

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Marriage of: ) 1 CA-CV 06-0228  
)  
TERI DENAPOLI aka TERI IRWIN ) DEPARTMENT A  
GILBERT, )  
) **MEMORANDUM DECISION**  
Petitioner-Appellee, ) (Not for Publication -  
) Rule 28, Arizona Rules  
v. ) of Civil Appellate  
) Procedure)  
ALBERT GEORGE DENAPOLI, ) **FILED 2-27-07**  
)  
Respondent-Appellant. )  
)

---

Appeal from the Superior Court in Maricopa County

Cause No. DR 1998-009817

The Honorable Larry Grant, Judge

**AFFIRMED**

---

Terri Irwin Gilbert  
Petitioner-Appellee *In Propria Persona*

Catonsville, MD

The Cavanagh Law Firm, PA  
By Christopher Robbins  
Attorneys for Respondent-Appellant

Phoenix

---

**S N O W**, Judge

¶1 Albert George Denapoli ("Father") appeals from the superior court's order increasing his child support obligation. He argues that the court abused its discretion in finding that Teri Irwin Gilbert ("Mother") had demonstrated a substantial and continuing change in circumstances that would justify a

modification of the child support award and in disregarding a prior stipulation between the parents setting Father's child support payment at \$100 per month. For reasons that follow, we affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶12 The parties' minor child, Anthony, was born in 1996. During the parties' marriage, Father established a limousine service to transport corporate clients to and from the airport. The parties' marriage was dissolved in September 2000, and the decree awarded the parties joint custody and ordered Father to pay \$314 per month in child support. In determining child support, the court found that Father's monthly income was \$1800 and Mother's monthly income was \$2000.

¶13 In January 2001, Mother notified Father that she intended to relocate to Maryland. Father objected, but the parties subsequently agreed that Mother would relocate with Anthony and that Father would pay \$100 per month in child support "*until further order of the Court.*" (Emphasis added.) The agreement included a revised visitation schedule and obligated Mother to assume seventy-five percent of Anthony's transportation costs. The court adopted the parties' stipulation.

¶14 In November 2003, Mother filed a request to modify child support pursuant to the simplified procedure; her application listed Father's monthly income as \$7500 and her income as \$2000, suggesting the difference between the existing award and a modified award would exceed fifteen percent. See Ariz. Child Support

Guidelines 22(b), Appendix to Ariz. Rev. Stat. ("A.R.S.") section 25-320 (2003) ("Either parent . . . may request the court to modify a child support order if application of the guidelines results in an order that varies fifteen percent or more from the existing amount."). Father requested a hearing and avowed that his income was \$1800 per month. His affidavit stated: "In consideration for agreeing to [Mother's] move, the parties agreed to deviate from the guidelines so that Respondent/Father would be able to exercise continuing and meaningful parenting time. The monetary value of the agreed upon deviation was \$214."

¶15 The court referred the parties to Expedited Services<sup>1</sup> and shortly after held an evidentiary hearing in December 2005 on Father's objection. Mother testified that when she agreed to the reduced child support, she had anticipated earning as much as \$60,000 but instead had earned only \$24,000 and had finally changed jobs in May 2004 to increase her income.<sup>2</sup> She also said that she sought modification because Anthony's expenses had increased and Father had told her that he was earning \$90,000 and had bought a home for \$200,000.

¶16 Mother disputed whether Father had accurately reported his income and showed that in 2003 he had deposited more than

---

<sup>1</sup> The parties accepted the figures adopted in the Expedited Services report for Mother's income, medical insurance, child care, and the number of Father's parenting days.

<sup>2</sup> By the time of the hearing, she was earning \$3,579.74 per month or approximately \$43,000 per year.

\$90,000 into his accounts and had a separate account with a \$66,000 balance containing proceeds from the 2004 sale of his home. She also questioned some of his corporate tax deductions and argued that Father had virtually no living expenses in light of his testimony that his new wife had paid for his expenses to visit Anthony, the mortgage on their shared home, their vacations, and Father's attorneys' fees. Mother further alleged that Father was underemployed because he made only fifteen to thirty trips to the airport a month and the rest of the time stayed home or played golf.

¶17 Father testified that he relied on referrals and did not try to increase his business. He conceded that he did not keep good records and that not all tax deductions were proper deductions for child support purposes. He admitted having stated on a 2002 mortgage application and 2003 refinance application that his gross monthly income was \$5000 and that he had savings of \$12,000; he stated that his mortgage payment was about \$1200<sup>3</sup> while he claimed his personal income was \$11,000 for tax purposes. Father's counsel argued, however, that even if his business grossed \$5000 a month, that did not account for deductions, which Expedited Services had considered in finding his income was \$1860.

¶18 Before taking the case under advisement, the court found that because Father had the same occupation that he had had during

---

<sup>3</sup> The application indicates that Father's mortgage payment was \$1562.

the marriage and Mother had not claimed he was underemployed then, he could not be underemployed now. The court would not attribute additional income to him on that basis. But, the court stated that \$100 was not in Anthony's best interests and should be modified.

¶9 In its signed minute entry, the court reiterated that the stipulated support award was not in Anthony's best interests. It noted Father's concessions that his gross corporate income did not match his bank accounts and deposits, that he had stated his gross income was \$5000 on the mortgage applications, and his agreement to pay \$350 a month for Anthony's private riding lessons. Nevertheless, the court found that Father's income was best reflected in his corporate and personal tax returns. It rejected Mother's request to deviate from the guidelines because the expense items she had identified were accounted for by the guidelines. The court then adopted the findings in the Expedited Services report of the parties' incomes and their respective child support obligations. The report found Father's income was \$1,860.14 and Mother's income was \$3,579.74. The court ordered that Father pay \$297.39 in child support.

¶10 Father timely appealed. Mother has no counsel on appeal and has not cross-appealed. She argues that Father's financial records indicated that his income was more than \$1800 per month and asks us to allocate additional income to him. We have no jurisdiction to consider this issue, however, because she did not

file a cross-appeal. We have jurisdiction over Father's appeal pursuant to A.R.S. § 12-2101 (C) (2003).

#### DISCUSSION

¶11 Father raises three contentions: that the superior court violated A.R.S. § 25-327(A) (Supp. 2006)<sup>4</sup> in failing to find a substantial and continuing change in circumstances existed before modifying his child support obligation, that the court abused its discretion in modifying child support because no evidence demonstrated that modification was in the child's best interests, and that Mother either is estopped from objecting or waived her right to object to a permanent award of \$100 per month after she stipulated to that amount in 2001.

¶12 Father notes that the court rejected the grounds proffered by Mother to support modification: it declined to find that Father's gross income was \$5000 per month as she had alleged, or that Father was underemployed and should be attributed additional income, or that sufficient reasons existed to deviate from the guidelines. Father asserts that Mother's sole basis for claiming a change in circumstances was his purported income but that the court found no substantial change in his income and that this finding is not clearly erroneous. If so, we are bound by the finding, and the superior court erred in modifying support.

---

<sup>4</sup> We cite to the current version of the statute where there has been no material change.

¶13 We cannot agree, however, that Mother's sole ground for modification was Father's income. She testified that she requested modification because her earnings were not \$60,000 as she had expected after completing her degree and working for several years but were only \$24,000 when she sought modification. She added that Anthony's expenses had increased as he had grown older. Moreover, Father testified that when the parties reached the stipulation, he believed that Anthony would be better off moving than staying in Arizona and that he had expected that Anthony would only be gone a year but he had not returned and there were no plans for him to do so. Thus, even if the court found that Father's income had not materially changed since the 2001 stipulation, the record still supports a finding of a substantial and continuing change in Mother's circumstances and in Anthony's need for support after 2001. Mother's higher income after May 2004 worked to Father's advantage in allocating the parties' respective shares of child support and further supports the court's revised award.

¶14 Father points to the lack of an express finding of changed circumstances in the court's judgment and argues that the court ignored the requirement of this preliminary finding before it could legally modify a support award. Section 25-327(A) states that "the provisions of any decree respecting . . . support may be modified . . . only on a showing of changed circumstances that are substantial and continuing." Similarly, § 25-503 (E) (Supp. 2006) provides that a child support order "may be modified or terminated

on a showing of changed circumstance that is substantial and continuing." Thus, we agree that the statutes require a *showing* of changed circumstances. However, we "must assume from any judgment the findings necessary to sustain it if such findings do not conflict with express findings and are reasonably supported by the evidence." *Cockrill v. Cockrill*, 139 Ariz. 72, 74, 676 P.2d 1130, 1132 (App. 1983); see also *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 349, ¶ 21, 35 P.3d 105, 110 (App. 2001) (appellate court will infer "any findings of fact supported by the evidence that are necessary to uphold the [superior] court's judgment"). As we have noted, even if Mother did not persuade the court that Father's income had substantially changed, she did show a substantial change in her own income from that anticipated at the time of the stipulation and the need for more than \$100 in meeting Anthony's expenses.

¶15 Father also argues that even if a child's best interest is an important factor in determining whether to modify support, without a finding of a substantial and continuing change, the court abused its discretion in finding that Anthony's best interest was not served by the parties' stipulation. Father contends that the meager size of the award did not necessarily indicate that it was not in the child's best interest and that the court failed to cite any evidence to support a finding of inadequacy. He asserts that the 2001 stipulation considered Anthony's best interests and nothing changed after that.

¶16 Nevertheless, we have assumed that the court found a substantial and continuing change. Furthermore, the record supports a finding that the \$100 award was not in Anthony's best interest because Mother testified that she was spending \$1400 a month on Anthony's expenses for school, sports, childcare, insurance, food, clothing, entertainment, and miscellaneous items. Father did not dispute this testimony or the figures from Expedited Services, and the child support guidelines, even accounting for Mother's increased income, still required a larger support award. Therefore, we reject Father's contention that the record is devoid of competent evidence to support a finding that \$100 was not in Anthony's best interest.

¶17 Finally, Father argues that Mother either waived her right to object to the stipulated award of \$100 by voluntarily relinquishing a known right or was estopped from objecting to it by her inducement, his reliance, and his resulting injury. He has raised these arguments for the first time on appeal and made no effort to prove the elements of these doctrines by clear and convincing evidence before the superior court. Thus, we decline to consider them. See *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987) (declining to consider even significant constitutional issues raised for first time on appeal). We also observe that this court has declined to enforce agreements between parents that serve their own interests but not those of their children. In *Evans v. Evans*, 17 Ariz. App. 323, 324, 497

P.2d 830, 831 (1972), a father sought to enforce an agreement by his ex-wife to give him custody of one child contrary to the decree and to deed her interest in land to him in exchange for any right to further child support. We refused to enforce the agreement, citing the statute permitting amendment of judgments relating to custody and maintenance of children and our public policy giving paramount consideration to the children's welfare in a modification proceeding. *Id.* at 325, 497 P.2d at 832.

¶18 Father has requested an award of his attorneys' fees incurred on appeal pursuant to A.R.S. § 25-324 (2000). In the exercise of our discretion, we decline his request. The judgment of the superior court is affirmed.

---

G. MURRAY SNOW, Judge

**CONCURRING:**

---

PATRICIA A. OROZCO, Presiding Judge

---

DIANE M. JOHNSEN, Judge