DIVISION ONE
FILED: 02/21/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	No. 1 CA-CV 11-0210
	)	
DEAN FREIWALD,	)	DEPARTMENT A
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules
	)	of Civil Appellate
REBECCA L BUNDY; STATE OF	)	Procedure)
ARIZONA ex rel. ARIZONA	)	
DEPARTMENT OF ECONOMIC SECURITY,	)	
	)	
Respondents/Appellees.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. DR1995-016294

The Honorable Michael Gordon, Judge

AFFIRMED

Dean Freiwald — Scottsdale
Petitioner/Appellant *in propria persona*

Thomas C. Horne, Attorney General — Phoenix
By Jane A. Butler, Assistant Attorney General
Myles Braccio, Assistant Attorney General
Attorneys for Appellee State of Arizona

G O U L D, Judge

¶1 Dean Freiwald ("Father") appeals from the family court's 2003 and 2004 orders modifying child custody, support, and parenting time. For the following reasons, we affirm.

Facts and Procedural History

¶2 As summarized by our earlier memorandum decision in this case, *In re Freiwald*, 1 CA-CV 10-0153, 2011 WL 887900 at *1, (Ariz. App. Mar. 15, 2011),[1] the underlying facts are as follows:

¶3 Father and Mother divorced in November 1995. Pursuant to the decree, which was entered by default, Father was granted sole custody of the parties' minor child and Mother was ordered to pay child support. Father, Mother, and child, however, lived with Mother's relatives until March 1999.

¶4 Husband's current appeal is based on Mother's efforts in 2003 and 2004 to amend the provisions of the original decree as to custody and child support. In November 2001, Mother filed a petition to modify custody and child support. The family court granted Mother custody after she filed an emergency petition in March 2003. A hearing was eventually held on Mother's petition on May 8, 2003. On August 7, 2003, the court signed an order amending the dissolution decree. The order, which was filed August 18, amended the decree as follows: (1) the primary residential parent was changed from Father to Mother, and (2)

[1] Father does not dispute these facts.

Mother was given an "in kind" set off for child support arrearages for the time Father lived with Mother's family.

¶5 Father filed a motion for new trial in September, which was denied pursuant to an unsigned minute entry dated October 22, 2003. Thereafter, Mother paid her arrearages judgment, and on February 25, 2004, the Court ordered Father to pay current child support to Mother commencing June 1, 2004.[2] In April, Father filed a motion for new trial, which was denied by the court on July 6, 2004. Father did not appeal the 2003 and 2004 arrearage calculations, his child support obligations, or the denial of his motions for new trial until 2010. Moreover, he did not seek to amend either the 2003 or 2004 judgments.

¶6 Litigation in this case continued for several years. Eventually, in January 2009, Father filed an order to show cause and claimed that Mother had absconded with the child and denied him visitation. The family court subsequently suspended his parenting time, appointed a therapeutic interventionist to determine Father's parenting time, and apportioned the cost for the interventionst between Mother and Father. The court denied Father's motion to reconsider apportionment of the interventionist's fees and later found that any custody issue was

[2] The Order amending the decree was filed by the Clerk on March 19, 2004.

moot because the child was nearly eighteen.[3] Mother requested, and was awarded, attorneys' fees. Father filed his first appeal ("First Appeal"). We affirmed. *In re Freiwald*, 1 CA-CV 10-0153, at *4, ¶ 20.

¶7 In First Appeal, we noted that although Father's appeal was technically timely, he "ha[d] not, however, provided any justification for waiting six years to challenge the 2003 judgment." While First Appeal was pending, we conditionally remanded the case to the family court and directed the family court to "issue a signed minute entry denying the motion for new trial nunc pro tunc to October 23, 2003," after which we stated that we would conference and resolve First Appeal.[4] The family court duly signed an order "denying [Father's] motion for new trial nunc pro tunc to October 23, 2003." This order was entered on February 7, 2011.

¶8 On February 17, 2011, Father filed this, his third notice of appeal ("Third Appeal"), relating to the trial court's October 23, 2003 denial of Father's motion for new trial.

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[3] Child was born on September 12, 1991, and is now over eighteen years of age.

[4] While First Appeal was pending, Father filed another notice of appeal ("Second Appeal") on June 9, 2010. This appeal was docketed as No. 1 CA-CV 10-0495. No briefing has yet occurred in this matter; we extended the time for Father to file his opening brief in Second Appeal until after we entered a decision in First Appeal, and again (upon Father's motion) until after our decision in this (his third) appeal issues.

Because the October 23, 2003 minute entry was not signed by the court until the February 7, 2011 nunc pro tunc order, the window of time in which Father could timely appeal from this order did not begin to run until February 7, 2011. Thus, Father's Third Appeal is technically timely. *Valley Nat'l Bank of Ariz. v. Meneghin*, 130 Ariz. 119, 123, 634 P.2d 570, 574 (1981) ("[T]he time for appeal runs from entry of judgment nunc pro tunc."); *see also In re Pima County Juv. Action No. S-933*, 135 Ariz. 278, 280, 660 P.2d 1205, 1207 (Ariz. 1982) ("[T]he applicable time period for appeal commences to run from the entry of the final order."). We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(2) and -120.21(A)(1) (West 2012).[5]

Discussion

¶9 Father's Third Appeal raises several issues relating to the family court's August 2003 and February 2004 rulings. With a few exceptions, all of these issues concern the family court's rulings on custody and child support. However, Father has already fully litigated in his First Appeal the support and custody issues he attempts to present in this appeal. As a result, Father's current appeal is barred by the law of the case.

[5] We cite to the current version of applicable statutes where no revisions material to this decision have since occurred.

¶10 The doctrine of the law of the case "describes the judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278, 860 P.2d 1328, 1331 (App. 1993) (citations omitted). "Under the law of the case doctrine, an appellate court's decision is controlling in both the lower courts and in subsequent appeals in the same case, so long as the facts and law remain substantially the same." *Copper Hills Enters., Ltd. v. Ariz. Dep't of Rev.*, 214 Ariz. 386, 390-91, 153 P.3d 407, 411-12 (App. 2007) (citations omitted); s*ee Powell-Cerkoney*, 176 Ariz. at 278, 860 P.2d at 1331 (explaining that the law of the case doctrine "promotes an orderly process leading to an end to litigation").

A. Father's Arguments Relating to Child Support and Fees

¶11 Our prior memorandum decision explained that "the 2003 judgment [reassigning child support] was not void" notwithstanding Father's arguments that "the court did not have legal authority to offset Mother's child support arrearages." Having already considered this issue in Father's First Appeal, under the law of the case, we cannot now re-examine this question, as Father urges us to do in his opening brief.

¶12 Moreover, Father cannot re-litigate the same issues concerning child support using slightly different arguments. Our

prior decision explained that although Mother was in arrears in paying child support, she had provided "in-kind services" by living with and providing housing for Father and child with her relatives. Thus, when Father seeks to have us consider whether "a non-custodial parent [may] properly and affirmatively defend against their [sic] willful failure to pay years of past due child support, as ordered by the original divorce decree, with allegations that the custodial parent and the parties' child resided in the residence of [relatives] and/or that such [relatives] provided care and support" he is simply making a slightly different argument about why he thinks the trial court's 2003 judgment was flawed. However, we generally will not consider in a second appeal matters which could and should have been raised in a first appeal. *See Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 425, ¶ 20, 46 P.3d 431, 436 (App. 2002) ("[I]ssues that 'should have been raised on the first appeal may not be presented to nor considered by this court on the second appeal.'") (quoting *Hurst v. Hurst*, 1 Ariz. App. 227, 229, 401 P.2d 232, 234 (1965)). For the sake of finality, appeals "cannot be allowed by piecemeal." *See Hurst*, 1 Ariz. App. at 229, 401 P.2d at 234 (quoting *Arizona-Parral Mining Co. v. Forbes*, 16 Ariz 395, 402, 146 P. 504, 506 (1915)).

B. Child Custody

¶13 Most of Father's arguments relating to the family court's child custody determination in the August 18, 2003 order are now moot because the child turned eighteen in 2009. We so held in our prior memorandum decision resolving Father's first appeal:

> Assuming, *arguendo*, that the trial court erred in suspending his parenting time, Father's claim is moot because the child turned eighteen during the litigation and can no longer be the subject of a custody order. *See* A.R.S. § 1-215(6) (Supp. 2010) (defining child as a person under eighteen years of age; *see also* A.R.S. §§ 25-1001 to -1013 (2007 & Supp. 2010) (sections codifying jurisdiction and enforcement of child custody). Consequently, even if the family court erred, we cannot order the court to correct its error and cannot fashion a remedy.

In re Freiwald, 1 CA-CV 10-0153, at *3, ¶ 13. Thus, under the law of the case, Father's arguments relating to child custody are moot. These arguments include Father's claims that Mother improperly provided documents to the child custody evaluator in 2003, that Father was not allowed equal time to present his case at the 2003 custody hearings, that the family court improperly denied Father's motion to strike the child custody evaluator's evaluation, and that Mother's attorney allegedly failed to disclose certain information at the May, 2003 hearing.

C. Attorney's Fees

¶14 Father argues that "[i]t was a breach of discretion to order that [he] pay $5,000 toward [Mother's] attorney's fees and

not award attorney's fees to [Father]." This attorney's fee award, which was part of the family court's August 2003 order, was eventually credited as an offset against Mother's arrearages judgment in the court's February 2004 order. Both the 2003 and 2004 child support orders have been reviewed by this Court in our First Appeal decision and the resolution is the law of the case.[6]

D. Father's "Bias" Argument

¶15 Father's sole remaining argument is that the trial court was "bias[ed] or prejudice[d]" against him because the court refused to allow him to testify for four hours as he requested. However, "[a] trial judge is presumed to be free of bias and prejudice." *Cook v. Losnegard*, 228 Ariz. 202, ___, ¶ 22, 265 P.3d 384, 388 (App. 2011). To show bias, an appellant must point to facts other than the trial judge's decisions in the case; adverse judicial rulings do not demonstrate bias or prejudice. *See Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977) ("[T]he bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done . . . in the case."). Here, the court's decision appears to be the reasonable exercise of the

[6] Father's argument that the trial court breached its discretion by ordering him to pay half of the child custody evaluator's fees "when it was [Mother's] misconduct that rendered the evaluation unusable by [Father]" is waived because he failed to provide record citations or a date on which this order was entered. ARCAP 13(a)(6); *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62, 211 P.3d 1272, 1289 (App. 2009).

court's inherent power to manage its docket in an efficient and expeditious manner. *See* Ariz. R. Fam. L. P. 22 ("The court may impose reasonable time limits on all proceedings or portions thereof . . . ."); *see also McCutchen v. Hill*, 147 Ariz. 401, 406, 710 P.2d 1056, 1061 (1985). Moreover, under Arizona Rule of Family Law Procedure 6, Father has waived this argument by waiting more than 20 days from the date of discovery of potential bias to file an affidavit.[7]

Conclusion

¶16 For the foregoing reasons, we affirm.

/S/
_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/
_____
MAURICE PORTLEY, Presiding Judge

/S/
_____
ANN A. SCOTT TIMMER, Judge

[7] Arizona Rule of Family Law Procedure 6 directs that "[a]ll notices and requests for change of judge shall be made in accordance with Rule 42(f), *Arizona Rules of Civil Procedure*." Rule 42(f) states that "[a]n affidavit shall be timely if filed and served within twenty days after discovery that grounds exist for change of judge." Ariz. R. Civ. P. 42(f)(2)(c).