LEE ANN GARRETT, Appellant, vs. ROBERT LAWRENCE GARRETT, Respondent.
111 Nev. 972; 899 P.2d 1112; 1995 Nev. LEXIS 100
No. 24915
July 27, 1995, FILED
SUPREME COURT OF NEVADA
SPRINGER, J., Rose, J., I concur: Shearing, J.

1. Disposition
Affirmed.

Counsel Joseph W. Houston, II, Las Vegas, for Appellant.
Marshal S. Willick, Las Vegas, for Respondent.

Opinion

Editorial Information: Prior History

Appeal from an order of the district court granting appellant monthly child support payments. Eighth Judicial District Court, Clark County; Frances-Ann Fine, Judge.

Opinion by: SPRINGER

{111 Nev. 972} {899 P.2d 1113} *OPINION*

By the Court, SPRINGER, J.:

This is an appeal by a custodial parent who claims that the family court misapplied the child-support formula set out in NRS 125B.070 . The custodial parent, appellant Lee Ann Garrett, has two children. The statute specifies that a non-custodial parent shall pay "for two children, 25 percent . . . of that "parent's {111 Nev. 973} gross monthly income, but not more than $ 500 per month per child . . . unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080 ."

In accordance with NRS 125B.070 , the family court set the statutory "obligation for support" at "$ 500 per month per child," a total for the two children of $ 1,000.00 per month. NRS 125B.080(6) authorizes the family court to make a support award that "is greater or less than the amount which [is] established under the applicable formula." In the present case $ 1,000.00 is the amount that the court properly "established under the applicable formula." The "established" amount is "presumed" to meet "the basic needs of a child" (NRS 125B.080(5)); but, under NRS 125B.080(6) , the court has the discretion to award an amount that is "greater or less" than the "established" amount, provided that the court sets forth "findings of fact as to the basis for the deviation" from the established amount.

In the present case the family court decided that it was appropriate to make a "deviation" from

the established amount of $ 1,000.00 per month and, in accord with NRS 125B.080(6) , awarded an amount that was "less than the amount which would be established under the applicable formula," namely, $ 700.00 per month. In making this deviation from the established amount of $ 1,000.00, the trial court made the required findings of fact to support the deviation, based on the court's evaluation of factors set out in NRS 125B.080(9) , factors which included the non-custodial parent's travel expenses, the relative income of the parties, and the relative amounts of time the children spend with the parents.

The custodial parent maintains, in effect, that the amount "established" by the formula in this case should be $ 1,354.16 per month and not the $ 1,000.00 per month used by the family court, and that any "deviation" from the formula should be taken from the larger amount. We reject this contention because the so called "cap" of $ 500.00 per month is clearly the amount that is *established* by the NRS 125B.070 formula "unless" the court decides to award a "different amount pursuant to subsection 5 of NRS 125B.080 ."1 *Unless,* then, the court were to {899 P.2d 1114} have decided {111 Nev. 974} upon a "different amount," a $ 500.00 per month award is the basic, "established" or presumptive amount, the starting point from which the court must begin its calculations in furtherance of any award that might be "greater or less" than the amount "established under the applicable formula."

If we were to accept a different rule, then the established amount would be different in every case in which the calculated percentage of gross income exceeded the $ 500.00 cap; and this would be contrary to the express wording of the statute, which provides that an award *shall not* be more than $ 500.00 per child *unless* the facts support a "deviation" from this amount.

The family court judge in this case followed the directions of the statute exactly, and we find no error in the manner in which she proceeded, nor do we find any abuse of discretion on her part.2 The judgment of the family court is affirmed.

Springer, J.

We concur:

Steffen, C.J.

Young, J.

Concur

Concur by: ROSE

ROSE, J., with whom SHEARING, J., joins, dissenting:

This case involves protracted litigation between the parties in the courts of Texas and Nevada. The divorce decree was entered in Texas, and it gave custody of the parties' two minor children to Mrs. Garrett with substantial visitation rights granted to Mr. Garrett. Mr. Garrett was ordered to pay $ 700.00 per month for both children, but was permitted to deduct his travel expenses

incurred in visiting the children.

The Nevada courts became involved before the Texas court issued the final divorce decree when Mrs. Garrett moved to Nevada and filed a motion to preclude Mr. Garrett's visitation with one of the children. This began a series of allegations and hearings in Nevada. The present district court judge assumed this {111 Nev. 975} case in its latter stages when a motion for reconsideration had been filed concerning an order adopting a referee's recommendations. At the rehearing, a recent mediation report and all other issues asserted by the parties were considered.

One of those issues was Mrs. Garrett's claim that Mr. Garrett was years behind in his child support payments. Mr. Garrett acknowledged that he had made very few child support payments over the years, but stated that this was because his travel expenses to visit the children each month had been greater than the $ 700.00 monthly child support payment. Since the Texas decree permitted him to offset his child support with his monthly travel expenses, he argued that he owed no child support payments.

Mr. Garrett indicated that he presently lived in California where he made $ 65,000.00 a year and that the cost of each thirty-two hour visitation with the children was $ 390.00. The district court judge wanted to make certain that the child support payments were not erased by the visitation expenses and determined that a $ 300.00 allowance could be deducted from the $ 1,000.00 statutory payments, for a $ 700.00 net child support payment each month. In doing this, the district court judge stated:

You should be paying a thousand a month based on your income. I'm giving you a credit of $ 300 a month in travel so {899 P.2d 1115} that you don't have to pay it. So you don't have to pay both. You make $ 65,000 a year, is that true? $ 65,000 a year for two children is $ 500 a month. That's a thousand dollars, you're only paying seven hundred. You live in Irvine. I think that you can arrange for some kind of travel once a month or twice -- you come here on business you don't have to pay for that, it's probably deducted from your business and that's what every other court has ordered and I think you can do it for less. I really do think you can do the travel for less.

I dissent because the district court and the majority opinion have misconstrued NRS 125B.080 , and that interpretation will prevent adequate support being paid in many cases similar to this.

The first, and I believe, controlling direction we receive from NRS 125B.070 is that a noncustodial parent shall pay a percentage of his or her gross salary for support of his or her child or children. In Mr. Garrett's case, the statute directs that a noncustodial parent with two children should pay twenty-five percent of his or her gross monthly salary for support, or $ 1,354.16 for Mr. Garrett. The statute then goes on to say that the percentage of gross monthly income indicated should not be more than $ 500.00 per month per child unless specifically determined otherwise by the court.

The question presented in this case is whether apparently {111 Nev. 976} legitimate visitation expenses incurred by the noncustodial parent should be first deducted from the figure derived by calculating a percentage of the monthly gross income, in this case $ 1,354.16, or from the stated $ 500.00 maximum per month per child. Put another way, do we deduct the legitimate visitation expenses before or after applying the maximum cap of $ 500.00 per month per child?

I submit the legitimate monthly visitation expenses of the noncustodial parent should first be deducted from the support figure arrived at by computing a percentage of gross monthly income and then the maximum of $ 500.00 per month per child limitation should be applied. In addition to how I believe the statute should be interpreted, such interpretation comports with the general philosophy of NRS 125B.070 , which is to make sure adequate monthly support is paid to our children. With the majority interpretation, custodial parents stand to lose thousands of dollars each year because legitimate visitation expenses of the noncustodial parent will be deducted from the maximum amount of $ 500.00 per month per child, rather than from a larger monthly support amount arrived at by calculating a percentage of gross monthly income.

It is equally clear from the record that the district court judge did not hear sufficient evidence or make the appropriate findings as required by NRS 125B.080 to deviate from the required child support payments. While the judge made a meaningful attempt to do rough justice under the circumstances, NRS 125B.080(9) contemplates substantially more than was done by the judge in this case. No specific findings were made to deviate from the statute, and I find no unusual circumstances to justify a reduction in the statutorily mandated child support payments required from a man making $ 65,000.00 a year. And, as previously explained, any reduction from the required monthly payments should have first been deducted from twenty-five percent of Mr. Garrett's gross monthly salary before applying the statutory maximum of $ 500.00 per month per child.

Rose, J.

I concur:

Shearing, J.

Footnotes

Footnotes

1 Although, as suggested in the text, ignoring the $ 500.00 cap when determining the "established" amount would probably make no practical difference in the amount of deviation upwards or downwards in these kinds of cases, the legislature may still, of course, wish to change the law to provide that the deviation must be made from the actual percentage of gross income rather than from the $ 500.00 cap.

2 It should be noted that the appellant in this case has made no showing that the result in this case would have been any different had the family court judge started her calculations from the $ 1,354.16 figure rather than from the statutorily "established" figure of $ 1,000.00; thus, even if her interpretation of the statute were accepted, appellant has shown no prejudice, and we would have to affirm the judgment of the family court. As a practical matter, it would not appear to

make very much difference where the starting point is in cases where the family court is asked to deviate either upwards or downwards from the formula. The formula is presumptively correct; but when the formula amount is made to appear to be inappropriately high or inappropriately low, the family court judge has some discretion to award an amount that is "greater or less" than the formula amount. If the family court is claimed to have abused its discretion in making this "deviation," the court's judgment is reviewable on appeal irrespective of the starting point that the family court used in making its calculations as to what was a fair and adequate child support award.