IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY D. LUNDLEE,
Appellant,
vs.
MICHELLE D. LUNDLEE,
Respondent.

No. 41447

FILED

OCT 19 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a post-decree order concerning child support and contempt. Third Judicial District Court, Churchill County; David A. Huff, Judge.

In this case we determine whether a non-custodial parent who chooses to attend school full-time and work part-time is willfully underemployed. The district court initially granted respondent Michelle D. Lundlee, now known as Michelle Montoya, child support in the amount of $803 per month and child dependency tax exemptions for the three children she had with appellant Gary D. Lundlee. Because Gary had decided to attend college instead of work full-time, the district court also found him willfully underemployed. Gary's previous salary was over $60,000 per year, and the district court determined that Gary could earn $28,000 if he would seek full-time employment. The district court lowered Gary's previous monthly child support obligation of $1,372 to $803 because Gary was unable to meet the prior obligation. The district court also found Gary in contempt for failure to pay his child support obligation from November 2002 to March 2003.

Gary argues on appeal that the district court abused its discretion by (1) finding him willfully underemployed, (2) finding him in

contempt for underpayment of child support,[1] and (3) awarding Michelle the income tax child dependency deductions for their three children. We conclude that the district court did not abuse its discretion and affirm the district court's order.

FACTS

Gary and Michelle divorced in October 1997 in Washington state. At the time of the divorce, they had three minor children. The Washington court awarded Michelle primary physical custody of the children and ordered Gary to pay monthly child support in the amount of $810. After the divorce, the parties cooperated with each other on matters regarding the children.

Gary worked in the wireless communications industry from 1992 to 2002. After the divorce, Gary's career continued to improve and his salary continued to increase. In 1999, Gary voluntarily increased his child support payments to $1,372 because his monthly net income at the time was $4,674. In 2001, the Washington court entered an order modifying Gary's child support obligation to $1,283 because Gary's net income had decreased to only $3,273 per month.

In July 2001, Gary moved to Hawaii to work as a senior wireless implementation engineer for Sprint-PCS. However, because of the stressful working environment and his diagnosis of adult attention deficit disorder, Gary quit his job. Gary moved back to Washington and, in March 2002, filed for unemployment benefits. Shortly thereafter, Gary

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[1]Although Gary challenges the district court's contempt order, the district court did not sanction Gary. Therefore, we will not address this issue.

and his new wife filed for bankruptcy. During this time period, Gary continued to make his child support payments to Michelle. Because Michelle had previously relocated to Fallon, Nevada, Gary decided to relocate to Sparks so he could spend time with his children. Gary did not want to return to work in the wireless communications industry because of the high pressure and long work hours associated with that industry so he decided to attend college full-time to become a school teacher. Gary had previously received an associate degree in general studies while in Washington.

Gary enrolled as a full-time student at the University of Nevada, Reno pursuing a bachelor of science degree in secondary education. In October 2002, after Gary's unemployment benefits ended, Gary stopped paying his child support obligation. In November 2002, Gary paid only $641.50 in child support; and from December 2002 to March 2003, he paid only $300 per month. In November 2002, Gary moved the district court to reduce his child support payments and modify custody and visitation. Michelle moved the court for Gary's arrearages and to modify their parenting plan because Gary and Michelle disagreed on Gary's visitation schedule. Michelle also filed a motion to show cause why Gary should not be held in contempt for failure to pay child support.

On March 12, 2003, the district court conducted a hearing on these matters. Gary testified that he submitted approximately twenty employment applications in Nevada during his period of unemployment. As a result of these applications, Gary obtained three to five interviews, but he did not receive any offers of employment. Gary estimated that he could earn approximately $22 per hour working as a field technician, but he did not want to be working odd hours or be "on call." Gary further

testified that he was capable of working, but he did not want a highly stressful position. Michelle contended that Gary should pay her $800 per month in child support because that is what the Washington court originally ordered him to pay and that she should receive the child dependency tax exemptions based on the change of circumstances.

The district court found Gary in contempt for failure to pay his child support. The district court also found that Gary had not rebutted the presumption that he was willfully underemployed. The district court found Gary willfully underemployed because he was able to work full-time, yet chose to attend school full-time and work part-time instead. Imputing a potential yearly salary of $28,000 to Gary, the court reduced Gary's child support obligation to $803 per month. The court also awarded Michelle the income tax exemptions for all three children. Gary timely appeals from the district court's order.

DISCUSSION

Willful underemployment

Gary argues that the district court abused its discretion in finding him willfully underemployed because he worked part-time, earning approximately $600 per month, and attended school full-time. Gary also argues that attending school full-time does not constitute willful underemployment. We disagree.

The district court may determine a parent's child support obligation based on the parent's potential earning capacity when "a parent who has an obligation for support is willfully underemployed or

unemployed to avoid an obligation for support of a child."[2] "[W]here evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support."[3] We review child support award modifications for an abuse of discretion.[4]

We addressed the issue of willful underemployment in Minnear v. Minnear.[5] Richard Minnear was a doctor who earned a substantial income and jointly owned several rental properties with his new wife. Although Richard collected $6,045 in monthly rental income from his properties, he claimed to have realized only a $18.31 monthly profit after deducting costs and expenses. The district court found that Richard was willfully underemployed and ordered him to pay additional child support.[6] We upheld the district court's order, holding that when substantial evidence of willful underemployment exists, the district court should presume that the underemployment is to avoid paying support.[7]

The legal propositions of Minnear apply to this case. The district court found that Gary had failed to overcome or rebut the willful underemployment presumption. Gary admitted that he was not seeking full-time employment and had earned a substantial salary in the past. The district court stated that "[a]lthough it is admirable that [Gary] wants

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[2]NRS 125B.080(8).

[3]Minnear v. Minnear, 107 Nev. 495, 498, 814 P.2d 85, 86 (1991).

[4]Id. at 496, 814 P.2d at 86.

[5]107 Nev. 495, 814 P.2d 85.

[6]Id. at 497, 814 P.2d at 86.

[7]Id. at 498, 814 P.2d at 86.

to further his education, the care and support of his three teenage children has priority." While Gary provided evidence that he attended school full-time and worked part-time earning approximately $600 per month, he never contended that he was unable to work full-time in the telecommunications industry. The district court found that Gary did not rebut the presumption of willful underemployment. Rather, the evidence showed that Gary was merely unwilling to work full-time. In addition, Gary testified that he was not seeking full-time employment. Gary had over ten years of experience in the area of project management, but did not attempt to locate employment in that area. Evidence of his willful underemployment permeated the hearing in this case. The district court carefully evaluated Gary's credibility as a witness. Gary failed to rebut the presumption of willful underemployment. We conclude that the district court did not abuse its discretion by finding Gary willfully underemployed.

Under the facts of this case, attending school full-time instead of working full-time should be construed as willful underemployment when the parent is able to work full-time. The district court's finding of willful underemployment was correct; Gary's primary obligation is to support his children, not increase his education.

Child dependency tax exemptions

Gary argues that the district court erred when it awarded the income tax child dependency deductions to Michelle because Michelle did not notify him that she would argue the child dependency deductions during the hearing. We disagree.

The district court order does not provide any reasons why it granted all three tax exemptions to Michelle. The only language in the

district court's order that discusses the tax exemptions states, "The Court grants all three tax exemptions to the Respondent."

We addressed the issue of a district court's ability to award child dependency exemptions for federal income tax purposes in Sertic v. Sertic.[8] In Sertic, the district court awarded the parties the child dependency tax exemptions in alternating years. The appellant, Mona Sertic, argued that the district court should have awarded her the tax exemptions each year. In rejecting her contentions, we noted that Congress intended the custodial parent to receive the tax exemption under the Tax Reform Act of 1984, but we also stated that "the district court should have broad discretion over [child dependency tax exemptions]."[9] Consequently, we upheld the district court's order awarding each party the child tax exemptions in alternating years.

The district court has broad discretion over child dependency tax exemptions and may award the child tax exemptions because they are part of a child support order. A child support order may be modified upon a showing of changed circumstances utilizing the formula in NRS 125B.070 to NRS 125B.080.[10] Originally, the Washington court granted Gary all three tax exemptions. Although Michelle filed a written motion for a child support modification, she did not specifically request the tax exemptions. Michelle made an oral request during the modification hearing. While Gary contends that the district court erred in granting the motion, his argument is unpersuasive for two reasons.

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[8]111 Nev. 1192, 901 P.2d 148 (1995).

[9]Id. at 1197, 901 P.2d at 151.

[10]NRS 125B.145(2)(b),(4).

First, Gary's attorney did not object to Michelle's motion and did not cross-examine her regarding the tax exemptions. Failure to object precludes appellate review of that issue.[11] Gary failed to object or rebut Michelle's request for the tax exemptions; thus, he has waived appellate review.

Second, even if Gary did object, "Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party."[12] We conclude that even though the child tax exemptions issue was not specifically raised in Michelle's pleadings, Michelle's written motion placed Gary on notice of her intention to modify the divorce decree. Pursuant to our holding in Sertic and policy of construing pleadings liberally, we conclude that the district court did not err in awarding Michelle the tax exemptions.

CONCLUSION

We conclude that the district court did not abuse its discretion in finding Gary willfully underemployed because Gary chose to attend school instead of obtaining full-time employment. Additionally, the district court did not abuse its discretion in awarding Michelle the child

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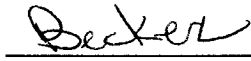
[11]Allum v. Valley Bank of Nevada, 114 Nev. 1313, 1324, 970 P.2d 1062, 1069 (1998).

[12]Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990).

dependency exemptions. Accordingly, we affirm the judgment of the district court.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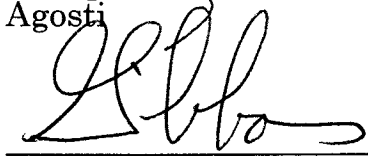
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Gibbons

cc: Hon. David A. Huff, District Judge
Mark L. Sturdivant
Carucci, Thomas & York
Churchill County Clerk