DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of: SATYA SARMA, Petitioner/Appellant-Cross Appellee, v. KUMAR S. IYER, Respondent/Appellee-Cross Appellant.	No. 1 CA-CV 10-0473 1 CA-CV 10-0839 (Consolidated) DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
In re the Marriage of: SATYA SARMA, Petitioner/Appellee, v. KUMAR S. IYER, Respondent/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-008864

The Honorable Veronica Brame, Commissioner

REVERSED AND REMANDED

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Attorneys for Respondent/Appellee/Cross-Appellant

N O R R I S, Judge

¶1 Satya Sarma ("Mother") timely appeals from the family court's denial of her motion for a new trial concerning her motion to modify the child support payment of Kumar Iyer ("Father"). Mother argues the court abused its discretion in denying the motion because it failed to consider changes in Father's travel expenses as a substantial and continuing change of circumstances warranting modification of child support. We agree and, therefore, reverse the court's denial of her motion for a new trial and remand for a new hearing consistent with this decision. In so doing, we reject Father's argument in his cross appeal that the family court should have awarded him attorneys' fees.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 Although the issue in this case pertains to Mother's

[1]We view the facts in the light most favorable to upholding the family court's ruling. *In re Marriage of Yuro*, 192 Ariz. 568, 570, ¶ 3, 968 P.2d 1053, 1055 (App. 1998).

petition for the modification of Father's child support, to understand the positions taken by the parties regarding this issue it is necessary to understand the somewhat muddled procedural background of the underlying dissolution of marriage proceedings and the family court's original child support order.

¶3 In November 2007, Mother petitioned to dissolve her marriage with Father. In March 2008, the family court entered temporary orders, and ordered Father to pay $1,665 per month in child support for their one child, born in May 2007. In April 2008, the court established a temporary parenting time schedule that gave Father parenting time on alternating weekends (the "First Parenting Plan").

¶4 On September 29, 2008, the parties entered into an agreement to "resolve all issues attendant to the divorce," pursuant to Arizona Rule of Family Law Procedure 69 (the "Rule 69 Agreement"). In the Rule 69 Agreement, the parties agreed to deviate Father's child support payments from the $1,665 temporary order to $300 per month; the parties further agreed this heavily discounted amount was in the child's best interests and was acceptable "because Mother can provide financial support for [the child] and because Father has travel expenses."

¶5 In February 2009, the family court entered a dissolution decree based on the Rule 69 Agreement and lodged by

Father, and denied Mother's objections to the decree, despite Mother's assertions the decree did not accurately reflect the language of the Rule 69 Agreement. Mother then moved for a new trial, arguing Father had placed "gratuitous statements . . . in the Decree substantially affecting the rights of" Mother, including the insertion of "language that there will be a 'permanent' deviation of child support," when the Rule 69 Agreement made no mention of the deviation being permanent. The family court granted Mother's motion for a new trial, and ordered the parties "to arbitrate the final language to be contained in the decree." The arbitrator then met with the parties and forwarded a revised decree incorporating "[t]he final decisions on the disputed issues presented for arbitration" to the parties for finalization and execution. The arbitrator also found Father had taken "certain unreasonable positions concerning the final language of the settlement documents, based on the parties' Rule 69 agreements," including his "assertion that the deviation in the child support amount, as agreed on by the parties, was 'permanent.'"

¶6 On October 21, 2009, the family court adopted a revised parenting plan proposed by the court-appointed Parenting Coordinator that, "[b]ased on Father's request," reduced Father's parenting time from the First Parenting Plan's short

visits on alternating weekends to short visits on "every second weekend of every second month" (the "Revised Parenting Plan").[2] The Parenting Coordinator reported the Revised Parenting Plan was submitted in response to "much confusion [between the parties] regarding a reasonable and age appropriate long distance parenting plan for [the child] as Father lives in California."

¶7 Then, on October 30, 2009, one week after the arbitrator had finalized the revised decree, but roughly six weeks before the family court entered the revised decree containing the arbitrated language, Mother petitioned for modification of child support. Among other arguments, Mother asserted "[t]he major reason for the child support deviation was Father's travel expenses, as Father lives in California. He has not complied or executed the travel pursuant to the parenting plan." Mother also argued the Revised Parenting Plan "reduce[d] the contact outlined in the [First Parenting Plan] and therefore reduce[d] the expenses for travel." Despite the pendency of Mother's petition to modify, on December 8, 2009, the family

[2]We note, however, the "Custody Agreement and Parenting Plan" attached to the revised decree is the First Parenting Plan, not the Revised Parenting Plan adopted by the court on October 21, 2009. Because the record does not explain why the First Parenting Plan was attached to the revised decree, we view this discrepancy as an oversight and assume the family court intended the Revised Parenting Plan to remain in force.

court entered the revised decree, which specified again that "[t]he parties believe [the deviated child support order] is in [the child's] best interests because [Mother] can provide for [the child's] financial needs and because Father has travel expenses."

¶8 On February 26, 2010, the family court held a child support modification hearing. During this often confused and rushed hearing, the parties presented conflicting evidence regarding their incomes and the reasons underlying Father's failure to exercise his parenting time. On April 5, 2010, the family court denied Mother's petition and affirmed Father's child support order of $300 per month. Eventually, the family court entered final orders denying Mother's motion for a new trial and both parties' requests for attorneys' fees.

DISCUSSION

I. Mother's Appeal

A. Travel Expenses

¶9 Because Mother appeals from the denial of her motion for a new trial, and did not appeal from the underlying judgment, "this court may not go beyond the matters assigned as error in the motion." *Matcha v. Winn*, 131 Ariz. 115, 116, 638 P.2d 1361, 1362 (App. 1981) (citations omitted). We may "review the entire record to determine whether the [family] court abused

its discretion in denying the motion for new trial." *Id.* at 116-17, 638 P.2d at 1362-63. In so doing we recognize the family court has "substantial latitude in deciding whether to [deny the motion]." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998). Nevertheless, we will reverse a denial of a new trial motion if the denial "reflects a manifest abuse of discretion given the record and circumstances of the case." *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). A new trial may be warranted if "the . . . judgment is not justified by the evidence or is contrary to law." Ariz. R. Fam. L.P. 83(A)(6).

¶10 As she did in the family court, Mother argues Father's failure to visit their child and thus travel to Arizona, coupled with the reduced parenting time in the Revised Parenting Plan adopted at Father's request, constituted "a material change of circumstances warranting modification of the [child support] agreement." We agree.

¶11 Settlement agreements, such as the parties' Rule 69 Agreement, do not preclude the modification of "terms concerning . . . the support, custody or parenting time of children." Ariz. Rev. Stat. ("A.R.S.") § 25-317(F) (2001). An "order for child support may be modified or terminated on a showing of

changed circumstance that is substantial and continuing." A.R.S. § 25-503(E) (2009).

¶12 As discussed above, in their Rule 69 Agreement the parties agreed to the $300 per month child support order because "Mother can provide financial support for [the child] and because Father has travel expenses." At the time the parties entered into the Rule 69 Agreement, the parenting plan then in place anticipated Father –- who was, as he was at the time of the hearing, living in California -- would visit his child in Arizona every other weekend. Mother argued in her new trial motion that "Father obtained a major deviation from the Child Support Guidelines to facilitate his travel to Arizona to see [the child]." Father did not file a response to Mother's motion for a new trial challenging this assertion, and although he argued, in his supplemental memorandum filed after the modification hearing, that the "[c]hild support deviation was not based on travel expenses," he offered no evidence supporting this position or reconciling the obvious conflict between this argument and the plain language of the Rule 69 Agreement and the revised decree. *See supra* ¶ 7. Thus, we agree with Mother the reduced child support order was grounded on the assumption Father would be making frequent trips to Arizona to visit his child.

¶13 Both Mother and Father testified during the modification hearing that Father had not seen their child since August or September of 2008. Although Father testified he had traveled from California to Arizona "a couple of times" to see the child only to have Mother thwart those attempts, Father agreed that he had not "seen [his] child at all essentially since birth." It is therefore manifestly clear from the record Father had not incurred the travel expenses –- associated with traveling from California to Arizona every other weekend –- the parties anticipated when they entered into their Rule 69 Agreement. It is also clear under the Revised Parenting Plan now in effect –- which only requires Father to visit his child every other month –- Father will not incur the same level of travel expenses, even if his visits are more regular than they have been in the past.

¶14 Despite these facts, on appeal, Father argues that when the family court finally entered the revised decree, the court had already adopted the Revised Parenting Plan and thus "the modified parenting time was not a *change* from the circumstances existing at dissolution, it *was* the circumstance existing at dissolution." We note, however, the arbitrator found Father had caused the delay in entering the revised decree by taking "certain unreasonable positions . . . which required

the parties to then proceed to arbitration to resolve wording disputes in the final documents." *See supra* ¶ 5. In addition, even if we were to give some weight to Father's argument and consider only the time between entry of the revised decree on December 8, 2009 and the modification hearing held on February 26, 2010, Father's testimony suggested he had not visited the child during this period, even though the schedule in the Revised Parenting Plan contemplated visits on "December 12 – 13, 2009" and "February 13 – 14, 2010."

¶15 Thus, there is a stark difference between the number of biweekly visits and associated travel expenses anticipated by the Rule 69 Agreement –- an amount the parties agreed justified reducing the $1,665 monthly child support payment to $300 -- and the reality evidenced by the record of, at best, a "couple" of attempted visits during a two-and-a-half year period. This difference is clearly a "changed circumstance that is substantial and continuing" and warranted a modification of the existing child support order. *See* A.R.S. § 25-503(E). The family court therefore abused its discretion by ruling to the contrary and denying Mother's motion for a new trial. *See Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (citation omitted) ("An abuse of discretion exists when the record, viewed in the light most favorable to upholding the

[family] court's decision, is 'devoid of competent evidence to support' the decision.").[3]

B. The Parties' Incomes

¶16 Mother also argued in her new trial motion and now on appeal that changes in the parties' incomes warranted modification of child support and, more specifically, that certain stock options held by Father should be included in the calculation of his income. Mother failed to develop the record on this point. The evidence and testimony presented by the parties during and after the modification hearing concerning these matters was unclear and conflicting. Because Mother is

[3]Although the simplified procedure described in the Arizona Child Support Guidelines was not appropriate here, the family court relied on the simplified procedure as an alternate measure to quantify whether Father's support obligation had substantially changed because of his decreased parenting time. The family court's application of the simplified procedure erroneously compared what it estimated Father's child support payment would have been under the Guidelines at the time of its ruling to the $1,665 amount the parties agreed to deviate from in the Rule 69 Agreement. Based on this comparison the court found there was "not a 15% change from the previous child support amount" that would warrant a modification under the simplified procedure. The Guidelines allow the court to "modify a child support order if application of the guidelines results in an order that varies 15% or more *from the existing amount*." A.R.S. § 25-320 app. § 24(B) ("Guidelines") (emphasis added). When dealing with deviations from the Guidelines, the Guidelines instruct the court to make written findings that "show[] what the order *would have been* without the deviation" and "show[] what *the order is* after deviating." Guidelines § (20)(A)(4)-(5) (emphasis added). The "existing amount" under the Guidelines is therefore the *deviated* amount, not the amount it would have been without the deviation.

entitled to a new trial on her petition to modify child support, we express no opinion on Mother's arguments regarding the parties' incomes and Father's stock options.

II. Father's Cross Appeal

¶17 On cross appeal, Father argues the family court "abused its discretion in declining to award Father his reasonable attorneys' fees." Under the circumstances of this case, as demonstrated by the record and discussed above, we reject this argument and hold the family court did not abuse its discretion in denying Father's request for attorneys' fees.

III. Attorneys' Fees on Appeal

¶18 Mother and Father both argue they should be awarded their attorneys' fees on appeal under A.R.S. § 25-324 (2010). The record before us does not justify a fee award to either Father or Mother; therefore, we deny their requests. Nevertheless, as the prevailing party on appeal, Mother is entitled to costs on appeal, subject to her compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶19 For the foregoing reasons, we reverse the family court's denial of Mother's motion for a new trial, remand for a new hearing on her petition to modify Father's child support,

and affirm the family court's denial of Father's request for attorneys' fees.

/s/_ _____
PATRICIA K. NORRIS, Judge

CONCURRING:

___/s/_____
MICHAEL J. BROWN, Presiding Judge

___/s/_____
PHILIP HALL, Judge