DIVISION ONE
FILED: 12/08/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	No. 1 CA-CV 11-0034
	)	
DANIEL N. COLEMAN,	)	DEPARTMENT E
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
KAREN SUE ROBINSON,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-000773

The Honorable J. Justin McGuire, Judge *Pro Tempore*

REVERSED; REMANDED

Daniel N. Coleman — Phoenix
Appellant *In Propria Persona*

Karen Sue Robinson — Phoenix
Appellee *In Propria Persona*

J O H N S E N, Judge

¶1 Daniel N. Coleman ("Father") appeals the superior court's denial of his "Motion for Sanction of Respondent

Pursuant to Rule 65 / Motion for Summary Judgment" and petition to modify child support. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 A son was born in 2001 to Father and Karen Sue Robinson ("Mother"), who were never married. In 2008, the superior court ruled that Mother and Father would have joint legal custody and equal parenting time. The court found that Father's monthly income was $12,500 and Mother's monthly income was $8,833, and ordered Father to pay child support of $450 per month.

¶3 In 2010, Father filed a petition to modify child support. The day before the hearing on the motion, Father filed a "Motion for Sanction of Respondent Pursuant to Rule 65 / Motion for Summary Judgment" ("Motion for Sanctions"). After hearing testimony from Mother and Father, the superior court denied Father's request to modify child support, finding that "although there have been some changes in circumstances since the date of the entry of the child support order, those changes are not substantial and continuing." The court also denied the Motion for Sanctions on the ground it was untimely. Father filed a motion for reconsideration and a motion for a new trial; the court denied both motions.

¶4 Father timely appealed.[1] We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 12–2101(A)(1) (2011).[2]

DISCUSSION

A. Motion for Sanctions.

1. Timeliness.

¶5 Father's motion argued Mother should be sanctioned for breaching her disclosure obligations and impermissibly seeking parochial school expenses after stipulating that she alone would bear those expenses. Without explanation, the court denied the motion as untimely.

¶6 Although the title of Father's motion included the words "Motion for Summary Judgment," the motion did not seek entry of summary judgment pursuant to Rule 79 of the Arizona Rules of Family Law Procedure; instead, the motion asked the court to enter judgment in Father's favor as a disclosure sanction. If Father's motion had been a true motion for summary judgment, it would have been untimely. *See* Ariz. R. Fam. Law P.

---

[1] Mother filed no answering brief. We could consider this a confession of error. *Thompson v. Thompson*, 217 Ariz. 524, 526, ¶ 6, n.1, 176 P.3d 722, 724 (App. 2008). In an exercise of our discretion, however, we will decide the appeal on its merits. *See Gibbons v. Indus. Comm'n*, 197 Ariz. 108, 111, ¶ 8, 3 P.3d 1028, 1031 (App. 1999).

[2] Absent material revisions after the relevant date, we cite a statute's current version.

79(C)(1) (summary judgment motion must be filed no later than 60 days before trial). As noted, however, the motion is more accurately characterized as a motion for sanctions.

¶7 On appeal, Father correctly argues the superior court erred by denying the motion as untimely because he filed the motion just after the alleged disclosure violations occurred. Though the court erred by finding the motion untimely, we will not reverse the resulting judgment absent prejudice. *E. Camelback Homeowners Ass'n v. Ariz. Found. for Neurology & Psychiatry*, 18 Ariz. App. 121, 128, 500 P.2d 906, 913 (1972). Accordingly, we next consider whether Father was prejudiced as a result of the court's denial of his Motion for Sanctions.

2. Alleged untimely disclosure.

¶8 To the extent Father's Motion for Sanctions argued Mother impermissibly altered the W2 she disclosed for use at trial, any error the court made in denying the motion is harmless. Father's brief concedes that at trial, he "provided evidence of Mother's full and unaltered 2009 W2." Accordingly, Father was not prejudiced by Mother's alleged failure to disclose a full and accurate copy of her W2.

¶9 The Motion for Sanctions also argued that Mother had failed to disclose financial documentation relating to her earnings from her sole proprietorship. The record does not reflect that Father had access to that documentation for use at

the trial. Indeed, the only information presented regarding Mother's sole proprietorship was her testimony that it operates at a loss. Therefore, because we cannot conclude that Father was not prejudiced by the superior court's failure to rule on the Motion for Sanctions on the merits, we must vacate the judgment and remand so that the superior court may consider the merits of the Motion for Sanctions.

3. Alleged violations of Rule 31(A).

¶10 Father also argues the superior court should have sanctioned Mother because by submitting a pretrial statement that requested a different allocation of "child expenses" from that stated in a prior stipulation, Mother violated Rules 31(A) and 69 of the Arizona Rules of Family Law Procedure.

¶11 Rule 31, which is based on Arizona Rule of Civil Procedure 11, requires that all pleadings, motions and other papers be signed by an attorney, or, if a party is not represented, by the party herself. Further, this signature

> constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Ariz. R. Fam. Law P. 31. Rule 69 states that written agreements between the parties are binding and are presumed valid.

¶12 Father's argument is based on the parties' Joint Motion to Modify Visitation by Agreement, which contained an agreement by Mother to pay for school costs, and the child support worksheet that Mother submitted with her pretrial statement, which included school costs in the child support calculation. Father seems to argue Mother must have acted in bad faith by signing the initial agreement or by submitting the proposed child support calculation.

¶13 We do not agree that Mother violated Rule 31 by asserting her school costs in the worksheet. The Joint Motion to Modify Visitation by Agreement was just that, an agreement. Mother was free at any time to ask the court to modify the agreement. Her request that the court consider school costs in calculating child support is not evidence that she signed the original agreement in bad faith or that she submitted either document for an "improper purpose." *See* Ariz. R. Fam. Law P. 31. Accordingly, Father was not prejudiced by the superior court's failure to consider this component of his Motion for Sanctions.

B. Petition to Modify Child Support.

1. Standard of review.

¶14 Father also argues the superior court erred in denying his petition to modify child support. Modification must be based on a substantial and continuing change in circumstances. A.R.S. § 25–327(A) (2011). The superior court's decision to modify an award of child support is within its "sound discretion" and will not be modified on appeal absent an abuse of discretion. *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." *Id.* (quotations omitted).

2. Father's income.

¶15 As stated, we must vacate the superior court's judgment denying Father's petition to modify child support because the court did not address Father's contention that Mother failed to make pretrial disclosure of financial documentation concerning her proprietorship in connection with the petition to modify. We will address other issues Father raises because they may arise in the superior court's consideration of the petition to modify child support on remand.

¶16 Father first argues the court erred in finding his income was $12,500 per month. The record does not support the

superior court's finding that Father's income in 2010 was $12,500 per month. In its ruling, the court appeared to rely on (1) a finding by the superior court in the 2008 proceeding that Father's income was $12,500 per month, (2) Father's testimony in the current proceeding that his income was consistent and stable from 2008 to 2010 and (3) Father's attributing to himself an income of $12,500 per month in a motion he filed in 2009.

¶17 The salary the court attributed to Father at the 2008 trial was based on what he earned in 2007. At trial in this proceeding, however, Father testified that his income during 2008, 2009 and 2010 was significantly lower than what he earned in 2007. He offered his 2009 tax return to show his monthly income during that year was $4,829. He further testified that his monthly income during 2010 was about $5,800.

¶18 Mother contended at the hearing that she believed Father's income was "grossly understated," arguing that Father received substantial benefits not reflected in his tax returns. She asserted that in the 2008 trial, while Father testified his income was $70,000 per year (meaning $5,000 a month), her expert witness testified his income was more than $260,000 a year and Father's own expert testified Father's income was $161,000 per year. Mother asserted that establishing Father's "true income" was difficult or impossible in the context of the current hearing. It may be true that, as Mother stated, Father's tax

returns do not reflect the full extent of his income. But the tax returns were the only evidence in the record before the superior court at trial, and they do not support the court's finding that his income was $12,500 a month.

¶19 Finally, the court erred to the extent that it concluded Father was estopped by language in his 2009 Motion to Clarify / Modify Child Support. That motion was directed only to the question of which party was obligated to pay summer childcare expenses. In the motion, Father argued that the existing order required Mother to pay all childcare expenses and asked the court, consistent with that order, to direct Mother to pay summer childcare expenses. In the alternative, Father wrote, "Father would request that monthly child support be recalculated without a child care allowance for either parent." In that analysis, he said, "Father is willing to modify support without disturbing the salaries and insurance costs assigned in November 2008." The court denied Father's motion. Under the circumstances, we cannot conclude that Father's 2009 filing constituted a judicial admission that he continued to earn $12,500 a month as of that date. *See Black v. Perkins*, 163 Ariz. 292, 293, 787 P.2d 1088, 1089 (App. 1989) (judicial estoppel applies to statement made by party who obtains relief based on the statement).

3. Mother's income.

¶20 Father also argues the superior court incorrectly calculated Mother's income. He first argues the court failed to recognize that Mother receives a $500 gift from her own mother each month. Mother testified, however, that she no longer receives the $500 gift from her mother. The superior court did not abuse its discretion by accepting this testimony.

¶21 Father also argues the court incorrectly calculated Mother's pay from her employer. He contends Mother's gross pay in 2009 was $114,269, which he derives by adding to her salary the value of her company life insurance and employer contributions to her 401(K).[3] Mother testified, and the court found, that her income was $110,741, her actual salary plus her annual bonus, minus work-related expense reimbursements. Employment benefits such as health or life insurance or employer contributions to a retirement plan should be considered as income for the purposes of calculating child support only when they "are significant and reduce personal living expenses." *Hetherington v. Hetherington*, 220 Ariz. 16, 23, ¶¶ 27-28, 202 P.3d 481, 488 (App. 2008). The difference between the amount

[3] In his brief, Father argues Mother's gross pay was $115,068.10. Because this contradicts his testimony before the superior court, we use the number he testified to at the hearing. *See Little*, 193 Ariz. at 520, ¶ 5, 975 P.2d at 110 (we view facts in the light most favorable to upholding the superior court's decision).

Mother claims for her income and the amount Father claims is $3,528, or just over three percent of Mother's income. We infer the superior court did not consider the employment benefits "significant." It therefore did not abuse its discretion by not considering the benefits in Mother's income.

¶22 The only evidence regarding income from Mother's sole proprietorship, however, was Mother's testimony that her business operates at a loss. As noted, on remand the superior court shall consider Mother's disclosures concerning income from the business and shall reconsider the issue of Mother's income on the basis of that determination.

4. Parenting time.

¶23 Father also argues the court erred in calculating child support based on Father having 152 days of parenting time, when he should been credited with 170.5 days. At the hearing, however, Father testified that he had "155 nights a year. [Mother] has the rest." Mother testified that, based on her records, Father had 152 days of parenting time. In its order, the court stated it "found Mother[']s specific testimony more credible than Father's more general testimony." Because Father argued at the hearing that he should be credited with 155 days, and because the difference between 155 days and 152 days is *de minimis*, we cannot conclude the court abused its discretion in accepting Mother's testimony over Father's.

5. Father's support of his new child.

¶24 Finally, Father argues the child support order makes it difficult to support his new child. The superior court considered Father's support of his new child in its child support calculation. We cannot conclude the court abused its discretion on this basis.

CONCLUSION

¶25 For the reasons set forth above, we reverse the superior court's denial of the Motion for Sanctions as untimely. We also reverse the superior court's denial of Father's petition to modify child support, and we remand for further proceedings consistent with this decision.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
MICHAEL J. BROWN, Judge