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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/31/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL ADU-TUTU,) 1 CA-CV 11-0262
)
Petitioner/Appellant,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
HANNAH ADU-TUTU,) (Not for Publication -
) Rule 28, Arizona Rules of
Respondent/Appellee.) Civil Appellate Procedure)
)

Appeal from the Superior Court in Maricopa County

Cause No. DR1994-014689

The Honorable Pamela S. Gates

AFFIRMED

Law Office of Florence M. Bruemmer, P.C.
Attorney for Petitioner/Appellant

Anthem

Thayer & Thayer, P.C.
By Teresa S. Thayer
Attorneys for Respondent/Appellee

Phoenix

G E M M I L L, Judge

¶1 Michael Adu-Tutu ("Father") appeals from an order denying his petition to terminate his spousal maintenance and child support obligations and awarding attorneys' fees to Hannah

Adu-Tutu ("Mother"). For the reasons stated below, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The parties were divorced in 1996. They have one adult child who is severely disabled and requires 24-hour care. Mother and the child have resided in Ghana since 2007. Father pays Mother \$600 per month in lifetime spousal maintenance and \$1,992 per month in child support. There is also a Special Needs Trust ("the Trust") for the child, funded with proceeds from a lawsuit on behalf of the child. At the time of the hearing, the Trust held approximately \$155,000 for the benefit of the child.

¶3 Since the last spousal maintenance order was entered, Mother began receiving Father's retirement benefits in the amount of \$1,241 per month. Mother was awarded a portion of Father's retirement benefits in the original divorce decree, but Mother did not begin receiving payments until 2010. Father has retired from one position but is "now working in a different position." Father petitioned to terminate his child support and spousal maintenance obligations. Mother petitioned to increase child support and spousal maintenance. The court consolidated the parties' petitions and held a one-day evidentiary hearing.

¶14 The trial court held that the Trust was not sufficient to render the child self-supporting for any significant period of time. The court rejected Father's claim that a substantial and continuing change in circumstances warranted termination of spousal maintenance and child support. Similarly, the court found no evidence supporting Mother's request to increase spousal maintenance and child support. The court awarded Mother \$10,000 in attorneys' fees based on the financial disparity of the parties.

¶15 Father filed a motion for new trial arguing that the evidence did not support the trial court's findings. The trial court denied the motion and Father filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2) and (A)(5)(a) (Supp. 2011).¹

ANALYSIS

Spousal Maintenance

¶16 "The question whether there has been a sufficient change in circumstances to modify an award of spousal maintenance lies within the sound discretion of the trial court and will not be interfered with absent an abuse of discretion."

¹ Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

MacMillan v. Schwartz, 226 Ariz. 584, 588, ¶ 12, 250 P.3d 1213, 1217 (App. 2011). The party seeking a modification must establish a significant and continuing change in circumstances. A.R.S. § 25-327(A) (2007); see also *Scott v. Scott*, 121 Ariz. 492, 494, 591 P.2d 980, 982 (1979). As the party seeking to terminate spousal maintenance, Father was obligated to establish that Mother was able to provide for her reasonable needs, be self-sufficient through appropriate employment, or should be required to seek outside employment. See A.R.S. § 25-319(A) (2007).

¶17 The trial court found that neither party established a substantial and continuing change in circumstances that justified a change in spousal maintenance or child support. We conclude that the court's decision not to terminate spousal maintenance is supported by the findings and the evidence in the record and that the trial court did not err. See *Platt v. Platt*, 17 Ariz. App. 458, 459, 498 P.2d 532, 533 (1972) (holding an abuse of discretion exists when the record is devoid of any evidence to support the court's ruling).

¶18 The trial court explained its decision by analyzing the factors listed in A.R.S. § 25-319. First, the court correctly determined that Mother is entitled to spousal maintenance because she is the custodian of a child whose

condition is such that she should not be required to seek outside employment. See A.R.S. § 25-319(A)(2). The parties' adult child requires two 24-hour caregivers. Presently, Mother is one caregiver, and she requires attendants to assist her. The trial court found that Mother offered sufficient proof that she had hired a secondary caregiver for her son. The court made the following finding:

[T]he Court finds that Mother proved that she now pays for an attendant to assist her care for her fully grown son. *The Court, in its discretion, did not include the cost of the attendant in the child support calculation, but rather, considered the cost in connection with the determination of spousal maintenance.* (Emphasis added).

¶9 The record supports the trial court's decision to continue the award of spousal maintenance based on the extraordinary needs of the adult child and Mother's continued 24-hour care. In the 2005 order, the trial court affirmed its previous orders that the child required 24-hour care and the court further found that the child's extraordinary expenses averaged \$600 per month and these expenses included the child's "van transport, diapers, special food, lotion, ointment, special shoes, batteries, toys for therapy, and special clothes."

¶10 The trial court made the same findings after the 2010 hearing, that is, the adult child still had extraordinary expenses totaling \$600 per month.

¶11 Father argues that the \$1,241 Mother receives as her share of the community retirement benefit is sufficient, in Ghana, for Mother to be self-sufficient. Father cites his exhibits that purport to show that \$1,241 a month is a substantial income in Ghana. Father contends that the retirement income, Mother's voluntary move to Ghana with the child, and Father's upcoming retirement are substantial and continuing changed circumstances that warrant terminating Mother's spousal maintenance.

¶12 At trial, Mother disputed that she was self-supporting or qualified to work as a teacher in Ghana. As has been previously found, Mother has not worked in many years and could only earn entry level wages. The trial court rejected Father's claim that Mother could earn enough to become self-sufficient. "We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). We affirm the trial court's finding that Mother still qualified for spousal maintenance.

¶13 The trial court also provided a detailed explanation of the factors listed in section 25-319(B) to support its decision to continue the \$600 spousal maintenance award. Father contends that the short marriage does not justify a lifetime

spousal maintenance award. However, as the trial court noted, the 8-year marriage produced a child with cerebral palsy who will require lifetime 24-hour care. See A.R.S. §§ 25-319(B)(1)-(2).

¶14 Father disputes that Mother is unable to work outside the home. As discussed above, Mother is the child's full-time caregiver, and should not be required to seek outside employment given her limited earning ability. *Supra* ¶¶ 8-10. See A.R.S. § 25-319(B)(3).

¶15 Father also argues that the "[d]istribution of community property may be a justification for reducing spousal maintenance." *Cooper v. Cooper*, 167 Ariz. 482, 490, 808 P.2d 1234, 1242 (App. 1990). Although this is a correct statement of the law, the court has discretion to consider all of the factors in section 25-319(B); the factor of Mother's financial resources is only one of several considerations. See A.R.S. § 25-319(B)(9); see also *Rainwater v. Rainwater*, 177 Ariz. 500, 504, 869 P.2d 176, 180 (App. 1993). The trial court did not ignore this factor. The court is in the best position to determine the appropriate weight to give each factor. *Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995) (holding trial court is in best position to evaluate the

credibility of the witnesses and determine what evidence to credit).

¶16 The previous \$600 per month order was based on Father's monthly income of \$7,600. The trial court was aware, however, that Father's income had substantially increased when Mother requested to modify child support in 2005. The court determined that Father made \$161,617 annually in 2005. Father's current monthly income is at least \$14,583, and his monthly expenses are \$5,000. Father does not dispute that he is able to meet his needs and pay spousal maintenance. See A.R.S. § 25-319(B)(4). Father argues that his income will soon decrease. The trial court did not abuse its discretion by failing to consider Father's impending retirement as a change in circumstances. Change expected to occur in the future "should not be considered in establishing the present rights of the parties relating to spousal maintenance." *Chaney v. Chaney*, 145 Ariz. 23, 27, 699 P.2d 398, 402 (App. 1985).

¶17 The trial court also found that Father has been able to earn a significant income as a dentist, in part, as a result of Mother's ability to care for their disabled child full-time. See A.R.S. §§ 25-319(B)(5)-(7). Father argues that there was no evidence to support these findings. However, these findings were based on findings in a prior order. Father did not provide

any evidence establishing that these facts had changed since the prior order.

¶18 Father also argues that there was no evidence regarding the parties' abilities to contribute to the future educational costs of their children. See A.R.S. § 25-319(B)(8). However, Mother testified that she was unable to save any of her income. Father testified that his monthly expenses were \$5,000. With a monthly income of over \$14,000, the court did not abuse its discretion by presuming Father is able to contribute a portion of that income to the future educational expenses of his children. Although Mother's income has increased since the 2000 order, this does not *require* the court to terminate spousal maintenance, especially in light of Father's more significant increase in income. *Chaney*, upon which Father relies, is readily distinguishable because there the spouse paying support established a *decrease* in his own income since the original order. 145 Ariz. at 25, 699 P.2d at 400.

¶19 The court found Mother established at least two expenses totaling \$980 per month. Father did not refute these expenses, but claims Mother can meet her needs with the retirement income of \$1,241 a month. As noted by the trial court, Mother has additional expenses that would likely exceed the retirement income, such as the costs associated with hiring

an attendant or caregiver and the ongoing extraordinary costs based on the adult child's needs. Furthermore, as noted above, Mother has been unable to save any of her income.

¶20 Father does not dispute the findings regarding the remaining section 25-319(B) factors.

¶21 The evidence establishes that Mother does indeed have a continuing need for spousal maintenance and that Father can afford to provide that support at this time. Accordingly, we affirm the conclusion that Father failed to establish a substantial and continuing change in circumstances that justified terminating the spousal maintenance award.

Child Support

¶22 Father argues that the child's Special Needs Trust renders the child self-sufficient so that he no longer qualifies for child support pursuant to A.R.S. § 25-320(E) (Supp. 2011) (authorizing child support order for adult child if (1) court considered factors listed in § 25-320(D); (2) the child is severely disabled "as demonstrated by the fact that the child is unable to live independently and be self-supporting[;]" (3) the disability began before the age of majority). See also A.R.S. § 25-809(F) (2007) (same).

¶23 The trial court concluded that the child is unable to "be self-supporting for more than a very short period of time."

Father disputes that the evidence supports this conclusion. "We will not disturb a trial court's decision on the amount of child support and whether to modify an award of child support absent an abuse of discretion." *In re Marriage of Robinson and Thiel*, 201 Ariz. 328, 331, ¶ 5, 35 P.3d 89, 92 (App. 2001). An abuse of discretion exists when the record is devoid of any evidence to support the court's decision. *See Platt*, 17 Ariz. App. at 459, 498 P.2d at 533.

¶24 The court found that the trust contained \$155,000. The parties' adult child requires 24-hour care by two adults. Mother does not draw compensation from the Trust for her role as a caregiver. She also does not seek reimbursement for other costs. The court found if the Trust is required to compensate Mother for the costs she now pays for with the monthly child support payments (\$1,992 per month), the Trust will be depleted in less than seven years.

¶25 Father argues that the Trust assets should be depleted before he is ordered to continue paying child support to an adult child. The only support available to the child comes from Father's child support payments and what Mother provides. Once Father passes away, the only asset available to support the child will be the Trust. Yet, Father currently has a sizable income and can afford to pay child support in addition to his

own expenses. We cannot say the trial court abused its discretion in seeking to prolong the Trust assets as long as Father is financially able to provide support to his disabled child. In fact, this is consistent with "the primary intention" of the Trust "to provide for continuing conservation and enhancement of the assets."

¶126 Father contends that the child's care should cost much less in Ghana, which the Trust could pay for over the next thirty to forty years. Mother claimed extraordinary child care expenses of \$3,467 per month. The trial court rejected both parties' assertions and found no proof of any change in the \$600 cost of extraordinary expenses. The court apparently gave little weight to either party's unsubstantiated testimony regarding the cost of care. The court found no change in circumstances justifying the termination of child support. The trial court was in the best position to evaluate the credibility of the witnesses and determine what evidence to credit. See *Premier Fin. Servs.*, 185 Ariz. at 85, 912 P.2d at 1314. We conclude that the trial court did not abuse its discretion in denying Father's petition to terminate his child support obligation. The Trust does not render the child self-sufficient for more than a brief period of time.

¶127 Father contends that he should not have to continue to pay child support based on Mother's voluntary decision to move the child and incur more expenses and deprive the child of benefits available in the United States. However, the trial court rejected Mother's claim that the child's extraordinary expenses had increased since the last child support order. Thus, Father is not paying anything more due to Mother's decision to move to Ghana.

¶128 Father also argues that the trial court erred in failing to credit the Trust against Father's child support obligation pursuant to the Arizona Child Support Guidelines A.R.S. § 25-320 app. § 26(A) (Supp. 2011). Father did not raise this argument in the trial court. We will not consider arguments raised for the first time on appeal. See *Dillig v. Fisher*, 142 Ariz. 47, 51, 688 P.2d 693, 697 (App. 1984).

Attorneys' Fees

¶129 Father argues that the trial court abused its discretion in awarding attorneys' fees to Mother because she can afford to pay her own attorneys' fees and because she took unreasonable positions below.

"Section 25-324 [Supp. 2011] allows the trial court to order one party to pay the other's attorneys' fees and costs after the trial court 'consider[s] the financial resources of both parties and the reasonableness of the positions each party

has taken throughout the proceedings.' An award of attorneys' fees under A.R.S. § 25-324 will not be disturbed on appeal absent an abuse of discretion."

MacMillan, 226 Ariz. at 592, ¶ 36, 250 P.3d at 1221 (citing *In re Marriage of Berger*, 140 Ariz. 156, 167, 680 P.2d 1217, 1228 (App. 1983)).

¶30 Mother testified that she was barely able to meet her reasonable needs with the child support and spousal maintenance. Father earns substantially more than Mother and can afford to pay Mother's fees.

¶31 Father claims Mother's failure to provide receipts in support of her claim for the child's expenses was unreasonable. Although the trial court agreed, the court also found Father acted unreasonably in failing to disclose all of his income and tax returns in a timely manner. Considering both parties' unreasonable conduct and the significant disparity in income, we cannot say the trial court abused its discretion. We affirm the award of attorneys' fees to Mother.

CONCLUSION

¶32 We affirm the trial court's judgment regarding spousal maintenance, child support, and attorneys' fees.

¶33 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324. Neither party took unreasonable positions on appeal. However, Father has a significantly greater income than Mother. Accordingly, we will

award Mother an amount of reasonable attorneys' fees plus her taxable costs, contingent upon her compliance with Arizona Rule of Civil Appellate Procedure 21.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PHILIP HALL, Judge