

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY KNIGHT,  
Appellant,  
vs.  
KAYLENE K. LEARY,  
Respondent.

No. 42298

FILED

JUN 28 2004

THOMAS W. BLOOM,  
CLERK OF SUPREME COURT  
BY *J. Ribick*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

This is a proper person appeal from a final divorce decree. Second Judicial District Court, Family Court Division, Washoe County; Deborah Schumacher, Judge.

"This court reviews district court decisions concerning divorce proceedings for an abuse of discretion. Rulings supported by substantial evidence will not be disturbed on appeal."<sup>1</sup> Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment.<sup>2</sup>

Nevada imposes upon both parents the duty to provide child support.<sup>3</sup> This court reviews a child support order for an abuse of discretion.<sup>4</sup> NRS 125B.070 sets forth a formula to determine the amount of child support. A court may deviate from the child support formula only

<sup>1</sup>Shydler v. Shydler, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998) (citation omitted).

<sup>2</sup>See Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

<sup>3</sup>NRS 125B.020.

<sup>4</sup>See Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996).

upon (1) making findings of fact as to the basis for the deviation, and (2) providing in those findings of fact the presumptive support amount under the statutory formula.<sup>5</sup> Under NRS 125B.080(8), “[i]f a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent’s true potential earning capacity.” “[W]here evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support. Once this presumption arises, the burden of proving willful underemployment for reasons other than avoidance of a support obligation will shift to the supporting parent.”<sup>6</sup>

Here, the district court found that appellant had failed to overcome the presumption that he was willfully underemployed in order to avoid his support obligation. Thus, to calculate appellant’s child support obligation, the district court imputed appellant’s earning capacity at \$10 per hour, or \$1,600 per month, based on his W-2 employer federal tax return information admitted during the proceedings. The court ordered appellant to pay child support in the amount of \$312 per month, which the court determined represented 18% of appellant’s imputed gross monthly

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<sup>5</sup>NRS 125B.080(6); see also Jackson v. Jackson, 111 Nev. 1551, 1553, 907 P.2d 990, 992 (1995) (concluding that under NRS 125B.080(6), a district court “shall” make findings of fact explaining its reason for deviating from the statutory formula for child support).

<sup>6</sup>Minnear v. Minnear, 107 Nev. 495, 498, 814 P.2d 85, 86-87 (1991).

income.<sup>7</sup> The court ordered the child support obligation to begin retroactive to the date of the child's birth and determined that appellant was in arrears for child support in the amount of \$2,028, based on the \$312 per month amount.

While the district court has wide discretion concerning a child support award, it appears that the district court erred when it calculated appellant's child support obligation under NRS 125B.070(1)(b)(1), because 18% of \$1,600 is \$288, not \$312. If the district court intended to deviate from the statutory formula of 18%, the order does not contain findings of fact or otherwise explain why the court deviated from the statutory formula as required by the statute. Moreover, any error in the amount of monthly child support would also affect the amount of child support arrears calculated by the district court. We therefore reverse that portion of the district court order concerning the child support obligation and arrears, and remand this matter to the district court for either, entry of written findings of fact to justify its decision to deviate from the statutory formula in awarding child support under NRS 125B.080, or a re-determination of the amount of monthly child support and arrears.

As for the portion of the district court's order concluding that appellant was in arrears for temporary spousal support,<sup>8</sup> pregnancy

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<sup>7</sup>NRS 125B.070(1)(b)(1).


<sup>8</sup>See NRS 125.040(1) (providing that an order for support and costs of suit during the pendency of a divorce action is within the district court's discretion).

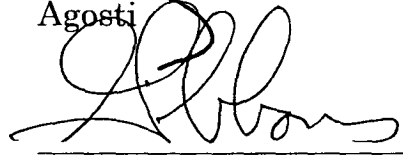
expenses,<sup>9</sup> and prior attorney fees,<sup>10</sup> and directing appellant to pay \$100 per month on the accrued arrears, we conclude that the district court's decision regarding arrears is supported by substantial evidence. Therefore, the district court did not abuse its discretion.

Finally, as for the award of attorney fees, the district court was within its discretion to award reasonable attorney fees.<sup>11</sup>

It is so ORDERED.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Agosti

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

cc: Hon. Deborah Schumacher, District Judge, Family Court Division  
Gregory Knight  
Kaylene K. Leary  
Washoe District Court Clerk

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<sup>9</sup>See NRS 125B.020(3) (providing that a father is liable to pay the expenses of a mother's pregnancy).

<sup>10</sup>See Sprenger v. Sprenger, 110 Nev. 855, 878 P.2d 284 (1994) (concluding that an award of attorney fees in divorce proceedings lies within the sound discretion of the district court).

<sup>11</sup>Id.