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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-139

JANUARY TERM, 2018

Marthanne G. Carver v. Marcel A. Dionne*	}	APPEALED FROM:
	}	
	}	Superior Court, Orange Unit,
	}	Family Division
	}	
	}	DOCKET NO. 237-12-93 Oedm
		Trial Judge: Timothy B. Tomasi

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

Father challenges Office of Child Support's (OCS) use of trustee process to attach his retirement accounts to satisfy unpaid child support owed to mother. We affirm.

The parties were divorced in 1994. The final divorce order directed father to pay child support to mother for their daughter, then three years old, in accordance with Vermont child support guidelines. In March 1997, mother filed a motion for enforcement of child support, resulting in a new child support order requiring father to pay $407.66 per month to mother, as well as $75 per month toward an arrears judgment of $4,773.90.

In January 2015, mother filed a motion to enforce the 1997 child support order. Following a hearing, the magistrate issued a decision on March 23, 2016 granting the motion. The magistrate found that the motion was timely, and rejected father's arguments that it would be unfair to grant mother's motion to enforce. Father argued that the passage of time had made it impossible for him to prove that he made more payments than mother gave him credit for, that he had voluntarily assumed other financial obligations for the child and assisted mother in other ways in reliance on his assumption that he would not owe further child support, and that both parties had ceased exchanging tax returns as required by the 1997 order, thus precluding them from adjusting liability on an annual basis as contemplated by that order. The magistrate noted that father had nine months to seek discovery from mother and otherwise prepare his case but failed to do so. The magistrate found that, given father's prior career in banking and the contentiousness of the original child support proceedings, father was expected to have kept better records of his payments. Finally, the magistrate noted that father could have sought to enforce the requirement to exchange tax returns or sought a modification of child support, but never did so.

The magistrate entered judgment in mother's favor for $45,578.94, representing support owed by father as of the child's emancipation in 2009. The magistrate ordered father to pay $272 per month toward this amount based on his current income. Pursuant to 15 V.S.A. § 606(d), the magistrate imposed a surcharge calculated at an annual rate of six percent, but discharged the surcharge for the years of 2005 and 2006 because father had demonstrated his inability to pay during that period. The magistrate ordered the OCS to prepare a case accounting affidavit.

Along with its decision granting mother's enforcement motion, the magistrate issued a Form 802 Child Support Order. The order stated that a party could request assistance from OCS in enforcing the order. The order stated that if OCS "is or becomes involved in this case (based either on a current or future request for their services or otherwise), [it] may . . . use any lawful collection remedies to collect any outstanding balance from the Obligor, regardless of any repayment plan on any unpaid debts." The order also stated that it would be updated to include the statutorily required child support surcharge once OCS submitted the case accounting affidavit.

In May 2016, OCS filed a case accounting affidavit stating a total balance due from father of $75,457.31—which included a surcharge of $29,869.42. On May 17, 2016, the magistrate issued an updated Form 802 Order, which included the surcharge amount. Father did not appeal either the March 2016 or May 2016 child support orders.

In June 2016, OCS informed father by letter that it intended to initiate trustee process against him, and that it could do so even though father was making regular payments toward his arrearage. In July 2016, OCS initiated trustee process against father by issuing summonses to the trustees of his two tax-deferred retirement accounts. It notified father of its action in a letter dated July 15, 2016. The letter informed father of his right to request an administrative review if he disagreed with the summons to trustees. Father requested an administrative review. OCS reviewed the request and dismissed father's administrative review in a decision dated August 18, 2016.

Father appealed the dismissal of his administrative review to the family court magistrate on September 21, 2016. See 33 V.S.A. § 4108(d) (providing that final decisions of OCS are appealable to magistrate). He argued that the parties' child had reached the age of majority in 2009, that he was paying the $272 per month ordered by the magistrate, that mother had not sought enforcement of the most recent order or shown that she had a pressing need for the entirety of the funds, and that it would be unfair to force him to dissolve his tax-deferred retirement accounts to repay the arrearage. In November 2016, the magistrate denied father's request for relief, stating "[i]t was never the Court's intention to restrict Ms. Carver's remedies for recovering the $75,457.31 of arrears to the monthly payments of $272.00." The magistrate further stated that he was "not persuaded that equity justifies the relief sought by [father]." Father appealed to the superior court.

The superior court found that father's appeal of the administrative review was untimely, because it was filed more than 30 days after the decision was signed. The court also found father's appeal to be without merit because OCS was authorized by 15 V.S.A. § 799(b) to attach assets held by a trustee when the obligor owed more than one-quarter of the annual support obligation. Further, the magistrate's child support orders specifically contemplated that OCS could seek other remedies in addition to any repayment plan. The court rejected father's argument that the court's child support orders amounted to an "alternative payment arrangement" under 15 V.S.A. § 799(g) that superseded OCS's right to seek trustee process. Finally, it found that the magistrate did not abuse its discretion in denying equitable relief to father where the record showed significant noncompliance as well as father's ability to pay. Father appealed to this Court.

On appeal, father does not challenge the superior court's conclusion that his appeal of the administrative review was untimely or that OCS was legally authorized to attach his retirement accounts even though he was making payments in accordance with the child support order. Instead, he seeks equitable relief, arguing that it is unfair for OCS to attach his tax-deferred retirement accounts because he is nearing retirement and will suffer significant tax penalties if he is forced to liquidate the accounts to satisfy his debt. The magistrate determined that father was

not entitled to equitable relief from trustee process under the circumstances. Even if father's challenge to OCS's action were not untimely, we would find no abuse of discretion in the magistrate's ruling. See Shattuck v. Peck, 2013 VT 1, ¶ 10, 193 Vt. 123 (explaining that lower court's denial of equitable remedy is reviewed for abuse of discretion). As the superior court noted, father paid nothing to mother for years despite earning at least a modest income and saving more than $215,000 for his retirement. He never sought a modification of the original support order. By the time mother initiated her enforcement action, which she was legally entitled to do, father owed more than $45,000 in unpaid support. The magistrate therefore acted within its discretion in denying the relief requested by father.

Father's other arguments relate to the magistrate's calculation of the child support arrearage and surcharge in the March and May 2016 orders. He challenges the sufficiency of the evidence presented by mother as to his payment history and the amount owed, and argues that the court should have adjusted the child support due each year of the period in question based on the parties' incomes for that year. He also argues that the amount of the surcharge was unfairly inflated because mother did not file her enforcement action until the last possible moment. He asks that we remand the case to superior court for recalculation of the child support arrearage, elimination of the surcharge, and establishment of a repayment plan as the sole remedy for mother and OCS.

Father is precluded as a matter of law from raising these challenges because he did not appeal the March or May 2016 child support orders. His collateral attack on those orders is barred by principles of res judicata. As we have previously held in a similar context, "claims or issues that were raised, or should have been raised, in the original proceeding cannot be relitigated in the enforcement action." Stein v. Stein, 173 Vt. 627, 628 (2002) (holding that father was precluded from attacking constitutionality of child support guidelines in enforcement action where he failed to appeal original child support order). We therefore will not address these arguments in this appeal.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice