IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

JENNIFER MARIE ARIOLA, *Petitioner/Appellant*,

v.

NICHOLAS ANTHONY REED, *Respondent/Appellee*,

STATE OF ARIZONA, ex rel., DEPARTMENT OF ECONOMIC SECURITY, *Intervenor/Appellee.*

No. 1 CA-CV 16-0743 FC
FILED 11-27-2018

Appeal from the Superior Court in Maricopa County
No. FC2007-053009
The Honorable Richard F. Albrecht, Judge *Pro Tempore*
The Honorable Judy Miller, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Scott L. Patterson PLLC, Tempe
By Scott L. Patterson
Counsel for Petitioner/Appellant

Nicholas Anthony Reed, Glendale
Respondent/Appellee

Arizona Attorney General's Office, Phoenix
By Carol A. Salvati
Counsel for Intervenor/Appellee

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Judge Jennifer M. Perkins joined. Presiding Judge Randall M. Howe specially concurred.

S W A N N, Judge:

¶1 Jennifer Marie Ariola ("Mother") appeals the superior court's denial of her motion for relief from a 2013 amended child support order. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Nicholas Anthony Reed ("Father") never married, but had two children together. Mother initially received sole legal custody[1] of the children and Father paid child support. Father later petitioned to modify child custody, and the parties agreed that Father would have sole legal and primary physical custody of their two children. The court terminated Father's child support obligations and directed the state to file an arrearage calculation. In December 2012, Father petitioned to establish child support. That same day, the court issued an order to appear for a hearing in February 2013 based on the petition for child support. In February, the court issued a new order to appear regarding the petition and set a hearing for March 2013. The order described the financial documents and other evidence that Mother should bring to the March 2013 hearing. Mother signed an acceptance of service for the order to appear in March 2013.

¶3 At the March 2013 hearing, Mother arrived over an hour late and missed the hearing. Even though the court had already entered a default order, it reopened the hearing to address Mother's income for purposes of determining the amount of child support she should pay. The court did not accept Father's allegation regarding Mother's income because

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[1] Effective January 1, 2013, the term "legal custody" was replaced with "legal decision-making." *See* A.R.S. § 25–401(3).

he did not have evidence to support the alleged amount. Mother testified that she was capable of working and had recently lost a job making $12 per hour. Father stated that he received physical custody of the children in August 2012 and that an earlier conference determined that the past-due support time period was from September 2012 through February 2013. Near the end of the hearing, and while determining the effective date of the child support order, Mother stated that Father had not served her with the "original papers" but later acknowledged that he had served her "last month, [in] February." The court later entered a child support order for current support of $585.22 per month effective March 1, 2013, with a past support judgment of $7,071.78. The court subsequently issued an amended child support order with the same current support amount but a past support judgment of $3,511.32.

¶4 Neither party asked the court to reconsider, amend, clarify, or set aside the amended child support order until September 2016, when Mother sought relief from the amended support order. She first argued that the order was void under ARFLP 85(C)(1)(d) because Father did not serve her with the petition to establish child support. She argued second that she was entitled to relief under ARFLP 85(C)(1)(f) because she had suffered an "extreme miscarriage of justice and prejudice." Specifically, she claimed that she had been deprived of a fair opportunity to present evidence about the child support calculation and that the court's order was contrary to the Child Support Guidelines. Mother also claimed that her motion for relief was made within a "reasonable time" because she submitted it within a few weeks of receiving the child support worksheet used in the order. Although Father did not respond to the motion, the state argued that the amended child support order was not void because Mother had waived that claim. Also, the State argued that her remaining due process claim was untimely. The court denied Mother's motion for relief in October 2016 without any express findings. Mother timely appeals.

DISCUSSION

I. THE CHILD SUPPORT ORDER WAS NOT VOID.

¶5 Mother claims that she was entitled to relief from the March 2013 child support order under ARFLP 85(C)(1)(d). She argues that the judgment was void because Father did not serve her with the petition underlying the amended child support order. The denial of an ARFLP 85(C) motion for relief is reviewed for an abuse of discretion. *In re Marriage of Dougall*, 234 Ariz. 2, 6, ¶ 11 (App. 2013). If a claim is made that the judgment is void, however, this Court reviews a decision on that claim de

novo. *Duckstein v. Wolf*, 230 Ariz. 227, 231, ¶ 8 (App. 2012). We conclude that the superior court's child support order was not void.

¶6 ARFLP 85(C)(1)(d) provides that the court may relieve a party from a final judgment if the judgment is void. A motion for relief usually must be filed within a reasonable time, but that limitation does not apply when an order is attacked as void. *Duckstein*, 230 Ariz. at 231–32, ¶ 9. However, a party "who appears in the matter and litigates it on the merits waives any objection over the failure to properly serve [her] with process." *State v. One Single Family Residence at 1810 East Second Ave.*, 193 Ariz. 1, 6 (App. 1997).

¶7 Here, assuming that Father did not serve Mother with the petition to establish child support in December 2012, Mother did receive notice of the petition and hearing regarding child support and accepted service in February 2013. Mother testified at the March 2013 hearing that Father had notified her of the hearing in February. Furthermore, Mother provided testimony relating to the court's child support calculation. Mother therefore waived her service of process argument by appearing and arguing the merits at the March 2013 hearing. As such, the court's amended child support order was not void, and the superior court did not abuse its discretion by denying Mother's motion on this ground.

II. MOTHER'S MOTION FOR RELIEF WAS UNTIMELY.

¶8 Mother also argues that she was entitled to relief under ARFLP 85(C)(1)(f) because she demonstrated exceptional circumstances that involved an extraordinary hardship upon her and resulted in a gross miscarriage of justice. Specifically, she asserts that the March 2013 hearing violated her due process rights because she was not allowed to fully participate and that the court's order for past child support violated the Child Support Guidelines and various sections of Title 25 of the Arizona Revised Statutes. Under ARFLP 85(C)(1)(f), the court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Relief under ARFLP 85(C)(1)(f), however, is available only when "the movant can show extraordinary hardship or injustice for a reason other than the five specified in [subsections (a)–(e)]." *See Rogone v. Correia*, 236 Ariz. 43, 48, ¶ 12 (App. 2014) (analyzing Ariz. R. Civ. P. 60—the rule ARFLP 85 and its subsections are based upon).

¶9 Here, the court had already entered default against Mother because she was over an hour late for the hearing. In an effort to help Mother, the court reopened the hearing to get her testimony regarding her

income rather than relying on Father's statements. Extracting factual findings from the parties' testimony was a difficult exercise. Despite multiple warnings from the court, including twice warning of possible contempt sanctions, Mother and Father continually interrupted one another and the court.[2]

¶10 Mother requested relief from the order over three years after it was issued, which was not a reasonable time considering the circumstances. First, Mother knew what information had and had not been disclosed to the superior court during the hearing, so she should have had a general idea about what information was included in the child support worksheet. Second, Mother could have easily informed the court that she had not received the child support worksheet. Third, Mother could have raised her issues in timely post-hearing motions under ARFLP 83 (Motion for New Trial or Amended Judgment) or 84 (Motion for Reconsideration or Clarification), but chose not to. Thus, Mother's lack of diligence does not entitle her to relief under ARFLP 85(C)(1)(f), and the superior court did not abuse its discretion by denying Mother's motion on this ground. Although the court did not provide findings for its denial of Mother's post-hearing motion, this court may affirm the superior court's decision if it was correct for any reason supported by the record. *See KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 236 Ariz. 326, 329, ¶ 14 (App. 2014).

CONCLUSION

¶11 For the foregoing reasons, we affirm.

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[2] Though the court was correct to reopen the hearing, and though the parties repeatedly disregarded the court's instructions to listen and cease interruptions, we are constrained to point out that Judge *Pro Tempore* Miller conducted the hearing in a manner unbecoming of the judiciary. During the hearing, the judge *pro tempore* told the litigants to "shut up," threatened them with contempt in which case they would go "right from here to jail" and stated that if contempt sanctions were issued, "you won't get your kids." Though we affirm for the legal reasons stated above, we do not condone such treatment of the public by the court; misbehavior by parties does not justify judicial intemperance. *See* Ariz. R. Sup. Ct. 81, Canon 2.8(B) (requiring judges to be patient, dignified, and courteous).

H O W E, J., specially concurring:

¶12 I join in the result the Majority reaches and in the legal analysis supporting that result. However, I do not join in the Majority's comments about the conduct of the judicial officer in this case. Whatever the validity of those comments, the judicial officer's conduct was not raised as an issue and played no part in this Court's resolution of the issues on appeal. Whether the conduct merits opprobrium is better left to the proper forum, the Arizona Commission on Judicial Conduct.

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