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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/24/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. ARIZONA) 1 CA-CV 12-0638
DEPARTMENT OF ECONOMIC SECURITY)
(FE MELISA SOTO aka FE MELISA) DEPARTMENT C
JUDD),)
)
) **MEMORANDUM DECISION**
Petitioners/Appellees,) (Not for Publication -
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
ERNEST BENJAMIN CUMMING a.k.a.)
BENJAMIN DAVIS FILLMORE,)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2003-095278

The Honorable Jaime B. Holguin, Commissioner

JURISDICTION ACCEPTED/RELIEF DENIED

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Ernest Benjamin Cumming Gallatin, TN
Respondent/Appellant

O R O Z C O, Judge

¶1 Benjamin D. Fillmore (formerly known as Ernest Benjamin Cumming) (Father) appeals the family court's order holding him in contempt of court for failure to pay child support. Father also argues that the family court erred both in its calculation of child support and its failure to quash the outstanding arrest warrant. For the following reasons, we convert this appeal from a contempt order to a petition for special action, accept jurisdiction, deny relief, and affirm the family court's order.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Fe Melisa Judd (Mother)¹ and Father were married in Nevada in January 2000 and have two children together.

¶3 Mother and Father separated and Father filed for divorce. The Superior Court of Guam granted the divorce in September 2003.² Although Mother and Father were divorced in Guam, the decree reserved various economic and family issues (i.e., property, debt, spousal support, child custody, support, and visitation) to be determined by another court with proper jurisdiction. Mother retained primary custody of the children during the separation and Guam divorce proceedings.

¹ Mother is also known as Fe Melisa Soto or Fe Melisa Cumming.

² The record before us does not indicate why Father filed for divorce in Guam when the parties and children were residing in Arizona at the time.

¶14 In September 2003, Mother moved with the children temporarily to Michigan to live with her sister. By the end of 2003, Father had left his job in Arizona and moved to Utah. On November 26, 2003, Father had a previously agreed-upon overnight visit with the children in Michigan. Rather than returning the children to Mother the next day, Father took the children to Utah without Mother's knowledge or consent. Father did not provide Mother with his Utah address. Mother returned to Arizona and filed a Petition for Dissolution of Marriage in December 2003. Mother also filed an emergency petition seeking temporary orders for child custody, child support, and supervised visitation for Father.

¶15 In February 2004, after an evidentiary hearing, the family court awarded Mother temporary sole custody of the children and ordered Father to pay \$1,014.25 monthly in child support beginning February 1, 2004. Father objected to the amount. The family court referred the matter to the Family Support Center to recalculate Father's child support obligation attributing "\$10.00 per hour to Mother" instead of zero. In June 2004, the family court reduced Father's monthly child support obligation to \$858.08 beginning February 1, 2004, based on the Family Support Center's recalculation. Although Father still objected to the modified order, the family court denied

his objection and affirmed the child support order. Father did not appeal the family court's June 2004 order.

¶16 Father failed to pay the court-ordered child support, and Mother filed a Contempt Petition. In July 2004, the family court held a hearing regarding Mother's Contempt Petition. Father appeared telephonically without counsel. As a result of the hearing, the family court (1) adopted the Guam divorce decree insofar as the marriage of the parties was dissolved, (2) awarded Mother sole custody of the children, (3) gave Father no parental access with the children, (4) denied Mother's request for spousal maintenance, (5) entered a judgment against Father in the amount of \$5,133.18 for child support arrears from February 1 to August 31, 2004, (6) affirmed its \$858.08 monthly child support order, and (7) found "Father in willful contempt of a lawful Court Order that Father was aware of when having the ability to pay child support." Father did not appeal the July 2004 order.

¶17 The Arizona Department of Economic Security (State) intervened in this case after Mother applied for Title IV-D child support services.

¶18 In April 2012, Mother filed a pro se Petition to Enforce Child Support. Mother alleged that Father has not made timely child support payments since July 2004 and that he owed \$93,000 in child support arrearages. Mother requested that the

family court require Father to pay the court-ordered monthly child support, find Father in civil contempt of court, and issue a child support arrest warrant. Upon Mother's service of the petition, the State entered its appearance to be heard on support and reimbursement issues. Father responded to the Petition and claimed that (1) he was not voluntarily unemployed or underemployed to avoid paying child support, (2) despite his continuing financial hardships, he had paid \$18,087.86 in child support since 2004, and (3) he owned his own business where he worked eighty or more hours per week just to pay the overhead, which he must pay before he can pay himself a salary.

¶9 The family court held a hearing on Mother's Petition to Enforce Child Support in July 2012 and issued an Order to Appear for that hearing to Father. The family court further ordered Father to file various financial documents at the enforcement hearing, but the record on appeal does not include any of these documents or otherwise indicate that Father complied with this order. Before the hearing, the State filed a child support arrears calculation with the court alleging that Father was in arrears in the amount of \$94,576.36.

¶10 At the hearing, the State argued that Father had not made any child support payments since December 2010 and noted that the State's arrears calculations were incorrect. The State requested the family court to find Father in contempt for

failing to pay the court-ordered child support and to schedule another hearing to determine the appropriate child support arrears judgment. Finally, the State asked the family court to order Father to pay the monthly child support previously ordered, but did not request a new child support arrest warrant because the 2004 warrant remained in effect.

¶11 In response, Father telephonically testified he had "paid [child support] whenever [he] was able to, with two exceptions." Father went on to explain the two exceptions and to testify that he had no income from January through December 2011. After discussing some specifics about Father's current living situation, the family court found Father in contempt and noted that Father was in continuing contempt for his "willful failure to comply with a valid support order which he acknowledged." In reaching its conclusion regarding Father's ability to pay child support, the family court made the following factual findings: Father was capable of working; he was not disabled; he was supporting two other children; and he was making rent payments. Father filed a timely notice of appeal.

DISCUSSION

Jurisdiction

¶12 In Arizona, "orders adjudicating whether a person should be held in contempt for refusing to obey a court order

are not appealable," because the party held in contempt had an opportunity to appeal the original order. *Elia v. Pifer*, 194 Ariz. 74, 80, ¶ 30, 977 P.2d 796, 802 (App. 1998).

¶13 In appropriate circumstances, however, a contempt order may be reviewable by special action petition. *Id.* "A special action petition is the appropriate method to challenge a civil contempt order" *Stoddard v. Donahoe*, 224 Ariz. 152, 154, ¶ 7, 228 P.3d 144, 146 (App. 2010); see also Ariz. R.P. Spec. Act. 1(a). We exercise our discretion in this case and accept special action jurisdiction. See *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18, 66 P.3d 70, 73 (App. 2003) (converting an appeal from a contempt order to a petition for special action and accepting special action jurisdiction). Accordingly, we accept jurisdiction and deny relief.

Family Court's Contempt Order

¶14 Father challenges the family court's contempt order based on a lack of evidence produced by Mother and the State. The family court retains continuing jurisdiction to enforce child support orders through contempt proceedings. See *Dyer v. Dyer*, 92 Ariz. 49, 52, 373 P.2d 360, 362 (1962). Moreover, the Uniform Interstate Family Support Act (UISFA) section 25-634(D)(5) authorizes "a responding tribunal to enforce its orders by means of civil or criminal contempt, or both."

Burton, 205 Ariz. at 30, 66 P.3d at 73. "To find [Father] guilty of contempt, the [family] court must determine that [Father] *willfully* failed to make the required [support] payments" *Dyer*, 92 Ariz. at 52, 373 P.2d at 362. A proponent requesting a contempt order establishes a *prima facie* case of willfulness by showing that the defendant failed to make payments in accordance with a divorce decree. *Id.* At that point, the burden shifts to the defendant "to show his *excusable inability* to make the payments ordered." *Id.* This court reviews contempt orders for an abuse of discretion. *Munari v. Hotham*, 217 Ariz. 599, 605, ¶ 25, 177 P.3d 860, 866 (App. 2008).

¶15 Here, Father was ordered to make child support payments in 2004. Father admitted that he was aware of the order and that he has not made child support payments since December 2010. The family court found Father in continuing contempt of court "for willful failure to comply with a valid support order which [Father] acknowledged." The record provides sufficient evidence to support the family court's finding that Father knew of the court-ordered child support obligation and repeatedly failed to comply with that order. Under these circumstances, the family court did not abuse its discretion in finding Father in contempt for non-payment of child support.

Family Court's Assignment of Income

¶16 Father challenges the family court's order attributing income to Father. Father contends the family court erred because it considered Father's new spouse's savings account and other financial resources when holding Father in contempt. Father asserts that income of other persons cannot be treated as income for purposes of a child support calculation.

¶17 We interpret the Arizona Child Support Guidelines (Guidelines)³ de novo. *Strait v. Strait*, 223 Ariz. 500, 502, ¶ 6, 224 P.3d 997 (App. 2010). A court may "consider all aspects of a parent's income" to order reasonable and necessary child support that is "based on the *total financial resources* of the parents." *Id.* at 502, ¶ 8, 224 P.3d at 999 (quoting *Cummings v. Cummings*, 182 Ariz. 383, 386, 897 P.2d 685, 688 (App. 1994)) (emphasis added). For child support purposes, gross income is not determined by a parent's gross income as stated on an income tax return, but rather gross income includes "the actual money or cash-like benefits received by the household which is available for expenditures." *Id.* at 502, ¶ 8, 224 P.3d at 999; see also Guidelines § 5.A.

¶18 Under Arizona law, "both parents, regardless of their employment status, must provide appropriately for their children's reasonable needs." *Engel v. Landman*, 221 Ariz. 504,

³ Ariz. Rev. Stat. (A.R.S.) § 25-320 (2011).

510-11, ¶ 22, 212 P.3d 842, 848-49 (App. 2009) (citing Guidelines § 5.E). Accordingly, if a parent's earnings are reduced voluntarily and not for reasonable cause, a court will attribute income to a parent up to the full earning capacity of the parent who is unemployed or earning below his full earning potential. Guidelines § 5.E; *Little v. Little*, 193 Ariz. 518, 521, ¶ 6, 975 P.2d 108, 111 (1999).

¶19 Here, the family court found that Father's earnings were reduced as a matter of choice and not for reasonable cause. Therefore, the family court was within its discretion to attribute income to Father up to his earning capacity. See Guidelines § 5(E). Under Arizona Revised Statutes (A.R.S.) § 25-320, the family court was obligated to attribute an income of at least minimum wage to Father in calculating his child support obligation, regardless of what his reported income may be. See *id.* Accordingly, the family court did not err in attributing income to Father.⁴

Father's Constitutional Claims

¶20 Father argues for the first time on appeal that his child support obligation is a debt and, as such, he could not

⁴ To the extent that Father argues the family court considered his Wife's income, we find this without merit. The family court did ask how the rent was being paid, but it did not consider her income in finding Father in contempt. Also the family court did not calculate the child support amount; therefore, it did not use Wife's income in calculating his child support obligation.

properly face contempt through a child support arrest warrant for his failure to pay that debt. Generally, this court deems arguments waived when raised by a party for the first time on appeal, including arguments raising constitutional issues. *K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 268, 941 P.2d 1288, 1293 (App. 1997). Accordingly, because Father did not challenge the constitutionality of the 2004 child support arrest warrant prior to this appeal, we may deem his arguments waived. However, in our discretion, we will analyze Father's contentions that the arrest warrant violates both Article 2, Section 18, of the Arizona Constitution and the Fourth Amendment of the United States Constitution. See *Aldrich & Steinberger v. Martin*, 172 Ariz. 445, 447-48, 837 P.2d 1180, 1182-83 (App. 1992) (explaining that the court of appeals may exercise discretion to evaluate certain compelling arguments that were raised for the first time on appeal, such as when a constitutional issue is raised).

¶21 Father contends that his child support obligation is a debt as contemplated by Article 2, Section 18, of the Arizona Constitution. We disagree. Article 2, Section 18, of the Arizona Constitution states, "[t]here shall be no imprisonment for debt, except in cases of fraud." Ariz. Const. art 2, § 18 (2013). In Arizona, the obligation to make support payments are "not regarded as a debt but a duty growing out of the [family]

relation and resting upon a sound public policy, and so this obligation may be enforced by attachment of the person for contempt" See *Stone v. Stidham*, 96 Ariz. 235, 239, 393 P.2d 923, 926 (1964). When a court-ordered support payment is modifiable, it is outside the scope of what Arizona considers a "debt" as contemplated by the Arizona Constitution. See *id.* at 239-40, 393 P.2d at 926 (distinguishing between non-modifiable alimony in the form of a property settlement, which is considered a debt, and modifiable monthly alimony payments, which are not considered a debt).

¶122 Here, Father's support payments were a modifiable court-ordered family obligation. Therefore, the family court acted within the bounds of the Arizona Constitution in holding Father in contempt and ordering the 2004 child support arrest warrant. Consequently, the warrant is valid and enforceable, and Father's constitutional rights have not been violated.

¶123 The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. When a government entity actually conducts a search or seizure, the Fourth Amendment is implicated. See, e.g., *State v. Millan*, 185 Ariz. 398, 401, 916 P.2d 1114, 1117 (App. 1995) ("For a seizure to occur there must be some meaningful interference with defendant's possessory

property interest. To claim protection under the Fourth Amendment, a defendant must have a legitimate expectation of privacy in the invaded place. A search occurs when that expectation is infringed upon." (internal quotation marks and citations omitted)). Here, Father's claim is premature. No government official has executed the 2004 warrant; therefore Father has not been subject to a government search or seizure. Hence, the Fourth Amendment is not implicated here, and Father is not due relief on this claim.

CONCLUSION

¶24 For the foregoing reasons, we accept jurisdiction and deny relief. The family court's findings of fact and order of contempt are affirmed.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

RANDALL M. HOWE, Presiding Judge

/S/

SAMUEL A. THUMMA, Judge