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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: 12/28/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:) 1 CA-CV 10-0161
)
ERIC W. DONNELLY,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
KAREN JILLEAN DONNELLY,) Appellate Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2006-004342

The Honorable Susanna C. Pineda, Judge

AFFIRMED

The Cavanagh Law Firm, P.A.
By Keith A. Berkshire
Marlene A. Pontrelli
Attorneys for Petitioner/Appellant

Phoenix

H A L L, Judge

¶1 Eric W. Donnelly (Husband) appeals from the trial court's denial of his motions to modify the spousal maintenance

and child support awarded to Karen Jillean Donnelly (Wife). For the reasons that follow, we affirm the trial court's rulings.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife were married on August 14, 1986. Husband and Wife are the parents of one adult child and one minor child. On June 2, 2006, Husband filed a petition for dissolution of marriage. On February 29, 2008, the family court entered a signed decree of dissolution allocating the parties' assets, awarding child custody, awarding spousal maintenance to Wife in the amount of \$5000.00 per month for a period of five years, and awarding child support to Wife in the amount of \$1290.14 per month.¹

¶3 On January 30, 2009, Husband filed a petition to modify spousal maintenance, contending that he is unable to pay any spousal maintenance to Wife due to a "substantial and continuing change of circumstances in [his] business[.]" In her response, Wife denied that Husband had sustained a substantial and continuing change in financial circumstances and petitioned the court to hold Husband in contempt for failing to pay spousal maintenance.

¶4 On October 5, 2009, the family court held an evidentiary hearing on Husband's petition to modify spousal

¹ Husband did not appeal from the decree of dissolution.

maintenance. At the outset of the hearing, Husband orally petitioned for a modification of the child support award as well.

¶15 Husband testified that he has been a roofing contractor for thirty years and has owned a roofing business, EWD Incorporated DBA Roof Rite (Roof Rite), for eighteen years. At the time of the parties' divorce, Roof Rite was valued at \$1,200,000.00. Husband was awarded the business and Wife received other assets of approximate equal value. Husband also received several other assets, including \$200,000.00 in cash. Husband testified that Roof Rite's clients are single-family new home residential builders. In 2006, at the height of new residential construction in the greater Phoenix area, Husband earned approximately \$300,000.00 per year. Husband testified that since that time, however, the new home construction market has "plummeted" and Roof Rite's revenue has decreased significantly. Husband testified that he has laid-off more than ninety percent of his employees and loaned his company substantial amounts of money to keep it afloat. Moreover, Roof Rite's accounts with its suppliers are "in arrears." Husband further testified that he currently has "no income" and stated that he has not received a paycheck since April 2008. Husband also acknowledged that he runs his personal expenses "through

the business" and has always done so (other than for a "short period" immediately before the dissolution decree was entered).

¶16 On cross-examination, Husband again acknowledged that his rent (\$3785 per month), vehicle payments (\$777 and \$1331 per month), child support, and every other personal expense "down to McDonald's and packs of gum" are run through the business. When asked to explain his monthly expenses, Husband admitted that he overstated his monthly expenses on his affidavit of financial information by \$10,300.00. Husband also admitted that in 2008, when Roof Rite's new home contracts were at their lowest point in the business's history, he attempted to obtain a \$1,300,000.00 loan to purchase a new home, but was unable to qualify.

¶17 Beverly Stotts, the former office manager/bookkeeper of Roof Rite, testified that she was laid-off on August 26, 2009 after working for Husband for ten years. She further testified that Roof Rite's income "dropped dramatically" since 2007 and that the business would not be "afloat" if Husband did not extend personal loans to the company. She also stated that, even excluding all of Husband's personal expenses, Roof Rite currently does not generate sufficient income to cover the business's overhead expenses.

¶18 Wife testified that since the dissolution decree was entered, she has started an "online store," but has yet to receive a profit from it. Because she has not received a spousal maintenance payment since December 2008, she has been paying her personal expenses by spending down the assets she received in the divorce allocation. Wife testified that Husband has always run personal expenses through the business and that Roof Rite normally owes significant amounts of money to its suppliers. Wife also stated that Husband is two months in arrears in his child support payments.

¶19 After taking the matter under advisement, the family court entered a signed minute entry denying Husband's motions, stating in relevant part:

Here, as at the time of the parties' dissolution proceedings, Husband has obtained expense reimbursements as benefits from his operation of EDW Inc. Previously, the Court found that Husband's monthly income was \$20,000.00 per month. A review of the benefits received by Husband and paid through the business indicates that Husband continues to receive approximately \$18,000.00 per month in reimbursement or benefit from his operation of EDW Inc. Although his tax documents demonstrate a business loss, this Court cannot ignore that Husband's loss is the result of his depreciation and deduction of personal expenditures.

This finding is supported by evidence that Husband, although claiming poverty, continues to maintain a lavish lifestyle.

In 2008/2009, while claiming that his income dropped from \$150,000.00 to approximately \$43,000.00, and then zero, Husband purchased a lavish home and a lavish car. Although he claimed to have traveled to Texas in search of work for his roofing company, his expenditures were excessive. He also had other excursions as demonstrated by his credit card expenditures. Husband's expenses have averaged almost \$18,000.00 per month.

Based on this evidence, the Court finds that Husband has failed to show a substantial and continuing change of circumstances mandating modification of spousal maintenance or child support.

The trial court also found that Husband "has knowingly and willfully failed to pay Court ordered spousal maintenance," and entered judgment in favor of Wife in the amount of \$45,000.00.

¶10 Husband appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-2101(B) and 12-2102(B) (2003).²

DISCUSSION

¶11 On appeal, Husband contends that the trial court misapplied the Child Support Guidelines (the Guidelines) and therefore erred by denying his motions to modify the spousal

² Although the December 7, 2009 minute entry from which Husband appealed was not a signed, appealable order, the trial court's subsequent entry of a signed, appealable order on February 1, 2010 cured the defect. See *Barassi v. Matison*, 130 Ariz. 418, 421-22, 636 P.2d 1200, 1203-04 (1981) (premature appeal need not be dismissed when court subsequently enters final judgment).

maintenance and child support awards. Specifically, Husband argues that the trial court erred by "utilizing § 5(A) and § 5(D) of the Guidelines, instead of § 5(C) as Husband's income is from a closely held corporation."³

¶12 Orders for spousal maintenance and child support may be modified only upon a showing of a substantial and continuing change in circumstances. A.R.S. §§ 25-327(A) (2007), -503(E) (Supp. 2010); *State ex rel. Dep't of Econ. Sec. v. McEvoy*, 191 Ariz. 350, 352, ¶ 7, 955 P.2d 988, 990 (App. 1998). The party requesting the spousal maintenance or child support modification has "the burden of establishing changed circumstances with competent evidence." *Jenkins v. Jenkins*, 215 Ariz. 35, 39, ¶ 16, 156 P.3d 1140, 1144 (App. 2007); see also *Scott v. Scott*, 121 Ariz. 492, 494, 591 P.2d 980, 982 (1979). Whether a change in circumstances is sufficient to warrant a modification of maintenance or support is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Jenkins*, 215 Ariz. at 37, ¶ 8, 156 P.3d at 1142; *Kelsey v. Kelsey*, 186 Ariz. 49, 53, 918 P.2d 1067, 1071

³ Wife has not filed an answering brief. Although we recognize the general principle that "when an appellant raises a debatable issue, the court, in its discretion, may find that an appellee's failure to file an answering brief constitutes a confession of error," *State ex rel. McDougall v. Superior Court*, 174 Ariz. 450, 452, 850 P.2d 688, 690 (App. 1993), we choose to reach the merits of the issue presented here.

(App. 1996). The trial court abuses its discretion if the record, when viewed in the light most favorable to upholding the trial court, lacks competent evidence to support the decision. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). We will accept the trial court's findings of fact unless they are clearly erroneous, but we "draw our own legal conclusions from facts found or implied in the judgment." *McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6, 49 P.3d 300, 302 (App. 2002) (citation omitted). We likewise review de novo a trial court's interpretation of the Guidelines. *Guerra v. Bejarano*, 212 Ariz. 442, 443, ¶ 6, 133 P.3d 752, 753 (App. 2006).

¶13 Pursuant to § 5(A) of the Guidelines, "[g]ross income includes income from any source." Under § 5(C), the gross income of a closely held corporation is calculated by subtracting the "ordinary and necessary expenses required to produce income" from the gross receipts. As further explained in subsection (C), "[o]rdinary and necessary expenses do not include amounts determined by the court to be inappropriate for determining gross income for purposes of child support." As set forth in § 5(D), "[e]xpense reimbursements or benefits received by a parent in the course of . . . self-employment or operation of a business shall be counted as income if they are significant and reduce personal living expenses."

¶14 Husband contends that the family court erred by applying § 5(A) and (D) of the Guidelines and attributing a monthly benefit to him of approximately \$18,000.00. Instead, he contends that the court's analysis should have been limited to § 5(C) because Roof Rite is a closely held corporation and § 5(D) is inapplicable "because the analysis under § 5(C) already allows for the inclusion of other benefits paid for by [the] corporation."

¶15 Applying Stott's testimony to § 5(C), Husband asserts that Roof Rite, and he as the sole owner, earned no gross income in 2008 and 2009 because Roof Rite's ordinary and necessary business expenses exceeded its gross receipts. Indeed, relying on Stott's testimony, Husband argues that, even excluding all of his personal expenses that were paid directly by the company, Roof Rite nonetheless operated at a loss for those years.

¶16 We reject Husband's contention that § 5(D) is "redundant for closely held corporations." Although Husband correctly notes that § 5(C) applies to closely held corporations and allows the court to exclude from ordinary and necessary expenses any amounts the court deems "inappropriate for determining gross income," § 5(D) provides an independent basis for attributing income to a parent that is not dependent on a company's gross income as defined in § 5(C). Thus, § 5(D)

allows a court to attribute income to a parent who is operating a closely held corporation at a loss, but nonetheless receives a significant benefit from the corporation that reduces personal living expenses.

¶17 Such is the case here. The undisputed evidence reflects that Roof Rite has sustained a substantial decrease in revenue over the last few years, coinciding with the overall decline in the housing market. The undisputed evidence also reflects that Husband has run his personal expenses through the business since its inception and, over the life of the company, has routinely extended personal loans to the company and routinely operated on credit with suppliers. Even assuming that Roof Rite has no gross income as defined under § 5(C), Husband has nonetheless continued to receive a substantial benefit from the company by having all of his personal expenses paid. Under § 5(D), this substantial personal benefit is attributable as income. That Husband has issued personal loans to the business in lieu of a third-party lending institution is of no consequence under the Guidelines. The business is indebted to Husband, as it would be to a financial institution, and Husband has continued to receive the same level of financial benefit from the company, relief from approximately \$18,000.00 in monthly expenses, as he received at the time the dissolution

