IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS LEWIS,
Appellant,
vs.
HEATHER LEWIS,
Respondent.

No. 48934

FILED

MAR 13 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a post-decree district court order concerning child support arrearages and contempt. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

The parties were divorced in March 1995. The divorce decree awarded primary physical custody of the parties' son[1] to respondent Heather Lewis. Under the decree, appellant Douglas Lewis was to pay $500.00 per month in child support. The parties were to alternate years claiming the son as a tax deduction. Douglas was to provide health insurance for the son through his employment. Both parties were responsible for one half of any reasonable medical or dental expenses for their son not covered by Douglas' health insurance policy.

The parties agree that for the last ten years, Douglas has paid for the son's extracurricular activities and has not paid the $500.00 per month in child support. The parties also agree that for the last ten years, Heather has maintained health insurance for the son and that she has

[1]The son is now approximately twenty years old.

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claimed the son as a tax deduction for each of those ten years. Both parties testified that at one point in 2002 or 2003, Heather mentioned returning to the $500.00 per month in child support but that Douglas told her he would have to stop paying for the son's activities, as he could not afford to do both. Both parties confirmed that Heather decided not to pursue receiving the $500.00 per month in child support because at the time, the son's extracurricular activities were, according to Heather, keeping him in school.

In 2006, after proceeding with this arrangement for more than ten years, Heather filed a motion in the district court seeking arrearages and to hold Douglas in contempt. Douglas opposed the motion, alleging that the two had orally modified the divorce agreement and raising the affirmative defenses of waiver and estoppel. Douglas further argued that even if the court did not find an express or implied waiver by Heather of the child support, his non-payment had not been willful.

In particular, Douglas testified that the parties entered into an oral agreement during the latter part of 1995 in which he would pay for the son's extracurricular activities in lieu of the $500 per month child support and that Heather would claim the son every year as a tax deduction. Douglas provided approximately $42,000.00 in receipts for these extracurricular expenses. Heather testified that the parties had no such agreement and that she declined to ask Douglas to pay child support in order to maintain harmony so that he and their son could have a close relationship.

Following a hearing on the motion, the district court entered an order granting Heather's motion for contempt and arrearages. The court found that the parties had not entered into a valid oral agreement

and that Douglas was responsible for child support arrearages in the amount of $63,338.14 and insurance arrearages in the amount of $11,400.00, based on Heather's testimony that she paid $200.00 per month for the son's health insurance. The court did not give Douglas any credit for the approximate $42,000.00 spent on the son's extracurricular activities. Douglas was ordered to pay arrearages in the amount of $600.00 per month--$500.00 for child support and $100.00 for insurance. The court also found Douglas in contempt for violating the divorce decree's support provisions and imposed a penalty of twenty days in the county jail, suspended on the condition that Douglas remain in compliance with that order.

Douglas appeals, arguing that no substantial evidence supports the district court's order and that the district court abused its discretion by refusing to credit him for amounts paid during the ten-year period and by retroactively modifying the divorce decree to require him to pay insurance premiums. He also contends that the district court's penalty for contempt is void for vagueness.

This court reviews a child support order for abuse of discretion.[2] We will not disturb district court rulings supported by substantial evidence on appeal.[3] "Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment."[4] The district court's order found that the parties had no valid oral agreement

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[2]Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996).

[3]Williams v. Williams, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004).

[4]Id.

modifying child support. This finding was based on Heather's testimony, which the district court found to be credible. Witness credibility and the weight to be given to their testimony are matters properly within the district court's discretion.[5] As we will not reweigh the credibility of witnesses on appeal,[6] we conclude that substantial evidence supports the district court's finding that no valid modification agreement existed between the parties. However, the district court's implied finding that Heather did not impliedly waive nor was she estopped from claiming child support arrearages does not appear to be supported by the record.[7]

We have held that the equitable defenses of waiver and estoppel may be raised by the obligor in a proceeding to reduce child support arrearages to judgment.[8] To establish a valid waiver, Douglas must show that there has been an intentional relinquishment of a known right.[9] "A waiver may be implied from conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any

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[5]Id.

[6]Castle v. Simmons, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

[7]As we interpret the district court's order as a matter of law, we construe the judgment to include an implied finding that respondent did not impliedly waive nor was she estopped from claiming child support arrearages, in order to render the judgment more reasonable and conclusive as a whole. See Allstate Ins. Co. v. Thorpe, 123 Nev. ___, ___, 170 P.3d 989, 992-93 (2007).

[8]Parkinson v. Parkinson, 106 Nev. 481, 483, 796 P.2d 229, 231 (1990).

[9]Id.

other intention than to waive the right."[10] According to the undisputed facts in the record, Heather's conduct from mid-1995 until August 2006 appears to be inconsistent with any intention to enforce her right to receive child support payments under the divorce decree.[11]

Douglas' second defense, equitable estoppel, is comprised of the following four elements: "(1) The party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped."[12]

In this case, the undisputed facts in the record appear to support a finding of the elements of estoppel: (1) Heather knew that the divorce decree awarded her $500.00 in monthly child support and that Douglas was paying for the son's extracurricular activities instead of paying her the monthly child support; (2) Heather did not request the monthly child support because she wanted to maintain harmony so that Douglas and the son could have a close relationship; (3) Douglas did not know that Heather was not in agreement with the arrangement that he pay for the son's activities in lieu of monthly child support and that Heather was simply waiting until the son reached the age of majority to

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[10]Mahban v. MGM Grand Hotels, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984).

[11]See Parkinson, 106 Nev. at 483-484, 796 P.2d at 229.

[12]Mahban, 100 Nev. at 596, 691 P.2d at 423.

claim child support arrearages; and (4) Douglas relied to his detriment on Heather's conduct. Consequently, we remand this case in order for the district court to make written factual determinations as to whether Heather impliedly waived or is estopped from claiming child support arrearages.[13]

As to the health insurance arrearages, the district court did not abuse its discretion in finding that Douglas owed arrearages for health insurance under the divorce decree.[14] The court ordered arrearages in the amount of $11,400.00 based on Heather's testimony, which the court found to be credible. Douglas' argument that the district court abused its discretion by retroactively modifying the divorce decree to require him to pay the son's insurance premium is without merit.

The district court's order found that, under the divorce decree, Douglas was to provide health insurance for the son and was to share equally in the cost of medical and dental expenses for the son that were not paid for by insurance. When Douglas lost his job, thereby losing the son's free health insurance coverage, he did not purchase any other health insurance for the son. Instead, Heather purchased the son's health insurance. We conclude that the district court did not abuse its discretion

FN 13 Vacated per order filed 12/3/08 SP

[13]Should the district court determine that Heather did not impliedly waive nor is she estopped from claiming child support arrearages, Douglas should be given credit for all documented expenses for the son's extracurricular activities and other support payments made to respondent and to the son against any child support arrearages owed. See Day v. Day, 82 Nev. 317, 327, 417 P.2d 914, 920 (1966).

[14]Appellant did not raise the defenses of estoppel or waiver in response to respondent's claim for health insurance arrearages.

in holding Douglas responsible for one-half of the son's health insurance premiums. Accordingly, we affirm that portion of the district court's order.

Finally, we address the contempt portion of the district court's order. We have held that a party cannot be found guilty of contempt for failing to pay child support unless the court first determines that the individual (1) has the ability to pay and (2) willfully refuses to pay.[15] The facts set forth in the record do not support the finding that Douglas willfully refused to pay child support. We, therefore, conclude that the district court erred in finding Douglas in contempt and reverse that portion of the district court's order pertaining to contempt.[16]

It is so ORDERED.

_____, J.
Maupin

_____, J.
Cherry

_____, J.
Saitta

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[15]Rodriguez v. Dist. Ct., 120 Nev. 798, 809, 102 P.3d 41, 49 (2004).

[16]In light of this order, we do not address appellant's argument that the contempt order was void for vagueness.

cc: Hon. David R. Gamble, District Judge
Cathy Valenta Weise, Settlement Judge
Law Office of Karen L. Winters
Peter B. Jaquette
Douglas County Clerk