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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

LUDMILA CARMACK, *Petitioner/Appellee*,

v.

GARY DAVID CARMACK, *Respondent/Appellant*.

No. 1 CA-CV 12-0772
FILED 12-26-2013

Appeal from the Superior Court in Maricopa County
No. FC2003-090415
The Honorable Thomas L. LeClaire, Judge

AFFIRMED

COUNSEL

Ludmila Carmack, Phoenix

Petitioner/Appellee In Propria Persona

Law Office of Harry P. Friedlander, Mesa
By Harry P. Friedlander

Counsel for Respondent/Appellant

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MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Michael J. Brown joined.

K E S S L E R, Judge:

¶1 Gary D. Carmack (“Father”) appeals the family court’s dismissal of his petition to modify child support. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Father and Ludmila Carmack (“Mother”) divorced in 2004. A key issue during the proceedings was the amount of income to be attributed to Father for calculating child support. Father is the original founder of Southwest Laboratories, and until 2002, owned seventy percent of the company’s stock. Prior to the initiation of the divorce proceedings, Father divested himself of all of his ownership interest in the company, and throughout the proceedings, he resisted divulging any information regarding benefits he received in addition to his wages.

¶3 The parties ultimately entered into a consent decree under which they agreed to deviate from the Arizona Child Support Guidelines (“the Guidelines”) so that Father would pay \$750.00 per month in child support. *See* Ariz. Rev. Stat. (“A.R.S.”) section 25-320 app. (Supp. 2013). In addition, Father was given six days of parenting time for every two-week block.

¶4 In 2010, Father filed a petition to modify parenting time to reflect the 50/50 parenting time plan that the parties had informally observed for three years. Father also requested a modification of the child support obligation so that Mother would pay him \$166.61 per month. Mother agreed to equal parenting time, but did not agree to modify Father’s child support obligation. After an evidentiary hearing, the family court ordered that it could not make a decision as to modification without a forensic accounting of the economic benefits Father derived from his business over and above his general wages.

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¶5 The family court ordered Father to comply with Mother's discovery requests and to cooperate with Mother's forensic accountant on five separate occasions, but Father did not provide the information as ordered. In the last of the five orders, the family court warned Father that failure to comply with the disclosure deadlines could result in the petition being dismissed.

¶6 In August 2012, the family court held another evidentiary hearing to determine whether Father had complied with the court's orders in anticipation of yet another evidentiary hearing to determine Father's income. At that hearing, Mother's forensic accountant testified that he was unable to complete a forensic accounting and determine Father's actual income because Father did not produce the necessary documents or allow him to examine Southwest Laboratories' business records, as ordered by the court.

¶7 The family court held that Father "failed to affirmatively provide required financial information pursuant to [Arizona Rule of Family Law Procedure 49]" and he "intentionally failed to follow the Court's Orders with respect to production of documents." The family court noted that it could dismiss Father's petition (1) as a sanction for failure to produce his financial records, or (2) for failure to produce evidence that would support modification. The court denied Father's petition to modify child support for failure to provide evidence to support modification.

¶8 Father timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(2) (Supp. 2013).

DISCUSSION

¶9 A court may modify the child support provisions of a consent decree upon a showing of changed circumstances that are substantial and continuing. A.R.S. § 25-327(A) (2007). In considering a request for modification, courts are required to apply the Guidelines unless their application would be "inappropriate or unjust." *State ex rel. Dep't of Econ. Sec. v. Ayala*, 185 Ariz. 314, 316, 916 P.2d 504, 506 (App. 1996). We will not disturb a trial court's decision regarding modification of a child support award absent an abuse of discretion. *Guerra v. Bejarano*, 212 Ariz. 442, 443, ¶ 6, 133 P.3d 752, 753 (App. 2006). However, we review the court's interpretation of A.R.S. § 25-327(A) and the Guidelines *de novo* as questions of law. *Id.*

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I. DISMISSAL OF PETITION WITHOUT MODIFYING CHILD SUPPORT DESPITE MODIFICATION OF PARENTING TIME

¶10 Father argues that the family court erred by dismissing his petition for modification because the Guidelines require modification of support when parenting time changes to equal custody. To modify his child support obligation, Father was required to show a substantial and continuing change in circumstances warranting a modification of child support. Even assuming that a seven percent change in parenting time, from six to seven days out of every fourteen, might constitute a substantial and continuing change in circumstances, Father admits that the parties made the change three years before he filed his petition. Furthermore, Father sought a modification in child support from his paying Mother \$750.00 per month, to Mother paying him \$166.61. Thus, the substantial and continuing change in circumstances which was the impetus for his petition does not appear to be the change in parenting time, but his alleged decline in income. Regardless, to reduce his support obligation Father had to provide reliable evidence of his income to compare to Mother's income.

¶11 A family court must follow the Guidelines in determining initial support awards and modifications thereto. *Ayala*, 185 Ariz. at 316, 916 P.2d at 506. As Father points out, Guideline 12 addresses the calculation of child support where the parties have equal custody:

If the time spent with each parent is essentially equal, the expenses for the children are equally shared and adjusted gross incomes of the parents also are essentially equal, no child support shall be paid. *If the parents' incomes are not equal*, the total child support amount shall be divided equally between the two households and the parent owing the greater amount shall be ordered to pay what is necessary to achieve that equal share in the other parent's household.

A.R.S. § 25-320 app. § 12 (emphasis added). The Guidelines make it clear that the calculation of a child support obligation is based upon a comparison of the parents' incomes.

¶12 The family court properly held that to determine whether Father's child support obligation should be decreased "requires a full analysis of [Father's] financial picture including, but not limited to, his cash flow from the business, any outside engagements, company and

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personal assets, and indirect compensation in the nature of perquisites and benefits.” In so holding, the court stated that because no forensic accounting was performed in the earlier litigation, and that fact that Father “maintains and visits with some regularity his condominium in the Lake Como, Italy vicinity, travels abroad for business, is provided a company BMW for his use, has use of a company-owned home in Strawberry, Arizona, and benefits from other perquisites that enhance his lifestyle” the court required closer scrutiny “than the current state of evidence allows.” As a result, the family court ordered a forensic accounting of Father’s business and income to determine whether modification was warranted.

¶13 Thereafter, on five separate occasions, the family court ordered Father to provide Mother’s forensic accountant with the information he needed to conduct the accounting and determine Father’s true income. The family court warned Father at the last hearing that it would grant no further continuances, and his failure to comply could result in dismissal of the petition to modify. Still, Father refused to comply with the court’s orders.

¶14 Even assuming that the seven percent change in parenting time constituted a substantial and continuing change of circumstances, Father was not entitled to a downward modification of child support until he provided sufficient evidence to the court of his income so that the court could apply the Guidelines to determine whether modification was warranted. The family court found that Father intentionally failed to provide the information, and the record supports this finding. In addition, Father has failed to provide this Court with a transcript of the evidentiary hearing. “When a party fails to include necessary items, we assume they would support the court’s findings and conclusions.” *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Because Father did not provide the necessary evidence to prove he was entitled to a decrease in child support, the court did not abuse its discretion in denying his petition.

II. FAILURE TO USE ATTRIBUTED INCOME AS DETERMINED IN A DIFFERENT FAMILY COURT CASE

¶15 Father next argues that the family court abused its discretion by not modifying child support pursuant to the Guidelines using Father’s attributed income which was established in another case involving Father and a child by a different Mother. The family court was not bound by another court’s decision to attribute income to Father because that court

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did not believe Father's reported income reflected his actual income. Moreover, the information gleaned by the family court in the other case, which resulted in its decision to attribute \$10,000 in monthly income to Father, was eight years old and could have changed significantly. In fact, there was evidence that Father had recently begun to provide services as part of a federal laboratory inspection team.

¶16 In short, the family court did not abuse its discretion by refusing to use an "attributed income" finding issued in an unrelated proceeding which was based upon stale information. Father brought the petition for modification, and the family court informed Father that it could not determine whether modification was appropriate without a forensic accounting. Father chose to disregard repeated orders from the court to produce the information needed to allow Mother's forensic accountant to complete the accounting. The family court did not abuse its discretion by denying Father's petition.

III. DISMISSAL AS A SANCTION

¶17 Father's final argument is that the family court abused its discretion by dismissing Father's petition without warning when less severe sanctions were available. The record demonstrates, however, that the family court did, in fact, warn Father that it could dismiss the petition as a sanction if Father continued to disobey the court's orders compelling him to produce financial information. So, even if the family court dismissed Father's petition as a sanction, the family court did not abuse its discretion as it had provided sufficient advance notice to Father that he risked dismissal for non-compliance.

¶18 More importantly, the family court did not dismiss the petition as a sanction. The family court explained that it could dismiss the petition on two separate, distinct grounds: as a sanction, or for failure to provide the evidence required to prove he was entitled to modification. The court then stated that it was denying Father's petition based on the latter reason. In short, Father's petition was not dismissed as a sanction.

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CONCLUSION

¶19 For the foregoing reasons, we affirm the family court's dismissal of Father's petition to modify child support. In addition, we award Mother her costs on appeal pursuant to A.R.S. § 12-341 (2003) contingent upon her compliance with Arizona Rule of Civil Appellate Procedure 21(a).



Ruth A. Willingham · Clerk of the Court
FILED: gsh