IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 04-22-2010
PHILIP G. URRY, CLERK
BY: GH

In re the Marriage of:	)	1 CA-CV 09-0243
	)	
JOAN GUSTAFSON,	)	DEPARTMENT D
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
GLENN M. GUSTAFSON,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-DO-0020040951

The Honorable Howard D. Hinson, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Law offices of Robert L. Frugé PC — Prescott
By Robert L. Frugé
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Glenn M. Gustafson — Anchorage, Alaska
In Propria Persona

T H O M P S O N, Judge

¶1 Glenn M. Gustafson ("Husband") appeals from a judgment, order of assignment, and other orders entered on March

17, 2009, and signed nunc pro tunc to August 20, 2007. For the reasons stated below, we affirm in part and reverse and remand in part.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The parties were divorced in 2006. The decree provided that Husband would pay Joan Gustafson ("Wife") $925.90 per month in child support for the parties' two minor children and $1300 per month in spousal maintenance through November 1, 2007.

¶3 In August 2006, Husband petitioned to terminate spousal maintenance and modify his child support obligation. Husband claimed he had lost his job and that Wife's income had significantly increased since the trial. Wife later filed a petition to enforce the support terms of the decree, claiming that Husband had not been paying child support or spousal maintenance. Nearly one year after Husband filed his petition to terminate spousal maintenance and modify child support, the court held a hearing on his petition and on Wife's petition to enforce the decree.

¶4 In an unsigned June 20, 2007 minute entry ruling, the court denied Husband's petition to terminate spousal maintenance, but because Wife's income had increased sixty-five percent, the court proportionately reduced Husband's spousal

maintenance obligation. The child support obligation was also adjusted to reflect these changes. The court ordered Husband to pay $455 per month in spousal maintenance terminating December 1, 2007, "[i]n accordance with previous orders of this Court."

¶5 In March 2009, the court entered several signed orders corresponding with the June 20, 2007 unsigned minute entry. The court ordered that Husband's spousal maintenance obligation was $400 per month as of September 1, 2006 through and including December 1, 2007. It signed this order nunc pro tunc to August 20, 2007. The court signed a child support order with a presumptive termination date of June 1, 2018. This order was also signed nunc pro tunc to August 20, 2007. The court signed an order of assignment for child support and spousal maintenance with a termination date of June 1, 2018. This, too, was signed nunc pro tunc to August 20, 2007.

¶6 Husband filed a timely notice of appeal from these signed orders and the underlying unsigned rulings. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(C) (2003).

DISCUSSION

I. Spousal Maintenance Termination

¶7 We review the modification of spousal maintenance under an abuse of discretion standard. *See Van Dyke v. Steinle,*

183 Ariz. 268, 273, 902 P.2d 1372, 1377 (App. 1995). Husband argues that the trial court erred by extending his spousal maintenance obligation through and including December 1, 2007 because prior court orders terminated spousal maintenance on November 1, 2007. Wife argues that this was a discretionary decision by the trial court that should be upheld on appeal.

¶8 The court's March 17, 2009 order reducing Husband's spousal maintenance obligation from $1300 to $400 per month states it was based on the court's prior ruling of June 19, 2007 (filed June 20, 2007). The June 2007 ruling modified spousal maintenance to $455, and stated, "[i]n accordance with previous orders of this Court [Husband's] obligation to pay spousal maintenance to [Wife] shall terminate as of December 1, 2007."[1]

¶9 Although the June 2007 order was not signed, Husband filed two separate motions to reconsider this order. Neither of Husband's motions to reconsider raised the issue he now raises on appeal regarding the improper termination date. Failure to bring the attention of the lower court to claimed errors constitutes a waiver of the issue on appeal. *See Hamm v. Y & M Enter., Inc.,* 157 Ariz. 336, 338, 757 P.2d 612, 614 (App. 1988).

[1] The parties do not address the fact that there is a discrepancy between the June 2007 order for $455 per month and the March 2009 order for $400 per month.

"The trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal." *Id.* (*citing Van Dever v. Sears, Roebuck & Co.,* 129 Ariz. 150, 629 P.2d 566 (App. 1981)). Husband failed to bring this issue to the family court's attention anytime in the past two years. We find that Husband has waived this claim of error.

II. Order of Assignment

¶10 Husband claims the court erred by issuing an order of assignment in March 2009 which included a $400 monthly spousal maintenance obligation when the spousal maintenance obligation terminated in 2007. He argues that this allows Wife to attach his wages long after his obligation terminated. He does not allege that Wife actually collected more than she was due because of this order of assignment.

¶11 Wife argues that Husband waived this argument by failing to raise it below. We disagree. He could not have raised the error with the order of assignment until after it was issued on March 17, 2009. Husband thereafter filed a timely appeal.

¶12 Wife also contends that Husband failed to seek a modification of the order of assignment and that she has already prepared and lodged with the family court a revised order of

assignment that omits spousal maintenance. Husband objected to Wife's proposed order of assignment on other grounds. He complains on appeal that the family court has taken no action on Wife's revised order of assignment. To the contrary, the family court stated that it would correct the order of assignment to remove the spousal maintenance obligation but refrained from doing so because Husband filed a notice of appeal which removed the issue from the family court's jurisdiction.

¶13 The order of assignment issued in March 2009 incorrectly included $400 as the current spousal maintenance obligation. Although Wife attempted to correct this issue below, Husband's notice of appeal removed the matter from the family court's jurisdiction. Because Husband suffered no prejudice there are no grounds for reversal. As we stated in the first appeal in this matter, the decree, or in this case, the signed order modifying the decree sets forth the determinative termination date of spousal maintenance. *See Gustafson v. Gustafson,* 1 CA-CV 06-0242 (Ariz. App. Apr. 17, 2007) (mem. decision), slip op. at ¶ 25. The court order modifying the decree is controlling, not the order of assignment. Once the family court again assumes jurisdiction, we presume it will correct the order of assignment to conform to the modified decree.

III. Child Support Termination Date

¶14 The family court ruled on Husband's petition to modify child support on June 20, 2007. This ruling noted the amount Husband had to pay, but did not contain a child support order. The child support order was not entered until March 17, 2009. This order noted the children's birthdays, September 18, 1997 and June 8, 1999. In accordance with the Child Support Guidelines, section 4, the child support order included a presumptive termination date of June 1, 2018. *See* A.R.S. § 25-320, § 4 (2007) ("Guidelines"). The corresponding order of assignment also stated a presumptive termination date of June 1, 2018.[2]

¶15 Husband argues that the child support order failed to provide for a reduction upon the oldest child reaching age

[2] Wife lodged an amended order of assignment after Husband's notice of appeal. This order of assignment eliminated the expired spousal maintenance obligation, but did not change the presumptive termination date of the child support order. Husband objected to Wife's proposed order of assignment on that basis. The family court proposed correcting the order of assignment to remove the spousal maintenance provision and correct the presumptive termination date to June 30, 2107. The family court, however, questioned whether it had jurisdiction to do so given Husband's appeal on this issue. Husband's notice of appeal removed this matter from the family court's jurisdiction. *See Allstate Ins. Co. v. Universal Underwriters, Inc.,* 199 Ariz. 261, 266, ¶ 15, 17 P.3d 106, 111 (App. 2000) (holding that superior court generally loses jurisdiction over a case once a notice of appeal is filed, except on matters in furtherance of the appeal).

eighteen and erroneously continued his obligation for one year beyond the date his legal support obligation will terminate. Wife argues that the presumptive termination date is the youngest child's nineteenth birthday and, therefore, is not erroneous. She also contends that Husband can petition to terminate the support order if the child completes high school before her nineteenth birthday.

¶16 A child is emancipated on his or her eighteenth birthday. A.R.S. § 25-503(O)(2) (Supp. 2009). A parent's duty of support continues, however, if the child is still in high school on his or her eighteenth birthday as long as the child is in high school, but only until the child reaches age 19. A.R.S. §§ 25-501(A); 25-320(F) (Supp. 2009).

¶17 Based on the evidence in the record and the presumptions contained in the Guidelines, the younger child will graduate from high school in May 2017, when she will be just shy of her eighteenth birthday.[3] *See* Guidelines § 4. Husband's support obligation continues until the last day of the month of the child's eighteenth birthday, or June 30, 2017. *Id.* Thus, the child support order and order of assignment contain an

[3] The child turned six in June 2005 and presumably entered first grade that year. *See* Guidelines at § 4(A). Therefore, she presumably will graduate from high school in May 2017, just before her eighteenth birthday. *Id.* at § 4(B).

incorrect termination date. We remand for modification of the termination date in accordance with this decision.

¶18 Husband also argues that the court erred by failing to state a reduced amount for child support when the older child turns eighteen. A child support order that covers more than one child does not automatically terminate once the duty to support one of the children stops. *See* Guidelines at § 25; *see also Guerra v. Bejarano,* 212 Ariz. 442, 444, ¶ 11, 133 P.3d 752, 754 (App. 2006) (holding that where child support order covers two children and one becomes emancipated, parent was required to seek modification of support order). The court did not err by failing to include a termination date for the portion of support attributed to the older child. Husband must petition to modify his support obligation when the older child turns eighteen. *Id.*

¶19 We remand for modification of the presumptive termination date contained in the child support order and the corresponding order of assignment to June 30, 2017. In all other respects the child support order and order of assignment are affirmed.

IV. Entry of Nunc Pro Tunc Orders

¶20 The family court filed several orders on March 17, 2009, which it signed nunc pro tunc to August 20, 2007. Husband argues that this was error because it was an attempt to hide the

fact that the family court failed to perform work on the case. As Wife points out, the entry of these orders nunc pro tunc did not conceal the court's failure to enter these orders within sixty days as required by the Arizona Rules of Supreme Court, Rule 91(e). We cannot infer any improper motive that warrants reversal.

¶21 Husband next argues that the court entered a judgment against him nunc pro tunc which included amounts that had not accrued by that nunc pro tunc date. Husband contends that this caused post-judgment interest to accrue as of the nunc pro tunc date. He contends that this was a violation of due process. Wife contends that Husband was not ordered to pay any amounts he was not already obligated to pay under the law.

¶22 The judgment entered nunc pro tunc on March 17, 2009, as of August 20, 2007, includes four different amounts: (1) $2,767.50 for attorneys' fees pursuant to the June 19, 2007 ruling; (2) $9,000 for sanctions pursuant to the June 19, 2007 ruling; (3) $10,935 for attorneys' fees pursuant to Wife's request made on August 7, 2007; and (4) $18,514 for child support and spousal maintenance arrearages, "including interest, from and including September 2006 to August 2007." The judgment states that it "shall accrue statutory post-judgment interest from entry hereof[,]" and is signed "nunc pro tunc to August 20,

2007." Under the stated terms of the judgment, therefore, post-judgment interest would accrue from August 20, 2007.

¶23 The general rule is "that a judgment nunc pro tunc cannot be entered unless such judgment has been in fact previously rendered." *Valley Nat'l Bank of Ariz. v. Meneghin,* 130 Ariz. 119, 124, 634 P.2d 570, 575 (1981). One exception to this rule is where the delay in rendition of the judgment is caused by the court itself. *Id.* Although the delay in the entry of these judgments was apparently caused by the court in this case, we must also consider that the purpose of a nunc pro tunc order is to reflect the truth or actual facts of what previously occurred. *See State v. Johnson,* 113 Ariz. 506, 509, 557 P.2d 1063, 1066 (1976) (*citing Black v. Indus. Comm'n of Ariz.,* 83 Ariz. 121, 125, 317 P.2d 553, 555-56 (1957)). A nunc pro tunc judgment may be entered "where a judgment has actually been rendered and that rendition is reflected in the record of the court." *Allen v. Allen,* 129 Ariz. 112, 114, 628 P.2d 995, 997 (App. 1981) (*quoting Black,* 83 Ariz. at 131-32, 317 P.2d at 560 (Struckmeyer, J., dissenting)). The rendition of judgment is a pronouncement that demonstrates the present intent of the judge and adjudicates the matter. *Allen,* 129 Ariz. at 115, 628 P.2d at 998.

¶24 In this case, not all of the four items included in the judgment entered nunc pro tunc were previously adjudicated. The amounts awarded as attorneys' fees (items 1 and 3 above) had never been previously set forth in any prior ruling or judgment. A prior order awarded Wife her reasonable costs and attorneys' fees for having to respond to two of Husband's petitions, but the *amount* of that award was never adjudicated. The amount was first determined in the March 17, 2009 judgment. Similarly, the award of $10,935 in fees constituted the court's first ruling this fee request. Wife's request for these fees had never been addressed in any previous ruling or order.

¶25 It was, therefore, improper for the court to enter judgment nunc pro tunc on these two matters that had not been previously adjuducated. Post-judgment interest could not begin to accrue on these amounts any earlier than the date the nunc pro tunc judgment was entered: March 17, 2009.

¶26 On the other hand, the $9000 sanction had been adjudicated in the June 20, 2007 ruling. The entry of a nunc pro tunc judgment as to the $9,000 sanction was proper because the court had previously ruled on that matter and the delay in entering the judgment was solely the fault of the trial judge. *See Valley Nat'l Bank,* 130 Ariz. at 124, 634 P.2d at 575.

¶27 The court had previously found that Husband was in arrears for child and spousal support obligations, but the amount set forth as the arrearage judgment ($18,514) had never been announced by the court. By operation of law, each child support obligation "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); *see also* A.R.S. § 25-503(I) (Supp. 2009). Therefore, the child support judgments were previously rendered by operation of law and the entry of the nunc pro tunc judgment on the child support arrearages was not erroneous. There was, however, no prior rendition of a spousal maintenance arrearage judgment by the court or by operation of law. Therefore, entry of a nunc pro tunc order as to spousal maintenance arrearages was erroneous.

¶28 We reverse the March 17, 2009 judgment entered nunc pro tunc to August 20, 2007 and remand for reconsideration in accordance with this decision.[4] On remand, the post-judgment interest shall be adjusted according to the corrected nunc pro tunc judgments.

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[4] Husband also argued that the court failed to state the reasons for its entry of a nunc pro tunc judgment as required by Rule 81(A), Ariz. R. Fam. L. P. Husband did not raise this argument until his reply brief. Accordingly, we decline to address it. *See Phelps v. Firebird Raceway, Inc.* 210 Ariz. 403, 404 n.1, 111 P.3d 1003, 1004 n.1 (2005) (appellate court may decline to address an issue first raised in the reply brief).

ATTORNEYS' FEES AND COSTS ON APPEAL

¶29 Both parties request an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324 (2009). Wife also requests sanctions pursuant to section 12-349 (2003). We conclude that, on balance, neither party is entitled to costs as the prevailing party. In the exercise of our discretion, we also deny Wife's request for attorneys' fees and sanctions.

CONCLUSION

¶30 We affirm the order modifying the spousal maintenance order and corresponding order of assignment. We remand for modification of the presumptive termination date contained in the child support order and the corresponding order of assignment to June 30, 2017. In all other respects, the child support order is affirmed. We reverse the March 17, 2009 judgment and remand for reconsideration consistent with this decision. Each party shall bear his or her own attorneys' fees and costs on appeal.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge