IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

JOSEPH R. PETRO, JR., *Petitioner/Appellee*,

v.

RACHEL A. GIANINI, *Respondent/Appellant*.

No. 1 CA-CV 16-0313 FC
FILED 4-6-2017

Appeal from the Superior Court in Maricopa County
No. FC2015-001972
The Honorable Timothy J. Thomason, Judge

REVERSED AND REMANDED

COUNSEL

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Counsel for Petitioner/Appellee

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By Mark A. Shields, DeeAn Gillespie Strub
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MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 Rachel A. Gianini ("Mother") appeals from an order denying her request for an award of past child support from Joseph R. Petro, Jr. ("Father"). A.R.S. § 25-809(A) requires an award of past child support in paternity cases, unless the obligor can establish equitable defenses by clear and compelling evidence. Because the superior court made no findings concerning equitable defenses, and the record contains no evidence that could establish such defenses by clear and compelling evidence, we reverse the order denying past child support and remand for calculation of support under the child support guidelines.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Mother are the parents of two minor children born in 2008 and 2009. When their relationship ended in October 2010, Mother and Father did not seek any parenting time or child support orders from the court, nor did they enter into any formal agreements. Father regularly paid $500 per month in child support until November 2011, when he lost his job. After his voluntary support payments ended, Father continued to see the children.

¶3 Mother married in October 2011. In early 2015, Mother's husband accepted a job transfer to Michigan. Mother sought to relocate, and Father filed a petition opposing the relocation and seeking to establish paternity, legal decision-making, and parenting time. After trial, the superior court concluded that the relocation was not in the children's best interests and ordered joint legal decision-making. Later, the superior court ordered equal parenting time and denied Mother's request for an award of past child support, citing A.R.S. § 25-320(C).[1] Mother appeals the child support ruling.

[1] Mother took the position that that no prospective support order was warranted if equal parenting time was ordered.

DISCUSSION

¶4 We review issues of statutory interpretation de novo. *Bobrow v. Herrod*, 239 Ariz. 180, 182, ¶ 7 (App. 2016). "We are bound by the trial court's findings of fact unless they are clearly erroneous. . . . However, we are not bound by the trial court's conclusions of law, and we may reach our own conclusions of law based on the facts found by the trial court." *Schnepp v. State ex rel. Dep't of Econ. Sec.*, 183 Ariz. 24, 27 (App. 1995).

¶5 The superior court found that Mother did not seek child support in the past and chose not to seek support when Father was unemployed. The court also found that Mother offered to forego past support if permitted to relocate. Citing A.R.S. § 25-320(C), and considering "all the relevant circumstances," the superior court denied Mother's request for past support.

¶6 The parties agree that A.R.S. § 25-320(C) does not apply to this case.[2] Mother argues that a retroactive child support order was required under A.R.S. § 25-809(A). We agree. Section 25-809(A) applies to paternity actions and provides that "the court *shall* direct, subject to applicable equitable defenses and using a retroactive application of the current child support guidelines, the amount, if any, the parties shall pay for past support of the child and the manner in which payment shall be made." (Emphasis added.) Accordingly, absent a finding that equitable defenses warrant a different result, an award of past support was mandatory as a matter of law. Though the parties addressed potential equitable defenses during the proceedings before the trial court, that court did not identify any such defenses in its final order.

¶7 Father contends the superior court's findings are sufficient to permit this court to conclude that equitable defenses justified the denial of any past support.[3] We disagree. Arizona courts have held the equitable

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[2] Section 25-320(C) applies to marital dissolution proceedings, and grants the court discretion to award past child support for the time before the filing of a petition after considering "all relevant circumstances" and specific factors listed in the statute.

[3] Much of Father's argument is framed in terms of the more amorphous factors listed in A.R.S. § 25-809(B), which (if applicable) might make the superior court's observations more relevant to the analysis. But § 25-809(B) applies to awards that exceed the presumptive three years of

defenses of waiver, estoppel, and laches may apply to child support arrearages.[4] *See Schnepp*, 183 Ariz. at 28–30. These defenses must be established by clear and compelling evidence.[5] *Id.* Here, the superior court made no findings to support the application of any of these defenses.

¶8 To establish waiver, Father must show that Mother "voluntarily and intentionally abandoned a known right." *Id.* at 28 (citing cases). Clear and compelling evidence of waiver can take the form of a written waiver or an admission of waiver by the custodial parent. *See, e.g.*, *Ray v. Mangum*, 163 Ariz. 329, 333 (1989). But "[w]here conflicting testimony exists and the parties' unspoken assumptions and intentions conflict, one party's belief [that the other waived child support] cannot provide clear and compelling evidence of [a waiver]." *Id.*

¶9 In this case, there was no written waiver of past child support. Father contends Mother told him she did not want his support, but Mother disputed that contention. Mother testified that she never waived past child support but rather decided not to pursue it after Father lost his job and that she told him that she would wait until he was financially stable. Temporary forbearance during Father's unemployment does not constitute a waiver of the right to collect past support at a later date. Although Mother offered to forego past support if Father consented to the relocation, Father never consented. Accordingly, these facts do not constitute clear and compelling evidence of waiver.

¶10 To establish estoppel, Father was required to show by clear and compelling evidence that Mother engaged in "conduct by which [she] induce[d] [him] to believe in certain material facts; acts resulting from justifiable reliance on the inducements; and injury caused by the resulting acts." *Schnepp*, 183 Ariz. at 28–29. Father again relies on Mother's failure to seek past support payments, her statement that she did not want his support payments, and her offer to forego past support if he consented to

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past support. Here, Mother only sought 33 months of past support. Accordingly, § 25-809(A) governs.

[4] Although there was no prior order for child support in this case and, hence, no "arrearages," Father's statutory obligation to support his children is subject to these same equitable defenses according to § 25-809(A).

[5] The "clear and compelling" standard appears in relevant Arizona case law. We perceive no difference between this standard and the more commonly-used "clear and convincing" standard.

the relocation. As noted above, conflicting testimony and disputed assumptions and intentions do not constitute clear and compelling evidence. *Ray*, 163 Ariz. at 333.

¶11 To establish laches, Father had to show that Mother unreasonably delayed bringing her claim for past support and that he was prejudiced by this delay. *Schnepp*, 183 Ariz. at 30; *State ex rel. Dep't of Econ. Sec. v. Dodd*, 181 Ariz. 183, 188 (App. 1994). Mother testified that she did not seek support payments when Father was unemployed. Father did not provide evidence to establish when his financial troubles ended, and therefore did not prove by clear and compelling evidence that Mother's delay was unreasonable.

¶12 In any event, Father failed to show how he was prejudiced by the delay. He did not contend that he changed his financial position in reliance on Mother's conduct. In view of Arizona's overriding public policy favoring support of children, financial hardship standing alone is insufficient to establish prejudice. *See, e.g.*, *Anonymous Wife v. Anonymous Husband*, 153 Ariz. 573, 577–78 (1983) (holding that financial hardship caused by ten-year delay in seeking child support did not establish laches when father knew someone else was bearing financial responsibility for his child); *In re Marriage of Yuro*, 192 Ariz. 568, 573–74, ¶ 17 (App. 1998) (finding increased financial burden caused by interest accruing on arrearages insufficient to establish prejudice).

¶13 This record lacks clear and compelling evidence of waiver, estoppel, or laches, and the superior court identified no other equitable defenses to justify departure from the statutory presumption of past support awards in paternity cases. We therefore reverse the order denying Mother's request for past support and remand for a retroactive application of the child support guidelines.

ATTORNEYS' FEES AND COSTS ON APPEAL

¶14 Both parties request an award of attorneys' fees and costs on appeal. Mother seeks fees pursuant to A.R.S. § 25-324, and Father failed to cite any statutory authority in support of his request. After considering the parties' financial resources and reasonableness of their respective positions, we decline to award attorneys' fees to either party.

CONCLUSION

¶15 We reverse the order denying Mother's request for past child support and remand for calculation of past support under A.R.S.

§ 25-809(A). As the successful party, Mother is entitled to an award of costs on appeal upon compliance with ARCAP 21. *See* A.R.S. § 12-342.

AMY M. WOOD • Clerk of the Court
FILED: AA