IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

DAVID ROBERT COX,
Petitioner/Appellant,

v.

ELLEN GORETTI,
Respondent/Appellee.

No. 2 CA-CV 2015-0029
Filed May 31, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20120572
The Honorable Jeffrey T. Bergin, Judge

REVERSED

COUNSEL

David Lipartito, Tucson
Counsel for Petitioner/Appellant

Christopher W. Caine, Tucson
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 David Cox appeals from the trial court's order denying his petition to terminate spousal maintenance based on appellee Ellen Goretti's remarriage and his alternative motion to set aside the spousal maintenance provisions in their decree of dissolution of marriage as unenforceable. Cox also challenges the order on the ground the court improperly considered extrinsic evidence that was not admitted. For the following reasons, we reverse.

Factual and Procedural Background

¶2 David Cox and Ellen Goretti were married in 1986. In July 2012, after the parties reached a marital settlement agreement (MSA), Cox's attorney, R.K., prepared a proposed consent decree and submitted it to the trial court. Under the terms of the MSA and the decree, Cox, who was unemployed at the time, agreed to pay Goretti spousal maintenance for ninety-six months, with payments to "commence the first day of the first month after [he] obtain[ed] employment." Cox would pay Goretti $2,000 per month in maintenance if his annual salary was "$50,000 or more per year," or fifty percent of his income if his salary was less than $50,000. Both the MSA and the decree provided that the spousal maintenance order "shall not be modifiable under any circumstances whatsoever" with the exception of "the death of either party." The decree, however, also stated the order could be modified upon "the remarriage of the recipient spouse." The decree additionally provided that "upon the filing of this Decree of Dissolution[, R.K. wa]s released as attorney of record in any post-decree proceedings." The trial court approved and signed the decree.

¶3 Shortly after the decree was entered, Goretti realized it contained different language from the MSA regarding modifiability

and she contacted R.K. regarding the discrepancy. After consulting with the Arizona State Bar, R.K. filed a notice informing the trial court and parties that the decree "d[id] not reflect the final and actual agreement of the parties" and "the jointly submitted [MSA] signed by both parties and merged into the decree contain[ed] the correct statement of the parties' agreement regarding spousal maintenance." The notice further stated "[t]he award of spousal maintenance was specifically intended to continue even if [Goretti] remarried," and asked that "[t]he phrase 'the remarriage of the recipient spouse or' . . . be struck" from the decree. R.K. noted that the decree also terminated her representation of Cox, which was why she had "filed th[e] notice and not a Motion to Set Aside." In October 2012, after no objection had been filed, the trial court issued an order striking the remarriage condition and further ordering "spousal maintenance [to] continue even in the event [Goretti] remarries."

¶4 Goretti remarried in December 2012. In March 2013, she filed a motion to enforce the MSA and the decree, complaining Cox had not paid her moving expenses or provided her with certain money, in violation of their agreement. In April 2013, after Cox failed to appear at the hearing on Goretti's motion, the trial court awarded Goretti a $9,050.67 judgment against Cox.[1]

¶5 In June 2014, Cox obtained new counsel and the parties entered into a stipulation "regarding spousal maintenance and satisfaction of judgments," which stated, in part, "[Cox] shall pay [Goretti] spousal maintenance in the amount of $2,250 per month for a period of 96 months. Spousal maintenance shall terminate June 30, 2022." In exchange, Goretti waived "all past due amounts . . . owed on the [April 2013 j]udgment" and acknowledged "said [j]udgment [a]s satisfied." The trial court entered an order consistent with that stipulation.

¶6 Two months later, Cox filed a petition for termination of spousal maintenance, citing Goretti's remarriage and "the absence of any express written language in the parties' decree" obligating him

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[1]Cox was unrepresented at the time of these proceedings.

to "continue paying spousal maintenance upon [Goretti's] remarriage." Cox also moved to set aside the trial court's October 2012 order, which he claimed was "based on the [n]otice [filed by his] former counsel to which [he] had no opportunity to reply." He claimed he was unaware of the notice R.K. had filed in 2012 and asserted he had not authorized her to do so. He also stated that, in the event the trial court granted his requested relief, "any judgments deemed satisfied as part of the [s]tipulation . . . should be reinstated." Goretti responded that Cox's petition and motion to set aside should be denied as untimely under Rule 85, Ariz. R. Fam. Law P., and on the basis of laches.

¶7 At a hearing on Cox's petition, he testified he had never received notice of R.K.'s "Notice Re: Incorrect Decree of Dissolution" or the court's October 2012 order correcting the decree. To refute that claim, Goretti provided a copy of an e-mail exchange between her and R.K. that reflected Cox had been copied with that exchange. She also noted that Cox "was named on the routing/distribution list for both [R.K.]'s Notice and [the trial court]'s October 10, 2012[,] Order." Cox acknowledged that the address listed on the distribution was correct and current. R.K. was present at the start of the hearing but left after Cox asserted attorney-client privilege.

¶8 The trial court issued an under-advisement ruling denying Cox's petition and motion, "find[ing] that the doctrine of laches applie[d]." Relying in part on the e-mail between Goretti and R.K., the trial court found Cox "ha[d] notice of the Decree and the Court's orders," and concluded Cox's position was "inconsistent with his own actions in negotiating new terms to spousal maintenance" and "long overdue." It further noted Cox's "position . . . would severely prejudice [Goretti] as he argues she is not entitled to maintenance that has been established through the corrected decree and through his stipulated modification." We have jurisdiction over Cox's appeal pursuant to A.R.S. §§ 12-120.21(A) and 12-2101(A)(2).

Laches

¶9 Cox first argues the trial court erred in dismissing his petition to terminate spousal maintenance on the basis of laches,

contending the equitable doctrine "does not apply where, as here, a party is seeking relief based on a recognition of an event that has occurred by operation of law." He asserts that the language contained in the decree and MSA did not meet "the requirements of A.R.S. § 25-327(B) for a spousal maintenance order t[o] continue past the recipient's remarriage," and as a result, his spousal maintenance obligation automatically terminated "as a matter of law" when Goretti remarried. Goretti counters that Cox's request to terminate spousal maintenance was appropriately barred by the doctrine of laches because Cox "waited too long to prosecute his action . . . and [Goretti wa]s prejudiced by that delay." She also argues the petition was otherwise untimely under Rule 85(c). We review a trial court's ruling on laches for an abuse of discretion, deferring to the court's factual findings unless clearly erroneous, but reviewing de novo its legal conclusions. *Rash v. Town of Mammoth*, 233 Ariz. 577, ¶ 17, 315 P.3d 1234, 1240 (App. 2013).

¶10 The defense of laches bars a claim when, under the totality of the circumstances, the delay in prosecuting the claim "'would produce an unjust result.'" *Prutch v. Town of Quartzite*, 231 Ariz. 431, ¶ 13, 296 P.3d 94, 98 (App. 2013), *quoting Harris v. Purcell*, 193 Ariz. 409, n.2, 973 P.2d 1166, 1167 n.2 (1998). But "laches may not be imputed to a party for mere delay in the assertion of a claim." *Flynn v. Rogers*, 172 Ariz. 62, 66, 834 P.2d 148, 152 (1992). Instead, the delay must be unreasonable under the circumstances and it must be shown that any change in circumstances caused by the delay resulted in prejudice to the other party sufficient to justify denial of relief. *Id.*; *see also Sotomayor v. Burns*, 199 Ariz. 81, ¶ 6, 13 P.3d 1198, 1200 (2000).

¶11 Here, Cox filed his petition for termination around twenty-one months after learning Goretti had remarried. The trial court determined the petition was "long overdue" because Cox had been "aware or should have been aware" of R.K.'s notice for nearly two years before the petition was filed, but it is unclear whether the court found that Cox "acted unreasonably." *See Prutch*, 231 Ariz. 431, ¶ 13, 296 P.3d at 98. But even if Cox's substantial delay in filing his petition was unreasonable, the only prejudice found by the trial court was "eliminati[on of] a maintenance obligation that is included

in the Decree and signed by the Court." *Cf. Sotomayor*, 199 Ariz. 81, ¶ 8, 13 P.3d at 1200 (laches defense cannot stand on unreasonable conduct alone). As Cox points out, "[p]rejudice, in this context, would require proof that [Goretti] had changed her position in reliance on the [2012] order" or the decree, "or had been placed in a detrimental financial position as a result, not of . . . [Cox seeking] relief [from the 2012 order and decree], but of his delay in seeking relief." *See League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, ¶ 6, 201 P.3d 517, 519 (2009) (prejudice demonstrated by showing injury or change in position as result of delay).

¶12 Most importantly, the equitable doctrine was inapplicable here, where Cox was seeking prospective relief on his obligation to make future payments on the ground it had terminated as a matter of law when Goretti remarried. *Cf. Beltran v. Razo*, 163 Ariz. 505, 788 P.2d 1256 (App. 1990) (laches unavailable to defeat spouse's claim to prospective division of community interest in military pension). Accordingly, the trial court erred in applying laches to bar Cox's petition for termination.[2] *See Rash*, 233 Ariz. 577, ¶ 20, 315 P.3d at 1240. That determination, however, does not end our analysis of the issues involved in this case.

Termination

¶13 Cox also asserts that by "deciding the case on the basis of laches, the trial court avoided" "address[ing] the main issue . . . : whether the Consent Decree and MSA met the requirements of A.R.S. §[]25-327(B) for a spousal maintenance order that would continue past the recipient's remarriage." He argues that the language contained in the decree and MSA did not meet the requirements of § 25-327(B), and as a result, his spousal maintenance obligation automatically terminated "as a matter of law" when Goretti remarried. We review the interpretation of statutes and

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[2]Having determined the trial court erred in applying laches, we need not address Cox's related contention that the trial court improperly relied on the e-mail between Goretti and R.K. in concluding he had unreasonably delayed in seeking termination of his spousal maintenance obligation.

decrees of dissolution de novo. *See Palmer v. Palmer*, 217 Ariz. 67, ¶ 7, 170 P.3d 676, 678-79 (App. 2007).

¶14 Generally, an obligation to pay spousal maintenance terminates on the death of either party or the remarriage of the recipient party. § 25-327(B); *Diefenbach v. Holmberg*, 200 Ariz. 415, ¶ 4, 26 P.3d 1186, 1187 (App. 2001). Under the plain language of § 25-327(B), a maintenance obligation only survives the remarriage of the recipient spouse if the parties execute a written agreement to that effect or "the decree distinctly expresses, without the need of implication or inference, that the spousal maintenance will continue notwithstanding the marriage." *Palmer*, 217 Ariz. 67, ¶ 10, 170 P.3d at 679; *see also Diefenbach*, 200 Ariz. 415, ¶ 4, 26 P.3d at 1187-88.

¶15 "When former spouses seek to avoid the application of § 25-327(B), they must make their intention unmistakably clear," and "[t]he language providing for the continuation of the obligation . . . must be 'direct or unmistakable.'" *Diefenbach*, 200 Ariz. 415, ¶¶ 4, 8, 26 P.3d at 1187-88, 89, *quoting In re Estate of Estelle*, 122 Ariz. 109, 113, 593 P.2d 663, 667 (1979). It is not merely enough to intentionally omit "'termination language'"; instead, the decree or agreement must include "'an affirmative, unambiguous statement that the parties intended the spousal maintenance obligations to continue.'" *Palmer*, 217 Ariz. 67, ¶ 13, 170 P.3d at 680, *quoting Diefenbach*, 200 Ariz. 415, ¶ 8, 26 P.3d at 1189.

¶16 Here, the language contained in the decree and MSA is similar to the decree in *Palmer.* The consent decree stated:

> That with the exception of the remarriage of [Goretti] or the death of either party, the spousal maintenance award shall not be modifiable under any circumstances whatsoever regardless of whether any substantial, or even catastrophic, material and continuing change of circumstances hereafter occurs whether such change of circumstances was foreseeable, not foreseeable, catastrophic, unknown or unanticipated.

After Cox's former attorney filed the notice with the trial court stating the parties intended spousal maintenance to continue even in the event that Goretti remarried, the trial court struck the words "the remarriage of the recipient spouse or" to reflect the language contained in the MSA. It also ordered that "[t]he award of spousal maintenance shall continue even in the event [Goretti] remarries."

¶17 Neither the MSA nor the consent decree contained an affirmative, unambiguous statement that the parties intended spousal maintenance to continue after Goretti remarried. *See Palmer*, 217 Ariz. 67, ¶ 13, 170 P.3d at 680. Thus, Cox's spousal maintenance obligation ostensibly terminated upon Goretti's remarriage by operation of law under § 25-327(B), *see id.*, unless the trial court's additional order that "[t]he award . . . shall continue even in the event [Goretti] remarries" was incorporated into the decree. If so, that language is sufficiently explicit to satisfy § 25-327(B). *See id.* ¶ 19.

2012 Order

¶18 Rule 85(A), Ariz. R. Fam. Law P. allows the trial court to correct clerical mistakes and errors in judgments "arising from oversight or omission." A clerical error may be corrected to reflect what was actually decided but "not correctly represent[ed] in the written judgment; it may not be used to correct 'judicial errors'—to supply something that the court could have decided, but did not." *Egan-Ryan Mech. Co. v. Cardon Meadows Dev. Corp.*, 169 Ariz. 161, 166, 818 P.2d 146, 151 (App. 1990); *see also* 46 Am. Jur. 2d *Judgments* § 139 (2016) (authority to correct judgments limited to instances where order fails to accurately reflect the judgment actually rendered and may not adversely affect the rights of parties or alter the substance of the order beyond original intent).

¶19 The discrepancy between the spousal maintenance provisions in the MSA and the consent decree appears to have been a mere clerical mistake, resulting from the filing of the incorrect decree.[3] *Cf. Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 142-43,

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[3]We note that neither party discussed Rule 85(A) in their appellate briefs or below. Nevertheless, because the § 25-327(B)

750 P.2d 898, 900-01 (App. 1987) (error is clerical when it occurs "in recording the judgment rendered"). The additional provision was not in the MSA and the trial court was authorized to correct the decree to reflect the correct terms of the agreement. *See* Ariz. R. Fam. Law P. 85(A) (clerical mistakes may be corrected by court at any time regardless of motion by party to do so). Moreover, because the MSA merged into the decree, an ambiguity arose in the decree as a result of the conflicting language. *Cf. Benson v. State*, 108 Ariz. 513, 515, 502 P.2d 1332, 1334 (1972) (ambiguous or uncertain judgment can be form of clerical error). By striking the language in the decree to conform to the related provision in the merged MSA, the trial court corrected the error without changing the substance of the decree beyond what was originally provided, and, accordingly, did not abuse its discretion in doing so.

¶20 The trial court's additional order, however, that "[t]he award . . . shall continue even in the event [Goretti] remarries," cannot be regarded as a mere clerical correction because it supplied something that could have been included in the MSA and decree, but was not. *See Egan-Ryan Mech.*, 169 Ariz. at 166, 818 P.2d at 151. Though the parties apparently intended that spousal maintenance continue even in the event Goretti remarried, as Cox notes, it was not expressly indicated in the MSA. Thus, even if the trial court intended to augment the decree to reflect that intent, it could not have done so because it would have corrected a judicial error, which is not permissible under Rule 85(A). *See Fid. Nat'l Fin., Inc. v. Friedman*, 855 F. Supp. 2d 948, 961 (D. Ariz. 2012) (almost identical

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issue cannot be resolved without determining whether the court's additional language was added to the decree, and because the issue was raised at oral argument, we address it. *Cf. Decola v. Freyer*, 198 Ariz. 28, ¶ 8, 6 P.3d 333, 336 (App. 2000) (where parties have failed to address completely the correct rule of law governing issues raised, we are not precluded from doing so); *Hill v. City of Phoenix*, 193 Ariz. 570, ¶ 10, 975 P.2d 700, 702 (1999) ("Arizona courts recognize that an overriding purpose of the Rules of Civil Procedure is to dispose of cases on the merits where errors in procedure can be characterized as harmless and non-prejudicial.").

Rule 60(a) does not permit court to correct errors of law or something deliberately done but later discovered to be wrong); *see also Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 150-51 (2d Cir. 1999) (in deciding whether Fed. R. Civ. P. 60(a) applies, courts distinguish between changes that implement result intended by court at time order was entered and changes that alter original meaning to correct legal or factual error; Rule 60(a) allows for former, but not latter).

¶21 Accordingly, we must conclude that because the MSA and amended decree lacked an affirmative, unambiguous statement that spousal maintenance would not be terminated upon Goretti's remarriage, Cox's obligation terminated by operation of law under § 25-327(B) when Goretti remarried. *See Palmer*, 217 Ariz. 67, ¶ 13, 170 P.3d at 680. Our conclusion, however, does not entirely resolve the spousal maintenance issue because the parties subsequently entered into a new agreement.

2014 Stipulation

¶22 As noted above, about a year after Goretti obtained the judgment against Cox for unpaid maintenance, the parties negotiated and executed a written stipulation whereby Cox agreed to pay spousal maintenance in the amount of $2,250 per month for ninety-six months in exchange for Goretti's waiver of "all past due amounts . . . owed on the Judgment entered . . . against [Cox]." At the time the parties entered into the stipulation, Cox was aware that Goretti had remarried.

¶23 Neither party addressed the validity or invalidity of the 2014 stipulation and the trial court's related order below, nor did Cox move to set that order aside pursuant to Rule 85(C). Before oral argument, we allowed the parties to submit supplemental briefing to address the effect of the 2014 stipulation, at which time Cox asserted that in light of the MSA's non-modification provision, the trial court "lacked statutory subject matter jurisdiction over spousal maintenance at the time it entered its order approving the . . . stipulation" and thus "the stipulation and order [were void], to the extent they purported to extend or create a spousal maintenance order." We cannot, however, address the court's 2014 order.

¶24 Challenges to a trial court's subject matter jurisdiction ordinarily cannot be waived and can be raised at any time, including for the first time on appeal. *See Health for Life Brands, Inc. v. Powley*, 203 Ariz. 536, ¶ 12, 57 P.3d 726, 728 (App. 2002). But this principle applies only when an appellant timely appeals from an underlying appealable order, and has failed to challenge subject matter jurisdiction below. *Dowling v. Stapley*, 221 Ariz. 251, n.13, 211 P.3d 1235, 1248 n.13 (App. 2009). An appellant's failure to timely appeal an appealable order deprives us of jurisdiction to review the order, even when a challenge to the trial court's jurisdiction is presented. *Id.*; *see also In re Marriage of Thorn*, 235 Ariz. 216, ¶ 5, 330 P.3d 973, 975 (App. 2014) (appellate court only acquires jurisdiction over matters identified in timely filed notice of appeal).

¶25 Here, Cox did not appeal from the 2014 order and thus we can review it only if it was interlocutory to the trial court's ruling denying his petition to terminate spousal maintenance. *See* A.R.S. § 12-2102(A) (court has jurisdiction to consider interlocutory orders on appeal from final judgment); *cf. Dean v. Powell*, 111 Ariz. 219, 221, 526 P.2d 1241, 1243 (1974) (§ 12-2102 requires court of appeals to consider all orders and rulings assigned as error on appeal from final judgment); *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, n.7, 254 P.3d 418, 422 n.7 (App. 2011) (Arizona appellate courts limited by § 12-2102(C)). Stated differently, if the 2014 order was substantively appealable, we lack jurisdiction to evaluate the trial court's jurisdiction to enter that order. *Dowling*, 221 Ariz. 251, n.13, 211 P.3d at 124 n.13.

¶26 To qualify as appealable, a post-judgment order must "'dispose[] of or settle[] ultimate rights'" and satisfy two requirements. *Williams v. Williams*, 228 Ariz. 160, ¶ 11, 264 P.3d 870, 874 (App. 2011), *quoting State v. Birmingham*, 96 Ariz. 109, 111, 392 P.2d 775, 776 (1964); *see also* A.R.S. § 12-2101(A)(2). First, the issues raised on appeal from the post-judgment order must be different from those that would arise from an appeal from the underlying decree. *See Williams*, 228 Ariz. 160, ¶ 11, 264 P.3d at 874; *see also Engel v. Landman*, 221 Ariz. 504, ¶ 19, 212 P.3d 842, 848 (App. 2009). Second, the order must affect the judgment or relate to its enforcement. *Williams*, 228 Ariz. 160, ¶ 11, 264 P.3d at 874.

¶27 Applying the first requirement, an appeal from the 2014 order would clearly raise issues that could not have been raised on appeal from the underlying decree. The 2014 order is based on a post-decree stipulation between the parties, which resolved two unpaid judgments entered in favor of Goretti during enforcement proceedings as a result of Cox's failure to perform under the parties' property settlement. Because the 2014 order resolved post-decree enforcement matters that could not have arisen until after the decree was entered, it does not raise issues that could have been raised on appeal from the underlying decree. *See Engel*, 221 Ariz. 504, ¶ 20, 212 P.3d at 848.

¶28 Moreover, the order also affects the decree and relates to the enforcement of its provisions. *See Williams*, 228 Ariz. 160, ¶¶ 15, 19, 264 P.3d at 874-75 (post-decree order regarding spousal maintenance appealable under § 12-2101(A)(2)); *Arvizu v. Fernandez*, 183 Ariz. 224, 226, 902 P.2d 830, 832 (App. 1995). The 2014 order resulted from Goretti's motion for enforcement of the decree, and it obligated Cox to pay additional spousal maintenance as a result of his failure to comply with the MSA. Thus, the 2014 order was appealable pursuant to § 12-2101(A)(2). Cox failed to timely appeal that ruling, and he is estopped to now challenge it when the 2014 order no longer benefits his position. *See Dowling*, 221 Ariz. 251, ¶ 43, n.14, 211 P.3d at 1249, 1249 n.14 (general rule allowing challenges to trial court's subject matter jurisdiction to be raised "at any time" is inapplicable when party does "not appeal from a[n appealable] order, accept[s] benefits from that order, and then seek[s] to [untimely] appeal from [such] order"). Accordingly, because we cannot review the trial court's jurisdiction to enter the 2014 order, we do not address the matter further, and the order remains in effect notwithstanding our reversal of the court's ruling on Cox's petition to terminate spousal maintenance. *See id.*

Attorney Fees

¶29 Both parties request attorney fees and costs on appeal pursuant to A.R.S. § 25-324(A) and Rule 21, Ariz. R. Civ. App. P. Section 25-324 requires that we examine both the financial resources of the parties and the reasonableness of their positions. *See Leathers v. Leathers*, 216 Ariz. 374, ¶ 22, 166 P.3d 929, 934 (App. 2007).

Neither party has provided any current information as to the parties' relative financial information, but the record does not reflect any significant financial disparity between them and neither has presented unreasonable arguments on appeal. We therefore conclude the parties should each bear their own attorney fees and costs on appeal.

Disposition

¶30 For the foregoing reasons, the trial court's denial of Cox's petition to terminate spousal maintenance is reversed.