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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-158

DECEMBER TERM, 2003

	}	APPEALED FROM:
Thomas McLeod	}	
v.	}	Washington Family Court
Eileen Dugan (Office of Child Support)	}	DOCKET NO 339-8-01 Wndmd
	}	Trial Judge: Jane G. Dimotsis

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

Father appeals the family court=s decision affirming in part the magistrate= s child support order finding father voluntarily unemployed and imputing income to him. We affirm.

The subject of the child support proceedings was the parties= daughter, who was born in February 1992. The magistrate held hearings on May 6 and July 29, 2002. Evidence presented at the hearings revealed that (1) father had earned between $30,000 and $40,000 per year between 1998 and 2000 developing software programs for clients; (2) by late summer of 2001, a downturn in the economy had dried up his prospects in that line of work; (3) he had worked very little since that time; and (4) he had made virtually no effort to obtain work outside the computer industry, even though work in that industry was scarce and he had work experience in other areas. Following the hearings, the magistrate issued an order finding that father was voluntarily unemployed and capable of earning fifteen dollars an hour working full-time. The magistrate imputed income to father retroactive to August 2001. On appeal, the family court upheld the magistrate= s imputation of income based on father= s voluntary unemployment, but remanded the matter for the magistrate to recalculate father= s child support obligation because father and his wife had a child born shortly before the July 29 hearing.

On appeal to this Court, father argues that the evidence required the family court to find that he was not voluntarily unemployed because he was attending school, which would enhance his future job prospects and thus ultimately be in the best interest of the parties= daughter. At the outset, we note that father= s argument has shifted and evolved through the various proceedings. Before the magistrate, father= s expert testified that father= s advancement in the computer software field would probably be helped by a college degree, but father did not argue that the community college courses he was taking precluded the court from finding him voluntarily unemployed. Before the family court, father argued that his seeking additional education could not be considered voluntary unemployment. Father asked the court to remand the matter to the magistrate for her to make findings regarding the necessity of him obtaining a further education. The family court ruled that father had failed to show that he could not seek an education to further his career while engaging in full-time employment.

We find no error on the record before us. At the time of the evidence presentation, father was taking only two courses from community college and the court properly found that his educational pursuit did not conflict with his employability. Thus, the court did not have to reach father= s argument that he could not be considered voluntarily unemployed because he was attending a vocational education program within the meaning of 15 V.S.A. ' 653(5)(A)(iii)(II). Although he has made the argument here, he never argued to either the family court or the magistrate that his voluntary unemployment was A in the best interest of the child@ as provided in ' 653(5)(A)(iii)(III). Accordingly, we

will not consider this unpreserved argument.

Next, father argues that 4 V.S.A. ' 465 entitled him to present additional evidence in the family court on appeal from the magistrate= s decision. At the July 29 hearing, father presented expert testimony that his job prospects in the computer field were not good for a number of reasons, including the downturn in the computer industry and his lack of a four-year college degree. The magistrate refused to grant father a continuance to present another expert who would have testified that employer expectations in the software development industry were undergoing a shift in which employees were expected to have a four-year degree. On appeal to the family court, father moved to present the testimony of the expert who was unable to testify at the July 29 hearing. The court denied the motion. We reject father= s argument that ' 465 required the court to grant his request. Section 465 provides: A An appeal from a decision of a magistrate shall be on the record to the family court. At the request of a party, the family court shall hear additional evidence.@ Rule 8(g)(4) of the Vermont Rules for Family Proceedings clarifies that appeals A shall be solely on the record, except that where, for good cause shown, the record is found to be incomplete additional evidence may be submitted and review shall be de novo.@ The Reporter= s Notes to Rule 8 explain the seeming discrepancy between the rule and the statute as follows:

> Subdivision (g) is adopted to implement the statutory language on appeals. Section 465 says that appeals shall be on the record to the family court B but it also says that A At the request of a party, the family court shall hear additional evidence.@ It would be unacceptably confusing, and counterproductive, for the family court to preside over an appeal which simultaneously is A on the record@ and includes live testimony from new witnesses. Appeal A on the record@ consists of review to determine if the tribunal below committed an abuse of discretion. Once the family court begins to accept additional testimony, the court will be forced to weigh the credibility of a live witness against the credibility of witnesses in the record; this is an extraordinarily difficult task, if not impossible. Moreover, the effect of allowing live testimony upon request of any party would be to transform almost every A appeal@ into a de novo hearing, since litigants will realize that the best way to respond to one live witness is to produce other live witnesses. This will diminish the role of magistrates, squander the resources which have been expended to create magistrates proceedings, and seriously undermine the statutory and federal goal of concluding 90 percent of support proceedings within 3 months and 98 percent within 6 months.
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> The rule, therefore, authorizes submission of additional evidence upon appeal but only when the record from the magistrate is incomplete and good cause has been shown for its incompleteness. An example would be when failure to comply with discovery by one party caused the other party to proceed before the magistrate with incomplete information.
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> The rule also provides that when additional evidence is being submitted review will be de novo, for the reasons noted above.

As we have stated before, the rule correctly construes the statute in a way that reconciles the internal inconsistency of the statute. Gavala v. Classen, 2003 VT 16, & 8, 819 A.2d 760, 764 (A For the reasons stated in the Reporter= s Notes, we conclude that ' 465 is internally inconsistent and therefore ambiguous, and must be construed as set forth in Rule 8(g)(4)). Further, we conclude that father failed to show good cause for submitting the expert= s testimony, and that the family court acted well within its discretion in denying the his motion. Indeed, the testimony from the second expert would have added little to the testimony of the first expert, which was not even challenged. The issue in dispute was not whether father= s job prospects may have been enhanced in the event he was eventually able to obtain a four-year degree, but rather how much, if any, income father was capable of earning and thus whether any income should be imputed to him based on his voluntary unemployment. As for father= s contention that the magistrate acted improperly by ruling on his motion after he had appealed the case to the family court, we find no reversible error. The magistrate= s mistake was rectified when the family court considered and denied the motion.

Finally, father argues that the evidence does not support imputing income to him at the rate of fifteen dollars per hour based on full-time employment. We disagree. Father himself testified that he had experience house painting and doing minor repair work, that he had been doing that type of work recently for his landlord at the rate of fifteen dollars per hour in exchange for rent, and that he thought he might be able to do similar work for others at a similar rate. The

evidence also indicated that husband had worked as a paralegal and had computer skills. Given this evidence, the amount of income imputed to father by the magistrate was reasonable. See Stickney v. Stickney, 170 Vt. 547, 548 (1999) (mem.) (trial court findings will stand if there is any reasonable and credible evidence to support them; on appeal, findings are viewed in light most favorable to prevailing party, and modifying evidence is disregarded); Tetreault v. Coon, 167 Vt. 396, 399 (1998) (findings of fact will not be set aside unless they are clearly erroneous).

Affirmed.

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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Denise R. Johnson, Associate Justice