

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

SUSAN GILLENKIRK N.K.A. SANDOVAL,
Appellant,

and

VINCENT GILLENKIRK,
Appellee.

No. 2 CA-CV 2014-0067
Filed October 28, 2015

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NOT FOR PUBLICATION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. D20003759
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Katherine Belzowski, Window Rock
Counsel for Appellant

Law Office of Thomas A. Niemeir
Thomas A. Niemeir, Tucson
Counsel for Appellee

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Susan Sandoval appeals the trial court's order modifying child support and its related under advisement ruling. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Sandoval and Vincent Gillenkirk dissolved their marriage in 2002. Pursuant to the dissolution decree, they agreed to share legal custody of their two minor children and determined Sandoval would have primary physical custody of the children. Custody was later modified so that the parties shared equal parenting time with the children.

¶3 In July 2012, Gillenkirk filed a petition for change of custody with a request for modification of child support. Following a settlement conference, the parties stipulated that Gillenkirk would have sole custody of their oldest child, who had been living with him exclusively since December 2011. In December 2013, after a contested hearing, the trial court awarded Gillenkirk "sole legal decision-making authority" and primary physical custody of the younger child as well.

¶4 The trial court held a separate hearing to resolve the issue of child support. At the hearing, Sandoval testified she had been employed until October 2007, when she was laid off due to performance issues. She further explained that, despite "looking for work since [she] got laid off," she had been unable to secure employment until May 2013, when she began working ten hours a

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week at \$11.60 per hour, an amount significantly less than her previous salary.

¶5 Sandoval attributed her long unemployment period to the struggling economy, and claimed she had “done quite a number of things” to improve her chances of finding work, including “taking workshops, going to skill-building classes, [and] volunteering at different organizations in town.” As of January 2014, Sandoval’s hours had increased to twenty-five hours a week, which she had “hope[d would] lead to a full-time job,” but she also continued to search for other full-time employment opportunities.

¶6 After taking the matter under advisement, the trial court entered a signed order awarding Gillenkirk \$446 per month in child support. In calculating Sandoval’s support obligation, the trial court found her “mentally and physically able to work forty hours a week” and “eligible to get paid at least \$11.60 an hour,” and imputed a monthly income to her based on that amount. The court also determined Sandoval owed \$7,304 in child support arrears dating back to August 1, 2012, and ordered her to make additional \$100 monthly payments toward her arrearages. Gillenkirk filed a motion for clarification, noting that the court’s ruling did not address the 2012 child tax exemption. After addressing that issue, the court had resolved all claims arising out of Gillenkirk’s petition, and Sandoval timely appealed the child support order. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶7 We review a trial court’s child support award for an abuse of discretion, accepting the court’s findings of fact unless clearly erroneous, but drawing our own legal conclusions from facts found or implied in the judgment. *McNutt v. McNutt*, 203 Ariz. 28, ¶ 6, 49 P.3d 300, 302 (App. 2002). We review de novo the interpretation of the guidelines governing child support calculations. *Patterson v. Patterson*, 226 Ariz. 356, ¶ 4, 248 P.3d 204, 206 (App. 2011).

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¶8 Sandoval argues the trial court failed to follow the Arizona Child Support Guidelines in imputing a monthly income to her based on an hourly rate of \$11.60 and a forty-hour work week from August 2012 to May 2013 when she was not employed during that period. Gillenkirk responds that the court’s decision was proper because it “had sufficient evidence before it to determine that [Sandoval] was capable of full-time employment at her potential earnings ability before she actually obtained part-time employment.”

¶9 The Guidelines were established to “provide procedural guidance in applying the substantive law” when determining child support obligations. *Milnovich v. Womack*, 236 Ariz. 612, ¶ 8, 343 P.3d 924, 927 (App. 2015), quoting *Little v. Little*, 193 Ariz. 518, ¶ 6, 975 P.2d 108, 111 (1999); see A.R.S. § 25-320 app. (2011).¹ In calculating child support, the trial court may impute income to an unemployed or underemployed parent “up to full earning capacity, if the parent’s earnings are reduced voluntarily and not for reasonable cause.” *Little*, 193 Ariz. 518, ¶ 6, 975 P.2d at 111; see § 25-320 app. § 5(E) (2011). The court may attribute income based upon its assessment of a parent’s educational level, prior work experience, and earning capacity. See, e.g., *Taliaferro v. Taliaferro*, 188 Ariz. 333, 336-37, 935 P.2d 911, 914-15 (App. 1996) (affirming child support award based upon income attributed to unemployed parent with college degree, prior experience in accounting and computer programming, and a consistent work history for many years); *Williams v. Williams*, 166 Ariz. 260, 266, 801 P.2d 495, 501 (App. 1990).

¶10 To the extent the trial court attributed income to Sandoval based on a forty-hour work week, it implicitly found she had not provided a reasonable basis for not obtaining full-time employment. See *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006) (we may affirm if court is correct for any reason supported by record); *Baker v. Baker*, 183 Ariz. 70, 72, 900 P.2d 764, 766 (App. 1995) (we can infer findings necessary to sustain trial

¹The Guidelines have since been amended, but we refer to the version in effect at the time of the proceedings.

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court's order). In its child support ruling, the court explicitly found Sandoval "mentally and physically able to work forty hours a week." This finding was clearly supported by the record, as consistent with Sandoval's work history, and her testimony that she had no physical or mental impairment preventing her from working full-time or finding employment comparable to her previous position.

¶11 Further, Sandoval offered no explanation as to why her employment search had been unsuccessful other than attributing it to the general state of the economy and her age. Nor did she provide any details regarding her failed search attempts, such as examples of where she had applied or positions for which she had been rejected. And though she offered some specific information regarding where she had volunteered "to try to find work," the trial court could have reasonably determined that those activities were unrelated to her job search.²

¶12 In essence, the only evidence Sandoval offered in support of her contention that she was actively seeking full-time employment during her five-year unemployment period was her claim that she had done so, which was within the trial court's purview to accept or reject. *See State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004) (we defer to trial court's assessment of witness credibility). This is particularly true given that Sandoval was significantly impeached regarding her income and tax status; thus, her credibility may have been a significant factor in the trial court's ruling.³ And though Sandoval's initial reduction in earnings

²When questioned further on cross-examination, Sandoval only repeated generally that she had been "[l]ooking for work, taking workshops, going to skill-building classes, [and] volunteering at different organizations in town." When asked "[w]hat kind of volunteer work," Sandoval named some organizations, most of which were non-profit animal shelters, but provided no other details of any job search activities.

³Sandoval contends that if the trial court did not accept her testimony that she was "engaging in reasonable career or occupation

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was clearly not a matter of choice, on this record, the trial court could have determined her continued unemployment and underemployment were voluntary and not for reasonable cause. *See* A.R.S. § 25-320 app. § 5(E) (2011). Accordingly, we cannot say the trial court erred in attributing full-time income to Sandoval. *See Taliaferro*, 188 Ariz. at 336-37, 935 P.2d at 914-15 (affirming attribution of income to father capable of gainful employment notwithstanding his receipt of disability benefits).

¶13 Sandoval also contends the trial court abused its discretion in erroneously finding she had obtained part-time employment in May 2012 at the rate of \$11.60 an hour, when she did not actually begin working until May 2013. Gillenkirk acknowledges this finding was made in error, but contends that when interpreted in light of the remaining order and the evidence, it is readily apparent the court’s error was clerical, not substantive. He further argues this mistake in any event has no impact on the court’s ruling because there was “sufficient evidence before [the court] to determine that [Sandoval] was capable of full-time employment at her potential earnings ability before she actually obtained part-time employment,” and the court’s intention was clear. We agree.

¶14 In its ruling, the trial court erroneously stated Sandoval had obtained part-time employment in May 2012. However, its ruling also noted that she had an income of zero for the years 2009-2012 and that Sandoval testified she had been “unable to find employment” during that time. Further, the court received exhibits and heard testimony from Sandoval that she was hired in May 2013, and the parties had also been arguing over a 2012 tax return centering on her lack of income for that year, which had also been

training to enhance her earning capacity, [it] should have articulated it in its findings.” Although courts must apply the Guidelines, we are unaware of any authority, and Sandoval has provided none, requiring express findings, including whether a party’s testimony was deemed credible. And as noted above, we can infer necessary findings if supported by the record. *See Baker*, 183 Ariz. at 72, 900 P.2d at 766.

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discussed at the child support hearing. Thus, it is clear the court made a mere clerical error in finding Sandoval had obtained part-time employment in May 2012.⁴ And, even had the court erroneously believed Sandoval began working in May 2012, its ultimate decision to impute income to her as of August 1, 2012, is supported by the record for the reasons stated above. *Cf. Forszt*, 212 Ariz. 263, ¶ 9, 130 P.3d at 540.

¶15 Finally, Sandoval argues the trial court erred in ordering her to pay child support arrearages for the oldest child dating back to July 2012. Specifically, she claims she “offered to stipulate to a change of custody” for the child in July 2012, which Gillenkirk refused to accept until September 2013, and contends the court should have considered his “bad faith delay” in awarding child support. As Gillenkirk notes, Sandoval did not present this argument below, and it is therefore waived on appeal. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 7, 119 P.3d 467, 471 (App. 2005) (issues not presented to trial court waived on appeal); *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000) (we generally do not consider issues raised for first time on appeal).⁵

Attorney Fees and Costs on Appeal

¶16 Gillenkirk requests attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P.

⁴We note that, pursuant to Ariz. R. Fam. Law P. 85, clerical mistakes in judgments or orders may be corrected by the trial court at any time of its own initiative or on motion of any party.

⁵We also decline to address Sandoval’s contention that the trial court erred in declining to award her attorney fees in its December 10, 2013 child custody order, an issue she has failed to argue in her briefs. *See Ariz. R. Civ. App. P. 13(a)(7); Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272 (App. 2009) (failure to present argument supported by authority in appellate briefs may constitute waiver of that claim).

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Neither party has taken an unreasonable position on appeal, and their respective finances are relatively comparable. Accordingly, in our discretion we decline Gillenkirk's request. *See McNutt*, 203 Ariz. 28, ¶ 27, 49 P.3d at 306.

Disposition

¶17 For the foregoing reasons the trial court's child support order is affirmed.