

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELANIE JEAN GREGORY,
Appellant,
vs.
SPENCER MCCULLY GREGORY,
Respondent.

No. 53363

FILED

SEP 09 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court divorce decree. Fourth Judicial District Court, Elko County; Robert E. Rose, Senior Justice.

The parties were married in Nevada in 2004 and have two minor children. In March 2008, appellant filed a complaint for divorce in the district court. Respondent answered the complaint and filed a counterclaim, to which appellant replied. During the underlying proceedings, appellant was granted leave to file an amended complaint.¹

Following a bench trial, the district court entered a divorce decree. Relevant to this appeal, the decree awards the parties joint legal and physical custody of the children, alternating on a weekly basis. Pursuant to this provision, the district court found that under NRS 125B.070 and Wright v. Osburn, 114 Nev. 1367, 970 P.2d 1071 (1998), respondent's monthly support obligation was \$970 and appellant's was \$200; the district court then subtracted the lower of the two amounts from

¹It is unclear whether respondent filed an answer to the amended complaint, as appellant's appendix does not contain a copy of such a document. Appellant does not raise this issue on appeal, however.

the higher, per Wright, and arrived at the amount of \$770 for which respondent was responsible. Considering the NRS 125B.080(9) factors, the court offset respondent's child support obligation by half of the insurance premium that respondent paid for the children. Thus, the district court ordered respondent to pay \$612.76 per month in child support. The district court further found that respondent's previous obligation to pay \$1,422.03 per month was based on respondent's earnings at that time, which included overtime wages. Since that support order was entered, however, the district court found that circumstances had changed because respondent began a new job that would allow him additional time to spend with his children and further his career, but resulted in a lower salary. The district court specifically stated that respondent was not willfully underemployed as a result of changing jobs. This appeal followed.

On appeal, appellant contends that the district court abused its discretion: (1) in determining respondent's income when it failed to take into account respondent's overtime wages and relied on a different base salary for respondent even though respondent purportedly had not yet changed jobs, and (2) in calculating support under NRS 125B.070 and Wright.

Standard of review

Child support matters rest within the district court's sound discretion, Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996), and this court will not disturb a district court's support decisions absent an abuse of discretion. Edgington v. Edgington, 119 Nev. 577, 588, 80 P.3d 1282, 1290 (2003).

Support based on respondent's income

As this court has previously held, “appellants are responsible for making an adequate appellate record,” and “[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision.” Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). In Cuzze, the appellants failed to include, on appeal, their opposition to the summary judgment motion. Id. at 603-04, 172 P.3d at 135. This court concluded that without the opposition, certain other documents in the appendix had no context and this court could not affirmatively determine whether those documents had even been submitted to the district court with appellants’ opposition. Id. Based on this failure, the district court’s summary judgment was affirmed because it was “necessarily presume[d]” that the missing opposition presented insufficient evidence to avoid summary judgment. Id. at 604, 172 P.3d at 135.

Similar to the situation in Cuzze, in this case appellant has failed to provide the necessary documentation or evidence for our appellate review. Specifically, the appendix filed in this court is devoid of any evidence pertaining to respondent’s gross monthly income, which may have been available in a hearing transcript or respondent’s affidavit of financial condition. Thus, having considered the appellate record in light of the parties’ appellate arguments,² we conclude that appellant has failed

²On July 1, 2009, respondent submitted to this court a proper person fast track response. We direct the clerk of this court to file the response that was provisionally received on July 1, 2009.

to demonstrate that the district court abused its discretion by using an inaccurate gross monthly income for respondent to calculate his child support obligation.

Child support calculation

When the parties share joint physical custody on an equal basis, Nevada law is clear as to how the district court must calculate child support. Under the Wright v. Osburn formula, the court must calculate the child support based on the requisite percentage of each parent's gross income. 114 Nev. at 1368-69, 970 P.2d at 1072. The lower amount is then subtracted from the higher amount and the parent owing the higher amount in child support is obligated to pay the other parent the difference. Id. After determining the Wright offset, the court must determine whether it is necessary to apply the relevant statutory cap. Wesley v. Foster, 119 Nev. 110, 113, 65 P.3d 251, 253 (2003). The district court may then consider the NRS 125B.080(9) deviating factors. Id.; Wright, 114 Nev. at 1369, 970 P.2d at 1072.

Here, the district court found that, based on their respective gross monthly incomes, under the Wright formula, respondent was obligated to pay appellant \$770 a month in child support. This support amount falls below the statutory cap for two minor children; thus, the district court was not required to apply the statutory cap. The district court then considered the NRS 125B.080(9) deviating factors and reduced respondent's monthly obligation by one-half of the children's monthly medical premium that respondent was paying. The reduced child support amount owed by respondent was \$612.76 a month for two children.

Having considered the appellate record and the parties' briefs, we conclude that the district court did not abuse its discretion as it

complied with Nevada authority in setting respondent's child support obligation. As respondent's child support obligation fell within the Wright-offset for joint physical custody, the district court was not required to apply the relevant statutory cap.

Because we conclude that the district court did not abuse its discretion in determining respondent's gross monthly income or in calculating respondent's child support obligation, we

ORDER the judgment of the district court AFFIRMED.³

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Chief Judge, Fourth Judicial District
Hon. Robert E. Rose, Senior Justice
Surratt Law Practice, PC
Spencer McCully Gregory
Elko County Clerk

³Having considered appellant's remaining argument on appeal, concerning judicial ex parte communications, we conclude that that argument does not constitute a basis for reversing the district court's judgment concerning whether the district court abused its discretion in determining respondent's gross monthly income.