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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 02/08/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF:) 1 CA-CV 09-0619
)
JASON CRAVEN,) DEPARTMENT A
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure
JODIE CRAVEN,)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court of Navajo County

Cause No. D020060549

The Honorable Thomas L. Wing, Judge

AFFIRMED

Gregory D. Green
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Winslow

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Show Low

T H O M P S O N, Judge

¶1 This is a dissolution case. Jason Craven (Father) appeals from the denial of his motion for new trial. For the reasons that follow, we affirm the decision of the trial court.

FACTS AND PROCEDURAL BACKGROUND

A. The Dissolution Proceeding

¶2 Father filed a dissolution petition in Navajo County Superior Court on October 19, 2006. He and Jodie Craven (Mother) had five living children, four of whom were minors at the time of the petition: A1., A2., R., and B. During the marriage, Father had worked as the president and chief executive officer of his company, Desert Rat Excavation, Inc. (Desert Rat), and Mother was a secretary for the business.

¶3 The family court filed its decree (the Decree) granting the dissolution on January 2, 2007. The Decree is a pre-printed form with boxes to check and blanks to complete. It provides for joint custody and for Father's payment of \$500 in monthly child support (based upon two children) starting in January 2007; \$750 in monthly spousal maintenance for Mother for twelve months; and the division of property pursuant to an attachment labeled "List of Assets for the Dissolution of Non-Covenant Marriage" (the List) executed by the parties on October 18, 2006. The List provides for the parties' residence as follows:

Real Property legal description (section 19, T11N.R20E: W2 of N 436.39' of S 875.15' of NE4 NW4 out of 205-31-023B) shall be sold with approximately 3 acres of land proceeds being shared equally. The remaining land shall become Jason's property.

After the Decree was entered, Mother accepted Father's offer to buy out her interest in the residence.

¶4 A parenting plan contemporaneously filed with the Decree, but not incorporated in it, provides that both Mother and Father will pay for non-insured medical expenses. No box is checked to indicate who will provide health insurance.

B. The Child Support Disputes

¶5 Initially A2. lived with Mother, and B. spent every other week with her while R. and A1. lived with Father. In August 2007, R. began living with Mother on alternating weeks. Meanwhile, Mother started working for the United Parcel Service and Home Depot, earning a monthly income of approximately \$2500.

¶6 In September 2007, the family court issued a contempt order against Father based upon his failure to pay Mother \$10,000 for her share of the community residence and failing to cooperate reasonably with Mother for payment of their children's uncovered medical expenses. Father successfully objected to the petition, and the family court denied Mother's contempt petition after a hearing. According to the minute entry: "It is the

finding of the Court it cannot determine based on the evidence presented what the agreement was between the parties.”

¶7 Meanwhile, Mother filed a petition to modify custody, parenting time, and child support on June 4, 2008. Mother’s modification petition alleges that Father had failed to contribute to the children’s medical expenses and requests primary physical custody of R. At the time of the hearing, one child resided with Mother full-time, one child resided with Father full-time, and the other two rotated, with the averaged result being that two resided with Father and two resided with Mother.

¶8 Father objected to modification, then filed his own Petition to Modify Child Custody And Child Support and To Provide Equitable Relief on August 21, 2008. He requested primary physical custody of A1. and shared custody of R. and B., with Mother having primary physical custody of A2. He also sought equitable relief for an alleged overpayment to Mother for her share of the house.

¶9 The family court conducted a modification hearing on May 19, 2009. During that hearing, the court granted Mother’s counsel’s oral motion to dismiss Father’s request for relief regarding the overpayment to Mother for equity in the marital home. The family court subsequently entered a signed order on child support on June 10, 2009 (along with child support

worksheets) reducing Father's child support obligation to \$221 per month, ordered him to pay child support and medical expense arrearages, and formally dismissed his equitable claim.

¶10 Father responded on June 25, 2009, with a notice of clarification and motion to clarify and for a new trial. The new trial motion raises the following issues: (1) whether the evidence supports the family court's calculation of Father's gross income for purposes of child support; (2) whether the family court erroneously credited Mother with \$737 in medical insurance; (3) whether the family court erroneously failed to credit Father with child support payments made prior to September 2008; and (4) whether the family court erroneously failed to make the modification order retroactive to the date of filing. The motion for clarification duplicates three of these claims.

¶11 The family court denied the motion for new trial in an August 3, 2009 order, but made additional findings that: (1) the child support worksheets correctly reflected the \$177 insurance credit to Mother and the \$737 reference was a typographical error; (2) Father owed arrears of \$2250 not \$2500; (3) and the court either lacked evidence to determine the amount of child support paid by Father through September 1, 2008, and could not determine an arrearage credit, or the parties could deduct the

amount as payment based upon records from the Clerk of Court's office.

¶12 Father attempted to appeal "from the judgment entered on the 3rd day of August, 2009, in favor of the Respondent" Because Father had not yet obtained a signed order we suspended the appeal to allow him to do so, and he did. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(F)(1)(2003) (authorizing an appeal from the denial of a new trial motion). See *Bulova Watch Co. v. Super City Dep't Stores of Ariz., Inc.*, 4 Ariz. App. 553, 555, 422 P.2d 184, 186 (1967) (holding that an interlocutory order made appealable by statute requires no appealability determination under Rule 54(b)).

DISCUSSION

A. The Family Court Did Not Abuse Its Discretion In Determining Father's Gross Income For Purposes Of Child Support

¶13 Because Father appealed solely from the denial of his motion for new trial, we review only the issues raised in his new trial motion. See *Matcha v. Winn*, 131 Ariz. 115, 116, 638 P.2d 1361, 1362 (App. 1981) (analyzing analogous Rule 59 of the Arizona Rules of Civil Procedure and concluding that "this court may not go beyond the matters assigned as error in the motion"). We also consider whether the family court had jurisdiction of Father's equitable claim.

¶14 This court will not disturb the family court's modification ruling absent an abuse of discretion. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). An abuse of discretion occurs "when the record, viewed in the light most favorable to upholding the trial court's decision, is "devoid of competent evidence to support' the decision." *Id.* (citation omitted). The same standard governs our review of the denial of a motion for new trial. *Drahos v. Rens*, 149 Ariz. 248, 251, 717 P.2d 927, 930 (App. 1985). We interpret the Arizona Child Support Guidelines, A.R.S. § 25-320 App. (2007) (the Guidelines), *de novo*. *Hetherington v. Hetherington*, 220 Ariz. 16, 21, ¶ 21, 202 P.3d 481, 486 (App. 2008).

¶15 Neither party requested findings of fact and conclusions of law pursuant to Rule 82(A), Arizona Rules of Family Law Procedure. Consequently, "we are constrained by the presumption that the Superior Court 'found every fact necessary to support the judgment, and such presumptive findings must be sustained if the evidence on any reasonable construction justified it.'" *Neal v. Neal*, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977) (citations omitted); *see also Berryhill v. Moore*, 180 Ariz. 77, 82, 881 P.2d 1182, 1187 (App. 1994) (in the absence of a request, an appellate court "must presume that the trial court found every fact necessary to support the judgment"). We accept the family court's factual findings unless they are clearly

erroneous. *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995).

¶16 Father contends that the family court erroneously attributed gross income to him for purposes of child support. As the party petitioning for modification of child support, Father had the burden to prove a substantial and continuing change of circumstances. A.R.S. § 25-327(A) (2007); see *Jenkins v. Jenkins*, 215 Ariz. 35, 39, ¶ 16, 156 P.3d 1140, 1144 (App. 2007) (affirming the denial of a modification request because the requesting party failed to show that the opposing party's circumstances had changed or that the latter had received sale income). The family court may consider "all aspects of a parent's income" to ensure that the award is "'just' and based on the total financial resources of the parents." *Cummings v. Cummings*, 182 Ariz. 383, 386, 897 P.2d 685, 688 (App. 1994) (considering gift income received over an 18-month period prior to the filing of the modification petition); see also A.R.S. § 25-320 App., Ariz. Child Support Guidelines, § 5(A) (defining "gross income" as "income from any source, and may include . . . recurring gifts . . .").

¶17 In the case of self-employment, gross income means "gross receipts minus ordinary and necessary expenses." Guidelines § 5(C). Benefits received in the course of

employment "shall be counted as income if they are significant and reduce personal living expenses. . . ." Guidelines § 5(D).

¶18 In *Pearson v. Pearson*, we applied Guideline 5(A) to another father running his solely owned corporation. 190 Ariz. 231, 233, 946 P.2d 1291, 1293 (App. 1997). The trial court imputed additional income to the father after finding that he had used corporate funds to finance his motorcycle, sports car, rental income, and payments to his parents. *Id.* at 235-36, 946 P.2d at 1295-96. We reasoned that a court "may not increase a child-support award to compensate for a payor's higher income in past years if the payor's current income is substantially lower." *Id.* at 236, 946 P.2d at 1296. There was a caveat, however:

Nevertheless, the court need not restrict its view of the evidence to a few isolated months after the filing of the modification petition in order to determine a party's current income, particularly when such income is controlled by the party himself and is subject to possible manipulation upon the filing of the modification petition.

Id. Thus, evidence of current income as well as "recent years' past income likewise may assist the court in determining whether an increase in income is 'continuing.'" *Id.* If "earnings are reduced as a matter of choice . . . the court may attribute income to the parent up to his or her earning capacity. *Id.* (citations omitted).

¶19 After receiving "total income" of \$52,000 or \$54,000 in 2006, Father claimed \$14,837 in income for 2007, yet paid \$12,000 for a car using mortgage refinancing proceeds and purchased a \$12,000 houseboat through Desert Rat. Father, who had not filed a 2008 tax return at the time of the May 19, 2009 hearing, expected that he would earned about the same amount of income in 2008 as in 2007, and was "living off the same expense" in 2008 that he was in 2007. Notwithstanding his assertion that he had not drawn a salary from Desert Rat in 2009, Father testified that "I'm buying [another boat] off of" a friend.

¶20 Meanwhile, Father's business gross receipts were \$634,925 in 2006 and \$520,113 in 2007. Father claimed that he had worked between 30 and 40 hours per week from April 2008 to January 2009 and had not been able to locate other work in Navajo County or Phoenix.

¶21 Father admitted that both Desert Rat and his mother subsidized his \$2100 monthly mortgage payments. He testified that his mother had made two \$8,400 payments toward his mortgage, and Desert Rat last paid the mortgage in April or May of 2008. Desert Rat was also funding (1) Father's monthly payments for gas for the children's vehicles (\$120), (2) Father's truck payment (\$800), and (3) Father's residential utility expenses (\$200). There is no evidence that Father agreed to repay any of these amounts.

¶22 Father's own testimony thus confirms that he receives a total of \$3220 from Desert Rat and his mother toward his monthly expenses. The family court calculated Father's gross income as \$3753, thereby imputing another \$533 in monthly income to Father. The net effect was that Father's monthly child support obligation was reduced to \$221.

¶23 The family court attributed income to Father based upon "large unnecessary debts on purchases in 2007 and/or 2008, which led to reduced and continues to reduce payments to him by the business, Desert Rat Excavating, Inc., to wit: a houseboat and a Honda vehicle." We find no abuse of discretion. As *Pearson* teaches, income from a parent-controlled business may be subject to manipulation for purposes of child support modification. *Id.* We therefore cannot agree that the family court was required to view the 2007 purchases in isolation and as relevant only to 2007 gross income, and therefore could consider their relevance to Father's 2008 earnings. Indeed, this court has considered the impact of gifts over an eighteen-month time frame. See *Cummings*, 182 Ariz. at 387, 897 P.2d at 689.

¶24 The only evidence concerning Father's gross income in 2008 and 2009 was his own testimony, which the family court is in the best position to evaluate. The family court did not find a precipitous drop in Father's income during the relevant time

frame. Although we cannot say how the court derived the additional \$533,¹ it was not required to specify in view of the parties' failure to request findings of fact. Viewing the evidence in the light most favorable to Mother, we hold that there was reasonable evidence upon which to sustain this attribution, whether through Father's unnecessary purchases and/or his mother's and Desert Rat's continuing contributions.

B. Father Did Not Preserve His Medical Expense Arrearage Argument

¶25 Father also objects to the family court's assessment of his medical expense arrearages. He failed, however, to raise this objection in the motion for new trial. We therefore decline to address it. See *Matcha*, 131 Ariz. at 116, 638 P.2d at 1362.

C. The Family Court Did Not Abuse Its Discretion In Crediting Mother With A \$177 Monthly Insurance Payment

¶26 Father also claims that the family court abused its discretion in crediting Mother with \$177 for insuring the children each month. Because the motion for new trial attacks

¹ Father complains on appeal that the family court contradicted itself in ruling during testimony that 2007 income was not relevant, and then relying on 2007 purchases for purposes of the support calculation. We note that the family court nevertheless admitted Father's and Desert Rat's 2007 income tax returns and heard testimony concerning the alleged decline in Father's income since 2007. No party asserts prejudice from the family court's evidentiary rulings.

the \$177 calculation both as a typographical error and as unsupported by the evidence, we address it on appeal.

¶27 According to her hearing testimony, Mother paid approximately \$108 per month to insure the children prior to January 2009, and \$152.16 per month since then. On appeal, Mother suggests that the family court added another \$24.84 in ongoing additional expenses to \$152.16 to arrive at the \$177 amount.

¶28 The record supports the family court's credit to Mother of \$177 per month. Health insurance for the children cost \$152.16 per month, and the record supports an additional \$24.84 for father's share of ongoing medical expenses for the children. We find no error.

IV. The Court Properly Dismissed Father's Claim For Equitable Relief

¶29 Father contends that the family court erred in dismissing his equitable claim. We review the dismissal and underlying statutory interpretation *de novo*. *In re Stephanie N.*, 210 Ariz. 317, 318, ¶ 5, 110 P.3d 1280, 1281 (App. 2005).

¶30 The List provides that the parties' real property "shall be sold with approximately three (3) acres of land proceeds being shared equally." The parties claim they entered into and performed an agreement for Father to buy Mother's

interest. No writing establishing the terms of this property sale appears in the appellate record.

¶31 Father testified that the residential property was appraised at \$525,000 and had about \$305,000 in equity. He paid Mother "170,000" and thus overpaid her by "30,000 to \$40,000." Father explained that Mother had requested \$170,000 and he gave her a check even after telling her "it sounds like it's too much money." The parties did not amend the Decree to reflect the transaction.

¶32 At the hearing, the family court granted Mother's motion to dismiss the equitable claim. The family court reasoned that "if they chose to contract in a way different from the judgment or decree of dissolution of marriage, that's not a subject matter for enforcement." We agree.

¶33 Family courts lack authority to grant equitable relief outside the statutory framework from which they derive their authority. *Victor v. Victor*, 177 Ariz. 231, 233, 866 P.2d 899, 901 (App. 1993). "Spousal maintenance, child support, custody, and visitation [agreement] provisions are squarely within the continuing jurisdiction of the trial court." *LaPrade v. LaPrade*, 189 Ariz. 243, 246, 941 P.2d 1268, 1271 (1997) (discussing agreements incorporated but not merged into the decree). In contrast, property awards are final and not subject to later modification except when grounds exist to reopen the

judgment, an argument Father does not make here. See A.R.S. § 25-327(A) (2007). Post-decree agreements are essentially debtor-creditor matters that do not require continuing family court jurisdiction. See *Diedrich v. Diedrich*, 424 N.W.2d 580, 583 (Minn. Ct. App. 1988).

¶34 Father argues in favor of jurisdiction by pointing out that the Decree does not expressly preclude selling the residential property to a third party. On this record, we cannot even determine the terms of the alleged post-Decree contract and how Mother's proceeds would be calculated. The family court lacks jurisdiction over Father's equitable relief claim, and properly dismissed it.

CONCLUSION

¶35 We affirm the family court's ruling as to Mother's insurance credit. We affirm the calculation of Father's gross income and the dismissal of his equitable relief claim. After considering the reasonableness of the parties' positions and the absence of evidence reflecting their current financial resources, we deny Father's request for attorneys' fees on appeal pursuant to A.R.S. § 25-324(A) (Supp. 2009). We also deny Mother's fee request in light of her failure to cite a statutory basis and our inability to infer such a basis from the

context of her brief.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

DANIEL A. BARKER, Judge