

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIANA L. MCINTYRE,
Appellant,
vs.
DENNIS L. MCINTYRE,
Respondent.

No. 49641

FILED

AUG 18 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

This is a proper person appeal from a post-decree district court order regarding child support. Second Judicial District Court, Family Court Division, Washoe County; Chuck Weller, Judge.

The parties were married in October 1984 and divorced in August 1995. The parties have two children, both of whom are now emancipated. On August 18, 2006, appellant Diana McIntyre filed a proper person motion in the district court, seeking to hold respondent Dennis McIntyre in contempt for failing to reimburse her for extracurricular activities and medical expenses and requesting review of the child support and property distribution portions of the divorce decree.

Two months later, Dennis, through counsel, filed a motion for primary physical custody of the parties' son, who was a minor at the time. This motion did not respond or refer to Diana's motion. Diana retained counsel and opposed Dennis's custody motion, asserting that a supporting document, which Dennis claimed to be authored by the parties' son, was actually written by the son's girlfriend, with Dennis's coaching and editing. Diana also sought attorney fees in her opposition. Dennis ultimately filed an opposition to Diana's support and contempt motion on

December 19, 2006, approximately four months after the opposition was due. Diana filed a motion to strike Dennis's opposition, which was denied by the district court.

Both Diana's contempt and support motion and Dennis's custody motion were set for hearing on April 20, 2007. At the hearing's commencement, the parties agreed that Dennis's custody motion would not be heard. Following the hearing, in a May 7, 2007, order, the district court found that Diana had implicitly waived certain claims concerning the reimbursement for extracurricular activities and medical expenses and that she had expressly agreed in writing to modify the child support agreement. In particular, the district court found that Diana violated her obligation under the divorce decree to notify Dennis in advance regarding children's activities which could cause Dennis to incur significant debt and that this violation, together with her delay in submitting her requests for reimbursement, were inconsistent with an intention to enforce her right to be reimbursed. The district court concluded that Diana's inconsistent conduct amounted to a waiver of any claim arising more than six years before Diana filed her motion. The court also concluded that Diana expressly agreed to release Dennis from all extracurricular activities and medical expenses incurred between September 1, 1995, and December 31, 1997. Thus, the court itemized each of Diana's child support expense claims and ruled on them individually, finding some reimbursable and others not. With regard to Diana's remaining claims, the district court found that Diana produced insufficient documentation regarding any medical expense claim incurred more than three years before she filed her motion, and it denied several other claims as unsubstantiated or duplicative. The court ordered each party to bear their own attorney fees

and costs without specifically mentioning Diana's request for attorney fees based on Dennis's custody motion and its purportedly false documentation. The May 7 order did not specifically address Diana's claims regarding the children's college funds, the children's life insurance policies, or the allocation of a business line of credit that was not addressed in the divorce decree. This appeal followed.

On appeal, Diana argues that the district court abused its discretion by considering Dennis's opposition, which the district court allowed him to file four months late, in not awarding statutory interest on the unpaid extracurricular activities and medical expenses which the court determined were reimbursable, in determining that a contract between the parties was valid and enforceable, in not awarding her attorney fees in connection with opposing Dennis's custody motion, and in not addressing matters concerning the children's college funds, life insurance policies, or the business line of credit. Dennis filed a response, as directed, and disputes each of Diana's claims.

This court reviews a child support order for an abuse of discretion.¹ We will not disturb district court factual determinations that are supported by substantial evidence on appeal.² "Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment."³

¹Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

²Williams v. Williams, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004).

³Id.

Diana first argues that the district court abused its discretion by considering Dennis's opposition, which the district court allowed him to file four months late. In her motion to strike Dennis's opposition, Diana did not allege any prejudice as a result of the delay. In its order denying the motion to strike, the district court reasoned that the interests of the parties and the children would be better served if the issues raised by Diana's motion were decided on the merits. As our general policy to resolve cases on their merits is heightened in domestic relations matters,⁴ we conclude that the district court did not abuse its discretion by considering Dennis's opposition after allowing him to file it four months late.

Diana next contends that the district court abused its discretion by not awarding her statutory interest under NRS 125B.140(2)(c)(1) on the amount awarded for the extracurricular activities and medical expense arrearages determined by the court. Because Diana was unable to demonstrate when she had submitted each of her claims for reimbursement to Dennis, the record does not establish a due date for each of her claims from which interest could be calculated. By the terms of the district court's May 7 order, Dennis was required to pay interest on those items the court found were reimbursable at the legal rate, beginning 30 days after the date of that order until paid. As Diana could not establish when her claims became due, the district court did not abuse its

⁴Lesley v. Lesley, 113 Nev. 727, 734, 941 P.2d 451, 455 (1997) (citing Price v. Dunn, 106 Nev. 100, 105, 787 P.2d 785, 788 (1990), overruled on other grounds by Epstein v. Epstein, 113 Nev. 1401, 950 P.2d 771 (1997)).

discretion in determining that interest would not begin to accrue until 30 days after the order was entered.

Diana also argues that the court abused its discretion in its determination that the written document that she and Dennis signed, modifying the divorce decree, was a valid contract. The district court found that the written document constituted an express modification of the support agreement and barred any claim incurred between September 1, 1995, and December 31, 1997. This finding was based on the document itself and on Dennis's testimony, which the court found to be credible. Witness credibility and the weight given to a witness' testimony are matters properly within the district court's discretion.⁵ As we will not reweigh the credibility of witnesses on appeal⁶ and as the document is signed by Diana and supports the district court's finding, we conclude that substantial evidence supports the district court's finding that there was a valid express modification of the divorce decree, which barred reimbursement for any claim incurred between September 1, 1995, and December 31, 1997.

Next, Diana maintains that the district court abused its discretion in not awarding her attorney fees in connection with opposing Dennis's custody motion. Diana, whose contempt and support motion had been filed in proper person, appears to have retained counsel in district court solely to defend against Dennis's custody motion. But for Dennis's custody motion, Diana states, she would not have incurred attorney fees.

⁵Williams, 120 Nev. at 566, 97 P.3d at 1129.

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

In her opposition to the custody motion, Diana objected to a document, allegedly written by their son, attached in support of Dennis's motion. To her opposition, Diana attached a copy of the document, which she maintained was not written by her son, as the document was in the son's girlfriend's handwriting. That copy also includes comments, allegedly written in Dennis's handwriting. Diana's opposition requested attorney fees for having to respond to the motion, as the motion was based on fabricated evidence. The record reflects that Dennis did not attempt to defend the veracity of the document in question, and at the April 20, 2007, hearing, Dennis voluntarily agreed not to have the motion heard by the court.

The district court's May 7 order directs both parties to bear their own attorney fees and costs. A district court's attorney fees award will not be reversed absent an abuse of discretion.⁷ However, in light of the above facts regarding Dennis's custody motion, we conclude that the district court abused its discretion in not awarding Diana her attorney fees incurred in opposing the custody motion. Accordingly, we reverse this portion of the order and remand for the district court to award Diana appropriate attorney fees and costs in connection with opposing the custody motion.

Finally, Diana contends that the district court erred in not addressing the issues raised in her support and contempt motion concerning the children's college funds, the children's life insurance policies, and the business line of credit not mentioned in the divorce

⁷See Sprenger v. Sprenger, 110 Nev. 855, 878 P.2d 284 (1994).

decree. As the May 7 order does not address these issues, we remand this matter to the district court for it to consider them.

Accordingly, we

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

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

cc: Hon. Chuck Weller, District Judge, Family Court Division
Diana L. McIntyre
Hardy Law Group
Washoe District Court Clerk