IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Matter of:

GUADALUPE SANCHEZ CANDIA, *Petitioner/Appellee*,

v.

MARCOS ANTHONY SOZA, *Respondent/Appellant*.

No. 1 CA-CV 20-0201
FILED 5-18-2021

Appeal from the Superior Court in Maricopa County
No. FC2009-000682 and FC2009-050496
CONSOLIDATED
The Honorable Scott Sebastian Minder, Judge

REVERSED AND REMANDED

COUNSEL

Law Office of Carolyn B. LeBlanc PLLC, Scottsdale
By Carolyn B. LeBlanc
Counsel for Petitioner/Appellee

Michael E. Hurley, Attorney at Law, Phoenix
By Michael E. Hurley
Counsel for Respondent/Appellant

OPINION

Chief Judge Peter B. Swann delivered the opinion of the court, in which Presiding Judge Jennifer B. Campbell and Judge Lawrence F. Winthrop joined.

S W A N N, Chief Judge:

¶1 This is an appeal from the denial of Marcos Anthony Soza's ("Father['s]") petition to modify child support for the children he shares with Guadalupe Sanchez Candia ("Mother"). Father contends that the superior court relied on incorrect income information when it calculated child support in the original order. We conclude that the court erred to the extent it determined that Father's failure to appeal the original order precluded his petition to modify. A party is not barred from seeking modification of child support based on the theory that the court previously relied on incorrect information. We further conclude that the court erred by disregarding Father's expert report on disclosure and hearsay grounds. Father promptly provided the report to Mother and identified it as an anticipated exhibit in his pre-hearing statement. Further, Mother neither objected to the report's admission nor requested strict compliance with the evidentiary rules. We therefore reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Mother are the parents of two minor children. The superior court originally determined Father's child support obligation for the children in September 2016. At that time, the court rejected Father's contention that his monthly income was $4,550, attributed him "$24,000.00 per month, although his income may be significantly higher," and ordered him to pay child support of $1,759.80 per month.

¶3 In early 2019, Mother petitioned to modify parenting time. Father responded and cross-petitioned to, as relevant here, modify child support. Father requested that child support be revised using the parties' current income information, and stated: "Father will retain an expert to determine his income as his income was previously determined by a court commissioner who did his own research on Father's income during the hearing and assigned him an income greater than received." Father proffered no other basis for his proposed modification.

¶4 Father retained a forensic expert who, after examining financial documents, opined in a written report that Father's average gross income from 2016 to 2018, including both Father's wages and wages his wife received from his solely owned business, was $120,151 per year (or approximately $10,012 per month). Mother received a copy of the report in August 2019, the same month it was created. She did not contact the expert or hire her own expert to rebut the report. Father listed the report as an exhibit in his pre-hearing statement for the hearing on the parties' modification petitions.

¶5 When Father sought to admit the expert report at the February 2020 hearing, Mother's counsel stated that she did not object. It therefore was admitted into evidence. But the court commented: "I know there was no objection given. But to the extent that this constitutes any sort of expert testimony, and I'm going to take—give it the weight that it deserves. It's not clear to me that experts have been disclosed, or that the appropriate process for getting expert testimony into evidence has been followed here." Mother's counsel then stated that though Mother did not dispute that Father obtained the report, she did dispute the report's accuracy. Mother testified that though she believed Father's wife was unemployed, 2016 tax documents attributed more wages to the wife than to Father (which we calculate resulted in combined earnings greater than those identified by Father's expert). Father submitted an affidavit of financial information in which he claimed less income than that identified by his expert.

¶6 The court attributed Father an income of "$24,000 per month, consistent with prior orders," and ordered child support "nearly identical to the prior amount." In so holding, the court twice stated that Father never appealed or otherwise challenged the 2016 findings regarding his income. The court also stated that it gave Father's expert report "weight . . . [of] not much more than zero" because the expert "was not present to testify nor was there any indication that he was not able to appear," and "there was no evidence that [the expert] was ever disclosed as an expert testifying witness." Father appeals.

DISCUSSION

¶7 As an initial matter, we decline to regard Mother's failure to file an answering brief as a confession of error. *See In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 2 (App. 2002). We review the superior court's child-support order for abuse of discretion, accepting the court's factual findings

unless clearly erroneous but reviewing conclusions of law de novo. *Birnstihl v. Birnstihl*, 243 Ariz. 588, 590, ¶ 8 (App. 2018).

¶8 Child support "may be modified . . . only on a showing of changed circumstances that are substantial and continuing." A.R.S. § 25-327(A). A parent seeking modification may use either a standard or a simplified procedure. ARFLP 91.1(b)(1), (2). We have previously recognized that child support may be modified based on the earlier use of incorrect information when the petition is litigated under the simplified procedure set forth in Section 24(B) of the Arizona Child Support Guidelines ("Guidelines"), A.R.S. § 25-320 app. Section 24(B) provides that the simplified procedure is available "if application of the guidelines results in an order that varies 15% or more from the existing amount," based on "documentation supporting the [parents'] incomes if different from the court's most recent findings regarding income"—and "[a] fifteen percent variation in the amount of the order will be considered evidence of substantial and continuing change of circumstances." Applying § 24(B), we held in *Birnstihl* that "[b]ased on the text of the Guidelines, . . . claim preclusion does not prevent a court from considering a parent's contention that a modification of child support is warranted based on incorrect information used in a previous calculation." 243 Ariz. at 592, ¶ 13.

¶9 Standard-procedure modification cases, unlike simplified-procedure cases, do not require any specific percent-variation of change. *Compare* Guidelines § 24(A) *with* Guidelines § 24(B). But the substantive standard for modification is the same whether modification is sought under the simplified or the standard procedure. *See* A.R.S. § 25-327(A). Accordingly, though *Birnstihl* relied on the language of Guidelines § 24(B), we conclude that the rule stated in *Birnstihl* is not confined to simplified-procedure cases. Regardless of the procedural posture, "[c]hanged circumstances in the context of child-support modification . . . may be that incorrect information was used to determine a previous order." *Birnstihl*, 243 Ariz. at 591–93, ¶¶ 9–14, 18. For that reason, a parent operating under the standard procedure is not precluded from seeking modification on the theory that the existing order was based on incorrect information and that using the correct (and current) information would result in a substantial and continuing variation in child support under the Guidelines.[1]

[1] Of course, though the movant in a standard-procedure case need not meet a percent-variation threshold like in a simplified-procedure case, he or she risks financial penalties if the court deems the variation insubstantial. *See* A.R.S. § 25-324(A) (providing for imposition of reasonable costs and

Accordingly, we hold that in this standard-procedure case, the superior court erred to the extent it suggested that Father's failure to appeal the 2016 order precluded him from seeking modification based on the theory that the court overstated his income in that order.

¶10 Further, we hold that the superior court erred by disregarding Father's expert report on disclosure and hearsay grounds. The purpose of the disclosure rules is "to ensure that each party is fairly informed of the facts, data, legal theories, witnesses, documents, and other information relevant to the case." ARFLP 49(a)(1). Mother was fairly informed of the report and Father's intent to use it—she received a copy of the report upon its creation approximately six months before the hearing, and Father identified the report as an anticipated exhibit in his pre-trial statement. *See* ARFLP 49(b), (e), (j) (prescribing deadlines for disclosure of documents and testifying expert information). And the report was not inadmissible on hearsay grounds—hearsay is not barred in family court proceedings unless a party requests strict compliance with the Arizona Rules of Evidence, which was not the case here. ARFLP 2(b)(1); *see also Woyton v. Ward*, 247 Ariz. 529, 533, ¶ 16 (App. 2019). Moreover, Mother expressly disclaimed any objection to the report's admission at trial.

¶11 The court also noted that "the report contradicts not only Father's own claims of his income, but also the determination of his income made by the Court in 2016." Because the report was presented to challenge the basis for the 2016 income determination, it is not surprising that the report and the 2016 findings are in conflict. Though the court was not required to adopt the report, none of the reasons advanced for its exclusion withstand scrutiny. The court therefore erred by concluding that it *could* not assign the report meaningful weight, though it would not have been required to give it dispositive weight. *See Woyton*, 247 Ariz. at 533–34.

CONCLUSION

¶12 The superior court misapprehended the significance of Father's failure to appeal the 2016 child support order. The court also erroneously concluded that it could not consider Father's expert report. We

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expenses based on parties' financial resources and reasonableness of their positions); ARFLP 26(b)–(c) (providing for imposition of sanctions if, inter alia, motion is not presented for proper purpose or factual contentions lack evidentiary support).

therefore reverse and remand. We deny Father's request for attorneys' fees under A.R.S. § 25-324.

AMY M. WOOD • Clerk of the Court
FILED: AA