IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KAREN D. POMPEI, N/K/A KAREN D. PURCELL,
Appellant,
vs.
JOHN L. POMPEI,
Respondent.

No. 82119-COA

FILED

NOV 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Karen D. Purcell (formerly, Karen D. Pompei) appeals from a district court order terminating child support. Second Judicial District Court, Washoe County; Dixie Grossman, Judge.

Karen D. Purcell and respondent John L. Pompei divorced in 1998.[1] At that time, Karen and John stipulated to joint physical custody of their only child, Alyssa Pompei,[2] and that neither parent would pay child support. Thereafter, Alyssa was diagnosed with "mild mental retardation" and "autism spectrum disorder." The district court then awarded Karen primary physical custody and ordered John to pay $969 in monthly child support until Alyssa was no longer "handicapped"[3] or until she became self-supporting within the meaning of NRS 125B.110(1) or until further order of the court.

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[1]We recount the facts only as necessary for our disposition.

[2]We refer to the parties and Alyssa by their first names to avoid confusion.

[3]We recognize that persons with disabilities is the appropriate terminology, however, Chapter 125B of the NRS specifically uses the term "handicapped." Pursuant to NRS 125B.110(4), an adult child is "handicap[ped]" if she is unable to engage in substantial gainful activity *because* of a medically determinable mental or physical impairment.

John initially moved to modify child support after Alyssa graduated from high school in 2012. The district court denied his request, but informed John that he could renew his motion in the future. In 2019, John filed a new motion to review child support because Alyssa was working and living on her own in Reno and it had been more than three years since the last child support review. *See* NRS 125B.145(1)(b). In his motion, John noted that he still "intends to assist" Alyssa financially, but he no longer wishes to directly pay Karen child support. Karen opposed the motion, and in July 2020, when Alyssa was age 26, the court held an evidentiary hearing.

There, the district court terminated John's support obligation, finding that Alyssa was not "handicapped." First, the court found that Alyssa was capable of substantial gainful activity. The court looked to *Edgington v. Edgington*, 119 Nev. 577, 885-86, 80 P.3d 1282, 1288 (2003), where the supreme court relied on the Social Security Administration's (SSA's) guidelines to define substantial gainful activity.[4] The court then stated that it "follows the analysis in *Edgington* and looks to the Code of Federal Regulations and Social Security Act for additional guidance" to determine exactly how much an adult child would need to be able to earn to be capable of substantial gainful activity. The court noted that, pursuant to the SSA regulations, someone earning $1,260 per month in 2020 demonstrated an ability to engage in substantial gainful activity. Relying on Alyssa's reported income for the one month preceding the hearing, the court then found that Alyssa earned an average monthly income of $2,600 in 2020, well above the SSA's $1,260 minimum. The court also found that,

[4]The definition of substantial gainful activity is "economic activity resulting in self-support." *Edgington*, 118 Nev. at 585-86, 80 P.3d at 1288.

between her income and public assistance, Alyssa earned more than the SSA's minimum threshold in 2019.

Next, the court found that even if Alyssa's prior earnings were less than those needed to qualify for substantial gainful activity, it was due to her preference for part-time, seasonal work rather than any impairment. Therefore, the district court terminated John's child support obligation effective September 1, 2019, which was shortly after John filed his motion. Karen now raises multiple issues on appeal and we address each in turn.

The district court did not abuse its discretion by applying the SSA's financial guidelines in determining whether Alyssa is capable of substantial gainful activity under NRS 125B.110

Karen argues that the district court abused its discretion by considering itself bound to apply the SSA's "bright-line" financial guidelines when determining whether Alyssa is capable of substantial gainful activity. John answers that the district court did not consider itself bound, it simply looked to the SSA regulations for further guidance. Regardless, he continues, even if Alyssa was not capable of substantial gainful activity, it was not due to any impairment. We agree with John.

"This court reviews the district court's decisions regarding child support for an abuse of discretion." *Rivero v. Rivero*, 125 Nev. 410, 438, 216 P.3d 213, 232 (2009). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014).

Generally speaking, a child support obligation ceases when a child reaches 18, or 19 if she is still enrolled in high school. *See* NRS 125B.200. This is because the law presumes a child who has reached the age of majority is capable of self-support. *Edgington*, 119 Nev. at 582, 80 P.3d at 1286. There are, however, exceptions. NRS 125B.110(1), for

example, provides that "[a] parent shall support beyond the age of majority his or her child with a handicap until the child is no longer handicapped or until the child becomes self-supporting." "Handicap" in this context means "an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." NRS 125B.110(4).

The Nevada Supreme Court has interpreted the meaning of "substantial gainful activity," and in so doing has looked to the SSA's regulations. *Edgington*, 119 Nev. at 585-86, 80 P.3d at 1288. In *Edgington*, the court reasoned that, in establishing a definition for "handicap" under NRS 125B.110, the Legislature borrowed language from the SSA's then-existing definition of "disabled." *Id.* at 584, 80 P.3d at 1288; *see also* 42 U.S.C. § 1382c(a)(3)(A) (1988). Therefore, the court looked to the SSA's interpretation of "disability" in the Code of Federal Regulations (CFR) for guidance. *Edgington*, 119 Nev. at 584-85, 80 P.3d at 1288-89. "With the CFR definitions in mind" as well as Nevada's public policy encouraging parents to share the rights and responsibilities of raising children, the court concluded that substantial gainful activity means "economic activity resulting in self-support." *Id.* at 585-86, 80 P.3d at 1288-89. However, NRS 125B.110 does not quantify how much money a child would need to earn to be capable of substantial gainful activity nor did the supreme court.

Here, the district court concluded that the SSA regulations provided appropriate further guidance for calculating whether Alyssa is capable of substantial gainful activity. The district court stated it "follow[ed] the analysis in *Edgington* and look[ed] to the Code of Federal Regulations and Social Security Act" in making that determination. The district court did not consider itself bound by the SSA regulations. It simply looked to the regulations for "additional guidance" and made its own

independent determination that Alyssa was capable of substantial gainful activity. The supreme court in *Edgington* specifically defined substantial gainful activity with the SSA's regulations "in mind." *See Edgington*, 119 Nev. at 585, 80 P.3d at 1288. And while the court in *Edgington* did not require the district court look to the SSA regulations, it did not prohibit it from doing so either. Therefore, the district court could have reasonably concluded that the SSA's regulations were an appropriate method to assist in evaluating whether Alyssa is capable of substantial gainful activity. *See Leavitt*, 130 Nev. at 509, 330 P.3d at 5. As such, the district court did not abuse its discretion by applying the SSA guidelines.

The district court did not abuse its discretion by failing to apply the NAC guidelines

Instead of the SSA guidelines, Karen argues that the district court should have applied the NAC 425.150 child support factors when determining whether Alyssa is capable of substantial gainful activity.[5] Karen asserts that the NAC 425.150 factors required the district court to consider "the specific needs of the child and the economic circumstances of the parties," and other "external factors" when awarding or modifying child

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[5]In her reply brief, Karen argues that the district court should have considered the NAC 425.150 factors because the court cannot read NRS 125B.110 "in isolation from its related statutes." As an extension of this argument, Karen argues for the first time in her reply brief that the district court was bound to apply NRS 125B.145 in deciding whether Alyssa is "handicapped." However, we need not consider this argument as she introduced it for the first time in her reply brief. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (concluding that appellant raising an argument for the first time in a reply brief deprives the respondent of "a fair opportunity to respond"); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) ("As this argument was raised only in [appellant's] reply brief, we need not consider it").

support, which in this case would have included Alyssa's lifestyle and the cost of living in Reno. Karen asserts that the district court failed to consider "any additional evidence" beyond the SSA regulations. John answers that the NAC 425.150 factors govern only the *amount* of child support owed, not whether a support obligation should still exist. Furthermore, John argues that the district court considered Alyssa's income, her bank account balance, and the monthly expenses Karen attributed to her, not just the SSA guidelines. We agree with John.

Here, Karen failed to raise her arguments regarding the NAC factors below and, therefore, we need not consider them. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Even if we were to consider them, her arguments fail. Karen does not point to any authority requiring the district court to consider the NAC guidelines, Alyssa's lifestyle, or the cost of living in Reno to determine whether she is capable of substantial gainful activity. NAC 425.150 itself states that "[a]ny child support obligation may be *adjusted* by the court in accordance with the specific needs of the child and the economic circumstances of the parties based upon the following factors and specific findings of fact." (Emphasis added). Therefore, the introductory language of the NAC factors suggests that they are to be used to determine the amount of child support owed, not whether an adult child is still in need of support.

The legislative history that Karen cites to support her argument does not show the district court abused its discretion either. She cites a quote opposing statutory caps on child support that states, "a rich man's child deserves to be treated as a rich man's child." *See* Hearing on A.B. 424 Before the Assembly Comm. on Judiciary, 64th Leg. (Nev., April 13, 1987). Again, this testimony pertains to the *amount* of child support

that a parent should have to pay, not *whether* a parent may be legally relieved from paying support, including after the child becomes an adult. And the Legislature rejected the argument that there should *not* be statutory caps on the amount of child support. *See* NRS 125B.070 (repealed 2017) (establishing the presumptive caps on child support); NAC 425.140 (establishing the base child support schedule that replaced the presumptive caps). The only other authority Karen cites is from outside Nevada and again indicates that the district court should apply child support factors in calculating the *amount* of child support owed to an adult child—not whether the adult child still needs child support in the first place.[6] Therefore, the district court could have reasonably relied upon the SSA's $1,260 minimum threshold for discontinuing child support without taking into consideration the NAC factors, or more specifically, Alyssa's lifestyle and the cost of living in Reno.[7] *See Leavitt*, 130 Nev. at 509, 330 P.3d at 5.

Regardless, the district court implicitly considered the NAC factors. The court stated that it would have found Alyssa self-supporting even without reference to the SSA regulations. And it considered Alyssa's income, her bank account balance, and the monthly expenses Karen attributed to her all before finding that she was capable of substantial gainful activity. As such, the district court did not abuse its discretion.

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[6]*See, e.g., Goshorn v. Goshorn*, 838 A.2d 1247, 1261 (Md. Ct. Spec. App. 2007); *Kotzbauer v. Kotzbauer*, 937 A.2d 487, 493-94 (Pa. Super. Ct. 2007); *State v. Burke*, 678 N.W.2d 68, 72 (Minn. Ct. App. 2004); *In re Marriage of Drake*, 62 Cal. Rptr. 2d 466, 478 (Ct. App. 1997); *DeMo v. DeMo*, 679 So.2d 265, 266-67 (Ala. Civ. App. 1996); *In re Marriage of Cropper*, 895 P.2d 1158, 1160 (Colo. Ct. App. 1995).

[7]SOCIAL SECURITY ADMINISTRATION, No. 05-10003, UPDATE 2021 (2021).

The district court did not abuse its discretion by only considering Alyssa's "basic needs" in determining whether she is capable of substantial gainful activity

In her reply, for the first time, Karen argues that the district court abused its discretion by only considering whether Alyssa was capable of providing for her "basic needs" in determining whether she is capable of substantial gainful activity. Karen argues that the *Edgington* court defined substantial gainful activity as capable of "being financially *self-supporting*," thereby linking the NRS 125B.110(4) definition of "handicap" and the NRS 125B.110(2) definition of "self-support." And under the NRS 125B.110(2) definition of self-support, Karen asserts that the district court should have considered Alyssa's accustomed lifestyle, rather than just her basic needs. We disagree.

Here, as an initial matter, we need not consider Karen's arguments because she did not include them in her opening brief. *See Weaver*, 121 Nev. at 502, 117 P.3d at 198-99. Indeed, Karen herself refers to Alyssa's "basic necessities" multiple times in her opening brief. Therefore, we decline to address her arguments out of fairness to John. *See Francis*, 127 Nev. at 671 n.7, 262 P.3d at 715 n.7.

Even if we were to consider them, the district court did not abuse its discretion. Foremost, Karen appears to misinterpret the district court's order. The district court referred to Alyssa's "basic needs" only to say that the $4,163.06 in expenses Karen reported were excessive. The district court was not applying NRS 125B.110(2) when it made that finding. It was interpreting whether Alyssa was capable of substantial gainful activity under NRS 125B.110(4). Furthermore, Karen overstates the interplay between the definitions of "handicap" and "self-support" under NRS 125B.110.

NRS 125B.110(1) reads "[a] parent shall support beyond the age of majority his or her child with a handicap until the child is no longer handicapped *or* until the child becomes self-supporting." (Emphasis added). The statute next explains that an adult child is self-supporting if she "receives public assistance beyond the age of majority and that assistance is sufficient to meet the child's needs." NRS 125B.110(2). And last, the statute defines "handicap" to mean "an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." NRS 125B.110(4). The supreme court concluded in *Edgington* that substantial gainful activity for purposes of whether a child is "handicapped" means capable of self-support. 119 Nev. at 586, 80 P.3d at 1288.

The Legislature added the self-supporting definition to NRS 125B.110 *before* the supreme court decided that substantial gainful activity meant capable of "self-support." *See* A.B. 424, 64th Reg. Sess. (April 13, 1987); *Edgington*, 119 Nev. at 586, 80 P.3d at 1288. And the supreme court did not mention NRS 125B.110(2) when defining "substantial gainful activity" in the *Edgington* case. Indeed, reading NRS 125B.110(2) into the statutory definition of "handicapped" would render the distinction between "handicapped" and "incapable of self-support" superfluous. Therefore, we disagree that the district court was bound to apply NRS 125B.110(2) to the definition of substantial gainful activity within the meaning of "handicap" under NRS 125B.110(4).

Regardless, Karen has not demonstrated that the district court abused its discretion by inserting the word "basic" before the word "needs." Karen's only authority against using the word "basic" is regarding child support *amount*, not whether an adult child should continue to receive child

support. *See* NAC 425.150 (factors for quantifying child support amount); *Fernandez v. Fernandez*, 126 Nev. 28, 39, 222 P.3d 1031, 1038 (2010) ("The parents' financial means may play a legitimate role in determining the amount of an original or modified support award."); Hearing on A.B. 424 Before the Assembly Comm. on Judiciary, 64th Leg. (Nev. April 13, 1987). Therefore, the district court reasonably could have found it only necessary to consider Alyssa's basic needs to determine whether she was capable of substantial gainful activity. *See Leavitt*, 130 Nev. at 509, 330 P.3d at 5. As such, we decline to conclude that the district court abused its discretion by inserting the word "basic" before the word "needs."

The district court based its findings that Alyssa is presently capable of substantial gainful activity on substantial evidence

Karen asserts that the district court lacked substantial evidence to support its finding that Alyssa earned $2,600 in average gross monthly income because that figure only considers Alyssa's earnings at the time of the hearing. John answers that the district court did have substantial evidence to support $2,600 and that the court also relied on Karen's testimony that Alyssa will be receiving $900 in estimated assistance from the state. We agree with John.

"Rulings supported by substantial evidence will not be disturbed on appeal." *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004) (internal quotation marks omitted). "Substantial evidence 'is evidence that a reasonable person may accept as adequate to sustain a judgment.'" *Rivero*, 125 Nev. at 428, 216 P.3d at 226 (quoting *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007)).

Here, the district court made four pages of detailed findings regarding Alyssa's ability to engage in substantial gainful activity. Specifically, the court found that Alyssa now (in 2020) earns $2,600 in

"average gross monthly income." The court based that finding on Alyssa's testimony, an earning statement for the June 20, 2020 through July 3, 2020 pay period, and a mathematical equation.[8] The court also found, based on Karen and Alyssa's testimony, that Alyssa's growing account balance indicated that her earnings exceeded her expenses and that she also may have received pandemic-related stimulus funds in 2020. Again, the district court found that Alyssa was set to receive $900 per month in public assistance from the state. And last, based on Alyssa's tax returns and Karen's testimony, the court found that Alyssa had demonstrated the ability to maintain steady work for four years, and there was no evidence "that Alyssa's mental impairment rendered her unable to engage in substantial gainful activity."

The district court determined Alyssa's "average" monthly income for 2020 to be $2,600. However, even though the word "average" may have been misused, ultimately, the court was asking whether Alyssa met the SSA's $1,260 threshold. The SSA regulations use the phrase "monthly earnings," not "average gross monthly income."[9] Neither the SSA nor our courts prescribe a specific formula for determining a person's earnings, so the district court was not bound to average Alyssa's past earnings in making its determination when the present situation was different. The district court used the most current, relevant, and accurate information submitted as evidence to calculate what Alyssa would be

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[8][$15 (Alyssa's hourly wage reported in the earning statement) x 40 (hours a fulltime employee works per week equals $600) x 52 (weeks) equals $31,200]/12 months (equals $2,600).

[9]SOCIAL SECURITY ADMINISTRATION, No. 13-11785, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2019 at 3 (2019).

earning henceforth. Indeed, factoring in Alyssa's earnings for the months of 2020 where she only worked part-time would not have given the court an accurate picture of whether or not she is presently capable of substantial gainful activity as a full-time employee. *See Griffith v. Gonzalez-Alpizar*, 132 Nev. 392, 394, 373 P.3d 86, 88 (2016) (concluding that the court "will seek to avoid a[statutory] interpretation that leads to an absurd result" (internal quotation marks omitted)). Therefore, a reasonable person could accept the district court's formula as adequate to sustain a finding that Alyssa earns $2,600 per month and will be capable of the same going forward.

Regardless, the district court also made specific findings that Alyssa was earning or receiving funds from other sources, the expenses Karen attributed to Alyssa exceeded her actual needs, and, to the extent that Alyssa has been unable to maintain full-time employment in prior years, it has been a result of her personal preference for seasonal and part-time work, not her impairment. Karen's testimony and Alyssa's bank statements, receipts, and tax returns supported these findings. Therefore, even if the court should have included Alyssa's earnings for January 2020 through June 2020 in its calculation, the district court still had substantial evidence to support its finding that Alyssa was earning, in total, more than $1,260 per month in 2020.

The district court did not abuse its discretion by making its order effective September 1, 2019

Finally, Karen argues that the district court should not have made its child support order effective September 1, 2019, because Alyssa was not capable of substantial gainful activity then either. John counters that the district court did not abuse its discretion because Alyssa was

earning more than the SSA's minimum threshold in 2019.[10]

As previously stated, this court will not disturb a district court's order if it is supported by substantial evidence. *See Rivero*, 125 Nev. at 428, 216 P.3d at 226; *Williams*, 120 Nev. at 566, 97 P.3d at 1129. And a district court may make its order terminating child support effective as of the date the motion to review was filed. *See Ramacciotti v. Ramacciotti*, 106 Nev. 529, 532, 795 P.2d 988, 990 (1990) (finding that a modification to a child support order may be made effective as of the date the motion to modify the decree was filed).

Here, again substantial evidence supported the district court's decision. The court made specific findings that the SSA's minimum threshold for substantial gainful activity in 2019 was $1,220.[11] The court further found, based on Karen's testimony and Alyssa's tax returns, that in 2019 Alyssa earned $801.32 from her job and between $1,136.68 and $1,194.54 in public assistance from the state per month. Indeed, Karen admitted that Alyssa's gross monthly income from her employment and benefits was approximately $2,000 in 2019. Therefore, her earnings exceeded the SSA's threshold for substantial gainful activity in 2019. As

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[10]For the first time in reply, Karen appears to argue that the court only should have looked at how much Alyssa was earning from her employment to determine whether she was self-supporting at the time John filed the underlying motion. Karen has waived this argument. *See Weaver*, 121 Nev. at 502, 117 P.3d at 198-99. Even if we did consider it, the SSA guidelines require that a person "earn" at least the threshold amount. The guidelines never state that this must be from employment alone without regard to public assistance. *See* NRS 125B.110(2).

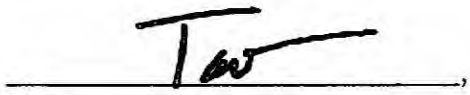
[11]SOCIAL SECURITY ADMINISTRATION, No. 13-11785, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2019 at 3 (2019).

such, the district court had substantial evidence to support making its order effective the date the motion to terminate was filed on and the district court did not abuse its discretion. *See id.*

Absent an abuse of discretion, this court does not reweigh evidence on appeal. *See Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). We discern no abuse of discretion here.[12] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Dixie Grossman, District Judge
Reed Law Offices, PLLC
Fennemore Craig P.C./Reno
Dickinson Wright PLLC
Kathleen T. Breckenridge
Washoe District Court Clerk

[12]Insofar as the parties raise 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.