

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUCIANO SPINUSO,  
Appellant,  
vs.  
JANET SPINUSO,  
Respondent.

No. 47192

**FILED**

JUL 24 2008

TRACIE L. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a motion to modify a child support obligation. Eighth Judicial District Court, Family Court Division, Clark County; Sandra Pomrenze, Judge.

The district court denied appellant Luciano Spinuso's motion to modify his child support obligation because, in the court's view, Luciano had intentionally reduced his income to avoid his obligation. On appeal, Luciano now contends that the district court abused its discretion in denying his motion by failing to properly apply the legislative formula for adjusting support. We agree and therefore reverse and remand this case for further proceedings. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Motions to modify child support may be based upon the moving parent's statutory right to have support orders reviewed every three years or upon "changed circumstances."<sup>1</sup> NRS 125B.070 establishes the formula applicable to modifying a parent's child support obligation.<sup>2</sup>

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<sup>1</sup>NRS 125B.080(3); NRS 125B.145.

<sup>2</sup>See NRS 125B.080(1)(b) (NRS 125B.070's formula applies to "[a]ny request filed after July 1, 1987, to change the amount of the required support of children").

Under NRS 125B.070, “a parent’s duty of child support [is specified] according to the parent’s means rather than according to the child’s needs.”<sup>3</sup> Thus, a parent has the duty “to provide a fixed percentage of his income as support . . . [and] [w]here no special circumstances exist, courts must focus exclusively upon the noncustodial parent’s duty to pay a fixed percentage of income.”<sup>4</sup>

NRS 125B.080 sets forth twelve factors that the district court must consider when adjusting the amount of child support upon specific findings of fact.<sup>5</sup> NRS 125B.080 also provides that the support obligation of a parent who is “willfully underemployed or unemployed to avoid an obligation for support of a child . . . must be based upon the parent’s true potential earning capacity.”<sup>6</sup>

In light of NRS 125B.070 and NRS 125B.080, we have recognized that the district court’s discretion in making child support

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<sup>3</sup>Lewis v. Hicks, 108 Nev. 1107, 1113, 843 P.2d 828, 832 (1992).

<sup>4</sup>Id. at 1113-14, 843 P.2d at 832-33.

<sup>5</sup>See NRS 125B.080(9). These factors include: the costs of health insurance, child care, and visitation transportation; the age and special educational needs of the child; the amount of time the child spends with each parent; the relative income of both parents; the value of services contributed by either parent and the legal responsibility of either parent for the support of others; any public assistance paid to support the child; and any other necessary expenses for the benefit of the child. NRS 125B.080(9). One remaining factor, which is wholly irrelevant to this case, is “[a]ny expenses reasonably related to the mother’s pregnancy and confinement.” NRS 125B.080(9)(h).

<sup>6</sup>NRS 125B.080(8).

determinations is limited.<sup>7</sup> Indeed, “[e]quitable principles alone are simply insufficient” to support a deviation from the statutory child support formula and, while the district court may employ equitable principles in considering a deviation, the deviation must be based on at least one of the factors enumerated in NRS 125B.080.<sup>8</sup> Moreover, the district court must justify its deviation in specific, written findings of fact as required by NRS 125B.080.<sup>9</sup>

Here, the district court decided not to modify child support. In making this decision, however, the district court failed to make several important factual findings. Initially, the district court did not state whether its review was based on alleged “changed circumstances” or Luciano’s right to have child support reviewed every three years.<sup>10</sup> Although the district court suggested that its review was based on Luciano’s right to a three-year review, the court did not state this in its order. This failure is significant because if the district court’s review of child support was based on Luciano’s right to a three-year review, then the

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<sup>7</sup>Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996).

<sup>8</sup>Khaldy v. Khaldy, 111 Nev. 374, 376-77 892 P.2d 584, 585 (1995).

<sup>9</sup>Anastassatos, 112 Nev. at 320, 913 P.2d at 654 (reversing a modification of child support where the modification deviated from the statutory formula and “the district court failed to set forth findings of fact concerning the basis for the deviation”); Jackson v. Jackson, 111 Nev. 1551, 907 P.2d 990 (1995).

<sup>10</sup>See NRS 125B.080(3).

court was required to perform a full NRS 125B.070 calculation, which it did not do.<sup>11</sup>

Additionally, the district court based its denial of Luciano's motion on three facts that do not satisfy the fact-finding requirements of NRS 125B.070 and NRS 125B.080: (1) that Luciano "has child support arrearages in excess of \$55,000"; (2) that Luciano "has a historical record of non payment and non compliance with court orders"; and (3) that Luciano's "track record regarding payment of child support" demonstrates that "he has intentionally reduced his income to avoid his child support obligation."

Of these three facts, the first two are irrelevant to the issue of modifying child support under NRS 125B.070 and NRS 125B.080. Indeed, the existence of arrearages is not listed anywhere in NRS 125B.070 or NRS 125B.080 as a factor to be considered in determining whether to modify child support. Moreover, Luciano does not deny that he owes more than \$55,000 in back child support; instead he has requested a modification of his monthly support obligation going forward so that he can meet his future obligations.

Similarly, the district court's third factual finding—that Luciano "intentionally reduced his income to avoid his child support obligation"—was not enough to deny his motion. Although NRS 125B.080 permits courts to consider whether a parent is "willfully underemployed or unemployed to avoid an obligation for support of a child" before modifying child support, if the court makes such a finding, it must also determine

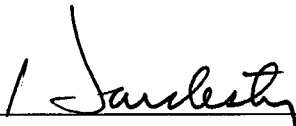
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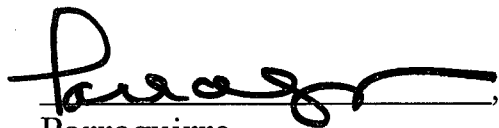
<sup>11</sup>See NRS 125B.145.

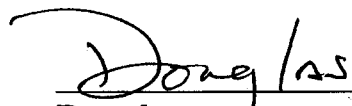
“the parent’s true potential earning capacity” and base child support on that earning capacity.<sup>12</sup> In this case, the district court made only the first finding and did not make the required “true potential earning capacity” calculation; thus, the district court failed to apply NRS 125B.080 properly.

For the reasons set forth above, we conclude that the district court failed to set forth sufficient factual findings in support of its denial of Luciano’s motion to modify his child support obligation. Accordingly, we

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

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Sandra Pomrenze, District Judge, Family Court Division  
Carolyn Worrell, Settlement Judge  
Anderson Legal Associates  
Gayle F. Nathan  
Eighth District Court Clerk

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<sup>12</sup>NRS 125B.080(8).