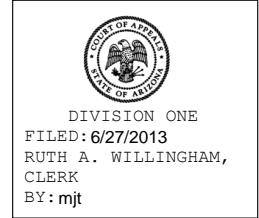


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) No. CV 12-0623
)
BRADLEY WALKER,) DEPARTMENT E
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) Not for Publication
v.) (Rule 28, Arizona Rules
) of Civil Appellate Procedure
BIANCA MARIE GUY,)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2004-004798

The Honorable Thomas L. LeClaire, Judge

AFFIRMED IN PART; REMANDED IN PART

Bradley Walker
In *Propria Persona* Petitioner/Appellee

Phoenix

Bianca M. Guy
In *Propria Persona* Respondent/Appellant

Greenwood Village, CO

G E M M I L L, Judge

¶1 Bradley Walker ("Father") and Bianca Marie Guy
("Mother") are the biological parents of their nine-year-old

daughter. After Mother relocated to Colorado with her husband and three other children, the superior court awarded Father temporary sole physical custody of Daughter. Father was also relieved of his child support obligations to Mother. In October 2011, Father filed a motion to establish child support payments in order to adjust to the new custodial arrangements.

¶12 The family court held an evidentiary hearing on the motion in April 2012. At the hearing, both parties presented evidence of annual income, parental support days, and other expenses relevant to child care. Based on this evidence, the court found that Father's monthly income equaled \$1540.70 and that his monthly child care expenses equaled \$400. The court also attributed an annual income of \$32,048 to Mother. In its calculations, the court credited Mother for paying \$53.92 per month in medical insurance for Daughter. It also credited Mother for the care of her three other children who are not part of her relationship with Father.

¶13 Applying the Arizona Child Support Guidelines – specifically, Arizona Revised Statutes (“A.R.S.”) section 25-320 app. (Supp. 2012) – the court ordered that Mother pay \$466.51 per month in child support to Father. Mother timely appeals. This court has jurisdiction under A.R.S. § 12-2101(A)(1) (Supp. 2012).

CHILD SUPPORT CALCULATION

¶4 Mother argues that the family court abused its discretion in its determination of child support payments. She asserts the court erred in determining Father's monthly income, Mother's attributable income, Father's child care costs, and the number of Mother's parenting days.

¶5 This court defers to the sound discretion of the family court and reviews awards of child support for an abuse of that discretion. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). An abuse of discretion occurs when the family court's decision is "devoid of competent evidence to support the decision." *Id.* (internal quotations and citation omitted).

Father's Income

¶6 First, Mother argues that the family court erred in attributing \$1540.70 to the Father as monthly income. She states that the court used Father's net earnings, rather than his gross earnings, to calculate his monthly income. "We accept the court's findings of fact unless they are clearly erroneous." *McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6, 49 P.3d 300, 302 (App. 2002).

¶7 The record indicates that, in calculating the child support award, the court used the number listed under gross monthly income on Father's Affidavit of Financial information

("Affidavit"). This number is labeled "gross income," and Mother did not establish that this label is incorrect or that Father incorrectly completed the Affidavit. Father additionally testified that his monthly income was \$1540.70. On this record, the court acted within its discretion by using the Affidavit and testimony as evidence of Father's monthly income, and its findings were not clearly erroneous.

Mother's Income

¶8 Mother also argues that because her decision to leave the workforce was voluntary but reasonable, the court erred in assigning her income above minimum wage when it made its child support calculation. When a parent is physically disabled, the court may decline to attribute any income at all to that parent. A.R.S. § 25-320 app. (5)(E)(1). On the other hand, when a decision to stop working is voluntary but reasonable, the court must balance the "parent's decision and the benefits therefrom against the impact the reduction in that parent's share of child support has on the children's best interest." A.R.S. § 25-320 app. (5)(E). In such a case, it is often appropriate to attribute "income of *at least* minimum wage" to that parent. *Id.* (emphasis added).

¶9 Although Mother asserts that she is physically unable to re-enter the workforce because of an injury to her thumb, she also testified that her decision to leave the workforce was

predicated on caring for her other children, not on her injury. Therefore, the court acted within its discretion to find that her decision not to work was voluntary, although reasonable. Further, the only evidence of Mother's income presented to the court was a 2010 tax return showing Mother's earnings of \$32,048. The court relied on this evidence when attributing income to Mother and, on this record, it was within its discretion to do so.

¶10 Mother further asserts that the court improperly relied on income from her current spouse, who does not have a legal duty to Daughter, to determine her gross income. Although a court may not consider the earnings of one with no legal duty to the child when awarding child support, it may consider the continual benefits that a married parent derives from the income of her new spouse, including the degree by which living expenses are defrayed as a result of the spouse's income. *In re Marriage of Pacific*, 168 Ariz. 460, 464, 815 P.2d 7, 11 (App. 1991); see also *Cummings v. Cummings*, 182 Ariz. 383, 387, 897 P.2d 685, 689 (App. 1994) (holding that a court may "take into account any regular and substantial benefits a parent receives from remarriage").

¶11 As a result of the relocation and job change, Mother's spouse is earning a six-figure income. Mother testified that her spouse's income allows her the opportunity to stay home with

her children for the first time in years. Despite the loss in income she sustains by remaining a stay-at-home parent, she has no plans to re-enter the workforce. The family court acted within its considerable discretion to consider these benefits when it determined Mother's attributable income.

Child Care Costs

¶12 Next, Mother argues that the court erred in its finding that Father's child care expenses are \$400 per month. "We accept the family court's findings of fact unless they are clearly erroneous." *McNutt*, 203 Ariz. At 30, ¶ 6, 49 P.3d at 302.

¶13 At the hearing, Father testified that his child care costs were ten dollars in the morning and ten dollars in the evening for a total of twenty dollars each day. He also presented as evidence a typewritten letter, signed by Daughter's babysitter and stating that weekly child care costs equaled \$100 per week. The letter was entered into evidence over Mother's hearsay objection. Mother argues that this evidence was unreliable since the sitter's name was incorrectly spelled. Although Mother challenged the reliability of the letter, she offered no affirmative evidence to directly rebut the information it contained. The court did not abuse its discretion when it relied on the evidence of child care costs found in this record.

Parenting Days

¶14 Finally, Mother argues that the court erred in its calculation of Mother's parenting time. At the hearing, Father testified that Mother was entitled to 81 days of parenting time based on the "court ordered appearing time." Mother testified that she was "hoping to have" parenting time of "at least 116 days." On appeal, Mother argues that she is entitled to credit for 104.5 days. The court found that Mother was entitled to credit for 81 parenting days.

¶15 To determine the number of parenting days, the court relied on a minute entry from September 8, 2011 which outlined mother's assigned parenting time from the date of the minute entry until the beginning of the 2012-2013 school year. The minute entry stated that Mother was entitled to parenting days from "May 24, 2012 from release from school through and until two weeks prior to the commencement of the 2012-2013 school year." However, the record from the evidentiary hearing reveals no evidence establishing the date on which school would start. Without the school start date, the family court could not have determined the actual number of parenting days attributable to Mother based on the minute entry alone. Further, the minute entry did not include Mother's assigned parenting days prior to September 22, 2011. Because the child support award was effective August 1, 2011, any parenting time after that date

should be included in the calculation. Because the record is unclear on these details, we remand for further findings and an adjustment to the award of child support, if required, based upon the actual number of parenting days undertaken by Mother.

BEST INTERESTS ATTORNEY

¶16 Finally, Mother asks for a ruling on her motion to appoint a Best Interests Attorney ("BIA") for Daughter. A motion "not ruled on is deemed denied by operation of law" when consistent with and justified by the procedural circumstances. *State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993).

¶17 Mother filed a written motion to appoint a BIA on March 14, 2013. At the evidentiary hearing, the court decided to hear both the petition for child support and the motion to appoint a BIA. Both parties offered testimony regarding the merits of the BIA motion. However, the court did not make a ruling on, nor any mention of, the motion in its decision. On this record, because the court did not rule on the motion for a BIA, the motion is deemed denied without prejudice by operation of law.

CONCLUSION

¶18 For the foregoing reasons, we affirm the findings of the court on all issues except the calculation of parenting days and the calculation of child support to the extent dependent on parenting days. We remand for calculation of Mother's parenting

days and, if necessary, the recalculation of child support, plus any further proceedings consistent with this decision.

/s/

JOHN C. GEMMILL, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

MICHAEL J. BROWN, Judge