**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

DIVISION ONE
FILED: 09/11/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

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| In re the Matter of: | ) 1 CA-CV 11-0010 |
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| THOMAS G. HAYMAN, | ) DEPARTMENT A |
| | ) |
| Petitioner/Appellant/ Cross-Appellee, | ) **SUPPLEMENTAL MEMORANDUM DECISION** |
| | ) (Not for Publication - |
| v. | ) Rule 28, Arizona Rules of |
| | ) Civil Appellate Procedure) |
| ALICIA M. LAWLER, | ) |
| | ) |
| Respondent/Appellee/ Cross-Appellant. | ) |

Appeal from the Superior Court in Maricopa County

Cause No. DR2000-016242

The Honorable Patricia Arnold, Judge Pro Tempore

**AFFIRMED**

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**P O R T L E Y**, Judge

**¶1** In our decision filed on April 10, 2012 (*Hayman I)*, we addressed the denial of attorneys' fees to Alicia M. Lawler ("Mother") in connection with her motion for modification of child support. We suspended the appeal of the issues presented by Thomas G. Hayman ("Father") and remanded the case to allow the family court to enter findings[1] pursuant to paragraph 22 of the Arizona Child Support Guidelines ("Guidelines") in Arizona Revised Statutes ("A.R.S.") section 25-320 (West 2012).[2]

**¶2** We have received the findings, as well as the subsequent briefs from the parties. We proceed to address the remaining issues on appeal.

**DISCUSSION**

**¶3** We review a child support award for an abuse of discretion and will accept the family court's findings of fact unless they are clearly erroneous. *Engel v. Landman*, 221 Ariz. 504, 510, ¶ 21, 212 P.3d 842, 848 (App. 2009) (citations omitted). We, however, review de novo the court's legal interpretation of the Guidelines. *Pullen v. Pullen,* 223 Ariz.

[1] We denied Father's subsequent request for reconsideration/ clarification.

[2] We cite the current version of an applicable statute if no revisions material to this decision have since occurred.

293, 295-96, ¶ 9, 222 P.3d 909, 911-12 (App. 2009) (citations omitted).

**A.**

**¶4** Father first asserts that Mother waived her right to child support. He argues that he consented to allow their child to be adopted and relinquished parenting time in return for a waiver of child support. As a result, he contends that the family court erred by refusing to enforce the waiver.[3]

**¶5** A parent has an obligation to support his child, which is "paramount to all other financial obligations." *Hamblen v. Hamblen*, 203 Ariz. 342, 346, ¶ 23, 54 P.3d 371, 375 (App. 2002) (citation and internal quotation marks omitted); *see also* A.R.S. § 25-501(A) (West 2012) ("[E]very person has the duty to provide all reasonable support for that person's natural and adopted minor . . . ."). The obligation continues even after the parent-child relationship is severed, and may only be terminated by a final order of adoption. A.R.S. § 8-539 (West 2012) ("An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations with respect to each other except the right of the

[3] Although Mother notes that Father did not raise the argument in his motions for summary judgment or new trial, he asserted it in his trial memorandum. The argument was, as a result, not waived.

child to inherit and support from the parent. *This right of . . . support shall only be terminated by a final order of adoption*." (Emphasis added.) Because their child was never adopted, Father's obligation to support the child never ended. *See* A.R.S. § 8-539.

**¶6** Relying on *Albins v. Elovitz*, 164 Ariz. 99, 791 P.2d 366 (App. 1990), Father claims that Mother failed to show that their child would be adversely affected by the enforcement of their agreement that he would not pay support in exchange for his consent to the adoption. In *Albins*, we upheld the waiver of child support arrearages in exchange for the father's surrender of his visitation rights. *Id*. at 101-02, 791 P.2d at 368-69; *see also Cordova v. Lucero,* 129 Ariz. 184, 187, 629 P.2d 1020, 1023 (App. 1981) (finding that custodial parent had waived her right to collect child support arrearages). As a result, Father argues that a waiver of prospective support should be subject to the same test of enforceability as a waiver of arrearages, and asserts that public policy is not contravened by enforcement of the waiver if the court finds that the interests of the child would not be adversely affected.

**¶7** Mother suggests that we follow the Washington Court of Appeals' ruling in *In re Marriage of Pippins*, 732 P.2d 1005 (Ct. App. 1987). There, the court held that the agreement purporting

to terminate future child support was invalid and contravened public policy because child support belongs to the child. *Id.* at 1007. Moreover, the court noted that a custodial parent receives support as trustee for the child and has no authority to waive the child's right to that support, and that the non-custodial parent may not "rid himself of the responsibility to support his child by relinquishing visitation privileges." *Id.* (citations omitted).

**¶8** We need not resolve whether *Albins* should be applied to prospective support, or whether we should follow *Pippins.* Mother presented, as we will discuss, evidence that a substantial and continuing change of circumstances had occurred and that she was no longer able to bear all of the costs of raising their child. As a result, she has adequately demonstrated that the child would have been adversely affected if the court refused to order child support based on the parties' waiver at the time of the divorce. Accordingly, the court did not abuse its discretion when it determined that it was in the child's best interests to allow Mother to seek modification of the zero-dollar child support order in the consent decree.

**B.**

**¶9** Father next argues that the court erred by finding that a change in circumstances warranted modification of the decree. We disagree.

**¶10** A child support order can only be modified if the party seeking the modification demonstrates a substantial and continuing change in circumstances. A.R.S. § 25-327(A) (West 2012); *Jenkins v. Jenkins*, 215 Ariz. 35, 39, ¶ 16, 156 P.3d 1140, 1144 (App. 2007) (citations omitted). Additionally, a modification of child support may be warranted when there is "[a] substantial variance between an existing child support order and an amount resulting from application of the new guidelines. . . ." Guidelines § 29(B). "The decision to modify an award of child support rests within the sound discretion of the [family] court and, absent an abuse of that discretion, will not be disturbed on appeal." *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (citation omitted); *Jenkins,* 215 Ariz. at 38, ¶ 8, 156 P.3d at 1142 (quoting *Little*, 193 Ariz. at 520, ¶ 5, 975 P.2d at 110).

**¶11** At the time Mother filed the modification petition, Father did not have to pay any child support. She presented evidence to support a substantial and continuing change in circumstances. For example, the child's expenses had increased

since the 2002 divorce. The youngster, who was now seven years older, had a medical condition that required expensive medications. The youngster also needed orthodontia, had increased educational expenses, and was involved in extracurricular activities. Mother also submitted evidence that she had incurred substantial debt to meet expenses for herself and their child, and had received assistance from her family to meet the obligations.

**¶12** Furthermore, there was evidence that if child support were modified, it would be more than a 15 percent variance between Father's then-child support obligation and any modification.[4] In fact, even if we assume that Father should have been attributed only a minimum wage, his child support obligation under the Guidelines was more than a 15 percent variance. Accordingly, based on the evidence, we find no abuse of discretion in the court's determination that Mother demonstrated a substantial and continuing change in

[4] Father contends that the family court could not modify support unless it found a deviation from his portion of the total child support obligation calculated at the time of the divorce. The deviation, however, can only be measured from the child support order in effect at the time of the filing of the modification petition. *See* Guidelines 29(B) (stating that a child support modification may be warranted when there is "[a] substantial variance between *an existing child support order* and an amount resulting from application of the new guidelines. . . ." (Emphasis added.)

circumstances that warranted modifying Father's child support obligation because there was a substantial variance between the child support order of zero dollars and the modified child support obligation.

**C.**

**¶13** Father next challenges several aspects of the court's child support calculation. He first argues that the court erroneously attributed income to him.

**¶14** Income may be attributed to a parent if the family court determines that the other working parent would otherwise pay a disproportionate share of the entire support obligation. *Engel*, 221 Ariz. at 510-11, ¶ 22, 212 P.3d at 848-49 (citations omitted). "Section 5(E) of the Guidelines . . . allows [the] court to attribute hypothetical income and expenses" to a parent who chooses to reduce his or her earning for unreasonable reasons. And, in order to determine whether to use a parent's actual income or earning capacity to calculate child support, a court is required to apply an intermediate test and balance a number of factors. *Little*, 193 Ariz. at 522, ¶ 11, 975 P.2d at 112 (citations omitted); *Pullen*, 223 Ariz. at 296, ¶ 12, 222 P.3d at 912 (citations omitted).

**¶15** The court first must determine whether the parent reduced his or her earning voluntarily and whether that choice

was reasonable. If the court finds that the reduction was unreasonable, "the court may attribute income to [that] parent up to his or her earning capacity." Guidelines § 5(E). "If the reduction in income is voluntary but reasonable," however, then the court must consider how the parent's decision "will affect the child[], and [must] weigh that impact against the benefits of the parent's choice." *Engel*, 221 Ariz. at 511, ¶ 23, 212 P.3d at 849 (citing Guidelines § 5(E)). The court may consider whether the parent's decision "(1) is designed to enhance future earning capacity, (2) places the child[] in financial peril, (3) allows a parent more needed time at home with his or her child[], and (4) [is] appropriate in view of the individual needs of a particular child." *Engel*, 221 Ariz. at 511, ¶ 23, 212 P.3d at 849. The court's task is to "decide each case based upon the best interests of the child, not the convenience or personal preference of a parent." *Little*, 193 Ariz. at 523, ¶ 14, 975 P.2d at 113 (citation and internal quotation marks omitted). We review the court's application of the appropriate factors for clear error. *Pullen*, 223 Ariz. at 295-96, ¶ 9, 222 P.3d at 911-12 (citation omitted).

**¶16** Here, Father, began winding down his law practice in 1997, stopped working as a lawyer in 1998 — four years before the divorce — and voluntarily allowed his license to practice

law in Arizona lapse in 2003. Although the timing is not dispositive, *see Little*, 193 Ariz. at 523, ¶ 14, 925 P.2d at 113 (citation omitted) (stating that family court retains discretion to consider nature of and reason for changes and to determine if modification is warranted given all of the circumstances), it is a factor that the court may take into account when conducting an income attribution analysis. *Pullen*, 223 Ariz. at 297-98, ¶¶ 15, 18, 222 P.3d at 913 (citation omitted).

**¶17** The court found that Father reduced his income voluntarily. He had practiced law for twenty years, and although he claimed that he had had an emotional breakdown and could no longer function as a lawyer, he presented no medical evidence to support his claim.[5]

**¶18** When Father allowed his license to lapse in 2003, he was not thinking about child support. Instead, he became a self-employed horse trainer and ferrier. His income, he claimed, did not exceed his expenses. The court, as a result, had to determine whether to accede to his request and attribute minimum wage income to him.

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[5] Father contends that the court erred by excluding the testimony of the Hon. Douglas Rayes, his former partner, who could have testified that Father had problems meeting deadlines. The preclusion of Judge Rayes was not an abuse of discretion because his testimony would have been cumulative to Father's. Ariz. R. Evid. 403 (court may exclude relevant evidence if it is cumulative).

**¶19** The court attributed more than a minimum wage income to Father. The court did not base its ruling on Father's decision to stop practicing law eleven years earlier. Instead, the court examined Father's financial information, which revealed substantial assets and his comfortable lifestyle, to counter his argument that only the minimum wage should be attributed to him. In its May 2012 ruling after remand, the court noted that it relied on the monthly income of $8333 that Father had listed in a 2007 loan application; his acquisition of land; a $400,000 home valued at over $1 million; a luxury motor home; and his recent ability to pay off a $460,000 mortgage and $30,000 of credit card debt.

**¶20** Although the court did not list the *Engel* factors it considered, "we may infer additional findings . . . to sustain the [family] court's order as long as [they] are reasonably supported by the evidence. . . ." *See Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998) (citation omitted). The court noted that Father "voluntarily terminated his legal practice [when] he was under no obligation to pay child support and his motives for doing so are irrelevant." The court, moreover, implicitly found that the reduction was not to enhance Father's future earning capacity, was not designed to allow him more time with his child, and was causing a hardship

for the child because Mother sought a modification seven years later. Consequently, the family court did not abuse its discretion when it attributed income to Father at an amount higher than minimum wage.

**¶21** Father next challenges the amount of income attributed to him. He argues that he does not earn $12,500 monthly or $150,000 annually, and never did even as a lawyer. Moreover, he argued that he and his wife live frugally on her income, and that he should not be held to the monthly income he listed on a loan application.

**¶22** Despite his frugal-lifestyle claim, Father did not include in his Affidavit of Financial Information the cost of his medical insurance, food, or other household expenses that may have been paid by his spouse. Additionally, despite the fact that the court did not allow him to explain that the loan officer had told him to list $8333 as his monthly earnings on the loan application, the court was entitled to reject his putative explanation. Consequently, because the court had reviewed Father's financial information and was able to resolve the credibility of the witnesses and give appropriate weight to the evidence, *Goats v. A. J. Bayless Mkts., Inc.*, 14 Ariz. 166, 171, 481 P.2d 536, 541 (App. 1971) (citations omitted), we

cannot conclude that the attributed amount was clearly erroneous.

**¶23** Father also contends that the court erred by failing to attribute income to Mother because she voluntarily worked less than full time. If the court determines that a parent's reduction is voluntary but reasonable, however, the court must weigh the impact of the parent's decision not to work full time against the benefits of the parent's choice. Guidelines § 5(E); *Engel*, 221 Ariz. at 511, ¶ 23, 212 P.3d at 849.

**¶24** Mother worked four days per week as a permanent judge pro tempore for the Phoenix municipal court.[6] Although the presiding judge of the municipal court had not permanently assigned her a fifth day, she often worked five days per week, which resulted in an increased total income. There was no evidence that Mother's decision to work as a judge four days per week placed the child in financial peril. In fact, the job allowed her the flexibility she needed as a single parent with sole custody to be available for her child's medical appointments and be involved in the child's schooling. Based on the evidence, the family court did not abuse its discretion by not attributing full-time income to Mother.

[6] Mother's total salary in 2009 was approximately $95,000.

**¶25** Moreover, despite Father's argument that the inclusion of child care costs in the support calculation contradicts the decision not to attribute full-time income to Mother, we find no abuse of discretion. Mother presented the child care costs for after-school programs and for the summer. She paid for the programs, and there was no evidence that the fees would have been reduced if Mother did not have to work a fifth day and could provide care for the youngster. The inclusion of child care costs is not inconsistent with the decision not to attribute full-time income to Mother. Consequently, the court did not abuse its discretion.

**D.**

**¶26** Father next argues that the court erred by including the costs of the child's private religious school in the support calculation. He did not want the child to attend the private school and did not want to support the tuition for the school.

**¶27** Section 9(B)(2) of the Guidelines provides that in determining the total child support obligation, the court may include "[a]ny reasonable and necessary expenses for attending private or special schools or necessary expenses to meet particular educational needs of a child, when such expenses are incurred by agreement of both parents or ordered by the court." If the court determines that a private religious school is in

the child's best interests, it can order the child to attend the school and require the objecting parent to pay his or her share of the "reasonable and necessary" costs. *Jordan v. Rea*, 221 Ariz. 581, 591, ¶ 29, 212 P.3d 919, 929 (App. 2009) (citing § 9(B)(2)).

**¶28** Although Father now argues that he did not agree to the school choice and the court did not specifically determine that such an education was in the child's best interest, he only told the family court that he wanted Mother to bear the expense. The court, however, specifically stated that it had considered the child's best interests, and the inclusion of the costs of the private religious education in the support calculation suggests that the court found that the school was in the child's best interests. Moreover, the ruling was not clearly erroneous because Father did not offer any evidence to refute the testimony that the youngster had enjoyed attending the school since she started as a preschooler.

**¶29** Additionally, the record supports the court's determination that the tuition was reasonable and necessary. Mother provided evidence of the cost of tuition, and Father did not contest the reasonableness and necessity of the tuition. Because the Guidelines do not require proof that private school tuition is necessary to meet a child's particular needs, s*ee*

Guidelines § 9(B)(2), the inclusion of the tuition in the child support calculation was not an abuse of discretion.

**E.**

**¶30** Finally, Father argues that the time limits the court placed on the evidentiary hearing "exalted efficiency over fairness" and resulted in a denial of his right to due process. We review the limitation of time for an abuse of discretion. *Gamboa v. Metzler*, 223 Ariz. 399, 402, ¶ 13, 224 P.3d 215, 218 (App. 2010) (citation omitted).

**¶31** Father did not independently object to the time limitations or request additional time to present evidence, either before or during the hearing.[7] He also made no offer of proof to the family court about what evidence he was unable to present during the time allowed at the hearing. Consequently, he cannot demonstrate he was harmed by the time limitations imposed by the family court. *Gamboa*, 223 Ariz. at 402-03, ¶¶ 17-18, 224 P.3d at 218-19 (citations omitted) (stating that "to show prejudice in this context, 'at a minimum,' the complaining

[7] Although Father agreed in his motion for new trial that the amount of time allowed for the hearing was "grossly insufficient," he did not assert any error or resulting prejudice. But, even if he had, the argument would have been untimely. *Helena Chem. Co. v. Coury Bros. Ranches, Inc.*, 126 Ariz. 448, 451, 616 P.2d 908, 911 (App. 1980) (citations omitted) (party may not base motion for new trial on alleged error that occurred at trial if party did not object to error at trial).

party must make 'an offer of proof stating with reasonable specificity what the evidence would have shown.'"). Accordingly, we find no error.

**F.**

**¶32** Both parties request an award of costs and attorneys' fees on appeal. In our discretion, we decline to award attorneys' fees on appeal. We also deny both parties' requests for costs on appeal, concluding that neither party should be considered the prevailing party on appeal.

**CONCLUSION**

**¶33** Based on the foregoing, we affirm the modification of child support.[8]

/s/
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Judge

/s/
ANDREW W. GOULD, Judge

[8] We deny the motion to strike Mother's reference to a psychologist's report filed in 2002 even though it was not offered in the modification proceeding because the report was part of the record before the family court. *Cf. GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (citations omitted) (stating that appellate court's review is limited to record before trial court and reviewing court cannot consider any evidence that was not part of record before trial court when it entered ruling challenged on appeal).