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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 05/08/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Matter of: ) 1 CA-CV 11-0295  
)  
LOGAN T. JOHNSTON, III, ) DEPARTMENT D  
)  
Petitioner/Appellant, ) **MEMORANDUM DECISION**  
) (Not for Publication  
v. ) - Rule 28, Arizona  
) Rules of Civil  
PAULA PARKER JOHNSTON, ) Appellate Procedure)  
)  
Respondent/Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV DR1993-018214

The Honorable Edward W. Bassett, Judge

**VACATED AND REMANDED**

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Logan T. Johnston, III Phoenix  
Petitioner/Appellant *in propria persona*

Paula Parker Johnston Phoenix  
Respondent/Appellee *in propria persona*

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**B R O W N**, Judge

¶1 Logan T. Johnston ("Husband") appeals the trial court's order dismissing his petition to modify his spousal maintenance obligation to Paula Parker Johnston ("Wife"). Husband argues the court abused its discretion by dismissing his

petition to modify on the grounds that he failed to appear at the court's return hearing because Husband had no notice of the hearing. For the following reasons, we vacate the dismissal and remand for further proceedings.

#### **BACKGROUND**

¶2 Husband and Wife were divorced on January 3, 1996. At that time, the trial court ordered Husband to pay spousal maintenance of \$4,000 per month to Wife for twenty-four months, and thereafter to pay \$2,000 per month "until Wife dies, remarries or further order of the Court."

¶3 On December 22, 2010, Husband filed a petition to modify spousal maintenance, in which he asked the court to decrease his obligation to reflect his reduced earning capacity. He claimed to have suffered a substantial and continuing change of circumstances when he was incarcerated after pleading guilty to aggravated DUI and his license to practice law was suspended. Accordingly, he asserted that he could no longer afford to pay his spousal maintenance obligation.

¶4 On January 7, 2011, the court issued an order directing Wife to appear at a return hearing on March 1, 2011. Neither Husband nor Wife appeared in court on March 1, 2011, and the court dismissed the petition to modify.

¶15 Husband filed a motion for reconsideration, asserting he had not received notice of the hearing. The court denied the motion, stating that it had provided Husband with telephonic notice of the order to appear. Husband filed a second motion for reconsideration and supplement thereto containing declarations from himself and his wife in which they avowed they had not received notice of the return hearing. Husband timely appealed the court's order dismissing his petition to modify.<sup>1</sup> We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2) (Supp. 2011).<sup>2</sup>

#### DISCUSSION

¶16 Husband argues the court erred by dismissing his petition to modify as a sanction for his failure to appear at the March 1, 2011 return hearing.<sup>3</sup> "We review the imposition of sanctions for an abuse of discretion." *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 153, ¶ 40, 211 P.3d 16, 31 (App. 2009).

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<sup>1</sup> The court did not rule on Husband's second motion for reconsideration before Husband filed his notice of appeal.

<sup>2</sup> The court's minute entry dismissing Husband's petition was not signed. On June 21, 2011, we suspended Husband's appeal to allow him to apply for a signed order. The court signed the minute entry on July 6, 2011 and entered a corresponding order on July 7, 2011.

<sup>3</sup> On appeal, Wife states that she does not object to Husband's request for a new hearing.

¶17 The trial court has the authority to impose sanctions if, without good cause, a party:

[F]ails to obey a scheduling or pre-hearing order or any provision of [Family Rule 91], or if no appearance is made on behalf of a party at a post-decree or postjudgment conference, an evidentiary hearing, or other scheduled hearing[.]

Ariz. R. Fam. L. P. 91(Q). These sanctions may include striking pleadings or parts thereof, or dismissing all or part of the action. *Id.*; Ariz. R. Fam. L. P. 76(D).

¶18 "Whether a trial court has the discretion to impose the sanction of dismissal depends on whether the specific facts and circumstances of the case are sufficiently extreme to warrant such a sanction." *Green*, 221 Ariz. at 153, ¶ 40, 211 P.3d at 31. Some of the factors courts typically consider before exercising their authority to dismiss are: (1) prejudice to the other party; (2) whether the violation was committed by the party or counsel; (3) whether the conduct was willful, in bad faith, repeated, or continuous; (4) the public interest in the integrity of the judicial system and compliance with court orders; (5) prejudice to the judicial system; (6) the efficacy of lesser sanctions; (7) whether the court had warned the party that violations would be sanctioned; and (8) public policy favoring the resolution of claims on the merits. *Id.* at 154, ¶ 45, 211 P.3d at 32.

¶19 The court did not investigate the reason for Husband's failure to appear at the return hearing to determine whether Husband had good cause. See Ariz. R. Fam. L. P. 76(D). Although the order to appear stated that the court might dismiss the petition if Husband failed to appear, the only evidence in the record shows that Husband did not receive the order. At the very least, lack of notice should constitute good cause for failure to appear. See *Maricopa County Juv. Action No. JS-4942*, 142 Ariz. 240, 242, 689 P.2d 183, 185 (App. 1984) (requiring new hearing on petition for termination of parental rights if father was not properly notified of hearings). Moreover, the court imposed the ultimate sanction without making any finding that Husband had acted willfully or in bad faith, or that the delay had prejudiced Wife or the judicial system. Further, there is also no indication that the court considered other, less severe sanctions. See *Nesmith v. Superior Court*, 164 Ariz. 70, 72, 790 P.2d 768, 770 (App. 1990) ("Dismissal as a sanction is to be exercised with great caution."). Accordingly, the court abused its discretion in dismissing Husband's petition to modify spousal maintenance, and Husband is entitled to notice and a hearing on his petition.

**CONCLUSION**

¶10 For the foregoing reasons, we vacate the court's dismissal of Husband's petition to modify spousal maintenance and remand for further proceedings consistent with this decision.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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PETER B. SWANN, Presiding Judge

/s/

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JON W. THOMPSON, Judge