

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS L. NESMITH,
Appellant,
vs.
SUZANNE KAY NESMITH, N/K/A SUZANNE
LEON,
Respondent.

No. 37108

FILED

JUN 20 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Carroll*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a post-decree order concerning child support arrears and the award of attorney fees.

The parties were divorced in November 1987. They have two children, who are approximately ages twenty and seventeen years old. The decree awarded primary physical custody of the children to respondent, with liberal visitation to appellant, and appellant was ordered to pay child support.

In the early 1990s, a dispute arose regarding child support, arrears, and visitation. At the time, both parties were represented by counsel. The matter was referred to a domestic referee, who recommended, among other things, that appellant be granted an abatement for child support for any period the children were with him for more than two weeks. This recommendation is reflected in the minutes, but was never reduced to a formal written order approved by the district court. Nevertheless, the record reveals that the parties abided by the oral recommendation.

In March 1994, the district court entered a written order that directed appellant to continue to pay \$724 per month in child support, plus \$55 for health insurance. The order further provided that no additional child support modification would be made. The order did not include a judgment for arrears.

The record reveals that from 1994 to 1997, the children visited appellant for the summers. Based on the October 1991 referee's recommendation, appellant did not pay child support during the summers the children spent with him. The children did not spend the summer of 1998 with appellant, and the youngest child did not come for the summer of 1999.

In May 2000, proceeding in proper person, appellant filed a motion to modify custody and child support. Respondent, represented by counsel, filed an opposition to the motion and a countermotion to collect child support arrears in the amount of \$6,850.50, plus interest and penalties. Respondent also requested attorney fees. Appellant filed a reply in which he contended that he was entitled to an abatement for the summer months that the children were in his care. Thereafter, the parties stipulated as to the issues concerning child custody and visitation. During an October hearing on arrears, respondent submitted a proposed calculation for arrears in the amount of \$13,724.56, over twice the amount sought in her written motion.

On November 6, 2000, the district court entered a written order that concluded that the referee's October 1991 oral recommendation for an abatement was supplanted by the March 1994 order concerning child support, and that since the March order did not provide for summer abatement, appellant was not entitled to an abatement from 1994-2000. The district court entered an arrears judgment totaling \$13,724.56, which included interest through October 31, 2000. The order does not explain how the court arrived at this amount. The district court also awarded respondent attorney fees of \$1,000, but did not state a basis for this award.

Matters of child support are within the discretion of the district court.¹ A district court's findings of fact will not be set aside unless they are clearly erroneous and not based on substantial evidence.² Here, substantial evidence does not support the district court's determination as to the abatement, child support arrears, and the award of attorney fees.

First, under the doctrine of laches, respondent is barred from recovering the amount of the abatement as arrears. Laches is an equitable doctrine that may be invoked when delay by one party causes actual prejudice to the other,³ through a change of circumstances that would make the grant of relief to the delaying party inequitable.⁴ Here, the record reveals that respondent's delay in challenging the abatement has worked to appellant's disadvantage and prejudiced him. Respondent's very lengthy delay would cause appellant to be subject to a substantial judgment for arrears, plus interest and penalties, and attorney fees. Accordingly, respondent may not recover the amount of the abatement.

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

²See Gibellini v. Klindt, 110 Nev. 1201, 885 P.2d 540 (1994); see also Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990) ("Findings of fact of the district court will not be set aside unless clearly erroneous.").

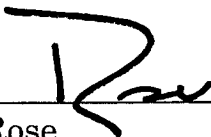
³State, Gaming Comm'n v. Rosenthal, 107 Nev. 772, 778, 819 P.2d 1296, 1301 (1991).

⁴Building & Constr. Trades v. Public Works, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992); see also Besnilian v. Wilkinson, 117 Nev. 519, 25 P.3d 187 (2001); Parkinson v. Parkinson, 106 Nev. 481, 483, 796 P. 2d 229, 231 (1990) (noting that waiver may be implied from the party's conduct, if the conduct is inconsistent with any other intention than to waive a right).


Second, as to the amount of the arrears, the record does not contain substantial evidence to support the district court's determination that appellant was in arrears \$13,724.56. Respondent sought arrears in the amount of \$6,850.50, but the district court ordered appellant to pay over double that amount without indicating the reason. Nor does the hearing videotape reveal how the district court arrived at its determination. Accordingly, the record does not contain substantial evidence to support the district court's decision. We therefore reverse the order directing appellant to pay arrears in the amount of \$13,724.56, and remand this matter to the district court for recalculation of the arrearages amount, which shall not include any amount for periods in which support was abated, according to the referee's recommendation and the parties' conduct.

Finally, the district court awarded respondent attorney fees in the amount of \$1,000 without providing the ground upon which the award was based. As the district court's arrearage judgment must be reversed, we also reverse the district court's \$1,000 fee award. Upon remand, the district court may reconsider whether and to what extent fees are warranted.


It is so ORDERED.⁵



Rose



Maupin, J.



Gibbons, J.

⁵Although appellant was not granted leave to file papers in proper person, see NRAP 46(b), we have considered the proper person documents received from appellant.

cc: Hon. Gerald W. Hardcastle, District Judge, Family Court Division
Bruce I. Shapiro
Douglas L. Nesmith
Clark County Clerk