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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-453

AUGUST TERM, 2007

Patricia W. McCormick	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Michael W. McCormick	}	
	}	DOCKET NO. 177-3-98 Cndm
		Trial Judge: A. Gregory Rainville

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

Father appeals the family court's decision upholding the magistrate's child-support order. We affirm.

The parties were married in 1995, separated in 1997 shortly after the birth of their only child, and divorced in 1999. The final divorce order awarded mother sole legal and physical parental rights and responsibilities subject to father's parent-child contact on alternate weekends. Mother moved to Massachusetts to live with her mother, and father remained self-employed in Vermont. Under the 1999 order, father was obligated to pay mother $390 per month in child support. In June 2004, the magistrate denied father's motion to reduce his monthly child-support obligation and ordered father to make additional monthly payments to cover arrears, which included reimbursement for the child's medical expenses and health coverage. On appeal from that order, the family court affirmed the magistrate's denial of father's motion to modify, but vacated the requirement that father reimburse mother for the child's medical-insurance premiums and unreimbursed medical expenses. The court remanded the matter for recalculation of the child-support arrearage. While the case was on remand, mother filed a motion to increase father's child-support obligation. Following three days of hearings, the magistrate increased father's monthly child-support obligation to $811 and established a revised outstanding arrearage. The magistrate also required father to pay for mother's attorney's fees and to reimburse mother for one-half of the child's health-insurance premiums and medical expenses. On appeal, the family court affirmed the magistrate's order.

In this appeal, father raises multiple issues challenging the magistrate's evidentiary rulings and findings, as well as the magistrate's authority to reinstate father's obligation to pay for part of the child's unreimbursed medical expenses and insurance premiums. Father first argues that the magistrate erred by admitting documents that mother submitted on the date of the child-support hearing without first making them available to him. He complains that the magistrate had already excluded, as untimely filed, documents he presented at the hearing, but then admitted mother's documents over his objection even though they were not filed by the discovery deadline. Upon review of the record, we find no abuse of discretion in admission of mother's documents. The magistrate ordered the parties to submit financial documents that they intended to introduce into evidence ten days before the hearing. Mother complied with that order by filing a fully completed

Form 813 Financial Affidavit with attached pay stubs and income verification. Father, however, failed to provide any documents as ordered. On the first day of the hearing, the magistrate refused to allow father to submit financial documents at the last minute. During mother's direct examination, the magistrate admitted two letters, one that mother had written applying for health insurance and the other that her former attorney had written to father's former attorney concerning termination of the child's health-insurance coverage. Noting that the letters were not the equivalent of financial forms, the magistrate ruled that they would be admitted and given whatever weight was reasonable. Considering that one of the letters was sent to father's attorney and the other was merely an application for health insurance with questionable evidentiary weight, there was no prejudice in the admission of the documents. The other documents father complains about were admitted at a later hearing and contained primarily supplemental information, including summaries of medical expenses and income, as well as updated pay stubs. We see no abuse of discretion or prejudice in the admission of such documents.

Next, father argues that the magistrate abused its discretion by awarding unproven expenses. We disagree. While acknowledging that mother's evidence was vague as to how she shared expenses with her mother, the magistrate noted that her claimed living expenses were low. Further, as the family court pointed out, because the parties were not asking the magistrate to deviate from the child-support guidelines, mother's living expenses were not particularly relevant. Regarding mother's claimed medical expenses for the child, as the family court stated, there was evidence in the record to support the magistrate's findings and conclusions, notwithstanding the existence of conflicting evidence. As the family court also noted, the magistrate took into account mother's credibility and accepted mother's testimony and evidence indicating that she made certain payments to cover the child's unreimbursed medical expenses and medical-insurance premiums. There is no abuse of discretion. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (stating that the trier of fact is "in a unique position to assess the credibility of the witnesses and the weight of the evidence presented"). We also reject father's argument that because the family court had vacated a previous order requiring him to reimburse mother for the child's medical expenses and insurance premiums, the magistrate was precluded, on remand, from reinstating that obligation. As the family court pointed out, the basis for the earlier family court order striking father's obligation to pay those expenses was that mother had failed to provide father with any notice or opportunity to respond to the claimed expenses. The family court did not preclude mother from raising the issue anew on remand, which she did, and father took advantage of his opportunity to cross-examine her with respect to her claims.

Father also argues that because his income was in dispute, the magistrate erred by taking judicial notice of previous family court findings establishing his income at $10,000 per month. We find no error. In a June 2004 order, the magistrate found that father had registered his car business through his wife's name, and that she had indicated on financial documents an income of $10,000 per month as owner of the business. The magistrate found this figure to be the best evidence of father's income, noting that a bank had approved a $175,000 mortgage with monthly payments of $1500 based on that income. On appeal, in its April 2005 decision, the family court concluded that the evidence supported the magistrate's finding with respect to father's income. On remand, after noting father's failure to provide any credible financial documents regarding his income and citing mother's testimony that father was earning nearly $100,000 annually when she was his bookkeeper, the second magistrate concluded in a January 2006 order that there was no basis to alter father's previously established income of $10,000 per month. The magistrate concluded that because father had failed to demonstrate that his income had changed since the prior proceedings, the best evidence indicated his income was $10,000 per month. See 15 V.S.A. § 662(b) (failure to provide an affidavit

of income creates a presumption that noncomplying parent's income is the greater of one and one-half times the average wage for all employment or "the gross income indicated by the evidence"). The family court concurred that the magistrate was justified in relying on father's previously determined income, given his failure to provide evidence establishing his current income.

Given father's failure to provide reliable new evidence of his income or to explain the discrepancy between his lifestyle and his claimed income, the magistrate did not err in relying on his previously established income. Nor do we find error to the extent that the magistrate was taking judicial notice of prior findings. See Mullin v. Phelps, 162 Vt. 250, 254 n.1 (1994) (noting that family court took judicial notice of findings made in previous family court proceedings involving the parties). The magistrate explicitly indicated at the October 2005 hearing that he would take judicial notice of findings from the previous child-support proceedings, and father did not object; indeed, father later asked the magistrate to take judicial notice of other findings from the earlier proceedings. See Condosta v. Condosta, 142 Vt. 117, 120 (1982) (indicating that court may take judicial notice of findings from prior proceedings at request of party). Moreover, the magistrate's reliance on previous family court findings did not demonstrate bias, as father claims. Nor was the magistrate compelled to defer to the family court on appeal with respect to findings on father's income, as father claims.

We also reject father's argument that the magistrate erred by allowing mother to testify on redirect that father had earned almost $100,000 annually years earlier. Mother testified on direct examination that when she worked as a bookkeeper for father's business, she became aware of his income. Father testified later and had an opportunity to rebut mother's testimony. In any event, the magistrate had already taken judicial notice of prior findings concerning the same testimony. We also reject father's argument that the magistrate erred by allowing mother's attorney to provide an explanation for an expense listed in mother's financial affidavit. As the family court stated, although the attorney's explanation could not be considered as evidence, it was not material because neither party was asking the magistrate to deviate from the child-support guidelines.

Finally, father argues that the magistrate erred in awarding attorney's fees to mother, given the lack of updated findings on his financial status. We find no merit to this argument. The reason that the magistrate did not have reliable updated information on father's financial status is because of father's refusal to provide such information. The magistrate considered the parties' respective needs and acted within its discretion in requiring father to pay mother's attorney's fees.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice