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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



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FILED: 06-08-2010
PHILIP G. URRY, CLERK
BY: GH

IN RE THE MARRIAGE OF:) 1 CA-CV 09-0647
)
JESSE DE LA HUERTA,) DEPARTMENT A
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
ARACELI GALVAN,) Civil Appellate Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-005164

The Honorable Peter C. Reinstein, Judge

REVERSED AND REMANDED

Jesse De La Huerta, Appellant Glendale
In Propria Persona

Araceli Galvan, Appellee Avondale
In Propria Persona

B A R K E R, Judge

¶1 Jesse De La Huerta ("Husband") appeals from the order modifying his spousal maintenance obligation and the amount of

child support Araceli Galvan ("Wife") was ordered to pay. For the reasons stated below, we reverse and remand for reconsideration of the spousal maintenance and child support orders.

Facts and Procedural History

¶12 The parties were divorced in November 2008. The decree awarded Wife \$600 per month in spousal maintenance for 60 months. The child support worksheet prepared by the court resulted in an order that Wife pay Husband \$57.72 in child support each month.

¶13 In May 2009, Husband filed a petition to modify the support orders. Husband claimed that his income was reduced due to mandatory work furloughs and that Wife's income had increased since trial. He also argued that his expenses, including child care costs, had increased since the trial and that Wife's expenses were less than she claimed. The court held an evidentiary hearing and entered modified support orders. Husband's spousal maintenance obligation was reduced to \$450 per month, and Wife's child support obligation was increased to \$150.76 per month.

¶14 Husband filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).

Discussion

¶15 Husband argues that the family court abused its discretion in denying his request to terminate spousal maintenance and increase the amount of child support Wife pays. A child support or spousal maintenance order "may be modified or terminated only on a showing of changed circumstances that are substantial and continuing." A.R.S. § 25-327(A) (2007). We review the trial court's decision regarding the existence of changed circumstances warranting a modification of spousal maintenance for an abuse of discretion. See *Van Dyke v. Steinle*, 183 Ariz. 268, 273, 902 P.2d 1372, 1377 (App. 1995). Similarly, the decision to modify a child support order will not be disturbed absent an abuse of discretion. See *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). "An abuse of discretion exists 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." *Jenkins v. Jenkins*, 215 Ariz. 35, 37, ¶ 8, 156 P.3d 1140, 1142 (App. 2007) (citation omitted).

¶16 The decree found that Husband's income as a court translator was \$4041 per month, and Wife's income as a teacher's aide was \$1405 per month. After the modification hearing, the court found that Husband's monthly income was \$3694 and Wife's

was \$1405. The court accepted Husband's evidence of a \$347 per month reduction in his income. On the child support worksheet, the court also gave Husband a \$686 credit for supporting the parties' niece for whom they are legal guardians. See A.R.S. § 25-320 app. § 6(D) (2007) ("Guidelines"). Thus, for child support purposes, Husband's income was \$3008. The Guidelines direct the court to first determine the amount of spousal maintenance before calculating child support. See Guidelines § 2(C). Therefore we will review the spousal maintenance award first.

¶7 Husband argues that he cannot afford to pay spousal maintenance because his child care costs and other living expenses have increased since the trial. The court found the evidence of increased child care costs and other living expenses was "ambiguous." Husband claimed that his average monthly child care costs were \$492. To prove this expense, Husband provided receipts from the three months prior to trial: May, June, and July. The average cost of child care for these three months was \$492. Wife did not dispute that Husband actually paid this amount, but claims that the increased expense was only temporary. She also argues that three months of receipts was insufficient to prove the amount of child care had increased.

¶18 At the hearing, Wife claimed that she left the children at the babysitter's longer hours because she wanted to remain available to work afternoons at a second job as a translator. Wife did not claim the second job was temporary; rather she testified that it was sporadic work depending on her employer's need for a translator on a particular day. Wife did not dispute the amount Husband was paying the sitter for the three months prior to the hearing, but claimed that these receipts were only for amounts paid during the summer months when the cost of daycare was higher because she left the children for longer hours to be available to work as a translator. Wife testified that during the school year, she picks up the children earlier, and the cost of child care is less.

¶19 Viewing the evidence in the light most favorable to Wife, the higher child care costs occur only in the summer months. See *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984) (holding that appellate court must view evidence in the light most favorable to appellee). The court is required to annualize fluctuating expenses. See Guidelines § 2(F). The evidence showed that Husband paid an average of \$492 per month in child care costs from May to mid-July 2009. The amount set forth in the prior child support order for child care was \$248

per month. This is the only evidence of the cost of child care in non-summer months.

¶10 The court did not appear to annualize the varying child care costs, but instead, imputed \$300 per month.¹ We reverse and remand for the trial court to use an annualized amount of child care costs instead of an imputed figure.

¶11 Next, Husband claims that he showed a substantial and continuing change in his living expenses that warranted terminating spousal maintenance. He claims that the prior support orders were based on his having only \$1500 in living expenses. However, the decree noted that Husband's Affidavit of Financial Information ("AFI") claimed \$1500 in living expenses *without any rent*. The decree attributed \$1000 for housing expenses, including utilities, when determining the appropriate amount for spousal maintenance. Thus, the prior spousal maintenance order is based on Husband having \$2500 in living expenses.

¶12 At the hearing, Husband's updated AFI showed that his living expenses, including rent and utilities, were \$1927.82. Adding in the health insurance costs, the total expenses are

¹ Annualizing \$248 (times nine months) and \$492 (times three months) results in a monthly child care cost of \$309 (\$3708/12). This is not a significant difference, but because we are also remanding on other grounds, *see infra* ¶ 14, the court shall annualize the child care costs on reconsideration.

\$2447.52. This is not significantly different than the expenses Husband incurred at the time of trial. Therefore, Husband failed to show any substantial and continuing change in his living expenses that warranted an adjustment of his support obligation.

¶13 Husband also argues that the court failed to consider evidence that Wife had exaggerated her living expenses on her AFI. He also claims that the court failed to take into account the additional \$100 per month in income Wife earns at her second job. The trial court did not address these claims.

¶14 Wife testified that her second job as a translator was sporadic and the income was not guaranteed. Her regular job is at a school, so during the summer months Wife is able to work more hours as a translator when she is called. Even then, Wife testified that she works only two or three times a week. Wife's AFI only showed pay stubs for approximately six weeks of work as a translator. These were during the summer months when she was not working her regular job at the school. She earned \$537.50 between May 16 and June 26, 2009, or about \$90 per week. These earnings are not consistent, but Wife testified that she could earn this amount during the summer months. The court failed to take this additional income into consideration because it found that Wife's income was \$1405, which is what she earns as a

teacher's aide. The court must annualize the amount Wife is able to earn during the summer months.² See Guidelines § 2(F). Although it is not a significant increase in Wife's income, the increase may affect the court's spousal maintenance determination and must be factored into the child support worksheet. We, therefore, reverse and remand for reconsideration of the child support and spousal maintenance orders.³

¶15 The trial court did not make any specific findings regarding Husband's claim that Wife's expenses were exaggerated. Wife does not respond to this argument in her answering brief. The only expense Husband has adequately challenged was Wife's claim that she pays \$260 for her own medical insurance. Her pay stubs show that this is a benefit paid by her employer. Wife did not dispute this fact. Nonetheless, this does not change Wife's entitlement to spousal maintenance. The court awarded

² Assuming a 12-week summer, Wife would earn \$90 per month (\$90 per week times 12 weeks = \$1080/12 months = \$90 per month).

³ Husband asks this court to award him the federal tax exemptions from 2009 through 2011. On remand, the trial court may consider this request, but this is only mandatory for child support obligations that are at least \$1200 per year, which is not the case here. See Guidelines § 27 (in cases where child support obligation is at least \$1200 per year, court is required to allocate tax exemptions to approximate as closely as possible the percentages of child support provided by each parent).

Wife spousal maintenance based on a finding that Wife's expenses were approximately \$2000 per month. Even without health insurance, Wife's current AFI lists living expenses of \$2203.84. These expenses, coupled with her income, still entitle her to an award of spousal maintenance. See A.R.S. § 25-319 (A)(1), (2) (2007). The amount of the award does not appear to have been based on the additional cost of her health insurance because her income (\$1405 or even \$1505 as Husband claims) plus support (\$450) still will not meet her reasonable living expenses (\$2203.84).

Costs on Appeal

¶16 Wife requests an award of her costs on appeal pursuant to Arizona Rule of Civil Appellate Procedure 21. Husband argues that Wife is not entitled to such award because she is not represented by counsel. Wife was not the successful party on appeal; therefore, we deny her request for costs. See A.R.S. § 12-341 (2003) (holding the successful party in a civil action is entitled to costs).

Conclusion

¶17 We reverse and remand the spousal maintenance and child support orders for reconsideration. We deny Wife's request for an award of costs on appeal.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge