

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: 05-20-2010  
PHILIP G. URRY, CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Marriage of: ) No. 1 CA-CV 09-0157  
)  
HOLLY STONE, ) DEPARTMENT B  
)  
Petitioner/Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
ROBERT STONE, )  
)  
Respondent/Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Coconino County

Cause No. DO 2004-0581

The Honorable Charles D. Adams, Judge

**AFFIRMED**

Bryon Middlebrook, P.C.  
By Bryon Middlebrook  
Attorneys for Petitioner/Appellee

Flagstaff

Robert Stone  
Respondent/Appellant *in propria persona*

Flagstaff

\_\_\_\_\_ **S W A N N**, Judge

¶1 Robert Stone ("Father") appeals the family court's refusal to modify his child support obligation, its exclusion of evidence, and its award of attorneys' fees to Holly Stone ("Mother"). For the reasons that follow, we affirm the family court's rulings and award Mother her attorneys' fees and costs on appeal.

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

¶2 The parties married in 1985 and have two children in common, T. and S. During the marriage, Father worked as a painting contractor and Mother was employed as a massage therapist.

¶3 Mother filed a petition for dissolution on October 13, 2004, which requested that the court award her sole custody of and child support for T. and S. The family court's Decree, entered on August 4, 2005, awarded the parties joint custody of the children. A settlement agreement that was incorporated into the Decree ordered Father to pay Mother child support in the amount of \$400 per month.

¶4 On February 26, 2008, Father moved to reduce his child support obligation to \$0 in accordance with A.R.S. § 25-503(E) (2007) and Rule 91 of the Arizona Rules of Family Law Procedure ("ARFLP"). ARFLP 91(B)(2) requires a party to attach a current Affidavit of Financial Information to the petition to modify. Father appended no such document to his request.

¶15 On March 5, 2008, Mother's counsel made the first of several requests for disclosure of documents supporting the modification request. The day before the modification hearing, Father filed the following materials: (1) three statistical reports on new residence construction in Flagstaff; (2) an e-mail regarding building construction permits; (3) 2005, 2006, and 2007 federal income tax returns for Father's company, Superior Painting, Inc.; and (4) Father's 2005, 2006, and 2007 individual federal income tax returns. But Father failed to file the required Affidavit of Financial Information before the hearing.

¶16 At the May 21, 2008 hearing, the family court declined to grant Mother's motion to dismiss based upon Father's failure to timely disclose, and instead granted Father an additional ten days to provide Mother's counsel with the necessary affidavit and an accurate child support worksheet. Accordingly, on June 2, 2008, Father served (1) his June 2, 2008 Affidavit of Financial Information, listing his year-to-date income as \$3000 and monthly expenses of \$2146, and (2) a Parent's Worksheet for Child Support Amount, listing his income at \$1000 per month.

¶17 In June 2008, Mother (1) filed a petition to decrease Father's parenting time with respect to the parties' younger child, S., and to increase Father's monthly support obligation to \$440; and (2) served interrogatories and requests for

production. While the modification request was pending, Father failed to pay child support, and arrearages accrued between March 2008 and December 2008.

¶18 After Father objected to Mother's untimely disclosed exhibits, and upon Father's avowal that the parties were scheduled to mediate in conciliation court, the family court continued the July 2008 hearing on the modification of child support. The family court also set new deadlines, including a requirement that the parties complete disclosure and discovery responses by August 22, 2008.

¶19 The modification trial began on October 27, 2008 -- more than two months after the disclosure and discovery deadline. During a bifurcated proceeding, the family court received evidence concerning the motion to modify child support and Mother's motion to reduce Father's parenting time schedule with S.<sup>1</sup> After the trial phase, the family court ruled that a schedule change was in S.'s best interests. The parties entered into an agreement on the record with respect to the parenting time schedule.

Disclosure and discovery disputes dominated the support modification phase of the trial. Three days before the first

---

<sup>1</sup> The parties did not litigate Father's access to T., who would turn eighteen before the trial concluded. Because T. remained in high school for the rest of the academic year, the family court considered T.'s needs for purposes of the child support order. See A.R.S. § 25-501(A)(Supp. 2009).

day of trial, on a Friday afternoon, Father disclosed documents including the following to Mother's counsel: (1) an accountant's affidavit, dated October 24, 2008, critical of Mother's tax calculations; (2) an Affidavit of Financial Information; and (3) the affidavit of a paint sales representative concerning the impact on painters of the current economic downturn.

¶10 On October 27, 2008, the first day of trial, Mother filed a motion to dismiss, based on Father's untimely disclosures and belated attempts to comply with Mother's discovery requests concerning his business income. Mother's counsel also received additional documents from Father, including copies of Father's painting contracts, expenditure lists, bank records and financial information. Father simultaneously filed a Resolution Management Statement listing his monthly income as "\$12,000.00"<sup>2</sup> and Mother's as "\$23,012.00 or more."

¶11 The family court declined to rule on Mother's motion to dismiss Father's modification petition. Instead, the court prohibited Father from introducing many exhibits as a sanction for the late disclosure. But it permitted Father to testify as to his gross monthly income, and admitted Father's Exhibits 39 through 41 (monthly statistical reports on construction

---

<sup>2</sup> After the initial hearing on this matter, the \$12,000 monthly figure was found to be erroneous. Father subsequently filed an affidavit, which listed his income as zero.

permits), Exhibit 42 (an April 22, 2008 e-mail on building permits), Exhibits 72 through 80 (National Bank records for Superior Painting), and Exhibits 100-103 (federal tax returns for Superior Painting in 2005 and 2006, and Father's individual federal returns for 2005 and 2007). With the exception of the bank records, these exhibits were disclosed before the May 21, 2008 hearing.

¶12 After the trial, the family court (1) denied Father's modification petition; (2) ordered Father to pay his arrearages at the rate of \$50 per month and child support of \$400 per month; (3) ordered Father to pay a lump sum of \$916.33, for the cost of dental, vision, and Kids Care medical insurance, which he had earlier agreed to pay; and (4) awarded \$8,592.08 in attorneys' fees and costs to Mother pursuant to A.R.S. § 25-324(A)(Supp. 2009)<sup>3</sup>. This appeal followed.

---

<sup>3</sup> We cite the statute's current version because no revisions material to this decision have occurred.

## DISCUSSION<sup>4</sup>

¶13 Distilled to its essence, Father's Opening Brief contends that the family court abused its discretion by (1) excluding most of Father's trial exhibits; (2) denying his request to modify the child support payment; and (3) awarding attorneys' fees to Mother. We consider these issues in turn.

### **I. The Preclusion Of Father's Untimely Discovery Responses And Disclosures Did Not Constitute An Abuse of Discretion.**

¶14 Father first contends that the family court abused its discretion by excluding most of his exhibits relating to the child support issue. Pursuant to ARFLP 49, when the issue of child support is raised, the parties must disclose not only a completed Affidavit of Financial Information and tax returns for the past two completed calendar years, ARFLP 49(C)(1-2), but also:

year-to-date pay stub, salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security

---

<sup>4</sup> An appellate court generally cannot consider documents not contained in the family court's record. See *State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997); see generally ARCAP 11(a)(1), (3). We therefore deny Mother's motion to strike with respect to Father's October 23, 2008 Affidavit of Financial Information, because it was filed with the family court as an attachment to his supplemental declaration. We grant Mother's motion to strike with respect to the following: (1) Father's letter to Mother's counsel dated October 7, 2008, (2) Mother's counsel's letter to Father dated September 29, 2008, (3) Mother's First Supplemental Answers to Set One Non-Uniform Interrogatories dated October 21, 2008.

benefits, worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, recurring gifts, prizes, and spousal maintenance.

ARFLP 49(C)(2). Absent a contrary agreement, court order, or rule, all disclosures are due within forty days after filing the response to the initial petition. ARFLP 49. Here, the family court set a deadline of August 31, 2008, for all disclosures, answers to interrogatories, and responses to document production requests.

¶15 If a party fails to disclose or makes misleading or untimely disclosures, the party "shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or in support of a motion, the information or the testimony of a witness not disclosed, except by leave of court for good cause shown." ARFLP 65(C)(1).

¶16 Father did not contend that he complied with Rule 49 or that good cause existed for his noncompliance; rather, he admitted at trial that he had first disclosed Exhibits 43-52, which pertained to his Capital One card and expenses, on October 24, 2008, three days before the scheduled trial. Father also conceded that despite being aware of the discovery deadline, he had not identified the documents in response to Mother's uniform family interrogatories. And he had not produced documents in response to Mother's request for production of business records



reflecting gross income and necessary business expenses for tax year 2007. Accordingly, the family court found that Father had violated the deadline with respect to the interrogatories and requests for production, and therefore excluded the evidence. “The trial court has broad discretion in ruling on discovery and disclosure matters,” and we will not disturb its ruling absent an abuse of discretion.” *Link v. Pima County*, 193 Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App. 1998)(quoting *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 434, 937 P.2d 353, 356 (App. 1996)). We find no abuse of discretion here.

¶17 The court employed the same reasoning to exclude Father’s Capitol One credit card transaction documents, copies of checks, and lists of Father’s expenses (Exhibits 53-62); Father’s receipt of \$25,000 as a testamentary gift (Exhibits 63-64); contracts, a proposal, and invoices for Father’s painting company, Superior Painting (Exhibits 65-71),<sup>5</sup> and Father’s personal statements from a federal credit union (Exhibits 81-99). Mother contended the late discovery did not afford her adequate time to analyze the documents and determine how Father had arrived at his conflicting income calculations. She pointed out that Father had not described his business income until a few days before trial.

---

<sup>5</sup> Father also admitted that his submission of the 2008 contracts for Superior Painting was incomplete.

¶18 These late disclosures were not harmless because they deprived Mother of an opportunity to prepare her case. See generally *Zimmerman v. Shakman*, 204 Ariz. 231, 236, ¶ 16, 62 P.3d 976, 981 (App. 2003)(applying analogous Ariz. R. Civ. P. 26.1 to exclude evidence and explaining that when a trial is set and imminent, the potential prejudice from late disclosure increases).<sup>6</sup> We conclude that the trial court acted within its discretion, and affirm its orders precluding evidence.

¶19 Father also complains on appeal about the exclusion of another untimely disclosed document, a supplemental affidavit from a certified public accountant concerning Mother's financial records (Exhibit 104). The affidavit is dated October 27, 2008 -- the first day of trial. Father intended to introduce this exhibit to rebut Mother's testimony. The family court excluded it after affording Father an opportunity to be heard.

¶20 ARFLP 49(H) requires each party to disclose, at least sixty days before trial, all information regarding any expert testimony to be presented at trial. Father did not call the

---

<sup>6</sup> Father argues on appeal that the family court improperly failed to sanction Mother's lawyer for late disclosures and for allowing a staff person and a lawyer who was not counsel of record to sign documents. Our review of the record discloses no abuse of discretion. Mother offered not to use the exhibits, but Father stated a preference to continue the proceedings to allow him to complete more discovery. The family court granted his request. Any prejudice from the late filing was cured by the continuance, and we find no abuse of discretion in the family court's decision not to impose Rule 11 sanctions as to the signing issue.

affiant at trial, and offered testimony in the form of a supplemental affidavit on the first day of trial. The record indicates that Father had previously identified the accountant as a custodian of records in interrogatory responses dated August 25, 2008; failed to identify any experts; and objected to Mother's interrogatory asking for the accountant's information. Mother's counsel did not learn of the accountant's identity as an expert until three days before trial when he received the original affidavit. In light of this record, we similarly conclude that the family court did not abuse its discretion in excluding Exhibit 104.

**II. Father's Evidence Failed To Support Modification Of His Child Support Obligation.**

¶21 Father also argues that the family court abused its discretion by rejecting his child support modification argument. We will not disturb the family court's modification decision absent an abuse of discretion. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). An abuse of discretion occurs if 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.* (quoting *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963)).

¶22 As the party petitioning for a child support modification, Father bore the burden to prove a substantial and

continuing change of circumstances.<sup>7</sup> *Jenkins v. Jenkins*, 215 Ariz. 35, 39, ¶ 16, 156 P.3d 1140, 1144 (App. 2007); A.R.S. § 25-327(A) (2007). The family court may consider "all aspects of a parent's income" to ensure that a support award is "'just' and based on the total financial resources of the parents." *Cummings v. Cummings*, 182 Ariz. 383, 386, 897 P.2d 685, 688 (App. 1994)(holding that gross income includes gifts); see also A.R.S. § 25-320 App., Ariz. Child Support Guidelines, § 5(A) (defining "gross income" as "income from any source"). Father's primary evidence at trial consisted of (1) his own testimony about his specialization in painting new homes, and (2) exhibits reflecting that new housing permits in Father's area had declined between 2005 and 2007. He further testified that his average gross monthly income for 2007 was \$962, but that he could not testify as to his 2008 income because to do so would require him to refer to excluded evidence.

¶123 Although he had paid only \$800 toward his child support obligations during 2008, Father testified that as of December 18, 2008, he was current on his other financial

---

<sup>7</sup> Because the parties failed to ask the family court to make findings of fact or conclusions of law pursuant to ARFLP 82(A), we presume that the court found every fact necessary to sustain its decision, and we will uphold the judgment if any reasonable evidence supports it and there is no conflict with the family court's express findings. See *Elliott v. Elliott*, 165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990).

obligations, including his mortgage. He also reaffirmed the accuracy of his most recent financial affidavit's listing of monthly expenses.

¶24 Mother testified that her gross income for 2007 was \$23,000, and that she netted \$16,300 after a farm deduction expense. Like Father, Mother anticipated that her income would decrease as a consequence of the continuing economic downturn. She pointed out that Father has at least three vehicles,<sup>8</sup> has lived in the same place for four years, and has been able to support himself.

¶25 The evidence presented at trial could be used to support an increase or decrease in the amount of Father's obligation, but no evidence supported the elimination of Father's obligation. Under one scenario, the court could conclude that Father should pay \$552 for monthly child support for two children if it gauged Father's true income by his monthly expenses -- which his affidavit indicated totaled \$2146 -- and allowing for adjustments and Mother's income. An alternative calculation, based upon Father's tax returns, would support a conclusion that Father's monthly child support obligation should be \$393. Even if the court used Father's

---

<sup>8</sup> Mother also claimed that Father had purchased one such vehicle worth \$12,000 in 2007, the year he claimed \$982 in monthly income. Father countered that the car was a 2001 Ford Mustang purchased for \$7000, and the funds came from the divorce settlement and his inheritance.

claimed income of \$1000, his child support obligation would be \$263.98.

¶126 At the trial's conclusion, the family court told Father that it believed that his income had decreased, but that Father had failed to prove by what amount it had decreased. The record supports this analysis. It was within the court's discretion to determine that, based on the evidence admitted, no substantial and continuing change in circumstances had occurred to justify eliminating Father's child support payment.

**III. The Family Court Did Not Abuse Its Discretion By Awarding Attorneys' Fees To Mother.**

¶127 Father also challenges the family court's award of attorneys' fees and costs to Mother pursuant to A.R.S. § 25-324(A). We review the family court's fee ruling for abuse of discretion. *Magee v. Magee*, 206 Ariz. 589, 590, ¶ 6, 81 P.3d 1048, 1049 (App. 2004).

¶128 Section 25-324(A) (Supp. 2009) grants the family court discretion to order one party to pay a reasonable amount of the other party's costs and expenses in litigation "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." Costs and expenses may include attorneys'

fees. A.R.S. § 25-324(B) (Supp. 2009).<sup>9</sup> To determine whether to award fees, the court "must consider all relevant factors," including the "relative financial disparity between the parties," the parties' "ability to pay" their respective fees, "the ratio of the fees owed to the assets and/or income of each party, and other similar matters . . . ." *Magee*, 206 Ariz. at 592, 593, ¶¶ 17, 18, 81 P.3d at 1051, 1052. How to balance these factors "becomes a matter for the trial court's sound discretion." *Id.* at 593, ¶ 17, 81 P.3d at 1052.

¶29 Here, the court based its award on the finding that Father had taken the unreasonable position that he should pay no child support and the evidence of the parties' respective resources available at trial.<sup>10</sup> The record also reflects that Father had unreasonably resisted discovery and made disclosures on the eve of trial and at trial. We find no abuse of discretion in the fee award.

#### CONCLUSION

¶30 We affirm the family court's rulings in all respects. In the exercise of our discretion, and after considering the parties' financial resources and the reasonableness of their

---

<sup>9</sup> A.R.S. § 25-324(A) (Supp. 2009) permits the parties to request findings of fact concerning the fee award factors, but no request was made in this case.

<sup>10</sup> The family court did not consider Father's parenting time argument or position unreasonable.

positions, we grant Mother's request for attorneys' fees on appeal pursuant to A.R.S. § 25-324(A) subject to her compliance with ARCAP 21. Mother is also entitled to costs on appeal.

/s/

---

PETER B. SWANN, Judge

CONCURRING:

/s/

---

PATRICIA K. NORRIS, Presiding Judge

/s/

---

DANIEL A. BARKER, Judge