

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-164

AUGUST TERM, 2003

	}	APPEALED FROM:
	}	
Nancy Eastman	}	Windsor Family Court
	}	
v.	}	DOCKET NO.217-6-01 WrDmp
	}	
Lynn Fisher	}	Trial Judge: Amy M. Davenport
	}	
	}	

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

Father Lynn Fisher appeals from the family court= s final child support order. He argues that the court erred in calculating child support because: (1) it did not base its calculation on his monthly income as of the date indicated in a prior temporary order; and (2) it based its calculation on child-care expenses that lacked evidentiary support. We affirm.

Father and mother, Nancy Eastman, are the parents of Benjamin, 6, and Tanner, 3. The parties entered into a stipulated temporary child support order in September 2001, agreeing that father would pay mother \$1200 per month as a compromise figure until a hearing could be held. The temporary order provided that A [a]t the time of the final child support hearing[,] findings shall be made as to the current income at the time of this temporary order and a guideline calculation done based on those income findings.@ In August 2002, Magistrate Christine Doremus held a hearing to establish the final child support order. At the hearing, father, a veterinarian and the sole shareholder and officer of the Claremont Animal Hospital, Inc., testified that he determines his own salary in consultation with his accountant. Father stated that the animal hospital employs approximately twenty-eight people and it grossed over \$1.3 million dollars in 2001. Father reported wages of \$130,000 in 2000 and \$106,000 in 2001. He claimed that his income at the time of the hearing was approximately \$78,000 per year. At the hearing, mother testified that her child care costs were approximately \$600 per month. She did not provide any receipts for these expenses.

In her September 2002 order, the magistrate determined that father should pay \$1,468.11 per month in child support. The magistrate found father= s monthly salary to be \$8,833.33, what he had earned in 2001, and used that figure in determining the proper amount of child support. The magistrate did not find father= s testimony about his diminished salary credible and concluded that he was voluntarily underemployed pursuant to 15 V.S.A. ' 653(5)(A)(iii). The magistrate found mother= s testimony about her child-care expenses credible and used these figures in her child support worksheets. Father appealed to the family court, arguing that the magistrate erred in failing to base its child support award on his income as of September 2001, and in accepting mother= s claimed child care expenses absent corroborating documentary evidence. The family court affirmed the magistrate= s order, concluding that the magistrate= s findings were supported by the record and she had acted within her discretion in determining father= s income. This appeal followed.

Father first argues that the family court erred by ignoring the parties= stipulation to assess his income as of September 2001, the date of the temporary order. Father asserts that the court abused its discretion by basing its child support award on an A arbitrarily assigned income figure.@ The family court rejected this argument, concluding that the temporary child support order did not require a narrow focus on September 2001, and the magistrate= s determination of

father= s income was fully supported by father= s 2001 tax return.

On appeal, father bears the burden of showing that there is no reasonable basis to support the family court= s child support award. Belanger v. Belanger, 148 Vt. 202, 204 (1987). We will find an abuse of discretion only where the trial court fails to exercise its discretion, or exercises it for clearly untenable reasons, or to an extent that is clearly unreasonable. Id. We will not set aside the trial court= s findings of fact A unless they are clearly erroneous, taking the evidence in the light most favorable to the prevailing party and excluding the effects of modifying evidence. @ Id. We will not set aside the court= s conclusions if they are supported by its findings. Begins v. Begins, 168 Vt. 298, 301 (1998).

The family court did not abuse its discretion in affirming the magistrate= s child support award because the court= s assessment of father= s income is supported by the record. The family court determined that the parties= temporary order did not require a narrow focus on September 2001 and that the magistrate acted within her discretion in relying on father= s 2001 tax return. The magistrate= s decision to rely on father= s reported earnings in 2001, rather than his income as of September 2001, was based on her assessment of father= s credibility. The magistrate rejected father= s claim that he was earning \$78,000, as indicated by his pay stubs, finding it disingenuous that he would be earning less than one of his newly-hired veterinarians. The magistrate noted that father determined his own salary and his veterinary practice had grossed over \$1.3 million dollars in 2001. The magistrate rejected father= s assertion that his income had declined because he suffered a heart attack in 1998, questioning his decision to cut back on work in 2001, once the parentage action had been filed. Based on these assessments of father= s credibility, the magistrate concluded that father was voluntarily underemployed and that father= s 2001 tax return offered a reliable assessment of father= s income. The magistrate= s factual findings are supported by the record, and we will not disturb her assessment of father= s credibility on appeal. See Begins at 301 (province of trial court to determine credibility of witnesses and weigh evidence). Father has failed to demonstrate that the family court abused its discretion in affirming the magistrate= s award. See Belanger, 148 Vt. at 204.

Father next challenges the family court= s affirmance of the magistrate= s finding that mother incurred \$600 per month in child-care expenses. He argues that the court should not have accepted mother= s testimony about her expenses in the absence of documentary support. The family court rejected this argument after concluding that the magistrate= s finding was supported by the record. We agree. As the family court pointed out, mother testified that her average monthly child care expenses were \$600. She filed income and assets affidavits in September 2001 and August 2002 that state the same child care costs. The magistrate found mother= s testimony credible, and the family court affirmed this finding on appeal. Given the trial court= s unique position to assess the credibility of witnesses and weigh the evidence, we will not set aside its findings where, as here, they are supported by the evidence. Begins, 168 Vt. at 301.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

