IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JARED JOHNSON,
Appellee,

v.

KATHERINE BLOHM,
Appellant.

No. 2 CA-CV 2022-0091-FC
Filed March 16, 2023

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. SP20171422
The Honorable Gilbert Rosales Jr., Judge Pro Tempore

AFFIRMED

COUNSEL

The Higgins Law Group, Tucson
By Maggie Higgins Schmidt
Counsel for Petitioner/Appellee

Wyland Law P.C., Tucson
By Dawn Wyland
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Presiding Judge Brearcliffe authored the decision of the Court, in which Judge Eckerstrom and Judge Kelly concurred.

B R E A R C L I F F E, Judge:

¶1 Katherine Blohm appeals the trial court's order modifying child support. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's order. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1 (App. 2007). Jared Johnson and Blohm never married and share a child, S.B.-J. The trial court established Johnson's paternity in March 2018, and it later ordered him to pay $169 in monthly child support.

¶3 S.B.-J. was scheduled to begin kindergarten in the fall of 2020. In February 2020, as a result of the parties' failure to agree on a school for S.B.-J., Blohm filed a petition seeking primary legal decision-making authority as to S.B.-J.'s education and also a modification of support. After a series of resolution management conferences, the parties agreed on a school and changes to parenting time, leaving the remaining issue of child support for trial. Blohm sought modification of Johnson's continuing child support obligation, as well as "back child support beginning in March 2020, when [his] payments for outside childcare ended."

¶4 On the first day of trial, before hearing the parties' testimony on income, the trial court stated that its "understanding . . . has been that . . . [it] doesn't have to consider anything beyond a full time job." Johnson is an auto mechanic and runs an auto repair business from his home. Blohm is a public school psychologist. Both parties testified on their respective incomes. Johnson also retained an accountant to analyze his accounts and finances and to, in part, testify to his income.

¶5 The accountant testified at trial regarding Johnson's income from 2018 to 2021. As part of her testimony, she referred to profit-and-loss statements that she had created for trial from Johnson's bank and business records and from her discussions with Johnson. Each yearly profit-and-loss statement was admitted as an exhibit.

¶6 At the conclusion of the trial, Blohm argued that the trial court should attribute an annual income to her of $60,000 with a $221 deduction for providing insurance for S.B.-J. She further asserted that the accountant's income calculations for Johnson were erroneous and that Johnson should be attributed an annual income of $120,000. Blohm urged the court to "impute [Johnson]'s earnings from buying and selling cars and car parts in addition to his mechanic's wages." Johnson argued that any income from buying and selling cars and car parts should not be attributed to his income calculation because it "is a hobby." He asked the court to establish his annual income based on his average income as an auto mechanic during the years 2018 to 2021, as reflected in the accountant's profit-and-loss statements.

¶7 In its June 2022 ruling, the trial court referred to the accountant's profit-and-loss statements from 2018 to 2021 and determined that Johnson's annual income was $54,888.55—the average of his business income for those years. After crediting Blohm with the cost of providing S.B.-J.'s medical insurance, the court concluded Blohm's monthly income was "$5,585.36 reported on her financial affidavit, plus the $300 per month in rental income she testified to." The court then ordered Johnson to pay $15 in continuing child support per month and declined to order any back child support.

¶8 Blohm filed a Rule 85(a), Ariz. R. Fam. Law P., motion requesting that the trial court award her attorney fees, not addressed in the court's modification order, based in part on "a great disparity in actual income and resources of the parties." In response, Johnson requested that the court award him attorney fees and costs. The court denied each party's request and certified the order as final under Rule 78(c), Ariz. R. Fam. Law P. Blohm appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).

Analysis

¶9 We review a modification of child support for an abuse of discretion. *Strait v. Strait*, 223 Ariz. 500, ¶ 6 (App. 2010). "A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or the record fails to provide substantial evidence to support the trial court's finding." *Duckstein v. Wolf*, 230 Ariz. 227, ¶ 8 (App. 2012) (quoting *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, ¶ 27 (App. 2007)). We will accept the court's findings of fact unless clearly erroneous, but we "review de novo the court's conclusions of law and interpretation of the Arizona Child Support Guidelines." *Sherman v. Sherman*, 241 Ariz. 110, ¶ 9 (App. 2016).

¶10 When calculating child support, a trial court's income computation must generally follow the Arizona Child Support Guidelines, A.R.S. § 25-320 app. *Id.*¶ 15. The court considers a parent's gross income, or "income from any source before any deductions or withholdings," including, but not limited to, salaries, wages, and capital gains. § 25-320 app. § 2(A)(1)(b); *Hoobler v. Hoobler*, ___ Ariz. ___, ¶ 23 (App. 2022). "[G]ross income for child support purposes is not determined by the gross income shown on the parties' income tax returns, but rather on the actual money or cash-like benefits received by the household which is available for expenditures." *Cummings v. Cummings*, 182 Ariz. 383, 385 (App. 1994).

¶11 On appeal, Blohm argues that the trial court's calculation of Johnson's gross income was erroneous because the court failed to include capital gains, non-primary business expenses, employment benefits, rental income, and income for November and December 2021.[1] Additionally, Blohm argues that the court erred by attributing summertime employment income to her in addition to her full-time salary during the school year.

Johnson's Income

¶12 Johnson's income fluctuated each year. The trial court determined his average annual income to be $54,888.55, based on the net business profits calculated in the accountant's profit-and-loss statements of $58,877.36 in 2018, $39,037.44 in 2019, $32,788.99 in 2020, and $88,850.41 in 2021. Blohm argues that the court erroneously omitted several sources of income in its calculation.

"Hobby Income"

¶13 Blohm first argues that the trial court failed to include Johnson's income selling cars and car parts within his gross income. The accountant first testified that Johnson's income from private car sales and parts was earned "outside of his normal business income," that "the sale of personal property would not be included in his income," and that income generated from the sale of personal property is "investment income," meaning "[i]t's not in a normal course of his everyday job." She consequently deducted "[p]rivate car sale income" from Johnson's net

[1]Blohm asserts that several of these omissions were erroneous because they "cannot be supported by the evidence admitted at trial." However, instead of relying on legal authority regarding the sufficiency of the evidence, each argument essentially alleges an omission in the gross income calculation under Arizona's Child Support Guidelines. We address them accordingly.

income in differing amounts for three of the four years she examined. Later in her testimony, however, the accountant stated that, "after further research," for taxation purposes, Johnson's income selling cars and parts was not capital gains or investment income but instead "ordinary income" because "he did it for . . . more than a year." Nonetheless, the court determined that "[t]he income [Johnson] earns f[ro]m the sale of his personal property are capital gains not earned in the course of his regular employment as a mechanic" and declined to attribute that income to Johnson's gross income.

¶14 Johnson argues that his income selling vehicles and parts is outside of his normal work as an auto mechanic and that "[t]he trial record does not show that [he] historically earned capital gains income from selling personal property." In support of his position, he points to his testimony that "he sold off most of his personal property and did not intend to repurchase inventory in the future." Blohm asserts that these earnings enabled Johnson "to pay down his mortgage by at least $153,000 through additional cash," which "shrieks of 'actual money' or 'cash-like benefits' that is available for expenditures."

¶15 "The court generally does not include more income than earned through full-time employment" because "[e]ach parent should have the choice of working additional hours through overtime or at a second job without increasing the child support obligation." § 25-320 app. § 2(A)(3)(a), (a)(i). "Voluntary overtime is excepted from the calculation to give parents the choice to work more hours 'without exposing that parent to the treadmill effect of an ever-increasing child support obligation.'" *Hoobler*, ___ Ariz. ___, ¶ 24 (quoting *McNutt v. McNutt*, 203 Ariz. 28, ¶ 17 (App. 2002)). A court *may*, but is not required to, "consider income actually earned if it is greater than would have been earned by full-time employment if that income was historically earned and is anticipated to continue into the future." § 25-320 app. § 2(A)(3)(b). It is also within the court's discretion whether "non-continuing or non-recurring income" is included in the child support calculation. § 25-320 app. § 2(A)(1)(d).

¶16 Here, the trial court heard testimony that Johnson's primary, consistent employment was his work as an auto mechanic and that this work did not overlap with his buying and selling of cars and parts. The court also heard testimony that he earned nothing from such sales in 2018, that this income fluctuated dramatically between 2019 to 2021 based on market conditions, and that it was not expected to recur. Additionally, although Blohm points to the accountant's corrected testimony that Johnson's income from private car sales was not capital gains or investment income but rather ordinary income, such only bore on how it would be

treated for income tax purposes. A court is not bound by the characterization of income for tax purposes in establishing child support. *See Cummings*, 182 Ariz. at 385; § 25-320 app. § 2(A)(1)(a) ("The term 'Child Support Income' does not have the same meaning as 'Gross Income' . . . for tax purposes."). It appears the court found that Johnson's work selling cars and parts, which he either already owned or which he purchased for that purpose, was non-recurring, voluntary overtime income. Blohm fails to demonstrate that such a determination was an abuse of discretion. We will not reweigh the evidence.[2] *Hoobler*, ___ Ariz. ___, ¶ 27.

Tax Deduction

¶17 As stated above, Johnson is self-employed with a home business. The accountant's 2018 to 2021 profit-and-loss statements include a forty-percent business expense deduction attributed to Johnson's utilities and mortgage payments. Blohm argues that the trial court should have included the deducted amounts in Johnson's gross income. She asserts that, "[b]y living and working at the same place, [Johnson] has the ultimate 'employment benefit' with the business absorbing 40% of his mortgage and utilities" and "[t]hat additional money he earns should find its way into his attributed income." Johnson counters that "[i]f [he] was renting a shop space, his expenses would be significantly more and would reduce his income dramatically" and that Blohm failed to articulate how much this benefit would be worth at trial and on appeal.[3]

¶18 According to the Guidelines, "[e]xpense reimbursements or benefits a parent receives in the course of employment, self-employment, or the operation of a business" that are "significant and reduce personal living expenses" are "included as Child Support Income." § 25-320 app. § 2(A)(1)(f). "Cash value is assigned to in-kind or other non-cash employment benefits." *Id*. "[M]ost courts agree that the employment benefits that a parent receives that reduce his living expenses should be

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[2]Relatedly, Blohm argues for the first time on appeal that deductions from Johnson's total expenses for "Cost of Goods Sold: Private Car Sales" should have been added into Johnson's total income for the years 2019 and 2021. Because Blohm did not advance this argument before the trial court, we do not address it. *See Westberry v. Reynolds*, 134 Ariz. 29, 33 (App. 1982) ("Where the record does not reflect that an argument was advanced at the trial level, an appellant is precluded from raising it for the first time on appeal.").

[3]On appeal, Blohm asserts these benefits amount to $40,085.71 for the years 2019 to 2021.

included as income to that parent for the purpose of determining the amount of child support." *Hetherington v. Hetherington,* 220 Ariz. 16, ¶ 24 (App. 2008) (discussing "employee benefits such as employer-paid health- insurance premiums and employer contributions to retirement accounts").

¶19 Neither party cites to authority stating that tax deductions attributed to a home-based business, such as those here, should or should not be treated like employer-expense reimbursements or employee benefits.[4] Under a prior version of the Guidelines, we determined that "[a]voidance of taxation is not a source of income" for child support purposes "but is, instead, a cost savings." *Mead v. Holzmann*, 198 Ariz. 219, ¶ 9 (App. 2000). Without more, therefore, we cannot say that the trial court abused its discretion by not adding the forty-percent business expense deduction to Johnson's gross income.

Rental Income

¶20 Blohm next asserts that Johnson's income for each year included $750 per month, which he "took a 40% business deduction from" by "dropping it into his general business income." Blohm argues, "This equates to [Johnson] being credited with $300 less income a month"—"($750 times 40% is $300)"—"or $3,600 a year, when he showed no costs involved for the upkeep of the rental property." Blohm contends that the trial court erred by not adding $3,600 to Johnson's net income for each year from 2019 to 2021.

¶21 Both Johnson and the accountant testified below that the rental income was factored into the net income reported on the accountant's profit-and-loss statements. Again, we will not reweigh the evidence on appeal, and we cannot say the trial court erred by not including these sums in Johnson's gross income. *Hoobler*, ___ Ariz. ___, ¶ 27.

Missing Months in 2021

¶22 Blohm notes that the 2021 profit-and-loss statement omitted Johnson's income for November and December, that is, that it only stated

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[4]Notably, "Child Support Income" under the current Guidelines "includes income from any source *before any deductions or withholdings*." § 25-320 app. § 2(A)(1)(b) (emphasis added). Blohm has not addressed, below or on appeal, whether "deductions or withholdings" include tax deductions, as opposed to other kinds of deductions or withholdings—such as for retirement or insurance. We therefore do not address it.

ten months of income. Blohm asserts that Johnson's average monthly income in 2021 from January to October was $8,885.04—$88,850.41 divided by ten months—and that two months of that average income (totaling $17,770) must be added to 2021's net profits to account for November and December.

¶23 Blohm did not advance this argument before the trial court, and we need not consider it for the first time on appeal. *See Westberry v. Reynolds*, 134 Ariz. 29, 33 (App. 1982).

Blohm's Income

¶24 Blohm argues that the trial court also erred by "attributing summer income to [her] in addition to her full time [school district] contract income." Blohm explains that she "*elects* to work in June, and in July if work is available." She testified that this work is "not reliable" and she has to apply for it each year. Blohm argues that any work she performed in June or July should be excluded from her gross income and the primary ten months of the year she works should have been annualized.

¶25 As explained above, it is within the trial court's discretion whether "non-continuing or non-recurring income" is included in the child support calculation. § 25-320 app. § 2(A)(1)(d). Blohm testified that she would regularly seek to work during the summer, did so in 2021, and likely would again the following year. The court did not err by deeming Blohm's summer income to be recurring and attributing monthly income to Blohm according to the amount reflected on her financial affidavit.

Attorney Fees

¶26 Blohm requests her attorney fees pursuant to Rule 21, Ariz. R. Civ. App. P., and A.R.S. §§ 25-324, 25-1062, and 12-341.01. Johnson requests his attorney fees pursuant to Rule 21(a) and A.R.S. §§ 25-324 and 12-342. Blohm is not the prevailing party on appeal; therefore, we deny her request for fees. Johnson is the prevailing party on appeal, but in our discretion we decline to award fees to him. However, Johnson is entitled to his costs incurred on appeal upon compliance with Rule 21.

Disposition

¶27 For the foregoing reasons, we affirm.