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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

WILLIAM N. LUNDY, JR., *Petitioner/Appellee*,

v.

COLLEEN S. LUNDY, *Respondent/Appellant*.

No. 1 CA-CV 15-0612 FC
FILED 8-4-2016

Appeal from the Superior Court in Yavapai County
No. V1300DO820030110
The Honorable Richard D. Lambert, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

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By Zachary J. Markham, Staci Lynn Foulks
Counsel for Petitioner/Appellee

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By Keith Berkshire, Maxwell Mahoney
Counsel for Respondent/Appellant

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Patricia A. Orozco and Judge Michael J. Brown joined.

S W A N N, Judge:

¶1 Colleen S. Lundy (“Mother”) appeals the superior court’s modification of William N. Lundy, Jr.’s (“Father[’s]”) child support obligation. We conclude that the court erroneously attributed income to Mother from a second job, and erroneously credited Father for the full amount paid on an insurance policy covering both the minor children and other dependents. We therefore vacate the modification order and remand for further proceedings. We further hold that the court erred by awarding attorney’s fees to Father in the absence of a written request for fees.

FACTS AND PROCEDURAL HISTORY

¶2 In 2004, Father and Mother, the parents of three then-minor children, entered a consent decree dissolving their marriage. The decree ordered Father to pay monthly child support and provide medical and dental insurance for the children.

¶3 In 2014, Father filed a petition to modify his child support obligation. He argued that modification was warranted because the parties’ incomes had changed and their oldest child had turned 18 years old.

¶4 After holding an evidentiary hearing in July 2015, the superior court granted Father’s petition and modified his child support obligation from \$1,354.41 per month to \$500 per month. In calculating the new amount, the court attributed to Mother income from two jobs. The court also credited Father for the full amount he paid to provide health insurance coverage for the three children and his wife, relying on testimony that Father’s cost to purchase dependency coverage would remain the same regardless of the number of dependents added to the policy. Finally, the court awarded Father approximately \$5,000 in attorney’s fees under A.R.S. § 25-324.

¶5 Mother appeals.

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DISCUSSION

I. THE SUPERIOR COURT ERRONEOUSLY CALCULATED FATHER'S NEW CHILD SUPPORT OBLIGATION.

¶6 After the consent decree was entered, the parties' oldest child reached the age of majority and graduated high school. That fact alone provided sufficient grounds for the court to revisit the issue of child support. *See* A.R.S. §§ 25-501(A), -503(E). We conclude, however, that several legal errors contributed to the calculation of the new support obligation.

A. The Superior Court Erred by Considering Income that Mother Earned from a Second Job.

¶7 Mother first contends that the superior court erred by including earnings from a second job when determining her income for the child-support calculation. We agree.

¶8 Section 5(A) of the Arizona Child Support Guidelines provides that when determining parents' incomes for child support purposes:

Generally, the court should not attribute income greater than what would have been earned from full-time employment. Each parent should have the choice of working additional hours through overtime or at a second job without increasing the child support award. The court may, however, 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.

A.R.S. § 25-320 app. § 5(A) ("Guidelines"). Section 5(A)'s intent is "consistent with the concept of full-time employment." *McNutt v. McNutt*, 203 Ariz. 28, 32, ¶ 17 (App. 2002). The provision "ensure[s] that the child support award is based on both parents' regular incomes but leave[s] to each parent the choice of working additional hours -- whether overtime or at a second job -- without exposing that parent to the 'treadmill' effect of an ever-increasing child support obligation." *Id.*

¶9 The court used Mother's 2013 tax return to determine her income, reasoning that her 2014 tax return reflected atypical earnings. The 2013 return showed that Mother's net annual profit from her job as a financial advisor was \$67,057, and that her net profit from a separate

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business management job was \$37,679. Her 2014 return and her testimony established that she continued to work as a financial advisor. The 2014 return did not, however, make any mention of a business management position (though it did report approximately \$3,000 in earnings from an “insurance” job). The court was not presented with evidence from which it could conclude that Mother’s business management income was “historically earned from a regular schedule and is anticipated to continue into the future.” We conclude, therefore, that the court erred by including that income in the child-support calculation.

¶10 We reject Father’s argument that Mother waived § 5(A)’s application. Neither Mother nor Father specifically addressed the business management income in the modification proceedings -- they instead disputed whether Mother’s 2014 earnings (which did not include business management income) accurately represented her financial situation and whether she correctly self-reported her 2015 income (which similarly did not include business management income). Mother cannot be said to have waived her right to challenge the court’s sua sponte inclusion of income.

B. The Superior Court Erred by Crediting Father with the Full Amount of His Insurance Premium Payments.

¶11 Mother next contends that the superior court erred by failing to prorate the amount Father paid to provide health insurance coverage for the two minor children, the adult child, and Father’s wife. Again, we agree with Mother.

¶12 Section 9(A) of the Guidelines provides that the court:

Shall add to the Basic Child Support Obligation the cost of the children’s medical dental or vision insurance coverage, if any In determining the amount to be added, only the amount of the insurance cost attributable to the children subject of the child support order shall be included. If coverage is applicable to other persons, the total cost shall be prorated by the number of persons covered.

Section 9(A) then provides an example of a “family option” premium payment that “provides coverage for the employee and *any number* of dependents.” (Emphasis added.) The example explains that the cost attributable to the dependents’ coverage should be divided by the number of dependents, then the quotient should be multiplied by the number of the dependents who are the subject of child support, and then the product

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should be used to calculate child support. The example makes clear that the premium must be prorated even if the named insured could add any number of non-child-support dependents to the policy at no additional cost.

¶13 In view of the foregoing, the superior court erred by refusing to prorate Father's premium payments to account for the health insurance's coverage of the adult child and Father's wife. Father's contention that Mother waived this issue is unavailing. The transcript reveals Mother specifically argued that proration was required. Her failure to cite § 9(A) did not constitute waiver.

II. THE SUPERIOR COURT ERRONEOUSLY AWARDED ATTORNEY'S FEES TO FATHER.

¶14 Mother finally contends that the superior court erred by awarding attorney's fees to Father, arguing that he did not properly request fees under ARFLP 78(D)(1).

¶15 ARFLP 78(D)(1) provides that "[a] claim for attorney's fees, costs and expenses initially shall be made in the pleadings, pretrial statement, or by motion filed prior to trial or post-decree evidentiary hearing." We need not decide the temporal strictures of the rule, because one thing is clear -- the rule requires a *filed*, written request. There was no such request in this case. Father did not ask for fees in the modification petition or in any other filing. He instead asked for fees orally in closing argument at the evidentiary hearing. That was insufficient under ARFLP 78(D)(1), and the fact that Mother requested fees in the same manner as Father does not constitute waiver -- neither party would have been eligible for fees under the rule.

CONCLUSION

¶16 We vacate the superior court's orders modifying child support, and we remand for further proceedings consistent with this decision. On remand, the parties should apprise the court of any new changes in circumstances or income that may affect child support.

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¶17 In exercise of our discretion, we deny both parties' requests for attorney's fees and costs on appeal.



Ruth A. Willingham - Clerk of the Court
FILED : AA