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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:

GRETCHEN H. QUINN, Petitioner/Appellee, and JAMES T. SHERMAN, Respondent/Appellant.	)	2 CA-CV 2012-0074 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100DO200601206

Honorable Brenda E. Oldham, Judge

VACATED AND REMANDED

Thompson Law Firm, LLC
By Carissa K. Seidl
Chandler
Attorneys for Petitioner/Appellee

Solyn & Lieberman, PLLC
By Scott Lieberman and Melissa Solyn
Tucson
Attorneys for Respondent/Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Respondent/appellant James Sherman appeals from the trial court's denial of his petition to modify spousal maintenance awarded to petitioner/appellee Gretchen Quinn and the subsequent denial of his motion for a new trial and motion for reconsideration. He argues the court erred when it precluded a witness on the ground of untimely disclosure, failed to set forth findings of fact and conclusions of law in support of its ruling, and concluded he had not shown a substantial and continuing change in circumstances warranting a modification of spousal maintenance. We agree with Sherman's first two assignments of error. Accordingly, we vacate the court's ruling denying his petition and remand the case for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 The parties' marriage was dissolved by consent decree in 2007. After a trial, Quinn was awarded spousal maintenance of $1,250 per month for her lifetime or until she remarries. Sherman filed a petition to modify spousal maintenance in June 2011. In his petition, he contended that changed circumstances of a substantial and continuing nature warranted a termination of spousal maintenance. Among the circumstances that had changed, according to Sherman, were that Quinn had begun receiving Social Security benefits and that his health conditions had worsened, which would necessitate him retiring from his employment as a school counselor. Finding he had not met his burden of proof under A.R.S. § 25-327(A) to show "changed circumstances that are substantial and continuing," the court denied his petition. Sherman then filed a "motion for reconsideration and motion for new trial," which the

court denied. This appeal followed. We have jurisdiction over this appeal pursuant to A.R.S. § 12-2101(A)(2). *See Williams v. Williams*, 228 Ariz. 160, ¶ 19, 264 P.3d 870, 875 (App. 2011); *see also Cone v. Righetti*, 73 Ariz. 271, 274-75, 240 P.2d 541, 543 (1952).

Discussion

Findings and Conclusions

¶3 Sherman argues the trial court erred by "failing to provide findings of fact and conclusions of law." Quinn concedes the court did not provide findings and conclusions but contends it is not error because Sherman failed to request findings properly. Under Rule 82(A), Ariz. R. Fam. Law P., "[i]n all family law proceedings tried upon the facts, the court, if requested before trial, shall find the facts specially and state separately its conclusions of law thereon." Sherman did not submit a request; rather, he submitted proposed findings. Then, in his "motion for reconsideration and motion for new trial," he made a specific request for findings of fact. Quinn contends those steps were insufficient to have triggered the court's requirement under Rule 82(A).

¶4 However, this court has concluded otherwise. In the case of *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, 18 P.3d 85 (App. 2000), we concluded that, under the analogous rule of civil procedure, Ariz. R. Civ. P. 52(A), a party had triggered the need for findings when it filed proposed findings and then requested the court enter those findings. *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 6, 18 P.3d at 88. As in that case, Sherman filed proposed findings for the court to enter. He expressly did so "pursuant to Rule 82." And he requested findings again in his post-hearing motion.

Those actions were sufficient to require the court to enter findings under Rule 82(A). *Cf. Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) (finding party had waived findings of fact and conclusions of law by failing to object to lack thereof based on principle trial court should be able to correct alleged defects before issue can be raised on appeal); *Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990) (determining wife had preserved right to request additional findings by filing post-judgment motion bringing insufficiency of findings to court's attention and giving court opportunity to cure defect).

¶5 The remedy for the trial court's failure to comply with Rule 82(A) "must be tailored to the particular case." *Miller v. McAlister*, 151 Ariz. 435, 437, 728 P.2d 654, 656 (App. 1986). Remanding for fact-finding is appropriate "particularly when the purposes for a fact-finding have been frustrated." *Id.* "Requiring a trial court to state separately findings of fact and conclusions of law accomplishes several goals." *Miller v. Bd. of Supervisors*, 175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993). It allows the losing party to "more easily determine whether the case presents issues for appellate review," "clarif[ies] what has been decided and thus provide[s] guidance in applying the doctrines of estoppel and res judicata," "prompts judges to consider issues more carefully," and, finally, "permit[s] an appellate court to examine more closely the basis on which the trial court relied in reaching the ultimate judgment." *Id*. In a case like this one, in which Sherman previously has filed at least one other petition to modify spousal maintenance

and two other appeals,[1] and in which he is raising some of the same arguments he made in the previous petition and appeals, the purposes set forth above are especially important, and specific findings are crucial for proper review.

¶6 Findings are also particularly valuable when, as here, the relevant facts are disputed and the applicable statutes require the trial court to consider several factors before making its ultimate conclusion. *See McAlister*, 151 Ariz. at 437, 728 P.2d at 656. "The factors to be considered in determining whether to modify a[spousal maintenance] award are the same as the factors taken into consideration when granting an award for support and maintenance . . . [and] are delineated in A.R.S. [§] 25-319." *Scott v. Scott*, 121 Ariz. 492, 495 n.5, 591 P.2d 980, 983 n.5 (1979); *accord Nace v. Nace*, 107 Ariz. 411, 413, 489 P.2d 48, 50 (1971); *Norton v. Norton*, 101 Ariz. 444, 445, 420 P.2d 578, 579 (1966). Therefore, the court's general finding on the ultimate issue of substantial and continuing changed circumstances was insufficient to provide this court with the basis for its decision. *Cf. Reed v. Reed*, 154 Ariz. 101, 106, 740 P.2d 963, 968 (App. 1987) (finding court's "limited, generalized determinations failed to address whether there had been changes in many of the crucial child support factors the trial court was required to consider"); *cf. also Elliott*, 165 Ariz. at 132-33, 796 P.2d at 934-35 (concluding court's findings insufficient to support spousal maintenance award when court did not address all factors "to which the parties presented evidence"). Accordingly, we vacate the trial court's ruling and remand the case for the court to set forth its findings of fact and

[1]*Quinn v. Sherman*, No. 2 CA-CV 2010-0184 (memorandum decision filed May 6, 2011); *Quinn v. Sherman*, No. 2 CA-CV 2009-0033 (memorandum decision filed Oct. 14, 2009).

conclusions of law pursuant to Rule 82(A). *See McAlister*, 151 Ariz. at 437, 728 P.2d at 656.[2]

Witness Preclusion

¶7 Sherman argues the trial court erred when it precluded his physician from testifying based on untimely disclosure. We generally review a court's ruling on the admission of witness testimony for an abuse of discretion. *See Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982). An error of law committed in the process of reaching a discretionary conclusion is an abuse of that discretion. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982).

¶8 The trial court originally scheduled the evidentiary hearing on the petition for September 20, 2011. Sherman requested a continuance of the hearing, and it was reset for October 25, 2011. On October 6, without previously disclosing him as a witness, Sherman moved to allow his physician to testify by telephone. The trial court granted Sherman's motion on October 12. Quinn then objected to this ruling, contending Sherman had not properly disclosed the witness, as required by Rules 2, 49, and 50, Ariz. R. Fam. Law P. On October 18, Sherman provided his physician's name and address and

[2]Sherman also argues the trial court abused its discretion in failing to find he had shown substantial and continuing changed circumstances warranting a modification of maintenance. Quinn responds that the record, even without findings, supports the denial of Sherman's petition. In general, this court will infer that a trial court has made the necessary findings to sustain its judgment. *See Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984). But we cannot make this inference when a party has requested findings of fact. *See Elliott*, 165 Ariz. at 135, 796 P.2d at 937. In such a case, we must be able to determine the bases on which the court's ultimate conclusion rests before we can affirm the court's ruling. *See id.* We will not review the merits of this issue in the absence of proper findings of fact and conclusions of law facilitating this review.

a summary of his proposed testimony. On October 20, the court then ordered that no witness other than the parties could testify because none had been properly disclosed under the rules.

¶9 At the hearing, Sherman testified briefly about his medical conditions. He stated his doctors had recommended he retire because of his worsening health and that he had retired in August of that year after about "two years . . . of doctor recommendations." The court made no express findings about the effect of Sherman's medical conditions on his financial situation but denied his petition to modify spousal maintenance, stating he had not shown substantial and continuing changed circumstances.

¶10 Sherman contends the disclosure deadlines set forth in Rule 91, Ariz. R. Fam. Law P., apply to this case. Under Rule 91(P)(3)(b) and (6), in a proceeding to modify spousal maintenance, each party must disclose its witnesses three days prior to a hearing, "[u]nless otherwise ordered by the court." Quinn maintains the deadlines set forth in Rule 91 do not apply because she "invoked [Rule] 2 . . . , requesting strict compliance with the Arizona Rules of Evidence and Civil Procedure." In fact, Quinn only invoked the Rules of Evidence pursuant to Rule 2(B), Ariz. R. Fam. Law P.[3] Rule 2(A), Ariz. R. Fam. Law P., provides that "[t]he Arizona Rules of Civil Procedure apply only when incorporated by reference in these rules." To the extent Quinn contends

[3]We note Rule 50, Ariz. R. Fam. Law P., allows a party to invoke the disclosure requirements of Rule 26.1, Ariz. R. Civ. P. Indeed, the trial court referred to Rule 50 in its ruling precluding the physician's testimony. However, Quinn did not file the proper notice under Rule 50 to have invoked the disclosure requirements of the Arizona Rules of Civil Procedure. Thus, we need not decide whether Rule 91 would still govern this case if Rule 26.1 had been invoked.

she invoked "the disclosure requirements of Rule 2" or could require "strict compliance" with rules of civil procedure by referring to Rule 2, neither the plain language of the rule nor any principle of law supports her position. *See Sw. Gas Corp. v. Irwin*, 229 Ariz. 198, ¶ 9, 273 P.3d 650, 654 (App. 2012) (plain language is best reflection of supreme court's intent in promulgating rule; we will look no further if language clear and unambiguous); *see also Roubos v. Miller*, 214 Ariz. 416, ¶ 9, 153 P.3d 1045, 1047 (2007) (noting civil procedure rules generally inapplicable to family law proceedings). Because she neither expressly invoked the rules for disclosure set forth in the Arizona Rules of Civil Procedure and because Rule 2 does not authorize her to invoke the civil rules in any event, we reject her contention that Sherman violated those rules in disclosing the physician witness.

¶11 Although Quinn has not argued on appeal that the disclosure deadline set forth in Rule 49, Ariz. R. Fam. Law P., applies here, we may affirm the trial court's ruling if it is legally correct for any reason found in the record, *see Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006), and the ruling precluding witnesses was based in part on Rule 49. Rule 49 provides that witnesses must be disclosed sixty days prior to trial "or such different period as may be ordered by the court." Ariz. R. Fam. Law P. 49(G). But Rule 49 is the general provision relating to disclosure and discovery in family law matters. Rule 91 specifically applies to post-decree petitions and, even more specifically, to petitions to modify spousal maintenance.

¶12 We interpret rules according to the same principles used to interpret statutes. *Sierra Tucson, Inc. v. Lee*, 230 Ariz. 255, ¶ 16, 282 P.3d 1275, 1279 (App.

2012). "A basic principle of statutory interpretation instructs that specific statutes control over general statutes." *Mercy Healthcare Ariz., Inc. v. Ariz. Health Care Cost Containment Sys.*, 181 Ariz. 95, 100, 887 P.2d 625, 630 (App. 1994); *accord City of Phx. v. Superior Court*, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984). And, "when a general and a specific statute conflict, we treat the specific statute as an exception to the general, and the specific statute controls." *Mercy Healthcare*, 181 Ariz. at 100, 887 P.2d at 630.

¶13 Here, the deadline set forth in Rule 91 conflicts with that set forth in Rule 49 for the disclosure of witnesses. Thus, the more specific provision in Rule 91 controls.[4] Were we to conclude otherwise, the deadline in Rule 91 would be meaningless. *See Bilke v. State*, 206 Ariz. 462, ¶ 11, 80 P.3d 269, 271 (2003) (principle of interpretation requires every clause, word, and sentence to be given effect). Furthermore, the trial court's July 14 order only required disclosure of witnesses three days before the hearing. Accordingly, the trial court abused its discretion in precluding the witness on the grounds of untimely disclosure.[5]

[4]Quinn has not argued Sherman did not meet the Rule 91 deadline; in fact, she concedes she received notice of the physician's potential testimony one week before the hearing.

[5]Quinn also contends for the first time on appeal that Sherman's physician "could not . . . testify as to personal knowledge of the allegations asserted by Sherman, pursuant to Rule 602," Ariz. R. Evid. She did not raise this fact-dependent argument below in her motion to preclude the testimony, it was not the basis for the court's ruling, and we therefore do not address it. *See Stewart v. Mut. of Omaha Ins. Co.*, 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991).

¶14 Nonetheless, error in excluding evidence is only reversible if it is prejudicial to the substantial rights of a party. *See* Ariz. R. Fam. Law P. 86; *Walters v. First Fed. Sav. & Loan Ass'n of Phx.*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982); *see also* Ariz. R. Evid. 103(a).[6] Our supreme court has found such an error harmless when the excluded evidence would have been repetitious or cumulative. *E.g.*, *State ex rel. La Sota v. Ariz. Licensed Beverage Ass'n*, 128 Ariz. 515, 523, 627 P.2d 666, 674 (1981) (preclusion of deposition testimony harmless where other statements admitted "were similar in content"). Although we acknowledge the court had other evidence from which to consider the effect of Sherman's health conditions on the legitimacy of his retirement, we decline to speculate, in the absence of any findings, what effect the exclusion of the physician's testimony may have had on the proceedings.

Attorney Fees

¶15 Both parties have requested the attorney fees and costs they have incurred in this appeal. Because we are remanding the case for further action in the trial court, we deny both requests without prejudice at this time. *See CNL Hotels & Resorts, Inc. v. Maricopa Cnty.*, 230 Ariz. 21, ¶ 25, 279 P.3d 1183, 1188 (2012); *Leo Eisenberg & Co. v.*

[6]Notably, Sherman did not make an offer of proof to the trial court about the substance of his physician's testimony, which is generally a prerequisite to appellate review of excluded evidence. *See* Ariz. R. Evid. 103(a)(2); *Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 453, 581 P.2d 682, 687 (1978). Arguably, however, "the substance was apparent from the context." Ariz. R. Evid. 103(a)(2); *cf. Horan v. Indus. Comm'n*, 167 Ariz. 322, 325, 806 P.2d 911, 914 (App. 1991) (reviewing exclusion of evidence despite lack of offer of proof because "the relevance of the excluded testimony was obvious").

Payson, 162 Ariz. 529, 535, 785 P.2d 49, 55 (1989); *Haroutunian v. Valueoptions, Inc*., 218 Ariz. 541, ¶ 29, 189 P.3d 1114, 1124 (App. 2008).

Disposition

¶16 For the foregoing reasons, we vacate the trial court's ruling and remand the case to the trial court.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge