

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: 06/07/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 11-0318
)
KATHLEEN ELLEN SMITH,) DEPARTMENT E
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
JOSEPH WILLIAM SMITH, IV,) Appellate Procedure)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2009-050407

The Honorable Shellie F. Smith, Pro Tem

AFFIRMED IN PART; VACATED IN PART AND REMANDED

Jennings Strouss & Salmon, PLC Phoenix
By Callie N. Parkinson

Renaud Cook Drury Mesaros, P.A. Phoenix
By Kevin R. Myer
Attorneys for Respondent/Appellant

H A L L, Judge

¶1 Respondent/Appellant Joseph William Smith, IV (Father) appeals the superior court's order denying his petition to modify child custody, parenting time, and child support and his

request that the court hold Petitioner/Appellee Kathleen Ellen Smith (Mother) in contempt of court. For the following reasons, we affirm the family court's denial of Father's petition to modify child custody and parenting time. We vacate its denial of Father's petition to modify child support and remand that matter for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 Mother and Father, who were divorced on August 31, 2009, have two children in common. Pursuant to the parties' agreement, the court ordered in the decree of dissolution that they would have joint legal custody of the children, with Mother designated as the primary custodial parent and Father to have parenting time two weekends per month and during school breaks. The court ordered Father to pay Mother \$352.00 per month as child support.¹

¶13 On August 20, 2010, Father filed a petition to modify child custody, parenting time, and child support. He requested that the court grant him sole custody of the children, order Mother to have reasonable parenting time, and order Mother to pay him \$352.00 per month as child support. He also asked the court to hold Mother in contempt for failing to give him

¹ Father failed to timely pay his child support obligations and the court later increased his support amount to include payments toward his arrears.

information about the children's medical treatments and education.² After conducting an evidentiary hearing, the court denied Father's petition, finding "there has not been a material change in circumstances that affects the welfare of the children."

¶4 Father filed a motion for reconsideration on the grounds that the court had only ruled on his request to change custody and not his requests to modify parenting time or child support. The court denied Father's motion. Father timely appealed the court's denial of his petition.³

¶5 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(2) (Supp. 2011).

ISSUES

¶6 Father argues the superior court erred by: (1) denying his request for a change in custody without making the statutorily required findings; (2) failing to address his request to modify his child support obligation; and (3) failing to hold Mother in contempt of court.

² Father listed as an additional basis for an order of contempt that Mother had lied to obtain an order of protection against him.

³ Father appealed the court's April 14, 2011 unsigned minute entry. On June 14, 2011, we suspended this appeal to allow him to apply to the superior court for a signed order corresponding to the April 14, 2011 ruling. The court entered a signed order on August 24, 2011.

DISCUSSION

A. The Court's Denial of Father's Request for Modification of Child Custody and Parenting Time

1. Child Custody

¶7 Father petitioned the court for sole legal custody of the children. At the evidentiary hearing, however, he told the court that he wanted to continue to share joint legal custody with Mother, but asked the court to designate him the primary residential parent and grant Mother parenting time on alternating weekends and holidays.

¶8 When the court considers a petition to modify child custody, it must first determine whether there has been a change in circumstances that materially affects the welfare of the child. *Black v. Black*, 114 Ariz. 282, 283, 560 P.2d 800, 801 (1977). Only if it finds that such a change has occurred may the court proceed to a second inquiry: whether modification of custody would be in the children's best interests. *Id.* The family court has broad discretion to determine whether a change of circumstances has occurred and we will not reverse its decision absent an abuse of that discretion. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982) (defining an abuse of discretion in the context of child custody modification as "a clear absence of evidence to support [the trial court's] actions").

¶9 In this case, the family court denied Father's request for a change in custody, writing: "THE COURT FINDS that there has not been a material change in circumstances that affects the welfare of the children. Therefore, no further inquiry is required." Father argues the court erred because he proved a change in circumstances sufficient to warrant a change in custody. In particular, he points out that the court entered the original custody order when he lived outside Arizona and cites his testimony that Mother had made several decisions regarding the children's medical care and education without involving him.

¶10 The decree of dissolution provides: "The parties shall be awarded joint legal custody of the minor children with Mother being designated the primary residential parent, subject to *Mother having final decision making authority* and parenting time as set forth in the Joint Custody Parenting Plan, signed by the parties and submitted contemporaneously herewith." (Emphasis added). As relevant, the Joint Custody Parenting Plan provides: "The parties agree that *Mother shall make all final decisions regarding the minor children's health, medical and dental care, education and religious training*, after consulting with Father via e-mail and considering Father's input so long as Father's input is timely. Father shall make all day to day decisions for

the minor children when they are in his custody." (Emphasis added).

¶11 Mother testified that Father had access to the children's medical and educational records and that she notified him of any serious issues, but that Father was demanding that she "inform him of every tiny little medical condition." She also disputed Father's claim that she had not allowed him to exercise parenting time. The Joint Custody Parenting Plan incorporated in the decree stated that Father could have parenting time with the children in Arizona on the first and third weekend of every month. In addition, the parties agreed Father could have parenting time with the children "any other time he is in Arizona provided that he gives Mother at least a two week notice." Mother testified that Father had invoked that provision to demand parenting time outside his assigned weekends now that he lived in the state.

¶12 Regarding the summer parenting time, the Joint Custody Parenting Plan stated that Father would be entitled to two consecutive weeks of visitation in summer 2010 and that Father's summer access would increase to four weeks in 2011 if Father had been exercising his parenting time and "if both parents agree at the time that the same is appropriate." If the parties did not agree regarding Father's summer parenting time, the Joint

Custody Parenting Plan required them to engage in mediation to determine the appropriate access schedule. Mother testified that she had agreed Father could have four weeks of parenting time during the summer in 2011, but she wanted him to exercise that time in two week blocks.

¶13 Given this evidence, we find no abuse of discretion in the family court's determination that there had been no material change in circumstances that affects the children's welfare. *Pridgeon*, 134 Ariz. at 179, 655 P.2d at 3. Further, because the court properly determined that no change in circumstances had occurred, it appropriately did not consider whether modification of custody would be in the children's best interests. *Black*, 114 Ariz. at 283, 560 P.2d at 801. Therefore, we need not consider Father's argument raised for the first time in his reply brief that the family court erred by not making on-the-record findings regarding the children's best interests, as required by A.R.S. § 25-403 (Supp. 2011).

2. Parenting Time

¶14 Father also argues that the court erred in denying his request that it increase his parenting time. The family court may only modify a parenting time order if modification would serve the children's best interests. A.R.S. § 25-411(J) (Supp. 2011).

¶15 At the evidentiary hearing, Father asked the court, as an apparent alternative argument to his request that it make him the primary residential parent, that it allow him parenting time with the children on the first, third, and fifth weekends of the month from Friday at 7:00 p.m. until Sunday at 7:00 p.m. Mother testified that she wanted the children to return home by 5:00 p.m. on Sunday so they would have sufficient time to eat dinner, prepare for school the next day, and go to bed early.

¶16 The evidence supported the court's implicit determination that modification of parenting time would not be in the children's best interests. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998) (appellate court will defer to the family court's factual determinations when they are supported by reasonable evidence).

B. The Court's Denial of Father's Request for Modification of Child Support

¶17 In his petition, Father requested that the court grant him sole custody of the children, order that Mother have reasonable parenting time, and order Mother to pay child support of \$352.00 per month. At the hearing, however, Father told the court that even if it did not change custody, he wanted it to modify his support obligation consistent with the Guidelines.

¶18 Father contends the court ignored his request and asks us to remand this matter to allow the court to rule on this

issue. In the alternative, he asserts that the court abused its discretion by refusing to modify his child support. The family court has broad discretion in considering a request to modify child support and we will affirm its ruling unless we find it was an abuse of that discretion. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999).

¶19 We disagree with Father that the court ignored his request that it modify child support; rather, it implicitly ruled on that request when it denied Father's petition in its entirety. *Cf. Qwest Corp. v. Kelly*, 204 Ariz. 25, 34, ¶ 26, 59 P.3d 789, 798 (App. 2002) (ruling that although the trial judge had not made any specific findings of fact or conclusions of law related to a particular affirmative defense, "it rejected [the defense] implicitly by denying the motion to dismiss after the argument was made both in the motion itself and at the hearing.").

¶20 We turn, then, to Father's argument that the court erred by refusing to modify his child support. The family court may modify a child support order when the party seeking modification demonstrates a substantial and continuing change of circumstances. A.R.S. § 25-327(A) (2007); *Jenkins v. Jenkins*, 215 Ariz. 35, 39, ¶ 16, 156 P.3d 1140, 1144 (App. 2007).

¶21 Father testified that a material change had occurred since the court's entry of the decree because he had become unemployed and was attending school full-time. He claimed his child support payments⁴ were unaffordable because he was collecting unemployment, attending school, had two children with his current wife, who was pregnant, and another child (in addition to his children with Mother) for whom he paid child support. He asked the court to reduce his child support payment to approximately \$60.00 per month based upon income of \$7.50 per hour minus the Social Security disability benefits Mother receives on behalf of the children and his \$170.30 monthly payment toward another child support obligation.⁵

¶22 The Guidelines provide that if a parent's earnings are reduced by choice, and not for reasonable cause, the court may attribute income to that parent up to his or her earning capacity. Guidelines § 5(E). If, however, the reduction in income is voluntary but reasonable, the court must consider how

⁴ The court had previously denied Father's request that it reduce his child support payment to \$0.00 per month, but had reduced the support amount from the \$352.00 per month ordered in the decree to \$340.60 per month. Thereafter, it adjusted its order of assignment for Father's child support from \$340.60 to \$415.60 to include payments on Father's arrearage.

⁵ The child support worksheet Father submitted in support of his request for modification was based on the assumption that he would be the children's primary residential parent and Mother would pay child support.

the parent's decision not to work will affect the children and weigh that impact against the benefits of the parent's choice. *Id.*; *Engel v. Landman*, 221 Ariz. 504, 510-11, ¶ 22, 212 P.3d 842, 848-49 (App. 2009). "The benefits must be determined on a case-by-case basis, and the court may consider such factors as whether the decision is: (1) designed to enhance future earning capacity; (2) places the children in financial peril; (3) allows a parent more needed time at home with his or her children; and (4) appropriate in view of the individual needs of a particular child." *Engel*, 221 Ariz. at 511, ¶ 23, 212 P.3d at 849. The family court's primary task is to "decide each case based upon 'the best interests of the child, not the convenience or personal preference of a parent.'" *Little*, 193 Ariz. at 523, ¶ 14, 975 P.2d at 113 (citation omitted).

¶23 We are unable to discern from the record whether the family court considered and applied the following *Little* factors in reaching its determination to deny Father's request: whether a reduction in child support due to Father's voluntary decision to change his employment status places a child in financial peril; whether Father's current educational level and physical capacity provide him with the ability to find suitable work in the marketplace; whether the additional training is likely to increase Father's earning potential; the length of Father's

proposed educational program; whether Father is able to finance his child support obligation while in school through other resources; and whether Father's decision was made in good faith. 193 Ariz. at 522, ¶¶ 12-13, 975 P.2d at 112. We therefore vacate the court's order denying Father's petition to modify child support and remand this matter for the court to enter findings regarding the reason for its denial of the petition.⁶

C. The Court's Denial of Father's Request that it Hold Mother in Contempt

¶24 In his petition, Father asked the court to hold Mother in contempt for refusing to give him medical and educational information and for lying under oath concerning an order of protection. At the hearing, he stated an additional basis for his request was Mother's failure to allow him to exercise his parenting time.

¶25 We lack jurisdiction over an appeal from a civil contempt adjudication. *See State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18, 66 P.3d 70, 73 (App. 2003). However, in our discretion, we elect to treat the appeal from the contempt order as a petition for special action, and accept special action jurisdiction.

⁶ Father complains Mother failed to submit an updated financial affidavit. *See* Ariz. R. Fam. L. P. 91(B)(2)(a). Upon remand, the court may require Mother to file an Affidavit of Financial Information. *Id.*

¶126 Father argues the family court failed to rule on his request.⁷ As with Father's request to modify child support, we determine that the family court implicitly denied his request that it hold Mother in contempt by denying his petition in its entirety. Accordingly, we deny relief.

D. The Court's Admission of Mother's Hearing Exhibits

¶127 Finally, Father argues the court erred by accepting Mother's exhibits in evidence at the hearing because she had not timely disclosed them. Mother offered four exhibits, each of which contained an unsworn statement regarding her position on the issues of the time for exchanging the children, the children's religious practice, parenting time for summer vacation and holidays, and final decision-making regarding the children's medical treatment. These statements were consistent with Mother's sworn testimony at the hearing. Father did not object at the hearing to the admission of the exhibits, and does not articulate any prejudice that allegedly resulted from the court's consideration of those documents. We therefore find no error. *State v. Maxwell*, 95 Ariz. 396, 400, 391 P.2d 560, 563 (1964) ("It is the general rule that unless objection is made to the admission of evidence, it cannot be urged on appeal that it

⁷ Father also asserts that the court misapprehended his contempt allegations and confused them with the allegations contained in Father's subsequent, May 17, 2011 petition for contempt of court. Based on our review of the record, we disagree.

was error for the court to admit it."); *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996) (stating appellate court will not disturb evidentiary ruling unless it finds a clear abuse of discretion and resulting prejudice).

CONCLUSION

¶28 For the foregoing reasons, we affirm the family court's denial of Father's petition to modify child custody and parenting time. We also affirm the family court's denial of his request to hold Mother in contempt. We vacate its denial of Father's petition to modify child support and remand that matter for further proceedings consistent with this decision.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
MAURICE PORTLEY, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge