DIVISION ONE
FILED: 10/21/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF:	)	1 CA-CV 09-0646
	)	
RANDY KENNISON,	)	DEPARTMENT E
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication
v.	)	- Rule 28, Arizona
	)	Rules of Civil
MARILEE TANGEN,	)	Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2007-002644

The Honorable Randall H. Warner, Judge

AFFIRMED

Mariscal, Weeks, McIntyre & Friedlander, P.A. Phoenix
By Robert L. Schwartz
Marlene A. Pontrelli
Attorneys for Petitioner/Appellant

Marilee Tangen Van Nuys, CA
In Propria Persona

H A L L, Judge

¶1 Randy Kennison (Father) appeals from the trial court's award of child support and arrears to Marilee Tangen (Mother)

and its denial of his motion for a change of judge. For the reasons that follow, we affirm the trial court's rulings.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Father are the biological parents of Violet Tangen (Violet), born on February 20, 2007. Mother and Father never married or lived together. At the time of Violet's birth and at the time Father filed a petition for paternity, Mother was residing in Arizona and Father in California.

¶3 In 2001, Father started his own business as a reseller of telephones and printers for one client, Countrywide Financial. Father earned income in excess of $1,000,000.00 in 2004, 2005, and 2006.

¶4 Father filed a petition for paternity on April 11, 2007. At the December 4, 2007 evidentiary hearing held on the petition, Father testified that, as a result of his exclusive association with Countrywide and the economic downturn experienced by the lending institution, his income was significantly reduced in late 2007. Indeed, he testified that his income had fallen to only $3,000.00 per month in the last quarter of 2007 and asked the court to calculate child support based on that amount. Father's tax return for 2007, however, reflected an earned income of $398,025.00. Evidence was also presented that Father has three mortgaged homes worth

approximately $7,700,000.00 and owns or leases four cars. Mother earns $2,752.00 per month.

¶5 On February 12, 2008, the trial court entered its paternity judgment. The court imputed income of $1,000,000.00 per year to Father and ordered, among other things, that Father pay child support in the amount of $4,182.00 per month and unpaid child support due for the period March 1, 2007 through December 1, 2007 in the amount of $15,736.00 plus interest. In its findings of fact and conclusions of law, the court explained its basis for the child support order:

> [A] strict application of the child support guidelines in this case is inappropriate and unjust in light of Father's income, financial resources and needs such that a deviation from the guidelines is appropriate.

¶6 Father filed a motion for reconsideration and a motion for new trial, which were denied. Father then timely appealed, arguing the trial court abused its discretion by deviating from the Child Support Guidelines (the Guidelines), failing to base child support on his current income, and awarding excessive arrears. Father also argued that the trial court did not consider and make findings as to all of the relevant factors before ordering child support in an amount above that recommended by the Guidelines. We vacated the award and remanded to the trial court because the court "did not explain

how and why it arrived at its conclusion that application of the Guidelines was inappropriate or unjust and that its deviation was in the best interests of the child." *Kennison v. Tangen*, 1 CA-CV 08-0352 at ¶ 11 (Ariz. App. Apr. 9, 2009) (memorandum decision).

¶7 On remand, the trial court affirmed its original order awarding Mother child support in the amount of $4,184.25 per month. In determining an upward departure from the presumptive child support award was justified, the trial court expressly considered the factors set forth in § 8 of the Guidelines and concluded that the "presumptive child support [award was] inappropriate [and] unjust based solely on Father's income, resources, needs and the standard of living the child would have enjoyed had the parents lived together."

¶8 Father timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-2101(B) and 12-2102(B) (2003).

DISCUSSION

I. Child Support Award

¶9 Father contends that the trial court erred by failing to base child support on his current income, deviating from the Guidelines, and awarding excessive arrears. We review child support awards for an abuse of discretion. *McNutt v. McNutt*,

203 Ariz. 28, 30, ¶ 6, 49 P.3d 300, 302 (App. 2002). The court abuses its discretion when the record "is devoid of competent evidence to support the decision." *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 14, 66 P.3d 70, 73 (App. 2003). We will accept the trial court's findings of fact unless they are clearly erroneous, but we draw our own legal conclusions from facts found or implied in the judgment. *McNutt*, 203 Ariz. at 30, ¶ 6, 49 P.3d at 302 (citation omitted). We review the trial court's interpretations of the Guidelines de novo. *Id*.

A. Income Used to Calculate Child Support

¶10 Father contends that the trial court abused its discretion by imputing to him an annual income of $1,000,000.00 rather than using the $3,000.00 per month figure that he testified was his current income.

¶11 At the evidentiary hearing, Father acknowledged that he earned in excess of a million dollars in 2004, 2005, and 2006. He also admitted that as recently as March 2007 he was earning over $500,000.00 per month. He testified, however, that his "financial situation has changed." When asked when his financial situation changed, Father initially stated "last month" and then later testified that in the "last two or three months" he had experienced a substantial decrease in revenue.

After Father testified on direct, the trial court asked him numerous questions about his standard of living. Father admitted that he was continuing to maintain his homes and vehicles and did not testify to any significant change in his lifestyle. The trial court then asked Father what he planned to do when his "money runs out" and Father explained that he "hope[s] that money doesn't run out" and he plans to "bring [his] company back."

¶12 As Father notes, pursuant to the Guideline § 5(E), the trial court "may attribute income to a parent up to his or her earning capacity," if the court finds the "earnings are reduced as a matter of choice and not for reasonable cause." Although Father testified that his income decreased dramatically in the month or few months immediately preceding the evidentiary hearing, the record reflects, and the trial court found, that "Father has not significantly altered his lifestyle" demonstrating that Father expects to "bring his earnings back to the million-dollar level." The trial court also found that Father "has the ability to earn a seven figure income."

¶13 Based on Father's historical income from 2004 through August 2007, the trial court's finding that Father has the ability to continue to earn a seven-figure income, and Father's decision to maintain his lifestyle, we cannot say that the trial

court abused its discretion by imputing a $1,000,000.00 annual income to Father, notwithstanding his testimony that his income fell sharply during the brief period immediately preceding the evidentiary hearing.

B. Deviation from the Guidelines

¶14 Father contends that the trial court abused its discretion by deviating from the Guidelines. First, Father argues that the trial court "ignored" the Guidelines income cap and corresponding presumptive child support amount. Second, Father argues that Mother failed to meet her burden of submitting evidence on *all* of the relevant factors and that the trial court did not consider *all* of the relevant factors and instead made inappropriate assumptions. Third, Father claims that the trial court's award does not take into account Violet's reasonable needs. Finally, Father maintains that the child support award is "disguised spousal maintenance."

¶15 Pursuant to § 8 of the Guidelines, a child support order is calculated based on the combined adjusted monthly income of both parents. "If the combined adjusted gross income of the parties is greater than $20,000 per month, the amount set forth for combined adjusted gross income of $20,000 shall be the presumptive Basic Child Support Obligation." Guidelines § 8. A party may seek a sum greater than the presumptive amount, but

bears the burden of proof to establish that a higher amount is in the best interest of the children,

> taking into account such factors as the standard of living the children would have enjoyed if the parents and children were living together, the needs of the children in excess of the presumptive amount, consideration of any significant disparity in the respective percentages of gross income for each party and any other factors which, on a case by case basis, demonstrate that the increased amount is appropriate.

Id. As set forth more generally in A.R.S. § 25-320(D) (Supp. 2009), relevant factors for deviating from the Guidelines also include:

> 1. The financial resources and needs of the child.
>
> 2. The financial resources and needs of the custodial parent.
>
> 3. The standard of living the child would have enjoyed had the marriage not been dissolved.
>
> 4. The physical and emotional condition of the child, and the child's educational needs.
>
> 5. The financial resources and needs of the noncustodial parent.
>
> . . . .
>
> 7. Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.

8. The duration of parenting time and related expenses.

¶16 In its minute entry issued upon remand, the trial court specifically considered each of the factors set forth in A.R.S. § 25-320(D), but modified the language in A.R.S. § 25-320(D)(3) to track that of § 8 of the Guidelines, considering the "standard of living the child would have enjoyed if the parents and the child were living together." The trial court made findings for each of these factors and concluded that neither Violet nor Mother has any extraordinary needs or circumstances. Indeed, the trial court noted that not "all factors point to the need for a deviation." The trial court found, however, that:

> the critical factors that made the presumptive Guidelines support unjust and inappropriate are (1) the child would have enjoyed a substantially greater standard of living had the parents and she lived together, (2) Father has substantial resources and far more than he needs, (3) there is a significant disparity between Father's and Mother's percentages of total income. To put it succinctly, it is unjust for the child to live on only $2,091 per month and Mother's modest earnings while Father lives the lifestyle he lives, makes the money he makes and can afford to pay much more in child support than the presumptive amount.

The trial court went on to find that "doubling the presumptive child support achieves a just result that is in the child's best

interests by bringing the child's standard of living closer to that of her Father, without imposing on Father an excessive burden."

¶17 As the trial court expressly stated in its minute entry, neither A.R.S. § 25-320(D) nor § 8 of the Guidelines requires that each of the relevant factors weigh in favor of a deviation from the Guidelines' presumptive amount. Instead, they each set forth factors for the trial court to consider in determining whether the presumptive amount is unjust or inappropriate. Here, the trial court made express findings as to each factor and concluded that the standard of living Violet would have enjoyed if Mother and Father lived together, Father's financial resources and needs, and the significant disparity between Mother's and Father's respective incomes merited an upward deviation.[1] We conclude that such a determination was within the trial court's discretion.[2]

---

[1] Father contends that the trial court erred in deviating from the Guidelines absent evidence that Violet's needs are greater than those of a typical child. Although there is a presumption that the basic child support obligation meets a single child's reasonable needs, a party may successfully rebut that presumption by presenting evidence of the factors prescribed in § 8 of the Guidelines and A.R.S. § 25-320(D). Contrary to Father's argument, a party need not demonstrate that the child has special needs.

[2] Father also argues that the trial court made improper "assumptions" by finding that Violet would have enjoyed a higher standard of living if Mother and Father lived together and that

C. Award of Child Support Arrearages

¶18 Father argues that the trial court abused its discretion by awarding child support arrearages for the ten-month period preceding entry of the paternity judgment in the amount of $41,820.00 (although offset by amounts Father already paid to Mother). The trial court calculated the arrearage amount using its ordered monthly child support of $4,184.25. Citing *Pizziconi v. Yarbrough*, 177 Ariz. 422, 868 P.2d 1005 (App. 1993), and *Ortiz v. Rappeport*, 169 Ariz. 449, 820 P.2d 313 (App. 1991), Father contends that the order for child support arrearages should be limited to the amount Mother proved she "actually expended" to care for Violet.

¶19 As explained in *Pizziconi*, these cases stand for the proposition that a father may prove "that the Mother's past expenses on behalf of the Child were less than those indicated by the Guidelines work sheets." 177 Ariz. at 426, 868 P.2d at 1009 ("We do not read *Ortiz* to hold that the only way of arriving at back child support is to document what was actually

---

his financial resources substantially exceed his needs. This claim is without merit. If Violet lived with Father, she would have, as the trial court specifically found, lived in an expensive home and rode in expensive cars. Moreover, we find no clear error in the trial court's finding that multiple expensive homes and multiple high-end vehicles are more than one individual "reasonably needs."

spent on the child's behalf."). Here, as in *Pizziconi*, Father "did not attempt to do so." *Id*.

¶20 More importantly, however, A.R.S. § 25-809(A) (2007) was amended in 1994, after decisions in *Pizziconi* and *Ortiz* were decided, and specifically provides that a trial court "shall . . . us[e] a retroactive application of the current child support guidelines [to calculate] the amount, if any, the parties shall pay for the past support of the child." Therefore, the trial court did not err by using its monthly child support order as the basis for calculating the arrearages Father owes.

II. Denial of Request for Change of Judge

¶21 Father argues that the trial court erred in denying his request for a change of judge. Specifically, Father contends that a new evidentiary hearing was necessary on remand and he was therefore entitled to a new judge as a matter of right. *See* Ariz. R. Civ. P. 42(f)(1)(E) ("When an action is remanded by an appellate court and the opinion or order requires a new trial on one or more issues, then all rights to change of judge are renewed[.]").

¶22 Contrary to his claim, however, our decision order in Father's first appeal did not require the trial court to hold another evidentiary hearing and receive additional evidence.

Instead, we "remand[ed] to the trial court for further findings" and instructed the court to "explain how and why it arrived at its conclusion that application of the Guidelines was inappropriate or unjust and that its deviation was in the best interests of the child." *Kennison*, 1 CA-CV 08-0352 at ¶ 11. Therefore, because we did not remand for a new trial, Father was not entitled to a new judge and the trial court did not err by denying his request. *See Anderson v. Contes*, 212 Ariz. 122, 126, ¶ 15, 128 P.3d 239, 243 (App. 2006) ("Absent a remand for a new trial, a party is not entitled to a judge who is ignorant of previous proceedings and may be more sympathetic to his position.").[3]

[3] To the extent Father requests that we order the trial court to grant his request for a change of judge on remand, we note that it is unnecessary given the disposition in this case and also that such a request, in any event, would not be properly before us.

CONCLUSION

¶23 For the foregoing reasons, we affirm the trial court's ruling affirming its paternity judgment.

/s/
PHILIP HALL, Presiding Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Judge

/s/
PETER B. SWANN, Judge