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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-514

SEPTEMBER TERM, 2006

Sheila Selden	}	APPEALED FROM:
	}	
	}	
v.	}	Bennington Family Court
	}	
Edward F. Johnson	}	
	}	DOCKET NO. 274-10-03 Bndm

Trial Judge: Nancy Corsones

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

In this divorce case, wife appeals the magistrate and family court orders concerning maintenance and child support. We affirm.

The parties began living together in the early 1990s, married in 1997, and separated in 2003. Their son was born in April 1994, and in 2001 they adopted a daughter born in February 1999. In October 2003, wife filed for divorce. In September 2004, the parties stipulated to a temporary order that gave wife sole legal and

physical parental rights and responsibilities, and provided husband substantial parent-child contact. Following hearings on December 15, 2004 and March 2, 2005, the magistrate issued a temporary child support order on July 20, 2005 that (1) awarded wife $740 per month in child support starting from September 2004 and until the family court issued a permanent child support order, and (2) required husband to pay $7663 in child support arrears at a rate of $185 per month. The magistrate amended that order on September 7, 2005, stating that she inadvertently failed to include in her calculation a substantial part of wife=s income. The new temporary order required husband to pay $229 per month starting from September 7, 2004, plus $57 per month to pay off $2374 in child support arrears.

Meanwhile, after five days of hearings between February and July 2005, the family court issued an August 30, 2005 order that (1) allowed wife, pursuant to the parties= agreement, to assume sole parental rights and responsibilities and have the children four nights a week (fifty-seven percent of the time), with husband having parent-child contact three nights a week (forty-three percent of the time); (2) required the parties to sell the marital home and their country-store business, with wife receiving fifty-five percent of the proceeds; (3) declined to award wife maintenance; and (4) declined to award either party child support. On February 14, 2006, the family court affirmed wife=s appeal of the magistrate=s amended temporary child support order. Wife appeals, arguing that (1) in determining whether to award child support, the family court erred by failing to impute income to husband and by attributing excessive income to her; (2) the magistrate erred by awarding her child support from the date the parties reached an agreement on parental rights and responsibilities rather than from the date she filed the divorce complaint; and (3) in determining whether to award maintenance, the family court erred by failing to impute income to husband, by attributing excessive income to her, and by failing to give adequate consideration to either her need for rehabilitative maintenance or her entitlement to compensatory maintenance.

We first consider wife=s argument that the family court erred by not awarding her child support. The main thrust of wife=s argument is that the court should have imputed income to husband and should have attributed less income to her. The court found that wife=s income from her graphic design business, odd jobs, and rent was somewhere between $2900 and $4000 per month, while husband=s monthly income was $1350 from running the family-owned convenience store and coaching lacrosse. The court ruled that it would not be fair to

impose a child-support obligation on wife, however, in part because of the multitude of expenses husband saved by working and living at the parties= store and its attached apartment.

Wife argues that the court should have ignored the support guidelines and imputed income to husband based on the substantial resources available to him from his treating the parties= jointly owned store as his own personal asset. The problem with wife=s argument is that both the magistrate and the family court found that the store had never turned a profit and that husband had been subsidizing its losses over the years with his own money, which had run out. The magistrate found that husband was working at the store fifty-to-seventy hours a week and hoped to turn a profit, but there is no evidence in the record demonstrating whether, and if so to what extent, the store ever actually made money. As the family court found, during their marriage, the parties enjoyed a standard of living that was supported largely by their individual savings and outside assets, which had become depleted. As part of the property settlement, the court ordered the parties to sell both the marital home and the store, at which point husband would have to find another job. Although husband had earned as much as $38,000 in a year working for a ski resort before he began managing the store full-time, there was no basis to impute income to him during the divorce proceedings, at which time he apparently was working full-time at the store but not earning much income. Thus, this case is not analogous to McCormick v. McCormick, 159 Vt. 472, 477 (1993), as wife argues, in that husband=s lifestyle did not demonstrate that he was earning far more than he claimed, as was the case with the husband in McCormick. To the contrary, the evidence showed that husband was living modestly in a two-bedroom apartment.

As for wife=s claim that the court attributed too much income to her, the court=s findings are based almost entirely on wife=s own financial statements. Wife contends that some of the financial information was stale because of delays in court hearings, and that the court should have averaged her income from her various jobs differently than it did. We find these arguments unavailing. Wife had multiple jobs that made it difficult for the magistrate and the court to calculate her income. They did so, however, based on income she actually had made, or was making, during the divorce proceedings. We conclude that the family court acted well within its discretion in finding that wife earned between $2900 and $4000 per month, and that husband was not required to pay child support, given his limited income and his substantial parent-child contact. See Turner v. Turner,

2004 VT 5, & 5, 176 Vt. 588 (AThe trial court is entitled to wide deference on review because it is in a unique position to assess the credibility of witnesses and weigh the evidence presented.@).

Finally, with respect to child support, the magistrate did not err in imposing its support obligation retroactively from September 7, 2004Cthe date that the parental-rights-and-responsibilities order issuedCrather than from October 14, 2003, when wife filed the divorce complaint. Wife complains of the delays in scheduling hearings, and yet, as the family court noted, she herself requested and received continuances that delayed the hearings. Further, the court found that the parties had not presented evidence of circumstances predating their September 7, 2004 agreement. Finally, the record demonstrates that wife=s income was substantially higher than husband=s before he received a trust distribution in October 2004. For all these reasons, the magistrate did not abuse her discretion in awarding child support retroactively from September 7, 2004 rather than October 14, 2003.

Wife also argues that the family court erred by not awarding her spousal maintenance. Much of her argument is predicated on her view of what the court should have found regarding the parties= respective incomes. As stated above, wife fails to demonstrate that the family court=s findings with respect to the parties= individual incomes are clearly erroneous. Nor has wife demonstrated that she is entitled to rehabilitative or compensatory maintenance. The parties= marriage was a relatively brief one. The evidence indicated that the decline in wife=s graphic design business was not the result of her abandoning her career to serve as a homemaker, but rather was the result of the development of personal computers and software programs that allowed more businesses and individuals to do their own graphic design work. Wife had more education than husband and, based on past income, had as much, if not more, ability to earn income in the future. Finally, the family court did not determine that wife was too old to go back to school, as she asserts; rather, the court stated that the parties could not afford the education contemplated by wife, and opined that such an investment did not appear to make financial sense, given wife=s age. In short, wife has failed to demonstrate that, given the criteria set forth in 15 V.S.A. ' 752, the family court abused its discretion in declining to award her maintenance. See Kohut v. Kohut, 164 Vt. 40, 43 (1995) (AIn order for this Court to overturn a maintenance award, the party seeking reversal must show there is no reasonable basis for the family court=s decision.@).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice