IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

EMILY MARIE KOTARA, *Petitioner/Appellee*,

v.

RICHARD DUEY FRANCO, *Respondent/Appellant*.

No. 1 CA-CV 12-0604
FILED 12-17-2013

Appeal from the Superior Court in Maricopa County
No. FC2006-005253
The Honorable Christopher T. Whitten, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

COUNSEL

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By Stephen R. Smith, James L. Cork II
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By M. Philip Escolar
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DECISION ORDER

Presiding Judge Peter B. Swann delivered the decision of the Court, in which Judge Patricia K. Norris and Judge Samuel A. Thumma joined.

S W A N N, Judge:

¶1 This appeal was considered by Presiding Judge Peter B. Swann and Judges Patricia K. Norris and Samuel A. Thumma during a regularly scheduled conference held on October 15, 2013. After consideration, and for the reasons that follow,

¶2 **IT IS ORDERED** reversing and remanding the dismissal of Richard Duey Franco's ("Father['s]") request to modify child support, affirming the dismissal of Father's request to modify child custody and parenting time, and affirming the award of attorney's fees and costs to Emily Marie Kotara ("Mother").

¶3 Father and Mother are the divorced parents of two children, an older son and a younger daughter. In February 2012, Father filed a petition by which he sought modification of custody, parenting time, and child support. Father requested modification of custody and parenting time of the parties' daughter based on allegations that Mother set a poor moral example for the daughter with respect to premarital respect and religion, disparaged the daughter, and acted irresponsibly by allowing the daughter to obtain a navel piercing, travel to another state without Father's permission, and drive a car at age 14. Father sought modification of child support based on the son's 18th birthday and high school graduation.

¶4 Mother filed a "Motion to Dismiss" in which she admitted that she had allowed the parties' daughter to pierce her navel, travel out of state without Father's permission, and learn to drive. Mother further confirmed that the parties' daughter continued to attend a church of a faith different from Father's, and she admitted that she had previously allowed her oldest son (by another father) to reside in her home with his girlfriend. Mother argued that these facts did not amount to changed circumstances warranting modification of child custody or parenting time of the daughter. She admitted, however, that the parties' son was an 18-

year-old high school graduate who was "no longer subject to this court order."

¶5 In an unsigned minute entry filed on May 15, the superior court granted Mother's motion to dismiss and her request for attorney's fees and costs. The court denied Father's subsequent motion for findings of fact and conclusions of law on June 20. On June 25, Father filed a "Request for Relief from Ruling." Citing ARFLP 85(C)(1), Father argued that the emancipation of the parties' son was undisputed and "to the extent [the] petition did not properly highlight or emphatically address the age-of-majority issue, . . . it was a simple inadvertent oversight that resulted in the custody issues overshadowing the support issues." Father did not challenge the dismissal of his claims for modification of child custody and parenting time, but he requested that the award of fees and costs to Mother be stayed pending full adjudication of the petition.

¶6 On July 5, the court entered a signed judgment awarding Mother approximately $3,000 in attorney's fees and costs. Father filed a notice of appeal on July 27. A little over a week later, on August 7, the court entered a minute entry by which it purported to partially grant Father's Request for Relief from Ruling by vacating the dismissal of Father's claim to modify child support. The court set the child support matter for a status conference that it later stayed pending resolution of this appeal.[1] Father's arguments on appeal are limited to the dismissal of his child support claim and the award of fees and costs to Mother.

¶7 We have jurisdiction to consider this appeal under A.R.S. § 12-2101, and it is not moot. When a motion that extends the time for appeal under ARCAP 9(b) is pending before the superior court, a notice of appeal does not divest the superior court of jurisdiction. *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011). But a motion for relief from judgment under ARFLP 85(C) is not a time-extending motion. *See* ARCAP 9(b). When an appeal has been perfected, the superior court lacks jurisdiction to rule on a motion for relief from judgment absent suspension or dismissal of the appeal. *See Burkhardt v. Burkhardt*, 109 Ariz. 419, 421, 510 P.2d 735, 737 (1973); *Budreau v. Budreau*, 134 Ariz. 539, 540-41, 658 P.2d 192, 193-94 (App. 1982); *In re Estate of Condry*, 117 Ariz. 566, 567-

[1] The superior court's stay order is not a part of the record before us. But because the order is available in the superior court's records, we take judicial notice of it. *See* Ariz. R. Evid. 201; *In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000).

68, 574 P.2d 54, 55-56 (App. 1977). Here, jurisdiction never revested in the superior court after Father filed his timely notice of appeal. The superior court's post-appeal ruling on Father's Request for Relief from Ruling was a nullity.[2]

¶8 The parties do not dispute, and we agree, that Father's claim for child support modification should have been resolved on the merits. For purposes of child support, a child generally emancipates upon turning 18 years old or upon turning 19 years old if he or she is still attending high school. A.R.S. §§ 25-320(F), -501(A), -503(O)(2). In the proceedings before the superior court, the parties agreed that their son had turned 18, had graduated from high school, and was no longer covered by the child support order. Father properly applied to the court for modification of his non-allocated obligation to provide child support to the parties' children. *See Guerra v. Bejarano*, 212 Ariz. 442, 444, ¶ 11, 133 P.3d 752, 754 (App. 2006). Summary dismissal of the application was error.

¶9 Father further contends that the superior court erred by awarding attorney's fees and costs to Mother. The award was necessarily made under A.R.S. § 25-324(B) (rather than § 25-324(A)) because the court was not provided information regarding the parties' financial resources. Section 25-324(B) provides that the court shall award reasonable attorney's fees and costs when it finds that a petition was filed in bad faith, filed for an improper purpose, or not grounded in fact or based on law. We review an award of attorney's fees and costs for abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 351, ¶ 32, 972 P.2d 676, 684 (App. 1998).

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[2] The Request for Relief from Ruling cannot be considered a time-extending motion for new trial because Father did not refer to the rule governing new trial and the court did not indicate that it considered the motion as one for new trial. *See Farmers Ins. Co. of Ariz. v. Vagnozzi*, 132 Ariz. 219, 221-22, 644 P.2d 1305, 1307-08 (1982).

¶10 Father argues that the award was unjustified because his claim to modify child support should have proceeded. But though Mother asked for dismissal of Father's petition "in its entirety," she contested only his claims for modification of child custody and parenting time of their daughter -- she immediately and unequivocally agreed that their son had emancipated. The superior court did not abuse its discretion by finding that Mother was entitled under § 25-324(B) to recover the attorney's fees and costs that she incurred in successfully defending against the contested claims. In the exercise of our discretion, we deny both parties' requests for attorney's fees and costs on appeal.