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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: 07/03/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Marriage of ) 1 CA-CV 11-0327  
)  
DAVID RAMSAY ) DEPARTMENT E  
)  
Petitioner/Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication-  
v. ) Rule 28, Arizona  
) Rules of Civil  
VICTORIA WHEELER-RAMSAY, ) Appellate Procedure)  
)  
Respondent/Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. FN2006-003270

The Honorable Helene F. Abrams, Judge

**REVERSED AND REMANDED**

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Goodyear

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O R O Z C O, Judge

¶1 Victoria Wheeler-Ramsay (Wife) appeals the family court's order dismissing her petition to modify spousal maintenance. For the following reasons, we reverse and remand for further proceedings.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 Wife and David Ramsay (Husband) were divorced on November 25, 2008. The Decree ordered Husband to pay spousal maintenance of \$2700 per month for twenty-one months beginning December 1, 2008. On August 31, 2010, the last day of the spousal maintenance period, Wife filed a petition to modify in which she asked the court to continue the spousal maintenance at the rate of \$1000 per month for a period of sixty months. The court issued an order directing Husband to appear at a resolution management conference on November 15, 2010.

¶3 On October 29, 2010, Wife filed an affidavit of service in which she avowed that she had delivered the petition to modify and order to appear to Husband's attorney via certified mail.<sup>1</sup> In response, Husband's counsel filed a Notice of Non-Service, in which she stated that Husband had not

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<sup>1</sup> Wife apparently also attempted to send the petition and order to appear to Husband via certified mail, but he did not accept it.

authorized her to accept service of Wife's petition.<sup>2</sup> Husband did not appear in court as ordered on November 15, 2010. The court then issued a new order to appear on January 25, 2011.

¶4 On January 28, 2011, the court vacated the January 25 conference due to lack of service. It placed the matter on the Inactive Calendar with instructions that it would be dismissed on February 25, 2011, unless prior to that date the court entered a judgment, the parties filed a stipulation for dismissal, or either party filed a motion to set and certificate of readiness.

¶5 On February 2, 2011, Wife asked the court to allow her to use a substitute method of service because Husband, who resides in Washington, had avoided her repeated attempts to personally serve him. She offered sworn declarations from four process servers describing their seven unsuccessful attempts to serve Husband at his home between November 23, 2011 and December 19, 2011 and asked the court to allow her to serve Husband by posting a copy of her petition to modify and the order to appear on the front door of his residence and mailing copies of those documents to his counsel. On February 24, 2011, having received

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<sup>2</sup> Husband's counsel also asserted that Wife had not included a copy of her petition to modify in the certified mailing. For purposes of our review, we accept Wife's representation in her affidavit of service that she mailed both the petition and order to appear.

no ruling on her motion for substitute service, Wife filed an expedited motion to continue the matter on the Inactive Calendar for sixty days to allow the court to rule on the motion for substitute service. Without ruling on Wife's motion to allow substitute service, the family court denied the expedited motion to continue and dismissed Wife's petition to modify spousal maintenance. Wife timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.2 (Supp. 2011).

#### DISCUSSION

¶6 Wife argues the court erred by dismissing her petition to modify from the Inactive Calendar because she diligently pursued the matter. We review the family court's decision to dismiss a case from the Inactive Calendar for an abuse of discretion. See *BCAZ Corp. v. Helgoe*, 194 Ariz. 11, 14, ¶ 15, 976 P.2d 260, 263 (App. 1998).<sup>3</sup>

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<sup>3</sup> Wife argues for the first time in her reply brief that the dismissal was erroneous because she did, in fact, serve Husband pursuant to Arizona Rule of Family Law Procedure 43.C.1 by mailing a copy of the petition to modify and order to appear to his counsel. We generally will not consider issues not raised in the family court or issues raised for the first time in a reply brief. *Banales v. Smith*, 200 Ariz. 419, 420, ¶ 6, 26 P.3d 1190, 1191 (App. 2001) (stating, absent extraordinary circumstances, errors not raised in the trial court may not be raised on appeal) (citations omitted); *Wasserman v. Low*, 143 Ariz. 4, 9 n.4, 691 P.2d 716, 721 n.4 (App. 1984) (refusing to consider arguments first presented in appellate reply brief). We therefore grant Husband's motion to strike Wife's argument

¶7 Arizona Rule of Family Law Procedure 91.R provides that if a petition to modify a family court decree is filed but not served upon the adverse party within 120 days, the court may issue a notice that the petition will be dismissed in sixty days unless the moving party completes service prior to that time and requests a hearing. If service has not been accomplished within one year after the petition was filed, the court may dismiss the petition without prejudice and without further notice. *Id.* In the alternative, the court may delay these dismissal dates if it finds good cause shown. *Id.*; see also Ariz. R. Fam. L. P. 46.B (allowing the court to involuntarily dismiss a family law case, including a post-decree petition, when the petitioner fails to prosecute, but allowing the court to extend the matter for good cause shown).

¶8 These family court procedures are similar to those applicable in all other civil cases.<sup>4</sup> Arizona Rule of Civil Procedure 38.1(d)(2) allows the superior court to continue a case on the Inactive Calendar for a specified period of time upon motion for good cause shown. The Inactive Calendar

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that she served Husband pursuant to Arizona Rule of Family Law Procedure 43.C.1.

<sup>4</sup> "Where the language of the family law rules is substantially the same as the language of other statewide rules, case law interpreting that language is applicable." *Kline v. Kline*, 221 Ariz. 564, 568-69, ¶ 13, 212 P.3d 902, 906-07 (App. 2009) (citing Ariz. R. Fam. L. P. 1 cmt.).

Guidelines (Guidelines), applicable in Maricopa County, acknowledge that "good cause" is a question for the sound discretion of the trial court, but state that "[t]he party seeking the continuance is required to show some substantial basis for the continuance and the court's focus is primarily upon whether there are unusual discovery or procedural problems which have prevented the case from proceeding at the presumptive pace." Ariz. R. Civ. P. 38.1 (Inactive Calendar Guidelines § IV.). The Guidelines direct the court to consider a non-exclusive list of five elements in determining whether good cause exists:

- A. Whether the underlying circumstances were unforeseeable;
- B. Whether the underlying circumstances were not due to lack of preparation;
- C. Whether the grounds are relevant;
- D. Whether the matter was brought to the court's attention in a timely manner; and
- E. Whether the adversary is prejudiced.

*Id.* A motion grounded upon failure to serve will not demonstrate good cause if the moving party does not show due diligence in attempting to serve. *Id.*

¶19 Here, Wife asked the court to extend the matter on the Inactive Calendar to allow it to rule on her outstanding motion for the court to allow her to serve Husband by alternate means.

Wife timely filed her petition to modify spousal maintenance on August 31, 2010, the last day of the spousal maintenance period. A.R.S. § 25-319.D (2007) (“[T]he court shall maintain continuing jurisdiction over the issue of maintenance for the period of time maintenance is awarded.”); *Evitt v. Evitt*, 179 Ariz. 183, 185, 877 P.2d 282, 284 (App. 1994) (holding family court had jurisdiction to consider wife’s petition to modify spousal maintenance because it was filed within the period of time for which maintenance was awarded, even though it was filed on the last day of the period and husband had already made the last payment).<sup>5</sup> Thereafter, on October 14, 2011, Wife timely attempted to serve the petition and order to appear by mailing them via certified mail to Husband’s attorney. Once Husband’s attorney filed a notice indicating she was not authorized to accept service on Husband’s behalf and Husband did not appear, Wife promptly began attempting to personally serve him. When those efforts failed, she asked the court to allow her to serve Husband using alternate means, offering evidence of her diligence in attempting to personally serve him. However, the court never ruled on Wife’s request.

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<sup>5</sup> Accordingly, we reject Husband’s argument that the court lacked jurisdiction over Wife’s petition to modify because it was filed after he made his final spousal maintenance payment pursuant to the original maintenance order.

¶10 Under these circumstances, the family court abused its discretion by dismissing Wife's petition without first ruling on her motion for substitute service. The record clearly shows that the reason Wife's petition had not proceeded was because her attempts to serve Husband with the petition and order to appear had been fruitless. It was therefore improper for the court to dismiss the matter without first considering the merits of Wife's pending motion for substitute service.

¶11 We reverse the court's dismissal and remand for further proceedings.<sup>6</sup>

#### CONCLUSION

¶12 For the foregoing reasons, we reverse and remand this matter to the superior court for further proceedings consistent with this decision.

¶13 Husband requests an award of attorney fees and costs on appeal pursuant to A.R.S. § 25-324 (Supp. 2011), Arizona Rule of Family Law Procedure 31, and Arizona Rule of Civil Appellate Procedure 25. We find no grounds for an award of fees under Arizona Rule of Family Law Procedure 31 or Arizona Rule of Civil Appellate Procedure 25, which allow the imposition of sanctions when a pleading is not well-grounded in fact or law, or is filed

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<sup>6</sup> Upon remand, the court may consider Wife's argument that she served Husband pursuant to Arizona Rule of Family Law Procedure 43.C.1 by mailing her petition to modify and the court's order to appear to his counsel.



for an improper purpose, or when an appeal is frivolous or taken solely for the purpose of delay. We also deny Husband's request for an award of fees and costs pursuant to A.R.S. § 25-324 due to Wife's unreasonable position, because we determine that Wife's position in this appeal was not unreasonable.

/S/

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

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PHILIP HALL, Judge

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JOHN C. GEMMILL, Judge