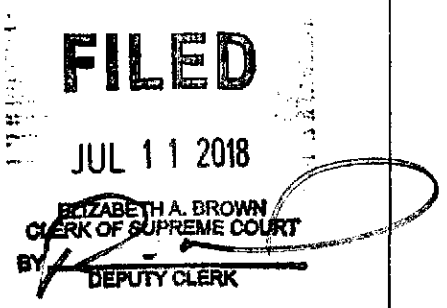
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JENNIFER STEPHENS,
Appellant,
vs.
ZACHARY STEPHENS,
Respondent.

No. 72071



ORDER OF AFFIRMANCE

Jennifer Stephens appeals from a district court divorce decree and subsequent order awarding attorney fees. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

As relevant here, the district court ordered that no child support be awarded and that Zachary be awarded attorney fees in an amount to be determined. The district court subsequently awarded Zachary $8,040 in attorney fees. Jennifer appeals from these orders.

Jennifer claims the district court abused its discretion in not awarding child support and argues the court should have at least awarded the statutory minimum of $100 a month pursuant to NRS 125B.080(4).[1] This court reviews a child support order for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

In joint custody situations, each parent's support obligation is calculated based on their gross incomes, with each parent obligated to pay a percentage of their income according to NRS 125B.070(1)(b). *Rivero v.*

[1]To the extent any NRS provisions cited herein have since been amended, all references in this order to the NRS are to the version in effect at the time the orders at issue were entered in this matter.

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Rivero, 125 Nev. 410, 437, 216 P.3d 213, 231-32 (2009) (citing *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998)). Then the difference between these amounts is calculated and the higher-income parent pays the lower-income parent the difference, although that amount may be adjusted using the NRS 125B.080(9) factors. *Id.* In utilizing this formula, the district court refused to impute income to Zachary, as requested by Jennifer, and imputed income to Jennifer instead. Jennifer takes issue with these decisions.

The parties' incomes

Jennifer requested that the district court impute income of $80,000 per year to Zachary based upon amounts he had made as a long haul truck driver. Although Zachary had lost his job as a long haul truck driver, the district court found he could make $21/hour if employed as a long haul truck driver and would need to work at least 80 hours a week to earn $80,000 annually. The court further found that, if Zachary was required to spend this much time on the road, he could not exercise joint custody and would likely not have frequent associations with the child. Zachary was able to earn $14 to $16/hour driving locally and he had sought jobs with higher pay rates but had not received any offers. Being self-employed, as he was at the time the order was entered, Zachary made approximately $18/hour and had the flexibility to spend significant time with the child without the need for daycare. Based upon all of these factual findings, the court concluded Zachary was not willfully underemployed and had not chosen an income source designed to avoid his support obligation. His income at the time was determined to be $3,000/month or $36,000 per year.

Here, the court's findings were supported by Zachary's testimony regarding his current income and employment history[2] as well as financial disclosure and tax returns. And because substantial evidence supports the district court's findings that Zachary was not willfully underemployed, *see Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) (defining substantial evidence), we conclude there was no abuse of discretion in the district court's refusal to impute income to Zachary. *See Wallace*, 112 Nev. at 1019, 922 P.2d at 543 (reviewing a child support order for an abuse of discretion); NRS 125B.080(8) (addressing willful underemployment); *Minnear v. Minnear*, 107 Nev. 495, 498, 814 P.2d 85, 86-87 (1991) (same).

Turning to Jennifer's income, the district court found that she could work as a Certified Nursing Assistant, but was only doing so for 7.5 hours per week even though she was capable of working full-time. As a result, the court found Jennifer willfully underemployed and that it was presumed she was underemployed for the purpose of avoiding her support obligation. It further found that she wanted to enroll in college full-time, that she had no intention of working more than 7.5 hours a week, that it appeared to be her expectation that Zachary should partially fund her education and living expenses, and that her position was indicative of an

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[2]While we were not provided the transcript from the trial in this matter, the parties' briefs make clear there was testimony presented on these matters. As the appellant, it was Jennifer's burden to provide the transcript. As such, we presume it supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (explaining that appellant is responsible for preparing an adequate appellate record and that "[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing [documents] support[ ] the district court's decision").

intention to avoid her support obligation. Based on these facts, the court found that Jennifer failed to rebut the presumption that she was underemployed for the purpose of avoiding her support obligation and imputed income to her of $2,296 based on her earnings of $13.25/hour and a 40 hour work week. *See Minnear*, 107 Nev. at 498, 814 P.2d at 86-87 (stating that "where evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support" and that the burden is on the underemployed party to show contrary intent). Our review of the record reveals that these findings are supported by substantial evidence, and thus we see no abuse of discretion in the district court's decision to impute income of this amount to Jennifer. *See Wallace*, 112 Nev. at 1019, 922 P.2d at 543 (reviewing a child support order for an abuse of discretion); NRS 125B.080(8) (addressing willful underemployment).

As we see no abuse of discretion in the court refusing to impute income to Zachary or imputing income to Jennifer, we likewise conclude there is no abuse of discretion in the court's application of the formula set forth above, to determine that Zachary's support obligation would be set at $126.72. *See Rivero*, 125 Nev. at 437, 216 P.3d at 232.

Downward deviation in support

The analysis does not end there however, as the district court found, based on the factors set forth in NRS 125B.080(9), that a deviation from this $126.72 amount to a $0 support award was warranted. In particular, the court reduced Zachary's support payment by $120 based on his payment of that amount into a college fund for the child, and then eliminated the remaining $6.72 based upon the fairly close incomes of the parties and, to a lesser extent, the fact that Jennifer was receiving food

stamps. Further, in the subsequent order regarding the award of attorney fees, the court, in response to arguments made by Jennifer, clarified that the agreement to contribute to the minor child's college fund necessarily impacted Zachary's ability to pay child support and specifically that Zachary simply was not able to pay child support. In doing so, the district court cited to NRS 125B.080(4) (setting the minimum child support award at $100 unless the court makes a written finding that the obligor is unable to pay) and stated that it took this inability to pay into consideration in setting child support.

Having reviewed the record and considered the parties arguments, we conclude substantial evidence supports the district court's determination that the payment to the child's college fund impacted Zachary's ability to pay and that, under the circumstances, a reduction below the $100 minimum support award was warranted. *See id.*; *Ellis*, 123 Nev. at 149, 161 P.3d at 242 (defining substantial evidence); NRS 125B.080(9)(k) (providing that, in considering whether to deviate from the statutory child support formula, the district court may consider whether a parent incurs any other necessary expenses for benefit of the child). Additionally, while we agree that reliance on Jennifer's receipt of public assistance to justify a deviation downward was improper, this was only a secondary basis for the deviation.[3] And here, the court properly concluded

[3]NRS 125B.080(9)(g) provides for the court to consider any public assistance paid to support the child when adjusting the amount of support of the child. However, neither the district court nor Zachary cite any authority supporting the consideration of public assistance received by the obligee parent to reduce the amount of support owed by the obligor parent. We further note that the record is not clear that the minor child was receiving public assistance as the order only mentions that Jennifer was receiving public assistance.

that the limited deduction of the remaining $6.72 was warranted based on the relative closeness of the parties' incomes. NRS 125B.080(9)(l). We therefore affirm the court's downward deviation resulting in no award of child support.

Attorney fees

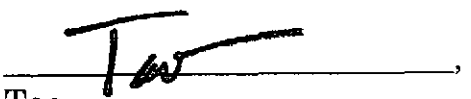
Jennifer also challenges the district court's award to Zachary of $8,040 in attorney fees pursuant to NRS 125.150(4) and NRS 18.010(2)(b). An award of attorney fees in divorce proceedings is reviewed for an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). When awarding attorney fees, the district court must consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). *Id.* at 623, 119 P.3d at 730. The district court generally may not award attorney fees absent authority under a statute, rule, or contract. *Id.* Additionally, in family law matters, such as the instant case, the district court must take into consideration the disparity in income of the parties when awarding fees. *Id.*

Here, the district court cited two statutory bases for awarding attorney fees: NRS 125.150(4) (allowing an award of attorney fees to either party in a divorce action) and NRS 18.010(2)(b) (allowing an award of attorney fees when claims or defenses are brought or maintained without reasonable grounds or to harass the prevailing party). In deciding to award fees to Zachary, the district court specifically noted that Jennifer had been unreasonable throughout the course of the litigation and set forth numerous specific instances while noting that list was not exhaustive. In setting the amount of fees, the district court addressed each *Brunzell* factor and set forth that it took into consideration the disparity in income between Jennifer and Zachary when making its fee award. The district court

ultimately concluded that an award of fees accrued since the entry of the parties' first agreement was warranted and awarded Zachary $8,040 in fees. After review of the arguments and record on appeal we conclude that the district court did not abuse its discretion in awarding attorney fees and therefore affirm the district court's orders in this respect.

It is so ORDERED.[4]


_____, C.J.
Silver


_____, J.
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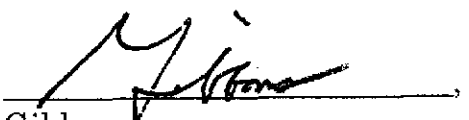
_____, J.
Gibbons

cc: Hon. Thomas W. Gregory, District Judge
Jennifer Stephens
Kathleen B. Kelly
Douglas County Clerk

[4]To the extent they are not expressly addressed in this order, we have considered Jennifer's remaining arguments and conclude they do not provide a basis for relief. Additionally, in light of our disposition of this matter, we deny, as moot all remaining requests for relief pending in this matter.