suggests that we use May 31, 2015, "the date upon which the last final trial court decision was based," as the date for calculating father's maintenance obligation and arrearages. Mother maintains that the court should have determined if father owed more than the compensatory portion of maintenance between May 31, 2015 and May 2018. Mother also argues that the court erred in using the December 2, 2016 judgment order to offset father's obligation.

We conclude that October 29, 2014, the date father filed his motion to modify, is the appropriate date from which to calculate maintenance due. As mother acknowledges, there has not yet been a final resolution of father's motion. Thus, on remand, the court must calculate as of October 29, 2014: (1) the total amount of maintenance owed, including determining if father owed anything beyond the compensatory component of $1498 per month from October 29, 2014 onward; and (2) based on that calculation, the arrearages that exist as of October 29, 2014. We are mindful that, with respect to the first question, the trial court has found, several times, that father was unemployed and unable to pay anything at all during certain periods in question. In calculating any arrearages, the parties are bound by their prior stipulations as to payments made. We note that, as reflected in the rulings above, there has not yet been a full accounting for all payments that father made to mother, including those that were garnished from his wages. Finally, we agree with mother that the court erred in using the December 2, 2016 judgment to offset father's arrearages. That judgment, which rested on an August 2016 trial court decision that has since been overturned, is void. See V.R.C.P. 60(b)(4). We thus remand for a calculation of father's obligation since October 29, 2014 up to the present and a determination of the maintenance he has paid since

[3] Mother filed this motion and a motion to reopen the evidence on June 22, 2018. In a July 10, 2018 entry order, the court directed mother to identify the date of the decision she was seeking to alter or amend. On July 19, 2018, the court denied the motion to reopen the evidence. It found that the evidence mother sought to present was outside the scope of the remand order and, additionally, there was no reason that mother's request to present such evidence could not have been made at the June 2018 hearing. On July 20, 2018, mother filed a memorandum in support of her motion to alter or amend and her motion to reopen the evidence. Father responded to the motion on July 27, 2018.

October 29, 2014. The court should include in its calculation any new offsets or payments made since the trial court's July 2018 order.

The court's order finding mother in contempt is affirmed; its decision on maintenance is reversed and remanded for additional proceedings.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice