

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case Nos. 2006-0018 and 2006-0325, In the Matter of Jennifer L. Johnson and David W. Johnson, the court on March 6, 2007, issued the following order:**

Having considered the briefs filed by the parties and the record submitted on appeal, we conclude that oral argument is unnecessary for the disposition of this appeal.

The appellant, David W. Johnson, claims that the trial court erred in: (1) giving the appellee, Jennifer L. Johnson, ultimate sole decision-making authority concerning the parties' minor child; (2) refusing to admit and consider a DCYF ombudsman's report and corrected report; (3) increasing his child support obligation; (4) failing to appoint a guardian *ad litem* for the parties' child; and (5) holding a hearing on the appellee's motion for increased parenting time on October 31, 2005, when the motion was filed on October 21, 2005.

The appellant first argues that the trial court erred when it gave the appellee sole decision-making authority concerning the child. The trial court has wide discretion in matters involving custody. In the Matter of Kosek & Kosek, 151 N.H. 722, 724 (2005). The court's overriding concern in structuring custody and visitation matters is the best interests of the child. *Id.* We review the trial court's decision under our unsustainable exercise of discretion standard. *Id.* This means that we review only "whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." In the Matter of Lockaby & Smith, 148 N.H. 462, 465 (2002) (quotation omitted). Based upon our review of the record, we conclude that the trial court did not unsustainably exercise its discretion in this regard.

The appellant next argues that the trial court erred by declining to admit and consider a DCYF ombudsman's report and a corrected report. We review a trial court's decision on the admissibility of evidence under an unsustainable exercise of discretion standard. Figlioli v. R.J. Moreau Cos., 151 N.H. 618, 626 (2005). To meet this standard, the appellant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *Id.*

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The record reveals that the trial court admitted the final two pages of the report, which contained DCYF's recommendations. As to the body of the report, which concerned the child's medical records, the court stated: "I'm not interested in what DCYF thought when it reviewed the records because I'm going to do that myself, so . . . ." This was not an unsustainable exercise of discretion.

The appellant next contends that the trial court erred in increasing his child support obligation. The trial court increased the appellant's child support after finding that he was voluntarily underemployed and attributing income to him in the amount of \$2,000.00 per month.

Whether a party is voluntarily unemployed is a question for the fact finder, whose decision will not be disturbed on appeal if supported by evidence in the record. See In the Matter of Donovan & Donovan, 152 N.H. 55, 58-59 (2005). "Trial courts have broad discretion in reviewing and modifying child support orders." In the Matter of Forcier & Mueller, 152 N.H. 463, 464 (2005) (quotation and citation omitted). We will overturn a child support modification order "only if it clearly appears that the trial court engaged in an unsustainable exercise of discretion." *Id.*

Based upon our review of the record, we conclude that there is evidence to support the trial court's determination that the respondent was voluntarily underemployed and its decision to attribute income to him in the amount of \$2,000.00 per month. The trial court, therefore, did not unsustainably exercise its discretion by increasing the respondent's child support obligation.

The appellant next argues that the trial court erred in refusing to appoint a guardian *ad litem* shortly before the January 2006 hearing. We conclude that the trial court did not err in this respect. See In the Matter of Fulton & Fulton, 154 N.H. \_\_\_, \_\_\_, 910 A.2d 1180, 1186 (2006).

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The appellant's final issue on appeal is that the trial court erred in considering the appellee's motion for increased parenting time at the October 31, 2005, hearing when it was filed on October 21, 2005. As the appellant failed to raise this issue to the trial court, it is not preserved for our review. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004). Moreover, as it is not part of his notice of appeal, it is deemed waived. See Wilder v. City of Keene, 131 N.H. 599, 605 (1989).

Affirmed.

Broderick, C.J., and Dalianis, Duggan and Galway, JJ., concurred.

**Eileen Fox,  
Clerk**

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