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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-488

MAY TERM, 2002

	}	APPEALED FROM:
	}	
Julie Pecor	}	Rutland Family Court
(Office of Child Support)	}	
	}	
v.	}	DOCKET NO. F138-3-93 RcDmd
	}	
Henry Bauer	}	Trial Judge: William D. Cohen
	}	
	}	

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

Defendant father appeals from a Rutland Family Court order upholding the magistrate's decision to modify father's monthly child support obligation from $50 to $659 based on the statutory income presumption in 15 V.S.A. § 662(b)(1). He claims no subject matter jurisdiction existed to modify his support obligation, and even if it did exist, the magistrate lacked grounds to enter a presumptive support amount under the statute. We disagree, and therefore affirm.

On January 13, 2000, plaintiff mother, with the assistance of the Office of Child Support ("OCS"), filed a motion to modify a March 15, 1994 order requiring father to pay $50 per month to support the parties' two minor children. Her motion asserted that more than three years had passed since the existing order was issued. On April 11, 2000, the magistrate held a hearing on mother's motion. Although he was given notice to do so, father, who is self employed, did not produce certain business records from January 2000 to April 2000, the period of time immediately following his last income tax filing, prior to or during the April 11 hearing. The magistrate therefore ordered father to provide copies of those records to mother and OCS by April 21, 2000. The magistrate warned father that she would prepare a modified child support order using the income imputation allowed by 15 V.S.A. § 662(b)(1), effective April 22, 2000, if father did not comply with the discovery order by the deadline. Imputing income pursuant to the statute would result in a payment obligation of $659 per month, the magistrate observed.

By April 22, 2000, father produced a one-page profit and loss statement of his business. Believing the document failed to satisfy the magistrate's order, OCS asked for a modified child support order using the statutory presumption. Father in turn asked the magistrate to clarify her April 11, 2000 discovery order. The magistrate convened a hearing on the matter on July 10, 2000. At the hearing, the magistrate found father's submission inadequate. The magistrate explained that her prior order directed father to produce the books and records documenting his income and expenses for each month from January 2000 through April 2000, rather than the summary sheet he submitted. The magistrate again ordered father to produce his books and records no later than 4:30 p.m. on July 17, 2000. She explained that her order meant that he must provide the documentation to mother and OCS in hand by that time; mailing it on July 17 to either party would not satisfy her directive. OCS prepared a written order reflecting the magistrate's bench order, which the magistrate signed on July 17.

On July 21, 2000, OCS filed an affidavit recounting father's failure to comply once again with the magistrate's discovery order by the July 17 deadline. The affidavit stated that father provided his profit and loss statement again, as well as a document purporting to detail the statement, but explained that the records from which the figures on the statement and detail derived were not produced as required by the discovery order. In addition, OCS stated that it did not receive the documents until July 18, one day after the ordered deadline. OCS renewed its request for a modified support order using the income imputation authorized by § 662(b)(1).

On September 19, 2000, the magistrate addressed the merits of mother's motion to modify and the outstanding discovery issue. Father did not appear at the hearing, although his attorney attended. Father's attorney told the magistrate that father believed the documents he submitted to OCS and mother complied with the discovery order. The magistrate found that father failed to comply with the latest order because he submitted the documents too late and what he submitted was inadequate. The magistrate pointed out that even if the information father produced complied with her order, father was not present at the hearing to testify in support of it or to answer any questions the magistrate or other parties might have about it. She considered father's conduct to be a blatant defiance of her prior orders, and consequently issued a modified order, effective April 22, 2000, requiring father to pay $659 per month in support pursuant to the statutory presumption in § 662(b)(1). Father appealed the decision to the family court, which found no abuse of the magistrate's discretion and denied father relief. A timely appeal to this Court followed.

Father first challenges the modified order on the grounds that the magistrate did not have subject matter jurisdiction. He argues that the magistrate failed to make findings on the jurisdictional prerequisite that a real, substantial, and unanticipated change of circumstance existed to entertain mother's motion. See 15 V.S.A. § 660(a) (child support order may be modified upon a showing of real, substantial, and unanticipated change of circumstances); Harris v. Harris, 168 Vt. 13, 17 (1998) (a change of circumstances is a jurisdictional prerequisite to modification of a child support order). Alternatively, father argues, less than three years had elapsed since the most recent child support order was issued, and therefore the magistrate could not waive the jurisdictional change-of-circumstances requirement under 15 V.S.A. § 660(a). We do not address father's first argument because we conclude that the record shows the magistrate had authority to waive the change-of-circumstances requirement under § 660(a).

Section 660(a) allows modification of a child support order if the movant shows the existence of a real, unanticipated, and substantial change of circumstances. 15 V.S.A. § 660(a). The statute allows the magistrate to waive that requirement if the child support order "has not been modified by the court for at least three years." Id. In this case, the order mother sought to modify was entered in March 1994. The magistrate was therefore permitted to waive the change-of-circumstances requirement and determine whether a modification was warranted.

Father argues that the relevant order from which to calculate the three year period was a June 22, 1998 order enforcing the 1994 child support order. Father states that although his support obligation did not change as a result of the 1998 order, the order nevertheless modified the 1994 order and thus the waiver provision of § 660(a) does not apply. He suggests that any other interpretation of the statute would lead to an absurd result. On the contrary, it is father's reading of the statute that would lead to an absurd result, and we therefore decline to interpret the statute as he suggests. Roddy v. Roddy, 168 Vt. 343, 347 (1998) (Court will interpret statute to avoid absurd results unintended by the Legislature). Under father's reading, an obligor parent's recalcitrance in paying support is rewarded by making it more difficult for the obligee parent to have a support order reviewed and modified for the children's benefit. An order enforcing an existing child support obligation does not qualify as a modification order contemplated by the waiver provision of § 660(a).

Father next takes issue with the magistrate's finding and conclusion that he failed to comply with her discovery orders. He argues that the magistrate's error invalidates her use of the statutory presumption regarding his income to arrive at the new $659 support obligation. See 15 V.S.A. § 662(b)(1) (where a parent fails to provide documentation supporting the parent's income and assets affidavit required by § 662(a), court is authorized to impute gross income to noncomplying parent equal to 150 percent of the most recently available annual wage or the gross income indicated by the evidence). We will not set aside the magistrate's findings unless they are shown to be clearly erroneous. Tetreault v. Coon, 167 Vt. 396, 399-400 (1998). Moreover, once the jurisdictional threshold has been met, the magistrate has discretion in deciding whether to modify the prior child support order. C.D. v. N.M., 160 Vt. 495, 499 (1993).

We find the magistrate's finding and conclusion regarding father's noncompliance well supported in the record and not clearly erroneous. The magistrate had before her both OCS's sworn affidavit and the documents father contended complied with the magistrate's directive to produce documents supporting father's profit and loss statement. Father was repeatedly put on notice that the magistrate wanted original receipts, bills, ledger entries, and other documents evidencing the numbers he used to prepare his profit and loss statement. Father repeatedly disregarded the magistrate's clear mandate. Moreover, even if father had timely produced the required information, he failed to appear at the merits hearing to testify about the documents he submitted. The facts of this case fall squarely within the purpose of the imputation provision of § 662(b). Thus, the magistrate did not abuse her discretion in utilizing the statutory

consequences for father's dilatory conduct, namely to impute income to him pursuant to § 662(b)(1) and enter a modified order accordingly.

Affirmed.

BY THE COURT:

_____
James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice