IN THE SUPREME COURT OF THE STATE OF NEVADA

DIANE WALKER,
Appellant,
vs.
ROBERT C. DUNN,
Respondent.

No. 43634

FILED

JUL 12 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a district court order modifying respondent's monthly child support obligation. Eighth Judicial District Court, Family Court Division, Clark County; N. Anthony Del Vecchio, Judge.

Appellant Diane Walker argues that the district court committed four errors in modifying respondent Robert Dunn's monthly child support obligation: (1) determining that $583 was the presumptive maximum that Dunn was obligated to pay per month in child support; (2) awarding Dunn the dependent tax exemption for the parties' child; (3) deviating from the presumptive maximum Dunn was obligated to pay per month in child support; and (4) failing to set forth specific findings of fact to justify its deviation from the presumptive monthly maximum of child support Dunn was obligated to pay. We assume that the parties are familiar with the facts and recite them only as necessary to discuss the disposition of these four issues.

Presumptive maximum of Dunn's monthly child support obligation

Pursuant NRS 125B.070, the district court determined that Dunn's gross monthly income resulted in a presumptive maximum child

support of $583 per month.[1] Walker argues that because Dunn's affidavit of financial condition (AFC) stated his gross monthly income was $8,027 per month, the district court should have determined that Dunn's presumptive maximum child support obligation was $637 per month. We disagree.

"The exercise of discretion, by the trial court, in awarding support for a minor child, will not be disturbed unless there is a clear case of abuse."[2] Pursuant to NRS 125B.070(1)(b), a parent who is required to pay child support for one child must surrender eighteen percent of his or her gross monthly income for that obligation, which is capped by the presumptive maximums outlined in subsection 2 of that statute. This court has held that "overtime should be included as income, if it is substantial and can be determined accurately."[3]

We conclude that the district court's determination of Dunn's monthly child support obligation was not a clear abuse of discretion. Dunn argued that his gross monthly income was $5,941 and that his AFC reflected a higher amount ($8,027) because of an atypical amount of overtime he had earned that year. Pursuant to NRS 125B.070, $583 was the presumptive maximum monthly child support obligation for a gross monthly income ranging from $4,168 - $6,250. Based on its finding of Dunn's normal income, the district court found that the presumptive maximum monthly child support Dunn was obligated to pay was $583.

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[1]The parties agreed to apply the presumptive maximums that were to go into effect July 1, 2004.

[2]Fenkell v. Fenkell, 86 Nev. 397, 400, 469 P.2d 701, 703 (1970).

[3]Scott v. Scott, 107 Nev. 837, 841, 822 P.2d 654, 656 (1991).

Such a finding was within the district court's discretion and did not constitute an abuse of discretion.

Award of the dependent tax exemption to Dunn

The district court found that the parties had an agreement that Dunn would be entitled to the dependent tax exemption in exchange for paying $600 a month in child support. The district court placed particular reliance on a letter drafted by Walker's former counsel. Thus, the district court ordered that Dunn be prospectively entitled to the tax exemption. Walker argues that, as the custodial parent, she is presumed to be the parent entitled to the tax exemption and that the evidence presented did not rebut that presumption. We agree.

"As this court has stated on numerous occasions, findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous."[4] "Substantial evidence has been defined as that which 'a reasonable mind might accept as adequate to support a conclusion.'"[5] This court has recognized that, pursuant to section 152(e) of the Internal Revenue Code, "[n]ormally, the custodial parent is entitled to claim the [dependency] exemption, unless this parent waives the right."[6]

We conclude that the district court's determination that the parties had an agreement that Dunn would be entitled to the tax

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[4]Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996).

[5]State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

[6]Jensen v. Jensen, 104 Nev. 95, 99, 753 P.2d 342, 345 (1988) (citing I.R.C. § 152(e)).

exemption in exchange for paying $600 a month in child support is not supported by substantial evidence. After filing a complaint for custody and paternity, Walker's former counsel sent a letter to Dunn's former counsel stating that "[i]f [Dunn] would like the income tax exemption, then he needs to pay $600.00 a month child support." The letter gave Dunn seven days to accept the offer, or Walker would file a motion for temporary relief. Seventeen days later, Walker filed a motion for temporary relief with a certificate of counsel stating that the offer had not been accepted.

Subsequently, the parties entered into two stipulations containing provisions for child support and daycare expenses, as well as personal and real property. Notably, both stipulations were signed by the parties' former attorneys; the parties signed the second stipulation as well. Conspicuously absent from both stipulations, however, was a provision concerning the tax exemption. Finally, in 2003, Dunn sent Walker a letter proposing that the parties alternate years claiming the tax exemption, despite the alleged agreement that he was entitled to it.

Thus, a reasonable mind could not accept the evidence presented as adequately supporting the conclusion that the parties had reached an agreement that Dunn would be entitled to the tax exemption. Accordingly, the portion of the district court's order awarding Dunn the tax exemption is reversed.

Deviating from Dunn's $583 presumptive maximum child support obligation

The district court found that Dunn had been paying $112.76 a month in health insurance premiums for the parties' child. As a result, the district court permitted Dunn to deviate from the $583 presumptive maximum in child support by one-half of those insurance premiums

($56.38). Hence, the district court ordered that Dunn pay $526.62 a month in child support. Walker argues that the district court erroneously deviated from the statutory guidelines by lowering Dunn's monthly child support obligation from the presumptive maximum.

We conclude that the district court's deviation from Dunn's presumptive maximum in child support was not an abuse of discretion. NRS 125B.080(9) lists factors that the district court shall consider in deviating from the presumptive maximums contained in NRS 125B.070. One of those factors is the cost of health insurance.[7] The district court found that Dunn was paying $112.76 in health care insurance premiums for the parties' child. Thus, the district court's determination that Dunn was entitled to a $56.38 deviation from his monthly child support obligation was within its discretion.[8]

Accordingly, we affirm those portions of the district court's order relating to Dunn's presumptive maximum child support payment and downward deviation based on health insurance premiums. Further, we reverse that portion of the district court's order awarding the

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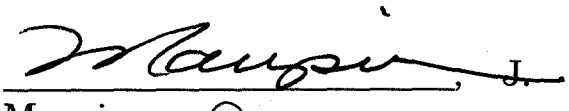
[7]NRS 125B.080(9)(a).

[8]For the same reasons stated above, Walker's argument that the district court failed to set forth specific findings of fact to justify deviating from Dunn's $583 monthly child support obligation is without merit. See, Scott v. Scott, 107 Nev. 837, 840, 822 P.2d 654, 656 (1991) ("NRS 125B.080 requires the court to apply the formula set forth in NRS 125B.070(2), unless it specifically finds facts justifying a deviation.").

dependent tax exemption to Dunn because, in the absence of an agreement between the parties, Walker is presumptively entitled to claim the tax exemption.

It is so ORDERED.



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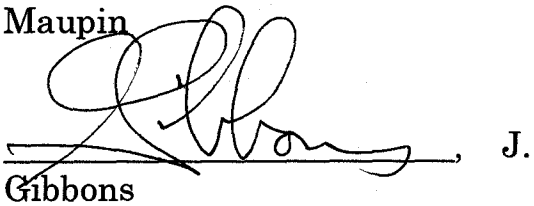
Maupin



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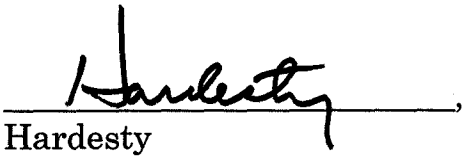

_____, J.
Hardesty

cc: Hon. N. Anthony Del Vecchio, District Judge, Family Court Division
Persi J. Mishel, Settlement Judge
Bruce I. Shapiro, Ltd.
Howard & Eccles
Clark County Clerk