IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

MARILYN CRYAN, *Petitioner/Appellant*,

v.

JOHN CRYAN, *Respondent/Appellee*.

No. 1 CA-CV 17-0341 FC
FILED 3-20-2018

Appeal from the Superior Court in Maricopa County
No. FC2015-052310
The Honorable Chuck Whitehead, Judge

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge James B. Morse Jr. joined.

J O N E S, Judge:

¶1 Marilyn Cryan (Wife) appeals from the property allocation and child support orders within the decree of dissolution dissolving her marriage to John Cryan (Husband). For the following reasons, we affirm the imputation of trust income to Wife but vacate the child support order. We also vacate the portions of the decree addressing the allocation of property and debt, and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 The parties were married in 2008 and have two minor children.[1] Wife filed a petition for dissolution in June 2015 while she resided in Arizona and Husband resided in New York. The following month, the family court entered temporary orders requiring Husband to pay $1,500 per month in child support. Although both parties identified legal decision-making, parenting time, child support, and the allocation of certain property and debts as contested issues, the majority of the August 2016 trial focused on how distributions to Wife from a family trust should be treated for purposes of calculating child support.

¶3 After taking the matter under advisement, the family court issued a ruling addressing legal decision-making and parenting time. The court also reduced Husband's child support obligation to $632 per month, retroactive to August 1, 2015, after increasing Wife's monthly income to account for trust distributions and calculating the parties' respective child support responsibilities. The retroactive child support order resulted in a $13,020 overpayment by Husband. The ruling did not address the allocation of property and debt, how to account for the child support

[1] "We view the facts in the light most favorable to sustaining the family court's ruling[s]." *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 522 n.1, ¶ 1 (App. 2007) (citing *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2 (App. 2005)).

overpayment, or the division of travel expenses related to long-distance parenting time. The court then directed the parties to "submit a Consent Decree to the Court for review and signature" by November 18, 2016.

¶4 The parties were apparently unable to reach a consensus regarding the issues that remained unaddressed by the family court, and on November 18, 2016, Husband lodged a proposed decree that included orders regarding the allocation of property and debt, as well as travel expenses related to long-distance parenting time. Husband's proposed decree also ordered Wife to repay Husband the child support overpayment within the next month. That same day, Wife objected to Husband's proposed decree and asked the court to wait until she submitted her own proposed decree, on or before December 2, before making a ruling.[2]

¶5 On November 30, 2016, the family court adopted Husband's proposed decree without further explanation. Wife then filed her proposed decree and moved the court, unsuccessfully, to reconsider its ruling after considering her position. Wife timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)[3] and -2101(A)(1).

DISCUSSION

I. Adoption of the Proposed Decree

¶6 Wife argues the family court erred as a matter of law by adopting Husband's proposed decree instead of making an independent decision upon the disputed issues.[4] Whether a decree accurately reflects

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[2] Although Wife claimed she had received a verbal extension to file a proposed decree from a judicial assistant, the record does not indicate that accommodation was ever granted by the family court.

[3] Absent material changes from the relevant date, we cite a statute's current version.

[4] Husband argues Wife waived any objection to his decree by failing to timely submit a competing proposal, failing to present evidence upon the issues not addressed within the under advisement ruling at trial, and failing to object to the inadequacy of the family court's findings within her motion for reconsideration. These contentions are not supported by the record, which reflects Wife filed a timely objection to Husband's proposed decree

the parties' agreements or the court's prior rulings presents a question of law reviewed *de novo*. *See Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, 272, ¶ 6 (App. 2003) (noting interpretation of a settlement agreement is a question of law reviewed *de novo*) (citing *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, 119, ¶ 5 (App. 2003), and *Citibank (Ariz.) v. Bhandhusavee*, 188 Ariz. 434, 435 (App. 1996)).

¶7 A consent decree "is one that is entered by stipulation of the parties." *Elliott v. Elliott*, 165 Ariz. 128, 133 (App. 1990) (citing *Cochise Hotels, Inc. v. Douglas Hotel Operating Co.*, 83 Ariz. 40, 47 (1957)). It is wholly different from a judgment issued by the court after a trial upon the merits of the case. *Id.* (quoting 47 Am. Jur. 2d *Judgments* § 1082 (1969)). The decision to proceed by consent rests solely with the parties. *See* Ariz. R. Fam. Law P. 45(A) (providing that "the *parties* may elect to proceed by Consent Decree") (emphasis added). When the parties agree to do so, "[t]he judge or commissioner assigned to the case shall determine whether the parties have met the requirements for a Decree, Order, or Judgment by consent." *Id.*

¶8 Even if the family court had been empowered to order the parties to proceed via consent when contested issues remained unresolved, to be valid, a consent decree must be signed and notarized by both parties, signed by counsel if represented, and specifically state that:

> (a) the parties agree to proceed by consent; (b) each party believes no duress or coercion is involved; (c) for any dissolution or legal separation, each party believes that any division of property is fair and equitable; (d) each party understands that he or she (i) may retain or has retained legal counsel of his or her choice and (ii) is waiving the right to trial; and (e) the effect, if any, on any existing protective orders.

Ariz. R. Fam. Law P. 45(B). Husband's decree did not comply with Rule 45 and did not even purport to represent a consensual agreement. Accordingly, the form, content, and execution of the "consent order"

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based, in part, upon its nonconsensual nature. Additionally, Wife listed all contested issues in her pretrial statement and requested additional time to present her case when she ran out of time at trial. Finally, Wife argued, within her motion for reconsideration, that the decree contained orders not addressed within the under advisement ruling and to which Wife did not consent. Accordingly, Wife did not waive her arguments.

Husband filed did not comport with the relevant rule, and the court erred in accepting it.

¶9 Husband argues the family court had discretion to order the parties to submit a proposed form of order. While the court may direct the parties to submit proposed findings of fact and conclusions of law, those findings must be "consistent with the [findings and conclusions] that [the court] reaches independently after properly considering the facts." *Elliott*, 165 Ariz. at 134 (citations omitted). The record contains no indication the court ever received, let alone considered, evidence or testimony regarding the allocation of property and debt. Thus, the court erred in adopting findings and conclusions addressing those issues. *See Boyle v. Boyle*, 231 Ariz. 63, 65, ¶ 8 (App. 2012) ("A family court abuses its discretion by . . . making a discretionary ruling that the record does not support.") (citing *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 19 (App. 2009)). Accordingly, we vacate the portions of the decree addressing the division of property and debt and remand for the court's taking and consideration of appropriate evidence and argument regarding their allocation.

II. Child Support Order

¶10 Wife argues the family court erred by: (1) including trust distributions as recurring income; (2) retroactively modifying the child support order using her current, higher earnings; and (3) failing to account for otherwise undisputed childcare costs. We review a child support order for an abuse of discretion. *McNutt v. McNutt,* 203 Ariz. 28, 30, ¶ 6 (App. 2002) (citing *Kelsey v. Kelsey*, 186 Ariz. 49, 53 (App. 1996)). We accept the court's findings of fact unless they are clearly erroneous but draw our own legal conclusions from the facts and review *de novo* the interpretation of the Arizona Child Support Guidelines. *Id.* (citing *Burnette v. Bender*, 184 Ariz. 301, 304 (App. 1995), and then *Mead v. Holzmann*, 198 Ariz. 219, 220, ¶ 4 (App. 2000)).

A. Trust Income

¶11 Wife contends the family court abused its discretion by adding $6,850 to her monthly income because the trust distributions she received were not regular and recurring. Indeed, the evidence establishes only that Wife withdrew funds from the trust between February and May 2016, a time during which she was unemployed. The trustee testified that distributions from the trust are not automatic; rather, the trustee considers each individual request and acts in compliance with the terms of the trust, which generally permit distributions for the health, education,

maintenance, or support of the beneficiary. Here, Wife received funds for living expenses during her brief period of unemployment as well as disbursements for other expenses, such as a vacation, furniture, and legal fees.

¶12 Pursuant to the Arizona Child Support Guidelines:

> Gross income includes income from any source, and may include, but is not limited to, income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits . . . , disability insurance benefits, recurring gifts, prizes, and spousal maintenance. . . . Seasonal or fluctuating income shall be annualized. Income from any source which is not continuing or recurring in nature need not necessarily be deemed gross income for child support purposes.

A.R.S. § 25-320 app. § 5(A) (Guidelines). By their express terms, the Guidelines grant the family court discretion to include income that is "not continuing or recurring" as gross income for child support purposes, "which also means that income received in a lump sum is not necessarily excluded from gross income." *Milinovich v. Womack*, 236 Ariz. 612, 616, ¶ 14 (App. 2015). Moreover, this Court has held that including "predictable gift income" as a parent's income is consistent with the purpose of "the Guidelines [to] ensure the child support award is 'just' and based on the total financial resources of the parents." *Cummings v. Cummings*, 182 Ariz. 383, 386 (App. 1994); *see also* Guidelines § 1(A) (stating the purpose of the Guidelines is "[t]o establish a standard of support for children consistent with the reasonable needs of children and the ability of parents to pay"); *Milinovich*, 236 Ariz. at 616, ¶ 15 (concluding a parent's withdrawal of principal from a retirement account "falls within the Guidelines' broad definition of gross income and categorizing these monies as income is both consistent with the overall purposes of the Guidelines and the best interests of the child") (citations omitted).

¶13 We review the family court's determination that a particular source of funds counts towards a parent's gross income within the meaning of § 5(A) of the Guidelines for an abuse of discretion. *See Milinovich*, 236 Ariz. at 615, 617, ¶¶ 7, 16 (noting the categorization of funds "requires consideration of the Guidelines on a case-by-case basis"). An abuse of discretion occurs where the record is "devoid of competent evidence to support the decision" of the family court. *Hurd*, 223 Ariz. at 52, ¶ 19 (citing *State ex rel. Dep't Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 14 (2003)).

¶14 Although Wife presented evidence suggesting she took disbursements only because she was temporarily unemployed and argued her trust income was not recurring, this position was rejected below. This Court has previously held that "the court need not restrict its view of the evidence to a few isolated months . . . particularly when such income is controlled by the party himself and is subject to possible manipulation." *Pearson v. Pearson*, 190 Ariz. 231, 236 (App. 1997) (identifying factors relevant to a determination of whether a change in income is "continuing" for purposes of child support modification) (citing *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995)). Moreover, we do not reweigh conflicting evidence or reassess the credibility of witnesses on appeal, *Hurd*, 223 Ariz. at 52, ¶ 16, and the record contains sufficient evidence upon which the court could conclude Wife had access to sufficient trust monies that she could and would continue to supplement her usual income with trust disbursements for extraordinary expenses at an annualized rate of $6,850 per month. We therefore find no error in the imputation of additional income to Wife.

B. Retroactivity

¶15 Wife argues the family court erred in applying her increased earnings and imputed income retroactively. We agree.

¶16 The undisputed evidence reflects that, when Wife petitioned for dissolution in June 2015, Wife earned $3,200 per month. She stopped working in December 2015 and then reported no earnings in January and February 2016. Wife received a trust distribution for the first time in February 2016, and, over the next few months, received a total of $82,197.31 from the trust, which was properly imputed to her as income. *See supra* ¶ 14. Wife then obtained new employment in April 2016, earning $4,330 per month.

¶17 Here, the family court calculated child support after assigning Wife more than $11,180 in monthly income, which resulted from adding the $6,850 monthly trust income to her higher, post-April 2016 monthly employment income of $4,330. Although the court is authorized to annualize temporary, fluctuating, or lump-sum income, *see* Guidelines § 5(A); *Milinovich*, 236 Ariz. at 616, ¶ 14, and impute income to Wife during her unemployment, *see* Guidelines § 5(E), the record does not contain evidence to support the notion that Wife was earning $11,180 per month in August 2015. Accordingly, the court abused its discretion in using Wife's increased income — resulting from the trust distributions, which began in February 2016, and her post-April 2016 employment — to calculate her child support obligation between August 2015 and December 2015.

¶18 The child support order is vacated and remanded for the proper calculation of Wife's gross income. On remand, the family court should complete separate child support worksheets for the relevant time periods and enter child support orders accordingly. The court should use one worksheet for August 1 through December 31, 2015, reflecting Wife's earnings of $3,200 per month, *see supra* ¶ 16; one worksheet for January 1 through March 31, 2016, reflecting any wages attributed to Wife during her unemployment pursuant to Guidelines § 5(E) and attributed trust income; and one worksheet from April 1, 2016 going forward, reflecting Wife's current earnings of $4,330 per month plus any attributed trust income.

C. Childcare Costs & Travel Expenses

¶19 Wife argues the family court erred in failing to account for monthly childcare expenses when calculating child support and ordering her to pay all travel expenses associated with parenting time.

¶20 Generally, the family court has discretion under the Guidelines to adjust the child support obligation to account for childcare expenses and allocate travel expenses related to long-distance parenting time. Guidelines § 9(B)(1), (18). The court here did not include the cost of childcare in its calculation or specifically reject the otherwise undisputed evidence that Wife spent $1,275 per month on childcare. Nor did the court hear any evidence regarding "the means of the parents [or] how their conduct . . . has affected the costs of parenting time." Guidelines § 9(B)(18). On remand, the court shall consider evidence and testimony on these issues and, if appropriate, adjust the child support obligation accordingly.

D. Overpayment

¶21 Wife argues the family court erred by ordering her to reimburse Husband through an immediate lump sum payment for the overpayment of child support created by retroactive application of Wife's trust income. In his answering brief, Husband agrees the past overpayment should be applied as a credit against future payments.

¶22 Because the parties agree on an appropriate method of resolution, we need not address Wife's contention that A.R.S. § 25-327 precludes reimbursement for child support overpayments until the child support obligation has terminated absent a deviation supported by appropriate findings. *See In re Marriage of Allen*, 241 Ariz. 314, 318, ¶ 19 (App. 2016) (holding that although the court must determine the appropriate remedy for a child support overpayment, the parent's "entitlement to make such a request accrues only after his support

obligation is terminated"). To the extent any overpayment remains after child support is recalculated on remand, *see supra* Parts II(B) and (C), the family court is directed to impose the remedy agreed upon by the parties.

CONCLUSION

¶23 The family court's order imputing trust income to Wife as of February 2016 is affirmed. The child support order is vacated, as are the portions of the decree addressing the allocation of property and debt, the child support overpayment, and the division of expenses associated with long-distance parenting time. The case is remanded for further proceedings consistent with this decision. The court may, in its discretion, order additional evidence and/or argument as it deems necessary to resolve the issues subject to reconsideration.

¶24 Both parties request an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324(A). In the exercise of our discretion, we decline both requests. However, as the successful party, Wife is entitled to an award of costs incurred on appeal upon compliance with ARCAP 21(b). *See* A.R.S. § 12-341.