

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 05-18-2010
PHILIP G. URRY, CLERK
BY: GH

IN RE THE MARRIAGE OF:) 1 CA-CV 09-0443
)
KATHY LYNN ESTES,) DEPARTMENT A
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
TRACY EUGENE ESTES,) Civil Appellate Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2008-003484

The Honorable Daniel G. Martin, Judge

AFFIRMED

Kathy Lynn Estes, Petitioner/Appellee Phoenix
In Propria Persona

Tracy Eugene Estes, Respondent/Appellant Fresno, CA
In Propria Persona

B A R K E R, Judge

¶1 Tracy Eugene Estes ("Husband") appeals from a decree of dissolution. He argues that the family court attributed an incorrect income to him and, as a result, abused its discretion

in the amount of child support and spousal maintenance awarded to Kathy Lynn Estes ("Wife"). Husband also argues that the judgment for child support and spousal maintenance arrearages and the award of attorneys' fees to Wife were abuses of discretion. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 The parties were married in 1985 and have two minor children. Wife works as a school teacher, and Husband works in the wholesale car industry. Wife filed a petition for dissolution of marriage in May 2008. Wife also requested temporary child support and spousal maintenance payments beginning May 2008.

¶3 The family court held an evidentiary hearing on Wife's request for temporary support orders in September 2008. The parties stipulated that Wife's income was \$3,100 per month but disputed Husband's earning ability. After the temporary orders hearing, the family court attributed a monthly income of \$6,000 to Husband and ordered him to pay \$1,000 per month in temporary spousal maintenance. Based on these income figures and the application of the Child Support Guidelines, Husband's temporary child support obligation was ordered to be \$688.19 per month beginning October 1, 2008. See Arizona Revised Statutes

("A.R.S.") § 25-320 app. (2007). The family court held that Wife's request for retroactive support would abide the trial.

¶14 After the trial, the court found Husband's monthly income was \$8,333 and Wife's monthly income was \$3,100. The court awarded Wife \$1,750 a month in spousal maintenance for ten years. This payment was ordered to be effective retroactive to June 1, 2008. Husband was ordered to pay child support of \$1,015.63 per month, also effective June 1, 2008.

¶15 The court awarded Wife a child support arrearages judgment of \$11,171.93, which consisted of: "(1) \$4,062.52 in arrearages based on the retroactive application of [Husband's] child support obligation (June 1, 2008 through September 30, 2008), and (2) \$7,109.41 in arrearages based on [Husband's] failure to have paid child support pursuant to the Court's temporary orders for the period October 1, 2008 through April 30, 2009.". Similarly, the court found Husband failed to pay temporary spousal maintenance and awarded Wife a judgment for spousal maintenance arrearages of \$19,250, which included "(1) \$7,000.00 in arrearages based on the retroactive application of [Husband's] spousal maintenance obligation (June 1, 2008 through September 30, 2008), (2) \$12,250.00 in arrearages based on [Husband's] failure to have paid spousal maintenance pursuant to the Court's temporary orders for the period October 1, 2008

through April 30, 2009." The court also awarded Wife \$13,832.50 in attorneys' fees and costs.

¶16 Husband filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).¹

Discussion

1. Husband's Income

¶17 Husband argues that the evidence does not support the amount of income that the family court attributed to him. In the decree the court concluded that Husband was capable of earning \$100,000 per year, or \$8,333 per month. We will affirm the court's conclusions regarding Husband's income if they are supported by sufficient evidence. *Pearson v. Pearson*, 190 Ariz. 231, 235, 946 P.2d 1291, 1295 (App. 1997). "We will not set aside the trial court's findings of fact unless they are clearly erroneous." *Id.* (quoting *Van Dyke v. Steinle*, 183 Ariz. 268, 273, 902 P.2d 1372, 1377 (App. 1995)).

¶18 Wife testified that between 2005 and 2008, Husband earned as much as \$120,000 a year. She could not estimate his income for 2008 because he had not disclosed his pay stubs or

¹ Wife did not file an answering brief. Although we may treat this as a confession of error, see ARCAP 15(c), in our discretion, we decline to do so. See *Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994) ("[N]ot fil[ing] an answering brief in this court . . . could constitute confession of reversible error.").

tax returns. At the September 2008 temporary orders hearing, Husband testified that he was earning about \$4,500 per month in commissions. Husband's resolution statement filed just one month earlier, in August 2008, stated that income was \$5,833 per month. Husband offered no other evidence of his income at the temporary orders hearing.

¶9 Husband argues that the downturn in the economy had further reduced his income by the time of trial. At trial, Husband claimed he was earning \$2,000 per month. There was no new documentary evidence regarding Husband's income introduced at trial other than Husband's updated affidavit of financial information, which reflected a \$2,000 monthly income.

¶10 At trial, Lee Birdsong, an expert in the auto wholesale industry, testified that the car business in general was presently "very tough" and was down from five years ago. He did not offer any opinion as to Husband's earning capacity. Husband argues that the court ignored Birdsong's testimony and failed to take judicial notice of the poor condition of the overall economy. The family court noted the general evidence of a "recent downturn in the wholesale auto industry" but found that Husband failed to present direct documentary evidence of his income.

¶11 Accordingly, the evidence regarding Husband's income consisted exclusively of the parties' conflicting testimony. "We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). Wife's testimony supported the family court's conclusion that Husband was capable of earning \$100,000 per year. Therefore, we affirm the attribution of this income to Husband.

¶12 Husband next claims the spousal maintenance and child support orders based on this income were abuses of discretion. Having affirmed the finding regarding Husband's earning capacity, it follows that the support orders based on this finding were not an abuse of discretion.² See *In re Marriage of Robinson & Thiel*, 201 Ariz. 328, 334, ¶ 17, 35 P.3d 89, 95 (App. 2001) (holding that trial courts have broad discretion in ordering child support); *In re Marriage of Berger*, 140 Ariz. 156, 167, 680 P.2d 1217, 1228 (App. 1983) (holding that award of spousal maintenance is reviewed under abuse of discretion standard).

² Husband also raises whether the court followed the Maricopa County Spousal Maintenance Guidelines. The trial court has no obligation to do so. To the extent Husband contends in passing that there were other factors in awarding spousal maintenance, we discern no abuse of discretion.

2. *Retroactive Support Orders*

¶13 The decree awarded Wife arrearage judgments for both spousal maintenance and child support. The decree ordered retroactive payments for child support of \$1,015.63 per month and \$1,750 per month for spousal maintenance beginning June 1, 2008 to April 30, 2009. The temporary orders for child support had been \$688.19 and \$1,000 for spousal maintenance each month.

¶14 Husband argues that the court abused its discretion by ordering that he pay a higher amount retroactively to June 2008. He claims the temporary support orders cannot be modified retroactively. This court addressed a similar issue in *Maximov v. Maximov*, 220 Ariz. 299, 205 P.3d 1146 (App. 2009). In *Maximov*, the husband was ordered to pay \$7,500 per month in temporary support effective April 1, 2006. *Id.* at 300, ¶ 3, 205 P.3d at 1147. The decree, however, reduced the support obligation to \$1,826.34 per month, finding that the husband could not afford the higher temporary support order when it was entered. *Id.* at ¶ 4. The decree held that this lower support obligation was effective December 1, 2005. *Id.* The decree retroactively modified the temporary support order, and the husband was obligated to pay the lower amount commencing on the earlier date. *Id.*

¶15 Like Husband in this case, the wife in *Maximov* argued that A.R.S. § 25-327 (2007) precludes retroactive modification of support orders. *Id.* at 300-01, ¶ 5, 205 P.3d at 1147-48. *Maximov* held that § 25-327(A)³ applies only to decrees and not to pre-decree temporary orders. *Id.* at 301, ¶ 6, 205 P.3d at 1148. The statute governing temporary support orders, A.R.S. § 25-315 (Supp. 2009),⁴ “does not prohibit the court from setting the effective date of a modification to temporary family support to a date prior to the date of filing a petition for modification.” *Id.* at ¶ 7. Thus, temporary support orders may be retroactively modified. *Id.*

¶16 Although this case does not involve a petition to modify, Wife requested that support begin in May 2008, five months earlier than the period included in the temporary orders (October 1, 2008 through April 30, 2009). Therefore, the court

³ Section 25-327(A) provides, in relevant part:

Except as otherwise provided in § 25-317, subsections F and G, the provisions of any decree respecting maintenance or support may be modified or terminated only on a showing of changed circumstances that are substantial and continuing except as to any amount that may have accrued as an arrearage before the date of notice of the motion or order to show cause to modify or terminate.

⁴ We cite to the current statute because no revisions material to this decision have occurred.

properly ordered support to begin June 1, 2008, which was the month after Wife filed a request for support. *Maximov* also supports the court's decision to modify the amount of Husband's support obligations. *Id.*; see also A.R.S. § 25-315(F) (stating that temporary orders do not prejudice rights of party to be adjudicated at a later hearing and may be revoked or modified prior to decree). We affirm the arrearage judgments.

3. Attorneys' Fees at Trial

¶17 Husband was ordered to pay Wife \$13,832.50 in attorneys' fees and costs. We review this award under an abuse of discretion standard. See *Gutierrez*, 193 Ariz. at 351, ¶ 32, 972 P.2d at 684.

¶18 Husband claims that the family court failed to make a proper comparison of the parties' relative financial resources. The family court awarded attorneys' fees based on Husband's greater earning capacity and unreasonable positions. As discussed above, the evidence established that Husband has a greater earning capacity than Wife. The decree does not indicate that Wife was awarded an unequal amount of assets. With the exception of one \$6,600 debt, the debts were equally divided; the parties took separate responsibility for the credit card in their names, and Husband and Wife were equally responsible for the tax lien. The evidence supports the

implicit conclusion that Wife did not have greater resources than Husband.

¶19 The court also found that Husband took unreasonable positions throughout the litigation by failing to comply with the temporary orders, allowing the marital home to go into foreclosure, and failing to provide pre-trial disclosure. Husband does not dispute these findings. The award, therefore, was not an abuse of discretion. We affirm the fee award.

4. Attorneys' Fees and Costs on Appeal

¶20 Husband requests an award of his attorneys' fees and costs on appeal. Based on Husband's greater earning ability, we deny his request.

Conclusion

¶21 We affirm the child support order, spousal maintenance order, arrearage judgments, and the award of attorneys' fees and costs to Wife. We deny Husband's request for attorneys' fees and costs on appeal.

/s/

DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s

/s/

LAWRENCE F. WINTHROP, Judge

DIANE M. JOHNSEN, Judge