IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

ROBERT REICHLING, *Petitioner/Appellant*,

v.

JENNIFER A. NUNGESSER, *Respondent/Appellee*.

No. 1 CA-CV 21-0359 FC
FILED 5-10-2022

Appeal from the Superior Court in Maricopa County
Nos. FC2011-008178, FC2014-095339
The Honorable Susanna C. Pineda, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge Samuel A. Thumma joined.

C A T T A N I, Chief Judge:

¶1 Robert Reichling ("Father") appeals from the superior court's post-dissolution ruling recalculating the amount he owes to Jennifer Nungesser ("Mother") in past-due child support, interpreting the parties' 2016 agreement for monthly $2,000 non-child-support payments, and calculating his current child support obligation. For reasons that follow, we remand the arrearages calculation for correction, affirm the court's interpretation of the 2016 agreement, and vacate and remand the current support order.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Mother, who have two children in common, were divorced by a decree entered in January 2013. Since February 2012, Father has been required to pay Mother child support, although the amount of his obligation has been modified on several occasions.

¶3 The decree imposed on Father an ongoing child support obligation of $2,000 per month, with payments to be made through the Support Payment Clearinghouse ("Clearinghouse") and $6,000 in arrears owed as of January 2013. Consistent with the parties' agreement, the court did not award spousal maintenance to either parent. The court later modified Father's child support obligation to $1,675 per month from November 2014 through January 2016, then to $2,700 per month effective February 2016. In doing so, the court again directed that Father pay his support obligation through the Clearinghouse.

¶4 A few months after that order was filed, Father filed a petition to modify child support. Mother and Father then entered two separate stipulations to resolve that petition: first, they agreed to reduce Father's child support obligation to $1,500 per month beginning June 2016 (without specifying whether these payments should be made directly to Mother or through the Clearinghouse); and second, they entered a "Stipulation for Direct Payment" requiring Father to pay Mother an additional $2,000 per

month. The superior court entered an order approving and adopting the parties' stipulation but only expressly mentioned modifying child support.

¶5 In September 2019, Mother filed a petition to modify legal decision-making and parenting time, which inherently required review and potential adjustment of Father's ongoing child support obligation. *See* A.R.S. § 25-403.09(A). Mother then filed a petition to enforce spousal maintenance, citing the parties' 2016 "Stipulation for Direct Payment," but the superior court summarily dismissed the petition to enforce.

¶6 Father subsequently filed a motion to correct and recalculate the amount he owed in child support arrears (which Clearinghouse records listed as $180,635 in principal and $62,415.94 in interest as of November 2019). He noted two primary issues: First, the Clearinghouse still listed his monthly obligation as $2,700 despite the court-approved, stipulated modification to $1,500 effective June 2016. Second, Clearinghouse records did not account for numerous child support payments he had made directly to Mother over the years and for which Father argued he should receive credit.

¶7 The court ordered that the two active post-dissolution proceedings—Mother's petition to modify and Father's motion to correct—be heard simultaneously. *See* Ariz. R. Fam. Law P. 5(a)(1). Mother then moved for clarification of the status of the 2016 stipulations, noting an anomaly in whether (or how) the court adopted the child support stipulation and a question as to whether the court had adopted the "Stipulation for Direct Payment." Both Mother and Father testified at the subsequent evidentiary hearing, as did an expert retained by Father to tabulate direct payments of child support and calculate arrears.

¶8 In a December 2020 ruling, the superior court resolved the issues presented in Mother's petition to modify, including a change of Father's child support obligation to $1,144 per month beginning January 2021. The court also granted Mother's request for clarification by expressly adopting both of the 2016 stipulations. As described by the court, the 2016 agreements established (1) Father's monthly child support obligation of $1,500 beginning June 2016, and (2) Father's separate $2,000 per month obligation under the "Stipulation for Direct Payment," which the court construed as spousal support with no specified end date. Finally, the court addressed the substantive issues presented in Father's motion to correct. The court ruled that Father had waived any claim for credit before they entered the stipulations, and for direct payments Father made to Mother in or after June 2016, the court ordered that Father receive child-support credit

only if the direct payments "specifically state they are for 'child support.'" The court then specified 36 payments to be credited and ordered the Family Conference Center (a Maricopa County Superior Court system for conferencing and documenting a variety of support and parenting time agreements) to recalculate arrears with credit for those payments. The Family Conference Center submitted the updated arrears calculation ($85,385 in principal and $45,886.34 in interest as of year-end 2019) a few weeks later, although the court did not then adopt or confirm the new calculation.

¶9 Father moved to alter or amend the December 2020 ruling, then filed a notice of appeal after the court denied his motion. This court dismissed that appeal as premature because the December ruling had not fully resolved the issue of child support arrearages. The superior court then entered an order confirming the Family Conference Center's new arrears calculation, and Father timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(2).

DISCUSSION

¶10 Father challenges several aspects of the superior court's ruling. First, Father asserts that the court erred by characterizing the 2016 "Stipulation for Direct Payment" as spousal maintenance and by construing its duration as indefinite rather than for a fixed, 36-month term. Next, regarding child support arrears, Father argues that the court erred by failing to grant him adequate credit for (or adopt his expert's calculation of) all the direct payments he made to Mother. Finally, Father urges that the court erred by setting his new current child support obligation based on a miscalculation of his income. We address each contention in turn.

I. Stipulation for Direct Payment.

¶11 Father challenges the superior court's interpretation of the 2016 "Stipulation for Direct Payment." He does not contest the existence, adoption, or enforceability of the stipulation, but rather argues that the superior court erred by (1) classifying the obligation as spousal maintenance despite a prior ruling denying enforcement of spousal maintenance and (2) interpreting its duration as indefinite, rather than for a fixed 36-month term. We review de novo both the applicability of claim preclusion and the interpretation of an agreement between the parties. *See Pettit v. Pettit*, 218 Ariz. 529, 531, ¶ 4 (App. 2008); *Chopin v. Chopin*, 224 Ariz. 425, 427, ¶ 6 (App. 2010).

¶12 The parties entered the "Stipulation for Direct Payment" in conjunction with a stipulation to reduce Father's monthly child support obligation from $2,700 to $1,500 per month. The "Stipulation for Direct Payment" required Father to pay Mother $2,000 per month for "no less than thirty-six (36) months" and recited that it was "a non-contestable agreement." Although the "Stipulation for Direct Payment" did not classify the type of obligation it represented, the child support worksheet supporting the stipulated reduction in Father's child support obligation credited Father for $2,000 per month in spousal maintenance. The parties apparently intended to provide a form of order memorializing their agreement for the court's signature, but they never did so. Instead, the superior court (without a hearing) entered a minute entry adopting the stipulation to modify child support but without mentioning (either to adopt or reject) the "Stipulation for Direct Payment," even though both stipulations had been submitted in a single filing.

¶13 Several years later, Mother filed a petition to enforce spousal maintenance, citing the "Stipulation for Direct Payment" as the source of Father's obligation. In an unsigned minute entry, the superior court summarily dismissed the petition with prejudice on the basis that spousal maintenance had never been ordered. The court relied on the absence of any spousal maintenance award in the decree, without mentioning the "Stipulation for Direct Payment."

¶14 During the current round of post-dissolution proceedings, the superior court considered Mother's request to clarify the status of the 2016 stipulations in conjunction with Mother's petition to modify and Father's motion to correct. After Father agreed at trial that the parties' 2016 agreement was for him to pay $1,500 in child support plus an additional $2,000 in "some sort of direct payment," the court adopted the 2016 stipulations, effective June 2016. Consistent with Mother's description in her motion for clarification, the court classified the stipulated $2,000 direct payment as spousal maintenance. The court further reasoned that because the parties' agreement required payment for "no less than" 36 months with no set end date, the obligation would continue indefinitely absent modification (which had not been requested).

¶15 Father first challenges the court's classification of the agreed $2,000 monthly payment as spousal maintenance. Although the "Stipulation for Direct Payment" did not expressly classify the type of obligation, the court's determination that the $2,000 direct payment represented spousal maintenance was consistent with—if not compelled by—the parties' contemporaneous stipulation to reduce child support

based, at least in part, on crediting Father with paying $2,000 in spousal maintenance.

¶16 Father argues, however, that the prior ruling dismissing Mother's petition to enforce spousal maintenance with prejudice was entitled to claim preclusive effect, which Father asserts would prohibit classifying the $2,000 direct payment obligation as spousal maintenance.

¶17 Claim preclusion prevents re-litigation of the same claim between the same parties after a final judgment on the merits. *See Pettit*, 218 Ariz. at 531, ¶ 4. To that end, a party asserting claim preclusion must show an identity of claims in the prior and current litigation, an identity (or privity) of parties in the two cases, and a final judgment on the merits in the prior case. *Lawrence T. v. Dep't of Child Safety*, 246 Ariz. 260, 262–63, ¶ 8 (App. 2019).

¶18 Spousal maintenance, however, is presumptively modifiable, *see* A.R.S. § 25-327(A), and Father does not explain how a prior ruling that no spousal maintenance had been awarded would preclude a subsequent ruling awarding spousal maintenance. And although claim preclusion requires identity of claims, *Lawrence T.*, 246 Ariz. at 263, ¶ 8, the claims at issue in the prior and current proceedings were meaningfully different: Mother's petition to enforce presupposed the *existence* of a spousal maintenance order to be enforced, whereas Mother's motion for clarification assumed the *absence* of an operative spousal maintenance order but asked the court to adopt one based on the 2016 stipulations and the parties' reliance on those agreements over the following years.

¶19 Moreover, Father does not object to the $2,000 per month direct payment obligation itself, just to its classification as spousal maintenance. But Father failed to develop any argument for how that classification (as opposed to the payment obligation) harmed him—particularly given that a spousal maintenance award is presumptively modifiable on a showing of changed circumstances. *See* A.R.S § 25-327(A).

¶20 Father next argues the superior court erred by interpreting the "Stipulation for Direct Payment" as an indefinite obligation rather than a fixed-term, 36-month obligation. In Father's view, the stipulation's statement that the obligation would run "for a period of no less than thirty-six (36) months" meant that the parties agreed to support for 36 months, no more. But even the dictionary definition on which Father relies acknowledges that the term "no less than" sets a minimum, not a maximum.

¶21 Father asserts that, if the parties had intended an indefinite obligation, the agreement would not have needed to include any time period at all. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158 n.9 (1993) (reiterating the rule against surplusage). Including a minimum duration without a maximum, however, plausibly reflects an intent that the obligation not be modifiable for the minimum period—which is also consistent with a separate provision making the agreement "non-contestable." *See* A.R.S. §§ 25-317(G), -319(C), -327(A). Father's proposed fixed-36-month-term interpretation, in contrast, would simply write "no less than" out of the agreement.

¶22 Accordingly, Father has not shown that the superior court's interpretation of the 2016 "Stipulation for Direct Payments" was erroneous.

II. Child Support Arrearages.[1]

¶23 Father argues that the superior court erred by failing to give him child-support credit for "all direct payments [he] made [to Mother] between 2013 and 2019." We review the superior court's calculation of arrearages for an abuse of discretion, deferring to the court's factual findings unless clearly erroneous. *See Ferrer v. Ferrer*, 138 Ariz. 138, 140 (App. 1983); *Alley v. Stevens*, 209 Ariz. 426, 428, ¶ 6 (App. 2004). We consider issues of law de novo. *Hughes v. Creighton*, 165 Ariz. 265, 267 (App. 1990).

¶24 Father has had a monthly child support obligation since the parties divorced: $2,000 per month from February 2012 through October 2014; $1,675 per month from November 2014 through January 2016; $2,700 per month from February 2016 through May 2016; $1,500 per month from June 2016 through December 2020; and $1,144 per month thereafter. All court-issued child support orders required Father to make all payments through the Clearinghouse.

¶25 Nevertheless, Father generally paid Mother directly rather than through the Clearinghouse. Father testified that he did so with Mother's unwritten agreement and for Mother's convenience. Mother confirmed that Father had made "a lot" of child support payments to her directly, but she also explained that he made many other payments to her for things other than child support. Such non-child-support payments included, for example, Father's monthly $2,000 direct payment obligation (now clarified as spousal maintenance), money for rent (he lived with her

[1] Unless otherwise stated, all amounts refer to principal only, exclusive of interest.

for a time), gifts and vacations (the two were a couple on and off for years after the divorce), credit card payments, and payments designated for other purposes like a child's tuition.

¶26 Father retained an expert to review his bank records (alongside Clearinghouse records), identify and tabulate direct payments that should be counted as child support payments, and thereby calculate the amount he owed in arrears. The expert credited payments Father made by check only if the memo said "support" or "child support." For electronic funds transfers, the expert credited the first $1,500 transferred in any given month (but only the first $1,500), even absent a descriptive memo and even if the memo expressly designated the payment for different purposes. The expert credited Father for almost $100,000 in child support payments made directly to Mother from 2013 through 2019, leaving him only $26,842 in arrears.

¶27 Although the superior court adopted a different methodology, the court's ruling was largely consistent with Father's expert's calculation. Mother had testified that she agreed with Father's expert's calculation of $16,345 owing as of year-end 2015, and the court appears to have intended to adopt that agreed amount, although it characterized this finding as Father waiving any claim for credit before the parties' mid-2016 stipulation modifying child support. Based on Mother's agreement to accept child support payments directly from Father, the superior court gave Father credit for direct payments from June 2016 onward—but only for those payments that expressly stated they were for child support. The court observed that Father's payment notations were specific when involving child support but vague otherwise, and the court declined to "speculate regarding the nature of any other payments." The court then listed 36 direct payments that qualified under its ruling and ordered the Family Conference Center to recalculate arrearages consistent with the ruling.

¶28 The Family Conference Center's tabulation gave Father no credit for direct payments through May 2016, leaving a principal balance of over $70,000 at that point. The new calculation then credited Father for each of the 36 payments listed in the superior court's ruling, although it appears to have mistakenly given Father credit in February 2015 for a $2,000 payment that was made in February 2019. With credits applied, the Family Conference Center calculated Father's new principal balance as $85,385 as of year-end 2019.

A. Total Arrearages as of 2016.

¶29 The Family Conference Center report calculated that Father owed $65,460 in unpaid principal for child support as of year-end 2015 (or $70,935 through May 2016), with no credit given for direct payments. Father points out that the parties agreed, and the superior court found, that he owed around $16,000 in arrears as of 2016. That figure ($16,345 to be precise) was based on Father's expert's calculation of arrears from 2013 through year-end 2015 *with credit for direct payments*; Mother testified that she agreed with that calculation. Although the court acknowledged the parties' agreement in that regard, the language of the ruling—that because the parties agreed to over $16,000 in arrears, "Father ha[d] waived any claim for credit prior to [June 2016]"—prompted the Family Conference Center to calculate all accrued principal over the years, with no credit for direct payments.

¶30 Given the parties' agreement, as acknowledged by the superior court, the arrears calculation should have reflected $16,345 in unpaid principal as of year-end 2015.

B. Credit for Direct Payments Thereafter.

¶31 Father argues that the superior court erred by crediting only those direct payments that expressly stated they were for child support. Generally, support obligations must be paid through the Clearinghouse, and the obligor is not entitled to credit for payments made to the obligee unless such direct payments were ordered by the court or authorized by a written support agreement. A.R.S. § 25-510(A); A.R.S. § 46-441(B), (H). The court may, however, give credit for direct payments that the obligor made as, and the obligee knowingly accepted as, child support payments. *Schultz v. Schultz*, 243 Ariz. 16, 18–19, ¶¶ 5, 9 (App. 2017); *see also* A.R.S. § 25-510(G). The obligor bears the burden of proving that the direct payments were made and that those direct payments were for child support. *See Schultz*, 243 Ariz. at 18, ¶ 5.

¶32 Here, the superior court had a reasonable basis to credit only the direct payments specifically and contemporaneously labeled as support. Although Father's bank records proved numerous payments to Mother over the relevant time frame, both Mother and Father confirmed that Father made those payments for a variety of reasons, not just child support. The only evidence of the purpose of any individual payment was the memo line on a check or the descriptive notation accompanying an electronic transfer. Thus, for any payment that lacked a memo or notation

describing it as a child support payment, Father did not meet his burden of proof. *See id.*

¶33 Father suggests that the superior court's ruling wrongly allowed credit only for payment by check, not electronic transfer. But the court gave Father credit for 29 electronic transfers as well as seven payments by check. Father also urges that the court erred by failing to adopt his expert's methodology. For checks, however, the court and the expert imposed the same requirement that the memo line reflect a "support" payment. And for electronic transfers, the expert's method did not adequately address the purpose of payments, instead counting the first $1,500 per month as child support even for payments expressly designated for something else. The court did not err by requiring proof that Father's payments were made and accepted as child support. *See Schultz*, 243 Ariz. at 19, ¶ 9; *see also* A.R.S. § 25-510(G).

¶34 Although the court's substantive assessment of Father's direct payments was proper, its list of payments to be credited was imprecise. Father's bank records show additional qualifying payments to Mother beyond those listed in the court's ruling, including: a $1,500 transfer on June 17, 2016 for "Child Support"; a $2,000 transfer on July 1, 2016 for "Child Support"; a $2,700 check (#1225) dated July 29, 2016 for "Child Support"; a $2,000 transfer on March 14, 2017 for "Child Support"; a $250 transfer on April 4, 2017 for "Support"; a $2,000 transfer on April 20, 2017 for "Support"; a $1,800 transfer on May 30, 2018 for "Child Support"; and a $1,000 transfer on January 25, 2019 for "Child Support 2 of 2." Additionally, the court's list includes a typo in the date of one payment listed as "02/17/18," but which seems to be a second $1,000 payment on December 17, 2018. And the court's list appears to improperly include credit for two extraneous payments: a $1,800 payment on June 20, 2018 that does not appear in Father's bank records, and a November 30, 2019 credit for a $2,000 check (#1244) that appears to have been from 2015, not 2019. Recognizing that technical difficulties rendered the submitted exhibits confusing at best, the superior court on remand may seek input from the parties in delineating those direct payments that qualify as child support under the court's ruling.

III. Current Child Support Obligation.

¶35 Father argues that the record does not support the superior court's finding as to his gross monthly income, which undermines the calculation of his current child support obligation under the Arizona Child Support Guidelines ("Guidelines"), A.R.S. § 25-320 app. We review the superior court's determination of gross income for an abuse of discretion,

see Milinovich v. Womack, 236 Ariz. 612, 615, ¶ 7 (App. 2015), deferring to that court's resolution of factual disputes. *Lehn v. Al-Thanayyan*, 246 Ariz. 277, 286, ¶ 31 (App. 2019).

¶36 Father was self-employed in the entertainment industry providing crews for live events. His business had substantial gross receipts in the first few months of 2020, but he testified that most of that money was paid out for labor costs. When the COVID pandemic began in March 2020, almost all of his events were canceled, and he had no new bookings at least into early 2021. Father received pandemic-assistance business loans and was drawing traditional and pandemic unemployment assistance, but his business income had stopped. He found a part-time job in August 2020 earning $500 per week, and he expected his total income for the year to be approximately $35,000. Father asked the court to use his $500 per week income for calculating child support, noting that Mother could seek to modify when he resumes running events post-COVID.

¶37 Mother testified that, based on his own report, Father was still running his events business. Based on Father's bank records, he deposited almost $200,000 into his business account in just the first few months of 2020. That amount was comparable to Father's total deposits in 2016, at which time the court calculated (and Father later stipulated) that his child support income was $154,817. Because the comparable receipts suggested similar income, she asked that Father's income for child support calculations remain at $154,817 annually.

¶38 Although acknowledging that Father "claim[ed] not to be working," the court found Father's income to be $154,000 based on the strength of his business's gross receipts—as high as in prior years—in early 2020. This income amount yielded a $1,144.11 per month current child support obligation.

¶39 Father asserts that the superior court improperly calculated his income based solely on gross receipts without accounting for expenses. A parent's income for child support purposes includes "income from any source." Guidelines § II.A.1.b. For parents who own their own business, child support income is the business's "gross receipts minus ordinary and necessary expenses." Guidelines § II.A.1.e. Here, however, the court was not using gross receipts to calculate Father's income directly, but rather reasoning by analogy to a known quantity: comparable levels of gross receipts, absent some evidence of increased or abnormal expenses, suggest comparable income.

¶40 Nevertheless, Father's next argument that the superior court failed to adequately account for the effect of the pandemic is well taken. Even assuming Father's income as of March 2020 would have been comparable to prior years, the *only* evidence was that Father's income had decreased dramatically since the onset of the pandemic. Father testified—and his bank records showed—that almost all his events canceled and that he was subsisting on pandemic-assistance loans and unemployment benefits for much of the year. By August he had found employment but was earning only $500 per week.

¶41 Although we defer to the superior court's credibility determinations and resolution of conflicting facts, *see Lehn*, 246 Ariz. at 286, ¶ 31, the record here conclusively showed that Father's March 2020 income numbers were no longer viable as a basis for his new child support obligation, effective January 2021. Accordingly, we vacate the child support order and remand for reconsideration based on an appropriate income calculation.

IV. Attorney's Fees on Appeal.

¶42 Father requests an award of attorney's fees on appeal but fails to state any substantive basis for the award, so we deny his request. *See* ARCAP 21(a)(2). Mother seeks an award of attorney's fees on appeal under A.R.S. § 25-324(A). Having considered the relevant factors, and in an exercise of our discretion, we likewise deny her request.

CONCLUSION

¶43 As set forth above, we vacate the child support order filed December 18, 2020 and remand for reconsideration, and we remand the arrearages calculation for clarification and correction. In all other respects we affirm.

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