IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILIP STANLEY BOVEE,
Appellant,
vs.
ANA LORENA BOVEE,
Respondent.

No. 76010-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Philip Stanley Bovee appeals a decree of divorce. Eighth Judicial District Court, Family Court Division, Clark County; Denise L. Gentile, Judge.

In the proceedings below, the district court entered a stipulated decree of divorce awarding the parties joint legal and joint physical custody of their minor child and concluding that, because the parties' incomes were so similar, no child support would be ordered. Additionally, the parties' minor child receives a derivative social security benefit based on Philip's social security retirement benefit and Philip receives the payment on the child's behalf as the representative payee. Because the parties could not reach an agreement as to how the derivative benefit should be applied, the district court ordered the parties to submit supplemental briefing on the issue. The district court subsequently entered an order concluding that after receiving the derivative benefit, Philip was to deposit the funds into an account for the child's benefit. Additionally, both Philip and respondent Ana Bovee were to be signatories on the account and both parties would be entitled to withdraw one-half of the derivative benefit each month. The

district court also awarded Ana $6,500.00 in attorney fees. This appeal followed.

On appeal, Philip argues that the district court abused its discretion in ordering him to deposit the child's derivative benefit into a separate account and in concluding that no child support would be ordered. This court reviews the district court's decisions in divorce proceedings for an abuse of discretion. *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004). This court will not disturb a district court's decision that is supported by substantial evidence. *Id.* Substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment. *Id.* Similarly, this court reviews a child support decision for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996); *see also Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004).

Here, in the decree of divorce, the district court determined that because the parties' incomes were so similar, no child support should be ordered. However, because the child's derivative benefit remained unaccounted for, the court issued a second order concluding that the parties should equally share the derivative benefit to use for the child's care, maintenance, and support. We agree with Philip that this order, dividing the derivative benefit, is preempted by federal law, which prohibits the social security payment from being transferred, assigned, or subject to any legal process. *See* 42 U.S.C. § 407(a). Although the district court noted that it was not improperly transferring or assigning the derivative benefit because it was not ordering the Social Security Administration to redirect the funds to someone other than to the representative payee, the court's order requiring Philip to deposit the funds he received on the child's behalf into a joint bank account with Ana is still preempted by 42 U.S.C. § 407(a).

See Boulter v. Boulter, 113 Nev. 74, 79, 930 P.2d 112, 115 (1997) (explaining that, pursuant to 42 U.S.C. § 407(a), even if the social security benefit is deposited into the recipient's bank account, the district court "is not empowered to compel [the recipient] to pay those benefits to [another]"); 42 U.S.C. § 407(a) (prohibiting any benefit amount "paid or payable" from being subject to legal process); *see also In re: Guardianship of Smith*, 17 A.3d 136, 140 (Me. 2011) (explaining that the court requiring the representative payee to deposit a portion of the child's social security benefit into a bank account subject to the joint control of another conflicted with the federal statutes and regulations); *Silver v. Pinskey*, 981 A.2d 284, 299 (Pa. 2009) (concluding that the court's eliminating child support and ordering the father to split a social security derivative benefit with the mother effectively dispensed with the state's statutory support guidelines and the federal statutes as a whole); *Brevard v. Brevard*, 328 S.E.2d 789, 792 (N.C. Ct. App. 1985) (explaining that 42 U.S.C. § 407(a) applies to funds that have been disbursed in concluding that the court did not have the power to order a father, the representative payee, to pay the benefits he received on behalf of the children to the court or to the mother).

While the district court was not permitted to order Philip to deposit the derivative benefit into another account that Ana could access, the district court was permitted to consider, and should have considered, the derivative benefit in determining whether the court should deviate from the statutory child support amount. *See* NRS 125B.080(9)(g); *see also Silver*, 981 A.2d at 299; *Brevard*, 328 S.E.2d at 792. Accordingly, we necessarily must reverse and remand the district court's child support order in light of our conclusion that the district court improperly divided the derivative benefit and that the derivative benefit should properly be

considered as a factor for deviation pursuant to NRS 125B.080(9). On remand, the district court should consider the derivative benefit and any other relevant factors when determining the child support amount and whether a deviation is appropriate. *See* NRS 125B.080.

Philip also appeals the district court's award of attorney fees to Ana. This court reviews a district court's award of attorney fees for an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). Although the district court did not expressly cite which rule it relied upon in granting the request for attorney fees, the district court concluded that fees were appropriate based on Philip's vexatious behavior and failure to comply with court rules, orders, and discovery. The district court also found that Philip's unreasonable conduct and his failure to participate in discovery increased Ana's attorney fees. Moreover, the district court specifically found that there was no reasonable basis to explain Philip's failure to cooperate or participate in discovery, his failure to file an updated financial disclosure form, or his failure to appear at his deposition.

Based on our review of the record, substantial evidence supports the district court's findings and, therefore, the award of attorney fees would be proper pursuant to EDCR 7.60(b). We also note that the district court always has discretion to award attorney fees in divorce and custody cases pursuant to NRS 125.150(4) and NRS 125C.250. Thus, we cannot conclude that the district court abused its discretion in determining an award of attorney fees was warranted. *See Miller*, 121 Nev. at 622, 119 P.3d at 729.[1]

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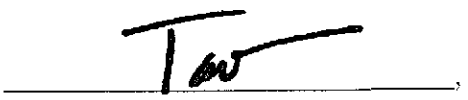
[1]We note that an award of attorney fees pursuant to any of the above-noted rules would be proper regardless of this court's reversal and remand on the social security derivative benefit issue.

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.[2]

_____, C.J.
Gibbons



_____, J.
Tao

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cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
Hon. Denise L. Gentile, District Judge, Family Court Division
Philip Stanley Bovee
Douglas Crawford Law
Eighth District Court Clerk

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[2]To the extent Philip raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

Additionally, we note that although this court generally will not grant a pro se appellant relief without first providing the respondent an opportunity to file an answering brief, *see* NRAP 46A(c), based on the record before us, the filing of an answering brief would not aid this court's resolution of this case, and thus, no such brief has been ordered.