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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

In re the Marriage of:) No. 1 CA-CV 10-0550
)
RHONDA A. HOLLOWAY,) DEPARTMENT A
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules
FRANK L. GOODARD, JR.,) of Civil Appellate Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2002-090478

The Honorable M. Jean Hoag, Judge

REVERSED AND REMANDED

Law Offices of John Bednarz, P.C.
By John G. Bednarz
Attorneys for Petitioner/Appellant

Gilbert

Ritter Law Group, L.L.C.
By Matthew A. Ritter
Attorneys for Respondent/Appellee

Florence

J O H N S E N, Judge

¶1 Rhonda A. Holloway ("Mother") appeals the superior court's order granting her request to modify child support but

refusing to order payment retroactive to the date of the request. For the reasons set forth below, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶12 Mother and Frank L. Goodard ("Father") had three minor children together. They entered a consent decree of dissolution in 2002. The parties agreed in August 2006 that Father would pay \$41 a month in child support.

¶13 In February 2008, Mother filed a "Petition to Modify Parenting Time (Primary Residence) and Child Support." Mother asked the court to allow the children to live primarily with her and to make a corresponding adjustment to Father's child-support obligation. Trial was set for late September 2008. In the joint pretrial statement, Mother reasserted her request to have child support modified effective March 1, 2008, and the pretrial statement listed child-support worksheets and other financial materials as exhibits. Two months after trial, on November 25, 2008, the superior court ruled on Mother's parenting-time motion without deciding the request to modify child support.

¶14 Acrimony ensued between the parties over the next 14 months, and Father's allotted parenting time changed several times. Additionally, during that time, Father's child-support obligation for a fourth child by a different marriage ended, Father and his current wife had a new baby, daycare expenses

fluctuated, and the children's insurance coverage shifted from Father to Mother.

¶15 In early February 2010, some 14 months after the court granted Mother's request to alter parenting time, Mother filed a motion asking the court to rule on the pending request for more child support. Father did not respond to Mother's motion, and the court set trial for April 19, 2010. Shortly before trial, Father filed a "Unilateral Pretrial Statement" in which he objected to altering child support as of the date Mother filed her motion. He argued without elaboration that "controlling case law regarding laches" required dismissal of Mother's motion with prejudice. After taking evidence, the superior court adjusted Father's child-support obligation for March 1 through December 31, 2008 to \$285.29 a month; from January 1 through June 30, 2009, \$442.04 a month; from July 1 through September 30, 2009, \$581.16 a month; and from October 1, 2009 forward, \$898.29 a month.

¶16 The court, however, held laches barred Mother from recovering child support for any past period:

The Court does not find good cause for Mother's delay and further finds Father has met his burden of proof re: laches.

The delay, from March 1, 2008 to the filing request February 22, 2010, is prejudicial to Father in that it would be financially devastating to him . . . ; Mother accepted the \$41.00 a month since ordered on or about

August 16, 2006 and Father consistently paid this; both parties were aware the Court's order dated November 24, 2008 did not set forth a modified order for child support; and, Mother's explanation that she was waiting for things to calm down, or words to that [e]ffect, do not justify the delay as noted.

By this ruling the Court is not finding that \$41.00 was an adequate amount for Father to pay; nonetheless, the parties agreed to this and, therefore, Mother's request for retroactive child support shall not now be ordered.

¶17 Mother moved for a new trial, which was denied. She then timely appealed to this court. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(B) (2003).

DISCUSSION

¶18 We review a child-support order for an abuse of discretion. *Cummings v. Cummings*, 182 Ariz. 383, 385, 897 P.2d 685, 687 (App. 1994). An error of law may constitute an abuse of discretion. *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8, 200 P.3d 1043, 1045 (App. 2008). We accept the superior court's factual findings unless they are clearly erroneous or unsupported by the evidence, and we view the evidence in the light most favorable to upholding the superior court's decision. *In re Marriage of Yuro*, 192 Ariz. 568, 570, ¶ 3, 968 P.2d 1053, 1055 (App. 1998).

¶9 Laches is an affirmative defense that requires the opponent of a claim for past child support to demonstrate, by clear and compelling evidence, that the claimant unreasonably delayed in bringing the action and that the delay prejudiced the other. See *State v. Garcia*, 187 Ariz. 527, 528-29, 931 P.2d 427, 428-29 (App. 1996); *State ex rel. Dep't of Econ. Sec. v. Dodd*, 181 Ariz. 183, 188, 888 P.2d 1370, 1375 (App. 1994). "A noncustodial parent is not relieved of his or her child support obligations merely because the custodial parent is dilatory in bringing a claim for support arrearages." *Schnepp v. State ex rel. Dep't of Econ. Sec.*, 183 Ariz. 24, 30, 899 P.2d 185, 191 (App. 1995).

¶10 We see nothing in the record explaining why the superior court failed to rule on Mother's request to modify child support following the September 2008 trial. The judge assigned to the matter in 2010 remarked that the prior judge must have overlooked the issue, and we presume that to be the case. But Father cites no authority for the proposition that a motion for modification of child support is barred by laches when an oversight by the court delays resolution of the motion.

¶11 Laches may be proven when a spouse is tardy in bringing an action to establish a right to child support or an action to recover past-due child support. See *Garcia*, 187 Ariz. at 528-29, 931 P.2d at 428-29; *Schnepp*, 183 Ariz. at 30, 899

P.2d at 191. But the defense does not apply to a motion to modify child support, which necessarily may result in a modification of support only going forward from the date of filing. See A.R.S. § 25-327(A) (2007). Moreover, Mother did not fail to "timely bring" an action; the superior court failed to timely rule on her motion. We know of no authority holding that laches applies when a parent waits 14 months to remind the court that it has failed to rule on a pending motion to modify child support. Cf. *Yuro*, 192 Ariz. at 573, 968 P.2d at 1058 (a delay of "two, maybe three, maybe four years" in seeking to collect child-support arrearages was not unreasonable) (internal quotation marks omitted); *Schnepf*, 183 Ariz. at 30, 899 P.2d 185 at 191 (six-year delay in seeking to collect arrearages was not unreasonable; citing with approval other jurisdictions' decisions that 11-year and 14-year delays did not bar recovery of arrearages based on laches); *Dodd*, 181 Ariz. at 188, 888 P.2d at 1375 (nine-year delay in pursuing arrearage was not unreasonable when mother believed father did not have the resources to pay).

¶12 The superior court also erred by finding Father would be prejudiced if he were ordered to pay modified child support from the date of Mother's motion. Prejudice for purposes of laches requires more than financial hardship. See *Anonymous Wife v. Anonymous Husband*, 153 Ariz. 573, 577-78, 739 P.2d 794,

798-99 (1987) (financial disruption caused by a ten-year delay in seeking child support did not establish laches when father knew another was bearing the financial burden for his child); *Yuro*, 192 Ariz. at 574, ¶ 17, 968 P.2d at 1059 (refusing to accept father's argument that he was prejudiced because mother's delay in claiming back child support resulted in an increased financial burden due to compound interest on arrearage).

¶13 Rather, prejudice for purposes of laches in this context requires the noncustodial parent to have changed position or undertaken an obligation that he or she would not have pursued with knowledge of the pending child-support obligation. See *In re Paternity of Gloria*, 194 Ariz. 201, 203, ¶ 13, 979 P.2d 529, 531 (App. 1998) ("Laches . . . applies when the party asserting the defense shows that, because of delay or lapse of time, he/she is injured or has changed position in reliance on the other party's inaction."); *Garcia*, 187 Ariz. at 529, 931 P.2d at 429 (16-year delay in seeking child-support arrearages prejudiced noncustodial parent in part based on his testimony that he would have had fewer subsequent children had he known of his son); *Schnepp*, 183 Ariz. at 30, 899 P.2d at 191 (evidence insufficient because noncustodial parent "failed to show that he undertook any obligation that he would have forsaken if he had believed he was still required to pay child support").

¶14 Father cannot establish laches because he cannot show he was unaware of the possibility that the court would grant Mother's motion to modify child support. Moreover, the record contains no evidence of prejudice. At the hearing, Father objected only that arrearages would amount to a "huge debt." He did not testify he undertook an obligation he otherwise would have forsaken; nor did he explain how he relied to his detriment on the court's delay in ruling on Mother's motion. Moreover, Father never claimed, nor does the record reveal, a substantial change in his financial situation (other than being relieved of one child-support payment from a different marriage) during the period that Mother's motion was pending.¹

¶15 The superior court further found Mother's acceptance of \$41 per month was evidence supporting laches. But a parent's agreement to accept reduced child-support payments does not bar a claim for arrearages. *Dodd*, 181 Ariz. at 187, 888 P.2d at 1374; *accord Yuro*, 192 Ariz. at 574, ¶ 17, 968 P.2d at 1059 (rejecting husband's assertion that wife's acceptance of his payments "effectively conveyed the message that . . . she agreed [they were correct]") (citing *In re Marriage of Ward*, 35 Cal. Rptr. 2d 32 (App. 1994)).

¹ In 2008, Father reported that he earned \$18.13 per hour; at the time of the evidentiary hearing the following year, he was earning \$18.58 per hour. Father further reported the birth of another child, but the superior court, in its discretion, excluded the after-born child from its calculus.

CONCLUSION

¶16 For the reasons set forth above, we reverse and remand for further proceedings consistent with this decision. Mother requests her attorney's fees on appeal. We deny the request because she fails to cite any substantive authority for her request. See *Ezell v. Quon*, 224 Ariz. 532, 539, ¶ 31, 233 P.3d 645, 652 (App. 2010). However, as the prevailing party on appeal, Mother is entitled to an award of her costs incurred in the appeal upon compliance with ARCAP 21. A.R.S. § 12-341 (2003); see *Chopin v. Chopin*, 224 Ariz. 425, 432, ¶ 24, 232 P.3d 99, 106 (App. 2010).

/s/

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

JON W. THOMPSON, Judge