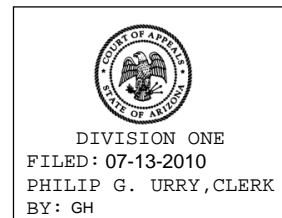


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA ex rel. ARIZONA) 1 CA-CV 09-0547
DEPARTMENT OF ECONOMIC SECURITY)
(ANNALISA B. ALVRUS),) DEPARTMENT D
)
Petitioners/Appellees,) **MEMORANDUM DECISION**
) (not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
KENNETH ALLEN VOLK,)
)
Respondent/Appellant.)
)
_____)

Appeal from the Superior Court of Maricopa County

Cause No. FC2001-000831 and FC2001-090230 (Consolidated)

The Honorable Wesley E. Peterson, Judge *Pro Tempore* and
The Honorable David P. Arrow, Commissioner, Retired
The Honorable Colleen McNally, Judge

REVERSED

Kenneth Allen Volk
Respondent/Appellant *in propria persona*

Tempe

T H O M P S O N, Judge

¶1 Kenneth Allen Volk (Father) appeals from the superior court's decision denying his motion to modify his child support obligation based on Annalisa Alvrus's (Mother's) salary increase and a reduction in child daycare costs. Father contends that the trial court ignored these changed circumstances. No response has been filed. For the following reasons, we reverse and remand to the trial court to calculate the appropriate support obligations of the parties in light of the changed circumstances.

FACTS AND PROCEDURAL HISTORY

¶2 On June 3, 2003, a child support order was entered directing Father to pay \$652.86 per month in child support, plus additional amounts for arrears and fees. The amount was based on Father's 2002 income of \$56,089.64 or \$4,674.13 per month, and Mother's yearly salary of \$37,793.00 or \$3,149.41 per month. At the time of the order, their only child was three years old.

¶3 In January 2005, Father filed a Request to Modify Child Support Simplified Procedure, seeking a reduction in monthly support. The accompanying Worksheet for Child Support Amount listed Father's adjusted monthly gross income as \$2,542.

¶4 In October 2005, Mother filed a motion to compel discovery, claiming that Father had failed to respond fully to requests for information related to his request to modify child support. In November, the court granted Mother's motion to

compel and ordered Father to comply with Mother's discovery requests in full within ten days. At a status conference in February 2006, Mother again asserted that Father was not complying with discovery requests.

¶15 In March 2006, Mother filed a Motion to Preclude Evidence Pursuant to Rule 65(C), Arizona Rules of Family Law Procedure (ARFLP). Mother argued that Father was claiming that his income from his family trust, on which his child support obligation was based, had decreased. Mother also asserted that Father had for several years been running several businesses, none of which had been considered when calculating his child support. She contended that a preliminary review of only some of his books for 2004, suggested that he grossed more than \$139,000 in business income that year. She argued that despite discovery requests, Father had failed to disclose his business receipt books and business account bank statements subsequent to 2004, personal or business 2004 and 2005 income taxes, and receipts supporting business expenses written off on taxes for any year. Mother asked the court to preclude Father from supporting his claims or defenses regarding his income or to oppose Mother's claims and defenses, to prohibit Father from introducing evidence concerning business expenses and business and personal income, and to prohibit Father from using as evidence all information and witnesses not yet disclosed.

Father responded that he complied with Mother's request to the best of his ability. He contended that he did not believe he was required to provide copies of the receipts to Mother, that he provided access to the documents by suggesting that Mother come look at the documents, and that he should not be punished because Mother chose not view the documents.

¶16 In July 2006, the court, Commissioner David Arrow, held an evidentiary hearing on Father's Request to Modify Child Support. Before the hearing began, the court denied Mother's motion to preclude evidence. Father explained that his motion was based on a decrease in his trust income from approximately \$56,000 to \$30,000 per year, an increase in Mother's income to about \$55,000, and the elimination of daycare expenses since his daughter was now in school. He also asserted that his business had shown no income before 2005 and that he had no income other than from the trust and the business. Father sought a revision retroactive to January 2005 when he filed the motion.

¶17 Mother agreed that her income had increased, but disputed Father's representation of his income. Mother also asserted that, although the child was in school, she still incurred after-school daycare costs.

¶18 An accountant for Mother testified that Father had received four distributions from the trust each in the amount of \$7,625 for a total of \$30,500; that he received 151,291.99 from

stocks; and that he received another \$46,287 from undetermined sources. She further testified that his business account had received deposits of \$69,429.57, and that a receipt book showed receipts in the amount of \$139,238.72.

¶19 Father produced tax returns for 2004 showing an adjusted gross income of -\$47,992 and for 2005 showing an adjusted gross income of \$527. With respect to the business in 2004, the tax return showed income of \$123,443 and expenses of \$158,811, resulting in a loss of \$35,368.

¶10 Mother testified that her base salary was \$55,824 and that the after-hours day care for the child cost \$145 per month. With regard to Father's tax returns, Mother questioned Father's "write-offs," noting that Father had not produced receipts for those amounts.

¶11 Mother asked the court to determine Father's income based on the income from the trust, stocks, cash receipts, and a Pay Pal account, without deducting questionable business expenses for which Father had not produced expense receipts.

¶12 The court expressed the view that, as the trial proceeded, it became clear that the evidence pertaining to the business expense receipts and Father's failure to produce them was significant. The court indicated that if Mother could produce evidence that Father was ordered to produce copies of his expense receipts and not just access to them and had failed

to do so, the court would consider sanctions and would consider making the assumption that the expenses Father had not documented should not be deducted from income. The court noted that using the figures presented would result in either a substantial decrease or substantial increase in support.

¶13 Several days later, Father filed a motion to supplement the record with evidence of business expenses. Mother objected, arguing that Father had failed to comply with Mother's request for the production of all documents related to business expenses, that the court had granted Mother's order to compel Father to produce the documents, and that Father had never complied with the court's order. Mother argued that Father should not be permitted to supplement the record with information he had previously failed to provide and asked the court to set child support based on Mother's calculations of the parties' income. In a simultaneously filed Parents' Worksheet for Child Support, Mother calculated child support based on her income of \$4,652 per month based on an annual income of \$55,824 and Father's income of \$4,958 per month based on an annual income of \$59,492. Mother based Father's income on \$30,500 from the trust and \$28,992 from his business. Mother explained that she derived the figure for the business income by "splitting the difference between the Parties for business expenses that

[Mother] would have challenged had [Father] complied with discovery."

¶14 In a lengthy unsigned minute entry filed August 23, 2006, the court stated in part:

The Court is not satisfied with the evidence presented in this case. . . . At trial, the Respondent was unable to state with clarity what child support amount he should pay and how he calculated that amount. As best the court could understand, the Respondent's position is that he is making little or no net income and so he should therefore pay little or no child support. The Petitioner's CPA and the Respondent's accountant were of little help in determining the ultimate issue of the Respondent's income, neither having adequate access to the Respondent's original records. While the Court was able to glean some information from all of the witnesses and exhibits, the central question of the Respondent's income substantially eluded the presentation of evidence. In addition, the Court did not find the demeanor or credibility of the witnesses very convincing. Since it was the Respondent's burden to prove a substantial and continuing change in circumstances justifying a modification of child support, it was incumbent on him to present a case that is reasonably intelligible and persuasive to the Court. He did not do so. At the same time, the Respondent's course of conduct has prevented the Petitioner from launching a proper challenge to the Respondent's income claims.

The court indicated it was making "somewhat alternative rulings in this case." Based on the evidence presented, the court found that Father had not shown "a substantial and continuing change

in circumstances justifying a modification of child support" and denied Father's petition to modify. The court also recounted that Father had failed to comply with discovery orders regarding expense receipts, noted that the court had reserved a final ruling on Mother's Motion to Preclude that evidence, and ultimately granted the motion to preclude, "precluding from the court's consideration all of [Father's] proffered evidence concerning business expenses and business and personal income." The court then again denied Father's motion to modify child support based on the evidence remaining after Father's evidence of business expenses and business and personal income was excluded, saying that Father had not shown a substantial and continuing change in circumstances justifying a modification of child support. The court denied Father's motion to reopen and awarded Mother her attorneys' fees. In September 2006, Father filed a motion for new trial from the ruling.

¶15 By minute entries filed March 11 and April 28, 2008, Father was found in contempt for failure to remain current in child support payments. On June 11, 2008, at another contempt proceeding, Father argued that the child support amount was unjust and suggested that an error occurred in the hearing before Commissioner Arrow. The court found Father in contempt and ordered Father incarcerated, unless he purged the contempt

by paying \$3,600 and remained current in his support obligations for two years.

¶16 In September 2008, Father filed a motion requesting a ruling on the motion for new trial he filed in September 2006. In January 2009, Commissioner Wesley E. Peterson, denied Father's motion for new trial, in an unsigned minute entry filed January 14, 2009. On January 22, 2009, Father filed a Motion for Reconsideration of the January 7, 2009 Ruling and Request for Specific Findings of Fact. On June 1, 2009, Father filed a motion requesting a ruling on his motion for reconsideration.

¶17 In an unsigned minute entry dated June 16, 2009, and filed June 17, 2009, Commissioner Peterson denied the motion for reconsideration. On June 29, 2009, Father filed a motion for the court to issue a signed order reflecting the court's June 17, 2009, ruling denying his motion for reconsideration.

¶18 On July 29, 2009, Father filed a motion requesting a signed order with respect to the August 23, 2006, minute entry by Commissioner Arrow denying Father's Request to Modify Child Support filed January 31, 2005. Father also filed a notice of appeal from the August 23, 2006 minute entry and the January 14, 2009 minute entry. On August 19, 2009, the Honorable Colleen

McNally entered a signed order adopting the findings of the August 23, 2006, minute entry.¹

¶19 This court has jurisdiction with respect to the August 19 order pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(C) (2003).

DISCUSSION

¶20 Father argues on appeal that Commissioner Arrow erroneously denied his Request to Modify Child Support. Father contends that the evidence at trial showed that, since the original order was issued, Mother's income had substantially increased and the child was no longer in full-day day care.

¶21 A child support order may be modified "only on a showing of changed circumstances that are substantial and continuing." A.R.S. § 25-327(A)(2007); *Little v. Little*, 193 Ariz. 518, 520-21, ¶ 6, 975 P.2d 108, 110-11 (1999). The decision to modify a child support order is within the discretion of the trial court, and we will not disturb that decision absent an abuse of discretion. *Little*, 193 Ariz. at 520, ¶ 5, 975 P.2d at 110. The court abuses its discretion "when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent

¹ The subsequent signed order rendered timely the premature notice of appeal with respect to the August 23 ruling. See *Barassi v. Matison*, 130 Ariz. 418, 421-22, 636 P.2d 1200, 1203-04 (1981)(entry of final order after notice of appeal from unsigned minute entry makes appeal timely).

evidence to support' the decision." *Id.* (internal citation omitted).

¶122 Mother conceded that her income beginning in 2005 was \$55,824 a year or \$4,652 per month, compared with \$3,149.41 per month when the original support order was entered. Mother also agreed that she paid \$145 per month for the child's day care, where under the original order she was credited with paying \$366.66. Mother included these amounts in the calculations for child support she provided to the court after the hearing, demonstrating agreement that she considered these to be substantial and continuing changes.

¶123 Although the trial court indicated in its minute entry that it considered all the facts presented at the hearing, the court offered no explanation as to why it disregarded the undisputed evidence of Mother's increase in income and the decrease in daycare costs. Mother's income increased by almost half and the daycare costs decreased by more than half. We find these to be substantial and continuing changes that the court should have addressed. *See Fletcher v. Fletcher*, 137 Ariz. 497, 497, 671 P.2d 938, 938 (App. 1983) (not an abuse of discretion to find substantial change in circumstances where husband's income had been reduced by half). The court was clearly concerned with what it viewed as inadequate evidence regarding Father's income. Such concern, however, does not explain the

court's failure to take into account the changes in circumstances on which the parties agree, namely her increased income and lowered daycare expenses. Because the record does not support the court's finding of no substantial and continuing change, we remand to the trial court to recalculate Father's and Mother's support obligations in light of the changed circumstances.

¶24 Father also argues that the court improperly precluded his evidence of business expenses as a discovery sanction and that that evidence should be considered as evidence of his reduced income on remand. We review a trial court's evidentiary rulings for an abuse of discretion and do not reverse absent unfair prejudice. *Larsen v. Decker*, 196 Ariz. 239, 241, ¶ 6, 995 P.2d 281, 283 (App. 2000).

¶25 Mother moved to preclude the evidence pursuant to Rule 65(C), ARFLP, which states in part that a party who fails to timely disclose information required by Rule 49 shall not be permitted to use that evidence at trial. ARFLP 65(C). Rule 49 sets out the information to be disclosed with respect to child support. ARFLP 49(C).

¶26 Although the court initially denied Mother's Motion to Preclude, thereby permitting Father to present his evidence, the court made it clear at the close of the hearing that it would reconsider its ruling if a review of the record showed that

Father in fact had not complied with discovery requirements. When the court ultimately ruled, it noted that it had reviewed a transcript of the November 2005, hearing before Commissioner Hugh Hegyi, at which the court granted Mother's motion to compel and ordered Father to produce the requested documents; the related minute entry clearly stated, "Respondent shall fully comply within 10 days of today's date." Mother's Request for Production sought the production of the original expense receipts for copying at Mother's counsel's office or delivery of legible copies to Mother's counsel's office. Mother presented the court with a statement by Father from November 2005, indicating that Father was in the process of copying the business expense receipts requested. The court was also presented with a letter from Father's then counsel dated February 2006, saying that if Mother wanted to see the receipts for the business write-offs, she should make arrangements to send a copy service to Father or should go to Father's location to examine the documents. However, the record shows that, on February 8, 2006, Mother advised the court that Father had not complied with the discovery request and asked the court to proceed by a motion to preclude evidence; the court ordered Mother to file the motion to preclude that Commissioner Arrow then addressed. Father has not denied that he did not provide the documents or copies to Mother, but contends that he complied

with disclosure because he offered access to the documents, which Mother declined to accept.

¶127 Commissioner Arrow, after review, concluded that Father did not comply with the order to compel and precluded evidence of his business expenses. The record supports the court's decision. We find no abuse of discretion under the circumstances.

¶128 We also note that the court heard the evidence it ultimately precluded and issued alternative rulings, one in which the court considered this evidence and one in which the court excluded it. Even considering the evidence, the court found the evidence presented at the hearing inadequate to determine Father's income. The exclusion of the evidence therefore had no practical adverse effect on the trial court's decision and so did not result in prejudice to Father.

¶129 Father also asks this court to "vacate the continued award of attorney fees . . . arising from contempt hearings" and to "vacate and set aside the findings of contempt resulting in incarceration." Father does not identify the particular orders or circumstances with respect to the findings of contempt, but appears to base his request for relief on the invalidity of the existing child support order; several minute entries in the record indicate father has been held in contempt for failure to keep current in his support payments.

¶130 Findings of contempt for failure to comply with a court order are not appealable. *Pace v. Pace*, 128 Ariz. 455, 456-57, 626 P.2d 619, 620-21 (App. 1981). We therefore do not have jurisdiction to address Father's request.²

¶131 Father also argues that the superior court's January 2009, ruling denying his motion for new trial was erroneous. This order is an unsigned minute entry and not a final appealable order. See ARFLP 78, 81(A); *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 140 Ariz. 174, 181, 680 P.2d 1235, 1242 (App. 1984). We therefore have no jurisdiction to consider Father's argument.³ In any event, Father appears to challenge that ruling on the grounds that the underlying decision denying his motion to modify was incorrect. We have already addressed the propriety of the underlying judgment.

¶132 We find that the increase in Mother's income and the decrease in child daycare costs represent a substantial and

² To the extent that Father is arguing that his contempt adjudications should be vacated because the underlying order was improper, we note for Father's benefit that an order issued by a court with jurisdiction must be obeyed by the parties until that order is reversed. See *Broomfield v. Maricopa County*, 112 Ariz. 565, 568, 544 P.2d 1080, 1083 (1975). Until modified, the June 2003 support order remains a valid order with which Father must comply.

³ Father asserts that the superior court ignored "repeated entreaties" to sign the order. The record shows a single motion requesting a signed order reflecting the January 2009 ruling (although other requests were made with respect to other minute entries). The record shows no response from the court.

continuing change in circumstances warranting a recalculation of the parents' child support obligations. We therefore remand to the trial court to make the required calculation.

CONCLUSION

¶133 We reverse the trial court's decision finding no substantial and continuing change in circumstances. We remand for a recalculation of child support taking into account Mother's change in income and the decrease in child daycare costs.

/S/

JON W. THOMPSON, Judge

CONCURRING:

/S/

MICHAEL J. BROWN, Presiding Judge

/S/

SHELDON H. WEISBERG, Judge