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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-471

MARCH TERM, 2004

Jennifer Lucia and Office of Child Support	APPEALED FROM:
	Addison Family Court
v.	DOCKET NO. 130-6-00 Andm
Jeremy Young	Trial Judge: Helen M. Toor

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

Appellants Jennifer Lucia and the Office of Child Support (OCS) appeal from an order of the Addison Family Court affirming the family court magistrate= s denial of their motion to enforce a child support order. We affirm.

On August 25, 2000, Lucia and defendant Jeremy Young stipulated to a child support order for their daughter. The order required Young to pay $361.10 per month in support, plus $100 per week to satisfy the arrearage that had accrued by that time. The magistrate= s order required the arrearage payment to be made through wage withholding. If the money was not withheld from Young= s wages, however, Young was ordered to send his weekly payment to OCS. Through a motion filed with the family court in late January 2003, Lucia sought enforcement of the August 2000 order, alleging that Young had not paid support since December 2002. She asked that the court require Young to participate in a Department of Employment and Training (DET) work program because he was not employed at the time and was receiving public assistance.

On March 20, 2003, the family court magistrate took evidence on Lucia= s motion, which OCS joined. Young did not appear, and only Lucia and a paralegal from OCS testified. Based on the evidence at the hearing, the magistrate found that as of February 28, 2003, Young owed $3,453.43 in back support. She also found that Young had paid $100 directly to Lucia for the child= s benefit not long after the child= s birth. Because the payment came on no particular occasion, was in the amount set forth in the August 2000 order on Young= s arrearage, and was for the child= s benefit, the magistrate offset the arrearage by the $100 payment and entered judgment for Lucia in the amount of $3,353.43.

The magistrate denied the request to make Young participate in a DET program. Although there was testimony that Young had received public assistance, the magistrate was not presented with any evidence on the type of assistance Young had been receiving, his health status, or whether he was in a means-tested public assistance program at the time of the hearing. The magistrate concluded that she had insufficient evidence to require Young to participate in a DET employment program. After their unsuccessful appeal of the magistrate= s decision to the family court, Lucia and OCS appealed to this Court.

On appeal, Lucia and OCS first argue that the magistrate incorrectly imposed on them the burden to prove the reasons for Young= s default before ordering him to engage in participation in the DET program in order to find work. Essentially, Lucia and OCS contend that the magistrate (and family court thereafter) was bound to grant their motion, including the DET participation requirement, once they had established that Young was in default. Citing Orr v. Orr, 122 Vt. 470 (1962), Lucia and OCS argue that Young was obliged to appear and explain his circumstances to the

magistrate to avoid the order Lucia and OCS sought. See Id. at 474 (if child support obligor= s circumstances make compliance impossible, the obligor has the burden to A establish facts to justify his failure to comply@). We disagree.

Under 15 V.S.A. ' 658(d), the magistrate has discretion to order the parent in default of his or her support obligation A to participate in employment, educational, or training related activities if the court finds that participation in such activities would assist in addressing the causes of default.@ Thus, before ordering Young to seek help from DET, the magistrate had to find that a DET program would assist Young in ameliorating the causes for his nonpayment. Without evidence on the reasons for Young= s noncompliance with the August 2000 order, the magistrate lacked the factual foundation upon which to exercise her discretion under ' 658(d) to grant the relief the motion for enforcement sought.

We do not agree with Lucia and OCS that the magistrate= s order B and the family court= s affirmance of it B altered the burden of proof in child support enforcement actions. Indeed, based on the evidence Lucia and OCS presented, the magistrate found Young had defaulted on his obligation, and she entered judgment for Lucia on the arrearage Young had accrued as of the hearing date.

Lucia and OCS next argue that it was error for the magistrate to offset Young= s arrearage by the $100 payment he made directly to Lucia for the benefit of their child. The magistrate found that the payment was made to comply with the August 2000 child support order to which Young stipulated. We will reverse on this issue only if the finding is clearly erroneous. Gilbert v. Davis, 144 Vt. 459, 461 (1984). We find no clear error here. Lucia testified that the $100 was a gift because it came directly to her instead of OCS as the August 2000 order required and was accompanied by a toy and baby wipes. The court was not persuaded by her testimony, however, and we do not review credibility and evidentiary weight determinations made by the fact finder. Id. Considering that Young= s payment was in the amount of the August 2000 order on his arrearage, was paid for the child= s benefit, and was paid for no particular occasion, we cannot say that the magistrate clearly erred by finding that Young intended the payment to partially satisfy the judgment entered on his arrearage.

Lucia and OCS also argue that in the absence of Lucia= s agreement to credit the $100 payment towards the money Young owes her, the magistrate had no authority to credit his arrearage by the amount of the payment. In support of their argument, Lucia and OCS cite McCormick v. McCormick, 159 Vt. 472 (1993). In that case, the Court rejected an obligor parent= s argument that payments he made voluntarily for the benefit of his children must be credited towards his child support debt. Id. at 478. Lucia and OCS construe McCormick to mean that the obligee parent must agree to treat an obligor parent= s voluntary payments as child support or the payments are considered gifts by law. We disagree that McCormick stands for such a broad proposition. In contrast to this case, at issue in McCormick were payments made to third parties and not to the mother-obligee. Id. The Court= s holding in McCormick ensures that a parent cannot avoid paying child support to the obligee parent by paying third parties for goods and services that benefit the children. The holding in McCormick has no relevance here because the payment at issue went directly to Lucia.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

Paul L. Reiber, Associate Justice