

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: 05/29/2012
RUTH A. WILLINGHAM,
CLERK
BY: sis

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 11-0159
)
KERRY LYNN DAVIS,) DEPARTMENT D
)
Petitioner/Appellee/) **MEMORANDUM DECISION**
Cross-Appellant,) (Not for Publication
) - Rule 28, Arizona
v.) Rules of Civil
) Appellate Procedure)
NATHAN TRENT DAVIS,)
)
Respondent/Appellant/)
Cross-Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. No. FC2009-090062

The Honorable James P. Beene, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

Law Offices of John R. Zarzynski Phoenix
By John R. Zarzynski
Attorneys for Petitioner/Appellee/Cross-Appellant

Steven M. Ellsworth, P.C. Mesa
By Steven M. Ellsworth
and Glenn D. Halterman
Attorneys for Respondent/Appellant/Cross-Appellee

G E M M I L L, Judge

¶1 Respondent/Appellant/Cross-Appellee Nathan Trent Davis ("Father") appeals the superior court's Decree of Dissolution. Petitioner/Appellee/Cross-Appellant Kerry Lynn Davis ("Mother") cross-appeals the court's denial of her request for an award of attorneys' fees and costs. For the following reasons, we vacate the portions of the decree ordering Father to pay child support of \$888 per month and denying his request to modify the temporary orders, and we remand for further proceedings on those issues. We affirm the court's division of the parties' 2008 tax refund and its denial of Mother's request for an award of attorneys' fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Father and Mother were married in 1997 and have two minor children. Wife petitioned for dissolution on January 13, 2009.

¶3 In March 2009, the court conducted an evidentiary hearing on Mother's request for temporary support, and based on the parties' most recent income tax return (for tax year 2007) ordered Father to continue paying the mortgage and homeowner's association fees for the marital home and to pay Mother \$8,000 per month as spousal maintenance and \$2,000 per month as child support pending the dissolution trial.

¶14 The parties then proceeded to trial on the issues of child custody, child support, spousal maintenance, and division of the marital property and debts. Father also asked the court to retroactively reduce the amount it had ordered him to pay as spousal maintenance and child support pending the trial and give him a credit for his overpayment. Each party requested an award of attorneys' fees and costs incurred in the dissolution.

¶15 The court awarded the parties joint legal custody of the children and ordered that Father would have parenting time every other weekend and one night during the intervening week and that the parties would share parenting time during holidays and school breaks. It applied the Arizona Child Support Guidelines, Arizona Revised Statutes ("A.R.S.") section 25-320 app. (Supp. 2011) ("Guidelines"), and set Father's child support obligation at \$888 per month. In addition, as relevant to this appeal, the court granted Mother a credit of \$10,126 for her one-half of a \$20,258 income tax refund Father received for tax year 2008. The court also denied Father's request for retroactive modification of the temporary orders regarding spousal maintenance and child support. Finally, the court ordered that the parties would bear their own attorneys' fees and costs.

¶16 Father moved to alter or amend the judgment. Mother

moved for reconsideration. The court granted Father's motion in part regarding issues not relevant to this appeal and denied Mother's motion.

¶7 Father timely appealed. Mother timely cross-appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2011).

ISSUES

¶8 Father challenges the family court's child support calculation, its determination that Mother was entitled to a credit for one-half of the income tax refund he received for tax year 2008, and its denial of his request for retroactive modification of the temporary orders. Mother cross-appeals the court's denial of her request for an award of attorneys' fees and costs.

DISCUSSION

A. Father's Appeal

1. Child Support Calculation

¶9 Father argues the family court abused its discretion by awarding Mother a child support amount that was not calculated in accordance with the Guidelines. In particular, he contends the court erred in calculating the number of his parenting time days and applying a 19.5% parenting time adjustment to his total child support obligation, rather than a

25.3% adjustment. We review a child support award for an abuse of discretion and will "accept the trial court's findings of fact unless they are clearly erroneous," but we review de novo the court's interpretation of the Guidelines and "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).

¶10 The Guidelines set forth the method by which the family court is required to calculate child support, and it may only deviate from them if it determines that their application would be inappropriate or unfair in a particular case. Guidelines §§ 3, 20. As relevant to this action, Section 11 of the Guidelines provides for an adjustment to the non-custodial parent's proportionate share of the total child support obligation to reflect the non-custodial parent's parenting time and contains a table that indicates what adjustment shall be applied based upon the number of parenting time days. Guidelines § 11, Table A. Section 11 also provides the manner in which the court must calculate parenting time. When the non-custodial parent has twenty-four hours of parenting time within one block of time, he or she receives credit for one day of parenting time. Guidelines § 11(B).

To the extent there is a period of less than 24 hours remaining in the block of time, after all 24-hour days

are counted or for any block of time which is in total less than 24 hours in duration:

1. A period of 12 hours or more counts as one day.
2. A period of 6 to 11 hours counts as a half-day.
3. A period of 3 to 5 hours counts as a quarter-day.
4. Periods of less than 3 hours may count as a quarter-day if, during those hours, the noncustodial parent pays for routine expenses of the child, such as meals.

Guidelines § 11(C).

¶11 Here, the family court ordered that Father will have care of the children every Thursday beginning after school, or at 5 p.m. during the summer, until Friday at the start of school, or 9 a.m. in the summer. In addition, Father will have care of the children every other weekend beginning Friday after school, or at 5 p.m. during the summer, until Monday at the start of school, or 9 a.m. in the summer. On the alternating weeks that Father has care of the children for the weekend, he will not return them to Mother's care on Friday morning, but his care will continue until Monday. In addition, Father will have parenting time with the children for 14 days over the summer break, 10 days for either the spring or fall break, and 7 days over the winter break, for a total of 31 days during breaks from school.

¶12 The family court applied the 19.5% parenting time

adjustment based on its determination that Father would have 118 parenting time days. Father claims this was error because he has a total of 138.5 parenting time days and is therefore entitled to a 25.3% parenting time adjustment under the Guidelines.¹

¶13 Father has one parenting time day from Thursday evening until Friday morning each week. Guidelines § 11(C)(1). On alternating weeks, Father has three additional parenting time days with the children. Guidelines § 11(B), (C)(1). Therefore, Father is entitled to five parenting days during each two-week period throughout the 43-week school year.² This calculation results in 107.5 parenting time days for Father during the school year.

¶14 Mother argues that Father is only entitled to 3½, not four, days of parenting time on weekends when he has the children because they are in school for at least six hours per day on Friday. She relies on a portion of Section 11 of the Guidelines that provides: "For purposes of calculating

¹ Father argued in his opening brief that the court had awarded him 156 parenting time days, and he was entitled to an adjustment of 36.2% under the Guidelines. This calculation was based, in part, on fall and spring breaks that were each eighteen days in length. In his reply brief, Father concedes that the children are now enrolled in a school that allows only one week for fall break and one week for spring break.

² The parties agree that 43 weeks per year are subject to the regular parenting-time schedule.

parenting time days, only the time spent by a child with the noncustodial parent is considered. Time that the child is in school or childcare is not considered." Guidelines § 11. Thus, Mother contends that Father is entitled to 4½ parenting days during each two-week period throughout the 43-week school year, for a total of 96.75 days.

¶15 We disagree with Mother's calculation. Father receives credit for one parenting day from Thursday evening until Friday morning because that period is greater than twelve hours. Guidelines § 11(C)(1). Even excluding the approximately six hours the children spend at school on Friday, Father still receives credit for two parenting days for the time from Friday evening until Sunday evening and another day from Sunday evening until Monday morning. Guidelines, § 11(B), (C)(1). Thus, excluding the time the children are in school on Friday does not alter the parenting-time calculation.

¶16 Father is entitled to 107.5 parenting time days during the school year. When his additional 31 days of parenting time during school breaks is included,³ Father's total parenting time is 138.5 days per year. Therefore, according to the Guidelines, the court should have applied a 25.3% parenting time adjustment

³ The parties agree that Father is entitled to an additional 31 days of parenting time for summer, winter, and fall/spring school breaks.

when determining Father's proportionate share of the children's total support obligation. Guidelines § 11, Table A. Although the family court had the discretion to deviate from the Guidelines if it determined that their application was inappropriate or unjust and the best interests of the children required a different support amount, see Guidelines § 20(A)(1), (2), the court did not indicate that it intended to deviate from the Guidelines and did not make the written findings required for a deviation. Guidelines § 20 (A)(3).

¶17 Accordingly, we vacate the family court's child support order and remand for the court to recalculate Father's child support obligation using the proper parenting time adjustment.

2. Tax Refund

¶18 Father next argues the family court erred by awarding Mother half of the parties' income tax refund for tax year 2008 and failing to apportion any of the community's 2008 tax liability to Mother.

¶19 Father offered evidence at trial that the parties' total tax obligation for the 2008 tax year was \$82,568. At the time Mother filed her petition for dissolution in January 2009, the parties had paid \$41,552 of their 2008 tax obligation. Their outstanding obligation was therefore \$41,016. In April

2009, Father paid a total of \$61,274 toward the parties' 2008 tax obligation. This was an overpayment of \$20,258, and Father later received a refund.⁴

¶20 At trial, Mother asked the court to award her one-half of the community's tax refund for the 2008 tax year. Father argued that he made the \$61,274 payment in April 2009 with his sole and separate funds, and he was therefore entitled to the entire refund. In addition, he sought \$20,508 from Mother representing her half of the \$41,016 he paid toward the community's 2008 tax obligation with his sole and separate monies. The family court rejected Father's claim that he was entitled to an offset of \$20,508 and ordered that Mother would receive a credit for \$10,126, half of the amount of the tax refund.

¶21 Father argues the court's ruling was incorrect because he used his separate property to make the \$61,274 payment. He contends that because he satisfied a community debt (the 2008 tax liability) with his sole and separate property, he was entitled to the entire refund amount, as well as contribution from Mother for her half of the community debt. Mother disputes Father's claim that he used his sole and separate property to

⁴ Father's refund was reduced by \$1,399 to reflect an estimated tax penalty. He does not contend that this reduction should affect the calculation.

pay the community's remaining 2008 tax obligation in April 2009. She points out that Father admits he made the April 2009 payment with monies from a business bank account owned by the community business, and she asserts that the funds in that account belonged to the community. We review the family court's determination regarding the character of property de novo as a question of law. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 523, ¶ 4, 169 P.3d 111, 113 (App. 2007).

¶22 There is no dispute that the orthodontic practice was a community asset to be divided between the parties. Father argues, however, that the funds he took from the business account to pay the community's tax obligation were his sole and separate property because they were accumulated after Mother served the petition for dissolution.⁵ If property is acquired after service of a petition for dissolution that results in a dissolution decree, it is generally classified as sole and separate property. A.R.S. § 25-211(A)(2) (Supp. 2011). But

⁵ Father argues for the first time in his reply brief that Mother was compensated for funds held in the business account as of the date of service of the petition because they were included as part of the business valuation. We usually do not consider issues not raised in the trial court, and we usually do not consider issues raised for the first time in a reply brief. See *Banales v. Smith*, 200 Ariz. 419, 420, ¶ 6, 26 P.3d 1190, 1191 (App. 2001) (stating, absent extraordinary circumstances, errors not raised in the trial court may not be raised on appeal) (citations omitted); *Wasserman v. Low*, 143 Ariz. 4, 9, n.4, 691 P.2d 716, 721 n.4 (App. 1984) (refusing to consider arguments first presented in appellate reply brief).

when "community property and separate property are commingled, the entire fund is presumed to be community property unless the separate property can be explicitly traced." *Cooper v. Cooper*, 130 Ariz. 257, 259, 635 P.2d 850, 852 (1981) (citing *Porter v. Porter*, 67 Ariz. 273, 281, 195 P.2d 132, 137 (1948)). The presumption of community property controls unless contradicted by clear and satisfactory evidence. *Id.* at 259-60, 635 P.2d at 852-53; see also *Martin v. Martin*, 156 Ariz. 440, 443, 752 P.2d 1026, 1029 (App. 1986) (requiring party claiming separate funds to prove amount by "clear and satisfactory evidence"). Furthermore, a petition for dissolution does not alter the status of preexisting community property or change the status of new property acquired with preexisting community property. A.R.S. § 25-211(B) (Supp. 2011). Father did not segregate, trace, or prove that he used separate property rather than commingled community property from the orthodontic practice to make the tax payment in April 2009. The orthodontic practice therefore remained a community asset even after Wife filed her petition for dissolution, and the monies and other assets owned by the business remained community property until divided by the family court. *Id.* Under these circumstances, revenue generated by the business after Wife filed the petition for dissolution did not belong to Husband as his sole and separate property, but

remained an asset of the business.

¶23 Nevertheless, Father contends that the funds he used to pay the 2008 tax liability were *his sole and separate* property because they comprised a "distribution" from the business that was allocated to him as income and he paid personal income tax on those monies. However, he does not cite any evidence in the record to support his position.⁶ Indeed, Father did not offer any testimony on this issue at trial; he stated only that his position was contained in the parties' joint pretrial statement.

¶24 Accordingly, we find no error in the family court's implicit determination that Father paid the community's remaining 2008 tax obligation in April 2009 with community funds and therefore (1) he was not entitled to a credit from Mother for one-half of the payment amount and (2) the refund he received was a community asset he was *required to share* with Mother.

3. Temporary Orders

¶25 Finally, Father challenges the family court's denial of his request that it retroactively modify the order it entered

⁶ Trial Exhibit 48, the register for the business bank account, indicates that a payment for "payroll expenses" was made to the United States Treasury on April 15, 2009, in the amount of \$54,774. This ambiguous entry, unsupported by any testimony, did not require the family court to determine that the payment was a distribution to Father.

on April 1, 2009, directing him to pay \$2,000 per month as child support and \$8,000 per month as spousal maintenance pending the trial. He contends that the court erroneously relied on his 2007 income when it entered that order and it erred by refusing to reduce the temporary support amount and give Father a credit for his overpayment. We review the family court's refusal to modify the amount of Father's temporary support and maintenance for an abuse of discretion, but review its interpretation of statutory authority de novo. *Maximov v. Maximov*, 220 Ariz. 299, 300, ¶ 2, 205 P.3d 1146, 1147 (App. 2009).

¶26 At the temporary orders hearing in March 2009, Mother argued Father should pay spousal maintenance and child support pending trial based upon the \$529,000 annual income he reported on his 2007 income tax return (approximately \$44,000 per month). Father argued that his income had declined and asked the court to apply an income of \$40,000 per month to determine his support obligations. In particular, he asked the court to order that he pay the mortgage and homeowners association fees for the marital home and a combined \$8,000 per month as child support and spousal maintenance pending trial. The court relied on the 2007 income tax return and ordered Father to continue paying the mortgage and homeowners association fees for the marital home and to pay Mother \$8,000 per month as spousal maintenance and

\$2,000 per month as child support pending the dissolution trial.

¶127 Two weeks prior to trial, on June 4, 2010, Father asked the court to modify the temporary support amount, effective April 1, 2009, based upon his actual 2009 income, and to grant him a credit for his overpayment. Mother opposed the request on the grounds that it was not timely, that Father had agreed at the time of the temporary hearing that his income was at least \$40,000, and that Father had understated his income during the temporary support period. The court did not rule on Father's motion prior to trial, and the parties included it as an issue for trial in their joint pretrial statement. At trial, Father asked the court to determine that the temporary maintenance and support amounts were improperly high and give him a credit for his overpayment. The court denied Father's request, stating that it had not erred when it calculated the temporary child support and spousal maintenance amounts and that Father had not timely requested review of the temporary order.

¶128 In a dissolution proceeding, the family court may issue an order for temporary maintenance or support in conformity with the statutory provisions for computation of spousal maintenance and "in amounts and on terms just and proper in the circumstances." A.R.S. § 25-315(E) (Supp. 2011). Such an order "[d]oes not prejudice the rights of the parties or of

any child that are to be adjudicated at the subsequent hearings in the proceeding[,]" and may be revoked or modified any time before entry of the final decree if there is a showing that there has been a substantial and continuing change of circumstances. A.R.S. 25-315(F)(1), (2) (Supp. 2011); A.R.S. § 25-327(A) (2007); *Maximov*, 220 Ariz. at 301, ¶ 7, 205 P.3d at 1148 (stating the family court retains its authority to modify temporary support *nunc pro tunc*).

¶129 Father contends the court erred in refusing his request that it retroactively modify the temporary support order because the reasons it articulated - that the support amount was correct when calculated in April 2009 and that he did not timely challenge the temporary order - were improper. He admits that at the time of the temporary orders hearing the 2007 income tax return was the most accurate data available to the court regarding his income. Nevertheless, Father claims that once he presented evidence to the court at trial that his earnings in 2009 were substantially less than in 2007, the court erred by refusing to retroactively reduce the temporary support amount. He further argues that he was not required to move to modify the order within a certain amount of time or at any time before trial.

¶130 The family court had discretion to decide whether

Father had shown that a substantial and continuing change of circumstances had occurred that warranted modification of his temporary support and maintenance obligations, and whether it would be equitable to modify those obligations retroactive to April 1, 2009. A.R.S. 25-315(F)(1), (2); A.R.S. § 25-327(A); *Maximov*, 220 Ariz. at 301, ¶ 7, 205 P.3d at 1148 (stating family court may modify a temporary order *nunc pro tunc* in a final decree). However, it appears from the court's ruling that it did not exercise that discretion, but instead denied Father's request on the basis that it was untimely and that the court had not erred when it entered the temporary orders. See *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003) ("[W]hen a judge commits an 'error of law ... in the process of reaching [a] discretionary conclusion,' he may be regarded as having abused his discretion."). As discussed, Father was not required to show that the temporary orders were erroneous when entered, and the court had authority to modify the orders at any time before entry of the decree. A.R.S. 25-315(F)(1), (2); A.R.S. § 25-327(A); *Maximov*, 220 Ariz. at 301, ¶ 7, 205 P.3d at 1148.

¶31 We therefore vacate the court's order denying Father's motion to modify the temporary orders and remand for further proceedings on Father's request for a retroactive modification

of his temporary support obligations. We express no opinion regarding whether the temporary orders should be modified.

B. Mother's Cross-Appeal

¶32 Both parties requested an award of attorneys' fees and costs pursuant to A.R.S. § 25-324(A) (Supp. 2011). The court declined to award fees to either party, stating, "there is reason to conclude that an attorney fee award is appropriate based upon the disparate incomes between the parties. However, the record in this case is replete with the unreasonable positions taken by both parties." Mother contends on cross-appeal that the family court erred by denying her request for attorneys' fees and costs because she has fewer financial resources than Father and both parties took equally unreasonable positions in the dissolution proceeding. We review the family court's ruling for an abuse of discretion. *In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 26, 5 P.3d 911, 917 (App. 2000).

¶33 Section 25-324(A) allows the family court to order one party in a dissolution action to pay the other's attorneys' fees and costs after it "consider[s] the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings[.]" Mother argues that because the court found that both parties were unreasonable throughout the proceedings, their actions "cancel each other out" and the

court's failure to award attorneys' fees to Mother – the party with fewer financial resources – was an abuse of discretion.

¶134 The record indicates the court complied with its statutory obligation to consider Mother's financial resources and the reasonableness of her positions. Based upon this record, we find no abuse of discretion in its decision to deny Mother's request for attorneys' fees and costs. *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 38, 250 P.3d 1213, 1221 (App. 2011) (affirming partial award of attorneys' fees to husband under A.R.S. § 25-324 and stating trial court was in the best position to observe and assess the conduct of the parties).

CONCLUSION

¶135 For the foregoing reasons, we vacate the portions of the decree ordering Father to pay child support of \$888 per month and denying his request to modify the temporary orders and remand for further proceedings on those issues. We affirm the court's division of the parties' 2008 tax refund and its denial of Mother's request for an award of attorneys' fees and costs.

¶136 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 25-342. In the exercise of our discretion, we deny both requests. We grant Father's request

for an award of taxable costs on appeal subject to his compliance with Arizona Rule of Civil Appellate Procedure 21.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Judge

_____/s/_____
ANDREW W. GOULD, Judge