

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-103

NOVEMBER TERM, 2006

Terri A. Hamilton

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APPEALED FROM:

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v.

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Orange Family Court

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Albert D. Hamilton, Jr.

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DOCKET NO. 1-1-05 Oedm

Trial Judge: Mary Miles Teachout

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

Wife appeals an order of the family court, challenging the court=s conclusion that husband was not voluntarily underemployed, its related decision to base his child support obligations on husband=s actual income (rather than his potential income were he not underemployed), and the court=s exclusion of certain marital debt from consideration in the division of marital property. We affirm.

At the divorce hearing, the contested issues were (1) whether husband was voluntarily unemployed, (2)

the proper level of child and spousal support, if any, and (3) the proper division of marital property. The parties agreed that wife would have sole parental rights and responsibilities for the children.

The evidence established that, prior to the parties' divorce, the family was primarily supported by husband's income, which ranged between \$60,000 and \$65,000 during the last five years of the marriage. Since the parties separated, husband had left his job with Green Mountain Power in Vermont and accepted employment in Michigan at roughly half his former salary. Wife made approximately \$31,000 per year both before and after the divorce. The parties testified as to the circumstances of and reasons behind their divorce. Wife further testified regarding husband's history of failing to comply with court orders and set forth the amount of child and spousal support he owed based on the initial temporary support order. Wife described the expenses she faced as the custodial parent and debts she had incurred as a result of husband's failure to meet his support obligations. Husband testified regarding his efforts to find work in Michigan, where he now lives, as well as his income, expenses and debts since the parties separated. Both parties provided testimony and evidence regarding the value of the marital home and other marital assets.

After considering the requests and proposals from each side, the family court ultimately ordered that the parties split the marital property as follows: Wife would retain the marital home, a motorcycle worth \$5,000, and her retirement account, as well as certain stock from husband's former employer, Green Mountain Power. Husband would retain his retirement account, except that he would cash out that portion needed to pay the support he owed wife under the terms of the temporary support order. Husband would also pay wife's attorney fees for the earlier enforcement proceedings from his retirement savings. The family court further ordered that husband pay child support in accordance with the Vermont child support guidelines, based on his current income. The court did not order spousal support in light of the parties' relative incomes and the division of marital property. Finally, the parties were ordered responsible for their own debts incurred after the separation date.

On appeal, wife argues that the family court should have concluded that husband was voluntarily underemployed and should have based his child support obligations on the income he was capable of earning

as evidenced by his salary prior to the divorce. She further argues that the family court failed to account for certain debts in its marital property division. In reviewing the family court's order, we will uphold any factual findings supported by credible evidence, and those conclusions supported by the findings. Wade v. Wade, 2005 VT 72, & 9, 178 Vt. 189.

Wife's argument that husband is voluntarily underemployed focuses largely on the assertion that husband violated a court order requiring him to maintain his employment with Green Mountain Power unless and until he found a job with comparable salary and benefits. The evidence could support the conclusion that husband violated this order in that he had only a contingent promise of employment—not a job offer—at the time he quit his job in Vermont, and ultimately was not hired for the comparable position in Michigan. The evidence could also support the conclusion that, based on assurances by the prospective Michigan employer, husband left his employment in Vermont with a good faith belief that he had secured comparable employment and did not violate the interim order. But there was also evidence that husband had subsequently obtained employment in Michigan at the highest hourly rate available currently to him and that he continued to actively search for jobs comparable to his prior employment. Accordingly, there is credible evidence supporting the family court's conclusion that husband was not voluntarily underemployed, and the family court was not required to depart from the child support guidelines. Cf. Mitchinson v. Mitchinson, 173 Vt. 483, 484 (2001) (family court has some discretion to depart from the support guidelines if it finds that an order based on the guidelines would be inequitable) (mem.) (citing 15 V.S.A. § 659(a)).

Regarding the division of marital property, wife presented evidence that she incurred approximately \$555 in debt on a Kohl's credit card and approximately \$10,000 in other credit card debt due to husband's failure to provide spousal and child support as ordered and his failure to keep a promise to pay for a portion of the children's Christmas presents, which were given jointly. On appeal she argues that the family court erred in not taking these amounts into consideration in dividing the marital property. Husband testified, however, that while the Kohl's credit card was taken out in his name, the outstanding charges were incurred by wife after their separation. Accordingly, the family court had a credible basis for concluding this debt was wife's responsibility. The \$10,000 of credit card debt wife incurred as a result of husband's failure to meet his support obligations

was addressed by the award of \$11,799.54 in support arrears awarded wife. The family

court did not abuse its discretion in dividing the marital property. See Mizzi v. Mizzi, 2005 VT 120, & 5 (Vermont family courts have wide discretion in division of property).

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice