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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

JENNIFER ZAK, *Petitioner/Appellant,*

v.

SOREN HAMMERSCHMIDT, *Respondent/Appellee.*

No. 1 CA-CV 17-0612 FC
FILED 8-7-2018

Appeal from the Superior Court in Maricopa County
No. FC2015-093850
The Honorable Stephen M. Hopkins, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Jennifer M. Perkins joined.

S W A N N, Judge:

¶1 This is an appeal from a decree of dissolution. Jennifer Zak (“Mother”) challenges the court’s determination of Soren Hammerschmidt’s (“Father[’s]”) income, the resulting child support calculation, and the allocation of therapeutic intervention expenses. We conclude that the court’s findings concerning Father’s income were not supported by the evidence. We therefore vacate and remand for recalculation of child support, and reallocation of the challenged expenses.

FACTS AND PROCEDURAL HISTORY

¶2 The parties were married in 2001 and are the parents of two minor children. In July 2015, Mother filed a petition for dissolution.

¶3 The parties consented to a comprehensive family evaluation, and the court appointed a clinical psychologist. The psychologist’s report noted allegations of domestic violence between the parties and observed that one of the children did not feel safe with Father.

¶4 Father moved for the appointment of a therapeutic interventionist, Mother consented, and the court entered the appointment as part of its temporary orders. The court restricted Father’s parenting time to that required by the intervention process, and ordered that the fees for the process be paid 50% by Mother and 50% by Father, subject to reallocation.

¶5 Father provided three Affidavits of Financial Information (“Affidavits”) in August 2015, August 2016, and December 2016. The Affidavits identified Father’s earnings from his teaching position at Arizona State University (the “University”) as \$3,670 in 2012, \$41,262 in 2013, \$65,655 in 2014, and \$69,534 in 2015. Father’s August and December

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2016 Affidavits self-reported his 2016 income as anywhere from \$87,600 to \$88,128.¹

¶6 In 2014, Mother received a tuition waiver of \$34,069 as a benefit from Father's teaching position at the University. Father argued that the "historical practice is to use [\$65,655] less the tuition waiver" to determine a party's income. For 2015 and 2016, Father's Affidavits identified his base salary from his teaching position as \$40,000 and \$44,000, respectively. The Affidavits also identified additional earnings in those years from work in other positions, including summer courses, courses taught at a community college, and consulting.

¶7 By the time of trial in January 2017, the parties had reached agreements concerning community property and debt, spousal maintenance, and attorney's fees. But they still disputed Father's income and the resulting child support obligations, as well as the allocation of therapeutic intervention costs.

¶8 Mother argued that Father had historically worked jobs in addition to his full-time teaching position, and she asked the court to consider the additional funds generated as historical work income. Mother presented Father's résumé showing his various teaching positions from 2014 to present, and argued that the court should consider Father's Affidavits. For his part, Father contended that the Arizona Child Support Guidelines, A.R.S. § 25-320 app. ("Guidelines"), do not support inclusion of the additional income for child support because "he would be confined to perpetual slavery in order to be able to meet [the] obligation." Further, he noted that the summer positions are not guaranteed because he competes with a pool of candidates. Father testified that the additional positions at the University are given "in addition to the regular faculty contract. They also rely, in the case of additional courses, on academic unit need. So, on enrollment during the semester, if there is need to cover additional courses, the department may offer additional employment to [faculty] that is already there."

¹ Father's August 2016 Affidavit indicated that he earned \$7,300 in gross monthly income (\$3,667 gross salary from the University + \$3,633 from additional teaching and research positions), totaling \$87,600 per year. Father's December 2016 Affidavit indicated that he earned \$7,344 in gross monthly income (\$3,667 gross salary from the University + \$3,677 from additional teaching and research positions), totaling \$88,128 per year.

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¶9 In an order concerning the disputed issues, the court found that the “best indicia” of Father’s historical income was his 2014 taxes, and that “any additional income for summer classes or research is speculative.” As a result, the court attributed to Father, as income, his base salary of \$44,000 and computed a child support obligation of \$857.98 per month. Father agreed to, and the court ordered, an upward deviation resulting in a child support payment of \$1,000 per month.

¶10 The court also ordered that the parties divide the therapeutic intervention costs in proportion to their income: 53% for Mother and 47% for Father. The court included the foregoing rulings in its decree of dissolution. Mother appeals.

DISCUSSION

¶11 Mother challenges the court’s exclusion of Father’s “supplemental, summer income” from its child support calculation. “Generally, a court may order reasonable and necessary child support based upon the parents’ financial resources, and may ‘consider all aspects of a parent’s income’ to ensure the award is just and ‘based on the total financial resources of the parents.’” *Strait v. Strait*, 223 Ariz. 500, 502, ¶ 8 (App. 2010) (citation omitted). The determination of the parents’ child support obligation begins with a calculation of each parent’s gross income. *McNutt v. McNutt*, 203 Ariz. 28, 31, ¶ 11 (App. 2002). “Gross income” is broadly defined by the Section 5(A) of the Guidelines as “income from any source.”

¶12 The Guidelines further provide that “[s]easonal 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.” *Id.* The Guidelines also provide that, “[g]enerally, the court should not attribute income greater than what would have been earned from full-time employment.” *Id.* However, “[t]he court may . . . consider income actually earned that is greater than would have been earned by full-time employment if that income was historically earned from a regular schedule and is anticipated to continue into the future.” *Id.* We review an award of child support for abuse of discretion. *Sherman v. Sherman*, 241 Ariz. 110, 112, ¶ 9 (App. 2016). We accept the court’s factual findings unless clearly erroneous, and we review the superior court’s interpretation of the Guidelines de novo. *Id.*

¶13 Here, the court found in 2017 that the “best indicia” of Father’s historical income was his 2014 tax return. The court identified

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Father's annual income as \$44,000—his base salary at the University in 2014, and determined that any other income was "speculative." Yet Father's own Affidavits for the years after 2014 belie this determination, and there was no evidence to support the court's rejection of Father's self-reported income in favor of a lower amount.

¶14 There is a significant difference between the continuing income Father himself reported and the court's income determination. Father's 2014 tax return and the figure reported for 2014 in the three Affidavits indicate that he earned \$65,655 that year. Father contends that "income from [the University] reflected in the 2014 tax return included Wife's tuition waiver, so the actual income in 2014 was less than reflected." We hold that the tuition waiver did not result in a decrease in income for child support purposes, but was part of Father's gross income because it is a "cash-like" benefit available for expenditure. *See Milinovich v. Womack*, 236 Ariz. 612, 616, ¶ 11 (App. 2015) (holding that "[b]ecause the Guidelines are based upon assumptions about spending patterns of families at various income levels, gross income for child support purposes is not determined by the gross income shown on the parties' income tax returns, but rather on the *actual money or cash-like benefits* received by the household which is *available for expenditures*" (citation omitted)). The tuition waiver represented actual value received by the marital community in 2014, and we see no basis upon which the court could use that benefit to reduce Father's attributed income years later.

¶15 Further, there was no dispute that Father continued to earn income from sources other than his base salary at the University. The question is whether Father's additional income is, as the superior court determined, "speculative," or whether it has been "historically earned . . . and is anticipated to continue" and therefore should be categorized as "gross income" for child support purposes under Section 5(A) of the Guidelines. The evidence only supports the latter conclusion. Though Father's tax return may be the "best indicia" of his historical income, he provided his own Affidavits indicating that he earned \$69,534 in 2015 and anywhere from \$87,600 to \$88,128 in 2016. The Affidavits show that in addition to his base salary, Father earned an extra \$3,333 per month in 2015 and \$3,667 per month in 2016. The continuous and regular nature of Father's additional income for at least two years supports a determination that the income was not "speculative," but rather "historical[]" and "anticipated to continue." Accordingly, we hold that Father's admitted earnings from positions other than his base salaried position fall within the Guidelines' broad definition of gross income and that the court's finding to the contrary was clearly erroneous.

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¶16 The superior court based its allocation of therapeutic intervention costs on the parties' relative income. Because we must remand for recalculation of child support based on Father's higher level of income, we remand for recalculation of that cost allocation as well.

CONCLUSION

¶17 We vacate the superior court's ruling pertaining to Father's child support obligation and its allocation of costs concerning therapeutic intervention, and remand for recalculation of those amounts. The court should treat Father's supplemental income as gross income in its recalculation to the extent relevant. In the exercise of our discretion, we deny both parties' requests for attorney's fees on appeal.



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