

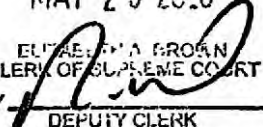
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JESUSA E. CONTE,
Appellant,
vs.
WAYNE D. CONTE,
Respondent.

No. 79922-COA

FILED

MAY 26 2020

ELIZABETH A. GROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Jesusa E. Conte appeals from a post-divorce decree order regarding a claim of exemption from a writ of execution. Eighth Judicial District Court, Family Court Division, Clark County; Sandra L. Pomrenze, Judge.

The parties were divorced by way of a decree of divorce entered in 2012. Pursuant to the decree, as relevant here, respondent Wayne Conte was required to pay Jesusa \$1000 per month in alimony for 15 years. After Wayne fell behind in his payments, Jesusa obtained a judgment as to the arrears and then served a writ of execution on Wayne's bank account via the Henderson Constable's office, resulting in approximately \$16,000 being garnished.¹ Wayne filed a claim of exemption from execution, asserting that the funds in his account are exempt pursuant to NRS 21.112. Jesusa timely filed her objection to the claim of exemption, and the matter was set for an evidentiary hearing.

¹Because this court granted a stay of the district court's order on January 30, 2020, those funds are currently still being held by the Henderson Constable's office.

At the time set for the evidentiary hearing, the district court noted that it was undisputed that Wayne does receive exempt income; namely, his monthly social security benefit and monthly disability payment. The court correctly noted that the evidentiary hearing was set to determine whether the \$16,000 that was garnished could be traced to Wayne's exempt funds or was non-exempt and, therefore, subject to garnishment. But, despite it being the time for an evidentiary hearing, the district court did not allow the parties to present evidence and did not take sworn testimony at the hearing.² Rather, it appears that the district court was inclined to try to get the parties to compromise by requiring Wayne to set up a separate bank account for his exempt funds and to allow Jesusa to garnish from the bank account that included non-exempt funds. Additionally, the district court wanted Jesusa to agree that the \$16,000 could be released to Wayne. Jesusa had no opposition to Wayne opening a second bank account for his exempt funds in the future, but argued that the \$16,000 was non-exempt and, therefore, she was entitled to those funds to partially satisfy her judgment. Ultimately, the district court concluded that it could not determine whether the \$16,000 was garnished from exempt or non-exempt funds and ordered the funds released to Wayne. The court also ordered Wayne to set up the second account as discussed at the hearing. This appeal followed.

On appeal, Jesusa challenges the district court's order releasing the \$16,000 to Wayne. Specifically, Jesusa argues that the district court improperly placed the burden on Jesusa to demonstrate the funds were non-exempt, rather than requiring Wayne to demonstrate the funds were

²We note that toward the end of the hearing the district court had Wayne placed under oath, but no testimony was elicited.

exempt, pursuant to NRS 21.112. Additionally, Jesusa asserts that the district court erred in failing to release the funds to Jesusa when Wayne failed to demonstrate that the funds were exempt, in failing to apply the exhaustion standard, and in failing to allow the evidentiary hearing to proceed.

When a judgment creditor attempts to enforce a judgment, as relevant here, NRS 21.090 and 21.105 exempt certain property from execution. And if a judgment creditor levies property to satisfy his or her judgment, NRS 21.112 provides the manner in which the judgment debtor may claim an exemption of that property. If the judgment debtor claims an exemption and the judgment creditor objects, the district court must hear the objection. NRS 21.112(6). At the hearing on the objection, the judgment debtor bears the burden of proving “that he or she is entitled to the claimed exemption.” *Id.*


Here, at one point during the hearing on Jesusa’s objection, the district court correctly stated that Wayne must demonstrate that he is entitled to the exemption he claimed. But at other times during the hearing, the court indicated that it was Jesusa’s burden to demonstrate that the garnished funds were not exempt. Thus, it is not clear whether the district court applied the correct burden of proof. *See* NRS 21.112(6). Moreover, as noted above, although the district court set the matter for an evidentiary hearing, the district court did not allow the parties the opportunity to offer their evidence at the hearing. Under these circumstances, we must reverse and remand this matter for the district court to apply the proper burden of proof. Additionally, because the district court previously determined an evidentiary hearing was warranted, on remand, the district court should allow the parties to offer their evidence so that it may determine whether

Wayne can demonstrate that the garnished funds are exempt based on any evidence properly admitted. We decline Jesusa's request to order that an adverse inference be applied based on Wayne's failure to comply with discovery, as the district court should address that issue in the first instance.³

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁴


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³In light of our resolution of this appeal, which reverses the district court's order directing that the \$16,000 be released to Wayne, we vacate the stay ordered on January 30, 2020, in this matter.

⁴To the extent Jesusa raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Sandra L. Pomrenze, District Judge, Family Court Division
Willick Law Group
Wayne D. Conte
Eighth District Court Clerk