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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/15/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 11-0562
)
TODD J. IVERSON,) DEPARTMENT B
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
JESSICA M. KANE,) Appellate Procedure)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-002299

The Honorable Pamela S. Gates, Judge

AFFIRMED

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By William P. Sargeant, III

and

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N O R R I S, Judge

¶1 Todd J. Iverson ("Father") timely appeals the family court's order modifying his child support payments to Jessica Kane ("Mother"). He argues the court should have included in Mother's income the value of payments her new husband makes towards the mortgage and utilities for his home, which he shares with Mother and her children. Father also argues the court improperly awarded Mother attorneys' fees. Because the evidence presented supports the family court's findings and conclusions, we affirm the family court's order.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Mother married in 1995, had three children, and divorced 13 years later, in 2008. In 2008, the family court ordered Father, a patent attorney making \$120,000 per year, to pay Mother, a registered nurse making \$46,000 per year, \$1,000 per month in spousal maintenance and approximately \$698 per month in child support. The court further ordered the parties to split their community debts and medical bills proportionally to their incomes, and ordered Mother to pay for the children's health insurance.

¶3 Mother remarried in July 2010, and asked the family court to modify parenting time and Father's support payments. In September 2010, the court terminated Father's spousal

maintenance payments because Mother had remarried, and ordered an evidentiary hearing on Mother's requests. After the evidentiary hearing in July 2011, the court increased Father's child support payments to \$1,380 per month and ordered him to pay \$2,000 of Mother's attorneys' fees.

DISCUSSION

¶14 First, Father argues the family court improperly "exclud[ed] from gross income the entirety of substantial recurring benefits [Mother] receives from remarriage."¹ Specifically, Mother testified her new husband was paying approximately \$3,500 per month for the mortgage and utilities for his home, which he shared with Mother and her children.

¶15 A court considering a modification of child support may not "automatically treat one-half of [a] parent's [new] spouse's income as the parent's own [income]." *Marriage of Pacific*, 168 Ariz. at 464, 815 P.2d at 11; see also Ariz. Rev.

¹Father argues we should review the court's "interpretation of the Child Support Guidelines *de novo* as a question of law." We disagree. As Mother points out, citing *Cummings v. Cummings*, 182 Ariz. 383, 897 P.2d 685 (App. 1994) and *In re Marriage of Pacific*, 168 Ariz. 460, 815 P.2d 7 (App. 1991), "Arizona courts have already considered the issue of attribution of remarriage benefits to a spouse's income." Moreover, the pivotal issue here is whether the evidence supported the court's findings these "benefits" were "not . . . significant." Thus, we review for an abuse of discretion. See *Cummings*, 182 Ariz. at 387, 897 P.2d at 689 (citation omitted) ("[T]he decision whether changed circumstances exist to warrant modification of an award is within the sound discretion of the trial court.").

Stat. ("A.R.S.") § 25-320 app. § 5(A), (F) (Supp. 2011) ("Guidelines") ("income of a parent's new spouse is not treated as income of that parent"). It may, however, "consider the *benefits* that a parent derives from remarriage or expense-sharing." See *Marriage of Pacific*, 168 Ariz. at 464, 815 P.2d at 11; see also A.R.S. § 25-320(D) (Supp. 2011) (Guidelines shall include consideration of "financial resources and needs" of both parents).

¶16 Here, the family court properly considered these housing "benefits," and did "not find that the payment of expenses by Mother's husband [was] significant or that [his] contributions meaningfully reduce[d] Mother's personal living expenses." The record supports these findings. Before she remarried, Mother lived with her sister and brother-in-law, and did not pay rent. Moreover, after the court's 2008 decree, Mother changed her work schedule (from weekends to a "more traditional" Monday-Friday schedule), and began incurring approximately \$1,294 in monthly child care expenses.² Further, Mother testified she contributed to other household expenses, including paying approximately 75% of the family's \$1,200 monthly grocery bills. Finally, as the family court found,

²Before the court's decree in 2008, the parties withdrew their children from day care.

Mother's new husband paid for the children's health insurance, a benefit to *both* Mother and Father. In sum, the family court was not required to "automatically" include these housing payments in Mother's income for the purpose of calculating child support, and had considerable discretion to consider the parties' positions, incomes, and expenses. See *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (citation omitted) ("An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision."). The court did not abuse its discretion in concluding these payments did not meaningfully reduce Mother's expenses.³

¶17 Second, Father argues the family court improperly awarded Mother \$2,000 in attorneys' fees "without finding that there was an income disparity between the parties" and with "no support" for its findings Father had taken unreasonable positions throughout the litigation. We disagree.

³Father also argues the court "failed to follow the criteria for deviation from the Child Support Guidelines." As Mother points out, this argument misinterprets the court's order. The court merely noted that if it had included the housing payments in Mother's income, it "would find that application of the Guidelines would be inappropriate and unjust . . . [and] would deviate from the presumptive child support to create a child support obligation" in the same amount it ultimately ordered. The court nevertheless used the presumptive support obligation, taking into consideration its finding these housing payments were not significant.

¶18 In its order modifying child support, the court explicitly noted it awarded attorneys' fees "[a]fter considering the financial resources of both parties and the reasonableness of the positions each party [had] taken throughout the proceedings." See A.R.S. § 25-324(A) ("The court . . . after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter."). Further, the court found Father had taken unreasonable positions, "including that *only* Mother should have increased income as a result of her significant other's contribution toward living expenses, that Mother should be attributed income higher than she [had] ever earned, and refusal to pay unreimbursed medical expenses." (Emphasis added.)

¶19 We acknowledge Father included, in his affidavit of financial information, \$200 of "[c]ontributions to [his] household living expenses," and, thus, the court's finding that he argued *only* Mother should have an increased income from others' contributions may have been incorrect. The record supports the court's finding, however, that Father took the position it should attribute to Mother an income far above the

income she was earning or had ever earned. Father presented testimony the court should attribute to Mother a yearly income of at least \$89,000 based on her "earning capacity" as calculated by "salary surveys" from internet websites. Mother testified the highest yearly salary she had earned was \$65,000.⁴ Although we agree with Father "earning capacity" may be relevant to child support calculations under certain circumstances, see *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 12, 222 P.3d 909, 912 (App. 2009), this does not undercut the court's finding Father's position in this case was unreasonable.

¶10 Further, although Father argues he had "paid his portion of all unreimbursed medical expenses," the family court accepted Mother's testimony and other evidence Father had not paid approximately \$180 in unpaid medical expenses. Thus, the court did not abuse its discretion in awarding Mother \$2,000 in attorneys' fees. *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 36, 250 P.3d 1213, 1221 (App. 2011) (citation omitted) ("An award of attorneys' fees under A.R.S. § 25-324 will not be disturbed on appeal absent an abuse of discretion.").

⁴Although Mother testified her monthly income at the time of the evidentiary hearing was \$4,800 because she made \$30 per hour but did not receive paid vacations or holidays, the court used the \$30 figure to attribute to Mother a monthly income of \$5,200, based on its finding "Mother could work 40 hours per week."

CONCLUSION

¶11 For the foregoing reasons, we affirm the family court's order.

_____/s/_____
PATRICIA K. NORRIS, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PETER B. SWANN, Judge