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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-262

MARCH TERM, 2007

Michele Rose	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
Kevin Rose	}	
	}	DOCKET NO. F-89-2-04 Cndm
		Trial Judge: Thomas J. Devine

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

Father appeals the family court's ruling affirming the decision of the magistrate judge regarding his motion to modify child support. We affirm in part and reverse in part.

Father moved to modify the child support order issued in September of 2004, on the basis that mother's income had increased. Specifically, at the time of the initial child support order, her salary was $3,926.00 per month, but by the time of the 2005 hearing, her income was $5,833.00 per month. Father also challenged the child support order to the extent it was based on the finding that father had a potential income of $68,000 per year.

The relevant facts are as follows. Under the original order, the parties shared overnights with the children with 70% of time being with mother and 30% of time being with father. In addition, however, both parents had the first option of caring for the children if the other parent was unable to do so on one of that parent's given nights. Mother and father disagreed as to the exact number of times that father had provided childcare when mother was out of town, but agreed that there were several such occasions. In recognition of this reality, the magistrate added another fifteen overnights per year to father's tally, such that the division of time was now 66% to 34%. In so doing, the magistrate emphasized that setting a reasonable fixed number would prevent ongoing disputes over use of the first option. In terms of child care costs, mother testified that she pays $151.42 per month in health insurance and $950.00 per month in child care expenses. The magistrate found that this rate was unusually high and reduced the monthly credit for childcare to $750.00 per month. The magistrate ordered that all out-of-pocket costs for therapy for the children be shared equally, as the therapy was necessitated by the divorce. Also, the cost of summer camp for the two boys was to be shared based on the production of actual invoices.

The crux of the issue before the magistrate was father's income and/or potential income. In the Final Judgment of Divorce, the court found father's income was "likely to be in the range of $68,000 per year"—a figure that the magistrate agreed was too high. The magistrate looked at the fact that father earned $45,000 in 2001, which was the last time father worked full-time. Before that, he had earned $30,000 per year working for the City of Burlington. His current occupation is running his own kayak touring business. At the time of the divorce, father expected to earn significant income from the business. But in 2005 and 2006, father was charged with, tried and convicted for domestic assault, and probation and parole restrictions hampered his ability to earn a full income.

The magistrate used the lowest income attributed to father—$2,276.00 per month or $27,312.00 per year—to calculate his child support obligations for the period of January 1, 2005 though April 30, 2006. Accordingly, the magistrate established a retrospective child support obligation for this period of $223.41 per month. Beginning May 1, 2006, the magistrate found that father was capable of earning $50,000.00 per year. This resulted in a calculated child support obligation of $511.27 per month. Based on past overpayment and missed payments of child support, the magistrate calculated that father was owed $292.13, but further concluded that father must pay mother $750.00 in legal fees and $383.50 for uninsured medical costs. The award of attorney fees was attributed to father's refusal to pay child support, the need for mother to bring an enforcement action, and "the prolongation of legal proceedings resulting from [father's] difficult, angry and disrespectful behavior in open court."

Father appealed the order to the family court. The court concluded that the magistrate did not abuse his discretion in resolving the parties' conflicting testimony and reaching a compromise figure of fifteen additional overnights per year for father based on the "first option" arrangement.

The family court further determined that the magistrate properly relied on the family court's findings in the divorce action (decided earlier in the month) regarding mother's business. The Final Order of Divorce contained a finding that mother owned a barbershop which carried substantial debt and that mother had an agreement to pay back the debt "if and when it begins to turn a profit." The court found the business had a net value of zero. At the child support hearing, mother testified that the barbershop was making no profit and that she had no income from the business. On this basis, the magistrate did not require mother to produce earnings statements from the business, and the family court affirmed this decision on appeal. In a related matter, the court affirmed the magistrate's decision not to include as income a loan that mother had received from her father for her business, because the loan would need to be repaid.

The family court also concluded that father was precluded from arguing that he had worked full-time between 2001 and 2005, because the family court found to the contrary in its earlier order and father had not appealed from this finding. See Trahan v. Trahan, 2003 VT 100, ¶ 7, 176 Vt. 539 (describing elements of doctrine of collateral estoppel, which prevents a party from re-litigating an issue decided in an earlier proceeding).

Regarding father's potential income, the family court noted that the magistrate credited father with a lower income for 2005 through April 30, 2006 (an income of $2,276 per month, or $27,312

annually) in recognition of the fact that father's income from the kayak touring business was reduced during that time as a result of his conviction for domestic assault. Father argued this amount should be set as his expected income going forward from May 1, 2006, as well, but the family court concluded that the evidence presented to the magistrate supported a finding that the amount reflected voluntary underemployment on the part of father. The $50,000 figure for annual salary determined by the magistrate was a compromise figure based on father's previous earnings in other work ($45,000 as a web designer and $30,000 working for the City of Burlington) and father's own predictions that he could earn $68,000 per year through the kayak touring business ($24,000 for summer kayak trips and $42,000 for winter trips). The family court found no abuse of discretion.

Father argued to the family court that even the reduced income of $2,276 per month was too high for the period of January 1, 2005, through April 20, 2006, because his actual earnings were less during that time due to his legal troubles. The family court affirmed the magistrate's conclusion that defendant's criminal convictions were the result of voluntary acts and therefore his reduced earnings during the relevant time period were a form of voluntary underemployment. In so deciding, the family court contrasted the instant case with our decision in Shaw v. Shaw, 162 Vt. 338, 340 (1994), where the voluntary wrongdoing at issue was not necessarily the cause of the defendant's underemployment.

The family court also agreed that the magistrate was entitled to rely on mother's credible testimony regarding child care costs, while reducing the amount claimed, and that father was not entitled to documentation of the costs.

The family court considered father's challenge to the magistrate's calculation of father's credit/debt vis-a-vis an escrow account that had been established by earlier court order. The court found that subsequent litigation over the funds in escrow had clarified the following. Some of the money owed to father and placed in escrow had been withdrawn to pay past due child support for which father was credited. Further, the family court held that, given the extent of the unpaid child support, the magistrate did not err in authorizing mother to withdraw a specified amount of funds and crediting father for the same.

Finally, the family court concluded that the magistrate's comments to father in open court did not indicate bias or partiality against father.

Father appeals, raising a number of issues. "Review of the magistrate's decision is based on the record made before the magistrate." Miller v. Miller, 2005 VT 89, ¶ 18, 178 Vt. 273. We will not set aside findings of fact unless they are clearly erroneous. Id. We review de novo interpretations of statutes and other questions of law. Id. at ¶ 10.

First, father argues that he was entitled to documentation of mother's earnings from her business pursuant to 15 V.S.A. § 662(a). That section provides, in relevant part, that "[u]pon request of either party . . . the other party shall furnish information documenting the affidavit" of income and assets. Id. Thus, the statute creates an entitlement in the parties to obtain documentation of income and assets. Here, notwithstanding the magistrate's determination that mother's testimony provided credible evidence of no income from the barbershop, father was entitled to see business records to

support her testimony. Without such information, cross examination would likely be futile. Accordingly, we reverse this determination that father was not entitled to the documentation. On remand, father should be granted access to records of the income and expenses associated with mother's business.

Father also cites 15 V.S.A. § 662(a) as a basis for obtaining documentation of the child care costs claimed by mother. The statute, however, applies only to the affidavit of income and assets, not to claimed expenses. Therefore, the statute does not specifically require documentation of child care costs. We note, however, that the financial affidavit required by the family court, which mother signed before a notary, does ask that child care costs be listed, but mother left this section of the form blank.

In addition to challenging the magistrate judge's denial of his request for documentation of child care costs, father also challenges the necessity of mother's claimed costs. Mother testified that she paid a nanny $950 per month for child care. The magistrate awarded credit for $750 per month. Father takes issue with the fact that plaintiff pays the nanny a flat rate to work for fifty-two weeks of the year, when in fact he cares for the children after school on Wednesdays and every other weekend. He further argues that the nanny is not needed during the summer months because the children are on vacation or at summer camp. Father argues that mother's testimony on the cost of child care was "inconsistent and contradictory," but does not point to any specific contradictions. Father has failed to demonstrate that the magistrate abused its discretion in finding that $750 per month was a reasonable amount given the standard of living the children would have enjoyed had the family remained intact. See 15 V.S.A. § 659(a)(3) (allowing this criterion to be used in awarding child support).

Next father challenges the conclusion that he is voluntarily underemployed and the calculation of his potential income. While the magistrate reduced father's expected income for January 1, 2005, through April 30, 2006—to $2,276 per month, as requested by father in his motion to modify—father argues that the magistrate should have set this as his potential income going forward from May 1, 2006. He faults the magistrate for essentially requiring him to work in other endeavors besides his kayak touring business that he has operated since 1996. In fact, this was not the basis for the magistrate's decision to set father's potential, full-time income at $50,000 per year. Rather, this was based on father's own predictions during the divorce proceedings that, in a normal year, his business could earn up to $68,000.

Father also argues it was error and contradictory to base his income on the gross revenues of his business when the magistrate also stated that the gross income from mother's business "would be meaningless without consideration of the business expenses and debt load." Father is correct, in that the relevant statute defines "gross income" as "gross receipts minus ordinary and necessary expenses where a party is self-employed or derives income from proprietorship of a business." 15 V.S.A. § 653(5)(A)(iv). On remand, the family court shall assess gross income in the same fashion between the two parties.

Regarding the calculation of father's credit or debt with respect to the escrow account, father claims error but does not demonstrate that the family court's calculation of father's support

obligation was incorrect or that prejudice resulted. The fact that mother was authorized to withdraw amounts from escrow that were different from the amounts determined to be owed by father does not demonstrate that either amount was in error.

Further, the inclusion of legal fees was within the trial court's discretion. Adams v. Adams, 2005 VT 4, ¶ 19, 177 Vt. 448 (noting broad discretion of court to enter attorney's fee awards in divorce cases). Father challenges the award, arguing that the magistrate himself prolonged the proceedings. The basis for the award, however, was not the total length of the proceedings, but the cost and delay attributable "to [father's] refusal to pay child support, the resulting need for [mother] to request enforcement, the resulting need for the Court to order withdrawal of support due from escrow, and the prolongation of legal proceedings resulting from [father's] difficult, angry and disrespectful behavior in open court." Father does not contest that his refusal to pay support necessitated the proceedings. Father claims that the amount of the award—$750—exceeds the amounts billed by mother's attorney for the proceedings. But father does not provide record support for this contention.

Finally, along these lines, it is apparent from reviewing the transcript that the magistrate struggled to impress upon father the necessity of following orders of the court. The magistrate's comments did not reveal bias or animus against father.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this decision. As stated above, on remand, father should be granted access to records of the income and expenses associated with mother's business, and the family court shall assess gross income in the same fashion between the two parties.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice