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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-357

APRIL TERM, 2002

Joshua Manheimer v. Sherry St. Germaine	}	APPEALED FROM: Windsor Family Court DOCKET NO. 425-10-99 Wrdm Trial Judge: Walter M. Morris, Jr.

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

Father appeals a Windsor Family Court order affirming a magistrate decision which reduced father's child support payments to mother. Claiming the magistrate should have reduced his payments even further, father alleges four errors below: (1) the court erred by failing to impute income to mother because father believes she is voluntarily underemployed; (2) the court should have considered the income of mother's husband when calculating mother's available income to support the parties' minor daughter; (3) the court's finding on father's income is clearly erroneous; and (4) the court improperly calculated father's after-tax income by using a federal tax filing status which is inconsistent with father's actual status. We find no reversible error, and therefore affirm.

On July 3, 2000, father moved to modify a September 25, 1992 child support order which directed him to pay mother $115.39 per week to support their only daughter, Alejandra.[(1)] The parties adopted Alejandra in 1990, and have shared custody of her equally since their divorce. Prior to the adoption, mother worked as a medical illustrator at Dartmouth College, earning $16,000 in 1989 and $12,000 in 1990. After Alejandra's adoption, mother stayed at home with her child, although she performed some free-lance work at home and worked a part-time job for three weeks in 1995 for $7.00 per hour. Since 1997, mother, who has an undergraduate degree in studio art and a master's degree in art history, has been self-employed as a silversmith. She works part-time at home designing and creating jewelry while Alejandra is at school. Mother's business income has increased since 1998, and she expects further yearly increases of approximately $2,000 per year. In 1999, mother's profit from her jewelry-making business was $199 per month. Based on her expectations, the magistrate found mother's net business income for the year 2000 to be $365.67 per month.

In contrast to mother's increasing business income, father's earnings and profits as a self-employed direct-response copywriter have been steadily declining in the past few years. In 1992, father's annual income from his business was $105,792. In 1998, his salaried earnings and profit totaled $60,000. In 1999, they were $47,500. Father projected that his year 2000 income would not exceed $36,156. Due to evidentiary conflicts regarding father's claimed expenses, the potential for his earnings to increase during the last quarter of 2000 as a result of father's marketing efforts, and the lack of clarity concerning father's allocation of business and personal expenses, the magistrate found that father's 1999 income of $47,500 was the appropriate income figure to use to calculate support for Alejandra under the child support guidelines.

Taking into account father's reduced income, his responsibility to support his step child who has no other means of

support, and other factors required by the child support guidelines, the magistrate calculated father's new support obligation to be $344.65 per month. Because the new obligation varied more than ten percent from the amount due under the prior order, the magistrate found a real, substantial, and unanticipated change of circumstances existed to modify the 1992 order, and entered a modified order accordingly. See 15 V.S.A. 660(b) (a ten percent difference between child support orders constitutes a real, substantial, and unanticipated change of circumstances justifying a modification of child support). Father appealed the magistrate's decision to the family court, which affirmed the order on all issues relevant to this appeal. An appeal to this Court followed.

On appeal, we will not set aside the magistrate's findings unless they are clearly erroneous. Tetreault v. Coon, 167 Vt. 396, 399 (1998). We will uphold the decision if the findings support the magistrate's legal conclusions. Id. at 400. We recognize the magistrate's discretion to modify an existing child support order if the evidence supports a finding that the statutory threshold for modification has been met, and therefore we will reverse only if such discretion has been abused. See C.D. v. N.M., 160 Vt. 495, 499 (1993) (once statutory threshold for modification is satisfied, magistrate has discretion in determining whether to modify a child support order).

Father first claims error in the magistrate's failure to find that mother is voluntarily underemployed because she works part-time only and is responsible for Alejandra's care only fifty percent of the time under the parties' shared custody arrangement. Father asserts that the court should have invoked 15 V.S.A. 653(5)(A)(iii) and imputed annual income to mother of at least $24,000 based on mother's pre-motherhood employment history because mother could devote more time to work to help support Alejandra. Section 653(5)(A)(iii) requires the court to impute a parent's potential income if the parent is voluntarily unemployed or underemployed, with certain exceptions, when calculating child support under the guidelines. The magistrate's conclusion that mother was not voluntarily underemployed is supported by the evidence, and the magistrate therefore did not abuse her discretion by declining to impute additional income to mother. See Tetreault, 167 Vt. at 402-03 (family court has discretion to evaluate factors relevant to voluntary under- or unemployment claim for purposes of imputing income).

As the family court pointed out, the magistrate's order was consistent with the evidence concerning mother's earning history since the parties adopted Alejandra. That evidence also showed that mother's income was increasing rather than decreasing over time; thus, a voluntary reduction in mother's income was not at issue. Further, both the magistrate and the family court noted that the record lacked evidence on mother's future earning potential, the existence of employment opportunities for mother in the area, and what mother's child care costs might be should she seek full-time employment outside the home rather than engage in her nascent home-based jewelry-making business. See Tetreault, 167 Vt. at 402 (among factors for court's consideration of claim to impute income due to underemployment are employment history, history of earnings, recency of employment, availability of suitable employment, and replacement child care costs). The evidence also showed that mother's chosen occupation is consistent with her undergraduate studio art degree and her graduate degree in art history. Moreover, there was no evidence demonstrating that mother started her part-time business in bad faith, for the purpose of evading her support obligation to Alejandra, or deliberately to earn less than she was capable of earning. See Beaudoin v. Beaudoin, 24 P.3d 523, 528 (Alaska 2001) (voluntary underemployment claim in child support cases requires court to determine whether parent's earnings reflect voluntary and unreasonable decision to earn less than parent is capable of earning); Hansel v. Hansel, 802 So. 2d 875, 880 (La. Ct. App. 2001) (voluntary underemployment for purpose of calculating child support is question of good faith); In re P.J.H., 25 S.W.3d 402, 405 (Tex. Ct. App. 2000) (court must find that parent reduced income for purpose of evading child support payments to find parent is voluntarily underemployed). The magistrate's decision therefore reflects the admitted evidence on which the findings and conclusions were appropriately based.

Father's next argument centers on his misreading of 15 V.S.A. 659, which requires the court to consider a variety of factors, including the custodial parent's financial resources and "[a]ny other factors the court finds relevant," when deciding whether to adjust the child support amount if application of the guidelines is unfair to the child or the parties. 15 V.S.A. 659(a) (Supp. 2001). According to father, it was legal error for the magistrate to ignore mother's total family resources when determining mother's ability to contribute to Alejandra's support because mother relies on her new husband for financial support. The family court rejected father's argument for the same reason we do here: father never asked the magistrate to engage in the 659 analysis and thereby waived the claim. By its terms, the statute requires the court to consider the 659 factors "[u]pon request of a party." Id. Father made no such request[(2)] and cannot now claim the magistrate erred by failing to apply the statute to the parties' dispute.

Father also claims error in the magistrate's finding that his income for 2000 would be $47,500 rather than father's estimate of $36,156. Father alleges that the magistrate found credible his claim that his income was decreasing, but "inexplicably concluded that his income for the year 2000 would be the same as his income for 1999." He takes issue with the magistrate's concerns about the evidence on father's income and expenses and father's method for allocating business and personal expenses. We review this claim under the longstanding principle that the trier of fact, not this Court, is responsible for determining the credibility of witnesses and the weight and persuasive effect of the evidence. Payrits v. Payrits, 171 Vt. 50, 54 (2000). When conflicting evidence on a factual issue exists, we do not set aside a judgment simply because we might reach a different conclusion. Id. If credible evidence appears in the record to support the magistrate's judgment, we will uphold her determination. Id.

We find nothing in the record to suggest that the magistrate's decision on this point was erroneous. The magistrate's decision to use father's 1999 income was within the range of the evidence admitted during the modification hearing. See Semprebon v. Semprebon, 157 Vt. 209, 214 (1991) (trial court properly exercised discretion by assigning value of property in divorce case within range of evidence presented on value). The premise underlying father's argument is that once the magistrate found credible his testimony explaining the reasons for his declining income, the magistrate was required to find father's year 2000 income estimate credible as well. That premise is unsupportable in our precedent, which, as we noted, leaves credibility and evidentiary weight determinations to the magistrate. See Payrits, 171 Vt. at 54. The record fully supports the magistrate's decision to rely on father's 1999 actual income rather than the estimate the magistrate deemed unreliable due to father's confusing and incomplete evidence on his income and expenses.

Father's final argument on appeal relates to the magistrate's calculation of father's after-tax income in accordance with 15 V.S.A. 653(1)(D)(iii) and the child support guidelines. The magistrate calculated the support obligation by giving father credit for the federal head-of-household tax exemption. The effect of the magistrate's decision, father alleges, is that his available income is increased, thereby increasing his support payment. Father claims the magistrate's error in using the head-of-household status was twofold. First, father cannot in fact claim head-of-household status on his federal income tax returns. Second, the magistrate used the sole/split custody conversion table rather than the shared custody conversion table when converting father's pre-tax income to after-tax income.

Neither of father's arguments has merit. Section 653(1)(D)(iii) of Title 15 requires the magistrate to calculate federal income taxes in shared custody arrangements by using the head-of-household filing status. 15 V.S.A. 653(1)(D)(iii). Father makes no argument as to why the magistrate erred by following the directives of the statute, and we will not search the record for errors a party fails to adequately explain. Harris v. Harris, 168 Vt. 13, 25 (1998). As to father's claim that the magistrate used the wrong table when she converted his pre-tax income, the record reveals that father never raised this argument below. He has therefore waived any claim of error on this point. Gus' Catering, Inc. v. Menusoft Sys., 171 Vt. 556, 559 (2000) (mem.).

The final matter before us concerns father's February 6, 2002 motion to strike portions of mother's brief, which mother filed pro se. Father's motion enumerates several instances in which mother's brief refers to matters outside the record on appeal. Materials which were not included in the original documents and exhibits on file in the trial court are not part of the record on appeal under V.R.A.P. 10(a) and cannot be considered by this Court. State v. Brown, 165 Vt. 79, 82 (1996). Father has specified which parts of the brief set forth matter outside the record on appeal, and this Court has not used those parts in rendering this decision. In view of our action, it is unnecessary to rule formally on the motion to strike.

The Windsor Family Court's July 18, 2001 order is affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

1. Both parties also filed motions to enforce the 1992 order, but the decision on those motions is not at issue in this appeal.

2. In his brief, father asserts that he suggested to the magistrate on the first day of hearing that the factors in 659 were relevant. We have reviewed the record father cites in support of his assertion, and we could find no such suggestion. Indeed, the transcript pages father points to are consistent with the family court's observation that father sought to use the child support guidelines only to calculate his support payments.