DIVISION ONE
FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	No. 1 CA-CV 10-0553
	)	
JAMES T. THOMASON,	)	DEPARTMENT A
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
KATHERINE L. THOMASON,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2006-007844

The Honorable Peter C. Reinstein, Judge

AFFIRMED; REMANDED

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By Stanley D. Murray
Attorneys for Respondent/Appellee

J O H N S E N, Judge

¶1 James Thomason appeals the denial of his requests to modify child support and parenting time. For the following

reasons, we affirm the superior court's order but remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 James and Katherine Thomason (respectively "Father" and "Mother") divorced in 2007. At the time, they entered into a joint custody agreement that granted Father parenting time every other weekend, on alternating holidays and for four weeks during the summer. The agreement also required Father to pay $800 per month in child support.

¶3 In May 2009, asserting his financial situation had deteriorated, Father filed a petition to modify child support. He argued that the general decline in the economy affected his livelihood as the operator of a welding company and created a "significant and material change in [his] financial circumstances" that justified a reduction in child support.

¶4 Mother filed an objection to Father's petition and also filed a petition to enforce child support, arguing that Father was $1,600 in arrears. The court set a hearing for August 3, 2009, on Mother's petition to enforce but did not immediately set a hearing on Father's petition to modify. Our record does not include a transcript of the August 3 proceeding, but on that date a commissioner signed an "Order Re: Child Support" that granted judgment in Mother's favor for $2,402 in

arrears plus interest and ordered Father to satisfy that judgment by monthly payments of $50. The order also provided:

> [Father] shall continue to make monthly current CHILD SUPPORT payments in the amount of $800.00 in accordance with the Court's Order dated 5/11/2007.
>
> That an Order of Assignment should be ordered against [Father's] wages in the amount of $850.00, which constitutes $800.00 for current CHILD SUPPORT as ordered above and $50.00 towards the arrears plus fees applicable by law against [Father's] present employer or payer, and future employers or payers upon proper notice.

At the end of the order was the following:

> **Stipulation,**
> **SIGNATURE BY PETITIONER AND RESPONDENT:**
>
> By signing this document, we state to the Court, under penalty of perjury, that we have read and agree to this Order and that all the information contained in it is true, correct and complete to the best of our knowledge and belief.

Father and Mother each signed and dated the document.

¶5 On September 18, 2009, Father filed an amended petition to modify child support that included a request to be designated the child's primary residential parent. In the parties' joint pretrial statement filed May 24, 2010, he asked that he receive "final decision-making over [the child's] medical issues and extracurricular activities." As for parenting time, Father asked for a "5/2/2/5" arrangement. After an afternoon-long trial on May 26, 2010, the court entered a

six-page order providing, *inter alia*, that Mother would continue to be the primary residential parent and increasing Father's parenting time. The court declined to modify Father's child support obligation, observing:

> The Court finds it is somewhat disingenuous of Father to file for a modification of child support only six weeks after he had agreed to the Child Support Order. The Court further finds that the evidence is ambiguous as to whether there has been a substantial and continuing change of circumstances that would require a modification of child support pursuant to A.R.S. § 25-327.

¶6 Father timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. Father's Due-Process Claim.

¶7 Father first argues the superior court violated his due process rights under A.R.S. § 25-327 (2007) by refusing to consider his petition to modify child support. He argues the court failed to consider his petition to modify because the court erroneously concluded either that the August 3, 2009 order resolved Father's original request to modify child support or that Father had agreed at the August 2009 hearing to a continuing child-support obligation of $800 a month. Father

contends the August 2009 hearing addressed arrearages but did not address the amount of child support Father should have to pay. He argues that by signing the August 3, 2009 order, he meant only to acknowledge the existence of the underlying child-support order and did not intend to agree to be bound to pay $800 a month in child support.

¶8 We do not accept Father's contention that the superior court failed to consider his petition to modify child support. At the May 26, 2010 trial, the court admitted exhibits Father offered to demonstrate his financial situation and did not preclude Father from testifying in support of his contention that his financial situation had deteriorated. Indeed, the court expressly considered evidence relating to Father's petition to modify child support, concluding "the evidence is ambiguous as to whether there has been a substantial and continuing change of circumstances that would require a modification of child support."

¶9 Father next argues the superior court erred by failing pursuant to A.R.S. § 25-327 to compare his then-current circumstances with the circumstances that existed at the time of the original May 2007 child-support order. He contends the court erred by comparing his current financial circumstances with the circumstances that existed at the time of the August 3, 2009 hearing.

¶10 Father, however, cites nothing in the record to support his contention that the superior court improperly applied § 25-327. In its June 4, 2010 order, quoted above, the court did not recite the financial evidence on which it based its order, and it did not explain the basis for its conclusion that "the evidence is ambiguous" on the substantial-and-continuing-change-in-circumstances issue. Father does not argue that the court declined a request to make findings of fact or conclusions of law that might have clarified the court's consideration of the request to modify child support; nor did Father file a motion for reconsideration or a motion for new trial on the issue. On appeal, we generally presume the superior court properly applies the law, and we do so here. *See Fuentes v. Fuentes*, 209 Ariz. 51, 55-56, 58, ¶¶ 18, 32, 97 P.3d 876, 880-81, 883 (App. 2004).

B. The Court Did Not Abuse Its Discretion in Declining to Modify Child Support.

¶11 Father argues the superior court abused its discretion by failing to modify child support pursuant to § 25-327. Modification must be based on substantial and continuing changed circumstances. A.R.S. § 25-327(A).

¶12 "[W]hether changed circumstances exist to warrant modification of [a child-support] award is within the sound discretion of the trial court." *Cummings v. Cummings*, 182 Ariz.

383, 387, 897 P.2d 685, 689 (App. 1994). Absent an abuse of discretion, we will not disturb the court's decision. *In re Marriage of Robinson & Thiel*, 201 Ariz. 328, 331, ¶ 5, 35 P.3d 89, 92 (App. 2001). "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." *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (internal quotations omitted).

¶13 The record contains substantial evidence supporting the superior court's decision to decline to modify Father's child-support obligation. Father testified at one point during the hearing that he does not pay himself through his business. Later, however, he admitted that he takes $2,440 a month from his company. Moreover, his affidavit of financial information, dated April 6, 2010, listed no housing expense.[1]

¶14 Father also argues the court erred by failing to consider his ability to pay child support. Again, however, Father cites nothing in the record to support that contention, and he does not assert that the court erred by denying a request to enter findings explaining its conclusion. Moreover, the

[1] Father also argues the superior court may have erroneously imputed income to him, but he offers no support in the record for that proposition. As noted, he does not complain that the court rejected any request to make findings of fact and conclusions of law.

court had before it Father's signed consent to an order dated August 3, 2009 that required him to pay $850 in child-support and arrearage payments. In view of that stipulation, we cannot conclude that the superior court abused its discretion in declining to modify child support based on Father's inability to pay. *See Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997) ("In deciding whether [a binding agreement] exists, we look at objective evidence, not the hidden intent of the parties.") (internal quotations omitted).[2]

C. The Court's Order Regarding Parenting Time.

¶15 Father argues that the superior court abused its discretion by failing to properly adjust parenting time based on the child's best interests. Decisions about parenting time are reviewed for an abuse of discretion. *See Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). We will affirm a superior court's ruling on parenting time unless the record is devoid of competent evidence to support the decision. *Borg v. Borg,* 3 Ariz. App. 274, 277, 413 P.2d 784, 787 (1966).

¶16 Arizona Revised Statutes § 25-411(D) (Supp. 2010) permits a court to modify parenting time "whenever modification

[2] Although Father argues in his reply brief that he is not bound by the stipulation in the August 3, 2009 order, he offers no evidence to support his implied argument that even though he signed the order, he did not mean to concede the order's terms or to be bound by the order.

would serve the best interest of the child." Although the superior court in this case expressed concern regarding aspects of Mother's conduct, we cannot conclude that it abused its discretion in not granting Father's request for an equal allocation of time with the child. Substantial evidence supports the superior court's decision.

¶17 Father testified he lived in a mobile home in a "highly industrial area" and that he had left the child alone for brief periods of time during the child's visits with him. He further testified that the mobile home contains only two rooms, one bedroom and another room with a fold-out couch, and that the bathroom is in a separate structure next to his home. Moreover, Father testified, with qualifications, that as a parent, Mother "is absolutely outstanding, you couldn't ask for a better mother."

¶18 Father argues the court abused its discretion by concluding that "the evidence is ambiguous as to whether" the child suffers from a health problem. He points out that Mother failed to offer expert testimony to rebut the opinions of two doctors that the child is "failing to thrive." The court, however, ordered both parties to "take all necessary steps to ensure that a medical professional is conducting regular check-ups on the child and will advise the parties what, if any, steps to take to ensure that the child thrives physically." As for

Father's argument that Mother should be faulted for failing to seek medical attention for the child, the joint custody agreement granted Father the right and responsibility "to make decisions regarding . . . [the medical] treatment of the minor child."

¶19 Father also argues the court erred in failing to make findings on the record pursuant to A.R.S. § 25-403(B) (Supp. 2010). Section 25-403(B) applies to orders entered in contested custody cases. A.R.S. § 25-403(B); *In re Marriage of Diezsi*, 201 Ariz. 524, 526, ¶ 4, 38 P.3d 1189, 1191 (App. 2002). Assuming without deciding that the court was required to make findings on the record in this case, we conclude its detailed findings complied with that requirement.

¶20 In its order, the court acknowledged that Mother was the primary residential parent and noted that Father wanted to modify the current parenting-time arrangement to grant him more time and that Mother objected to any modification. *See* A.R.S. § 25-403(A)(1) (wishes of parents as to custody); -403(A)(7) (whether one parent has provided primary care of the child). As for A.R.S. § 25-403(A)(2), (3) (wishes of the child as to the custodian and relationship of child with parents and others), the court concluded Father's relationship with the child may be "strained" and therefore ordered joint counseling for Father and the child and warned Mother to "facilitate the child attending

any appointments with the" counselor. The court also advised Father to find a "more suitable" housing arrangement if he wanted to improve his relationship with the child. The court found that the child suffers from a form of Asperger's Syndrome and as a result, often does not complete his homework or turn it in at school. *See* A.R.S. § 25-403(A)(4) (child's adjustment to home, school and community). The court also found it had concerns about the child's health and, as noted, ordered both parties to "take all necessary steps to ensure that a medical professional is conducting regular check-ups on the child" so that the parties can ensure that the child will thrive. *See* A.R.S. § 25-403(A)(5) (mental and physical health of all individuals involved). Further, it found that it had "considerable concern" about "Mother's supportiveness of Father's relation with the child" and warned the parties that their animosity for each other could not affect either party's relationship with the child. *See* A.R.S. § 25-403(A)(6) (which parent is more likely to allow frequent and meaningful continuing contact with the other).

D. Parenting-Time Changes Require Reassessment of Child Support.

¶21 Father also argues the superior court erred by not reducing his child support payments in accordance with the expanded visitation schedule the court ordered.

¶22 "[W]hen proof establishes that parenting time is or is expected to be exercised by the noncustodial parent, an adjustment shall be made to that parent's proportionate share of the Total Child Support Obligation." A.R.S. § 25-320 app. § 11 (2007). On appeal the parties assert markedly different positions with respect to the result of the court's June 4, 2010 order modifying parenting time. If and to the extent that the order significantly altered Father's parenting time, the court should consider whether Father's child-support obligation should be modified as a consequence. *Id.* We therefore remand this issue for further consideration by the superior court.

CONCLUSION

¶23 For the reasons stated above, we affirm the superior court's order and remand so that it may consider whether the additional parenting time it granted to Father requires a reduction in the amount of his child-support obligation.

¶24 Both parties request attorney's fees pursuant to A.R.S. § 25-324 (Supp. 2010). This statute requires a court to examine the reasonableness of the parties' positions and the "relative financial disparity" between the parties. *See Magee v. Magee*, 206 Ariz. 589, 593, ¶ 18, 81 P.3d 1048, 1052 (App. 2004). Mother submitted a financial affidavit that demonstrated a monthly income of approximately $2,800; Father testified to earning an estimated $2,400 per month. This evidence does not

demonstrate a disparity sufficient to award fees under § 25-324. *See McNutt v. McNutt*, 203 Ariz. 28, 34, ¶ 27, 49 P.3d 300, 306 (App. 2002) (no disparity in income sufficient to award fees when father earned $2,840 per month and mother earned $1,316 per month). Moreover, we do not conclude that either party took an unreasonable position on appeal. Accordingly, we decline to award fees pursuant to § 25-324. Father also requests attorney's fees under A.R.S. §§ 12-341 and -342 (2003). These statutes relate to costs, not attorney's fees. We grant Mother her costs on appeal, contingent on her compliance with ARCAP 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
JON W. THOMPSON, Judge