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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

In re the Matter of:

DUSTIN MATTHEWS, *Petitioner/Appellant*,

v.

ROSEANN ROBLES, *Respondent/Appellee*.

No. 1 CA-CV 17-0494 FC
FILED 9-13-2018

Appeal from the Superior Court in Maricopa County
No. FC2012-093973
The Honorable Jerry Bernstein, Judge *Pro Tempore*

REVERSED AND REMANDED

APPEARANCE

Dustin Matthews, Tempe
Petitioner/Appellant

Stewart Law Group, Chandler
By Jennifer Mihalovich
Respondent/Appellee

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Paul J. McMurdie joined.

WEINZWEIG, Judge:

¶1 Dustin Matthews (“Father”) appeals from the superior court’s order denying his petition to modify child support and award of attorney’s fees to Roseanne Robles (“Mother”). We reverse and remand for an evidentiary hearing because Father presented a colorable claim for modification of child support.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Mother are the biological parents of D.M., born in 2011. The superior court entered a paternity judgment in December 2013 granting the parties joint legal decision-making over D.M., implementing a parenting time schedule and ordering Mother to pay Father \$39.46 in monthly child support. The parties later agreed to terminate Mother’s ongoing child support obligation based on Father’s increased income, and the court entered an order to that effect.

¶3 Father filed a petition to modify legal decision-making, parenting time and child support in August 2016. He argued the prior judgment had become “outdated.” The court conducted an evidentiary hearing at which both Father and Mother testified. The court then issued an order in February 2017 that modified the co-parenting arrangement by increasing Mother’s monthly child support obligation to \$47.05, granting the parties joint legal decision-making and establishing equal parenting time. The court attributed additional gift income to Father in calculating the child support obligation:

[I]t is appropriate to attribute Father’s income at \$16.67 per hour. Mother has alleged that Father receives additional income in the form of gifts from other family members. Mother did not provide any evidence of these gifts, but simply referred to a previous finding by the Court attributing an additional \$1,037.00 per month in income to Father. Father did not address this allegation by Mother. There was no

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evidence presented that there had been any material changes in circumstances with respect to the monthly gifts to Father from his family. Father will be attributed an additional \$1,037.00 per month in income.

¶4 Father moved to alter or amend the February 2017 Order pursuant to Arizona Rule of Family Law Procedure (“Rule”) 83(A). He argued the court (1) improperly added \$1,037 to his monthly income because he no longer received gift income from his family, (2) did not consider that he paid all child care costs, (3) did not consider that the minor child had been added to his health insurance, (4) switched the alternating years in which the parties could claim the child as a tax exemption and (5) should not have designated Mother as the primary residential parent because the parenting time plan was equal.¹

¶5 On March 29, 2017, the superior court denied Father’s motion to alter or amend the February 2017 Order, finding “no good cause appearing.” That same day, Father filed a second petition to modify child support (“March 2017 petition”). He averred in the petition that he “does not receive recurring gifts” and filed a supporting Affidavit of Financial Information reflecting no gift income. Mother generally responded that Father’s pleading was harassment and circumstances had not changed since the last order. She did not, however, address Father’s argument about gift income or offer countervailing evidence.

¶6 The court denied the March 2017 petition, finding that Father had “failed to demonstrate a material change in circumstances.” The court awarded Mother her attorney’s fees incurred in response to the March 2017 petition because it “was not reasonably filed.” The court held that “Father’s remedies are limited to post-judgment relief as specified in Rules 83-85,” found that Father had engaged in “a pattern of conduct that is unreasonable and intentionally or unintentionally is resulting in unnecessary attorney fees to be incurred by Mother” and reiterated that “there has not been demonstrated any material change in circumstances.” Father moved to

¹ Father separately appealed and raised the recurring gift income and child care expense issues. A different panel of this court affirmed, however, but only because Father did not provide a transcript of the evidentiary hearing and we presumed the missing transcript supported the superior court’s decision. *Matthews v. Robles*, 1 CA-CV 17-0241 FC, 2018 WL 897683, at *1-3, ¶¶ 5-9, 14 (Ariz. App. Feb. 15, 2018).

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reconsider the fees award because the court did not consider his response to Mother's application for fees. The court denied his motion.

¶7 Father timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).²

DISCUSSION

¶8 Father contends the superior court erred by denying his March 2017 petition without conducting an evidentiary hearing and by awarding attorney's fees to Mother.

¶9 We review the superior court's ruling on a petition to modify child support for an abuse of discretion. *Milinovich v. Womack*, 236 Ariz. 612, 615, ¶ 7 (App. 2015). Child support may be modified at any time, including after entry of a final order, if the party seeking modification shows a substantial and continuing change of circumstances. *Birnstihl v. Birnstihl*, 243 Ariz. 588, 592, ¶ 14 (App. 2018); *see also* A.R.S. §§ 25-327(A), 25-503(E); A.R.S. § 25-320 app. § 24 ("Guidelines").

¶10 Father presented a colorable claim of a substantial and continuing change of circumstances in his March 2017 petition. He avowed that he no longer receives recurring gift income and offered an affidavit of financial information reflecting the same. As alleged, the overall variation in the child support obligation exceeded 15 percent. *See* Guidelines § 24(B) ("A fifteen percent variation in the amount of the order will be considered evidence of substantial and continuing change of circumstances."). Mother did not contest Father's disclaimer of gift income or provide countervailing evidence. Her response never addressed whether \$1,037.00 (or any amount) per month in gift income should have been attributed to Father. On this record, Father should have received an evidentiary hearing on his March 2017 petition. *Birnstihl*, 243 Ariz. at 592, 594, ¶¶ 15, 22. The Guidelines identify recurring gift income as a relevant factor in determining child support, *see* Guidelines §§ 5(A), 8, and the facts surrounding such income were in dispute. We reverse and remand for an evidentiary hearing on Father's petition to modify child support.

² Mother did not file an answering brief. Although we could treat her failure to do so as a confession of error, we instead exercise our discretion to address the merits of Father's claims. *Savord v. Morton*, 235 Ariz. 256, 259, ¶ 9 (App. 2014).

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¶11 We likewise reverse the court's award of attorney's fees to Mother because Father presented a colorable claim for modification of child support and was not limited to post-judgment relief under Rules 83-85. See *Birnstihl*, 243 Ariz. at 592, ¶ 14 ("Our child support modification statutes provide that, so long as a party makes a showing of substantial and continuing change of circumstances, child support may be modified even after a final order is entered.") (citing A.R.S. §§ 25-327(A), -503(E); Guidelines § 24).³

¶12 Father requests attorney's fees and costs on appeal pursuant to A.R.S. § 25-324(A) and § 12-341. Father is not entitled to attorney's fees as a self-represented litigant. *Hunt Inv. Co. v. Eliot*, 154 Ariz. 357, 362 (App. 1987). Father is the successful party on appeal and may recover his taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶13 We reverse the denial of Father's petition to modify child support and associated fees award and remand for further proceedings consistent with this decision.



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

³ Given our conclusion, we need not address Father's arguments regarding the denial of his motion for reconsideration.