IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BERNADETTE PEREZ,
Appellant,
vs.
CORNELL HAYWOOD,
Respondent.

No. 83625-COA

ORDER OF REVERSAL AND REMAND

Bernadette Perez appeals from a post-judgment order denying a request to impose constructive child support arrears. Eighth Judicial District Court, Family Court Division, Clark County; Amy Mastin, Judge.

Bernadette and respondent Cornell Haywood were never married and have one minor child together, born in 2006. In 2011, Bernadette and the child relocated to Texas, and Cornell has had limited contact with the child since that time.

As relevant here, in 2017, Bernadette, with the assistance of the Clark County District Attorney Family Support Division (DAFS), commenced the underlying proceeding against Cornell by filing a notice and finding of financial responsibility that sought, among other things, child support arrears for the period of January 1, 2017, to January 27, 2017. The district court ultimately entered a consent order that set Cornell's monthly child support obligation at $462 and required him to pay arrears for the period from January 2017 to April 2017 in the amount of $1,923. However, Bernadette did not sign the consent order, and contends that she was never served with the filed copy of the order. At some point thereafter, Bernadette learned that the order upon consent only awarded arrears for a period of

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four months, rather than the maximum of four years as permitted by NRS 125B.030.

In 2019, Bernadette retained counsel and filed a "Motion for Order to Set Aside and/or Correct Prior Child Support Order and Reduce Child Support Arrears to Judgment." In that motion, Bernadette asked the district court to modify the 2017 order under NRCP 60(b), or in the alternative, enter a new judgment. Cornell failed to oppose this motion. However, DAFS appeared at the hearing and recommended denying the motion based on res judicata principles. The hearing master denied this motion, and Bernadette objected. Cornell failed to file a response to Bernadette's objection. However, DAFS filed a response indicating that the motion should be denied, as Cornell had "a right to rely on the arrears being settled during the time period of January 1, 2017, and April 1, 2017." Ultimately the district court granted Bernadette's objection to the report and recommendation and remanded this matter to the hearing master for an evidentiary hearing on whether it should award constructive arrears from February 1, 2013, to December 31, 2016, the four year period prior to Bernadette's child support request.

Prior to the evidentiary hearing, the hearing master directed Cornell to provide proof of his income from 2013-2016 and directed Bernadette to provide a schedule of arrears and medical expenses for that time period. Cornell did not object to Bernadette's proposed schedule of arrears and while he provided some documents related to his tax returns to DAFS,[1] he did not file any documents prior to the evidentiary hearing.

[1]Cornell provided tax return documents for 2013, 2015 and 2016, and a letter from the IRS stating that he did not file a tax return in 2014.

During the hearing, both parties testified that Cornell did not provide any support for the minor child from 2013-2016. Bernadette's counsel cross-examined Cornell during the hearing.[2] During this cross-examination Cornell testified that during the relevant time, he was a member of a band that toured around the country and that he made approximately $14,000 working as an entertainer in 2013, and roughly $10,855 in 2014. In 2015, Cornell began working at his current job, making roughly 16 dollars an hour, and he continued working full time at that job in 2016. Notably, Cornell did not offer any argument or opposition related to Bernadette's request for constructive arrears. Additionally, neither party moved to admit Cornell's tax returns into evidence, and Bernadette did not submit any additional documents to support her request for constructive arrears with the court.

During closing arguments, Bernadette argued that Cornell should be required to pay constructive arrears from 2013-2016, as he failed to comply with his duty to support the child. In its closing argument, DAFS argued that NRS 125B.030 is discretionary, and that it is DAFS's office policy to only request constructive arrears for one month prior to the application. Further, DAFS argued that Bernadette was aware in 2017 that arrears were ordered for a limited period but failed to object or challenge the order. Consequently, DAFS argued that it would be unfair to now award additional arrears in this matter four years after the fact. Cornell had the opportunity to make closing arguments but offered no arguments in opposition to Bernadette's request for constructive arrears.

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[2]We note that at several points during this cross-examination, the deputy district attorney objected to Bernadette's line of questioning (seemingly to Cornell's benefit).

In its report and recommendation, the hearing master declined to order additional constructive arrears on the basis that Bernadette had failed to present evidence of Cornell's income or to provide evidence supporting her requests for medical expenses and insurance premiums. Bernadette objected to this second report and recommendation, arguing that the hearing master's findings were clearly erroneous and not supported by substantial evidence. Specifically, Bernadette argued that Cornell never opposed her motion nor objected to her proposed schedule of arrears, and that the DA improperly "acted as counsel by proxy for Dad" by taking a position that supported one parent over the other. Moreover, Bernadette argued that Cornell's uncontroverted testimony provided adequate proof of income for the hearing master to determine whether child support was appropriate. DAFS responded in support of the report, and Cornell again failed to file any response. Following the objection, the district court affirmed the report and recommendation, and Bernadette now appeals.

We review a district court's order regarding child support for an abuse of discretion. *Hargrove v. Ward*, 138 Nev., Adv. Op. 14, 506 P.3d 329, 331 (2022). A court abuses its discretion if "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). The district court may only disregard the hearing master's recommendation when "the findings are based upon material errors in the proceedings or a mistake in law; or are unsupported by any substantial evidence; or are against the clear weight of the evidence." *Russell v. Thompson*, 96 Nev. 830, 834 n.2, 619 P.2d 537, 539 n.2 (1980).

Under NRS 125B.030, district courts have discretion to award child support arrears for the "reasonable portion of the cost of care, support, education, and maintenance provided by the physical custodian." However,

"[i]n the absence of a court order for the support of a child, the parent who has physical custody may recover not more than 4 years' support furnished before the bringing of the action to establish an obligation for the support of the child." NRS 125B.030.

On appeal, Bernadette contends that the district court erred in denying her objection to the hearing master's recommendation. And although Bernadette concedes that NRS 125B.030 affords the hearing master with some discretion, she contends that discretion is not unlimited. Bernadette also challenges DAFS's involvement in this case and contends that the agency effectively represented Cornell during the proceedings by filing responses and appearing to object on his behalf.

DAFS initially filed a notice of appearance in this matter indicating that it represented Cornell. However, DAFS later provided a notice to the supreme court correcting this error. Subsequently, DAFS was removed as counsel but remains in this case for notice purposes only. Nonetheless, DAFS filed an answering brief in this case on behalf of the State, arguing for affirmance of the district court's order. However, we decline to consider that brief as DAFS does not represent any party to this appeal and the arguments DAFS advances on appeal exceed the authority provided under NRS 125B.150 to the extent these arguments oppose Bernadette's efforts to seek payment of child support arrearages and medical expenses for the child from Cornell.[3] *Cf. Hedlund v. Hedlund*, 111

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[3]DAFS likewise exceeded the authority provided to it under NRS 125B.150 when it repeatedly opposed Bernadette's efforts to obtain constructive arrearages and medical expenses in the proceedings below. Although DAFS initially indicated that it was appearing on behalf of the State and took no position on whether Bernadette's motion should be granted, the record demonstrates that DAFS went beyond this neutral

Nev. 325, 326-27, 890 P.2d 790, 791 (1995) (holding that district attorneys were not allowed to exceed the authority provided under NRS 125B.150 in providing services on behalf of the State, and holding that DAFS does not represent the parent or the child in child support proceedings); *see also* NRS 125B.150(1) ("The district attorney of the county of residence of the . . . alleged parent or guardian who does not have physical custody of the child, shall take such action as is necessary to establish parentage of the child and locate and take legal action, including the establishment or adjustment of an obligation of support, *against a person who has a duty to support the child when requested to do so by the parent*, . . . alleged parent, guardian or child." (emphasis added)).

Following the clarification from DAFS, the supreme court instructed Cornell to file an answering brief in this appeal within 14 days. The time for responding to the supreme court's order has passed, and as of this date, Cornell has failed to either file his answering brief or communicate with this court regarding an extension. Because Cornell has failed to file an answering brief in this matter, we elect to treat his failure to file an answering brief as a confession of error. *See* NRAP 31(d)(2) (providing that the appellate courts may treat a respondent's failure to file an answering brief as a confession of error*); Ozawa v. Vision Airlines, Inc.*,

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position and effectively opposed Bernadette's requests. Notably, nothing in NRS 125B.150 authorizes a district attorney to appear and respond in opposition to a custodial parent's attempt to obtain constructive arrearages or medical expenses, or object on the noncustodial parent's behalf at an evidentiary hearing. Accordingly, on remand, the district court shall only consider DAFS's filings to the extent that DAFS acts within the confines of the authority provided by NRS 125B.150.

125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious).

But regardless of Cornell's confession of error, we also conclude that the hearing master's report and the district court's order were unsupported by substantial evidence. Although the district court and the hearing master correctly noted that Bernadette failed to proffer any documentary evidence during the hearing, the hearing master received evidence in this matter when it heard the unopposed and uncontested testimony regarding Cornell's failure to pay child support at any point prior to the entry of the order upon consent in 2017 and heard Cornell's testimony as to his annual income during 2013-2016. *See In re DISH Network Derivative Litig.*, 133 Nev. 438, 445 n.3, 401 P.3d 1081, 1089 n.3 (2017) (noting that "evidence need not be in a particular format to qualify as evidence—testimony is evidence whether it is given in court or a deposition"). Concerningly, the hearing master and the district court seemingly took no notice of Cornell's concession that he did not pay child support, his consistent failure to oppose Bernadette's filings on this issue, or his failure to provide a complete picture of his income during the period spanning 2013-2016, and instead appeared to give great weight to the arguments of DAFS in opposition to the requests. And despite receiving evidence of Cornell's income, the hearing master failed to fully consider awarding constructive arrears, or even the statutory minimum, *see* NRS 125B.080(4) (2001),[4] or directing the parties to conduct further discovery on

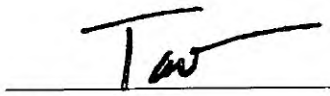
[4]NRS 125B.080 was amended in 2017, effective February 1, 2020. *See* 2017 Nev. Stat., ch. 371, § 2, at 2284-85; Approved Regulation of the Adm'r of the Div. of Welfare & Supportive Servs. of the Dep't of Health & Human Servs., LCB File No. R183-18 (2019) (amending NAC Chapter 425

the issue, which goes against the weight of the evidence in this matter. *See Russell*, 96 Nev. at 834 n.2, 619 P.2d at 539 n.2.

Accordingly we,

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court with instructions to remand this matter to the hearing master for a new hearing to determine whether four years of retroactive child support and payment of identified medical expenses is warranted.[5]

_____, C.J.
Gibbons



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and making the amendments to NRS 125B.080 effective). Because the constructive arrears at issue here accrued before these amendments became effective, we cite to the prior version of the statute.

[5]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

cc: Hon. Amy Mastin, District Judge, Family Court Division
Jacobson Law Office, Ltd.
Cornell Haywood
Clark County District Attorney/Family Support Division
Eighth District Court Clerk