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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-543

OCTOBER TERM, 2006

Julie Robare	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
William J. Rock	}	
	}	DOCKET NO. 454-6-97 Cndm

Trial Judge: Brian J. Grearson

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

Father appeals decisions of the magistrate and family court denying his motions to set aside and, in the alternative, to modify his child support obligation. We affirm.

This matter, which began in 1997 as a parentage action, has a tortured procedural history. The record indicates that father was personally served at his home in Florida in April 1998 with the parentage complaint and summons, but did not appear for the December 1998 hearing. Father was sent notice by first-class mail of

a scheduled child-support hearing, but the notice did not conform with the requirements of V.R.F.P. 4(b)(2)(B). A child support order issued on January 20, 1999 by default judgment. The support obligation was calculated using a statutory presumed income for father. The result was a guideline calculation of $1040 per month in support of the parties= three children, who were born in January 1981, September 1988, and December 1995.

Father was not served with a copy of the child support order until August 3, 2000. The next day, he filed a motion to modify the order based on a claimed disability and consequent lack of employment. Father participated by telephone from his home in Arizona in the October 2000 and March 2001 hearings on his motion. The magistrate treated father=s motion to modify as a motion for relief from the default judgment and reduced his support obligation to $606 per month. The magistrate arrived at that sum, in part, by imputing to father a monthly income of $1728. That sum represented one-half of father=s and his wife=s household living expenses, which father claimed were being paid by his wife. On appeal, the family court concluded that the magistrate correctly imputed income to father based on a portion of the monthly household expenses, but remanded the matter for the magistrate to consider whether one-half of the expenses was an appropriate reflection of father=s income, given that his step-daughter also lived with him and his wife. Father did not participate in the hearing on remand, however, and the magistrate kept the same support obligation absent any additional evidence from father. Father did not appeal that decision.

Further proceedings were held in 2002 in response to the Office of Child Support=s (OCS) attempts to determine and enforce child support arrears. Father did not appear at those proceedings, despite receiving notice by mail. Judgments were entered in favor of OCS for approximately $15,000 and mother for approximately $27,000.

In October 2004, father filed motions to set aside the original January 1999 child support order and, in the alternative, to modify his child support obligation. In a lengthy July 2005 decision following three days of hearings, the magistrate denied father=s motion to reopen, but granted in part his motion to modify. The magistrate concluded that father had failed to bring his motion to reopen within a reasonable period of time, as required by V.R.C.P. 60(b), but reduced father=s monthly child support obligation, retroactive to the date of father=s motion, from $606 to $459 because the parties= oldest child had reached the age of majority. The

magistrate concluded, however, that father had failed to demonstrate changed financial circumstances with respect to his claimed poor health, inability to work, and reduced support from his now ex-wife. Father appealed to the family court, which affirmed the magistrate=s decision, ruling that (1) the issue of whether father had been properly served with respect to the original child support proceeding was res judicata, and Rule 60(b) is not a substitute for a timely appeal; (2) father failed to meet his burden of demonstrating either that his poor health prevented him from working or that he was no longer receiving support from his ex-wife; (3) the issue of father=s past income is res judicata; and (4) in any event, the magistrate properly imputed income to father based on his living expenses, considering his lack of evidence and credibility regarding his financial circumstances. On appeal, father makes several arguments in support of his position that the family court should have granted his motions.

Father first argues that the family court should have set aside the original child support order because he was not served with notice of the proceeding in conformity with the rules of procedure and thus had no opportunity to participate in the proceeding. The problem with this argument is that it does not respond to the magistrate=s and family court=s determinations that father was given a hearing on his motion to set aside the default judgment, that he participated in the hearing and obtained a reduced child support obligation, that he failed to appeal from the magistrate=s final order following the hearing, and that he did not challenge the underlying child support order within a reasonable period of time. As the magistrate and family court concluded, Rule 60(b) may not serve as a substitute for a timely appeal, Richwagon v. Richwagon, 153 Vt. 1, 3 (1989), and father acted unreasonably in failing to pay child support for years before renewing his efforts to set aside the original child support order, see V.R.C.P. 60(b) (motion must be made within reasonable time). We find no abuse of discretion in these determinations. See Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 149 Vt. 365, 368-69 (1988) (test for determining whether trial court could find that motion for relief from judgment had not been filed within reasonable time is whether court exercised sound discretion given all factors and circumstances of case; trial court=s decision will be disturbed only upon showing of abuse of discretion).

Father also raises arguments challenging the family court=s 1998 parentage order. These issues were not raised in any of the hearings before the magistrate or the family court and therefore have not been preserved for

appeal. See Pion v. Bean, 2003 VT 79, & 45, 176 Vt. 1 (issues not raised before trial court are not preserved for appeal).

Next, father challenges the magistrate=s and family court=s continued imputation of income to him based on his household expenses. Again, we find no error. The magistrate and family court have wide discretion in evaluating the relevant factors for determining whether to impute income to the parties in a child support proceeding. See Tetreault v. Coon, 167 Vt. 396, 402-03 (1998). Implied in these factors is a policy of allowing imputed income based on living expenses. Id. at 403. In determining child support, the family court may impute income to a parent equal to the parent=s expenditures if the court is unable to obtain a true picture of the parent=s income and assets. McCormick v. McCormick, 159 Vt. 472, 477 (1993). Here, as in McCormick, the magistrate found father not to be credible in his claims regarding his finances and how he supports himself. Under these circumstances, it was the prerogative of the magistrate to consider the credibility of the witnesses and to impute income to father based on his living expenses. See Schipper v. Quinn, 2006 VT 51, & 14 (mem.) (family court has power and discretion to consider credibility of witnesses). Further, the record supports the magistrate=s determination that father failed to demonstrate that his divorce from his wife substantially changed his living situation. Indeed, the evidence indicated that father and his ex-wife were still living together, that the ex-wife was still providing support to father, and that father=s living situation and financial circumstances had not changed.

Father misses the point when he complains that the family court should not have based its decision on his ex-wife=s failure to provide details of her personal finances. He had the burden of demonstrating changed circumstances, and he failed to do so. Apart from his eldest child reaching majority, he failed to demonstrate to the magistrate that his living situation and personal finances had substantially changed from the time of the last child support order, so as to justify a reduction in his child support obligation. In the end, neither the magistrate nor the family court could reconcile father=s testimony concerning his income with his living situation and household expenses.

Finally, father contends that the magistrate erred by not finding that he was unable to work due to his poor

health. We find no error. The magistrate determined that father had failed to lay a proper foundation for the various documents he provided to support his contention that he was unable to work. Father contends that the magistrate should have admitted his evidence, but fails to cite to specific documents or explain how the court erred in refusing to admit those documents. The record supports the magistrate=s conclusion that father failed to meet his burden of demonstrating that his poor health prevented him from working.

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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Marilyn S. Skoglund, Associate Justice