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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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ELIZABETH H DWYER, *Petitioner/Appellee*,

*v.*

JUSTIN FRANCIS DWYER, *Respondent/Appellant*,

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STATE OF ARIZONA, *ex rel.*, DEPARTMENT OF  
ECONOMIC SECURITY, *Third-Party/Appellee*.

No. 1 CA-CV 17-0055 FC  
FILED 10-26-2017

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Appeal from the Superior Court in Yavapai County  
No. P1300DO20050774  
The Honorable Patricia A. Trebesch, Judge

**AFFIRMED IN PART; VACATED AND REMANDED WITH  
INSTRUCTIONS**

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COUNSEL

Law Office of Robert L. Frugé P.C., Prescott  
By Robert L. Frugé  
*Counsel for Petitioner/Appellee*

Gillespie Shields Durrant & Goldfarb, Mesa  
By Mark A. Shields  
*Co-Counsel for Respondent/Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Peter B. Swann and Judge Maurice Portley<sup>1</sup> joined.

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**M c M U R D I E**, Judge:

¶1 Justin Francis Dwyer (“Father”) appeals from the superior court’s order modifying his child support obligation. For the reasons stated below, we affirm the ruling that a deviation from the Child Support Guidelines, Arizona Revised Statutes (“A.R.S.”) section 25-320 (“Guidelines”), was warranted, but remand for redetermination of the amount of the deviation after the parties conduct proper discovery.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 The parties have three children, one of whom graduated from high school during the modification litigation. In 2009, the superior court ordered Father to pay \$250 per month in child support. Father’s obligation would have been zero per the Guidelines, but the court ordered an upward deviation based on his lack of living expenses and parenting time while incarcerated, and the extraordinary expenses Elizabeth H. Dwyer (“Mother”) paid for the children’s activities and travel.

¶3 In 2013, Mother filed a petition to modify the 2009 child support order, seeking \$1,050 per month from Father because he had received a large inheritance. She later supplemented her petition, stating the upward deviation should also be based on Father’s lack of expenses while incarcerated. In January 2015, Mother additionally asked the court to (1) increase the child support order to \$1,500 per month, (2) order past child support of \$135,000, and (3) increase Father’s share of the health care expenses not covered by insurance.

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<sup>1</sup> The Honorable Maurice Portley, retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

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¶4 At an evidentiary hearing on Mother’s petition, the parties stipulated Father’s interest income on his inheritance was \$70,000 per year. Mother testified about expenses warranting a deviation from the Guidelines. Father objected arguing Mother had not properly requested a deviation, failed to disclose the expenses before the hearing, and had not filed a pretrial statement indicating the basis for her request. Regarding Father’s objection to the deviation request, the court stated a deviation was “fair game” in any child support calculation. Concerning the lack of disclosure, the court noted Mother’s Affidavit of Financial Information (“AFI”) should have reflected these expenses, and it was ultimately Mother’s burden to provide the court with sufficient evidence to support a deviation. The court stated it would address Father’s claim of surprise at the end of the hearing, but it never did. The court ultimately concluded a “reasonable” deviation was warranted based on Father’s approval of the children’s activities and travel, and directed the parties to submit child support worksheets along with a proposed reasonable deviation amount or the court would determine the amount.

¶5 Per the Guidelines, Father’s child support obligation was \$1,200 per month, reduced to \$1,100 when the oldest child graduated from high school. The final order granted a deviation, finding the children’s lifestyle during the marriage was above average and Father had approved of and encouraged the numerous activities for the children. The court found these activities cost \$2,500 to \$3,500 per month and, therefore, increased Father’s child support obligation to \$3,500 per month, reduced to \$3,000 per month when the oldest child graduated. Father filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).

## DISCUSSION

¶6 Father contends the superior court erred by failing to follow the Income Shares Model when it ordered him to pay more than his proportionate share of the total child support obligation, and by deviating from the Guidelines absent a proper request by Mother and on insufficient evidence. We review the superior court’s ruling on a petition to modify child support for abuse of discretion; however, we review *de novo* the court’s interpretation of the child support statutes and Guidelines. *Milnovich v. Womack*, 236 Ariz. 612, 615, ¶ 7 (App. 2015).

### **I. The Superior Court Properly Applied the Income Shares Model.**

¶7 Unless a written finding is made based on criteria set forth in A.R.S. § 25-320(D) and Guidelines § 20 “that application of the guidelines

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would be inappropriate or unjust in a particular case,” courts must order child support in accordance with the Guidelines. After considering the statutory criteria, the superior court found, in writing, a significant upward deviation was warranted. Per the Guidelines, Father’s proportionate share of the total child support amount would have been 35%, or approximately \$1,200 (and later \$1,100), but he was ordered to pay a deviated amount of \$3,500 (and later \$3,000) per month.

¶8 As this court has previously stated:

The Guidelines establish a framework for determining the amount of child support “consistent with the reasonable needs of children and the ability of parents to pay.” Guidelines § 1. The premise of the Guidelines is the Income Shares Model, which itself is based on two principles: (1) “The total child support amount approximates the amount that would have been spent on the children if the parents and children were living together,” and (2) “Each parent contributes his/her proportionate share of the total child support amount.” *Id.*

*Nash v. Nash*, 232 Ariz. 473, 476, ¶ 7 (App. 2013). Father contends the superior court erred as a matter of law when it failed to follow the Income Shares Model when it calculated the deviated amount.

¶9 A deviation is a child support order “in an amount different from that which is provided pursuant to these [G]uidelines[.]” Guidelines § 20. The Guidelines are based on the Income Shares Model. Therefore, when a court determines a deviation from the Guidelines is appropriate, it is determining that the Income Shares Model is inappropriate for that case. The court must, of course, comply with the Guidelines and the statutory requirements when determining whether the deviation is appropriate. *See* Guidelines § 20; A.R.S. § 25-320(D). We find no abuse of discretion by the superior court in ordering Father to pay more than his proportionate share of the total child support amount.

¶10 Father contends *Nash* held each party must pay support in proportion to their income even after deviation. We disagree. The superior court in *Nash* never determined the parties’ proportionate income amounts. *Nash*, 232 Ariz. at 477, ¶¶ 11-12. Therefore, *Nash* instructed the superior court on remand to add the relevant expenses to the basic child support obligation, determine Father’s income, and allocate the Total Child Support Obligation in proportion to the parties’ incomes. “After performing that

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division, the court may order the parties to make specific child-support payments consistent with the outcome of its analysis.” *Id.* at 478, ¶ 15 (emphasis added). In other words, the court shall first determine the child support obligation per the Guidelines, then consider the deviation factors, and follow with an order of child support consistent with that analysis. *Nia v. Nia*, 242 Ariz. 419, 424, ¶¶ 19–20 (App. 2017). *Nash* did not hold that in a case where a deviation is appropriate the court must nonetheless apply the Income Shares Model in determining a parent’s child support obligation.

**II. Father Was Prejudiced by Mother’s Failure to File a Pretrial Statement or Provide Requested Discovery.**

¶11 Father argues that because Mother failed to file a pretrial statement requesting a deviation, Father was denied adequate due process. Therefore, Father contends that the potential deviation was limited by Mother’s pleadings and the submitted child support worksheets. The pleadings sought an order increasing child support to \$1,050 per month retroactive to the date when Father received his inheritance. Mother counters that she sufficiently raised her request for a deviation and was not required to file a pretrial statement because the court did not specifically order one.

¶12 We disagree that a pretrial statement was not required. Arizona Rule of Family Law Procedure (“Rule”) 91(N)(3) requires a pretrial statement to be filed in post-decree modification hearings “in the form set forth in Rule 76(C),” unless otherwise ordered by the court. “The pretrial statement controls the subsequent course of the litigation.” *Leathers v. Leathers*, 216 Ariz. 374, 378, ¶ 19 (App. 2007) (quoting *Carlton v. Emhardt*, 138 Ariz. 353, 355 (App. 1983)). A pretrial statement puts parties on notice of the remaining contested issues; issues not listed are waived. *See id.* at ¶ 17–19 (the court properly limited a hearing only to the issues raised in the parties’ joint pretrial statement, which excluded husband’s failure to maintain a court-ordered life insurance policy, although wife raised that issue in her request for temporary orders, settlement conference memorandum, and husband testified about the issue in open court). Unless Father can show prejudice, Mother’s failure to file a pretrial statement does not mean the child support order must be vacated. *See* Rule 86 (“No error . . . by any of the parties is ground . . . for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.”)

¶13 Unlike *Leathers* where many potential issues remained to be resolved, the main purpose of the hearing in this case was Mother’s request

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for a deviation. In September 2013, Mother sought “an increase in child support, medical/dental support and child expenses. A deviation from the child support calculator, substantially increasing child support, due to the fact that [Father] has little to no expenses while he in [sic] incarcerated.” Although the court did not specifically relieve the parties from filing a pretrial statement, *see* Rule 91(N)(3), Mother’s lack of filing her pretrial statement did not preclude the court from considering the issue of deviation because it was raised and addressed by both parties before the hearing, including in Father’s own pretrial statement. Likewise, the determination of whether a deviation is warranted, and the appropriate amount, is within the discretion of the court based on the evidence presented. *Nia*, 242 Ariz. at 422, ¶ 7.

¶14 The superior court erred, however, by holding that a deviation is always “fair game” in any modification proceeding. A party has a “due process right to adequate notice and a *meaningful opportunity to be heard*.” *Heidbreder v. Heidbreder*, 230 Ariz. 377, 381, ¶ 13 (App. 2012) (emphasis added); *Cook v. Losnegard*, 228 Ariz. 202, 206, ¶ 18 (App. 2011). Although Father had adequate notice a deviation was at issue even without Mother filing a pretrial statement, he was not given a reasonable opportunity to respond to the evidence presented because Mother failed to disclose the evidence she claimed supported the extraordinary expenses warranting a deviation.

¶15 In November 2015, Father requested medical bills and copies of Mother’s evidence per Rule 91(P)(5). When Mother failed to provide these documents, Father filed a motion to compel discovery, to which Mother did not respond, and the court never ruled on the motion.

¶16 Early in the case, Mother filed a pleading that merely listed expenses, but did not include the supporting documentation. At the final hearing, Mother’s attorney claimed a pretrial statement was not required, and that Father had not requested any specific information. However, Mother *was* required to file a pretrial statement, and Father *had* specifically requested the information from Mother. While the court noted Mother’s AFI needed to demonstrate these expenses “in fairness to [Father,]” and told Mother it was her duty to submit any exhibits she wanted the court to rely on to support the children’s extraordinary expenses, the court nonetheless issued a deviation order without such evidence in the record.

¶17 Mother contends Father was not prejudiced because he had notice of Mother’s deviation request. Notice alone is insufficient to comply with due process requirements; sufficient supporting evidence is also

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necessary. Mother's AFI does not include any of the extraordinary expenses, to which she testified. Mother also cites her "exhibits" as sufficient support for the deviation ordered. But Mother's list of various expenses lacks sufficient dates or detail to allow a court to determine which expenses were incurred monthly or annually. Because Mother did not file the required pretrial statement, *see* Rule 91(N)(3), did not respond to the motion to compel, and the court did not rule on Father's motion or objection to the lack of disclosure, nothing in the record supports Mother's contention that Father was not prejudiced. *See In re Marriage of Kells*, 182 Ariz. 480, 484 (App. 1995) (without evidence supporting the court's deviation, it must be set aside for an abuse of discretion); *see also Elliot v. Elliot*, 165 Ariz. 128, 135 (App. 1990) ("[W]e must be able to determine which evidence formed the bases of the awards before we can affirm them."). Therefore, a new hearing is required after the parties conduct proper discovery.

**III. Mother's Ability to Pay Expenses Does Not Preclude a Deviation.**

¶18 Because it may arise on remand, we address Father's argument that a deviation is not warranted because Mother was able to pay for the children's expenses herself when she received only \$250 per month in child support. Father contends that based on his increased income the new child support obligation is approximately \$1,100, which, combined with Mother's past ability to pay for these expenses, does not justify any deviation. Father's argument was expressly rejected in *Nash*, 232 Ariz. at 480-81, ¶ 28. Father now has a significant income that will enable him to contribute to these expenses. Mother should not be required to bear most of these expenses when Father has a monthly income of at least \$5,833, and had nearly zero living expenses while incarcerated.

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**ATTORNEYS' FEES AND COSTS ON APPEAL**

¶19 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324. In the exercise of our discretion, and after considering the reasonableness of the parties' positions on appeal and their financial resources, we decline to award attorneys' fees to either party. As neither party was entirely successful on appeal, we also decline to award costs on appeal pursuant to A.R.S. § 12-342.

**CONCLUSION**

¶20 We affirm that portion of the order finding a deviation was appropriate. We remand for redetermination of the amount of the deviation after the parties have the opportunity to conduct discovery. The parties shall bear their own attorneys' fees and costs on appeal.



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