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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HEATHER BURKE,

Petitioner-Appellant,

v.

SEAN MCCARGAR,

Respondent-Appellee,

and

STATE OF NEW MEXICO ex rel.

HUMAN SERVICES DEPARTMENT,

Intervenor-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

Shannon Broderick Bulman, District Court Judge

Heather Burke

Santa Fe, NM

Pro Se Appellant

Durham, Pittard & Spalding, LLP

Caren I. Friedman

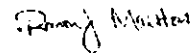
Philip M. Kovnat

Santa Fe, NM

for Appellee Sean McCargar

Court of Appeals of New Mexico

Filed 10/10/2024 11:57 AM



Ramon J. Maestas
Clerk of the Court

No. A-1-CA-40947

1 **MEMORANDUM OPINION**

2 **IVES, Judge.**

3 {1} This is a consolidated appeal by Petitioner Heather Burke (Mother) against
4 Respondent Sean McCargar (Father), concerning various aspects of child support.
5 Mother appeals an order by the district court denying reconsideration of her motion
6 to claim Child on her taxes, as well as a hearing officer’s report and decision denying
7 Mother’s motion to modify child support, and the district court’s order adopting that
8 decision. Prior to briefing by the parties, Father filed a motion to dismiss for lack of
9 appellate jurisdiction, arguing that Mother’s appeals were untimely. This Court held
10 the motion in abeyance and ordered the parties to address the arguments pertaining
11 to jurisdiction in their briefs.

12 {2} On appeal, Mother argues that the district court (1) abused its discretion by
13 concluding that Father could claim Child on his tax returns, (2) abused its discretion
14 by denying Mother’s motions related to the modification of child support for failure
15 to comply with discovery, and (3) violated her procedural due process and privacy
16 rights. Father contends that these rulings are correct and that Mother’s appeals are
17 untimely. We hold that one of Mother’s notices of appeal was untimely, but that the
18 others were timely filed. Accordingly, we deny Father’s motion to dismiss in part
19 and grant his motion in part. We, however, affirm because we agree with Father that
20 the district court did not err.

1 **DISCUSSION**

2 **I. Timeliness of Appeals**

3 **A. The First Appeal**

4 {3} Father argues that this Court does not have jurisdiction to hear Mother’s first
5 appeal because her motion to reconsider the district court’s order was filed three
6 days after the time allowed by the rules. *See* Rule 1-059(E) NMRA (“A motion to
7 alter, amend, or reconsider a final judgment shall be filed not later than thirty (30)
8 days after entry of the judgment.”). Father contends that the district court erred by
9 allowing Mother to file her motion late, the motion did not extend the time for
10 Mother to appeal the district court’s order, and her notice of appeal was therefore
11 late. We are not persuaded.

12 {4} The relevant facts are as follows. A report and decision was issued by the
13 hearing officer regarding Mother’s ability to claim Child on her tax returns on April
14 20, 2022. Mother filed objections to the decision, pursuant to NMSA 1978, Section
15 40-4B-8(B) (1993), and the district court issued a written order resolving Mother’s
16 objections and adopting the hearing officer’s decision on June 3, 2022. Mother filed
17 a motion to reconsider on July 6, 2022—thirty-three days after the written order was
18 filed. Despite the motion to reconsider being filed three days after the thirty-day
19 deadline for motions to reconsider under Rule 1-059(E), the district court concluded

1 that the motion was timely because Rule 1-006(C) NMRA afforded Mother three
2 additional days.

3 {s} Father argues that the district court did not have discretion to extend Mother’s
4 time for filing a motion to reconsider because under Rule 1-006(B)(2), “[a] court
5 shall not extend the time to act under Rule[] . . . 1-059,” and motions to reconsider
6 are governed by Rule 1-059(E). Yet, as mentioned previously, the district court here
7 did not extend the deadline under Rule 1-006(B)(2), but rather it considered the
8 motion timely because of “the additional time allowed” under Rule 1-006(C). Father,
9 in short, conflates Rule 1-006(B)—which grants the district court discretion to
10 *extend* a deadline—and Rule 1-006(C)—which addresses how to *calculate* a
11 deadline in certain situations and allows for three days to be added to that time period
12 “[w]hen a party may or must act within a specified time after service and service is
13 made by mail, facsimile, electronic transmission, or by deposit.” Critically, Father
14 merely asserts—without supporting argument—that the district court lacked “the
15 authority to add three extra days” under Rule 1-006(C). Father does not explain how
16 the district court erred by applying Rule 1-006(C) in calculating the deadline. *See*
17 *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (“We will
18 not review unclear arguments, or guess at what a party’s arguments might be.” (text
19 only) (citation omitted)). Because we are not persuaded that the district court failed

1 to calculate the deadline correctly, we will address the merits of Mother’s first
2 appeal.

3 **B. The Second Appeal**

4 {6} Father argues that Mother’s second appeal is also untimely because one of her
5 notices of appeal was filed three days after the deadline. In her second appeal,
6 Mother challenged (1) a district court order filed on December 22, 2022,¹ appealable
7 within thirty days, pursuant to Rule 12-201(A) NMRA, and (2) a hearing officer’s
8 report and decision filed December 28, 2022, which had become final and appealable
9 fifteen days after Mother’s objections went unanswered by the district court,
10 pursuant to Section 40-4B-8(C). Because Mother did not file her first notice of
11 appeal within thirty days of the district court’s December 22, 2022, order, her appeal
12 is untimely.

13 **1. The December 22, 2022, Order**

14 {7} A hearing officer issued a report and decision on November 14, 2022, denying
15 various motions filed by Mother, which the district court adopted in a written order
16 on December 22, 2022. Mother’s notice of appeal from the December 22, 2022,

¹Mother states that the order from the district court was “served December 27, 2022.” However, the district court order was *filed* on December 22, 2022, and became final and appealable on that date. *See* Rule 12-201(A)(1)(b) NMRA.

1 order was due January 23, 2023, by the end of the day.² *See* Rule 12-201(A) (stating
2 that notices of appeal must be filed within thirty days of a final judgment or order).
3 Mother did not file her notice of appeal until January 26, 2023—three days after the
4 deadline.

5 ¶8} We have the discretion to hear untimely appeals if “the appeal is only
6 marginally untimely.” *Santa Fe Pac. Tr., Inc. v. City of Albuquerque*, 2012-NMSC-
7 028, ¶ 27, 285 P.3d 595. However, the party seeking to appeal must show that
8 “unusual circumstances” warranted the late filing. *See id.* ¶ 31; *Schultz ex rel. Schultz*
9 *v. Pojoaque Tribal Police Dep’t*, 2010-NMSC-034, ¶ 21, 148 N.M. 692, 242 P.3d
10 259 (reasoning that a delay caused by United States Postal Service was an “unusual
11 circumstance”). Although Mother’s late filing may have been “marginal,” *see*
12 *Schultz*, 2010-NMSC-034, ¶ 21 (holding that a two-day delay in filing a notice of
13 appeal was “only marginal”), Mother fails to argue that unusual circumstances
14 existed to warrant excusal. While Mother suggests in her reply brief that “court-
15 caused delay” warrants excusing her untimeliness, *see Santa Fe Pac. Tr. Inc.*, 2012-
16 NMSC-028, ¶ 27, she does not adequately develop this argument, and we decline to
17 consider her argument because it was made for the first time in her reply brief. *See*
18 *Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 29, 127 N.M. 282, 980 P.2d 65

²Thirty days from December 22, 2022, is Saturday, January 21, 2023. The notice of appeal was therefore due Monday January 23, 2023. *See* Rule 1-006(A)(1)(c).

1 (“[W]e do not address issues raised for the first time in a reply brief.”). We therefore
2 do not reach the merits of Mother’s appeal of the district court’s December 22, 2022,
3 order.³

4 **2. The December 28, 2022, Hearing Officer’s Report**

5 ¶ Mother also appealed the hearing officer’s report—distinct from the report
6 that was adopted by the district court in its December 22, 2022, order discussed
7 above—filed on December 28, 2022, denying her motion to modify child support.
8 Pursuant to Section 40-4B-8(C), “[i]f the district court judge wishes to review the
9 hearing officer’s decision de novo or on the record, he shall take action on the
10 objections presented by the parties within fifteen days after the objections are filed.”
11 If the district court fails to act within the fifteen-day period, the hearing officer’s
12 decision is “deemed accept[ed] by the district court” and it is given “the full force
13 and effect of a district court decision.” *Id.* Once a hearing officer’s decision has
14 become final by operation of law, a notice of appeal may then be filed “in the same
15 manner as that of an appeal from a district court decision.” NMSA 1978, § 40-4B-9
16 (1988). Here, Father filed objections to the hearing officer’s report on January 7,
17 2023, and Mother filed objections on January 9, 2023—both within the time allowed

³We note that even were we to exercise our discretion to hear Mother’s untimely appeal of the December 22, 2022, order, we would conclude that she has failed to persuade us of reversible error for the reasons stated below.

1 by statute.⁴ *See* § 40-4B-8(B). Fifteen days after Mother’s objections were filed, the
2 hearing officer’s report was given the “full force and effect of a district court
3 decision.” Section 40-4B-8(C). Because Mother filed her appeal within thirty days
4 of this date, her notice of appeal was timely.

5 **II. Tax Credit Issue**

6 {10} Mother argues that the district court lacked jurisdiction to allocate the
7 dependency tax credit for Child to Father because the court only has continuing
8 jurisdiction over matters of custody and child support, and Father’s right to claim
9 Child was not related to custody or child support. In the alternative, Mother contends
10 that by entering into a marital settlement agreement with Mother, Father contracted
11 away his right to claim Child. Father argues that it was within the district court’s
12 discretion to allocate tax obligations related to Child between the parties and that the
13 marital settlement agreement did not bar the district court from allowing him to claim
14 Child. We agree with Father and conclude that the district court did not abuse its
15 discretion. *See Mintz v. Zoernig*, 2008-NMCA-162, ¶ 17, 145 N.M. 362, 198 P.3d
16 861 (recognizing that we review child support determinations for an abuse of
17 discretion).

⁴Ten days from December 28, 2022, is Wednesday, January 11, 2023. *See* Rule 1-006(A)(2)(a).

1 {11} Mother first argues that the district court lacked jurisdiction to modify the tax
2 exemption provision in the parties’ marital settlement agreement. We disagree. The
3 district court has continuing jurisdiction to “modify a child support obligation upon
4 a showing of material and substantial [change in] circumstances subsequent to the
5 adjudication of the pre-existing child support order.” *Jury v. Jury*, 2017-NMCA-036,
6 ¶ 37, 392 P.3d 242. In *Macias v. Macias*, this Court explicitly held that dependency
7 exemptions should be viewed “as another form of financial resource to be allocated
8 for the benefit of minor children.” 1998-NMCA-170, ¶ 8, 126 N.M. 303, 968 P.2d
9 814. Therefore, the district court had the authority to reallocate the child dependency
10 exemption based on a material and substantial change in circumstances. The district
11 court did just that, reasoning that because “Father [was] now the primary custodial
12 parent, . . . [he] should be able to claim . . . [C]hild in compliance with federal
13 regulations.” That is, the court determined that the changed circumstance of Father
14 becoming the primary custodial parent justified changing the allocation of the tax
15 exemption. *See Jury*, 2017-NMCA-036, ¶ 37. The district court had the authority to
16 do so under *Macias*.

17 {12} Mother argues that “the [d]istrict [c]ourt mistakenly relied on *Macias* for the
18 proposition that only the custodial parent could claim the tax exemption, when the
19 *Macias* Court clearly recognizes that parties can contractually waive the right to
20 claim tax exemptions.” Mother contends that “[t]he *Macias* Court explicitly

1 recognized that it is perfectly legal for the non-custodial parent to claim the
2 exemption, and legal for a custodial parent to waive the right to that exemption.”
3 While it is true that a custodial parent may waive the right to claim a child on their
4 taxes, *see* 1998-NMCA-170, ¶ 5, that is not what occurred here. The *Macias* Court
5 provided that a custodial parent could “waive the exemption in favor of the non-
6 custodial parent by signing a written declaration to that effect on a specified federal
7 form.” *Id.* Here, Father was the custodial parent, and he did not waive the exemption
8 because he did not sign any declaration to that effect.

9 {13} Finally, Mother contends that Father contracted the right to claim Child on his
10 taxes away in their marital settlement agreement, which provided that Mother would
11 be “entitled to declare . . . [C]hild as an exemption for income tax purposes each
12 taxable calendar year.” As we understand Mother’s argument, she claims that she
13 gave up spousal support in consideration of claiming Child on her tax returns as a
14 “middle ground.” In its order, the district court found that “the [marital settlement
15 agreement] is silent regarding an agreement of Mother’s tax claim in exchange for
16 no spousal support paid, and there is no evidence of consideration for an agreement
17 that Mother claim . . . [C]hild.” Mother does not specifically challenge these
18 findings, *see* Rule 12-318(A)(4) NMRA, and they are therefore binding on appeal.
19 *See Siefert v. Johnson*, 2003-NMCA-119, ¶ 26, 134 N.M. 394, 77 P.3d 298. Nor has
20 Mother challenged the alternative rationale in the district court’s order denying her

1 motion to reconsider. There, the court noted that “[n]onmodifiable agreements
2 regarding child support are not in the best interests of . . . [C]hild” and are therefore
3 against public policy. Mother has not persuaded us that the district court erred by
4 concluding that the marital settlement agreement did not bar the district court from
5 reallocating the tax credit.

6 **III. Discovery Sanctions**

7 {14} In her second appeal, Mother argues that the hearing officer abused his
8 discretion by denying Mother’s various motions related to child support for
9 discovery violations. Because we are not addressing Mother’s untimely appeal of
10 the December 22, 2022, order, we limit our review to Mother’s arguments related to
11 the hearing officer’s December 28, 2022, denial of her motion to modify child
12 support. For the reasons that follow, we disagree and affirm.

13 {15} We review the imposition of discovery sanctions for an abuse of discretion.
14 *Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 131 N.M. 317, 35 P.3d 972.
15 That is, “we will disturb the trial court’s ruling only when the trial court’s decision
16 is clearly untenable or contrary to logic and reason.” *Id.* (internal quotation marks
17 and citation omitted). “Implicit in the [abuse of discretion] standard of review is the
18 question of whether the court’s findings and decision are supported by substantial
19 evidence.” *Weiss v. THI of N.M. at Valle Norte, LLC*, 2013-NMCA-054, ¶ 15, 301
20 P.3d 875 (alteration, internal quotation marks, and citation omitted).

1 {16} To the extent that Mother does make a substantial evidence argument, she
2 makes a specific attack on only one finding regarding discovery. *See* Rule 12-
3 318(A)(4) (“A contention that a verdict, judgment, or finding of fact is not supported
4 by substantial evidence shall be deemed waived unless the argument identifies *with*
5 *particularity* the fact or facts that are not supported by substantial evidence.”
6 (emphasis added)). The finding was made by the district court in its written order
7 filed on February 9, 2023—an order that was not appealed by Mother. Although
8 Mother did not appeal from this specific order, she timely appealed from the
9 December 28, 2022, hearing officer’s report, and we therefore have jurisdiction over
10 the subsequent district court order adopting the hearing officer’s report. *See Sw.*
11 *Rsch. & Info. Ctr. v. N.M. Env’t Dep’t*, 2003-NMCA-012, ¶¶ 20-21, 133 N.M. 179,
12 62 P.3d 270 (noting that if there is a subsequent final order, premature filing of an
13 appeal does not prevent this Court from reaching the merits of an appeal).

14 {17} Mother attacks the district court’s finding that
15 [a]t the November 1, 2022, hearing, [Mother’s] objections to [Father’s]
16 interrogatories were reviewed and denied. [Father] identified the individual
17 questions most needing a response, and [Mother] was required to provide
18 answers by November 30, 2022. [Mother] responded in the form of objections
19 to the interrogatories, but there is no dispute that [Mother] did not answer
20 [Father’s] questions.

21 Mother argues that she had, in fact, responded to Father’s discovery requests on
22 November 30, 2022, and cites to a certificate of service in the record to support this

1 contention.⁵ Although Mother may have responded to some of Father’s discovery
2 requests on November 30, 2022, we understand the district court’s order to be
3 referencing the specific interrogatories addressed in Father’s motion to compel
4 discovery filed on December 7, 2022. At the hearing on Mother’s motion to modify
5 child support and Father’s motion to compel discovery held on December 13, 2022,
6 Father stated that he had not received responses to any of the discovery requests
7 *outlined in his motion*. The district court reviewed on the record each interrogatory
8 that Mother had not responded to, and Mother failed to provide additional answers
9 related to any of the discovery requests. Viewed in this context, we believe the
10 district court’s finding regarding the lack of response by Mother is supported by the
11 record and therefore defer to that finding. *See Phelps Dodge Corp. v. N.M. Emp. Sec.*
12 *Dep’t*, 1983-NMSC-068, ¶ 8, 100 N.M. 246, 669 P.2d 255.

13 {18} Mother makes other vague attacks on the hearing officer’s findings and the
14 district court’s rulings but does not cite specific findings or relevant portions of the
15 record to support her argument. *See Stanley v. N.M. Game Comm’n*, 2024-NMCA-
16 006, ¶ 15, 539 P.3d 1224 (“Summarizing the evidence and making a generalized

⁵ The certificate of service contains no attachments showing Mother’s discovery responses, Mother does not cite the discovery responses, and we have not found them in the record. It is Mother’s burden to provide an adequate record for review. *See Albuquerque Bernalillo Cnty. Water Util. Auth. v. NMPRC*, 2010-NMSC-013, ¶ 49, 148 N.M. 21, 229 P.3d 494 (recognizing that it is appellant’s burden on appeal to provide an adequate record).

1 assertion that the evidence does not support the district court’s findings of fact,
2 without directly attacking them, is insufficient.”). Mother does not challenge with
3 specificity any findings made by the hearing officer or the district court regarding
4 her discovery violations. *See* Rule 12-318(A)(4) (“A contention that a verdict,
5 judgment, or finding of fact is not supported by substantial evidence shall be deemed
6 waived unless the argument identifies *with particularity* the fact or facts that are not
7 supported by substantial evidence.” (emphasis added)). We therefore conclude that
8 Mother waived her substantial evidence challenge, *see id.*, and the findings that
9 Mother does not challenge are binding on appeal. *See Siepert*, 2003-NMCA-119,
10 ¶ 26.

11 **IV. Procedural Due Process and Privacy Rights**

12 {19} Mother also argues that her procedural due process rights were violated when
13 the district court “heard issues not fully briefed and/or noticed to be heard,
14 disparately applied procedural requirements, issued inaccurate orders which did not
15 properly reflect the actual record from the associated hearing, and refused to let her
16 create a clear record for appeal,” and that Father’s request for medical records
17 violated her “rights to privacy of her person, papers and things.” Mother’s arguments
18 consist of summaries of the law and conclusory statements that the law requires
19 reversal in this case. Mother fails to adequately develop her arguments, and we will
20 not develop them for her. *See Elane Photography, LLC*, 2013-NMSC-040, ¶ 70.

1 CONCLUSION

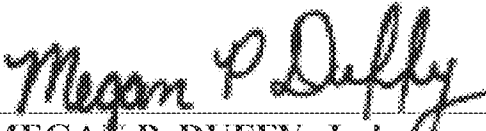
2 {20} We affirm and therefore deny Mother's request for attorney fees.

3 {21} IT IS SO ORDERED.

4 
5 _____
ZACHARY A. IVES, Judge

6 WE CONCUR:

7 
8 _____
JENNIFER L. ATTREP, Chief Judge

9 
10 _____
MEGAN P. DUFFY, Judge