

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-388

APRIL TERM, 2008

Heide Scheurer	}	APPEALED FROM:
	}	
v.	}	Orange Family Court
	}	
Leon Shabott	}	DOCKET NO. 70-5-00 Oedm

Trial Judge: M. Patricia Zimmerman

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

Father appeals pro se from the denial of his motion to modify his child support obligation. We affirm.

Mother and father divorced in August 2001. At the time of their divorce, they agreed that father would pay \$2000 per month in child support. In 2004, the parties agreed to reduce this obligation to \$500 per month beginning in July 2004, which would increase to \$700 per month beginning in September 2005. In October 2006, father moved to reduce his obligation to \$250 per month. After a hearing, a magistrate judge denied father's request. The magistrate found that the parties' children, then aged thirteen and sixteen, lived primarily with mother. Mother was a teacher and a part-time masseuse, and she lived in the former marital residence, which was subject to a mortgage. Father was self-employed as a roofer. Father argued that his business had been losing money, and that he had incurred substantial debt from the divorce. Yet father provided no income tax returns at the hearing, no profit or loss statements, and he did not complete the Schedule C on the Income and Asset affidavit. The only financial information father provided was his checking account statement between March 2006 and October 2006. This evidence showed that father deposited \$33,439.12 in six months, averaging \$5,573.18 per month, all of which was depleted. Father did not provide any evidence as to where these deposits came from, where the money went, and whether the withdrawals were for business or personal expenses.

The magistrate found that both mother and father had reasonable and basic living expenses. Mother could not meet her budget, however, even with her income and child support. Giving father an income of \$5573.18, the magistrate found that father could maintain his budget. The magistrate acknowledged that father's income must be reduced by his business expenses, but she explained that father had not provided the court with any evidence of those expenses. The magistrate also found that father owned six vehicles worth a total of \$3350. The court ran a guideline calculation giving father an income of \$5573.18 per month and mother an income of \$2668.01, which indicated a child support payment of \$879.12 per month. The magistrate thus

denied father's motion to modify his \$700 per month child support obligation, and it ordered review of the matter in six months. The magistrate directed father to provide a completed income and asset affidavit, monthly profit and loss statements from his business, and copies of his tax returns for 2005 and 2006, prior to the review hearing.

Father appealed to the family court, which affirmed the magistrate's decision. The court rejected father's assertion that the magistrate erred in finding that mother had inherited a mortgage as part of the parties' divorce. The court found that the magistrate drew no inferences as to when mother obtained a mortgage, nor did she appear to have taken any such inferences into account in reaching her decision. The court also rejected father's assertion that the magistrate erred in concluding that he was capable of paying \$700 per month in child support. As the court explained, the parties stipulated to a \$700 monthly payment, and thus, the issue before the magistrate was whether father demonstrated a sufficient change in circumstances to warrant a downward modification. Mother did not have to prove that father could afford to pay \$700 per month. The court agreed with the magistrate that father failed to meet his burden of proof. It pointed out that, contrary to father's assertion, the magistrate recognized the difference between father's net income and his gross income. The magistrate was aware that father must have business expenses, but she found that father failed to provide any evidence as to what those expenses might be. The court found no grounds to disturb the magistrate's denial of father's motion to modify. This appeal followed.

On appeal, father reiterates many of the same arguments that were considered and rejected by the family court. He claims, for example, that the magistrate erroneously found that mother inherited a mortgage at the time of the parties' divorce. He also maintains that the magistrate failed to consider his business expenses in calculating his income, and she improperly construed his gross income as net income. Father states that the family court was obligated to define what evidence he needed to provide and order him to provide it. In a similar vein, he asserts that the magistrate should have allowed him time to obtain more evidence before reaching its decision. Father also argues that the court erred by assuming that the parties' 2004 stipulated child support order was fair and reasonable, and he states that the court cannot order him to pay an amount of child support that he cannot afford. Father claims that his in forma pauperus status further demonstrates his inability to pay child support as ordered. Finally, father questions why the magistrate's decision was affirmed when mother did not raise any objection at the hearing.

We find no basis to disturb the court's decision. "The court has broad discretion to determine whether it will modify a support order." Garrow v. Garrow, 150 Vt. 426, 428 (1988). On appeal, we "view the evidence in a light most favorable to the prevailing party, and exclude the effect of all modifying evidence," and we will uphold the factual findings made below unless they are clearly erroneous. Id. (citation omitted). We will overturn the court's decision "only in the presence of legal error or the absence of factual support for the result." Id. (citation omitted). No such circumstances are present here.

As the family court explained, the parties agreed in 2004 that father would pay \$700 per month in child support. Father did not challenge the fairness of this agreement at the time it was entered. He later moved to modify this order, and thus, he had the burden of showing "a real, substantial and unanticipated change of circumstances." 15 V.S.A. § 660; see also Garrow, 150 Vt. at 428 (same). As both the magistrate and the family court concluded, father failed to meet

his burden of proof. He provided insufficient evidence to allow the magistrate to discern his net income. We reject father's assertion that the magistrate was obligated to "order" father to provide such evidence before ruling on his request to modify, or that the family court was obligated to define the necessary evidence that father needed to produce.

Father moved to modify an existing order and thus he had the burden of proof. He failed to complete a necessary part of his financial affidavit, and while he claimed to be losing money, he provided no evidence of his business losses or even his business expenses. He did not provide any tax returns. He did not seek a continuance so that he could obtain such materials. While father states that he has not filed his taxes in years, this does not absolve him of complying with 15 V.S.A. § 660 and proving to the magistrate that a change in circumstances existed. The fact that father is proceeding in forma pauperis, assuming that father raised this argument below, similarly does not relieve father of the obligation of presenting sufficient evidence at the hearing below. The magistrate acted within her discretion in running a guideline calculation based on the information that father did provide, and as set forth above, her calculation supported a payment of approximately \$880 per month, which was \$170 less than father was paying.

Finally, we agree with the family court's treatment of father's remaining arguments. As set forth above, the mortgage issue was irrelevant to the magistrate's decision, and mother did not have to prove that father could afford to pay \$700 per month in child support. We have considered all of father's arguments, and find them all without merit. The court did not err in upholding the denial of father's motion to modify.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice