

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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IN RE THE MARRIAGE OF:

ROBERTO VARELA,  
*Petitioner/Appellant,*

AND

LILIANA GOMEZ,  
*Respondent/Appellee.*

No. 2 CA-CV 2013-0096  
Filed February 21, 2014

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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NOT FOR PUBLICATION  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); Ariz. R. Civ. App. P. 28(c).*

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Appeal from the Superior Court in Santa Cruz County  
No. DR08028  
The Honorable Anna M. Montoya-Paez, Judge

**AFFIRMED IN PART; VACATED IN PART; REMANDED**

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COUNSEL

Solyn & Lieberman, PLLC, Tucson  
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J.L. Machado, P.C., Cortaro  
By Joe L. Machado  
*Counsel for Respondent/Appellee*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 In this domestic-relations case, Roberto Varela appeals from the trial court's post-decree-of-dissolution order in favor of appellee Liliana Gomez. Roberto contends the court erred in denying his request for modification of child support, calculating a judgment entered against him for child support arrearages, and awarding Liliana her attorney fees. For the reasons stated below, we affirm in part, vacate in part, and remand for proceedings consistent with this decision.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to upholding the trial court's order. *See Downing v. Downing*, 228 Ariz. 298, ¶ 2, 265 P.3d 1097, 1098 (App. 2011). The parties' marriage was dissolved in December 2009. Pursuant to the decree of dissolution, the parties were awarded joint legal custody of their son, N., who resides primarily with Liliana. The decree also provided that Roberto would pay Liliana \$454 per month in child support.

¶3 In July 2011, Liliana filed a motion to modify child support. After a hearing, the trial court granted the motion, awarding Liliana \$1,017.13 per month, effective August 2011. As part of that proceeding, the court also entered a judgment against Roberto for child support arrearages from December 2009 through August 2011 in the amount of \$1,270.40. The court issued an order of assignment to garnish Roberto's wages, beginning in December

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2011, for both the modified child support amount and an additional \$40 per month for the judgment.

¶4 In October 2012, Roberto filed a request for modification of child support. In response, Liliana asserted that “no modification of [Roberto]’s child support obligation [wa]s warranted” because their circumstances had not sufficiently changed. She also requested that the trial court enter a judgment for child support arrearages from August 2011 through December 2011 in the amount of \$2,711.49 and that the court award her attorney fees and costs.

¶5 After a hearing, the trial court issued an under-advisement ruling on February 22, 2013, denying Roberto’s motion. The court found that Roberto had not met “his burden of proof and there [wa]s no substantial and continuing change” in circumstances. The court also granted Liliana’s request for a judgment on the arrearages, ordered the parties to submit their interest calculations, and directed Liliana to submit a proposed form of judgment. In addition to the requested documents, Liliana filed a motion for and affidavit of attorney fees, and Roberto filed a motion for reconsideration. The court denied Roberto’s motion for reconsideration in April 2013, on the same day it entered the final order denying his request for modification, entered a judgment for arrearages against Roberto, and awarded Liliana her attorney fees and costs. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).

**Modification of Child Support**

¶6 Roberto argues the trial court erred by denying his request for modification of child support. “The decision to modify an award of child support rests within the sound discretion of the trial court and, absent an abuse of that discretion, will not be disturbed on appeal.” *Jenkins v. Jenkins*, 215 Ariz. 35, ¶ 8, 156 P.3d 1140, 1142 (App. 2007). However, we review de novo the trial court’s interpretation of the Arizona Child Support Guidelines. *Clay v. Clay*, 208 Ariz. 200, ¶ 5, 92 P.3d 426, 428 (App. 2004).

¶7 A trial court can modify child support upon “a showing of changed circumstance that is substantial and continuing.” A.R.S.

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§ 25-503(E); *see also* A.R.S. § 25-327(A). Pursuant to a simplified procedure, a party may request that the court “modify a child support order if application of the [G]uidelines results in an order that varies [fifteen percent] or more from the existing amount.” A.R.S. § 25-320 app. § 24(B). A fifteen percent variation is “considered evidence of substantial and continuing change of circumstances.” *Id.* The proponent of the modification “has the burden of establishing changed circumstances with competent evidence.” *Jenkins*, 215 Ariz. 35, ¶ 16, 156 P.3d at 1144.

¶8 Here, Roberto alleged a fifteen-percent variation, under the simplified procedure, based upon two factors: (1) N.’s daycare expenses, and (2) N.’s education expenses. Roberto argued the trial court had previously estimated N.’s daycare expenses to be \$4,595 per year but, for a more accurate child support calculation going forward, should use the total spent on daycare over the past year, \$3,141. And, although the existing child support calculation included \$460 per year in education expenses for Liliana to cover N.’s uniforms and extracurricular activities, Roberto asked the court to no longer include these expenses in the support calculation. He asserted that he also purchased uniforms, that the extracurricular activities—and the costs associated with them—frequently changed, and that, in any event, these particular expenses could not be included in the calculation.

¶9 The trial court rejected Roberto’s arguments. With respect to the daycare expenses, the court found Roberto had failed to prove that the amount paid during the previous year would continue into the future. And, the court concluded that the education expenses were “clearly warranted and ha[d] not changed.”

¶10 On appeal, Roberto first argues the trial court “disregarded the testimony and evidence of the current and actual [daycare] expenses.” Specifically, he contends the court overlooked evidence that N.’s daycare expenses were significantly less than expected under the existing child support order and that N. would be attending daycare even less in the future because of a longer school day. He maintains that the court should have modified the

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child support order, using “actual daycare costs and not rough estimates.”

¶11 Roberto essentially is asking us to reweigh the evidence presented at the hearing. This we will not do. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998) (“We will defer to the trial court’s determination of witnesses’ credibility and the weight to give conflicting evidence.”). Rather, we determine whether competent evidence exists to support the court’s decision. *See Rowe v. Rowe*, 154 Ariz. 616, 620, 744 P.2d 717, 721 (App. 1987). The record before us contains such evidence. Liliana testified that her annual daycare costs would be \$4,310 to \$4,751.25, depending on which school N. attends. The \$4,595 figure used in the existing child support calculation falls within that range. Although there was conflicting testimony about whether N.’s school day would be longer, Liliana explained that her estimates took the change into account.

¶12 Liliana acknowledged that her estimates were based on the “perfect situation,” with N. attending daycare every day, which the parties seem to agree is unlikely. But Roberto did not present alternate estimates and instead urged the court to use the purported amount of actual expenses from the previous year—something that is not required by the Guidelines. *See A.R.S. § 25-320 app. § 9(B)(1); Jenkins*, 215 Ariz. 35, ¶ 16, 156 P.3d at 1144 (burden of proof on proponent of modification). We thus cannot say the court abused its discretion regarding its determination of daycare expenses. *See Jenkins*, 215 Ariz. 35, ¶ 8, 156 P.3d at 1142.

¶13 Relevant to the education expenses, Roberto suggests the trial court should have given him credit in the child support calculation for uniforms he had purchased.<sup>1</sup> First, to the extent

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<sup>1</sup>Roberto also argues that he should be given credit for N.’s private-school-tuition payments. This argument, however, does not appear to have been raised below until Roberto filed his motion for reconsideration. *See Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 18, 235 P.3d 285, 290-91 (App. 2010) (we do not consider arguments raised for first time in motion for reconsideration). And,

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Roberto had purchased uniforms that the trial court had not ordered him to buy, he is not entitled to a credit for doing so. See A.R.S. § 25-320 app. § 9(B)(2). Second, Roberto's argument again seems to be a request that we reweigh the evidence. Although Roberto testified that he purchased "uniform[s] or uniform-type clothing for [N.]," he did not present proof of the purchases. The trial court therefore was entitled to reject Roberto's testimony, see *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 12, 9 P.3d 314, 318 (2000) ("The court . . . is not compelled to believe the uncontradicted evidence of an interested party."), and implicitly did so here. We cannot say the court abused its discretion regarding the education expense for uniforms. See *Jenkins*, 215 Ariz. 35, ¶ 8, 156 P.3d at 1142.

¶14 Roberto also maintains that the Guidelines prohibit inclusion of extracurricular activities as education expenses in the child support calculation. We disagree. The Guidelines provide that, in calculating child support, the trial court may consider "education expenses," which are defined as "[a]ny reasonable and necessary expenses for attending private or special schools or necessary expenses to meet particular educational needs of a child, when such expenses are incurred by agreement of both parents or ordered by the court." A.R.S. § 25-320 app. § 9(B)(2). "Education" is a broad term meaning "the knowledge or skill obtained or developed by a learning process." *The American Heritage Dictionary* 439 (2d coll. ed. 1982). Fees and supplies for extracurricular activities, including sports, can constitute "necessary expenses to meet particular educational needs of a child." A.R.S. § 25-320 app. § 9(B)(2). The court therefore did not err by including these expenses in the child support calculation. See *Clay*, 208 Ariz. 200, ¶ 5, 92 P.3d at 428.

### Child Support Arrearages

¶15 Roberto next argues the trial court erred in calculating the amount of child support arrearages from August to December 2011. We review a trial court's rulings on child support arrearages

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in any event, it was not clear from the testimony whether N. would continue going to private school.

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for an abuse of discretion. See *Ferrer v. Ferrer*, 138 Ariz. 138, 140, 673 P.2d 336, 338 (App. 1983). “An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision,” *Hurd v. Hurd*, 223 Ariz. 48, ¶ 19, 219 P.3d 258, 262 (App. 2009), or when the court “commits an error of law in the process of exercising its discretion,” *Kohler v. Kohler*, 211 Ariz. 106, ¶ 2, 118 P.3d 621, 622 (App. 2005).

¶16 After Liliana requested a judgment in the amount of \$2,711.49 for child support arrearages, Roberto made a payment of \$1,655.77 in late 2012. At the hearing, Roberto asserted that he intended the payment to cover the August to December 2011 arrearages. The trial court, however, determined that the payment had to be applied to the prior judgment of \$1,270.40 and associated interest.

¶17 Thereafter, Roberto filed a motion for reconsideration, in which he argued, even if the trial court applied the \$1,655.77 to the prior judgment, the payment was significantly more than what was due and the remainder should be applied to the August to December 2011 arrearages.<sup>2</sup> He also asserted that the court should have applied additional amounts garnished from his wages in 2012 to the arrearages. The trial court summarily denied the motion.

¶18 On appeal, Roberto raises the same argument presented in his motion for reconsideration. As a preliminary matter, we address Liliana’s assertion that the issue is waived because it was not properly raised below. “Generally, we do not consider arguments raised for the first time in a motion for reconsideration.” *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 18, 235 P.3d 285, 290-91 (App. 2010); see also *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006) (when new argument raised for first time in motion for

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<sup>2</sup>Roberto made the same argument in his interest calculation submitted to the trial court. Liliana responded to Roberto’s interest calculation, maintaining that he was presenting “new arguments and evidence” and had “far exceed[ed]” the court’s instruction.

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reconsideration, prevailing party generally deprived of opportunity to respond). Nevertheless, we understand Roberto's argument regarding the \$1,655.77 payment to be an extension of his previous contention that the payment should apply to the August to December 2011 arrearages. We therefore address this argument.

¶19 Section 25-510(A), A.R.S., requires child support payments to be distributed in the following order: (1) current child support; (2) current administrative fees; (3) past due child support reduced to a judgment and then associated interest; (4) past due child support not reduced to a judgment and then associated interest; and (5) past due administrative fees.

¶20 Here, Roberto paid current child support and the administrative fee through the wage garnishment. Thus, pursuant to § 25-510(A), the \$1,655.77 payment applied first to the prior judgment of \$1,270.40 and then to interest accruing on the judgment. Any remaining amount would then be applied to child support arrearages not reduced to a judgment, *see* A.R.S. § 25-510(A)(6), such as those from August to December 2011. At the time Roberto made the payment in late 2012, the prior judgment and interest were less than \$1,655.77. *See* A.R.S. § 25-510(E) ("A support arrearage reduced to a final written money judgment accrues interest at the rate of ten per cent per annum and accrues interest only on the principal and not on interest."). However, in finding that Roberto had failed to pay \$2,711.49 in child support, the trial court did not consider the carryover from the \$1,655.77 payment.<sup>3</sup>

¶21 Based on the foregoing, the trial court erred in applying § 25-510(A) to this case, and the record lacks evidence supporting the \$2,711.49 judgment. The court therefore abused its discretion. *See Ferrer*, 138 Ariz. at 140, 673 P.2d at 338. Accordingly, we vacate

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<sup>3</sup>Roberto also requested a \$555 credit against the judgment for amounts he had paid directly to a daycare provider and Liliana. At the hearing, Liliana agreed that Roberto had made those payments and that the amounts should be deducted from the arrearages. The trial court, however, did not address this issue. *See* A.R.S. § 25-510(G).

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the judgment for child support arrearages and remand the matter to the trial court for further proceedings to determine the proper amount.<sup>4</sup>

**Attorney Fees**

¶22 Roberto lastly challenges the trial court's award of attorney fees in favor of Liliana. Specifically, he argues that Liliana's request was "untimely and improperly filed."<sup>5</sup> We review a trial court's award of attorney fees for an abuse of discretion, *Medlin v. Medlin*, 194 Ariz. 306, ¶ 17, 981 P.2d 1087, 1090 (App. 1999), but we review questions involving the interpretation and application of court rules de novo, *Duckstein v. Wolf*, 230 Ariz. 227, ¶ 8, 282 P.3d 428, 432 (App. 2012).

¶23 "A claim for attorneys' 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." Ariz. R. Fam. Law P. 78(D)(1). Attorney fees and other costs must be supported by an itemized affidavit. Ariz. R. Fam. Law P. 78(D)(3). "[W]hen attorneys' fees are claimed, the determination as to the claimed attorneys' fees shall be included with a decision on the merits of the case or as otherwise ordered by the court." Ariz. R. Fam. Law P. 78(D)(2).

¶24 Here, Liliana requested attorney fees in her response to Roberto's request for modification. Such a request was timely under

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<sup>4</sup> We do not suggest that Roberto's calculations for the arrearages are correct. Indeed, contrary to § 25-510(A)(4), Roberto appears to have applied payments for the prior judgment to interest first and then principal. See *Alley v. Stevens*, 209 Ariz. 426, ¶ 9, 104 P.3d 157, 159 (App. 2004).

<sup>5</sup> As Liliana points out, Roberto never filed a "formal objection" to her motion for attorney fees. However, in his objection to Liliana's proposed form of judgment, Roberto argued that she was "attempting to take a second bite at the apple" by including an award of attorney fees in the judgment. We therefore address the argument.

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Rule 78(D)(1). Although the trial court failed to address Liliana's request for attorney fees in the February 2013 ruling, it ordered Liliana to submit a proposed form of judgment. On occasion, courts wait until entry of a final judgment before ruling on a request for attorney fees. *See, e.g., Breitbart-Napp v. Napp*, 216 Ariz. 74, ¶ 11, 163 P.3d 1024, 1028 (App. 2007) (awarding attorney fees and costs in signed order after court granted relief on underlying motion). Such an approach is consistent with Rule 78(D)(2).

¶25 Roberto nevertheless argues that, because the trial court did not rule on the request for attorney fees in the February 2013 ruling, the request should be "presumed denied" and Liliana's subsequent motion for attorney fees provided her a "second bite at the apple." While it is generally true that a failure to rule implies denial, *Pearson v. Pearson*, 190 Ariz. 231, 237, 946 P.2d 1291, 1297 (App. 1997), that is not the case here. With her proposed form of judgment, Liliana submitted a motion for and affidavit of attorney fees. *See* Ariz. R. Fam. Law P. 78(D)(3). The court then could have explained that it had denied Liliana's previous request by not including an award in the February 2013 ruling, but it did not do so. *See In re Paternity of Gloria*, 194 Ariz. 201, ¶ 24, 979 P.2d 529, 533 (App. 1998). Instead, the court awarded her attorney fees in the April 2013 final order. The court thus did not deny Liliana's request for attorney fees in the February 2013 ruling but merely had not yet ruled on it. Accordingly, Liliana was not afforded a "second bite at the apple" as Roberto suggests. We therefore find no error in the award of attorney fees.<sup>6</sup>

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<sup>6</sup>Roberto also argues, albeit briefly, that the trial court abused its discretion in setting the amount of the award. He contends that, because the court awarded Liliana "her entire amount of legal fees," it must have concluded that "nothing [he] ple[d] . . . demonstrate[d] a good faith basis for his requested modification." However, because Roberto never raised this argument below, we deem it waived. *See Cook v. Losnegard*, 228 Ariz. 202, n.3, 265 P.3d 384, 387 n.3 (App. 2011).

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**Disposition**

¶26 For the foregoing reasons, we affirm in part, vacate in part, and remand for further proceedings consistent with this decision. Both parties have requested their attorney fees and costs on appeal pursuant to A.R.S. § 25-324. Pursuant to that statute, we have considered the financial resources of the parties and the reasonableness of their positions. Although Roberto was successful in one of his arguments on appeal, Liliana prevailed on the remaining issues. The record also establishes that Roberto's income is more than double Liliana's income. Accordingly, we deny Roberto's request. However, we award Liliana a portion of her attorney fees and costs upon compliance with Rule 21, Ariz. R. Civ. App. P.