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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/12/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 11-0195
)
CORNELIUS EDWARD WENZ,) DEPARTMENT A
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
RENE LOUISE WENZ,) Appellate Procedure)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. DR 2000-022643

The Honorable Michael D. Gordon, Judge

AFFIRMED

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P O R T L E Y, Judge

¶1 Cornelius Edward Wenz ("Husband") appeals the order modifying his spousal maintenance obligation to Rene Louise Wenz ("Wife"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The parties were divorced in January 2002. The decree ordered Husband to pay Wife \$828.75 monthly as spousal maintenance for 8.5 years.

¶3 Approximately one month before the spousal maintenance term was set to expire, Wife filed a petition to modify, in which she requested that the obligation be increased and extended indefinitely. She also asked that Husband be held in contempt because he was in arrears on his spousal maintenance payments. The court set a return hearing on Wife's April 29, 2010 petition to modify, and ordered Husband to appear and show cause as to why the petition should not be granted.

¶4 Husband appeared at the hearing, and told the court that he only had constructive notice of the hearing because he had not received the petition. Because he had paid the maintenance arrearages, he agreed that the contempt issue was moot.

¶5 The family court subsequently found that Wife had demonstrated a substantial and ongoing change in circumstances

and granted her petition. The spousal maintenance obligation was set at \$2000 per month for an indefinite period.

DISCUSSION

¶6 Husband raises two issues on appeal. First, he contends that the court lacked jurisdiction to modify the award because the spousal maintenance period expired before he received notice of the modification petition. He also claims that the court abused its discretion by granting the petition.¹

A. The court had jurisdiction to modify spousal maintenance.

¶7 We review whether the family court had jurisdiction to modify the award de novo. *In re Marriage of Waldren*, 217 Ariz. 173, 175, ¶ 6, 171 P.3d 1214, 1216 (2007) (citation omitted).

¶8 The family court maintains "continuing jurisdiction" over a maintenance award. Ariz. Rev. Stat. ("A.R.S.") § 25-319(D) (West 2012).² A maintenance award may be modified so long as the petition is filed before the time period expires. *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989) ("[I]f a decree is silent as to modifiability, the court may, within the [spousal maintenance] period . . . , modify the

¹ In his opening brief, Husband argued that the court did not have jurisdiction to modify the award because the court did not expressly reserve that right in the decree. He subsequently abandoned the argument in his reply brief.

² We cite the current version of an applicable statute if no revisions material to this decision have occurred since the court's order.

decree to either shorten or lengthen the term of periodic payments upon a showing of a substantial and continuing change of circumstances affecting the purpose underlying the original spousal maintenance order"); *Evitt v. Evitt*, 179 Ariz. 183, 185, 877 P.2d 282, 284 (App. 1994) (family court had jurisdiction to consider petition to modify spousal maintenance because it was filed within the period of time for which maintenance was awarded, even though it was filed on the last day of the period and the final payment had already been made). Here, Wife filed her petition to modify before the 8.5-year maintenance period expired on June 1, 2010. Thus, the family court had jurisdiction to resolve the petition.

¶19 Husband contends, however, that he did not receive notice of the petition before June 1, and argues that the court lost jurisdiction to act because any modification could not have occurred before the maintenance period expired. He argues that because he did not receive notice until July 23, 2010, and because A.R.S. § 25-327(A) (West 2012) provides that a modification of spousal maintenance will be effective on the first day of the month following notice of the petition for

modification,³ the modification could not have become effective before August 1, 2010, and therefore would have occurred after the award expired.

¶10 First, there is nothing in the record that establishes when Husband received notice of the petition. The July 23, 2010 date he cites was from Wife's testimony at an October 9, 2009 hearing and concerns when she received notice of that hearing.

¶11 Second, the record demonstrates that although the petition does not have a mailing certificate,⁴ Husband's lawyer received the May 19, 2010 minute entry and appeared at the date and time set for the hearing. Accordingly, and pursuant to § 25-327(A), under his argument, the modification would have become effective September 1, 2010, unless the court found good cause for the change to become effective on a different date, which it did. Moreover, even if Husband correctly argued that the modification could not have become effective within the spousal maintenance period, the court had jurisdiction because

³ Upon a showing of good cause, the court may order the change to become effective on a different date, but not earlier than the date the petition for modification was filed. A.R.S. § 25-327(A).

⁴ Husband suggests that § 25-327(A) required Wife to serve him with the petition. The statute contains no such requirement. And, even assuming that the Arizona Rules of Family Law Procedure require personal service, see Ariz. R. Fam. L.P. 43(C)(4), 91(L), & 92(B), Husband appeared at the return hearing and conceded that the arrearages issue was moot. As a result, any service defect was waived. Ariz. R. Fam. L.P. 40(F).

the petition was filed within the maintenance period. Consequently, the court retained jurisdiction to modify the maintenance award. A.R.S. § 25-319(D); *Evitt*, 179 Ariz. at 185, 877 P.2d at 284.⁵

B. The court did not abuse its discretion by granting Wife's petition to modify.

¶12 Husband also argues that the modification was not supported by the evidence. In particular, he contends there was insufficient evidence of a substantial and continuing change in circumstances because Wife (1) did not offer competent evidence to support her claim that she suffered from cancer, (2) did not offer a current affidavit of financial information, and (3) did not base her request on her current living expenses, but on anticipated future expenses.

¶13 A modification is appropriate only if there has been "a continuing and substantial change in circumstance[s]." A.R.S. § 25-327(A). We review the court's ruling for an abuse of discretion, *Schroeder*, 161 Ariz. at 323, 778 P.2d at 1219 (citation omitted), and "view the evidence in the light most favorable to supporting the decision below" *Cooper v. Cooper*, 167 Ariz. 482, 487, 808 P.2d 1234, 1239 (App. 1990)

⁵ Because we find that the family court had jurisdiction to consider Wife's petition to modify, we need not address Husband's alternative argument that the modification was improper under Rule 85, Ariz. R. Fam. L.P.

(citation omitted). In fact, we will sustain the family court's decision so long as any reasonable evidence supports it. *Id.* (citation omitted).

¶14 Wife's verified modification petition noted that she suffered from numerous health conditions that prevented her from seeking employment to provide for her daily needs. Additionally, she testified that she had surgery to remove a growth in her brain in August 2008 and was thereafter treated with radiation therapy, but that her physicians discovered in August 2010 that the growth had recurred and she was scheduled for further testing. She also testified that she had medical problems involving her lungs, large and small intestines, female organs, and liver, and she admitted that she was still an alcoholic. Furthermore, she offered portions of her medical records to corroborate her testimony.

¶15 Although Husband argues on appeal that this court should define what competent evidence should be allowed to support a modification, we will not consider the argument because he did not object to Wife's testimony at the hearing. *Rhue v. Dawson*, 173 Ariz. 220, 230, 841 P.2d 215, 225 (App. 1992) (citation omitted) ("An objection to the admission of evidence raised for the first time on appeal is deemed to be waived."). Moreover, the court was in the best position to

determine what weight, if any, to give to Wife's medical records. Even if the records contradict her claim that she may have cancer, the court apparently found that she has medical conditions that affect her ability to work and make it unlikely that she will achieve financial independence in the foreseeable future. On this record, the finding is not clearly erroneous.

¶16 Husband also complains that Wife failed to timely file her current affidavit of financial information. Her April 2010 affidavit of financial information, however, was admitted at the hearing without objection. She also testified that her monthly expenses were \$2759. Consequently, the finding that her reasonable monthly expenses were approximately \$2000 is not clearly erroneous. Furthermore, because Husband did not object to the affidavit being admitted, he has waived the issue. *Rhue*, 173 Ariz. at 230, 841 P.2d at 225 (citation omitted).

¶17 Finally, Husband argues that the court should not have considered Wife's anticipated expenses. She testified that although she was then living with her sister, she could not remain there and would have to rent a home for approximately \$1,000 to \$1,200 per month. She claimed that her utility and maintenance expenses at any rental home would be similar to those she had previously incurred at the family home, as identified on her affidavit of financial information. Again,

Husband did not object to her testimony, and we will not consider his argument for the first time on appeal. *Id.* (citation omitted); see also *Gutierrez v. Gutierrez*, 193 Ariz. 343, 350, ¶ 28, 972 P.2d 676, 683 (App. 1998) (citing *Rhue*, 173 Ariz. at 230, 841 P.2d at 225) (husband waived objection to expense included in computation of wife's reasonable needs by not raising it in the trial court).⁶

¶18 Evidence in the record supports the finding that there was a substantial and continuing change in circumstances because Wife's ability to work and her reasonable needs had changed substantially and on an ongoing basis. Consequently, we find no abuse of discretion.

¶19 Both parties request attorneys' fees on appeal pursuant to A.R.S. § 25-324 (West 2012). After considering the matter, we exercise our discretion and deny both requests. We,

⁶ We nevertheless note that *Richards v. Richards*, the authority Husband cites, did not require the family court to disregard all evidence of Wife's anticipated expenses. 137 Ariz. 225, 699 P.2d 1002 (App. 1983). In *Richards*, we reversed the court's decision to terminate spousal maintenance based, in part, on the wife's anticipated future income, and stated that "such matters are best left to future modification proceedings." *Id.* at 226, 699 P.2d at 1003; see also *Gutierrez*, 193 Ariz. at 349, ¶ 23, 972 P.2d at 682 (A maintenance award "cannot be based upon mere hopes and speculative expectations.") (citation and internal quotation marks omitted). Here, there is nothing speculative about Wife's testimony regarding the cost of a rental home, and Husband does not contend that her anticipated housing costs were unreasonable.

however, grant Wife's request for an award of her appellate costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶20 For the foregoing reasons, we affirm.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Judge

/s/

ANDREW W. GOULD, Judge