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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/17/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 12-0749
)
DANIEL N. COLEMAN,) DEPARTMENT A
)
Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
KAREN SUE ROBINSON,)
)
Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-000773

The Honorable J. Justin McGuire, Judge *Pro Tempore*

AFFIRMED

Daniel N. Coleman
Appellant *In Propria Persona*

Phoenix

Karen Sue Robinson
Appellee *In Propria Persona*

Phoenix

C A T T A N I, Judge

¶1 Daniel N. Coleman ("Father") appeals from the superior court's decisions on remand denying his motion to sanction Karen Sue Robinson ("Mother") for an alleged disclosure violation and granting his petition to modify child support but imposing a

child support obligation of \$250 per month. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Mother are the parents of one minor child born in 2001. In 2008, the superior court entered orders establishing joint custody and equal parenting time, and setting child support obligations pursuant to the Arizona Child Support Guidelines ("Guidelines"), Arizona Revised Statutes ("A.R.S.") § 25-320 app.¹ At that time, the court found Father's income to be \$12,500 per month and Mother's income to be \$8,833 per month, and ordered Father to pay \$450 per month in child support.²

¶3 In 2010, Father filed a petition to modify child support in light of a new child and a "long-term change in compensation." One day before the hearing on the petition, Father filed a "Motion for Sanction of [Mother] Pursuant to Rule 65 / Motion for Summary Judgment" ("Motion for Sanctions")

¹ Absent material revisions after the relevant date, we cite a statute's current version. Because the child support modification order at issue in this appeal was entered in July 2012, we consider the 2011 Guidelines unless otherwise indicated. See Guidelines § 29(A).

² The court acknowledged that Father had testified to earning only \$5,833.33 per month and to a downturn in his business, but attributed a higher monthly income to him to account for "significant personal benefits he derives from this business that must be considered (Section 5D of the Guidelines)." The court also included an upward deviation in Father's support obligation, finding that \$293 per month as calculated under the Guidelines "would be inappropriate or unjust under the circumstances."

alleging, as relevant here, that Mother had failed to timely disclose any financial documentation pertaining to her side business as a dance instructor. Both Mother and Father then testified at the evidentiary hearing, and the court denied Father's petition to modify support because the change in circumstances was not "substantial and continuing" as required for a modification of the support order. The court thereafter denied the Motion for Sanctions as untimely. After the superior court denied Father's motion for reconsideration and motion for new trial, Father appealed.

¶4 On appeal, this court concluded the superior court had erred by denying the Motion for Sanctions as untimely and remanded for consideration of that motion on the merits. *Coleman v. Robinson*, 1 CA-CV 11-0034, 2011 WL 6101825, at *1-2, ¶¶ 7, 9 (Ariz. App. Dec. 8, 2011) (mem. decision). This court also "vacate[d] the superior court's judgment denying Father's petition to modify child support because the [superior] court did not address Father's contention that Mother failed to make pretrial disclosure of financial documentation concerning her proprietorship in connection with the petition to modify." *Id.* at *3, ¶ 15. This court then addressed several issues likely to arise on remand, noting that no record evidence supported the superior court's finding that Father's monthly income remained \$12,500 and directing the superior court on remand to reconsider

the issue of Mother's income in light of its resolution of the Motion for Sanctions. *Id.* at *3-4, ¶¶ 15, 18-19, 22.

¶15 On remand, without further briefing, the superior court addressed the merits of Father's Motion for Sanctions. On the basis of the parties' testimony at the 2010 evidentiary hearing, the court considered Father's allegation that Mother had failed to disclose an IRS 1099 form related to her business as a dance instructor for 2009. The court found that both parties testified Mother's dance-instructor income was included in her 2009 tax return, which Father possessed before the hearing. In addition, the court, in its discretion, excluded Mother's income from her second job as a dance instructor from the child support calculation because mother has a full-time job, which rendered the additional sole-proprietorship income irrelevant to the modified support determination. See Guidelines § 5(A). Accordingly, the court denied the Motion for Sanctions because any alleged discovery violation was harmless.

¶16 The superior court also reassessed the merits of Father's petition to modify child support on remand. Relying on evidence presented at the 2010 evidentiary hearing, the court found Father's income to be \$5,892.86 per month (which accounted for Father's personal use of a company car and airplane using IRS guidelines), accounted for Father's expenses for his new child, found Mother's income to be \$9,228.42 per month, and

attributed to Father 152 days of parenting time yearly. The court noted that a calculation pursuant to the Arizona Child Support Guidelines would result in Father paying \$43.52 per month, but concluded an upward deviation to \$250 per month was appropriate. See *infra* ¶¶ 19-20.

¶7 Father timely appealed.³ We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Motion for Sanctions.

¶8 Father first argues the superior court ignored this court's mandate by denying his Motion for Sanctions without considering Mother's dance-instructor income. In the prior appeal, this court concluded the superior court had erred by denying the Motion for Sanctions as untimely and remanded for consideration of the motion on the merits. *Coleman*, 2011 WL 6101825, at *1-2, ¶¶ 7, 9. On remand, the superior court considered the merits of the motion "insofar as it relates to an alleged discovery violation regarding disclosure of documents

³ Father filed his notice of appeal more than 11 weeks after the entry of the signed child support modification order. Within 15 days of the child support modification order, however, Father filed a "Motion to Vacate" the modification order, which argued grounds for a new trial under Arizona Rule of Civil Procedure 59(a). See also Ariz. R. Fam. Law P. 83. Father timely filed his notice of appeal after the superior court denied this time-extending motion.

related to Mother's work as a dance instructor." Although Father disagrees with the denial of his motion, the superior court complied with this court's mandate by addressing the merits of the Motion for Sanctions.

¶9 Father claims the superior court necessarily erred by denying his motion for sanctions without determining whether Mother had complied with her disclosure obligation. We review the superior court's ruling on discovery and disclosure matters, including requests for sanctions, for an abuse of discretion. *Marquez v. Ortega*, 231 Ariz. 437, 441, ¶ 14, 296 P.3d 100, 104 (App. 2013). Ariz. R. Fam. Law P. 65(C)(1) provides for mandatory sanctions for a failure to timely disclose required information "unless such failure is harmless." Here, the superior court reasoned that Mother's failure to disclose financial documentation of her side-job dance-instructor income was harmless both because Father had access to the requisite information and because Mother's second income, if any, would not be included for purposes of the child support calculation. Father argues both of these findings are erroneous.

¶10 The Guidelines direct that "[g]enerally, the court should not attribute income greater than what would have been earned from full-time employment." Guidelines § 5(A). Mother testified at the evidentiary hearing that she earned \$110,741 annually from her 40-hour-per-week job. This full-time job was

entirely separate from her side business as a dance instructor, which Mother testified operated at a loss. In the child support calculation, the court attributed to Mother the full amount of earnings from Mother's full-time employment. The court did not abuse its discretion by declining, in accordance with the Guidelines, to consider Mother's additional income from a side job.⁴ Mother's alleged failure to timely disclose financial documentation of her side job thus had no impact on the support determination. Accordingly, the superior court did not err by concluding on that basis that any alleged disclosure violation was harmless.⁵

¶11 Although the superior court did not determine whether Mother had failed to timely comply with her disclosure obligations, that determination was unnecessary given the court's conclusion that any such failure did not prejudice

⁴ Father argues that this court "clearly rejected" the superior court's decision to exclude Mother's dance-instructor income from the child support calculation. In the prior appeal, this court took no position on whether the income from Mother's side job should or could be excluded from the support calculation, but rather instructed the superior court to reconsider its calculation of Mother's income as necessary in light of its decision on the merits of Father's Motion for Sanctions on remand. *Coleman*, 2011 WL 6101825, at *4, ¶ 22.

⁵ Because we affirm the superior court's ruling on this basis, we need not address Father's argument that the court erred by finding Father had adequate access to the dance-instructor income information.

Father. We therefore affirm the superior court's denial of Father's Motion for Sanctions.

II. Child Support Modification.

¶12 Father next argues the superior court erred in calculating his modified child support obligation. The superior court has broad discretion in considering modification of child support, and we will not disturb its decision absent an abuse of discretion. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). "An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision." *Id.* (citation omitted).

A. Mother's Income.

¶13 Father argues the superior court erred by excluding Mother's income from her side business as a dance instructor. But, "the court should not attribute income greater than what would have been earned from full-time employment." Guidelines § 5(A). Although Father claims no record evidence establishes that Mother's full-time earning capacity does not include income from her sole proprietorship, the superior court acted within its authority when it determined that Mother's 40-hour-per-week job constituted full-time employment. The court did not err by following the Guidelines and excluding from consideration Mother's income from her side job as a dance instructor.

B. Father's Income.

¶14 Father claims the superior court "lacked jurisdiction" to recalculate his income in light of this court's mandate and that this court ruled that his income was \$4,829 per month. To the contrary, this court expressly recognized that Father's income would be reconsidered on remand. See *Coleman*, 2011 WL 6101825, at *3-4, ¶¶ 15-19. We concluded only that the evidence presented -- including Father's 2009 tax return, Father's testimony as to his earnings in 2010, and Mother's testimony that Father's income was "grossly understated" -- did not support a finding of \$12,500 per month, but did not determine Father's income in the first instance. *Id.* at *3, ¶¶ 17-18.

¶15 To the extent Father also argues the superior court's finding of his income (\$5,892.86 per month) lacked support in the record, we disagree. Although Father testified to, and his 2009 tax return showed, monthly income of approximately \$4,892, Father also testified that his income through the first seven months of 2010 totaled \$41,750, yielding income of \$5,964.29 per month. The superior court was entirely within its discretion to accept Father's more recent income figures, and to adjust the monthly amount slightly downward to account for Father's testimony that his income is cyclical and tends to decrease toward the end of the calendar year.

C. Application of 2011 Guidelines.

¶16 Father next argues the superior court erroneously applied the 2005 rather than the 2011 version of the Guidelines. Because the modification order was entered in July 2012, Father is correct that the 2011 Guidelines control. See Guidelines § 29(A). Although the court used a Child Support Worksheet based on the 2005 Guidelines, the record does not indicate that the court applied the incorrect version of the law or that application of the 2011 Guidelines would yield a different result. See *Hart v. Hart*, 220 Ariz. 183, 188, ¶ 18, 204 P.3d 441, 446 (App. 2009) (superior court presumed to know and apply correct law unless record shows otherwise).

¶17 Father argues that changes to § 9 (regarding childcare expenses) and to §§ 11-12 (regarding parenting time adjustments and equal custody situations) would result in a different obligation if calculated under the 2011 Guidelines. None of these sections, however, were changed in the 2011 Guidelines.⁶

⁶ Father misconstrues the language of § 9 in arguing that the court should not have considered either parent's childcare expenses in the support calculation. Section 9(B)(1) expressly allows the superior court to add appropriate childcare expenses to the basic child support obligation. The language cited by Father -- that "neither parent shall be entitled to the credit for purposes of calculating child support" -- refers to the application of a federal tax credit for childcare costs to the support calculation.

Additionally, the superior court applied the appropriate parenting-time adjustment -- 30.7 percent -- for Father's 152 days of parenting time. See Guidelines § 11, tbl.A. To the

See Ariz. Sup. Ct. admin. order no. 2011-46 (May 4, 2011) ("No change in text" to sections 9. through 26.).

D. Upward Deviation in Father's Support Obligation.

¶18 Father argues the superior court erred by making an upward deviation from his child support obligation as calculated under the Guidelines. The Guidelines require a deviation from the specified amount if, upon consideration of the best interests of the child, application of the Guidelines in the particular case would be "inappropriate or unjust." Guidelines § 20(A)(1)-(2). The court must make written findings to that effect and state what the support obligation would have been both with and without the deviation. Guidelines § 20(A)(3)-(5).

¶19 Here, the superior court entered the requisite written findings, stating that the Guideline amount of Father's obligation would be \$43.52 per month but deviating upward to \$250.00 per month. See Guidelines § 20(A)(4)-(5). The court expressly found applying the Guideline amount in this case would be "inappropriate and unjust" and stated it "ha[d] considered the best interests of the child in determining that a deviation is appropriate." See Guidelines § 20(A)(1)-(3). The court explained that "[t]he deviation is appropriate because the Court

extent Father argues the superior court erred by finding he exercised 152 rather than 155 days of parenting time, Mother's testimony provided sufficient support for the superior court's finding. Cf. *Coleman*, 2011 WL 6101825, at *5, ¶ 23.

does not believe that the IRS guidelines fully reflect the actual value of Father's access to and use of the airplane and car provided by his business."⁷

¶20 Father claims the superior court had no basis for its conclusion that the value of these fringe benefits for child support purposes exceeded the value reflected in Father's tax return as calculated under IRS guidelines. We note that the original, 2008 support order considered the "significant personal benefits [Father] derives from this business." Further, the superior court has discretion to consider the actual value of benefits received by a parent in order to calculate the appropriate amount of child support. Cf. Guidelines § 5(D) ("[B]enefits received by a parent in the course of employment . . . shall be counted as income if they are significant and reduce personal living expenses."). Although IRS regulations may be instructive in appropriate cases, the superior court is not bound by IRS valuation standards used for federal income tax purposes -- for example, the vehicle cents-per-mile automobile valuation rule to which

⁷ Father claims that this court's decision in the prior appeal foreclosed the superior court's finding that the amount of Father's income "does not accurately reflect the true value of Father's personal use of [the] company aircraft and car." As explained above, see *supra* ¶ 15, we concluded only that the record did not support attributing \$12,500 monthly to Father but took no position on the value of Father's use of employer-provided vehicles. See *Coleman*, 2011 WL 6101825, at *3-4, ¶¶ 15-19.

Father testified, see 26 C.F.R. § 1.61-21(e) -- when assessing the benefit actually received by Father for child support purposes.⁸ Accordingly, the superior court did not abuse its discretion by determining an upward deviation in Father's child support obligation was necessary to reflect the full value of fringe benefits of his employment.

CONCLUSION

¶21 For the foregoing reasons, we affirm.

/S/

KENT E. CATTANI, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

JOHN C. GEMMILL, Judge

⁸ Father also argues the superior court "had no evidence or testimony to determine what the IRS Guidelines are for aircraft /vehicle cost calculation." Although the guidelines are not part of the record on appeal, the IRS valuation rules for fringe benefits are matters of law rather than facts to be proven through submission of evidence. See, e.g., 26 U.S.C. § 61(a)(1) (defining gross income to include "fringe benefits"); 26 C.F.R. § 1.61-21(b) to (g) (IRS valuation rules for income inclusion of employer-provided vehicles as fringe benefits).