DIVISION ONE
FILED: 07-27-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:	)	1 CA-CV 09-0399
	)	
KIMBERLY KAY CRUTCHER,	)	DEPARTMENT C
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
PAUL HENRY CRUTCHER,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FN2005-051694

The Honorable Alfred M. Fenzel, Judge

REVERSED AND REMANDED

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K E S S L E R, Judge

¶1 Paul Henry Crutcher ("Husband") appeals from the family court's denial of his petition to modify his $2500 monthly spousal maintenance payment pursuant to Arizona Revised Statutes ("A.R.S.") section 25-327(A)(2007). For the following reasons, we reverse and remand this case for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

I. The Divorce

¶2 Kimberly Kay Crutcher ("Wife") and Husband married in 1976. Wife, who had taken three years of college classes, worked for the Paradise Valley Schools starting in 1992. Husband, a high school graduate, began working as a mechanic in the parties' community business, Crutcher Automotive L.L.C. ("Crutcher Automotive"), in 1982. The parties' other community assets included Crutcher Properties, L.L.C. and a house in Scottsdale.[1]

¶3 Husband earned $51,000 from Crutcher Automotive in 2005. Wife filed a petition for dissolution on December 1, 2005 and requested spousal maintenance. At this point Husband had already started "shopping" to sell Crutcher Automotive.

¶4 The parties' consent decree (the "Decree"), filed on November 14, 2006, provides that Husband will pay Wife $2500 in monthly maintenance starting on July 1, 2006 and continuing

[1] The parties had no minor children at the time of dissolution.

until either spouse dies or Wife remarries. It does not state that spousal maintenance is non-modifiable.

¶5 The Decree also incorporates a property settlement agreement. Exhibit A to the agreement estimates that Wife will receive $562,380 for her 60 percent share of the marital assets, and Husband will receive $374,920 for the remaining share, once the marital estate assets are sold.

II. Post-Divorce Events

¶6 Husband had to borrow funds to meet Crutcher Automotive's business operating expenses in 2006 and 2007. By 2007, Crutcher Automotive had lost $53,995.

¶7 The parties sold (1) the vacant lot next to Crutcher Automotive in 2007, (2) the Crutcher Automotive business in 2007, and (3) the Crutcher Automotive building in July 2008. At the time of the divorce Wife received the marital home, valued at $450,000, and $19,000 worth of other property. She assumed a $137,500 mortgage on the home and $44,000 in other debt, leaving her a net value of $287,500. Wife received approximately $426,727.15 in community asset proceeds after the divorce, including proceeds from the vacant lot sale ($167,146.24), the business sale ($85,235.75), and the building sale ($174,345.16). Thus, Wife received a total of $715,227.15 in assets ($426,727.15 and $287,500), or $152,847.15 more than the $562,380 the parties had projected she would receive.

¶8 Husband received $118,800 in assets and property at the time of the divorce and assumed responsibility for $44,000 in marital debt, for a net value of $74,800. Husband received $167,146.24 as his share of the sale of the vacant lot, with $23,778.96 paid directly to a parts supply bill and $143,367.28 being paid directly to Husband. Husband received $85,235.75 from the business sale. Husband received $134,302.78 as his share of the building proceeds, with $11,757.92 being paid directly to pay off a loan against a life insurance policy. Husband received a total of $425,928.03 after the divorce and sale of the business properties, $50,028.03 greater than the $374,920 that the parties anticipated he would receive at the time of the divorce.

A. Husband

¶9 Husband remarried and purchased a $625,000 home in California, using a down payment of $250,000. Husband received assets worth about $74,800 at dissolution and applied that amount to the down payment for the California house. At the time of dissolution, Husband expected that he would find a job that would pay enough for him to cover his spousal maintenance payments and his $3000 monthly mortgage.[2]

[2] Husband testified that the current value of his California house was $541,000 and he owed $417,000.

¶10 Husband initially ran Crutcher Automotive long distance in the summer of 2006, during the pendency of the divorce proceeding, earning $64,500 in 2006 and $69,000 in 2007. Husband's employment ended in October 2007, when Crutcher Automotive was sold (and after the divorce was finalized). Nevertheless, Husband remained current on spousal maintenance payments to Wife through May 2008.

¶11 Husband testified that he stopped paying spousal maintenance thereafter because he "ran out of funds." He had $1000 in his checking account in June 2008.

¶12 In July 2008, Husband received a wire transfer of $122,544.86, representing the proceeds from the Crutcher Automotive building.[3] He spent $63,000 of this amount on his carry-back mortgage, $33,000 on 2007 income taxes, and $20,000 to pay loans made to Crutcher Automotive. This left him with $6,544.86 for living expenses.

¶13 Husband testified that he paid about $53,000 in business debts for Crutcher Automotive using his share of community asset proceeds, another $15,000 in 2008 for taxes due to the Internal Revenue Service, and about $18,000 for his new wife's emergency heart surgery in November 2008. As of April 2009, Husband estimated that he had about $2500 left from the

[3] Although an exhibit states this amount, Husband's testimony indicates the amount was $144,000.

sale of all community assets from his marriage to Wife. In February 2009, Husband and his new wife had taken out a $15,000 loan, were liquidating personal property, and had exhausted loans from the wife's relatives.

¶14 After about fifteen months of unemployment, Husband found a temporary position as a material analyst and began work about two months prior to the April 28, 2009 evidentiary hearing. He was being paid $13.04 per hour and had earned about $3500. Prior to obtaining this position, Husband had applied for thirty jobs in his town and outlying areas. He also testified that, based upon newspaper accounts and "stay[ing] in touch with the automotive world," his job prospects would have been no better in Phoenix.[4]

B. Wife

¶15 In 2006, the year of the divorce, Wife earned $19,000 as a Paradise Valley School District employee and received health care benefits. She also started a job as a Walgreen's clerk in March 2006. Wife's employment income increased in 2007 to $29,786, including Walgreen's commissions. In 2008, her

[4] Husband testified that he had done work on cars since the divorce mainly for family members and himself at no charge. Wife admitted on cross-examination that she had no proof that Husband had earned money from such work since their divorce.

Wife also complained of Husband's post-divorce expenses, including charitable contributions, but even the family court acknowledged that these contributions had decreased. The family court also acknowledged that Husband had "significant" living expenses.

income exceeded $30,000. This amount represented more than three-quarters of her claimed annual living expenses of $36,646.76.

¶16 Wife quit the Walgreen's job one month before the modification hearing, citing health reasons. She testified that she currently works 32 hours per week for the school district at the rate of $13.15 per hour.

¶17 As noted above, Wife received approximately $426,727.15 in community asset proceeds after the divorce. She turned $300,000 over to a financial adviser. At the time of her deposition, Wife had paid taxes and wedding expenses for her daughter.

III. The Petition to Modify and Request to Find Husband in Contempt

¶18 On July 24, 2008, Husband petitioned to modify or terminate spousal maintenance pursuant to A.R.S. § 25-327 and Rule 91 of the Arizona Rules of Family Law Procedure. The petition requested termination of or a substantial reduction in spousal maintenance.

¶19 Wife denied that Husband was eligible for modification and sought a contempt finding based upon his failure to pay spousal maintenance. Husband countered that he was current as of April and May 2008, and that contempt was not warranted because he had not willfully refused to pay. *See* Ariz. R.

Family L.P. 92(D).[5] In the joint pre-trial statement, the parties contested whether Husband was entitled to modification pursuant to either A.R.S. § 25-327 or Rule 85(C) of the Arizona Rules of Family Law Procedure.[6]

¶20 After an evidentiary hearing, the family court denied the modification petition and declined to find Husband in contempt in a signed order filed on May 4, 2009. Husband filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. section 12-2101(B) (2003).

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[5] Husband had also blamed his circumstances on Wife's alleged failure to pay her share of community debts. He later withdrew his demand for payment after his counsel received a signed Expanded Settlement Agreement in which Husband had assumed responsibility for those debts.

[6] Rule 85(C) provides in relevant part:

> 1. On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:
>
> * * *
>
> e. the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> f. any other reason justifying relief from the operation of the judgment.

DISCUSSION

¶21 A family court may modify a spousal maintenance award upon a showing of "changed circumstances that are substantial and continuing." A.R.S. § 25-327(A); *see Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989). The party seeking modification bears the burden of proving these changed circumstances by a preponderance of the evidence. *Van Dyke v. Steinle*, 183 Ariz. 268, 278, 902 P.2d 1372, 1382 (App. 1995). Whether a substantial and continuing change of circumstances has occurred is a factual question which lies within the family court's sound discretion. *Schroeder*, 161 Ariz. at 323, 778 P.2d at 1219 (quoting *Fletcher v. Fletcher*, 137 Ariz. 497, 497, 671 P.2d 938, 938 (App. 1983)). We will not reverse the family court's determination as to the sufficiency of such a change absent an abuse of discretion. *Linton v. Linton*, 17 Ariz. App. 560, 563, 499 P.2d 174, 177 (1972). In general, a court commits an abuse of discretion when the record fails to substantially support its decision or the court commits an error of law in reaching the decision. *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004)(quoting *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001)).

¶22 One factor potentially affecting review is whether a party requested findings of fact and conclusions of law after trial pursuant to Rule 82(A) of the Arizona Rules of Family Law

Procedure. Father made such a request prior to the modification hearing. When Rule 82 is invoked, this court will not infer that the family court has made the additional findings necessary to sustain its judgment. *Elliott v. Elliott*, 165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990) (analyzing the analogous Rule 52 of the Arizona Rules of Civil Procedure). Father, however, was obliged to object to any deficiency in the findings and conclusions prior to appeal to afford the family court an opportunity for correction. *Id.* at 134, 796 P.2d at 936 (citing *Green v. Geer*, 720 P.2d 656 (Kan. 1986)).

I. Husband's Period Of Unemployment Did Not Disqualify Him from Seeking to Modify His Maintenance Obligation.

¶23 The family court found that no substantial and continuing change had occurred in over two years since the Decree was filed because Husband voluntarily chose to move to California:

> Respondent entered into an agreement at the time of the Dissolution and voluntarily chose to relocate to California. He purchased a $650,000 home on 27 acres of land and can no longer afford it. He moved from Arizona under no job prospects. Respondent testified that he believed that he could find a job that would enable him to meet his spousal maintenance obligations as well as his personal expenses. Under these circumstances, the Court cannot find that there have been substantial and continuing circumstances to warrant a modification of spousal maintenance.

We read the court's conclusion to mean that Husband's decision to move to California without a job awaiting him disqualified him from successfully seeking to modify his maintenance obligations.[7] We disagree.

¶24 It was undisputed that Husband had not worked for about fifteen months after the divorce and had only found a temporary position that paid less than half of what he had earned as a mechanic for Crutcher Automotive. To a large extent, this may be because of the economic meltdown which occurred in 2007 and 2008. This development can constitute a substantial and continuing change of circumstances. *See Fletcher*, 137 Ariz. at 498, 671 P.2d at 939 (holding that a one-half reduction in the husband's income warranted a reduction in child support). The family court did not find otherwise; rather, it faulted Husband for liquidating a failing business and trying to start over elsewhere.

[7] At the end of the evidentiary hearing, the trial court listed and summarized the factors and some of the evidence to be considered in granting spousal maintenance found in A.R.S. § 25-319(B), without stating how any of the relevant factors might affect its decision. It then issued its minute entry quoted above. This record supports Wife's argument that the court held Husband failed to show a substantial and continuing change of circumstances to merit modification of the prior award. We disagree with the superior court on that latter conclusion. Thus, Husband did not waive the argument the court failed to make sufficient findings under § 25-319 by not filing a motion for new trial because the court never reached any determination based on those statutory factors.

¶25 Given the court's reasoning, it did not consider other aspects of the alleged changed circumstances, such as the unexpected increase in Wife's share of the community property proceeds. *See Cooper v. Cooper*, 167 Ariz. 482, 490-91, 808 P.2d 1234, 1242-43 (App. 1990) (upholding a reduction in spousal maintenance, even though the husband's income had increased, because husband's expenses had also increased and the wife would start receiving her share of retirement benefits and no longer had to care for minor children); *cf. Jarvis v. Jarvis*, 27 Ariz. App. 266, 268, 553 P.2d 1251, 1253 (1976) (holding that the wife's success in obtaining employment supported a reduction of her spousal maintenance and child support).

¶26 Wife nevertheless argues that the changes at issue here were not substantial and continuing. We disagree. The losses experienced by Husband are significant and ongoing. He was out of work for more than a year, and could find only temporary work at a fraction of his prior salary. *See Fletcher*, 137 Ariz. at 497-98, 671 P.2d at 938-39 (holding that a one-half reduction in the husband's income warranted a reduction in child support). These are not the speculative future losses rejected as modification grounds in *Scott*. *See Scott v. Scott*, 121 Ariz. 492, 494, 591 P.2d 980, 982 (1979) (holding that the temporary present losses from a division's inaugural year and the

speculative future income losses for an aging broadcaster are insufficient to support modification).

¶27 Wife additionally contends that the spousal maintenance award should not be modified because the parties had the changed circumstances in mind at the time of the Decree. *See Linton*, 17 Ariz. App. at 563, 499 P.2d at 177 (declining to modify because "all of these facts" were available to the parties at the time they executed the settlement agreement). We disagree. Arizona courts have consistently found a substantial and continuing change in circumstances when the change was generally known but significant details were unknown.

¶28 For example, *Hornbaker v. Hornbaker* reversed a superior court's denial of a spousal maintenance modification because the wife's new employment as a teacher and acquisition of tenure status was a substantial and continuing change in circumstances. 25 Ariz. App. 577, 578, 545 P.2d 425, 426 (1976). At the time of the divorce decree the parties contemplated that wife would become a teacher when she completed her education. *Id.* However, the parties were not certain that she would be able to find the anticipated employment, what salary she would earn, whether she would succeed as a teacher, or that she would eventually receive tenure. *Id.* Because so much uncertainty relating to wife's eventual status as a teacher existed when the decree was entered, the superior court abused

its discretion in not finding that the changes in the wife's income justified modification.

¶29 Similarly, *Jorgenson v. Jorgenson* affirmed the superior court's modification of a child support decree based on the mother's substantial increase in income. 131 Ariz. 271, 272-73, 640 P.2d 202, 203-04 (App. 1982). In *Jorgenson*, the parties anticipated that the mother would have a substantial increase in income because she was an unemployed university student when the decree was entered, and they reasonably expected that she would obtain full time employment upon graduation. *Id.* However, mother was able to earn an unusually high amount of money and the parties could not have anticipated the size of her salary. *Id.* at 273, 640 P.2d at 204. Therefore, the court affirmed modification of support based on the mother's increase in income.

¶30 By contrast, *Linton v. Linton* reversed a superior court's finding that the husband had experienced a substantial and continuing change in circumstances because of his transition to inactive status at his law firm. 17 Ariz. App. at 565, 499 P.2d at 179. Because the fact of the husband's retirement and resultant decrease in income were "certainly known" at the time of the divorce decree, the diminution in the husband's income was not a changed circumstance justifying a diminution of spousal maintenance. *Id.* at 563-64, 499 P.2d at 177-78.

¶31 Husband's financial difficulty here was like the unforeseeable events in *Hornbaker* and *Jorgensen* that constitute a substantial and continuing change in circumstances. The evidence does not show that the parties anticipated Husband's need to spend fifteen months seeking employment only to find a position that paid less than half his former salary because of the severe economic downturn which plagued the nation. The mere foreseeability of Husband's need to locate new employment does not prevent the unusual length of his job search and inability to earn his former income from being a substantial and continuing change in circumstances. *See Jorgensen*, 131 Ariz. at 272-73, 640 P.2d at 203-04.

II. The Facts Do Not Support Basing Spousal Maintenance On Husband's Alleged Earning Capacity.

¶32 Wife further argues that Husband was not entitled to voluntarily reduce his income and assert a claim for modification as a result. She also speculates, in the absence of findings, that the family court "could have justifiably also found that Husband had voluntarily chosen to be underemployed and could have attributed income to him at his past earning capacity." Even assuming that the family court attributed income, the undisputed evidence fails to support that decision.

¶33 Whether or not a court can appropriately attribute greater income to a party is an issue we review de novo. *Pullen*

v. Pullen, 223 Ariz. 293, 295, ¶ 9, 222 P.3d 909, 911 (App. 2009) (quoting *Hall v. Lalli*, 194 Ariz. 54, 57, ¶ 5, 977 P.2d 776, 779 (1999)). In *Pullen*, we identified five factors relevant to this determination:

> (1) [t]he reasons asserted by the party whose conduct is at issue; (2) [t]he impact upon the obligee of considering the actual earnings of the obligor; (3) [w]hen the obligee's conduct is at issue, the impact upon the obligor of considering the actual earnings of the obligee and thereby reducing the obligor's financial contribution to the support order at issue; (4) [w]hether the party complaining of a voluntary reduction in income acquiesced in the conduct of the other party; and (5) [t]he timing of the action in question in relation to the entering of a decree or the execution of a written agreement between the parties.

Id. at 297, ¶ 15, 222 P.3d at 913 (citing Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 U. Conn. L. Rev. 647, 675-76 (1997)).

¶34 Applying these factors, *Pullen* concluded that husband had left his job at FedEx and moved to Washington for personal reasons. *Id.* at 298, ¶ 19, 222 P.3d at 914. These reasons included a desire to make a go of it with his girlfriend and possibly to avoid criminal prosecution. *Id.* Using actual income to determine maintenance would have a detrimental impact upon the wife, who could not support herself without the payments, and the wife's conduct was not at issue. *Id.* Finally, the wife did not acquiesce to the change in employment

and the husband had left his job while the divorce and maintenance proceedings were pending. *Id.* In light of these factors, we held that the court appropriately considered the husband's earning capacity, not his actual income, to determine spousal maintenance. *Id.* at ¶ 20.

¶35 This case is largely distinguishable. Like the *Pullen* husband, Husband left Arizona for personal reasons. Husband differs from the *Pullen* husband, however, because he did not refuse possible employment in his chosen field. Rather, Husband attempted to find employment in his industry in California and there is evidence he would not have fared any better in Phoenix.

¶36 Furthermore, the impact on Wife of using an actual income calculation would not be as detrimental as in *Pullen*, because Wife had acquired a larger than anticipated return from the parties' community property sales. Wife had also been working two jobs and earning more than $30,000 in 2008, which was almost enough to meet her own needs. Moreover, Wife had agreed to the sale of Crutcher Automotive, she had notice that it was losing money, and Husband did not seek modification until twenty months after the divorce and during a period of unemployment. Finally, Husband continued to run the business after the divorce, made reasonable efforts to obtain work in California, and paid spousal maintenance for a time while

unemployed. Accordingly, *Pullen* is distinguishable and does not support attribution to Husband of earning capacity income.

¶37 In conclusion, we hold that the family court erred in applying A.R.S. § 25-327(A) to hold that Husband could not pursue a change in his maintenance obligation because he had moved to California without a job offer. This, by itself, did not disqualify Husband from seeking modification because it ignores that his inability to find comparable employment may have been caused by the unexpected factor of the economic meltdown.[8] On remand, the family court should determine whether spousal maintenance should be modified in light of all relevant factors found in A.R.S. § 25-319(B). The family court may simply weigh the factors it has already heard evidence on or, if it feels it is necessary, hold an additional evidentiary hearing relating to any one or more of those factors. Although the court may ultimately reach the same conclusion that no modification is called for, it may not disqualify Husband from modification solely based on his voluntary move to California. This holding obviates the need to consider whether Husband is

[8] The family court did not mention Husband's arrearages in its ruling. It is settled that Wife has a vested right to receive the maintenance previously ordered and that on remand the family court may not modify maintenance retroactively. *See Cooper*, 167 Ariz. at 491, 808 P.2d at 1243.

also entitled to relief under Rule 85(C) of the Arizona Rules of Family Law Procedure.

III. Attorneys' Fees On Appeal

¶38 Wife requests an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324(A) (Supp. 2009). Husband does not request an award, but disputes Wife's right to fees on appeal.

¶39 Section 25-324(A) grants courts the discretion to order one party to pay a reasonable amount of the other party's costs and expenses, including attorneys' fees, "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." *Id.* In the exercise of our discretion, having considered the parties' resources and their positions on appeal, we deny Wife's request.

CONCLUSION

¶40 We reverse the family court's ruling and remand this case for reconsideration in light of Husband's petition in light of all relevant factors. In accordance with this decision, the family court shall consider all relevant factors in A.R.S. § 25-319(B), including the post-divorce proceeds allotted to Wife and Husband's ability to provide for Wife's needs as well as his own. Finally, we award Husband his costs on appeal, *see* A.R.S.

§ 12-341 (2003), subject to his compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

PATRICK IRVINE, Presiding Judge

/S/

MICHAEL J. BROWN, Judge