

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 06/18/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Marriage of: ) 1 CA-CV 12-0609  
)  
KIMO KALALAHUA STANT, ) DEPARTMENT E  
)  
Petitioner/Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication  
v. ) - Rule 28, Arizona  
) Rules of Civil  
MARGARET TWINE, ) Appellate Procedure)  
)  
Respondent/Appellant. )  
)  
ARIZONA DEPARTMENT OF ECONOMIC )  
SECURITY, )  
)  
Intervenor/Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-000279

The Honorable Mina E. Mendez, Commissioner

**AFFIRMED IN PART AND REMANDED IN PART WITH INSTRUCTIONS**

Knapp & Roberts, P.C. Scottsdale  
By David L. Abney  
Attorneys for Petitioner/Appellee

The Cavanagh Law Firm, P.A. Phoenix  
By Christina S. Hamilton  
Attorneys for Respondent/Appellant

N O R R I S, Judge

¶1 Margaret Twine ("Mother") appeals the family court's order modifying the child support payments of Kimo Kalalahua Stant ("Father"). On appeal, Mother argues the family court abused its discretion in, first, finding a substantial and continuing change in circumstances justifying a modification of Father's child support obligation; second, failing to give her a credit for daycare expenses in calculating child support; third, deviating from the Arizona Child Support Guidelines; and fourth, failing to determine Father's child support arrearages. We disagree with Mother's first three arguments, but agree the family court should have determined Father's child support arrearages. Thus, we affirm the family court's order, but remand for the family court to determine the amount Father owes in child support arrearages.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 In June 2005, Father and Mother, the parents of two minor children, divorced. In its dissolution order, the family court attributed Father a monthly income of \$2,420 and ordered him to pay \$620 per month in child support.

¶3 In August 2010, Father petitioned to modify child custody and support. After an April 2011 evidentiary hearing ("2011 hearing"), the family court attributed \$3,600 in income per month to Father and \$2,200 per month to Mother. The court

also gave Mother a \$700 credit for daycare expenses. Accordingly, the court ordered Father to pay \$478.90 in child support and \$100 in arrearages per month.

¶4 In December 2011, Father petitioned to modify child support, asserting his spouse had suffered an injury that adversely affected their jointly-owned window cleaning business and his earning capacity. After the family court denied Mother's motion to dismiss the petition, it held a two-day evidentiary hearing ("modification hearing"). Based on the evidence presented at the modification hearing, the family court found Father had met his burden of showing a substantial and continuing change in circumstances to modify child support. See Ariz. Rev. Stat. ("A.R.S.") § 25-327(A) (2007) (substantial and continuing change in circumstances is prerequisite for modification). The court attributed a monthly income of \$2,800 to Father, but did not adjust Mother's monthly income it had previously attributed to her in the 2011 hearing. It declined, however, to credit Mother with the \$700 in daycare expenses it had previously credited to her. Although, based on these adjustments, Father's child support obligation would have been \$42.14 per month under the Arizona Child Support Guidelines, A.R.S. § 25-320 App. (Supp. 2012) ("Guidelines"), the court

deviated from this amount and reduced his child support payment to zero, as we discuss in more detail below.

## DISCUSSION

### *I. Motion to Dismiss*

¶15 Mother first argues the family court should have granted her motion to dismiss because Father's petition to modify child support failed to state a substantial and continuing change in circumstances to warrant a modification under A.R.S. § 25-327(A). We disagree.

¶16 In his modification petition, Father alleged that as a result of his spouse's "debilitating injury," their "community business" had "fallen behind in terms of billing, invoicing, [and] payments," which adversely affected his ability to pay child support. Because Father's petition set forth facts that, if proven, would entitle him to modification of child support, the family court properly denied Mother's motion to dismiss. See Ariz. R. Fam. L.P. 32(B)(6) (motion to dismiss for failure to state a claim); Ariz. R. Fam. L.P. 1, cmt. 1 ("Wherever the language in [the Arizona Rules of Family Law Procedure] is substantially the same as the language in other statewide rules, the case law interpreting that language will apply to these rules."); *Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 534, ¶ 15, 115 P.3d 124, 128 (App. 2005) (dismissal for failure

to state a claim under Rule 12(b)(6) of Arizona Rules of Civil Procedure is proper only when plaintiff cannot prove facts justifying relief) (citations omitted).

*II. Substantial and Continuing Change in Circumstances*

¶17 Mother next argues the evidence does not support the family court's finding that a substantial and continuing change in circumstances existed. Whether changed circumstances existed to warrant a modification of child support is "within the sound discretion of the [family] court." *Cummings v. Cummings*, 182 Ariz. 383, 387, 897 P.2d 685, 689 (App. 1994). We will not disturb the family court's modification of child support absent an abuse of discretion. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). An abuse of discretion occurs "when the record, viewed in the light most favorable to upholding the [family] court's decision, is 'devoid of competent evidence to support' the decision." *Id.* (citations omitted). Based on our review of the record, the family court did not abuse its discretion in finding a substantial and continuing change in circumstances.

¶18 At the modification hearing, Father's spouse testified that in June 2011, she permanently severed the median and radial nerves in her right hand, leaving her with no feeling in that hand, and the injury "limited [her] in everything" she did,

including driving, child care, and bookkeeping for the window cleaning business she and Father owned. She explained that because she could no longer "work in the same capacity" after her injury, Father had to make up for her diminished ability to work and learn "how to do the invoicing." Father also testified that since his spouse's injury, he could not work or bill as many hours as before. This testimony constituted competent evidence supporting the family court's finding that Father's spouse's injury had significantly and adversely affected his earning capacity. Accordingly, the family court did not abuse its discretion in finding a substantial and continuing change in circumstances that warranted a modification of Father's child support obligation.

¶19 On appeal, Mother raises various factual challenges to the family court's finding of changed circumstances. She argues a comparison of Father's affidavits of financial information ("AFI") failed to demonstrate a change in his financial condition between the 2011 hearing and the modification hearing. She also asserts Father did not show lost contracts resulting from his spouse's injury, did not present adequate financial records, and must have had undisclosed financial resources. All of these arguments essentially attack the credibility of Father and his spouse. As a reviewing court, we, however, do not

reweigh conflicting evidence and defer to the family court's determination of credibility. *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998).

¶10 Here, the family court found Father and his spouse's testimony credible and, based on their testimony and the exhibits presented at the modification hearing, found Father's income from the family business had in fact decreased, and he was unable to pay the expenses on an ongoing basis, "bounced" a number of checks, and, as a consequence, had incurred substantial insufficient funds fees. Given this evidence, the family court did not abuse its discretion in concluding Father's financial situation had worsened because of his spouse's "catastrophic injury."

¶11 Further, although Mother suggests the family court ignored the Guidelines and improperly used "the lack of income" of Father's spouse as a basis to modify child support, the Guidelines, however, did not preclude the family court from considering the effect of Father's spouse's injury on his earning capacity. While a court may not treat income of a new spouse as income of that parent, see Guidelines § 5(F), it has broad discretion to consider the "financial resources and needs"

of a parent. A.R.S. § 25-320(D) (Supp. 2012). Father's spouse's serious injury substantially affected Father's "financial resources and needs," and thus, the family court properly considered the economic impact of Father's spouse's injury in determining whether a substantial and continuing change in circumstances existed, and nothing in the Guidelines or the statutes precluded the court from doing so.<sup>1</sup>

### *III. Daycare Expenses*

¶12 Mother argues the family court could not "take away" the \$700 daycare expenses it had previously attributed to her because those expenses were not the basis for Father's modification petition. She also contends because Father acknowledged he was not contesting daycare expenses, she had no notice those expenses would be an issue at the modification hearing. Further, she argues the Guidelines required "the child care credit be imputed" if the court attributed income to her. As discussed, we disagree with each argument.

¶13 First, while Father did not argue Mother's daycare expenses, or more precisely, lack of such expenses, served as "a

---

<sup>1</sup>Mother also argues the modified child support order was a "horizontal appeal" because it failed to indicate "what had actually changed" from the 2011 hearing. The family court explained in detail the substantial and continuing change in circumstances that warranted a modification of Father's child support obligation, as discussed in Part II. Thus, we reject this argument.



threshold matter" for modification, he correctly argued that if the family court found it should modify his child support obligation, it would then need to re-evaluate all of the factors that a court must consider in determining a parent's child support obligation. See *infra* ¶ 15. Under the Guidelines, a child support order must be based on the financial resources of each parent and a court "shall make findings" showing all elements of a child support order. Guidelines §§ 1(A), 22. Therefore, in modifying a child support order, a court is not bound by the child support determinations made in prior proceedings, but should consider the changes in the parties' financial needs and resources.

¶14 Here, in rejecting Mother's argument that it was required to accept the income and daycare expenses attributed to her in the 2011 hearing, the family court explained:

the basis of [Father's] modification is a change in circumstances based on his spouse having suffered an injury and his ability to work a certain number of hours has decreased . . . [But] a modification isn't limited to the issue of what caused the substantial and continuing change of circumstances. You still have to look at what other factors go into the [child support] worksheet.

In light of the purpose and design of the Guidelines, we agree with the family court -- once it determined a change in circumstances warranted modification, it was required to re-evaluate all the factors that "go" into determining the modified child support, which would include Mother's daycare expenses.

¶15 Second, Mother had adequate notice her daycare expenses would be an issue in the calculation of child support if the court found a substantial and continuing change in circumstances that would justify modifying child support. Although perhaps Father could have been clearer, nevertheless, as noted above, at the modification hearing he argued that if the family court found a change in circumstances, then "everything [became] fair game," meaning the court could reconsider Mother's previously attributed daycare expenses. Specifically, Father stated

Your Honor, can I stipulate the \$2000 [income attributed to Mother] is appropriate [?] What I stipulated is we are not going to use her income as the basis for our substantial and continuing change in circumstances. That was my stipulation. We are not addressing her income as the basis [for modification]. But as I said, and I've said repeatedly every time you find a substantial and continuing change in circumstances, all factors are in play.

Father also argued in his opening statement Mother was incurring "no daycare expenses at all." Under these circumstances, Mother had sufficient notice that Father intended to ask the court to re-evaluate her attributed daycare expenses at the modification hearing if it found a substantial and continuing change in circumstances.

¶16 Finally, attributing child care expenses is within the family court's discretion. See Guidelines § 5(E) ("If income is attributed to the parent receiving child support, appropriate childcare expense may also be attributed."). Under the Guidelines, a court may add "[c]hildcare expenses that would be appropriate to the parents' financial abilities." Guidelines § 9(B)(1). Here, Mother's AFI showed "zero" childcare costs. And, at the modification hearing, Mother testified she did not work, did not use a nanny or babysitter, and her children were of school-age. Because the evidence supported the court's finding Mother was not incurring daycare expenses, and including daycare and other childcare costs is discretionary, the family court did not abuse its discretion in excluding daycare expenses in calculating Father's modified child support obligation.

V. *Deviation from the Guidelines*

¶17 Mother argues the family court abused its discretion by reducing Father's child support from \$42.14, the amount determined using the Guidelines, to zero, without a request by Father, and failing to make the required findings to justify the deviation. We disagree.

¶18 The Guidelines require a court to deviate from the Guidelines amount when, after considering the factors specified in A.R.S. § 25-320, application of the Guidelines would be "inappropriate or unjust" in the individual case, the deviation is not contrary to the child(ren)'s best interests, and the court makes written findings stating why it deviated and what the child support obligation would have been with and without the deviation. Guidelines §§ 20(A), 3 (court "shall deviate" when criteria are met); *Mead v. Holzmann*, 198 Ariz. 219, 223 n.5, ¶ 14, 8 P.3d 407, 411 n.5 (App. 2000) (although party did not request deviation, the Guidelines mandate deviation under former version of § 20 when failure to do so would be "inappropriate or unjust"). Thus, the family court was entitled to deviate from the Guidelines without a request from Father.

¶19 Further, the family court made the findings required by the Guidelines. In its modification order, the family court

explained why the deviation was appropriate and in the children's best interests:

The parties are [in] extremely high conflict; this conflict is greatly exacerbated by disputes over child support. The parties['] continued conflict is not in the children's best interests. In addition, the parties share equal parenting time. Both parties have sufficient financial resources to provide for the children when they are in each parent's care.

¶20 Given this explanation -- which, based on our review is supported by the record -- and because the family court had calculated Father's child support obligation without the deviation, *see supra* ¶ 4, the family court made all the required findings. Therefore, the family court did not abuse its discretion in reducing Father's child support obligation to zero.

#### VI. Arrearages

¶21 Mother argues the family court should have decided Father's child support arrearages. We agree. At the modification hearing, the State provided a calculation showing Father owed \$13,377 in arrearages as of April 12, 2012. Although the court ordered Father to pay half of the arrearages, it did not enter an order actually determining Father's child support arrearages. Therefore, on remand, we direct the family

court to enter an order determining Father's child support arrearages.

*VII. Costs and Attorneys' Fees*

¶22 Mother challenges the family court's refusal to award her costs and attorneys' fees. We will not disturb the family court's award of fees absent an abuse of discretion. See A.R.S. § 25-324 (Supp. 2012) (court may award fees and costs after considering parties' financial resources and reasonableness of positions taken throughout the case); *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 36, 250 P.3d 1213, 1221 (App. 2011). Because, at the time of the modification hearing, Father had extremely limited financial resources and had asserted reasonable grounds for modification, the family court did not abuse its discretion in denying Mother's request for costs and fees.

**CONCLUSION**

¶23 For the foregoing reasons, we affirm the family court's order modifying Father's child support payments and remand for the family court to determine Father's child support arrearages. Finally, Father and Mother have each requested an award of attorneys' fees under A.R.S. § 25-324. In the exercise of our discretion and based on the record before us concerning the parties' financial resources and the reasonableness of their positions on appeal, we deny their competing requests for fees

