

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2016-0107, In the Matter of Melissa Allen and Lawrence Holdsworth, the court on January 18, 2017, issued the following order:

The petitioner, Melissa Allen (wife), appeals an order of the Circuit Court (Yazinski, J.) ruling upon the parties' post-divorce motions. She argues that the trial court improperly modified the property distribution in the final decree by: (1) finding that it had awarded a certain tractor to the respondent, Lawrence Holdsworth (husband); and (2) not enforcing a \$50 per day penalty provision in the decree for the husband's failure to comply with one of his obligations. She further argues that the trial court erred by denying her request for attorney's fees. We affirm.

The trial court may not modify a property settlement in a final divorce decree absent certain limited circumstances that are not at issue here. See Sommers v. Sommers, 143 N.H. 686, 689 (1999). The trial court may, however, interpret the decree in the course of resolving a post-divorce dispute without effectuating a modification of the decree. See id. at 692. The interpretation of a trial court order is a question of law, which we review de novo. See In the Matter of Salesky & Salesky, 157 N.H. 698, 702 (2008); Sommers, 143 N.H. at 692. We look to the plain meaning of the language used in the decree, and construe subsidiary clauses so as not to conflict with its primary purpose. Salesky, 157 N.H. at 702. The primary purpose of a property settlement is to establish a final and equitable distribution of the marital property. Bonneville v. Bonneville, 142 N.H. 435, 438 (1997).

The record in this case establishes that the parties began cohabiting, and purchased a home, in 2011. They married in July 2012, and separated in July 2013, when the wife filed the divorce petition and a domestic violence petition. When the husband vacated the marital home, he left behind several items of property, including a tractor. His father had given him the tractor several years before the marriage. At the temporary hearing, a lengthy discussion ensued concerning the tractor, including the husband's desire to remove it from the property and the wife's desire to use it before he removed it. The trial court's temporary order noted that the wife "was . . . anxious to have [the husband] remove [the] tractor," and allowed the husband "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." The order did not impose any time limit upon the husband's right to remove the tractor.

At the time of the final hearing on October 28, 2014, the husband had not yet removed the tractor. At some point thereafter, he “went to pick up the tractor [and] it wasn’t there”; it had been stolen. Although it is not clear precisely when the theft occurred, at the hearing on the motions that are the subject of this appeal, the husband’s counsel read into the record, without objection, the following e-mail, which he represented was dated December 15, 2014, was from the wife’s attorney, and concerned the tractor’s theft: “It does not look like house insurance is an option because it wasn’t registered to [the wife], and at the time of the theft it was not her property.” The wife did not dispute that the tractor had been stolen or that her counsel had sent that e-mail on December 15, 2014. Thus, the record contains evidence from which the trial court reasonably could have found that the tractor was stolen at some point between October 28 and December 15, 2014. This evidence was not before the trial court, however, when it issued the final decree.

The trial court issued the final decree, with a narrative order, by notice of decision dated November 26, 2014. The narrative order primarily concerned property division. In it, the trial court found that an unequal distribution of property was equitable given the short-term nature of the marriage and the wife’s greater contributions to the marital estate, and it awarded the wife two-thirds of the equity in the marital home, the \$10,000 value of a vehicle that the husband had purchased with her funds, and an engagement ring that the husband had purchased with his own funds worth \$11,000. The husband was awarded the remaining one-third of the equity in the marital home.

The final decree was proposed by the wife. It contained three provisions that are relevant to this appeal: (1) it awarded the wife “[a]ll items [of personal property] in her possession not specifically awarded to” the husband; (2) it awarded the husband specific items of personal property listed on an addendum, and required that he “obtain his personal property from [the marital] residence” within thirty days of the effective date of the decree or “forfeit his interest in [such] items”; and (3) it ordered the husband to pay a certain utility bill “within 30 days of the effective date of this decree,” or pay the wife “\$50.00 per day for each week [the bill] is not paid.” The addendum, entitled “Larry’s Belongings,” consisted of household furnishings and personal items, many of which were identified by areas of the house in which the items had been located or stored. Neither the narrative order nor the decree specifically mentioned the tractor.

By notice of decision dated December 22, 2014, the trial court denied a motion for reconsideration or clarification. The notice advised the parties that, absent an appeal, the decree would become final on January 22, 2015. See Fam. Div. R. 2.29(B). Neither party appealed.

In October 2015, the husband filed a motion for contempt concerning the wife’s payment of his portion of the equity in the marital home, and a motion

“to assign insurance proceeds” to him; the motion for contempt is not at issue in this appeal. In the motion to assign insurance proceeds, the husband noted that the temporary order had allowed him to remove the tractor from the marital property, and asserted that, although the final decree had awarded the wife “all items in her possession not specifically awarded to” him, the tractor “was already awarded to” him. He alleged that the wife had claimed that the tractor had been stolen and that he believed it was an insured loss, and he requested that she be ordered to assign to him her insurance claim. In her objection, the wife asserted that “there was no permanent award of the tractor to the” husband, and denied that the theft was an insured loss because the husband had already unsuccessfully asserted an insurance claim. The wife also moved for contempt, asserting that the husband had not paid the utility bill that he was required to pay under the decree. She requested that he be ordered to pay her \$50 per day for each day after February 21, 2015.

At the hearing on the motions, the husband asserted that “[t]here’s no question that the tractor belongs to” him, and relied upon the e-mail, quoted above, as an admission by the wife “that when this tractor was stolen it belonged to” him. With respect to the wife’s contempt motion, the husband submitted evidence that he had paid the utility \$229.06 on December 22, 2014. He asserted that he had contacted the utility prior to paying \$229.06, and that \$229.06 was the amount that the utility had said was due.

In response, the wife did not dispute the husband’s assertions that the tractor was his, and that it had been stolen. Indeed, she asserted that when she first noticed that the tractor was missing, she did not file a police report because she had assumed that it was the husband who had taken it. She further asserted that the husband had already filed an insurance claim, and that it had been denied. When the trial court asked if the wife objected to “assigning any rights that [she] may have under [her] insurance for the – on the tractor,” she responded, “I have no rights because when [the husband] applied for the insurance, he did the insurance claim, he claimed that the tractor was his, and they denied him based on the fact that he hadn’t lived at the property.” Thus, she contended, any assignment would be “meaningless.” With respect to the utility bill, the wife asserted that the December 2014 payment did not satisfy the entire bill, and that \$349 remained unpaid.

In its order on the motions, the trial court ruled as follows with respect to the tractor:

The Court awarded a Kubota tractor to [the husband]. Prior to the removal of the tractor, it was stolen from [the wife’s] property. She submitted an insurance claim, but was denied. [The husband] seeks assignment of any rights [the wife] may have to pursue insurance coverage for the tractor. [The wife] is ordered to sign whatever documents are necessary in order to transfer her

rights to [the husband] 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.

With respect to the utility bill, the trial court found that the husband had not paid the bill, but that “the claim that [the husband] owes [the wife] \$13,300.00 as of November 13, 2015 [under the penalty provision] for his failure to pay the . . . bill is onerous.” Thus, the trial court ordered the husband to pay the balance within thirty days, and ruled that if he failed to pay it, the wife would be allowed to deduct the amount owed from her payment of the equity. The trial court did not expressly find the husband in contempt.

The wife moved for reconsideration. With respect to the tractor, she argued that the husband had already unsuccessfully sought insurance proceeds for the tractor, and that she “fear[ed] that the order as written will require her to sign a document that is fraudulent or contrary to the insurance policy’s terms.” She requested that she only be required to “sign a document transferring her right to any possible home insurance claim for the stolen tractor if said document is approved by her insurance company.” With respect to the utility bill, she argued that the trial court’s decision not to enforce the penalty provision amounted to the modification of the final property distribution. With his objection to the motion, the husband submitted proof that he had satisfied the \$349.91 balance of the bill. The trial court denied the wife’s requested relief with respect to the tractor and the utility bill, finding that “the penalty provision regarding the [utility] bill [is] unconscionable and [that it] will not enforce it through an award in excess of \$13,000.00.”

On appeal, the wife first argues that the trial court erred by finding that it had awarded the tractor to the husband. According to the wife, the trial court awarded the tractor to her because it was not included in the addendum of items awarded to the husband, and because the husband did not retrieve it within thirty days of the effective date of the decree. Thus, she argues that the trial court effectively modified the property settlement without proof of the circumstances that would justify modifying the property settlement. See Sommers, 143 N.H. at 689.

We conclude that this issue is not preserved. It is a long-standing rule that parties may not have judicial review of issues not raised in the trial court. In the Matter of Hampers & Hampers, 154 N.H. 275, 287 (2006). The trial court must have had the opportunity to consider any issues asserted by the appealing party; thus, to satisfy this preservation requirement, any issues which could not have been presented to the trial court prior to its decision must be presented to it in a motion for reconsideration. See Fam. Div. R. 1.26(F); N.H. Dep’t of Corrections v. Butland, 147 N.H. 676, 679 (2002). Here, although the wife denied the husband’s allegation that the tractor “was already awarded to” him at the time of the final decree “because there was no permanent award of the

tractor to” him, at no point did she argue that the trial court had in fact awarded the tractor to her. Indeed, when the husband asserted at the motions hearing that “[t]here’s no question that the tractor belongs to” him, and read into the record the December 15, 2014 e-mail from the wife’s trial counsel stating that at the time of the theft, the tractor was not her property, the wife responded by stating that she had not reported the theft at the time that it had occurred because she had mistakenly believed that it was the husband who had taken the tractor. Likewise, although the wife argued on reconsideration that the court had modified the property division by not enforcing the \$50 per day penalty, she never argued that the trial court’s finding that it had awarded the tractor to the husband amounted to a modification of the property division.

Even if this issue were preserved, however, we would conclude that the trial court did not modify the property settlement, but merely clarified an inherent ambiguity in the decree. In her brief, the wife correctly observes that “[i]f a final order is not appealed or stayed, it becomes final and effective 30 days after it is rendered.” In a case in which a party files a timely post-decree motion, but no appeal, Family Division Rule 2.29 specifically defines the “effective date” of the decree as “thirty (30) days from the Court’s action on the post-decree motion.” Fam. Div. R. 2.29(B). We have held that, following the issuance of a final divorce decree, any temporary order in the case remains in effect during the pendency of an appeal unless the trial court specifically orders that the final decree become effective pending resolution of an appeal. Gray v. Kelly, 161 N.H. 160, 167 (2010); Rollins v. Rollins, 122 N.H. 6, 10 (1982). This rule applies both to support obligations and property distributions within a final decree. See In the Matter of Nyhan & Nyhan, 151 N.H. 739, 745-46 (2005); cf. In the Matter of Aube & Aube, 158 N.H. 459, 461-64 (2009) (holding that, upon the effective date of a decree following an appeal, the property division in the decree becomes a judgment subject to post-judgment interest).

In this case, the record reflects that the decree became effective on January 22, 2015, thirty days from the trial court’s December 22, 2014 decision on the motion for reconsideration. Up until January 22, 2015, therefore, the temporary order, which authorized the husband to remove the tractor from the marital property at any time, remained in effect. The evidence establishes that the husband in fact attempted to retrieve the tractor at some point between October 28 and December 15, 2014, but could not do so because it had already been stolen.

The decree itself did not expressly award the tractor to either party. Rather, it awarded the wife only those items of personal property in her possession as of the effective date of the decree that were not otherwise awarded to the husband, and awarded the husband specific items, not including the tractor, that were also in the wife’s possession so long as he retrieved them within thirty days of the effective date. The decree is otherwise silent as to personal property not in the wife’s possession, including property in

the husband's possession and property in neither party's possession due to theft. Read within the context of the temporary order, however, it is clear that the trial court intended to award the tractor to the husband so long as he removed it from the marital property prior to the effective date of the decree. In light of the tractor's theft, it was not in the wife's possession as of the effective date and, thus, was not awarded to her under the plain meaning of the language used in the decree. The trial court's determination that it had awarded the tractor to the husband, therefore, did not modify the property division, but simply clarified to whom it had awarded the tractor under circumstances—the theft—not anticipated at the time of the final hearing. This interpretation is consistent with the trial court's purpose in effectuating a final and equitable division of the marital estate. Bonneville, 142 N.H. at 438.

We note that the wife does not otherwise challenge the trial court's decision to require her to "sign whatever documents are necessary in order to transfer her rights to [the husband] to pursue a claim for the tractor." Accordingly, we express no opinion as to the propriety of such relief.

We next address whether the trial court improperly modified the decree by not enforcing the \$50 per day penalty provision. The wife contends that, by not enforcing the provision, despite finding that the husband had not paid the utility bill, the trial court effectively modified the decree without proof of the circumstances that would justify modifying a property settlement, Sommers, 143 N.H. at 689, or "even [proof of] a change in circumstances," the standard applicable to a request to modify a support obligation or custody provision, McSherry v. McSherry, 135 N.H. 451, 453 (1992). The penalty is not, however, a property settlement, support obligation, or custody provision. Rather, it is a prospective penalty for future contempt of the utility bill obligation.

The trial court's contempt power is discretionary, and the proper inquiry is not whether we would have found the husband in contempt, but whether the trial court unsustainably exercised its discretion. In the Matter of Conner & Conner, 156 N.H. 250, 253 (2007). In this case, the trial court did not find the husband in contempt. Nor was it compelled to do so in light of the evidence that the husband paid \$229.06 in December 2014, after having been advised by the utility that that was the amount owed. Accordingly, the trial court did not "modify" the decree by declining to enforce the penalty provision. We express no opinion as to whether the penalty provision is enforceable under New Hampshire law. Compare Elmore v. Elmore, 617 A.2d 159, 161-62 (Vt. 1992) (although disfavored, prospective coercive fines in response to pending contempt motions are enforceable in certain circumstances), with Vande Hoven v. Vande Hoven, 399 N.W.2d 855, 858 (N.D. 1987) (finding that trial court lacked authority to impose prospective contempt fines for future violations of visitation provisions of divorce decree).

Finally, we address whether the trial court erred by denying the wife's request for attorney's fees. The wife sought attorney's fees in connection with her motion for contempt. In light of this order, we cannot say that the trial court unsustainably exercised its discretion by denying the wife's request for attorney's fees. In the Matter of Mason & Mason, 164 N.H. 391, 399 (2012).

Affirmed.

HICKS, LYNN, and BASSETT, JJ., concurred.

**Eileen Fox,
Clerk**