IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

ROGER H. CONTRERAS,
Appellant,

and

NANCY L. BOURKE,
Appellee.

No. 2 CA-CV 2019-0205-FC
Filed June 17, 2021

Appeal from the Superior Court in Cochise County
No. DO200901390
The Honorable Michael D. Peterson, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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By Danette R. Pahl
Counsel for Appellant

Nancy Bourke, Sierra Vista
In Propria Persona

MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Roger Contreras appeals from the trial court's ruling of October 21, 2019. Specifically, Contreras argues the court abused its discretion when it deviated from the Arizona Child Support Guidelines in calculating the child support obligation for his ex-wife, Nancy Bourke, as $0, while also allowing her to claim tax exemptions for their minor child in alternating years. He further complains the court abused its discretion in denying his request for attorney fees and costs. For the following reasons, we vacate the portions of the order regarding Bourke's child support obligation and tax exemptions and the denial of Contreras's attorney fees and costs. We remand these portions to the trial court to modify its order, consistent with this decision. We otherwise affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the trial court's findings. *Vincent v. Nelson*, 238 Ariz. 150, ¶ 17 (App. 2015). Bourke and Contreras are the parents of a minor child. Since the 2011 dissolution of their marriage, they have engaged in "almost non-stop, ferociously contested litigation," spanning several trial judges and involving multiple appeals to this court.[1] The instant appeal[2] arises out of the trial court's ruling that set aside an earlier child support obligation order, modified the parties' child support obligations, resolved Contreras's

[1]We have decided three prior appeals relating to this dissolution action. *See In re Marriage of Contreras & Bourke*, 2 CA-CV 2014-0158 (Ariz. App. Aug. 13, 2015) (mem. decision); *In re Marriage of Contreras & Bourke*, 2 CA-CV 2013-0092 (Ariz. App. Feb. 24, 2014) (mem. decision); *Contreras v. Bourke*, 2 CA-CV 2011-0103 (Ariz. App. Mar. 30, 2012) (mem. decision).

[2]This appeal originated as Contreras's cross-appeal in response to Bourke's appeal from the trial court's ruling. However, we dismissed Bourke's appeal for failure to file an opening brief.

petition to modify legal decision-making and parenting time, and denied Contreras's request for attorney fees and costs associated with the petition.

¶3 During a three-day bench trial, the trial court heard testimony from multiple witnesses. These included a therapist who conducted co-parenting therapy sessions with the parties, a superior court security officer who witnessed a 2018 incident in which Bourke lay on the floor in front of the courthouse elevators after a hearing related to these proceedings and, after being helped to a bench, continued to cry "uncontrollably," a therapist who testified to Bourke's "mental health challenges," and two individuals called by Bourke, both of whose testimony the court characterized as "irrelevant" to the proceedings. The court also heard testimony from Contreras, but not from Bourke, whom the court noted had "deliberately conducted herself in such a way as to leave no time for her testimony," behaved in accord with "a larger pattern" of "deliberate[] abuse" of the proceedings, lacked preparation, and exhibited inappropriate, unprofessional comportment, despite the fact that she was a "practicing attorney."

¶4 The trial court repeatedly noted Bourke suffers from mental health issues, which it characterized as "profound, debilitating," and "incapacitating." It observed that "extreme acrimony which defies description" exists between the parties, whose "inability to communicate and cooperate is due, in large part," to Bourke's "combative approach to parenting, hostility toward [Contreras,] and related mental health challenges." It further noted Bourke "does not put [the child]'s interests first." Consequently, it concluded Bourke could not co-parent with Contreras at that time, and it ruled the child would reside primarily with Contreras, with specific visitation privileges retained for Bourke. It ordered that, although Bourke was under no requirement to obtain mental health services, it would not revisit the parenting time schedule unless she did so. It further advised that the "express intent of this order is to incentivize mother to obtain treatment that can assist her to be the best mother that she can be."

¶5 The trial court also granted Contreras's motion to set aside a child support order that had been entered in March 2018. Contreras never made any payments in compliance with that order, before which Bourke had paid $90 a month in child support to Contreras. The court noted that, during the same period, Bourke had owed but failed to pay Contreras $100 a month in attorney fees and costs related to a prior judgment. Because "[n]either party was paying the other," the court ruled that neither party owed the other for the child support owed during the time the March 2018

order was in place. The court also set Bourke's child support obligation at $0, a deviation from the Guidelines, and ordered that Bourke and Contreras alternate years for claiming the child as a dependent for tax exemption purposes.

¶6 This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Deviation from Arizona Child Support Guidelines

¶7 Contreras objects to the trial court's calculation of Bourke's future and retroactive child support obligation to $0. He further objects to its order that Bourke may claim the child as a dependent for tax purposes on alternating years despite contributing no money to the child's support. He argues the court failed to follow the requirements of A.R.S. § 25-320 app. § 20 in deviating from the Arizona Child Support Guidelines.

¶8 We review a trial court's decision on whether and how to modify an award of child support for abuse of discretion. *In re Marriage of Robinson & Thiel*, 201 Ariz. 328, ¶ 5 (App. 2001). We will not find such abuse unless the record, viewed in the light most favorable to upholding the ruling, lacks evidence to support the court's decision. *Little v. Little*, 193 Ariz. 518, ¶ 5 (1999). We review questions of statutory interpretation de novo, applying the clear and unambiguous language of the statute when possible. *Beatie v. Beatie*, 235 Ariz. 427, ¶¶ 14, 19-20 (App. 2014); *see also Mead v. Holzmann*, 198 Ariz. 219, ¶ 8 (App. 2000) ("In interpreting the Guidelines, we apply the same rules of construction as are used in construing statutes.").

¶9 Guideline 20(A) provides that a trial court shall deviate from the Guidelines "only if all of the following criteria are met:"

> 1. Application of the [G]uidelines is inappropriate or unjust in the particular case,
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> 2. The court has considered the best interests of the child in determining the amount of a deviation. A deviation that reduces the amount of child support paid is not, by itself, contrary to the best interests of the child,
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> 3. The court makes written findings regarding 1. and 2. above in the Child Support Order, Minute Entry or Child Support Worksheet,

> 4. The court shows what the order would have been without the deviation, and
>
> 5. The court shows what the order is after deviating.

§ 25-320 app. § 20(A); *see also Stein v. Stein*, 238 Ariz. 548, ¶ 7 (App. 2015) (if deviating from Guidelines, court must make written findings as to § 20(A)(1) and (A)(2)).

Elimination of Bourke's Child Support Obligation

¶10 During the bench trial, the trial court found that Bourke had not "disclose[d] financial records as required" by prior orders. The court stated in its order that although Bourke had "deliberately and unreasonably reduced her income" and failed to "comply with disclosure and discovery requirements regarding her finances," it would deviate from the Guidelines by eliminating Bourke's child support obligation. It did so, it explained, "to free-up as much of the mother's financial resources as possible to permit her to obtain the professional assistance necessary to address and resolve her mental health challenges."

¶11 This language does not satisfy the requirements of Guideline 20(A). Specifically, the trial court never made written findings that application of the Guidelines was inappropriate or unjust in this case, nor did it expressly state that it had considered the best interests of the child in deviating from the schedule. *See Nia v. Nia*, 242 Ariz. 419, ¶ 26 (App. 2017) (trial court must make express findings outlined in § 20(A) if it determines deviation in best interests of child); *In re Marriage of Allen*, 241 Ariz. 314, ¶ 20 (App. 2016) (same); *cf. Stein*, 238 Ariz. 548, ¶ 8 (concluding trial court's findings sufficient to satisfy Guideline 20). Although both findings may be inferred from the order and from the record before us, Guideline 20(A)(3) clearly requires those findings to be set forth in writing.

¶12 Further, the trial court's order did not show "what the order would have been without the deviation," as required by Guideline 20(A)(4). The parties do not cite, and we cannot locate in the record, a worksheet the court used to support its ruling.[3] In the portion of the order modifying child

[3]Bourke directs us, among other financial affidavits and records, to a worksheet she filed with her motion to modify support in December 2017, which appears to be the most recent worksheet filed by either party. However, this information was nearly two years old by the time the trial court made the ruling under review. In any event, the court set aside the

support, the court wrote only that based on the modification of parenting time, "mother would be required to pay father child support." Nowhere else does the ruling specify the amount of money Bourke would have been required to pay Contreras each month absent the deviation, as required under Guideline 20(A)(4). Therefore, we are compelled to remand the order so that the court can comply with the Guidelines.

¶13 In addition, our review of the record indicates that the trial court's order that Bourke's $0 child support obligation take effect retroactively to November 1, 2017, does not comport with A.R.S. § 25-503(E). Bourke's motion to modify was filed December 29, 2017. Section 25-503(E) would require the court to set Bourke's new obligation as commencing either on the "first day of the month following notice of the petition for modification," or, "for good cause shown . . . at a different date but not earlier than the date" the motion to modify was filed, December 29, 2017. Thus, the court should redetermine the effective date of the support order when it makes its findings on remand.

¶14 Because we agree the trial court failed to expressly consider each of the factors set forth in Guideline 20, we vacate these portions of the order and remand to allow the court to make the necessary findings to support its determinations. We also direct the court to set the effective date for its child support order to comport with § 25-503(E). By remanding this portion of the ruling, we express no opinion regarding the propriety of the trial court's decision to deviate from the Guidelines. *See Nash v. Nash*, 232 Ariz. 473, ¶ 16 (App. 2013) (trial courts enjoy broad discretion in fashioning child support awards); *see also* § 25-320 app. § 20(A)(2) ("A deviation that reduces the amount of child support paid is not, by itself, contrary to the best interests of the child[.]"). We note, however, that the court's decisions are amply supported by the record.

Allocation of Tax Exemptions for Dependent Child

¶15 The trial court also abused its discretion in directing Bourke and Contreras to claim the child as a dependent for tax exemption purposes on alternating years without first calculating their respective incomes. Guideline 27 states that a court "shall" allocate dependent tax exemptions for each parent in a manner that is "proportionate to adjusted gross income in a reasonable pattern that can be repeated in no more than 5 years." § 25-320 app. § 27. "Shall" ordinarily imposes a mandatory provision in a

child support order entered on the basis of this worksheet, and thus we presume the court did not rely on it in issuing the ruling under review.

statute. *Woodward v. Woodward*, 202 Ariz. 179, ¶ 17 (App. 2002). Thus, under its plain meaning, *see Milinovich v. Womack*, 236 Ariz. 612, ¶ 10 (App. 2015), Guideline 27 requires a court to award parents the right to claim tax exemptions in a manner proportionate to their income, in the absence of an alternate agreement, § 25-320 app. § 27.

¶16 Here, however, the trial court made no findings in the section setting the parties' support obligations regarding their respective incomes, other than to reason that Bourke had "intentionally misrepresented her income" and "deliberately mislead the Court regarding her earning capacity." This finding is insufficient to sustain the court's directive that the parties claim a tax exemption in alternating years. Thus, we also vacate this portion of the order so that the trial court may, on remand, make the necessary findings regarding the parties' incomes to support its tax exemption allocation and to modify that allocation as necessary.[4]

Attorney Fees and Costs

¶17 Contreras argues the trial court erred in declining to award him attorney fees and costs, which he requested under A.R.S. § 25-324. Specifically, he maintains that the court's findings regarding Bourke's conduct during litigation eliminated its discretion to deny fees under § 25-324(B).[5]

¶18 We review a trial court's denial of attorney fees and costs for an abuse of discretion. *See Mangan v. Mangan*, 227 Ariz. 346, ¶ 26 (App. 2011). A court abuses its discretion when it makes an error of law or when the record, viewed in the light most favorable to upholding the ruling, does not support the court's decision. *Michaelson v. Garr*, 234 Ariz. 542, ¶ 5 (App. 2014). Section 25-324(B) provides that a trial court "shall award reasonable

[4]We disagree with Contreras that the allocation of tax exemptions was error on the ground Bourke now "has essentially zero financial obligation" in child support. With no supporting authority, Contreras misinterprets the plain language of the Guidelines, which directs courts to allocate dependent tax exemptions for each parent in a manner that is "proportionate to adjusted gross *income* in a reasonable pattern that can be repeated in no more than 5 years." § 25-320 app. § 27 (emphasis added). The correct calculation for allocating tax exemptions is the parents' respective incomes, not their respective contribution to child support.

[5] Contreras does not discuss, and we therefore do not address, whether the trial court should have granted fees under § 25-324(A).

costs and attorney fees to the other party" if it finds that "a party filed a petition under one of" three circumstances. Specifically, a court must award such fees if the petition "was not filed in good faith," "was not grounded in fact or based on law," or "was filed for an improper purpose, such as to harass the other party, to cause an unnecessary delay or to increase the cost of litigation to the other party." § 25-324(B). We recently reversed a trial court's refusal to award fees under § 25-324(B) when the record plainly showed the original petition was not grounded in fact or law. *Tanner v. Marwil*, 250 Ariz. 43, ¶ 19 (App. 2020).

¶19 The trial court quoted both subsections of § 25-324 when denying Contreras's request for fees and costs. It found that Bourke had "unreasonably and greatly increased the cost" of the proceedings, had filed "dozens" of unnecessary and untruthful "motions, petitions, requests, etc.," had "manipulated her use of time . . . to ensure that she would not be held to answer questions," and that her conduct had been "completely unreasonable." It further observed, in the portion of the ruling immediately below the section on attorney fees and costs, that Bourke was "the epitome of a vexatious litigant" and had not "acted in good faith regarding her finances throughout the course of the[] proceedings." In the portion of the order modifying parenting time and legal decision-making, the court found, as set forth throughout the order, that Bourke had "intentionally and egregiously abused the litigation process," had "intentionally misled" the court "to cause an unnecessary delay, to increase the cost of litigation, and to improperly attempt to persuade" the court to give her parenting time and legal decision-making preference. Despite these numerous findings, the court reasoned that although it would be acting well within its discretion to award fees and costs to Contreras, it would decline to do so because there was "a greater good in finality."

¶20 Bourke argues that she should not be subject to fees under § 25-324(B) because she filed no petition in the proceedings below. The parties cite no opinions that directly address whether a party must have filed a document particularly labeled as a petition in order for a party to be subject to fees and costs under § 25-324(B), and we are aware of none.[6] However, our recent jurisprudence considering fees and costs under that

[6]Contreras cites no case law specific to § 25-324(B) in his opening brief. And he incorrectly asserts in his reply brief that "the only published opinion citing A.R.S. Part 1 § 25-324(B) is *Cruz v. Garcia*," 240 Ariz. 234, ¶¶ 19-20 (App. 2016). As we discuss, recent opinions have instructively applied or reviewed a trial court's application of § 25-324(B).

provision is germane to our analysis here. Specifically, we have awarded partial fees and costs to an appellant on the basis that the appellee—not the party who filed the petition for special action—had taken an "unreasonable position at trial," had taken an "unsupported position on the law," and had presented appellate arguments that "were not made in good faith." *Dole v. Blair*, 248 Ariz. 629, ¶ 19 (App. 2020) (citing § 25-324(B) as partial basis to award partial fees of special action proceeding).[7]

¶21 Even if we strictly construe the term "petition" in § 25-324(B), the record indicates Bourke filed at least two petitions in the proceedings under review: a counter-petition for contempt and a petition to enforce the child support order entered in March 2018. The trial court ruled against Bourke on both. The court's denial of fees and costs is particularly troubling given its assessment of the litigation over the March 2018 child support order and the related income withholding order. The court described the related litigation as pivoting on whether the orders were "the subject of fraud perpetrated by mother." And in setting the orders aside, the court noted that Bourke "knew or should have known that the[y] . . . should not have been entered." This reasoning—that Bourke knew the March 2018 order had been entered incorrectly—implies that her petition to enforce it was not filed in good faith, was not grounded in fact or law, and was filed for an improper purpose. The finding thus supports mandatory fees under all three subsections of § 25-324(B). Therefore, even if Bourke were correct that only a party who files a "petition" is subject to fees and costs under § 25-324(B), she would still be susceptible to a fee and costs award with regard to the petitions she filed.

¶22 Given the express findings outlined above, the record does not support the trial court's decision to deny Contreras his attorney fees and costs. *See Michaelson*, 234 Ariz. 542, ¶ 5. Although the court did not make each of its findings regarding Bourke's abuse of the litigation process

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[7]And, although they do not control our reasoning, several recent unpublished decisions have similarly required the award of fees under § 25-324(B) to parties who were not the original petitioners in a family law action. *See, e.g.*, *Reed v. Farmer*, No. 2 CA-CV 2017-0097-FC, ¶¶ 17-19 (Ariz. App. May 30, 2018) (mem. decision) (upholding trial court's grant of attorney fees and costs against party who filed motion for reconsideration in paternity action); *Evers v. Rose*, No. 1 CA-CV 16-0122-FC, ¶¶ 16-17 (Ariz. App. Mar. 16, 2017) (mem. decision) (once trial court found husband's motion—not petition—for relief from divorce order legally and factually groundless, § 25-324(B) mandated fees).

in the section denying attorney fees and costs, the order as a whole is replete with express findings that Bourke increased the cost of the litigation through delay, bad faith practices, abuse of the litigation process, and unreasonable behavior. Although we readily defer to a trial court's discretion in ruling on a request for fees under § 25-324(A), under which fees are discretionary even in the presence of unreasonable litigation practices, *Mangan*, 227 Ariz. 346, ¶ 28, subsection (B) mandates a fees award under the conditions recorded here. On remand, we note that the trial court may limit its award of fees and costs to cover only the portions of the proceedings adversely affected by Bourke's behavior consistent with the factors set forth in § 25-324(B)(1)-(3).

Bourke's Appellate Filing Fees and Transcript Fees

¶23 Contreras also argues that we should require Bourke to pay the appellate filing fees and transcript costs, both of which we waived at the outset of this appeal. However, we denied Contreras's motion to reconsider these fee waivers in January 2020. We have not issued an order specifically permitting Contreras to request that we reconsider our denial of his initial motion for reconsideration. *See* Ariz. R. Civ. App. P. 22(f). The opening brief merely reiterates the bases for Contreras's initial objection and motion for reconsideration. Contreras argues that Bourke's failure to prosecute her appeal—which led to our dismissal of her appeal in this matter—constitutes a "significant change in circumstances" that would compel us to consider this issue anew. However, Contreras has provided no legal authority for the proposition that a change in circumstances renders Rule 22(f) inoperative, and we will not address it further. *See* Ariz. R. Civ. App. P. 13(a)(7); *Murphy v. Woomer*, 250 Ariz. 256, ¶ 20 (App. 2020) (undeveloped argument that fails to comply with Rule 13(a)(7) not addressed on appeal). Thus, we construe this argument as an impermissible motion for us to reconsider our order denying reconsideration, and we decline his request.

Attorney Fees and Costs on Appeal

¶24 Contreras requests his fees and costs on appeal. However, he cites no basis for his fee request, and we therefore deny it. *See* Ariz. R. Civ. App. P. 21(a)(2); *Grubb v. Do It Best Corp.*, 230 Ariz. 1, ¶ 17 (App. 2012). Contreras has been partially successful in this appeal; accordingly, we are obligated to award him costs as provided by A.R.S. § 12-341, upon his compliance with Rule 21(b). *See Henry v. Cook*, 189 Ariz. 42, 43-44 (App. 1996).

Disposition

¶25 For the foregoing reasons, we vacate the portions of the trial court's order setting Bourke's child support obligation as $0, evenly allocating tax exemptions between the parties, and denying Contreras attorney fees and costs, and we remand the matter for further proceedings as outlined above. We deny Contreras's request that we reconsider our waiver of Bourke's appellate filing and transcript fees. We otherwise affirm.