

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ABDULLAH BADRIAN,  
Appellant,  
vs.  
MICHELLE C. BADRIAN, N/K/A  
MICHELLE C. AASE,  
Respondent.

No. 61557

FILED

MAR 04 2016

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

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

This is an appeal from a final order modifying child support. Eighth Judicial District Court, Clark County; Cynthia N. Giuliani, Judge.

The parties were divorced by way of Decree of Divorce filed on March 31, 1997. Abdullah was ordered to pay child support for the parties' two minor children. According to Michelle, Abdullah began accruing arrearages immediately after the Decree was entered.<sup>1</sup> Following entry of the Decree, there were subsequent orders modifying Abdullah's child support obligation. The parties agree that in January 2010 Abdullah became eligible for and began collecting Social Security Retirement benefits, while still working full time. Subsequently, the minor children began receiving benefits pursuant to 42 U.S.C. § 402(d), which provides a direct entitlement of benefits to qualifying dependent minors. Abdullah's wages continued to be garnished during this time.

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<sup>1</sup>Abdullah does not appear to dispute this fact; he only disputes the amount of arrearages owed based on credits he thinks the district court should have given him.

Effective May 1, 2011 the District Court modified Abdullah's obligation to \$0.00 per month, finding Abdullah's qualification for Social Security Retirement benefits constituted a service, warranting a downward deviation pursuant to NRS 125B.080(9)(f). The youngest child emancipated in September 2012.<sup>2</sup> The district court entered a subsequent order on July 25, 2012 making findings relating to various credits to be awarded and ordering a total amount of child support arrears owed by Abdullah. This appeal followed.<sup>3</sup>

Abdullah raises three issues on appeal: (1) whether the district court erred in failing to apply his garnished wages to his child support arrears; (2) whether the district court erred in failing to give appropriate credit for the overpayment toward arrears; and (3) whether the district court erred in declining to award attorney fees.<sup>4</sup>

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<sup>2</sup>At some point during the litigation the older child emancipated and her Social Security benefits stopped, but this Order refers to the children's benefits (plural) because both children did receive benefits at some point. The parties do not dispute that the amounts were properly adjusted for the emancipation of the oldest child.

<sup>3</sup>Because the parties are familiar with the extensive procedural history and facts of this case, we do not recount them further except as necessary to our disposition.

<sup>4</sup>In her answering brief, Michelle contends this appeal is untimely and therefore this court lacks jurisdiction, asserting that although Abdullah states he is timely appealing an order entered July 25, 2012, his requested relief requires reversal of orders entered on November 16, 2011 and May 11, 2012 (she refers to a February 13, 2012 hearing, but that order was entered on May 11, 2012) and that Abdullah's notice of appeal is untimely as to those orders. We find this argument is without merit as the November 16 and May 11 orders do not fully and finally resolve the arrearages issue or the application of retirement credits issue presented

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We review child support orders for an abuse of discretion. *Edgington v. Edgington*, 119 Nev. 577, 588, 80 P.3d 1282, 1290 (2003) citing *Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541 (1996). Similarly, the Nevada Supreme Court has held that child support matters rest within the trial court's sound discretion and we presume the trial court has properly exercised. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) citing *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975).

*The district court properly credited Abdullah's garnished wages*

Abdullah first argues the district court abused its discretion by failing to apply his garnished wages toward his child support arrears. The retirement benefits to Abdullah and the children commenced in January 2010 and Abdullah's wages were being garnished at the same time. Abdullah asserts that payments from the Social Security benefits Michelle received on behalf of the children suspended Abdullah's current child support obligation, and the wage garnishment Michelle was receiving should have been credited toward Abdullah's arrears, but it was not. Therefore, Abdullah argues, this constituted an inequitable double-enrichment. Additionally, Abdullah asserts the district court stated in its July 24, 2012 decision that both parties' schedule of arrears were incorrect, but then adopted Michelle's schedule and that on Michelle's

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on appeal. That was done in the July 25, 2012, order from which Abdullah appealed and this court has proper jurisdiction to resolve this matter.

Michelle also asserts Abdullah and his counsel should be sanctioned pursuant to NRAP 28(j), NRAP 30(g), and NRAP 38. We conclude that while sanctions may be warranted in this instance, we decline to issue any in light of the complex factual background giving rise to this appeal.

schedule of arrears, Abdullah was given credit for the months he overpaid child support, which was appropriate under *Hern v. Erhardt*, 113 Nev. 1330, 948 P.2d 1195 (1997). However, Abdullah argues there was no credit given for payments through the wage garnishment.

Michelle argues Abdullah was credited the appropriate amounts. She asserts that *Hern* only discusses arrearages, not the current obligation, and NRS 125B.140(1)(a) does not permit retroactive modification; therefore, the children's Social Security benefits do not automatically apply to the current obligation, which is why she applied the wage garnishment money to the current obligation. Michelle further asserts the district court abused its discretion by using the Social Security benefits to improperly credit Abdullah's pre-2010 arrears.

*Hern v. Erhardt* holds Social Security disability benefits paid in excess over the amount owed as child support can be credited toward child support arrears accruing after the date the obligor parent becomes disabled.<sup>5</sup> 113 Nev. at 1335, 948 P.2d at 1198. This credit is given based on the idea that the arrearages accrued because the obligor parent became disabled, and was therefore unable to make the support payments. *Id.* For that reason, the credit cannot be applied towards arrearages accruing prior to the onset of the disability or accruing after the termination of benefits. *Id.* at 1336, 948 P.2d at 1199. The Nevada Supreme Court also noted that the obligor parent must make a good faith effort to obtain the

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<sup>5</sup>We note the Nevada Supreme Court recognized that whether Social Security benefits may be applied to pay child support was an unanswered question, but did not answer the same. *Hern v. Erhardt*, 113 Nev. at 1334-37, 948 P.2d at 1198-99.

Social Security benefits for the child as soon as possible, or the court should not give a credit. *Id.* at 1335, P.2d at 1198.

Additionally, NRS 125B.080 allows the court to deviate from the statutory child support amount established by NRS 125B.070 if the court makes findings of fact after considering a number of factors enumerated in NRS 125B.080(9). The Nevada Supreme Court has noted the legislature has limited the district court's discretion in deviating from the statutory child support formula. *Anastassatos v. Anastassatos*, 112 Nev. 317, 320 913 P.2d 652, 654 (1996). The court went on to state the district court must make findings when deviating and the basis for deviating "must be found in the unfairness, the injustice, which may result" to the obligor parent. *Id.* (citing *Barbagallo v. Barbagallo*, 105 Nev. 546, 552, 779 P.2d 532, 536 (1989)). The court went on, still citing *Barbagallo*, stating, "courts should exercise considerable caution before reducing the formula amounts" and "the primary custodian is faced with an array of fixed expenses relating to child rearing, costs such as rent, mortgage payments, utilities, car maintenance and medical expenses. These expenses go on and are not usually appreciably diminished as a result of the secondary custodian's sharing of the burdens of child care and maintenance." *Id.* at 321, 913 P.2d at 654.

Here, the district court properly considered *Hern* and Abdullah's applicable credits. In its November 16, 2011 order, the district court concluded Abdullah was entitled to credits based on *Hern* and stated it was appropriate to give Abdullah dollar-for-dollar credit against the children's Social Security benefits because the benefits were awarded on account of Abdullah's eligibility for retirement. The district court properly noted it was permitted to deviate from the statutory child support formula

if it made findings; it found that pursuant to NRS 125B.080(9)(f), the value of services contributed by Abdullah, his earning record, enabled the children to receive Social Security benefits, entitling Abdullah to a downward deviation. The district court found the children's needs were met by the Social Security benefit of \$714.00 per month and ordered a dollar-for-dollar credit.<sup>6</sup>

In its May 11, 2012 order, the district court specifically noted Michelle did not give Abdullah the proper post-2010 credits, requiring her to file a supplemental schedule of arrears to include those credits. Then, in its July 25, 2012 order, the district court made numerous findings relating to credits and arrearages. Contrary to what Abdullah argues, the district court does not state in its July 25, 2012 order that it is relying on Michelle's schedule of arrears despite it being incorrect. The district court stated that because Abdullah's supplemental affidavit appeared to give Abdullah double-credit, it relied on Michelle's schedule of arrears "in determining the amounts paid by [Abdullah] since it appears to be more accurate." The court went on to find that Michelle's schedule of arrears properly gave Abdullah *Hern* credits for the months he underpaid child support, but did not give Abdullah dollar-for-dollar credit from May 1, 2011 through the then present date. The district court then calculated the

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<sup>6</sup>The district court indicated it was giving Abdullah a dollar-for-dollar credit, but also indicated it was deviating the child support obligation down to \$0.00 based on NRS 125B.080(9)(f). We caution the district court that it cannot do both; either a child support obligation is ordered and a parent receives a specific credit against that amount or the parent is entitled to a deviation and based on that deviation an obligation amount (more than or less than the statutory amount) is ordered. However, the distinction is inconsequential under the facts of this case so we do not discuss the issue further.

amount Abdullah overpaid, the amount Abdullah should have paid toward his pre-2010 arrears, and ultimately found Abdullah was entitled to \$6,886.39 credit. The district court concluded that after subtracting Abdullah's credits from \$21,907.43 – his arrears balance as of January 2010, he owed total arrears of \$15,021.04 plus interest and penalties.

Based on its findings, the district court properly considered the Social Security benefits as one factor for deviating from the statutory formula and did not fail to consider Abdullah's credits pursuant to *Hern*, as he alleges. Therefore, the district court did not abuse its discretion.

However, Michelle is correct in noting the district court improperly applied \$718.00 of *Hern* credits to pre-2010 arrearages. Specifically, in the July 25, 2012 order, the district court indicates there were \$718.00 of *Hern* credits given to Abdullah from January 2010 through April 2011 and then added that amount to the total amount of credits Abdullah was entitled to receive. It then subtracted that full amount (including the \$718.00) from the arrears Abdullah owed; this was error. Therefore, on remand the district court shall increase the total arrearages owed by \$718.00.

*The district court appropriately credited the overpayment*

Abdullah next argues the district court erred in failing to give him "credit for payments received through the overpayment."<sup>7</sup> Abdullah states the children's Social Security benefit exceeded the statutory child

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<sup>7</sup>Abdullah's argument is unclear and we could decline to reach this issue in its entirety, but because the result is the same, we take this opportunity to discuss and clarify the issues raised. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating we need not consider claims not cogently argued nor supported by relevant authority).

support obligation; that the district court then ruled the children's needs were met by the Social Security benefit; that this was a matching of the obligation to the retirement benefit amount; and also ruled Abdullah was obligated to pay \$300.00 per month toward arrears – which was being garnished from his wages. He then argues his child support obligation should have been terminated or suspended once the benefits were received. Abdullah contends the district court's conclusion that Michelle gave Abdullah the appropriate *Hern* credits for the months he underpaid child support was error because no overpayment was applied and he was entitled to a credit of \$11,106.39, which should have been applied to his arrears that accrued prior to January 2010. He then states the \$300.00 payment was not applied to the arrears and the wage garnishment amounts were not applied to arrears.

Michelle argues the district court did not abuse its discretion and the district court could not modify the child support obligation prior to May 6, 2011.

We must note here that Abdullah's math is as follows:

Giving *Hern* credits, Abdullah was entitled to a credit of \$11,106.39 (this figure is the amount of credit the district court indicated in its July 25, 2012 order, which as we noted above is \$718.00 more than it should be).

The total arrears accrued prior to January 2010 was \$21,907.43; less the \$11,106.39 leaves arrears of \$10,801.04.

Then, Abdullah states, if the *Hern* credit of \$11,106.39 is added to the total amount garnished, \$26,454.93, his total credit toward arrears should be \$37,561.32.



If this amount is subtracted from the balance of arrears owed, \$10,801.04, Abdullah is entitled to a refund of \$26,760.28.

Even assuming *arguendo* that these figures were accurate (which at least the \$11,106.39 is not, as discussed above, and it is unclear where Abdullah obtained a total garnishment amount of \$26,454.93) this math is completely inaccurate as Abdullah subtracts the \$11,106.39 twice.

Abdullah argues the Social Security benefit overage (the amount of the benefit less the current child support obligation) was not being applied to his arrears. We disagree. The Social Security overage was properly applied by the district court to arrears accruing after January 2010 (when Abdullah became eligible for the benefits). *Hern* states the overage cannot apply to arrears accruing prior to the benefit eligibility; thus, once the district court modified the obligation to \$0.00 there were no arrears accruing and therefore nothing to which the overage could apply.

To the extent that Abdullah argues the \$300 per month being garnished from his wages were not applied to his arrears, Abdullah mixes facts. He was ordered to pay \$300 per month towards arrears that accrued prior to January 2010; his wages were being garnished to make that payment, but Michelle argues she never received \$300 per month from the garnishment as she received \$138.46 every two weeks, and these amounts were accounted for in her schedule of arrears. Whether the amount garnished was \$300 per month or \$138.46 every two weeks is irrelevant here as the district court found Michelle gave Abdullah credit for whatever amount was being garnished in her schedule of arrears and the amount the district court concluded Abdullah owed included the

credits from that wage garnishment. Therefore, the district court properly considered Abdullah's wage garnishment money.

Insofar as Abdullah argues the \$300 per month he owed for arrears accruing prior to January 2010 should have been in essence paid for (or credited) by the Social Security benefit the children received, Abdullah is incorrect. The *Hern* case is clear that the Social Security benefit overage applies towards arrears accruing after he became eligible for benefits. Allowing the benefit to pay Abdullah's \$300 per month obligation (which he was ordered to pay toward his arrears accruing prior to January 2010) would violate the spirit of *Hern*. Thus, because the district court considered the controlling case law and statutes, we cannot say the district court abused its discretion in applying the credits or in modifying the child support.

*The district court did not err in declining to award attorney fees*


Awarding "attorney fees in divorce proceedings lies within the sound discretion of the district court." *Hern v. Erhardt*, 113 Nev. 1330, 1338, 948 P.2d 1195, 1200 (1997) citing *Sprenger v. Sprenger*, 110 Nev. 855, 861, 878 P.2d 284, 288 (1994). NRS 125.150(3) states in pertinent part, "the court may award a reasonable attorney's fee to either party to an action for divorce." NRS 18.010(2) provides that the court may award attorney fees to a prevailing party and EDCR 7.60 allows an award of attorney fees as a sanction against a party for bringing a frivolous motion.

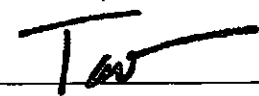
Abdullah argues he was entitled to fees as the prevailing party; he also asserts he was entitled to fees because Michelle caused delay, her motion was frivolous, and her motion was vexatiously litigated. Interestingly, Abdullah argues Michelle did not understand the district court's prior orders, thereby bringing unnecessary motions, but it was Abdullah that filed a Motion to Clarify the court's prior order. Based on

the record, we cannot say the district court abused its discretion in declining to award attorney fees.

We therefore,

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.<sup>8</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Charles J. Hoskin, Presiding District Judge, Family Division  
Hon. Cynthia N. Giuliani, District Judge, Family Division  
Eighth Judicial District Court, Family Division, Department M  
Robert E. Gaston, Settlement Judge  
Harris Law Office  
Michelle C. Aase  
Eighth District Court Clerk

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<sup>8</sup>As noted above, this matter is being remanded for the limited purpose of adding \$718.00 to the arrearages calculation due to the district court's improper application of *Hern* credits.