IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

DALE HOOBLER, *Petitioner/Appellant*,

v.

MICHELLE HOOBLER, *Respondent/Appellee*.

No. 1 CA-CV 21-0331 FC
FILED 10-06-2022

Appeal from the Superior Court in Maricopa County
No. FC2020-093118
The Honorable Joshua D. Rogers, Judge

AFFIRMED

COUNSEL

Berkshire Law Office PLLC, Tempe
By Keith Berkshire, Kristi A. Reardon, Alexandra Sandlin
Counsel for Petitioner/Appellant

Law Office of Zalena M. Kersting PLLC, Gilbert
By Zalena M. Kersting
Counsel for Respondent/Appellee

OPINION

Acting Presiding Judge Randall M. Howe delivered the opinion of the court, in which Chief Judge Kent E. Cattani joined. Judge James B. Morse Jr. concurred in part and dissented in part.

H O W E, Judge:

¶1 Dale Hoobler ("Husband") appeals the family court's decree of dissolution of marriage. He contends, among other arguments, that the court erred (1) in using a hybrid method to distribute his pension, which involved ordering him to obtain a life insurance policy to ensure that Michelle Hoobler ("Wife") receives her community portion in the event of Husband's premature death; and (2) in attributing overtime income in calculating child support.

¶2 We reject Husband's first argument because a life insurance policy is a proper vehicle to facilitate the division of assets when the community cannot withstand a lump-sum distribution of its present value. We also reject Husband's second argument because the court considered the evidence before it—including Husband's overtime work history and testimony about his past and future overtime work—and evaluated his credibility. Because we reject these arguments and the other arguments discussed below, we affirm the decree as modified.

FACTS AND PROCEDURAL HISTORY

¶3 Husband and Wife were married in 1995 and have three children, one of whom is a minor. Husband is a police sergeant with the Tempe Police Department and intends to retire in April 2024 after 25 years of service. Through his employment, Husband accrued $7,240 in his Nationwide 457(b)-retirement account and $284,496 in his 401(k)-retirement account. He has a Public Safety Personnel Retirement System ("PSPRS") pension of approximately $7,800 per month, A.R.S. § 38–845(A), calculated on his highest three consecutive years of income. He also has a Deferred Retirement Option Plan ("DROP") account anticipated to be worth $600,000 when he retires. The DROP program is a contract wherein Husband agrees to retire after a maximum of five years but can retire before then. A.R.S. §§ 38–844.02, –844.08. Until he retires, his deferred retirement benefits are added to his DROP account and accrue

with interest. The DROP account value is Husband's "retirement benefits that he [has] earned up through the date that he elects to go into the DROP."

¶4 Husband elected to enter DROP in March 2019, and the pension amount began accruing in his DROP account the following month. Wife is the primary beneficiary. She has been a stay-at-home mother since 2002. Although she worked in sales through the beginning of the marriage, she desires to obtain a two-year photography certificate.

¶5 In early 2020, Husband petitioned for dissolution of marriage. Around September 2020, Husband stopped depositing his paychecks in the parties' joint account and terminated Wife's access to their credit card. Husband had also been paying for the expenses associated with the parties' two homes. Wife later petitioned for temporary orders. Husband responded, asking the court not to award spousal maintenance but instead to order him to continue paying community debts and obligations. The court ordered Husband to pay monthly child support of $1,274, and in lieu of monthly spousal maintenance of $6,000, to pay "all of the community expenses and debt."

¶6 At trial over a year later, Husband testified that he paid for the expenses on the parties' two homes for 15 months after he petitioned for dissolution. He also testified that he regularly works from 5 a.m. to 3 p.m., Tuesdays through Fridays, but that he works overtime and off-duty shifts on weekends and overnight. These additional hours are voluntary and unscheduled, and based on "luck" through either a lottery system or through a job becoming available. His off-duty shifts are non-pensionable work. Husband testified that he worked some overtime for at least the last 10 years. He clarified that he worked a lot of overtime during the divorce proceedings and as a result did not exercise parenting time set forth in the temporary orders. But he said that he "would like not to" work overtime and later that he "would try not to" work overtime after the divorce to spend time with his daughter. He testified that if the court attributed overtime in calculating child support and spousal maintenance, he would not have enough to support himself and would always need to work overtime. Husband testified that upon his retirement, Wife would receive half of the DROP value, $300,000, and half of the $7,800 monthly pension. He added that the DROP amount and pension are both payable before he retires. But if he retired earlier, the DROP account amount would be around $230,000 rather than the maximum $600,000.

¶7 Husband's Affidavit of Information ("AFI") showed that as of early 2021, he earned a base salary of $10,448.44 per month and worked

overtime. His pay stub showed that he currently earns $66.21 per hour, approximately $127,000 per year. In 2017, he earned about $115,900 in addition to $37,000 in off-duty income. In 2018, he earned about $123,000 in addition to $38,000 in off-duty income. In 2019, he earned about $160,000, which included about $23,000 in overtime, $2,100 bonus, $6,600 call-back pay, and $20,000 in "other" pay. In 2020, he earned $205,000, which included about $40,000 in overtime, $2,100 bonus, $8,300 call-back pay, $9,500 in lieu of vacation, and $7,700 in "other" pay.

¶8 Wife's pension expert testified about the actuarial value of Husband's pension and retirement accounts. He testified that the $600,000 DROP value consists of community monies that would be paid in a lump sum in April 2024. A.R.S. § 38–844.08(B) (explaining lump-sum distribution). He added that along with the lump-sum payment, Husband would also receive an accrued monthly pension benefit of $7,800 upon retirement for the rest of his life, and this amount would increase based on Cost of Living Adjustments ("COLA"). If Husband died before completion of the DROP in April 2024, then his death beneficiary form would govern who receives the DROP payment. Husband could name Wife as his DROP beneficiary after the divorce decree is entered. In the event of Husband's death post-decree, however, Wife would not be an eligible spouse and would stop receiving half of the monthly pension. He explained that to determine the pension value as of the community termination date, he used an actuarial value, based on the monthly benefit, the mortality table, and the interest rate as of the community termination date, to calculate a present value of $2,699,336 for Husband's pension as of February 4, 2020. The DROP amount at that time would be $81,050.18 for a combined total of $2,780,386.18. Wife's interest would thus be roughly $1.4 million. To protect Wife's share of the $7,800 monthly PSPRS pension payments in the event of Husband's premature death, the expert suggested that he obtain a life insurance policy for a term of years.

¶9 Wife later testified that as of the trial date, Husband had not exercised his parenting time entered in the temporary orders. She also acknowledged that the child support calculation in her pretrial statement included Husband's base pay in addition to overtime as reflected in his most recent paystub for the year 2020.

¶10 The court issued a dissolution decree that ordered Husband to name and maintain Wife as the death beneficiary of the DROP account. The court noted that although the pension is mature, payments will not begin until April 2024 when the parties would each receive one-half of the monthly $7,800 and one-half of the $600,000 DROP amount. The court

recognized that death benefits cease when spouses divorce. To mitigate the risk to Wife, the court considered the present cash-value method—where the present value of the pension is calculated actuarially and generally awarded as a lump sum—and the reserved jurisdiction method—where the court determines a division formula but withholds dividing the payments until the employee-spouse retires. *Koelsch v. Koelsch*, 148 Ariz. 176, 183 (1986). The court concluded that the latter method was inequitable "because the pension is actually mature, and the division can be determined right now." The court reasoned that awarding a lump sum under the former method, or assets with a lump-sum value, would also be inequitable, however, because Wife would receive half of the present value and Husband would have nothing with which to move forward financially. As a result, the court fashioned a "hybrid" approach in which Wife would receive 44.6% of the PSPRS pension and DROP, the remaining 5.4% of her half would come from the entire Nationwide 457(b) and 401(k) accounts, and Husband would obtain a ten-year $1,000,000 life insurance policy naming Wife as owner and beneficiary. They would share the cost of the premium for the first five years, and then Wife would be responsible for it. If Husband removed Wife as beneficiary of the DROP, he would need to obtain an additional term of $250,000.

¶11 The court ordered the sale of the parties' two homes and the proceeds divided in half. Wife's half would be reduced by about $23,700, or one-half of Husband's payments on these properties for 15 months. The court ordered Husband to pay $3,000 a month in spousal maintenance for 34 months. The court also ordered him to pay $649 in monthly child support, attributing $12,916 as his gross monthly income and $9,916.67 as his adjusted gross monthly income. The court also found that Husband credibly testified that Wife charged approximately $29,000 of her own expenses to the joint credit card post-petition. The court noted that Wife "should be responsible for most of this amount." Instead of ordering her to reimburse Husband, the court "deem[ed] it paid as support" and did not order retroactive payments for child support. The court also ordered Husband to pay a portion of Wife's reasonable attorney fees and costs. Husband timely appealed.

DISCUSSION

¶12 Husband argues that the family court erred in (1) choosing a hybrid method to divide his retirement accounts, (2) attributing his overtime income to calculate child support, and (3) denying him reimbursements for Wife's expenditures during the dissolution proceedings.

I. Retirement accounts

¶13 Husband argues that the family court should have followed the reserved jurisdiction method to divide his pension. The family court has broad discretion to equitably divide assets and liabilities. *In re Marriage of Flower*, 223 Ariz. 531, 535 ¶ 14 (App. 2010). Thus, we review the court's ruling for an abuse of discretion, *id.*, which occurs if the court "commits an error of law in the process of exercising its discretion," *Kohler v. Kohler*, 211 Ariz. 106, 107 ¶ 2 (App. 2005). Community property must be equitably divided. A.R.S. § 25–318(A). Pension plans "are a form of deferred compensation to employees for services rendered" and are community property subject to equitable division if acquired during the marriage. *Koelsch*, 148 Ariz. at 181. A pension is "vested" when the employee's "right to be paid is not subject to forfeiture if the employment relationship terminates before the employee retires." *Johnson v. Johnson*, 131 Ariz. 38, 41 n.2 (1981). A "mature" pension is an "unconditional right to immediate payment" when the "employee reaches retirement age and elects to retire." *Id.*; *see also Boncoskey v. Boncoskey*, 216 Ariz. 448, 451 ¶¶ 15–16 (App. 2007) (finding that a 40-year-old husband did not have an "unconditional and immediate right to payment of pension benefits" because his pension would mature "at the earliest" when he turned 54 years old).

¶14 Courts may divide pension benefits under the present cash-value method or reserved jurisdiction method. *Johnson*, 131 Ariz. at 41. Through the present cash-value method, the court awards half of the present cash value of the community interest to the non-employee spouse in a lump sum. *Id.* The lump sum can be paid in the form of equivalent property or in installments. *Koelsch*, 148 Ariz. at 184. This method allows the employee-spouse to take interest in the pension plan free and clear of community ties. *Johnson*, 131 Ariz. at 41. Through the reserved jurisdiction method, "the court determines the formula for division at the time of the decree but delays the actual division until payments are received, retaining jurisdiction to award the appropriate percentage of each pension payment, if, as, and when, it is paid out." *Id.*

¶15 The present cash-value method is preferable "if the pension rights can be valued accurately and if the marital estate includes sufficient equivalent property to satisfy the claim of the non-employee spouse without undue hardship to the employee spouse." *Id.* at 42. When a benefit is mature and payable, the court must use the present cash-value method. *Koelsch*, 148 Ariz. at 183. The "former spouses are spared further entanglement because the litigation is completed, and the problems of continued court supervision and enforcement of the employee's duty to pay

the ex-spouse's share are avoided." *Johnson*, 131 Ariz. at 42. "The present cash value of the community's interest is the actuarial current value," which necessitates expert testimony. *Miller v. Miller*, 140 Ariz. 520, 523 (App. 1984). Although this method comes with criticism, including that the actuarial calculations for a lump sum are "expensive, speculative, and always inaccurate," these problems abate when the pension is mature. *Koelsch*, 148 Ariz. at 184; *see also Boncoskey*, 216 Ariz. at 451 ¶ 15 (stating that a mature pension is more easily valued than an unmature pension). The reserved jurisdiction method is proper when the benefit has not matured and is not immediately payable. *Koelsch*, 148 at 183.

¶16 The court, however, is not limited to these two methods when dividing the community assets. The parties and courts should be "as creative and flexible as possible" to ensure that the non-employee spouse will get her share of the benefits and avoid making the employee-spouse retire against his wishes. *Id.* at 185. Ordering the employee-spouse to obtain a life insurance policy on his life is within this scope. *See id.* ("[T]he court could require the employee spouse to provide a policy of insurance naming the non-employee spouse as irrevocable beneficiary."); *DeLintt v. DeLintt*, 248 Ariz. 451, 454 ¶ 12 (App. 2020) (quoting same); *see also Dopadre v. Dopadre*, 156 Ariz. 30, 31–32 (App. 1988) (court ordered veteran-husband to pay wife's portion of his pension benefits in monthly installments and to obtain life insurance to guarantee she would receive her portion).

¶17 The court did not abuse its discretion in developing a hybrid method of distributing the retirement accounts. The present cash-value method applies here because Husband's DROP is vested and mature: he has an unconditional right to immediate payment if he decided to retire earlier than 2024. The court considered the risk of Husband's premature death, which would divest Wife of her pension benefits. *See* A.R.S. § 38–846(B); *Koelsch*, 148 Ariz. at 182. Wife's expert testified that the present value of the pension was $2,699,336 as of February 4, 2020, and in addition to the amount in the DROP account, her interest would be roughly $1.4 million. However, the community could not sustain a lump-sum award of her half in assets because Husband would be left with no assets himself, resulting in an undue hardship. In applying the present cash-value method, however, the court is not limited to awarding the divided assets in a lump sum but may use payment alternatives, "the choice of which depends on the equities of the individual case." *Koelsch*, 148 Ariz. at 185. The court's use of a "hybrid" approach, awarding Wife the entire Nationwide 457(b) and 401(k) accounts—reducing the PSPRS pension and DROP accordingly—and ordering Husband to obtain a life insurance policy with Wife as the

beneficiary, properly accounted for her community portion and was thus not an abuse of discretion.

¶18 Husband argues that the court created a new asset in the life insurance policy in violation of A.R.S. § 25–318, which authorizes only the division of existing assets. The court did not create a new asset but ordered a term life insurance policy, which has no payout until the insured dies. *See In re Estate of Alarcon*, 149 Ariz. 336, 339 (1986). This is true even for the additional $250,000 policy that Husband must obtain if he removes Wife as the DROP beneficiary. The life insurance policy is merely a vehicle to ensure the proper division of existing community assets. Further A.R.S. § 25–318 authorizes the court to divide the community equitably. The court has "discretion to decide what is equitable in each case," *Toth v. Toth*, 190 Ariz. 218, 221 (1997), and in doing so may consider (1) excessive or abnormal expenditures and (2) destruction, concealment, or fraudulent disposition of property, *Flower*, 223 Ariz. at 535 ¶ 14. But the statute "does not limit the inquiry to conduct regarding the property." *Toth*, 190 Ariz. 221. The court may consider other factors based on the particular facts of the case. *Flower*, 223 Ariz. at 535 ¶ 14. On these particular facts, the family court's requiring Husband to purchase a life insurance policy was equitable.

¶19 Husband points to *Parada v. Parada*, 196 Ariz. 428 (2000), to argue that A.R.S. § 38–846 strictly prohibits any kind of monetary recourse for Wife should he prematurely die, and that the life insurance policy creates an unlawful survivor benefit. If that were true, however, the present cash-value and the reserved jurisdiction methods would likewise be unlawful. While ex-spouses are not entitled to the decedent ex-spouse's monthly pension under A.R.S. § 38–846, courts can use the pension plan's present value to award the non-employee spouse's interest, especially when the community lacks available assets for an equitable division at dissolution. *Koelsch*, 148 Ariz. at 185.

¶20 In any event, *Parada* is distinguishable. In that case, the family court entered a divorce decree awarding the non-employee wife half of her husband's monthly retirement benefit without accounting for the risk of his premature death. 196 Ariz. at 185 ¶¶ 1–2. Neither party had presented evidence of the present value of the retirement proceeds, and neither party appealed the division, leaving an "inequity [the court] cannot now correct." *Id.* at 435–36 ¶¶ 36–37 (McGregor J., concurring in part and dissenting in part). To account for the former wife's community portion, the husband and his new wife assigned half of the death benefits to the ex-wife, *id.* at ¶ 3, but our supreme court held this was unlawful, *id.* at 187 ¶ 11. Here, however,

the court did not order Husband to assign his pension rights to Wife but to make her the beneficiary of the DROP. *See* A.R.S. § 38–844.07(A), (C) (stating that a beneficiary designation must not abrogate a member's "community property obligations"). Unlike in *Parada*, the court did not create an end run-around of the statute but ensured that Wife received her community portion since the community had insufficient assets for a typical lump-sum payment. After all, "[a] community property interest should be fixed at the time of divorce." *Parada*, 196 Ariz. at 433 ¶ 23. Husband did not dispute the present value amount of nearly $2.7 million. Had the community housed enough assets to provide the parties their respective portions, the court would likely have awarded those assets. Neither does the decree allow Wife to "double dip" in the event of Husband's premature death. Wife is responsible for paying half the premium amount for five years, and then the entire premium for the remaining five years. Thus, the court properly allocated Wife's interest based on the present value of Husband's matured retirement plan. As explained above, the hybrid method was a proper way to divide the pension.

¶21 The decree ambiguously ordered Husband to name Wife as the beneficiary of the DROP without specifying the percentage of the benefit. Wife conceded at oral argument in this court that she should be designated the beneficiary of 44.6% of the DROP, the same as her community portion, if we affirm the life insurance policy. Because A.R.S. § 38–844.07 does not indicate a "manifest intent to the contrary," *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, 305 ¶ 18 (2004) (internal quotations omitted), this is proper because one may designate more than one beneficiary under the statute, *see* A.R.S. § 1–214(B) ("Words in the singular number include the plural."). Because this modification is minor, we modify the decree without remand. *See* A.R.S. § 12–2103(A) (describing that the appellate court may modify a judgment "as the court below should have rendered"); *Acuna v. Kroack*, 212 Ariz. 104, 115 ¶ 42 n.15 (App. 2006) (acknowledging that A.R.S. § 12–2103 authority applies to the court of appeals); *Kennedy v. Kennedy*, 93 Ariz. 252, 257–58 (1963) (stating that the court's authority to modify judgments under A.R.S. § 12–2103(A) "avoid[s] the expense of a retrial of these issues").

II. Child Support

¶22 Husband also argues that the court erred in attributing his overtime income in the child support calculation. Child support awards are within the discretion of the family court. *Simpson v. Simpson*, 224 Ariz. 224, 225 ¶ 4 (App. 2010). We accept the family court's findings of fact unless clearly erroneous and review de novo the court's interpretation of the

Arizona Child Support Guidelines, A.R.S. § 25–320 ("Guidelines"). *Sherman v. Sherman*, 241 Ariz. 110, 113 ¶ 9 (App. 2016). We interpret the Guidelines consistently with its language and purpose: the "reasonable needs of the children and the ability of parents to pay." *Hetherington v. Hetherington*, 220 Ariz. 16, 23 ¶¶ 26–27 (App. 2008) (internal quotations omitted).

¶23 Generally, for purposes of the child support calculation, the court first considers the parents' gross income, *Sherman*, 241 Ariz. 110, 113 ¶ 14, such as salaries, bonuses, pensions, and interest, Guidelines § 5(A).[1] That number is then used to establish the percentage child support owed by a non-custodial parent; in this case, the court calculated that the amount owed by Husband under the Guidelines is $649 monthly.

¶24 The gross income calculation accounts for "all aspects of a parent's income to ensure the award is just and based on the total financial resources of the parents." *Strait v. Strait*, 223 Ariz. 500, 502 ¶ 8 (App. 2010) (internal quotations omitted) (quoting *Cummings v. Cummings*, 182 Ariz. 383, 386 (App. 1994)). 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." *McNutt v. McNutt*, 203 Ariz. 28, 32 ¶ 17 (App. 2002). But the Guidelines do not entitle a parent "who continues to work the same schedule as he or she consistently worked during the marriage to a *decreased* support obligation." *Id.* at 31–32 ¶ 14. Although parents have the choice to work overtime without an increase in the child support amount, the court has discretion to consider overtime income "if that income was historically earned from a regular schedule and is anticipated to continue into the future." Guidelines § 5(A). The court can attribute additional income if it does not require the parent to have an extraordinary work regimen. *Id.* Determining an extraordinary work regimen depends on "all relevant circumstances including the choice of jobs available within a particular occupation, working hours[,] and working conditions." *Id.*; *see McNutt*, 203 Ariz. at 31–32 ¶¶ 14–15 (stating courts should look to specific facts in each case to determine a parent's regular working schedule).

¶25 The court did not err in setting Husband's child support obligation at $649 monthly, rather than $551 monthly had overtime been excluded from the calculation, an amount only $98 less. The record shows that Husband has regularly worked and earned overtime at least for the

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[1] Since the parties' dissolution, the Guidelines have been reorganized. We cite to the prior version because it was in effect at the time of the parties' dissolution.

past 10 years. He testified that he worked overtime on weekends and overnight. Even though he also testified that these overtime jobs are voluntary, unscheduled, and not guaranteed, and that he "would like not to" and "would try not to" work overtime anymore, his pay stubs reflect a history of overtime income. Further, Husband and Wife testified that as of the trial date, Husband had not exercised his parenting time allotted in the temporary orders. The court may have even considered the circumstances surrounding Husband's occupation as a police officer. Because we presume that the family court fully considered the evidence in the record in issuing the decree, even if the decree does not detail the relevant evidence considered, *see Fuentes v. Fuentes*, 209 Ariz. 51, 55 ¶ 18 (App. 2004), the court had sufficient reason to include some overtime income in calculating child support. In fact, it attributed $4,000 less than what Mother requested be included in her pretrial statement. Further, the child is nearly 17 years old as of the date of this opinion; child support will presumptively terminate by September 2023, which is about 27 months from its June 2, 2021 commencement date and not a disproportionately long timeframe. The court thus did not abuse its discretion.

¶26 The dissent argues, however, that (1) Wife made no argument that Husband's overtime income was anticipated to continue in the future, and (2) the family court had no evidence to find that Husband would continue to earn overtime post-dissolution. Contrary to the dissent's first argument, Wife presented her position on Husband's future overtime in her separate pretrial statement—and referred to it at trial—wherein she proposed $17,123 be attributed as Husband's monthly income in the child support calculation. This figure was based on Husband's 2020 gross income, which included overtime. The court, in its final child support worksheet, attributed $12,916.67 towards Husband's gross monthly income, more than $4,000 less than Wife's proposal. We will affirm the court's ruling so long as its explicit and implicit factual findings are not clearly erroneous, *BNCCORP, Inc. v. HUB Int'l Ltd.*, 243 Ariz. 1, 9 ¶ 35 (App. 2017), and we have a duty "to affirm where any reasonable view of the fact and law might support the judgment of the [family] court," *id.* at 8 ¶ 29.

¶27 Contrary to the dissent's second argument, the family court also had sufficient evidence about Husband's future overtime work, most notably Husband's routine practice of overtime work in the past. *See supra* ¶ 25. Although Husband indicated that he was going to "try" not to work overtime in the future, the family court was entitled to assess Husband's credibility and weigh his testimony against evidence of his prior work history, whether Wife challenged his credibility or not. We defer to the family court's finding because witness credibility is for the fact finder to

determine, *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347 ¶ 13 (App. 1998); *see also In re Ghostley*, 248 Ariz. 112, 117 ¶ 21 (App. 2020) (stating that our function is not "to reweigh the facts or to second-guess the credibility determinations of the judge who had the opportunity to evaluate the witnesses' demeanor and make informed credibility determinations") (quotation marks omitted), and witness credibility is included in weighing the sufficiency of evidence, *see State v. Piatt*, 132 Ariz. 145, 150–51 (1981) (weighing testimony, determining witness credibility, and deciding facts is part of determining whether a party has proven their case). Wife's position was that Husband would continue to work overtime as he always had—even as he was doing during the dissolution proceedings. The family court considered the evidence and Husband's credibility and determined that he would likely continue to work overtime after the dissolution proceedings, albeit not as much as he had before. This is a reasonable view of the evidence and testimony. With respect, the record does not support the dissent's view. Should Husband cease working overtime before the child reaches the age of majority, he can move to prospectively modify the child support order. *See* A.R.S. § 25–327. The family court did not abuse its discretion in calculating child support.

III. Reimbursement

¶28 Husband also argues that the family court erred in declining to reimburse him for Wife's post-petition expenses. Courts, in their broad discretion to divide assets and liabilities equitably, *Flower*, 223 Ariz. at 535 ¶ 14, may deem this obligation as paid retroactive support, *Barron v. Barron*, 246 Ariz. 580, 591 ¶ 43 (App. 2018), *vacated on other grounds by Barron v. Barron*, 246 Ariz. 449 (2019); *see* A.R.S. § 25–320(B) (stating that the court shall use a retroactive application of the Guidelines "if the court deems child support appropriate"); *Simpson*, 224 Ariz. at 226 ¶ 9. Here, the family court did not err in denying Husband's post-petition reimbursement claims. The court found that Wife was responsible for part of the expenses and deemed them paid as past child support. Temporary orders for $1,274 in monthly child support began February 2020, and the final decree awarded $649 to begin June 2021—a time span of 16 months. *See* A.R.S. § 25–320(B) (stating that retroactive application of child support to the date of filing dissolution petition). At a rate of $1,274 per month, the 16 months of past child support would total approximately $20,000. The record supports the court's implicit finding that Wife is financially unable to share in these expenses. *See Barron*, 246 Ariz. at 591 ¶ 43. Thus, the court properly recognized that Wife was responsible for most, not all, of the requested amount. As a result, the court acted within its discretion.

¶29 Husband cites *Bobrow v. Bobrow*, 241 Ariz. 592 (App. 2017), to argue that the credit card payments and property-related expenses are Wife's separate obligations and that he did not intend his payment of the expenses to be a gift. The family court did not find that these payments were gifts. Rather, the court acknowledged that Wife was responsible for most of the amount, and the court properly treated them as Husband's retroactive support obligations.

¶30 Both parties request attorney fees and costs under A.R.S. § 25–324 and ARCAP 21. Husband currently has more financial resources available to him than Wife has available to her. Having considered the parties' financial resources and the reasonableness of their positions, we exercise our discretion and award Wife her reasonable attorney fees on appeal. *See* A.R.S. § 25–324(A). Furthermore, because Wife is the prevailing party on appeal, we also award her costs on appeal upon compliance with ARCAP 21.

CONCLUSION

¶31 For the foregoing reasons, we affirm the decree as modified.

M O R S E, J., concurring in part and dissenting in part:

¶32 I fully join the majority decision as to Part I (retirement accounts) and Part III (reimbursement). I respectfully dissent as to Part II (child support) because the record does not support the family court's decision to attribute future overtime income to Husband.

¶33 For purposes of calculating child support, the Guidelines in operation at the time provided that "gross income" included "income from any source" such as salaries, bonuses, and pensions but not income "greater than what would have been earned from full-time employment." Guidelines § 5(A). A court could consider overtime income, however, if it (1) "was historically earned from a regular schedule," and (2) "is anticipated to continue into the future." Guidelines § 5(A). Because no evidence or argument was presented to the superior court that Husband's overtime income was anticipated to continue, the superior court erred in including that income in its calculation.

¶34 The evidence presented to the superior court established that Husband regularly worked and earned overtime at least for the past ten years. But Husband also presented uncontradicted evidence that this overtime income was not anticipated to continue. In his pre-trial statement, Husband declared that his overtime income "is not expected to continue into the future" and he testified that he does not want to continue working overtime because he "needs to spend more time with [his minor daughter] and "repair [his] relationships with [his] two older daughters." Husband explained that overtime work could come on nights and weekends, including during his parenting time, and stated that if overtime income were included in the child support calculation, then he would have to work overtime to meet that obligation.[2] Husband also testified that a new system at his work would reduce his ability to get additional off-duty jobs and that overtime work is not guaranteed.

¶35 In response, Wife only pointed to Husband's historical practice of working overtime. Notably, Wife did not present evidence to contradict Husband's testimony about future overtime or argue that Husband's overtime income was anticipated to continue. Nor did she challenge the credibility of Husband's claim that he wished to stop working overtime or his assertion that overtime hours could conflict with his parenting time. In her pre-trial statement for the temporary orders hearing, Wife alleged only that "[Husband]'s historical income . . . evidences the significant amount of off-duty income that has been [Husband]'s historical practice which has continued since this matter began." Nowhere below did Wife claim that evidence showed the overtime income was anticipated to continue in the future. Instead, she pointed to only the historical overtime income Husband earned. Without referring to any direct argument Wife made, or evidence she presented, the majority claims Wife implicitly argued that overtime was expected to continue by proposing Husband's gross income be based upon his income in 2020. *See supra* ¶ 26. But historical data does challenge or contradict Husband's statements throughout the proceedings that his overtime income was not expected to continue. Historical data cannot suffice to show that overtime income is anticipated to continue in the future, particularly in the face of Husband's uncontradicted claims to the contrary.

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[2] I also note that subsequent amendments to the Guidelines specify that "[a] parent who historically worked overtime when the family was intact may choose to reduce or not to work overtime hours to ensure the parent has meaningful interaction with the child during that parent's parenting time." A.R.S. § 25-320 § II(A)(3)(ii).

¶36 While the majority is correct, *supra* ¶ 27, that the trial court may consider credibility in reaching its decision, nothing in the record demonstrates any challenge to Husband's credibility. Wife never raised credibility as an issue nor challenged, during cross examination, Husband's claims that he intended to cease working overtime. And the court made no such credibility finding. In fact, by attributing significantly less overtime income than Wife proposed, the court appears to have at least partially accepted Husband's claim that he would work less overtime in the future.

¶37 The Guidelines only allow for the inclusion of overtime income that "was historically earned" **and** "is anticipated to continue." Guidelines § 5(A). Therefore, without evidence or argument that Husband's overtime was anticipated to continue, the court erred in including any overtime income in its child support calculation. By affirming the family court, we allow the court to include overtime income based solely on historical practice. This renders superfluous the Guidelines' requirement that overtime income need be "anticipated to continue" before it can be included in determining child support. *See Mead v. Holzmann*, 198 Ariz. 219, 221, ¶ 8 (App. 2000) ("In interpreting the Guidelines, we apply the same rules of construction as are used in construing statutes."); *Fann v. State*, 251 Ariz. 425, 434, ¶ 25 (2021) ("We also avoid interpreting a statute in a way that renders portions superfluous.").

¶38 In the absence of competing evidence (or even argument) providing a basis for finding that Husband's overtime income was expected to continue, the family court erred. *See Lundy v. Lundy*, 242 Ariz. 198, 200, ¶ 9 (App. 2017) (concluding the family court erred in including income from a second job in a child support calculation because there was no evidence presented that the additional income from the second job was "historically earned from a regular schedule and is anticipated to continue into the future"). Including historical overtime, without evidence it would continue in the future, denies a parent the choice to work more hours "without exposing [him] to the 'treadmill' effect of an ever-increasing child support obligation." *McNutt v. McNutt*, 203 Ariz. 28, 32, ¶ 17 (App. 2002); *see* Guidelines § 5(A) ("Each parent should have the choice of working additional hours through overtime or at a second job without increasing the child support award.").

¶39 Further, Husband testified that if the court entered awards based on his historic overtime, then he "would have no choice" but to continue working overtime hours, which are inconsistent and may only be available on his days off, overnight, or during his parenting time. *See* Guidelines § 5(A) ("The court should generally not attribute additional income to a parent if that would require an extraordinary work regimen.").

Because the record does not support a finding that Husband's overtime income was anticipated to continue, the superior court erred in including it in the child support calculation. Of course, if Husband continues to work overtime, Wife could seek to modify the child support order. *See* A.R.S. § 25-327.

¶40 For the foregoing reasons, I would vacate the child support order and remand to the superior court for entry of a child support award that does not attribute overtime income to Husband.