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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	
DOLLY CHERI COLWELL,	2 CA-CV 2010-0171
	DEPARTMENT B
Petitioner/Appellee,	MEMORANDUM DECISION
	Not for Publication
and	Rule 28, Rules of Civil
	Appellate Procedure
JAMES C. OUTENREATH,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO97000097

Honorable James L. Conlogue, Judge

AFFIRMED

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

¶1 Respondent/appellant James Outenreath appeals from the trial court's order granting a petition for modification of child support filed by petitioner/appellee Dolly Colwell. Outenreath contends the court erroneously calculated his income and child support obligation based on extra pay he receives from working in Iraq. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's order. *See Smith v. Beesley*, 599 Ariz. Adv. Rep. 14, ¶ 3 (Ct. App. Jan. 12, 2011). The court dissolved the marriage of Colwell and Outenreath by decree in 1997. It awarded custody of their two daughters to Colwell, and Outenreath was given "reasonable visitation." And, it ordered Outenreath to pay $200 per month in child support. Colwell petitioned for modification in September 2009, alleging that "[t]he children are now over twelve and both parties are earning more than they were twelve years ago." At that time, Outenreath was paying $188 per month in child support, apparently pursuant to an agreement he had made with Colwell.

¶3 At the hearing, Outenreath testified he went to aircraft mechanic school after he and Colwell divorced. While working full time as an aircraft mechanic in Arizona, he earned approximately $52,000 annually. In May 2007, Outenreath took an assignment in Iraq, where he could earn more money than in the United States. Outenreath testified he did this to eliminate some of the debt that threatened his ability to obtain a security clearance with his employer and, thus, ultimately threatened his job. He earns approximately $150,000 annually from working in Iraq; this amount includes

"hazard duty pay," and "deployed pay." Outenreath testified he believes the court should only consider the pay that he would receive if working in the United States because his extra income from working in Iraq is "basically like overtime."

¶4 Based on Outenreath's increased income, the trial court ordered him to pay $1,491 monthly in child support.[1] Outenreath filed this timely appeal.

Discussion

¶5 Outenreath argues

> the trial court should not include [his] hazard pay, deployed pay and per diem pay as income for purposes of calculating child support because that additional income, voluntarily earned to reduce his debt load and retain his employment, is tantamount to overtime pay or additional hours pay, or a second job, within the meaning of A.R.S. § 25-320, appendix 5(A) "Guidelines."

¶6 We generally review child support awards for an abuse of discretion. *McNutt v. McNutt*, 203 Ariz. 28, ¶ 6, 49 P.3d 300, 302 (App. 2002). But we review de novo the trial court's interpretation of the Child Support Guidelines. *Id*. When "interpreting the Guidelines, we seek to determine the intent of the Arizona Supreme Court based on the language and the overall purpose of the Guidelines." *Hetherington v. Hetherington*, 220 Ariz. 16, ¶ 26, 202 P.3d 481, 488 (App. 2008). Arizona's Guidelines follow an "Income Shares Model," in which the "total child support amount approximates the amount that would have been spent on the children if the parents and children were living together." § 25-320 app. "Background." One of the purposes of the

[1]The trial court calculated a lesser amount for the time Outenreath had spent in Arizona recovering from a work-related injury and receiving worker's compensation benefits.

Guidelines is to set forth a support standard "consistent with the reasonable needs of children and the ability of parents to pay." § 25-320 app. § 1(A).

¶7 Section 5 of the Guidelines governs the determination of the parent's gross income. Subsection 5(A) provides:

> Gross income includes income from any source, and may include, but is not limited to, income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits (subject to Section 26), worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, recurring gifts, prizes, and spousal maintenance. Cash value shall be assigned to in-kind or other non-cash benefits. Seasonal or fluctuating income shall be annualized. Income from any source which is not continuing or recurring in nature need not necessarily be deemed gross income for child support purposes. Generally, the court should not attribute income greater than what would have been earned from full-time employment. Each parent should have the choice of working additional hours through overtime or at a second job without increasing the child support award. The court may, however, consider income actually earned that is greater than would have been earned by full-time employment if that income was historically earned from a regular schedule and is anticipated to continue into the future.

¶8 The trial court found that Outenreath's full-time employment in Iraq, which persisted for three years, was his "regular schedule," and the length of his stay working there in the future was "indefinite."[2] The court further stated that his children "should

[2]Outenreath asserts his "ability to earn the extra income may be changed at any time, depending upon the needs of the United States government in Iraq." However, the child support was accurately based on Outenreath's situation at that time, not on his hypothetical return to the United States. *See Muchesko v. Muchesko*, 191 Ariz. 265, 272, 955 P.2d 21, 28 (App. 1997) (child support award should be based on "present conditions" not on "'uncertain contingencies or hypothetical earnings or income'"),

share in his increased earnings for so long as [he] chooses to remain in Iraq" and ordered an increase in the amount of child support from $188 monthly to $1,491 monthly.

¶9 Outenreath contends the trial court erred when it included his "hazard pay, deployed pay and per diem pay" in his gross income calculation because his employment in Iraq instead of Arizona is equivalent to working overtime or a second job.[3] But Outenreath has provided no authority for the proposition that working one's primary job overseas constitutes working overtime or a second job, and we have found no support in the law for that notion. Nor has he argued that while in Iraq he works more hours than he would in a regular work week. *See McNutt*, 203 Ariz. 28, ¶ 14, 49 P.3d at 303-04 (recognizing definition of "overtime" as "'hours in addition to those of a regular schedule'"), *quoting The American Heritage Dictionary* 1293 (3d ed. 1992).

¶10 Moreover, the Guidelines only exclude voluntary overtime from income, not overtime required by the employer. *See McNutt*, 203 Ariz. 28, ¶ 17, 49 P.3d at 304. On the one hand, Outenreath contends his Iraq assignment was voluntary, and on the other, he contends it was necessary to retain his job. To the extent the trial court based its conclusion on resolving this conflict in the evidence created by Outenreath's own testimony, we will not second-guess its determination. *See Gutierrez v. Gutierrez*, 193

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quoting Brevick v. Brevick, 129 Ariz. 51, 54, 628 P.2d 599, 602 (App. 1981). Moreover, upon his return to the United States and presumably to a lower level of income, he can petition the trial court to reduce his child support obligation on that basis. *See* A.R.S. § 25-327(A) (support modified upon showing of substantial and continuing changed circumstances).

[3]Contrary to Outenreath's assertion, the trial court did not include his per diem pay in its calculation of his gross income.

Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998) (appellate court defers to "trial court's determination of witnesses' credibility" and "weight to give conflicting evidence").

¶11 In a similar vein, Outenreath contends his overseas assignment constituted an "extraordinary work regimen," and, therefore, should not be included in the calculation of his gross income. The provision of the Guidelines that he relies upon to support this proposition states: "The court should generally not attribute additional income to a parent if that would require an extraordinary work regimen. Determination of what constitutes a reasonable work regimen depends upon all relevant circumstances including the choice of jobs available within a particular occupation, working hours and working conditions." § 25-320 app. § 5(A); *accord In re Marriage of Simpson*, 841 P.2d 931, 936-37 (Cal. 1992) (earning capacity should be based on "objectively reasonable work regimen," not one requiring "excessive hours or continuous, substantial overtime"). As stated above, Outenreath has not shown he works excessive hours. And although we may infer that Outenreath's working conditions in Iraq are more dangerous given the hazard pay attached to the position, that is only one of the "relevant circumstances" identified by the Guidelines. § 25-320 app. § 5(A). We presume the trial court considered all of the factors set forth in the Guidelines when it implicitly found Outenreath's work regimen in Iraq is reasonable, and Outenreath has not argued the court failed to consider them. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (presuming court considers all relevant evidence before issuing decisions). In short, Outenreath has provided no authority to support the proposition that hazardous work overseas necessarily constitutes an "extraordinary work regimen" and we find none.

¶12 Finally, contrary to Outenreath's suggestion, the Guidelines plainly provide for more than a parent's mere "base salary" to be included as gross income for child support. *See* § 25-320 app. § 5(A) (including regular and recurring bonuses, commissions, and dividends as "gross income"). Indeed, the clear intent of the Guidelines is to include regular, recurring income from all sources when calculating gross income for child support purposes. *See Strait v. Strait*, 223 Ariz. 500, ¶ 8, 224 P.3d 997, 999 (App. 2010) (in ordering child support, trial court "may 'consider all aspects of a parent's income' to ensure the award is just and 'based on the total financial resources of the parents'"), *quoting Cummings v. Cummings*, 182 Ariz. 383, 386, 897 P.2d 685, 688 (App. 1994); *McNutt*, 203 Ariz. 28, ¶ 23, 49 P.3d at 305 (noting "in all cases, a parent's actual, regular, and continuous income is the basis for the child support award"); *see, e.g.*, *Patterson v. Patterson*, 601 Ariz. Adv. Rep. 4, ¶¶ 10-11 (Ct. App. Feb. 10, 2011) (holding value of father's on-base military housing should be income under Guidelines if its "value is significant and reduces personal living expenses"); *In re Marriage of Robinson*, 201 Ariz. 328, ¶ 10, 35 P.3d 89, 94 (App. 2001) (finding vested stock options part of gross income for child support purposes). For the foregoing reasons, we find the trial court did not abuse its discretion when it included Outenreath's hazard pay and deployed pay in determining Outenreath's income.

¶13 Colwell requests her attorney fees and costs incurred on appeal pursuant to Rule 21, Ariz. R. Civ. App. P. But she cites no authority providing a basis for this request. Rule 21(c)(1) requires that a request for attorney fees state "the statutory or contractual basis for the award." *Roubos v. Miller*, 214 Ariz. 416, ¶ 21, 153 P.3d 1045,

1049 (2007). Citation to Rule 21 alone "does not provide a substantive basis for an appellate court to consider an award of attorneys' fees." *Ezell v. Quon*, 224 Ariz. 532, ¶ 31, 233 P.3d 645, 652 (App. 2010). A "general request that [a party] be awarded attorneys' fees does not constitute a claim 'pursuant to statute, decisional law or contract[.]'" *Id.*, *quoting* Ariz. R. Civ. App. P. 21(c)(1). Because Colwell's request does not cite any basis for an award of fees and costs, we deny her request.

Disposition

¶14 We affirm the judgment.

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

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge