IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF:

BARBARA J. NOEL,
Petitioner/Appellee,

AND

DAVID W. NOEL,
Respondent/Appellant.

No. 2 CA-CV 2012-0147
Filed November 26, 2013

Appeal from the Superior Court in Pima County
No. D20111201
The Honorable Wayne E. Yehling, Judge

AFFIRMED

COUNSEL

Mesch, Clark & Rothschild, P.C., Tucson
By Gary J. Cohen
Counsel for Petitioner/Appellee

Patricia A. Taylor, Tucson
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

K E L L Y, Presiding Judge:

¶1 David Noel appeals from the trial court's order affirming an earlier amended decree of dissolution that had ordered him to pay spousal maintenance to his former spouse Barbara Noel. David argues the court erred by failing to terminate his spousal maintenance obligation and by denying his request for numerous credits or offsets against that obligation.[1] We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *In re Marriage of Downing*, 228 Ariz. 298, ¶ 2, 265 P.3d 1097 (App. 2011). The court entered a decree of dissolution in 2002, finding that David and Barbara had entered into a Property Settlement Agreement and a Partial Marital Settlement Agreement, and that the terms were "fair and equitable." It ordered the parties to comply with the agreements, which were attached to the decree and incorporated by reference. The Partial Marital Settlement Agreement provided that David would pay Barbara $6,000 per month in spousal maintenance through August 2011; however, in the Property Settlement Agreement the parties "forever waive[d] any claim for spousal maintenance." Both agreements provided they could be modified if certain formalities were met.

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[1]On appeal, David does not challenge the trial court's entry of a $27,000 judgment against him for payments he agreed to make in exchange for Barbara's interest in his retirement account, nor does he challenge the court's $17,000 award to Barbara for her attorney fees and costs.

¶3 In 2004, the court accepted a stipulated amendment to the agreements, which removed the provision waiving the parties' claims to spousal maintenance and replaced it with a provision matching the Partial Marital Settlement Agreement provision ordering David to pay Barbara $6,000 per month in spousal maintenance through August 2011. In 2008, the court accepted the most recent stipulated amendment, which changed David's spousal maintenance obligation to $3,000 per month through September 2017.

¶4 David made spousal maintenance payments for over nine years. In April 2011, Barbara filed a petition for post-decree relief and asked the court to hold David in contempt, alleging in relevant part that he had failed to pay spousal maintenance for three months beginning in December 2010 and requesting a judgment for the amount owed. David filed a petition in July 2011, alleging the previous spousal maintenance awards were invalid and requesting, inter alia, the following relief: termination of any future spousal maintenance obligation, credits against any obligations, and an accounting of the proceeds from Barbara's sale of an insurance business.

¶5 The trial court conducted evidentiary hearings on the petitions over the course of seven days. The court affirmed David's spousal maintenance obligation pursuant to the 2008 amended decree of dissolution and denied his request for offsets against that obligation. It declined to address David's argument regarding the sale of the insurance business, concluding it was "not appropriate" to discuss property not disposed of in the decree in an action to enforce the decree. This appeal followed.[2]

[2]Barbara initially filed a cross-appeal, which she has since abandoned.

Discussion

Spousal Maintenance Obligation

¶6 David first argues the trial court erred by failing to terminate his spousal maintenance obligation. The court agreed with David that the original decree had not included a provision requiring him to pay spousal maintenance and that Barbara did not meet the criteria for maintenance under A.R.S. § 25-319(A). Nonetheless, the court observed that David was "mounting a collateral attack" on the amended decrees, which he had failed to appeal, by challenging their validity during these post-decree proceedings. The court concluded the decrees were not subject to collateral attack, and that David therefore was precluded from raising any arguments he could have raised on direct appeal. *See Duncan v. Progressive Preferred Ins. Co. ex rel. Estate of Pop*, 228 Ariz. 3, ¶ 13, 261 P.3d 778, 782 (App. 2011) (final judgment cannot be collaterally attacked, even if erroneous and reversible on appeal, unless void for lack of jurisdiction).

¶7 We review a trial court's ruling on a petition for modification of spousal maintenance for an abuse of discretion, *In re Marriage of Priessman*, 228 Ariz. 336, ¶ 7, 266 P.3d 362, 364 (App. 2011), but review de novo legal questions, including the application of res judicata, *Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, ¶ 10, 53 P.3d 1139, 1142 (App. 2002).

¶8 On appeal, David fails to address the trial court's ultimate conclusion that he is barred from raising any argument he could have raised in the dissolution proceedings. Instead, he raises the same arguments the court found precluded below: that the court had erred by accepting the parties' stipulated spousal maintenance awards because Barbara did not meet the requirements of § 25-319(A), the court "had no jurisdiction" to award spousal maintenance when there had been no award in the original decree,

that Barbara had "waived forever" her right to spousal maintenance, and that the award was "a disguised property settlement."[3]

¶9 We agree with the trial court's conclusion that David is precluded from raising those arguments in this proceeding. The doctrine of claim preclusion, or res judicata, bars a claim "'when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privies was, or might have been, determined in the former action.'" *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co.*, 231 Ariz. 517, ¶ 6, 297 P.3d 923, 925 (App. 2013), *quoting Hall v. Lalli*, 194 Ariz. 54, ¶ 7, 977 P.2d 776 (1999). The res judicata consequences of a final judgment are not affected by the fact that the judgment may have been erroneous. *Rodriguez v. Rodriguez*, 133 Ariz. 88, 88, 649 P.2d 291, 291 (App. 1982). The doctrine "provides finality and deters harassment of former litigants." *Hall*, 194 Ariz. 54, ¶ 6, 977 P.2d at 779.

¶10 Claim preclusion applies to decrees of dissolution and their incorporated agreements. *See De Gryse v. De Gryse*, 135 Ariz. 335, 337, 661 P.2d 185, 187 (1983) (doctrine applies to final decree of dissolution); *LaPrade v. LaPrade*, 189 Ariz. 243, 247, 941 P.2d 1268, 1272 (1997) (incorporation of agreement renders it res judicata in subsequent action). A petition for post-decree relief commences a new proceeding. *Williams v. Williams*, 228 Ariz. 160, ¶ 24, 264 P.3d 870, 876 (App. 2011); Ariz. R. Fam. Law P. 3(B)(5) (petition is initial pleading commencing post-decree matter). Although claim preclusion does not prevent a party from petitioning for a modification of spousal maintenance based on changed circumstances since the dissolution, it does prevent him or her "from obtaining a modification . . . based on facts which could have been

[3] David also challenges Barbara's writ of garnishment by stating "[t]here was no outstanding judgment upon which to garnish." Because he does not support or develop this argument further, we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007).

raised at the dissolution hearing." *See In re Marriage of Rowe*, 117 Ariz. 474, 475-76, 573 P.2d 874, 875-76 (1978).

¶11 David is precluded from raising in this action any issue that might have been determined in the dissolution proceedings, including upon direct appeal from the amended decrees. *See id.* David's arguments challenge the validity of the amended dissolution decrees at the time they were entered. Although he made a brief reference to changed circumstances in his petition, he did not develop an argument based on changed circumstances below and does not raise the issue on appeal. Therefore, his arguments regarding failure to terminate spousal maintenance are subject to claim preclusion.

¶12 However, because res judicata applies only to judgments "rendered by a court of competent jurisdiction," *Tumacacori*, 231 Ariz. 517, ¶ 6, 297 P.3d at 925, we must briefly address David's argument that the trial court "ha[d] no jurisdiction" to enter a spousal maintenance award. A judgment is void if it is "rendered by a court [that] lacked jurisdiction, either of the subject matter or the parties." *Auman v. Auman*, 134 Ariz. 40, 42, 653 P.2d 688, 690 (1982). By contrast, if a judgment was issued by a court with jurisdiction, but is subject to reversal on appeal, it is merely erroneous and retains its preclusive effect. *Id.*

¶13 Jurisdiction over dissolution proceedings is conferred by statute. *Weaver v. Weaver*, 131 Ariz. 586, 587, 643 P.2d 499, 500 (1982). "The superior court is vested with original jurisdiction to hear and decide all matters arising pursuant to [title 25, chapter 3]," which provides for dissolution of marriages. A.R.S. § 25-311(A). Within that chapter, A.R.S. § 25-317 "allows the parties [to a dissolution action] to reach their own agreement as to . . . spousal maintenance," the terms of which are binding upon the court unless it finds them unfair. *Marquez v. Marquez*, 132 Ariz. 593, 595, 647 P.2d 1191, 1193 (App. 1982). Therefore, once a court has jurisdiction over a divorce and personal jurisdiction over both parties, it has authority to determine all questions concerning the divorce, including stipulated rights to maintenance. *See Auman*, 134 Ariz. at 42, 653 P.2d at 690; § 25-317. It is undisputed that the trial court in this case had jurisdiction over the parties and their divorce. Therefore, its

orders amending the dissolution decrees, even if erroneous, were not void for lack of jurisdiction.

¶14 The cases upon which David relies to attack the trial court's jurisdiction do not affect our analysis. Even assuming, without deciding, that those cases describe limits on the court's jurisdiction, rather than the proper exercise of its authority,[4] they discuss the proper application of A.R.S. § 25-319, which is not at issue here. *See, e.g.*, *Neal v. Neal*, 116 Ariz. 590, 592-93, 570 P.2d 758, 760-61 (1977) (pursuant to § 25-319, spouse must qualify for spousal maintenance at the time of dissolution); *see also Birt v. Birt*, 208 Ariz. 546, n.6, 96 P.3d 544, 550 n.6 (App. 2004) (where decree had not provided for maintenance, wife could not later seek modification to provide for maintenance under § 25-319), *citing Neal*, 116 Ariz. 590, 592-93, 570 P.2d at 760-61 *and Long v. Long*, 39 Ariz. 271, 5 P.2d 1047 (1931). Section 25-319 does not govern stipulated maintenance orders. This court recognized this distinction in *Marquez v. Marquez*, where a husband argued his wife no longer qualified to receive maintenance pursuant to § 25-319 because she was able to support herself. 132 Ariz. at 595, 647 P.2d at 1193. We rejected that argument, observing that the parties' stipulated maintenance agreement was governed by § 25-317, not by § 25-319. *Id.* The husband, therefore, was required to show a substantial and continuing change of circumstances after the agreement, pursuant to A.R.S. § 25-327. *Id.*

¶15 The trial court properly concluded that David was precluded from raising in this action any issue that might have been determined in the dissolution proceedings. Therefore, it did not err by refusing to terminate David's spousal maintenance obligation.

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[4]As the Arizona Supreme Court noted in *Cockerham v. Zikratch*, courts in some instances have improperly used the term jurisdiction "'when, in reality, they meant, not the power to perform a certain act, but the performing of it when it was prohibited, a very different thing.'" 127 Ariz. 230, 235, 619 P.2d 739, 744 (1980), *quoting Collins v. Superior Court*, 48 Ariz. 381, 392-93, 62 P.2d 131, 137 (1936).

Offsets

¶16 David argues he was entitled to "significant offsets" against Barbara's claims, including credit for Barbara's sale of an insurance business that was not divided in the dissolution decree. The trial court refused to address David's request to have Barbara "account . . . for his share of the [insurance business sale] proceeds," concluding "discussion of property not disposed of in the Decree of Dissolution of Marriage or Marital Settlement Agreements [wa]s not appropriate in this action, which is to enforce the terms of the Decree." The court resolved his remaining offset claims by making factual determinations based on the evidence in the record. We review legal questions de novo, *Better Homes Constr., Inc.*, 203 Ariz. 295, ¶ 10, 53 P.3d at 1142, but defer to the court's factual determinations unless they are clearly erroneous or unsupported by credible evidence, *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, ¶ 11, 189 P.3d 1114, 1119 (App. 2008).

¶17 David has failed to develop or support his offset arguments on appeal, and they therefore are waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument "shall contain . . . citations to the authorities, statutes and parts of the record relied on"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007). He alleges he made extra spousal maintenance payments, life insurance premium payments, and payments on a construction loan. He also alleges Barbara was "unjustly enriched" when he deeded a Ventana Canyon property to her. He provides no citations to the record that would support the dollar amounts he has included, the obligations to which he refers, or the payments he claims to have made. Moreover, David has failed to address or challenge any of the court's factual findings supporting its rejection of his offset claims.

¶18 In a related argument, David contends the trial court's "fail[ure] to determine the issue" of whether he was entitled to proceeds from Barbara's sale of the insurance business violated his due process rights. However, unlike spousal maintenance, property settlements are not subject to modification or termination absent conditions to justify reopening the judgment. § 25-327(A); *LaPrade*, 189 Ariz. at 246, 941 P.2d at 1271. And David's argument critiques only the post-decree proceedings; he has failed to explain how the

dissolution proceedings failed to provide him adequate process concerning the parties' division of property. Therefore, we cannot conclude his due process rights were violated by the court's refusal to address the issue in this proceeding.

Conclusion

¶19 For the foregoing reasons, the trial court's judgment is affirmed. Barbara has requested an award of attorney fees pursuant to A.R.S. § 12-341.01 and the parties' agreement. Upon her compliance with Rule 21, Ariz. R. Civ. App. P., we award Barbara her reasonable attorney fees on appeal.