

NOTICE: NOT FOR PUBLICATION.  
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

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

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YUCEL YALIM, *Petitioner/Appellant*,

*v.*

ZEYNEP YALIM, *Respondent/Appellee*.

No. 1 CA-CV 12-0744  
FILED 12-10-2013

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Appeal from the Superior Court in Maricopa County  
No. FC2007-008020  
The Honorable James T. Blomo, Judge

**AFFIRMED**

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COUNSEL

The Murray Law Offices, P.C., Scottsdale  
By Stanley David Murray

*Counsel for Petitioner/Appellant*

The Law Office of Bert E. Moll, P.C., Chandler  
By Bert E. Moll

*Counsel for Respondent/Appellee*

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**MEMORANDUM DECISION**

Presiding Judge Peter B. Swann delivered the decision of the Court, in which Judge Patricia K. Norris and Judge Diane M. Johnsen joined.

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**S W A N N**, Judge:

¶1 Yucel Yalim (“Husband”) appeals from the superior court’s denial of his request to modify spousal maintenance awarded to Zeynep Yalim (“Wife”). We find no abuse of discretion and therefore affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 Husband and Wife married in 1989 and divorced in 2009. The decree of dissolution ordered equitable division of the parties’ wholesale jewelry business in the form of a lump-sum inventory payout to Wife. The decree also ordered Husband to pay spousal maintenance to Wife in the amount of \$2,000 per month for nine years.

¶3 In support of the spousal maintenance award, the court found that Wife lacked sufficient property to provide for her reasonable needs, was unable to be self-sufficient through appropriate employment, and lacked earning ability to be self-sufficient. The court concluded that Wife and Husband each required at least \$5,000 per month to provide for their reasonable needs and Husband was capable of earning at least \$5,400 per month but Wife would be unable to meet her earning potential of \$2,000 per month for at least a year. The court found that Husband had chosen self-employment in the jewelry business despite holding qualifications that had previously allowed him to earn more than \$13,000 per month, and Wife had not worked outside of the home for 19 years and had recently suffered serious health problems that gave her little opportunity to seek or prepare for employment.

¶4 Approximately six months after the decree was entered, the parties entered into an ARFLP 69 agreement modifying the method by which Wife would receive her equitable interest in the jewelry business. Under the agreement, Husband executed a promissory note in the amount of Wife’s interest in the business and promised to make payments toward satisfaction of the debt in the amount of \$3,000 per month plus 50% of

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monthly gross revenue exceeding \$10,000. The agreement did not modify spousal maintenance.

¶5 Eight months later, Husband petitioned the court to terminate spousal maintenance. Husband contended that modification of the decree's award was warranted because the jewelry business had continued to decline. He also asserted that he had been forced to cut his monthly expenses but Wife had secured employment and purchased a new home. Wife objected to Husband's petition and the matter proceeded to an evidentiary hearing.

¶6 At the evidentiary hearing, Husband testified that he continued to operate the jewelry business because he had not worked in other industries for many years and the industry in which he was experienced had moved to other countries. He also testified that he had a large investment in the jewelry business and "wouldn't be able to pay [Wife] out her interest [under the ARFLP 69 agreement] if [he] wasn't working the business." According to Husband, the business had "declined substantially" because of the poor economy, even though sales had increased between 2010 and the first half of 2011. Husband claimed that he had been forced to reduce his monthly living expenses by adjusting his insurance coverage, selling a vehicle, and clipping coupons, but admitted that he had also expanded his business pursuits by purchasing over 130 internet domain names and at least \$10,000 in photography equipment.

¶7 Wife testified that she had purchased a home after the divorce using the property she received from the division of the parties' stock brokerage account, and had been employed as a dental assistant for the past two years, earning \$12.50 per hour. Wife testified that her monthly expenses totaled \$8,600, including \$2,239 paid toward college tuition for the parties' adult children and \$420 in mandatory retirement-account contributions. Wife's boyfriend testified that he had loaned Wife approximately \$20,000 while her divorce case was pending and she had since repaid part of that sum.

¶8 The court denied Husband's request to modify spousal maintenance, finding that Husband had failed to show that modification was warranted by substantial and continuing changed circumstances. The court also ordered Husband to pay a portion of Wife's attorney's fees and costs under A.R.S. § 25-324. Husband perfected his appeal from the court's ruling after some procedural delays.

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DISCUSSION

I. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION BY DENYING MODIFICATION OF SPOUSAL MAINTENANCE.

¶9 A decree's spousal maintenance award "may be modified or terminated only on a showing of changed circumstances that are substantial and continuing." A.R.S. § 25-327(A). The party seeking modification bears the burden to prove that there has been an actual, objective, unanticipated, and continuing change in circumstances since entry of the decree. *Scott v. Scott*, 121 Ariz. 492, 494, 591 P.2d 980, 982 (1979) (burden of proof is on petitioner; speculative or temporary changes do not support modification); *Reeves v. Reeves*, 146 Ariz. 471, 472, 706 P.2d 1238, 1239 (App. 1985) (changes anticipated by judge do not support modification); *Richards v. Richards*, 137 Ariz. 225, 226, 669 P.2d 1002, 1003 (App. 1983) (inquiry compares current circumstances with those existing at dissolution); *Sheeley v. Sheeley*, 10 Ariz. App. 318, 321, 458 P.2d 522, 525 (1969) (subjective changes do not support modification). The criteria to be considered are the same as those considered in making an original maintenance award. *Nace v. Nace*, 107 Ariz. 411, 413, 489 P.2d 48, 50 (1971). These criteria are set forth in A.R.S. § 25-319, in which subsection (A) defines circumstances that may justify an award and subsection (B) lists factors relevant to deciding the amount and duration of an award. The superior court has considerable discretion to decide whether modification is warranted. *Nace*, 107 Ariz. at 413, 489 P.2d at 50.

¶10 Husband contends that the superior court abused its discretion because its findings cited § 25-319(B) but not § 25-319(A) and because, according to Husband, the evidence "was overwhelming that a substantial and continuing change of circumstances had occurred" in support of modification. We reject these arguments.

¶11 The court's findings, though articulated within the framework of § 25-319(B), clearly show that the court considered all relevant criteria. The initial spousal maintenance award was made based on findings under § 25-319(A)(1) and (2) that Wife lacked sufficient property to provide for her reasonable needs and was unable to be self-sufficient through employment. The court's findings on Husband's petition for modification reflect that the court properly considered whether Wife's employment and ability to make voluntary expenditures showed that she was then able to provide for herself.

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¶12 Contrary to Husband’s contention, the evidence of Wife’s employment and expenditures did not compel the court to find that she no longer qualified for spousal maintenance. Wife’s employment was merely one factor to be considered. *Norton v. Norton*, 101 Ariz. 444, 446, 420 P.2d 578, 580 (1966). We cannot say that the court abused its discretion by concluding that Wife’s sooner-than-projected earnings did not justify modification, especially in view of the decree’s provision for long-term spousal maintenance concurrent with her anticipated employment. Further, Husband presented no evidence that Wife’s discretionary expenditures<sup>1</sup> were funded by resources she acquired after entry of the decree. Wife’s use of property previously awarded to her does not, in and of itself, constitute a changed circumstance. *See Scott*, 121 Ariz. at 495, 591 P.2d at 983. Wife testified that she purchased her home using property she received in the divorce. Further, contrary to Husband’s contentions, Wife’s receipt of monthly payments under the ARFLP 69 agreement did not constitute new income. The agreement did nothing more than change the mechanism by which Wife received property awarded to her in the decree. It did not increase her resources, and Husband’s suggestions to the contrary are purely speculative.<sup>2</sup>

¶13 On this record, the superior court did not abuse its discretion by concluding that Wife continued to qualify for spousal maintenance as contemplated by the decree. Nor did the court abuse its discretion by concluding that Husband continued to be able to pay the spousal maintenance.

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<sup>1</sup> We reject Wife’s contention that her contributions to the educational expenses of the parties’ adult children were properly considered as an “offset” to her sooner-than-projected earnings. Husband is correct that these expenditures were purely discretionary. *See* A.R.S. § 25-320(F); *MacMillan v. Schwartz*, 226 Ariz. 584, 591, ¶ 31, 250 P.3d 1213, 1220 (App. 2011).

<sup>2</sup> Husband contends that the agreement benefitted Wife because it gave her cash payments plus interest. He ignores, however, that the agreement also deprived Wife of the time-value of her interest in the business and calculated interest at the rate of eight percent per annum, which is lower than the rate she could have obtained on a pre-2011 judgment. *See* 2011 Ariz. Sess. Laws, ch. 99, § 15 (1st Reg. Sess.).

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II. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION BY  
AWARDING ATTORNEY'S FEES AND COSTS TO WIFE.

¶14 Under A.R.S. § 25-324(A),

[t]he court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under [chapter 3 of Title 25] or chapter 4, article 1 of [Title 25].

We review the grant of attorney's fees under § 25-324(A) for abuse of discretion. *Graville v. Dodge*, 195 Ariz. 119, 131, ¶ 56, 985 P.2d 604, 616 (App. 1999).

¶15 The court ordered Husband to "pay a portion of Wife's reasonable attorney's fees and costs," finding that there was "no substantial disparity in financial resources between the parties" but "Husband acted unreasonably by . . . including in the calculation the \$3,000.00 per month payment for Wife's share of the business." Husband contends that the court "erred in its interpretation and application of [A.R.S. § 25-324(A)] by emphasizing the reasonableness factor over the financial disparity factor." In support of this argument, Husband asserts that "the primary purpose of A.R.S. § 25-324[A] is to provide a remedy for the party least able to pay their own attorney's fees." But the case law from which this principle derives, such as *Edsall v. Superior Court (Fenton)*, 143 Ariz. 240, 248-49, 693 P.2d 895, 903-04 (1984), has been superseded, at least in part, by the legislature's addition of the "reasonableness of the positions" factor to the statute in 1996. See 1996 Ariz. Sess. Laws, ch. 145, § 9 (2d Reg. Sess.). By its plain language, the current version of § 25-324(A) requires the court to consider not only the parties' relative financial circumstances, but also the reasonableness of their positions. See *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 37, 250 P.3d 1213, 1221 (App. 2011). Because there are two factors that must be considered, a neutral finding on one of the factors does not necessarily preclude an award. Here, the court expressly considered both factors. We cannot say that the court abused its discretion by concluding that the factors, taken together, weighed in favor of a partial fees and costs award to Wife.

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**CONCLUSION**

¶16 We affirm the superior court's denial of Husband's petition to modify spousal maintenance, and we affirm its award of attorney's fees and costs to Wife. Both Husband and Wife request an award of attorney's fees and costs on appeal under A.R.S. § 25-324. In the exercise of our discretion, we deny Husband's request and grant Wife's request. Wife is entitled to an award of reasonable attorney's fees and costs upon her compliance with ARCAP 21.



Ruth A. Willingham · Clerk of the Court  
FILED: mjt