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JUL -1 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	
MARTHA ANGELICA SPEARS,	2 CA-CV 2011-0016 DEPARTMENT A
Petitioner/Appellee,	MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
v.	
ROY EARL SPEARS,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20061563

Honorable K. C. Stanford, Judge Pro Tempore

AFFIRMED

Roy E. Spears — Tucson
In Propria Persona

B R A M M E R, Presiding Judge.

¶1 Roy Spears appeals from the trial court's order denying his request to modify child support. He argues the court "failed to find Martha's true gross income," and erred by denying his motions seeking discovery, motion for reconsideration, and

motion to strike evidence presented after the modification hearing. He also contends the court erred by failing to make required findings when it attributed to him income above the presumptive minimum wage, and by denying his request for costs. We affirm.

Factual and Procedural Background

¶2 We view the facts "in the light most favorable to upholding the trial court's decision." *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999). The court dissolved the marriage between Roy and Martha Spears by decree in 2003. It awarded Martha primary physical custody of their children and provided for joint legal custody. Roy was ordered to pay $603.54 per month in child support, which was reduced to $385 per month in 2009. In 2010, Roy filed a request to modify child support, alleging his income had decreased to $700 per month.

¶3 The trial court held a hearing on Roy's request to modify child support, at which it heard testimony from both parties. The court, denying Roy's request to continue the hearing, limited the evidence to what was presented at the hearing and requested the parties submit written closing arguments afterwards.

¶4 The trial court found Roy's reasonable attributed income to be ten dollars per hour for a forty-hour work week, or $1,733 per month, and found Martha's income to be unchanged at $6,047 per month. Although the amount of child support Roy would owe based on his attributed income was eleven percent less than his existing $385 per month obligation, the court nonetheless found that difference did not demonstrate a

substantial and continual change in circumstances.[1] The court denied Roy's request to modify child support and his request for costs. This appeal followed.

Discussion

¶5 We review a trial court's denial of a motion to modify an award of child support for an abuse of discretion. *Little*, 193 Ariz. 518, ¶ 5, 975 P.2d at 110. To show cause to modify support, the proponent must show "changed circumstances that are substantial and continuing." A.R.S. § 25-327(A); *Jenkins v. Jenkins*, 215 Ariz. 35, ¶ 16, 156 P.3d 1140, 1144 (App. 2007). An abuse of discretion occurs if the record is "'devoid of competent evidence to support' the decision." *Little*, 193 Ariz. 518, ¶ 5, 975 P.2d at 110, *quoting Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963). We note Martha has not filed an answering brief. "When a debatable issue is raised on [appeal], the failure to file an answering brief generally constitutes a confession of error." *Gibbons v. Indus. Comm'n of Ariz.*, 197 Ariz. 108, ¶ 8, 3 P.3d 1028, 1031 (App. 1999). However, in our discretion we address the merits of the appeal to determine whether a reversible error has occurred. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (courts prefer to decide cases on merits).

Martha's Income

¶6 Roy argues the trial court abused its discretion by "fail[ing] to find Martha's true gross income."[2] He first argues the court erred by failing to adjust

[1]*See* A.R.S. § 25-320 app. § 24(B) (fifteen percent variation evidence of substantial and continuing change).

Martha's income to reflect profits from the 2009 sale of a duplex property and rental income from the same property. At the hearing on the request to modify child support, Martha testified she had made approximately twenty thousand dollars profit from the sale of the property. She also testified she had received rental income from one of the two units before the sale, but that the rental income was less than her expenses for the mortgage, taxes, and insurance on the property.[3] Roy contends the Arizona Child Support Guidelines[4] (Guidelines) require these to have been included in her gross income. *See* A.R.S. § 25-320 app.

¶7 Although we review the trial court's modification decision for an abuse of discretion, we review de novo whether the trial court correctly applied the Guidelines. *Strait v. Strait*, 223 Ariz. 500, ¶ 6, 224 P.3d 997, 999 (App. 2010). Because the parties failed to ask the family court to make findings of fact or conclusions of law pursuant to Ariz. R. Fam. Law P. 82(A), we presume the court found every fact necessary to sustain

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[2]Roy's request to modify child support alleged his income had changed but did not allege Martha's income had changed. However, because the court heard testimony regarding Martha's income without objection, we treat the issue as if it had been raised in the petition. *See* Ariz. R. Fam. Law P. 34(B) (issues tried by implied consent of parties treated as if raised in pleadings).

[3]Roy challenges the truth of Martha's testimony that the other unit did not generate income because the parties' daughter was residing there, but to the extent the court relied on Martha's testimony, we do not reweigh the evidence or judge her credibility. *See Goats v. A. J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 169, 481 P.2d 536, 539 (1971) ("trial court, sitting without a jury, is the sole judge of the credibility of the witnesses"); Ariz. R. Fam. Law. P. 82(A) ("due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses").

[4]A new version of the Guidelines went into effect on June 1, 2011. Because the relevant provisions are identical to those in effect at the time of the trial court's ruling, we cite to the current version for ease of reference.

its decision, and we will uphold the judgment if any reasonable evidence supports it and there is no conflict with the family court's express findings. *See Elliott v. Elliott*, 165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990).

¶8 It is unclear to what extent the trial court considered the sale and rental of the property in making its findings, although we presume the court fully considered all evidence of Martha's financial situation. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004). Nonetheless, even assuming the court did not add Martha's estimated profits from the sale or rental income to her total gross income, it did not abuse its discretion. The Guidelines provide that "[i]ncome from any source which is not continuing or recurring in nature need not necessarily be deemed gross income for child support purposes." A.R.S. § 25-320 app. § 5(A). Although Roy relies on out-of-state caselaw to argue that one-time capital gains must be included in calculating gross income, he cites no Arizona authority contradicting the Guidelines' clear language. The Guidelines also provide that gross income from rents "means gross receipts minus ordinary and necessary expenses required to produce income." § 25-320 app. § 5(C). Roy's contention that any rental income should have been added to Martha's income without subtracting any mortgage or other expenses therefore is not supported. Additionally, Roy does not explain how the previous sale or rental of a property no longer belonging to Martha demonstrates a change of circumstances that is "substantial and continuing." *Jenkins*, 215 Ariz. 35, ¶ 16, 156 P.3d at 1144. On this record, we find nothing to suggest the court abused its discretion to the extent it declined to add these additional amounts to Martha's gross income.

¶9 Roy also argues there was insufficient evidence upon which the trial court could determine accurately Martha's income. He contends Martha's 2009 tax return, which had not been filed at the time of the hearing due to an extension, was "critical" to interpreting Martha's "complicated" financial circumstances, including the profit and expenses from her rental income. However, there is competent evidence in the record to support the court's determination that Martha's income had not changed, including her 2008 tax return, her 2009 Internal Revenue Service "1099" form showing the amount of compensation received for her real estate work, testimony from both parties regarding Martha's other sources of income, including details about the former rental property, and written closing arguments from both parties. Roy additionally suggests the court did not have sufficient information regarding "potential ongoing financial assistance" from Martha's fiancé due to Martha's failure to provide requested discovery on the issue.[5] However, Roy provided the court with the details of his allegations. We presume the court considered the allegations, *Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d at 880-81, and we give due regard to its opportunity to judge their credibility, *see* Ariz. R. Fam. Law. P. 82(A).

¶10 Moreover, the worksheet Roy submitted with his request listed Martha's income as either at or below $6,047 per month—the amount of the court's determination—and did not assert Martha's income had increased or provide an

[5]Roy also alleges Martha failed to answer certain interrogatories. However, the interrogatories appear to have been requested in response to Martha's motion to reconsider the previous modification, which has been withdrawn and is not at issue on appeal.

estimated or attributed amount of the alleged increase. *See* § 25-320 app. § 24(B) (party requesting modification unable to provide documentation supporting other party's income shall indicate income amount is attributed or estimated). Therefore, we cannot say the record was "'devoid of competent evidence'" to support the court's findings as to Martha's income, and the court did not abuse its discretion by finding Roy had failed to prove a substantial and continuing change in circumstances. *See Little*, 193 Ariz. 518, ¶ 5, 975 P.2d at 110, *quoting Fought*, 94 Ariz. at 188, 382 P.2d at 668; § 25-327(A).

¶11 Roy additionally contends the trial court erred by "choosing not to address" the refusal of Martha's employer to respond to a subpoena. Although Roy alleges "it was within the court's discretion" to take such measures as continuing the hearing or withholding final judgment until the employer complied with the subpoena and urges the court should aspire to such "proactive involvement," he does not argue the court abused its discretion by not doing so. Therefore, he has waived that argument. *See Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

Discovery Motions, Motion to Strike, and Motion for Reconsideration

¶12 Roy also argues the trial court erred in denying his motions seeking discovery from Martha, his motion to strike exhibits Martha submitted with her written closing argument, and his motion for reconsideration. We review a court's rulings on evidentiary and discovery issues for a prejudicial abuse of discretion. *Miller v. Kelly*, 212 Ariz. 283, ¶ 4, 130 P.3d 982, 984 (App. 2006); *Zimmerman v. Shakman*, 204 Ariz. 231, ¶ 10, 62 P.3d 976, 980 (App. 2003). We also review the denial of a motion for

reconsideration for an abuse of discretion. *Tilley v. Delci*, 220 Ariz. 233, ¶ 16, 204 P.3d 1082, 1087 (App. 2009).

¶13 Roy identifies instances where Martha "refus[ed] to abide by discovery requests and orders" and asserts his case was prejudiced by the trial court's refusal to grant the majority of his motions to compel discovery. Nowhere, however, does Roy identify how the court abused its discretion, nor does he argue the court acted outside its discretion. Instead, he merely notes the court "could have on its own motion addressed these violations . . . and admonished [Martha]." Because he has not adequately argued the court abused its discretion, we do not address that portion of his appeal. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2. To the extent Roy suggests the denial of his discovery motions constituted reversible error because the court thereby was prevented from accurately ascertaining Martha's income, we already have determined sufficient evidence was before the court to support its decision.

¶14 Finally, although Roy asserts the trial court erred in denying his motion for reconsideration and motion to strike, he has not provided any argument explaining how the court abused its discretion.[6] Because he, again, has not developed this argument adequately, we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2.

[6]We also note the trial court's denial of Roy's motion to strike does not appear in the record.

Required Findings

¶15 Roy further contends the trial court erred by failing to make required findings supporting its decision attributing to him income above the presumptive level. *See* A.R.S. § 25-320 app. § 22 ("If the court attributes income above minimum wage income, the court shall explain the reason for its decision."); A.R.S. § 25-320(N) (court shall presume parent capable of full-time employment at minimum wage). But Roy did not request the court make specific findings below and he accepted the ten-dollar an hour figure in his motion for reconsideration. *See* Ariz. R. Fam. Law P. 82(A) (court "if requested before trial, shall find the facts specially and state separately its conclusions of law thereon"). Because Roy did not raise the lack of findings below, he has waived the issue on appeal. *See Banales v. Smith*, 200 Ariz. 419, ¶¶ 6, 8, 26 P.3d 1190, 1191 (App. 2001) (must bring lack of finding to trial court's attention to preserve issue); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (trial court "should be afforded the opportunity to correct any asserted defects before error may be raised on appeal").

Request for Costs Below

¶16 Last, Roy argues the trial court erred in denying his requests for costs pursuant to A.R.S § 25-324 because his positions were reasonable and there is a disparity in income between himself and Martha. Section 25-324 authorizes a court to award costs, including attorney fees, "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." We review a trial court's ruling on attorney fees and costs for an abuse of discretion. *In*

re Marriage of Pownall, 197 Ariz. 577, ¶ 26, 5 P.3d 911, 917 (App. 2000). There is evidence in the record from which the court could have determined Roy had sufficient funds to pay his costs of $168.32 and, therefore, the court did not abuse its discretion in denying his request. *See Bender v. Bender*, 123 Ariz. 90, 94, 597 P.2d 993, 997 (App. 1979) (no abuse of discretion in denying attorney fees where party has sufficient funds to pay legal costs).

Disposition

¶17 For the foregoing reasons, we affirm. Roy requests an award of costs on appeal pursuant to A.R.S. § 25-324. In our discretion, we deny his request.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

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