DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. ARIZONA DEPARTMENT OF ECONOMIC SECURITY (LISA YVONNE CALDERON),	)	1 CA-CV 08-0772
	)	DEPARTMENT E
Petitioners/Appellees,	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
THOMAS GEOFFREY CALDERON,	)	
Respondent/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV1999-011494 and DR1998-092817 (Consolidated)

The Honorable Wesley E. Peterson, Commissioner

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kathryn E. Harris, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

Thomas Geoffrey Calderon — Phoenix
Appellant *in propria persona*

Lisa Yvonne Calderon — Chandler
Appellee *in propria persona*

O R O Z C O, Judge

¶1 Thomas Geoffrey Calderon (Father) appeals from the family court's order requiring him to pay child support arrearages and interest to Lisa Yvonne Calderon (Mother). For the reasons discussed below, we affirm the family court's order.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Mother and Father were married in March 1992 and are the parents of a child born in March 1993. Mother filed for divorce in May 1998, and the decree of dissolution of marriage was entered on February 9, 1999 (Decree). The Decree required Father to pay $170 per month in child support beginning September 1, 1998. The Decree also provided the parties would have joint custody of the minor child. Father made intermittent child support payments beginning November 1998, but he discontinued paying child support after February 2001. On January 15, 2008, Father filed a petition to modify parenting time and child support (Petition for Modification). In the Petition for Modification, Father asserted the child had lived with him full-time since March 22, 2001. Therefore, Father requested "credit"

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[1] Pursuant to Arizona Rule of Civil Appellate Procedure 13(a)4 and (b), briefs on appeal must contain a statement of facts with "appropriate references to the record." This court may disregard statements of facts that do not comply with Rule 13. *See, e.g., Lansford v. Harris*, 174 Ariz. 413, 417 n.1, 850 P.2d 126, 130 n.1 (App. 1992). Accordingly, we do not consider Mother or Father's statement of facts because they both fail to cite to the record as required. In this case, the facts set out in the decision are based on our own examination of the record and the State's Answering Brief.

from March 22, 2001 until "present" and asked that he and Mother negotiate costs for child's participation in extra-curricular activities. At the July 7, 2008 hearing on Father's Petition for Modification, the family court modified Father's child support obligation from $170 per month to $282.39 per month, beginning August 1, 2008.

¶3 On July 23, 2008, the State filed a petition to enforce the child support order and enter judgment for past due child support and interest (Petition to Enforce). At a hearing on September 18, 2008, the court found Mother was living out of state from March 1, 2001 through March 2002 and although there was "no formal modification" of child support, it was equitable to suspend Father's child support payments for the time period mother was residing out of state.[2] The court directed the State to lodge a judgment and order for the court's signature. Additionally, the court ordered the State to prepare a child support calculation removing any payments owed by Father from March 1, 2001 through May 1, 2002. On October 2, 2008, the court

[2] The family court retroactively modified Father's child support obligation based on Mother's absence from the state from March 2001 through March 2002. However, because neither the State nor Mother filed a cross-appeal addressing this issue, we do not discuss it in this decision. *See* ARCAP 13(b)3 (stating an "appellate court may direct that the judgment be modified to enlarge the rights of the appellee or to lessen the rights of the appellant only if the appellee has cross-appealed seeking such relief.").

entered a judgment against Father for $14,374.77 in child support arrearages which accrued from September 1, 1998 through August 31, 2008, and a $1200 judgment for interest that accrued on the child support arrearages.

¶4 Father filed a timely notice of appeal.[3] We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B (2003).

DISCUSSION

¶5 We review a decision to modify child support for an abuse of discretion, but we review *de novo* the interpretation of statutes governing child support modification. *See Guerra v.*

[3] We note Father's notice of appeal states his appeal "is in response to the Notice of Lodging Proposed Judgment and Order dated 9/26/2008." While this document is not an appealable order, Father sufficiently identifies the ruling he is appealing from: the "9/18/2008 evidentiary hearing that addressed the arrears on child support." Also, neither the State nor Mother point out this technical error. Additionally, not every technical error will defeat an appeal. *See State v. Rasch*, 188 Ariz. 309, 311, 935 P.2d 887, 889 (App. 1996) ("A notice of appeal gives the adverse party notice that an appeal has been taken from a 'specific judgment in a specific case.' . . . A 'mere technical error[],' however, does not render the notice ineffective, unless the appellee shows that the error prejudiced him." (citation omitted)). In reviewing the record, it appears Father was attempting to appeal the family court's October 2, 2008 "Enforcement and Judgment Order," which memorialized the terms of the September 18, 2008 hearing and neither the State nor Mother has demonstrated any surprise or prejudice. The State does argue, however, because of Father's failure to cite to the record, he has abandoned his claim on appeal. In our discretion, *supra* n.1, we address Father's claim.

Bejarano, 212 Ariz. 442, 443, ¶ 6, 133 P.3d 752, 753 (App. 2006) (citations omitted).

¶6 Father does not address the applicability of A.R.S. §§ 25-327.A (2007) or 25-503.E (2007). Father's argument, as we understand it, is that at the September 18, 2008 hearing on the State's Petition to Enforce, he was denied due process, the right to a fair trial and discovery, and as a result, the judgment for child support arrearages and interest does not "reflect true justice." Essentially, Father is requesting a retroactive application of the child support order from the Decree.

¶7 Section 25-327.A, provides in part, "[m]odifications . . . are effective on the first day of the month following notice of the petition for modification . . . unless the court, for good cause shown, orders the change to become effective at a different date *but not earlier than the date of the filing the petition for modification*." (Emphasis added.) A companion statute, A.R.S. § 25-503.E, provides, in applicable part, "[a]ny order for child support may be modified . . . on a showing of changed circumstance that is substantial and continuing, except as to any amount that may have accrued as an arrearage before the date of notice of the motion or order to show cause to modify."

¶8 When interpreting statutes, we look to the plain meaning of the statute. *State ex rel. Ariz. Dept. of Econ. Sec. v. Lee*, 217 Ariz. 427, 429, ¶ 10, 175 P.3d 85, 87, (App. 2008).

Both A.R.S. §§ 25-327.A and 25-503.E provide child support modifications cannot be retroactive. Additionally, we have consistently held "under the plain language of §§ 25-327(A) and -503(E), the court cannot modify a child support award to alter the amount of arrearages accrued before notice of the petition to modify is given to the other parent." *Guerra*, 212 Ariz. at 444, ¶ 7, 133 P.3d at 754. Furthermore, "each child support installment vests as a final judgment as it becomes due and is enforceable by law." *Martin v. Martin,* 198 Ariz. 135, 138, ¶ 14, 7 P.3d 144, 147 (App. 2000).

¶9 Therefore, the child support obligations in this case may not be modified until the first day of the month after the non-petitioning parent is notified except for good cause shown. A.R.S. § 25-327.A; *see Guerra*, 212 Ariz. at 444, ¶ 7, 133 P.3d at 754. If good cause is shown, the modification may be effective at an earlier date, but in no event may it be effective prior to the date of filing the petition for modification. A.R.S. § 25-327.A. As discussed, *supra* ¶ 2, Father filed the Petition for Modification on January 15, 2008. Mother was served with the Petition for Modification on January 28, 2008. In this case, absent a showing of good cause, the earliest the modification of Father's child support obligation could occur was February 1, 2008. If good cause was shown to the court, the modification

could have been effective January 15, 2008, but not earlier. *See* A.R.S. § 25-327.A.

¶10 Father states he was the full-time parent from March 22, 2001 until late September 2007.[4] However, he never filed a petition to modify custody or child support during that time. Father argues "neither party was abiding by [the Decree] for at least seven years." We have previously held "a court order for child support payments should not be considered alterable by a party. Whether or not support payments should be continued is a matter for judicial determination and not a matter to be decided by the party upon whom the obligation rests." *Baures v. Baures*, 13 Ariz. App. 515, 519, 478 P.2d 130, 134 (1970).

¶11 Father argues that his due process rights, discovery rights and rights to a fair trial were violated. Although Father was allowed to testify at the September 18, 2008 hearing on the State's Petition to Enforce, Father alleges he was not permitted to introduce evidence showing child lived with him full-time from March 22, 2001 until September 2007. Even if Father had been permitted to introduce such evidence, it would not have changed

[4] In Father's Petition for Modification, filed on January 15, 2008, he asks the court for "credit" from March 22, 2001 until "present" time. Father notes "[s]ince March 22, 2001 child has been living with father full time." However, in his opening brief and notice of appeal, Father indicates he was the full time parent from March 2001 until September 2007. For purposes of this decision, we use September 2007 as the end date for when Father alleges the child was in his physical custody.

the outcome in this case. As previously stated, the earliest date child support could have been modified was January 15, 2008 for good cause shown, or February 1, 2008, after Mother was served with the Petition for Modification. *See* A.R.S. § 25-327.A.

¶12 Father also argues the court's judgment on arrears "clearly does not reflect true justice." We have previously held in specific situations that equitable principles may require an offset against child support arrearages. *See Cole v. Cole*, 101 Ariz. 382, 384, 420 P.2d 167, 169 (1966); *Badertscher v. Badertscher*, 10 Ariz. App. 501, 460 P.2d 37 (1969), *abrogated on other grounds by Bryan v. Bryan*, 132 Ariz. 353, 645 P.2d 1267 (App. 1982); *Baures*, 13 Ariz. App. at 519, 478 P.2d at 134. However, given the facts of this case, equitable principles cannot be applied.

¶13 In *Cole*, a mother and father were divorced and the divorce decree required father to pay both alimony and child support payments. 101 Ariz. at 383, 420 P.2d at 168. The decree was subsequently modified by minute entry to account for a change in custody of the son from temporary to permanent physical custody with the father. *Id.* The mother filed a petition for back spousal and child support and argued the change in custody did not alter father's obligation to pay child support. *Id.* Our supreme court disagreed, explaining because mother allowed father

to take permanent physical custody of the son *pursuant to the trial court's order*, she was not entitled to collect child support for support she did not provide. *Id.* at 384, 420 P.2d at 169. In the present case, unlike *Cole*, there was no court order formally changing custody. The court in *Cole* was aware the father had custody of his son pursuant to a court order and our supreme court recognized that order as the basis for denying the mother back child support payments. *Id.*

¶14 In *Badertscher* we found father had an ex parte order that granted him custody of the children and terminated his child support payments. 10 Ariz. App. at 503, 505, 460 P.2d at 39, 41. We held father was entitled to credits for expenditures made while he had custody of his children, "where such payments constitute a substantial compliance with the spirit and intent of the decree." *Id.* As a result, we vacated the trial court's order requiring father to pay child support for the time he had custody of his children under the ex parte order. *Id.* at 505, 460 P.2d at 41. Similar to *Cole*, where equitable principles were applied, the focus of *Badertscher* was the ex parte order changing custody.

¶15 Finally, in *Baures*, mother and father divorced and the decree required father to pay child support. 13 Ariz. App. at 517, 478 P.2d at 132. The mother remarried and took the daughter to Germany for three years to live with mother and her new

husband. *Id.* When mother and daughter returned from overseas, daughter lived with father for fourteen months. *Id.* The trial court gave father credit for both the time the child was in Germany and for when the child lived with father. *Id.* On appeal, we overturned the trial court's decision to give father credit for both the time child lived with him and for the time when the child lived overseas. We held that "notwithstanding the fact that the child lived with [father] for a period of time, he was not entitled to credit against the arrearages for such period." *Id.* at 519, 478 P.2d at 134. Furthermore, a parent who is required to make child support payments has an opportunity modify his obligations under a decree, and he cannot remain silent while arrearages and interest accrue and request the court to modify his obligation retroactively. *See id.*

¶16 In this case, Father requested credit towards his child support arrearages during the time Father alleges child primarily resided with him. Although Father may have had custody of child from March 22, 2001 until late September 2007, Father did not file a petition to modify custody or child support until January 15, 2008. We have reasoned a parent who is required to make child support payments "has an opportunity to relieve himself of that liability by a petition to modify the decree . . . but he cannot remain silent while the installments accrue and then claim credit for his voluntary acts." *Id*. The same reasoning applies

here. Father took no action until he filed his Petition for Modification in January 2008. Absent an order modifying the terms of the Decree, both Mother and Father were required to fulfill the support and custody obligations in the Decree. Under the facts of this case, we hold the family court properly declined to invoke equitable principles and retroactively modify child support arrearages.

CONCLUSION

¶17 For the above mentioned reasons, we affirm the judgment of the family court requiring Father to pay both child support arrearages and interest accruing on those arrearages.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
_____
PHILIP HALL, Presiding Judge

/S/
_____
DONN KESSLER, Judge