IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

TRACY ROSEMARY DAVIS,
Appellee,

and

MICHAEL ANDREW DAVIS,
Appellant.

No. 2 CA-CV 2020-0054-FC
Filed December 18, 2020

Appeal from the Superior Court in Pima County
No. D20071773
The Honorable John J. Assini, Judge Pro Tempore

VACATED IN PART AND REMANDED

COUNSEL

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and

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this family law action, Michael Davis appeals from the trial court's order modifying his child support obligation after one of his children with his former wife, Tracy Davis, became emancipated. He argues the order should be vacated because the court failed to properly apply the Child Support Guidelines and erred in calculating Tracy's gross income. He further contends the court denied him substantial justice by relying on "prior findings" about his credibility and improperly imputing his income, and by failing to sua sponte appoint a federally authorized tax practitioner to review his income. For the reasons that follow, we vacate in part and remand.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *In re Marriage of Yuro*, 192 Ariz. 568, ¶ 3 (App. 1998). Michael and Tracy married in 1999 and have two children, B.D. and C.D. In 2008, the court entered a decree dissolving their marriage, ordering joint custody of the two children, and requiring Michael to pay child support to Tracy. The court has modified Michael's child support obligation several times, as recently as 2018.

¶3 In March 2019, anticipating eighteen-year-old B.D.'s graduation from high school and resulting emancipation, Michael filed a petition to reduce his child support obligation beginning June 1. *See* A.R.S. § 25-501(A). He asserted that his new payment amount should be $453 per month. Tracy agreed that a modification was appropriate, but argued Michael should be required to pay $876 per month. After a hearing, the trial court modified Michael's support obligation to $700 per month beginning June 1, 2019. Michael timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).

Tracy's Income Calculation

¶4 Michael argues the trial court improperly applied the Child Support Guidelines ("Guidelines") by not including Tracy's rental income and retirement account withdrawals as income for child support purposes. He also contends the court erred in calculating Tracy's gross income because it did not properly impute full-time earnings to her. We review a child support award for an abuse of discretion but review de novo conclusions of law and interpretations of the Guidelines. *Birnstihl v. Birnstihl*, 243 Ariz. 588, ¶ 8 (App. 2018). A court abuses its discretion when the record is "devoid of competent evidence to support [its] decision," *Platt v. Platt*, 17 Ariz. App. 458, 459 (1972), or when the court "commits an error of law in the process of exercising its discretion," *Kohler v. Kohler*, 211 Ariz. 106, ¶ 2 (App. 2005). We will uphold the court's factual findings "if there is any reasonable evidence to support [them]." *Mitchell v. Mitchell*, 152 Ariz. 317, 323 (1987); *see also Castro v. Ballesteros-Suarez*, 222 Ariz. 48, ¶ 11 (App. 2009).

¶5 While not a "source of law," the Guidelines aid trial courts in applying the law when ordering or modifying child support. *In re Marriage of Pacific*, 168 Ariz. 460, 463 (App. 1991); *see* A.R.S. § 25-320 app. § 1(C). The Guidelines are aimed at providing children with approximately the support they would have received had both their parents lived with them. *See Walsh v. Walsh*, 230 Ariz. 486, ¶ 29 (App. 2012). When calculating a parent's gross income, courts shall include "income from any source" such as "salaries, wages, . . . pensions, [and] interest," but need not include income that is "not continuing or recurring in nature." § 25-320 app. § 5(A). Parents may have the option of working overtime or second jobs without increasing their obligation because courts generally "should not attribute income greater than what would have been earned from full-time employment." *Id.* Courts may "consider income actually earned that is greater than would have been earned by full-time employment if that income was historically earned from a regular schedule and is anticipated to continue into the future." *Id.* After considering the parent's specific circumstances—to the extent they are known—courts generally "may attribute income to a parent up to his or her earning capacity" and may consider the reasons that a parent is "working below full earning capacity." *Id.* § 5(E). Ordinarily, any attributed income should be at least minimum wage. *Id.*

¶6 If strict application of the Guidelines would be "inappropriate or unjust" and not in the best interest of the child, courts "shall deviate" from them. *Id.* § 20(A)(1-2) (emphasis omitted). To deviate from the Guidelines, courts must issue written findings that a deviation is warranted

and must show what the order would have been before and after the deviation. *Id.* § 20(A)(3-5); *see Hetherington v. Hetherington*, 220 Ariz. 16, ¶ 29 (App. 2008). "[O]nce a court finds there has been a significant and continuing change in circumstances from a previous child support order, the court must review the parties' situation anew; no presumption from a previous order [finding deviation appropriate] exists." *See Nia v. Nia*, 242 Ariz. 419, ¶¶ 24-25 (App. 2017) (rejecting contention that previous deviation created presumption).

¶7 In 2018—based on testimony that leaving her part-time employment for a full-time position would result in a lower hourly wage—the trial court imputed Tracy's hourly wage as $15, not the $20 she actually earned in her part-time employment. It also stated that it was "not concerned with" whether she had reached the calculated monthly amount through "a combination of two jobs, a part-time job, and rental income" and that "[a]ny additional sums of money . . . made by [Tracy] would be treated by the Court like it treats overtime earnings or second job earnings."

¶8 During the 2020 hearing, evidence showed that Tracy made $20.50 per hour as an administrative assistant for an accountant, the same position she had held in 2018. During the tax season, she worked full time, but otherwise worked part time. She also received income from a rental property, and from 2014 to 2018, she made annual withdrawals from her retirement account to pay down debt and attorney fees. Michael suggested that the trial court include these sources when calculating Tracy's income.

¶9 The trial court found Tracy's employment had not changed since 2018 and imputed her income as $16 per hour (one more dollar than in 2018) for a monthly income of $2,773. It once again did not include "any of [her] extra income" in excess of the calculated employment income, essentially stating that consistent with its 2018 findings there was no evidence of underemployment and noting that it had also not included such extra income in its 2018 ruling.

¶10 Michael argues that the trial court erred in three specific ways when calculating Tracy's gross income. First, he asserts it "failed to include any of [Tracy's rental income] in determining her gross monthly income." Rental income is continuing or recurring in nature and is specifically contemplated as income in the Guidelines. *See* § 25-320 app. § 5(C) (stating that gross income from rent is calculated as "gross receipts minus ordinary and necessary expenses required to produce income"). We agree with Michael as to Tracy's rental income, and the same principles apply to his rental income as well. The court therefore abused its discretion by failing

to either include rental income in the parties' gross incomes, or to properly deviate from the Guidelines by making necessary findings. Thus, we remand this matter for the court to include rental income as income for both parties or to make the findings necessary to deviate from the Guidelines.

¶11 Second, Michael contends the trial court erred in failing to include Tracy's consistent retirement withdrawals in her income. He cites *Milinovich v. Womack*, 236 Ariz. 612 (App. 2015), for the proposition that treating withdrawals of a retirement account's principal as gross income is consistent with the Guidelines. When considering withdrawals from a retirement or other account, courts must acknowledge that "there are countless ways of investing for future needs, and [that] determining whether a particular investment vehicle falls within the definition of gross income requires consideration of the Guidelines on a case-by-case basis." *Id.* ¶ 16. This requires courts to consider whether income is like a second job or overtime pay, is recurring and continuous, or is "historically earned from a regular schedule and is anticipated to continue into the future." *See* § 25-320 app. § 5(A); *Milinovich*, 236 Ariz. 612, ¶¶ 11, 14, 16.

¶12 Although we detect no abuse of discretion in the trial court's excluding Tracy's withdrawals from her retirement account, the record arguably supports both parties' positions. On remand, the court may revisit its determination of the retirement account withdrawals considering factors such as Tracy withdrawing funds every year since 2014, totaling nearly $200,000 and ranging from $17,160 to $55,452; Tracy using some of the funds to pay debts while she worked below her full earning capacity; Tracy using the money to pay off attorney fees that Michael had been ordered to pay; and the fact that there is a zero balance in the account. In sum, it is unclear whether the court may have, in its discretion, deviated from the Guidelines, as it seemed to do for both parties on various issues; it must follow the Guidelines and make the appropriate findings to do so. *See* § 25-320 app. § 20(A)(1-2).

¶13 Finally, Michael claims the trial court "inexplicably" imputed Tracy's earnings as $16 per hour, not what she actually earns at her part-time position—$20.50 per hour. Tracy's employment status is primarily part time, and the court attributed to her an income based on full-time employment at an hourly wage less than what she actually earns. There was no evidence at the hearing regarding what Tracy would earn had she sought a full-time position or if there had been any change in her job prospects, but the court's previous ruling attributing her income at $15 per hour was based on evidence at the previous hearing. And the court considered that she actually earned $.50 more per hour in 2020 than 2018

and considered the previously imputed income, increasing it by one dollar. Consistent with the Guidelines, the court took into account—to the extent possible—Tracy's job prospects, her job skills, and her actual change in income, when it attributed her income above minimum wage. *Id.* § 5(E). We thus conclude the court did not abuse its discretion when attributing Tracy's earnings income.

Michael's Income Calculation

¶14 Michael argues the trial court erroneously based its credibility determination and his imputed income on its 2018 findings instead of the "evidence and testimony presented" at the hearing, and failed to sua sponte appoint a federally authorized tax practitioner to assist in calculating Michael's complicated income. Again, we review a child support award for abuse of discretion, *Birnstihl*, 243 Ariz. 588, ¶ 8, and will uphold the court's factual findings "if there is any reasonable evidence to support [them]," *Mitchell*, 152 Ariz. at 323; *see also Castro*, 222 Ariz. 48, ¶ 11. Because the trial court "is in the best position to weigh the evidence, observe the parties [and] judge the credibility of witnesses," *Doherty v. Leon*, 249 Ariz. 515, ¶ 16 (App. 2020) (quoting *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004)), we will defer to its findings of fact, *see Farmers Ins. Co. of Ariz. v. Young*, 195 Ariz. 22, ¶ 19 (App. 1998).

¶15 When a parent has been ordered to pay child support for multiple children and the duty to support one of the children ends, the parent must make a request for the court to recalculate the parent's obligation. § 25-320 app. § 25. Courts may consider past earning history when calculating a parent's income. *See Pearson v. Pearson*, 190 Ariz. 231, 236 (App. 1997); *Williams v. Williams*, 166 Ariz. 260, 266 (App. 1990).

¶16 Michael owns an accounting firm and testified that he works eighty hours a week there. On the weekends, he earns additional income playing piano and organ for various venues. He testified that the firm's income had decreased recently, but that he was convinced it would turn around. According to the most recent tax forms provided to the court, Michael's firm had over $200,000 in gross receipts. Based on his W-2 for the same year, he had received $15,500 in wages from his accounting firm, $8,500 of which went to his retirement account. In addition to his reported wages, during the hearing, Michael testified about his other sources of income for child support purposes. Michael noted a contribution from the firm into his retirement account, rental income from the firm minus expenses, interest, cost of three automobiles, and half the cost of his cell phone service, as these expenses had been for his benefit, had been

significant, and had reduced his personal living expenses. Michael acknowledged that his annual personal gross income for child support calculations was $41,110—a net monthly income of $3,425.

¶17 The trial court stated that it was difficult to calculate Michael's income as a "self-employed" accountant, and consistent with previous rulings, it questioned his credibility with respect to his income and expenses. It specifically noted that Michael had worked eighty hours per week with approximately 200-300 clients and that his W-2 stated he had an actual income of $12,000 from his firm and a weekend job, which the court calculated to be $2.90 per hour.[1] Even with add backs for child support purposes, the court calculated that Michael's firm had paid him less than minimum wage.[2] *See* A.R.S. § 23-363(A) (stating minimum wage during 2018 was $10.50).

¶18 The trial court then considered the 2018 ruling, which had imputed income to Michael. The court compared the firm's previous gross income with the amount Michael currently claimed, and concluded that the expenses had stayed relatively consistent and Michael's purported net income "cannot be a reliable source." It, therefore, imputed Michael's income by reducing the previously imputed income by twenty-three percent—the percentage that the firm's gross income had declined.

¶19 Michael contends the trial court's ruling "simply mirrors findings made in [the 2018 ruling] concerning [his] credibility" and "is devoid of a single finding on which the court believe[d Michael's] testimony [was] not credible." He further argues he was "absolutely forthright" and his testimony was "unrefuted."

¶20 Courts are not required to accept uncontradicted testimony. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 12 (2000); *Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, ¶ 12 (2012). The trial court was able to view Michael's demeanor and tone as he testified. It supported its finding by referring to specific testimony. Apparently, the court did not believe that an accountant with over twenty-five years of

[1]This calculation assumes zero hours for the weekend job.

[2]Michael contends he testified that "he made double the minimum wage." This assertion is not an accurate summary of his testimony or the record. While he did assert a monthly income of $3,425, Michael testified that he worked eighty hours a week, so the court calculated that his hourly wage was $9.95 per hour, which is less than minimum wage—not double.

experience was working for less than minimum wage. The court further supported its credibility determination by noting the history of Michael's credibility issues. After reviewing the record and deferring to the court's credibility determination, there is reasonable evidence to support its finding that Michael was not credible. *See Doherty*, 249 Ariz. 515, ¶ 16.

¶21 Michael nevertheless asserts that the trial court incorrectly relied on the 2018 findings about his income, "taking the easy way out instead of rolling up its sleeves and analyzing the testimony and evidence," and that there is no evidence to support the court's "indiscriminate calculation of his gross income." We disagree.

¶22 Based upon evidence that Michael's income had changed, and its finding that Michael was not credible, the trial court could, in its discretion, consider his income history, including the 2018 ruling as a baseline for imputing Michael's income.[3] *See Pearson*, 190 Ariz. at 236 (may consider parent's income history); *Williams*, 166 Ariz. at 266 (same); *but see Nia*, 242 Ariz. 419, ¶ 25 (past deviation ruling does not create presumption). The court decreased Michael's imputed income after comparing his gross income as determined in the 2018 ruling and the evidence of his current gross income.[4] Evidence supported the court's determination that Michael's income had decreased by twenty-three percent since the 2018 ruling. Michael challenges the court's finding that the firm's expenses had "stayed relatively consistent" for "several years," contending there was "no testimony or evidence presented" at the hearing "about [his] expenses for the last several years, only 2017 and 2018." Michael concedes that he presented evidence relating to his expenses for 2017 and 2018, the years since the court had last modified his child support obligation. The court could reasonably compare the evidence to previous reported expenses to

[3]To the extent Michael challenges the 2018 ruling as lacking specific findings, such a challenge is untimely and we do not consider it further. *See* Ariz. R. Civ. App. P. 9(a) (notice of appeal generally must be filed no later than thirty days after judgment being appealed).

[4]Michael raises for the first time in his reply brief that using a percentage to decrease his imputed income "disregards that certain fixed expenses . . . don't fluctuate whether gross earnings increase or decrease." Because this argument was raised for the first time in his reply, Michael has waived it. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3 (App. 2005) (appellate court not required to address issues first raised in reply brief); *see also* Ariz. R. Civ. App. P. 13(c).

calculate Michael's income after finding his testimony to not be credible. We cannot say the court abused its discretion in imputing Michael's income.

Sua Sponte Appointing Tax Practitioner

¶23 Michael argues that, given the trial court's concerns about his credibility, it erred by not sua sponte appointing a federally authorized tax practitioner pursuant to A.R.S. § 25-320.02.[5] We review a court's failure to make a sua sponte appointment for abuse of discretion. *Cf. Kelly R. v. Ariz. Dep't of Econ. Sec.*, 213 Ariz. 17, ¶ 24 & n.6 (App. 2006) (considering failure to sua sponte appoint guardian ad litem).

¶24 Section 25-320.02(A) provides that "[o]n request of either parent or on the court's own motion," it "may order both parents to meet with a federally authorized tax practitioner if at least one of the parents is self-employed," and the practitioner "shall . . . submit a written report to the court to help it determine the child support obligation." The word "may" usually indicates "permissive intent" or discretion, whereas "shall" has a mandatory connotation. *City of Chandler v. Ariz. Dep't of Transp.*, 216 Ariz. 435, ¶ 10 (App. 2007) (quoting *Walter v. Wilkinson*, 198 Ariz. 431, ¶ 7 (App. 2000)). When a statute uses both "may" and "shall," we "presume that the Legislature was aware of the difference between the two words and meant each to carry its ordinary meaning." *Id.* (quoting *Walter*, 198 Ariz. 431, ¶ 7).

¶25 Here, the legislature's use of both "may" and "shall" in § 25-320.02(A) shows that it intended for trial courts to have discretion in appointing tax practitioners. Michael has provided no authority indicating that the trial court was obligated to appoint a tax practitioner. Given the discretionary nature of § 25-320.02(A), the court did not abuse its discretion in not appointing a tax practitioner.

Attorney Fees

¶26 Both parties request attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and in accordance with Rule 21, Ariz. R. Civ. App. P. Michael contends that "Tracy is in a greatly better economic

[5]Michael acknowledges that he could have requested a tax practitioner but did not do so. He therefore cannot argue his request was erroneously denied. *See Cullum v. Cullum*, 215 Ariz. 352, n.5 (App. 2007) (issues not raised in trial court waived).

position than [him]." Tracy asserts that she has incurred "significant attorney's fees to litigate again the amount of his income, and now an appeal." Having reviewed the record as to the financial resources of both parties and having considered the reasonableness of their positions throughout the proceedings, in our discretion, we deny both parties' requests for attorney fees. *See* § 25-324(A). But because we vacate part of the award, Michael is entitled to his costs. *See* A.R.S. § 12-342(A); *cf. Stenberger v. McVey ex rel. County of Maricopa*, 234 Ariz. 125, ¶ 98 (App. 2014) (awarding costs when vacating part of dismissal).

Disposition

¶27 For the foregoing reasons, we vacate the trial court's ruling in part and remand for further proceedings consistent with this decision.