IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LAURA E. RODRIGUEZ, *Petitioner/Appellee*,

v.

LUIS B. RODRIGUEZ, *Respondent/Appellant*.

No. 1 CA-CV 16-0754 FC
FILED 11-16-2017

Appeal from the Superior Court in Maricopa County
No. FC2010-093572
The Honorable Peter A. Thompson, Judge

AFFIRMED

COUNSEL

Kimberly A. Eckert, Mesa
Counsel for Respondent/Appellant

John Bednarz P.C., Gilbert
Counsel for Petitioner/Appellee

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Jon W. Thompson joined.

T H U MM A, Judge:

¶1 Luis B. Rodriguez (Father) appeals from the superior court's order denying his July 2016 motion to correct clerical error, which sought to retroactively change a payment obligation date in a December 2010 default decree. Because Father has shown no reversible error, the order is affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Father and Laura Rodriquez (Mother) married in June 1997. The couple had two children together, and then separated sometime during the first part of 2010. In August 2010, Mother filed a petition for dissolution, which she amended later that month. As amended, the petition alleged that the parents shared legal custody but Mother was the primary residential parent. Mother served Father with the petition, summons and related documents; Father, however, failed to timely respond or appear. Accordingly, after a December 2010 hearing, the superior court entered a default decree, which incorporated a child support order requiring Father to pay Mother $865 in monthly child support starting January 1, 2010.

¶3 In May 2016, Mother filed a petition for contempt, alleging Father had failed to make child support payments required by the decree for many years. Father responded with a July 2016 motion to correct clerical error, claiming the child support obligation in the decree should have begun on January 1, 2011, not January 1, 2010. *See* Ariz. R. Fam. Law P. ("Rule") 85(A) (2017).[2]

¶4 The superior court held an evidentiary hearing on the competing petition and motion, where Mother and Father testified and presented evidence. After considering the evidence, the court rejected Father's argument that the payment start date was a clerical mistake under Rule 85(A), finding instead that Father's argument was governed by Rule 85(C) and was untimely. Accordingly, the court denied Father's motion and found for Mother on her contempt petition. This court has jurisdiction over

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[1] The court views the facts in the light most favorable to sustaining the superior court's order, giving "due regard . . . to the opportunity of the trial court to judge the credibility of witnesses." Ariz. R. Fam. Law P. 82(A) (2017); *see also Gutierrez v. Gutierrez*, 193 Ariz. 343, 348 ¶ 14 (App. 1998).

[2] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

Father's timely appeal from the denial of his motion pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1).

DISCUSSION

I. The Record On Appeal.

¶5 Although challenging the basis for the decree, Father failed to provide this court with a transcript from the December 2010 default hearing, and failed to otherwise seek to reconstruct the information provided to the superior court at that hearing. *See* ARCAP 11(c). "[W]here an incomplete record is presented to an appellate court, the missing portions of that record are to be presumed to support the action of the trial court." *Cullison v. City of Peoria*, 120 Ariz. 165, 168 n.2 (1978); *accord Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995). Without such record of this key hearing, Father's assertion the superior court erred in "the factual basis for its decision" fails.[3]

II. Father Has Not Shown The Superior Court Erred In Applying Rule 85(C).

¶6 Father argues the superior court erred in applying Rule 85(C) instead of Rule 85(A). Father relies on Rule 85(A), which provides that "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative." Under Rule 85(C), by contrast, a party may be relieved from a "final judgment" or order on motion by the party showing "mistake, inadvertence, surprise, or excusable neglect" filed within six months "after the judgment or order was entered." Father argues the start date for child support in the decree is a result of clerical mistake governed by Rule 85(A), meaning the superior court erred in finding his motion was not timely.

[3] Without any supporting authority, Father's reply brief on appeal asserts that "[a] court can only order past support in a default case if pled in the Petition." By failing to raise the issue in the opening brief on appeal, it is waived. *See, e.g., Dawson v. Withycombe*, 216 Ariz. 84, 111 ¶ 91 (App. 2007); *Nelson v. Rice*, 198 Ariz. 563, 567 ¶ 11 n.3 (App. 2000).

¶7 Father notes the child support order (on which he posits the decree was based) states "no evidence was presented in support of any child support arrearage" and "[t]he evidence does not support a judgment for . . . past care expenses." Father correctly states no judgment for arrearage or past-due child support was entered at the time of the decree. As a result, Father argues the January 1, 2010 child support start date had to be clerical mistake, given the decree was not entered until December 2010, which he suggests means the start of the payment obligation should have been January 1, 2011. But the fact that any evidence received before the entry of the decree did not support entry of a judgment for an arrearage or past-due child support does not mandate a conclusion that there were no unpaid child support obligations. Indeed, Father has not shown how a decree could both (1) initially impose a pre-petition child support payment obligation and, at the same time, (2) conclude that there was an arrearage for non-payment of that same previously un-imposed payment obligation. More significantly, Father fails to provide any evidentiary basis to show that the January 1, 2010 start date was an error of any type, let alone a clerical mistake under Rule 85(A).

¶8 Father next argues that whether a mistake was clerical "turns on the question whether the error occurred in rendering judgment or in recording the judgment rendered." *Ace Auto. Prod., Inc. v. Van Duyne*, 156 Ariz. 140, 142 (App. 1987). Father argues it is "clear that the trial court intended the start dates [for child support payments] as of . . . January of 2011." But Father has provided no evidence showing that was the case.

¶9 Nor has Father supported his assertion that, because the payment obligation imposed by the decree was pre-petition, no such obligation could be imposed. By statute, if a divorcing couple

> lived apart before the date of the filing for dissolution of marriage, legal separation, maintenance or child support and if child support has not been ordered by a child support order, the court may order child support ***retroactively to the date of separation, but not more than three years before the date of the filing***.

A.R.S. § 25-320(C) (emphasis added). The record shows the parties separated in 2010 ***before*** Mother filed the petition. Although the precise date is unknown on this record, Father has provided no evidence showing that the separation did not occur on or before January 1, 2010. On this record,

Father has not shown the evidence could not support imposing retroactive child support payment obligations as of January 1, 2010.

¶10 The superior court found, following an evidentiary hearing, any error in the start date of the child support obligation was, at most, "mistake, inadvertence, surprise, or excusable neglect" under Rule 85(C)(1)(a) and, as a result, was time barred because it was filed years after December 2010. *See* Rule 85(C)(2) (requiring motion under Rule 85(C)(1)(A) to be filed "not more than six (6) months after the judgment or order was entered"). On this record, Father has not shown this factual finding (construing the nature of a claimed error) was an abuse of discretion. *Alvarado v. Thomson*, 240 Ariz. 12, 14 ¶ 11 (App. 2016). Thus, Father has not shown the court erred in applying Rule 85(C), meaning Father's motion was time-barred.

III. Father Has Not Shown The Superior Court Erred Even If Rule 85(A) Applied.

¶11 Even if Rule 85(A) governed his motion, as Father argues, he has shown no reversible error. Father claims the child support start date was a clerical mistake under Rule 85(A). Rule 85(A) is based on Ariz. R. Civ. P. 60(a). *See* Rule 85(A) Committee Comment. Commentary to the civil rule analogue notes that Ariz. R. Civ. P. 60(a) "only authorizes the correction of 'clerical' errors – to show what the Court actually decided but did not correctly represent in the written judgment." McAuliffe & McAuliffe, *Arizona Practice Arizona Civil Rules Handbook* 777 (2017 ed.). Particularly given the absence of the transcript from the December 2010 hearing, Father has not provided any evidence suggesting that the decree does not correctly represent what the court actual decided at that hearing. Accordingly, Father has shown no error even if Rule 85(A) applied.

IV. Attorneys' Fees And Costs On Appeal.

¶12 Both parties request an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324. Having considered the financial resources of the parties and the reasonableness of their positions, in exercising the court's discretion, Father's request for fees and costs on appeal is denied; Mother is awarded her taxable costs and reasonable attorneys' fees on appeal contingent upon her compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶13 Because Father has shown no reversible error, the superior court's order denying his motion to correct clerical error is affirmed.

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