DIVISION ONE
FILED: 03/27/2012
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 11-0073
	)	
RANDY S. LARGE,	)	DEPARTMENT A
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
KRISTA K. LARGE,	)	
	)	
Respondent/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. FC2009-003936 and FC2009-092158 (Consolidated)

The Honorable David B. Gass, Judge

AFFIRMED

Udall, Shumway & Lyons, P.L.C. Mesa
by Steven H. Everts
Attorneys for Petitioner/Appellant

P O R T L E Y, Judge

¶1 Randy S. Large ("Father") appeals the family court's upward deviation of his child support obligation and its refusal to enforce the attorneys' fees provision of the couple's antenuptial agreement. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Father and Krista K. Schmidt ("Mother") met when she was a fifteen-year-old high school student and he was a medical school graduate. She moved in with him during her senior year, and they got engaged several years later. A few weeks before their wedding, the couple signed an antenuptial agreement.

¶3 The agreement was prepared by Father's attorney. It addressed a number of issues, including that if they got divorced neither would get spousal maintenance or any other money. Although Mother did not retain counsel to review the agreement, she signed it. The couple married on December 31, 1997.

¶4 They had two children during the marriage, and both filed divorce petitions on June 12, 2009. The cases were consolidated, and the family court entered temporary orders in September 2009. Father subsequently filed for bankruptcy, and moved to Joplin, Missouri, to begin a new job as an anesthesiologist.

¶5 The principal dispute at trial was the validity of the antenuptial agreement and its spousal maintenance provision. When the family court entered the divorce decree, the court, in detail, outlined its analysis and determined it would enforce the antenuptial agreement. The court, however, found that the fee-shifting provision, which made a party liable for the

other's attorneys' fees if that party challenged the validity of the agreement and lost, was unconscionable. As a result, Mother did not receive spousal maintenance, but she was not required to pay the legal fees Father incurred in defending the agreement.

¶6 The other contested issue was child support. Despite the child support calculation of $3034.87, the court found that the award should be deviated upward and ordered Father to pay $4500 per month in child support. Father filed a motion for post-trial relief, and the court reaffirmed its attorneys' fees and child support orders. Father then filed his appeal.[1]

DISCUSSION

I. Child Support

¶7 Father challenges the child support award.[2] By deviating from the Child Support Guidelines ("Guidelines") by nearly $1500 monthly, he asserts the family court improperly: (1) refused to deduct his ordinary and necessary business expenses in calculating his monthly income; (2) used $900 instead of $130 for child care costs; and (3) relied on a depublished opinion to support the award. Further, he argues that the court did not consider all of the factors listed in Arizona Revised Statutes ("A.R.S.") section 25-320(D) before it

[1] Mother did not file a response brief.

[2] Based on a stipulation of the parties after Father filed a "Motion to Set Aside Child Support Award/Petition to Modify Child Support," the family court reduced Father's child support to $3000 a month in June 2011.

deviated from the presumptive amount of child support. As a result, he asserts that the court's findings were not based on the evidence, "particularly with regard to the reasonable needs of the children and the standard of living before the divorce."

¶8 We review the child support order for an abuse of discretion, *McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6, 49 P.3d 300, 302 (App. 2002) (citation omitted), but review the application of the Guidelines de novo. *Hetherington v. Hetherington*, 220 Ariz. 16, 21, ¶ 21, 202 P.3d 481, 486 (App. 2008) (citation omitted). We accept the family court's findings of fact "[u]nless they are clearly erroneous." *Engel v. Landman*, 221 Ariz. 504, 510, ¶ 21, 212 P.3d 842, 848 (App. 2009) (citation omitted).

¶9 Section 8 of the Guidelines discusses when a deviation from the standard child support calculation is appropriate. It provides, in relevant part, that:

> If the combined adjusted gross income of the parties is greater than $20,000 per month, the amount set forth for combined adjusted gross income of $20,000 shall be the presumptive Basic Child Support Obligation. The party seeking a sum greater than this presumptive amount shall bear the burden of proof to establish that a higher amount is in the best interests of the children, taking into account such factors as the standard of living the children would have enjoyed if the parents and children were living together, the needs of the children in excess of the presumptive amount, consideration of any significant disparity

> in the respective percentages of gross income for each party and any other factors which, on a case by case basis, demonstrate that the increased amount is appropriate.

A.R.S. § 25-320(8) (West 2012).[3] Accordingly, to determine whether deviation is appropriate, the court must consider the statutory factors and the best interests of the children. *Id.*

¶10 Here, the family court followed section 8 of the Guidelines. The court made its findings of fact and conclusions of law, and addressed the section 8 factors. The court noted that Father earned $390,000 annually, which was in excess of $20,000 a month, the threshold amount before the court considers any child support deviation, even before considering Mother's income as a daycare teacher. The court then compared the children's standard of living before Father moved to Casa Grande and then to Missouri with their standard of living as a result of the divorce. The court noted that Father had not made any mortgage payments and allowed the marital residence to fall into foreclosure after he moved, and now lives in a 4800 square-foot home in Missouri while Mother and the children live in an apartment. The family court also found that "Father has not demonstrated any marked change in his standard of living. The children, however, face a different fate."

[3] Unless otherwise noted, we cite the current version of the statute if no revisions material to this decision have since occurred.

¶11 The court also noted that Father stopped making payments on the car Mother drove when he moved, and told the lender the location of her car, which resulted in the car being repossessed from the daycare where Mother worked. Mother, as a result, had to find alternative transportation, a Ford Focus, and her "payment is nearly 20% of her monthly income."

¶12 When noting the disparity of income between the parties, the court also considered that one child may need tutoring and speech therapy, an expense which Father thinks is unnecessary and believes Mother should provide on her own without his help. The court found that without an upward deviation, Mother would have to choose between speech therapy, tutoring, and meeting the basic needs of the children; and "children of doctors who earn $390,000 per year" generally do not have to make those choices. Consequently, it is clear that the court followed the section 8 Guidelines, made its finding of fact and conclusions of law, and considered the best interests of the children before finalizing the child support award.

¶13 Father next argues that the court erred when it refused to deduct certain "ordinary and necessary expenses required to produce the income" from his gross monthly income on the child support worksheet. *See* A.R.S. § 25-320(5). At trial, and in his motion for post-trial relief, Father asked the court to take into account, among other expenditures, the $42,286

spent to purchase medical malpractice "tail coverage," which was required by his Casa Grande contract when he moved to Missouri. The court found that he voluntarily chose to incur the liability and "the evidence did not establish that the one-time cost of tail insurance was either ordinary or necessary." We agree.

¶14 Section 5(C) of the Guidelines provides, in part, that "gross income means gross receipts minus ordinary and necessary expenses required to produce income. Ordinary and necessary expenses do not include amounts determined by the court to be inappropriate for determining gross income for purposes of child support." Section 5(C) allows the family court to decide whether certain income is gross income and whether certain expenses are "ordinary and necessary." The tail coverage was not designed to produce income, but to protect his income and assets if there was a malpractice claim. Accordingly, the court exercised its discretion to determine which expenses are ordinary and necessary, and we find no error.

¶15 Additionally, in Father's post-trial motion, he reasserted a claim for other expenses he believed should have been considered in making the child support determination. The family court considered those, made additional findings of fact and conclusions of law, and found that his expenses for meals, travel, entertainment, and communication were not "ordinary and necessary expenses required to produce income." Because the

findings and conclusions are not clearly erroneous, we find no abuse of discretion. *Engel*, 221 Ariz. at 510, ¶ 21, 212 P.3d at 848 (citation omitted).

¶16 Father next argues that the family court improperly relied on *East v. Matthews*, 222 Ariz. 99, 213 P.3d 248 (App. 2009), *depublished* by 223 Ariz. 109, 219 P.3d 1038 (2009).[4] Although the court should not have cited the depublished case, we do not find that the court relied on it to the exclusion of the Guidelines. Even though *East* was a child support deviation case, Mother was required to prove that child support deviation was appropriate, and the court found that she met her burden. We agree, and find nothing in the ruling which contravenes the deviation requirements in section 8 of the Guidelines.

¶17 Finally, Father challenges the child care costs of $900 per month and argues that $130, the amount used in the temporary orders, should have been used. We disagree.

¶18 The family court made specific findings about the child care expenses. The court found that "Mother's testimony provided sufficient evidence of her childcare expenses and of the necessity for those expenses" and that the higher costs were consistent with those incurred during the marriage. Because the court considered witness credibility in making its

[4] The divorce decree discussed *East* even though it had been depublished some eight months before the decree was filed.

determination, there is evidence to support the finding and we do not find that the court abused its discretion.

II. Antenuptial Agreement Attorneys' Fees Provision

¶19 Father argues that the family court erred when it denied his request for attorneys' fees and costs under the antenuptial agreement and granted Mother fees and costs. The fees provision in the agreement stated:

> In the event suit is brought or an attorney is retained by either party to this Agreement to enforce the terms of this Agreement or to collect any monies due hereunder, or to collect money damages for breach hereof, the prevailing party shall be entitled to recover, in addition to any other remedy, reimbursements for reasonable attorneys' fees, court costs, costs of investigation and other related expenses incurred in connection therewith.

The court found that it was bound to enforce the antenuptial agreement, but found the fees provision to be procedurally unconscionable and severable.

¶20 Antenuptial agreements are governed by the Arizona Uniform Premarital Agreement Act. *See* A.R.S. §§ 25-201 to -205 (West 2012). Any "issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law." A.R.S. § 25-202(E). We review de novo a family court's decision on a question of law. *In re Marriage of Pownall*, 197 Ariz. 577, 580, ¶ 7, 5 P.3d 911, 914 (App. 2000) (citation omitted).

¶21 Father applauds the family court's determination that it had to enforce the provision that precluded spousal maintenance. He argues, however, that the family court erred when it equated the agreement with property settlement agreements and improperly relied on A.R.S. § 25-324 (West 2012) to determine that the attorneys' fees provision was unconscionable because the statute does not apply to antenuptial agreements.

¶22 Although the family court was concerned about the financial disparity between the parties, it focused on the *Pownall* factors suggesting procedural unconscionability for its analysis; namely, the "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, [and] whether alterations in the printed terms were possible." *Pownall*, 197 Ariz. at 580, ¶ 10, 5 P.3d at 914 (quoting *Maxwell v. Fidelity Fin. Servs., Inc.*, 184 Ariz. 82, 89, 907 P.2d 51, 58 (1995) (internal quotation marks omitted)).

¶23 Here, after conducting its analysis, the family court found that: Father's attorney drafted the agreement; Mother was twenty-two years old, was not college-educated, and did not run a business, while Father was thirty-two years old, was a doctor, and had his own business; Mother did not have independent legal

counsel;[5] Father was in control of virtually all of the couple's finances and "Mother was not in a position to bargain"; and there was no evidence to demonstrate that Father's attorney told Mother she could make changes to the document. Despite its findings, the court decided that it could enforce the agreement.

¶24 With respect to the attorneys' fees provision, however, the court found that it was not explained to Mother and that she did not understand it. The court observed that the provision "makes Mother liable for attorney fees and costs if she challenges the agreement and loses, even if she has a good faith basis for the challenge." As a result, the court ruled the provision unconscionable.

¶25 In reviewing the record, we come to the same conclusion. Mother had lived with Father since she was seventeen, she was a high school graduate and was willing to sign the agreement to get married. Father made her pay for half of the fee he was charged by his attorney to draft the agreement, but Father did not offer to pay any portion of a fee for Mother to get independent legal advice. And, although Father's attorney may have read the provisions to Mother, there

[5] As noted in *Pownall*, the comment to § 6 of the Uniform Premarital Agreement Act provides that a "lack of independent legal counsel may be a factor in determining whether an agreement is unconscionable." *Pownall*, 197 Ariz. at 580, ¶ 9, 5 P.3d at 914 (citing Unif. Premarital Agreement Act § 6, cmt. (1983)).

was no evidence that the fees and costs-shifting provision was explained to her, or that she understood the financial consequences of unsuccessfully challenging the agreement in the future. As a result, we hold that, in the absence of evidence that she understood the provision at the time the agreement was signed, the attorneys' fees provision is unconscionable and, therefore, unenforceable. Accordingly, we find no error because the court's ruling was supported by the evidence and guided by a reasonable application of the *Pownall* factors.

¶26 Father also contends that the court's focus on the fees provision rather than the spousal maintenance provision is "illogical and unlawful." We disagree.

¶27 Although Mother knew that Father did not want to pay spousal maintenance if they got divorced, the family court found that "Father offered no evidence that Mother was made aware [of] the fee shifting provision . . . or that Mother understood that once she signed the Antenuptial Agreement, she could not raise a good faith challenge to it without being exposed to an award of attorney fees and costs." Moreover, despite Father's argument, he has not cited, and we have not found, any case law suggesting that a person's ability to understand one provision of an antenuptial agreement is conclusive evidence of understanding them all. In fact, his argument is undermined by the fact that the antenuptial agreement contains a severability clause that

provides that if any provision of the agreement is declared unenforceable or invalid, then the parties intend for the remainder of the agreement to be enforced. Consequently, we find the argument unpersuasive.

¶28 Father also argues that unconscionability is inapplicable if there was full disclosure pursuant to A.R.S. § 25-202(C), which provides:

> The agreement is not enforceable if the person against whom enforcement is sought proves either of the following:
>
> 1. The person did not execute the agreement voluntarily.
>
> 2. The agreement was unconscionable when it was executed and before execution of the agreement that person:
>
> (a) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party.
>
> (b) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.
>
> (c) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

¶29 The statutory provision, however, focuses on whether the agreement itself is unconscionable. Here, Mother testified that she signed the agreement voluntarily because she wanted to marry Father. She also had knowledge of his property and debts.

The agreement, as a result, met the statutory threshold for enforceability and precluded her claim for spousal maintenance. The family court, however, with evidence for its consideration, determined that the attorneys' fees provision was unconscionable and therefore invalid because its content and consequences had not been explained to her. We agree.

¶30 Finally, Father argues that the court interpreted the facts "more aggressively than the facts justified." "We defer to the trial court with respect to any factual findings explicitly or implicitly made, affirming them so long as they are not clearly erroneous, even if substantial conflicting evidence exists." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 537, ¶ 10, 96 P.3d 530, 535 (App. 2004) (citations omitted). Moreover, we will not re-weigh the findings and we decline to second-guess the court's analysis of the evidence, especially because it had to determine the credibility of the witnesses. *See Magna Inv. & Dev. Corp. v. Pima County*, 128 Ariz. 291, 294, 625 P.2d 354, 357 (App. 1981) (citation omitted).

CONCLUSION

¶31 Based on the foregoing, we affirm the judgment.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Judge

/s/
_____
ANDREW W. GOULD, Judge