IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

CINDIE CHARLOTTE LEWELLEN,
Petitioner/Appellant,

and

ROSARIO ANDRES RIVERA,
Respondent/Appellee.

No. 2 CA-CV 2020-0007-FC
Filed December 23, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20191038
The Honorable Helena S. Seymour, Judge Pro Tempore
The Honorable Renee T. Bennett, Judge

AFFIRMED

COUNSEL

Law Offices of Joseph Mendoza PLLC, Tucson
By Joseph Mendoza
Counsel for Petitioner/Appellant

Gilbert Law Firm, Tucson
By Thea M. Gilbert
Counsel for Respondent/Appellee

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Cindie Lewellen appeals from the trial court's November 2019 minute entry order terminating spousal maintenance payments by her former spouse, Rosario Rivera. Lewellen argues the court abused its discretion by re-opening matters of spousal maintenance and, in doing so, violated Lewellen's procedural due process rights by not following the Arizona Rules of Family Law Procedure. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Lewellen filed a petition for dissolution of marriage from Rivera in April 2019, requesting, inter alia, $500 per month spousal maintenance. Rivera accepted service of the petition but did not file a response. Lewellen then filed an application for default. At the default hearing in June 2019, a family court commissioner signed the dissolution decree, finding Lewellen entitled to the requested monthly maintenance award, with the duration "to be determined." The decree was ostensibly entered as a final one, however, the matter was referred to a trial judge to determine the duration of spousal maintenance.[1]

¶3 Lewellen was directed to file a motion regarding the duration of spousal maintenance and did so in June 2019. In the motion, she

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[1]Although the decree was signed and entered "under Rule 78(b)," Ariz. R. Fam. Law P., it was not final. To constitute a final order, the decree must include an express determination that there was no reason for delay. *Camasura v. Camasura*, 238 Ariz. 179, ¶ 7 (App. 2015). Because the court did not include such a determination in the decree and because the issue of duration was still pending, the judgment was not final under Rule 78(b). *See Natale v. Natale*, 234 Ariz. 507, ¶ 9 (App. 2014) (family court ruling that resolves some but not all pending issues and lacks certification of finality not final).

acknowledged she had failed to include a duration in her petition and requested maintenance for five years. At a September 2019 hearing, both parties appeared and the trial court heard from each. Because neither party had filed a financial affidavit or exchanged relevant financial information, the court determined it had insufficient information to rule on the duration issue and set the matter for trial, admonishing both parties regarding failure to appear. The court explained what information was needed, including financial affidavits, lists of witnesses and exhibits, and directed them to exchange information prior to the hearing pursuant to the rules of family law procedure. These requirements were repeated in the court's minute entry order following the hearing. In a separate order, the court also advised the parties of the factors it would consider when ruling on spousal maintenance duration at the October trial.

¶4 Rivera retained counsel who filed a notice of appearance in early October 2019, as well as a financial affidavit and pretrial statement. Around the same time, Lewellen filed her financial affidavit but not a pretrial statement.

¶5 In October 2019, the trial court recused from the case, and the new judge issued an order resetting the trial date for November 2019. Rivera filed a notice of disclosure to comply with the court's September order regarding exchange of pretrial statements and financial information. In early November 2019, Rivera filed a motion for reconsideration of spousal maintenance, for the first time asserting Lewellen was not entitled to any award of spousal maintenance. He also requested an award of attorney fees.

¶6 Lewellen failed to attend the November hearing. After taking Rivera's testimony and evidence as to the financial resources of the parties, the trial court found that the four months of spousal maintenance Rivera had already paid was "plenty based on all of the factors." Accordingly, the court ordered spousal maintenance terminated as of October 2019 and that Rivera owed no further maintenance payments. The court further found that, although Rivera's motion for reconsideration was not yet "before the [c]ourt," Lewellen had failed to prosecute her case, failed to file a pretrial statement, and failed to appear at the hearing, and therefore directed Rivera to file an affidavit of attorney fees.

¶7 In December 2019, Lewellen filed a notice of appeal from the trial court's ruling. Because the court had not yet ruled on Rivera's attorney fee request, however, and the court's order did not contain the finality certification required by Rule 78(c), Ariz. R. Fam. Law P., we stayed this

appeal until a final judgment was entered in February 2020. We now have jurisdiction pursuant to A.R.S. § 12-2101(A).

Discussion

¶8 In challenging the trial court's conclusion that four months of spousal maintenance was sufficient, Lewellen argues that the initial deferment of a duration determination was an abuse of discretion, allowing Rivera to present evidence on the issue of duration, compounded by the court's failure to "adhere[] to any of the Arizona Rules of Family Law Procedure."

¶9 A spousal maintenance order "shall be in an amount and for a period of time as the court deems just." A.R.S. § 25-319(B). The trial court has substantial discretion to determine the duration and amount of spousal maintenance. *See Rainwater v. Rainwater*, 177 Ariz. 500, 502 (App. 1993). In setting the amount and duration of an award, the court is to consider "all relevant factors," including thirteen criteria enumerated in § 25-319(B). *Id.* We review a spousal maintenance award for abuse of discretion, *Sherman v. Sherman*, 241 Ariz. 110, ¶ 17 (App. 2016), considering first whether the spouse "meets the statutory requirements for maintenance set out in A.R.S. § 25-319(A)" and second, "whether the trial court properly considered the factors listed in A.R.S. § 25-319(B)," *Thomas v. Thomas*, 142 Ariz. 386, 390 (App. 1984).

Deferral of Duration Determination

¶10 We preliminarily address Lewellen's claim that the court commissioner erred in not ordering a duration for spousal maintenance at the default hearing in June 2019 when "the petition and decree [were] in complete conformity." She argues the trial court then abused its discretion by "going outside of the [p]etition to determine relief that was not specifically sought in the [p]etition, that is the duration of spousal maintenance." Lewellen also argues that there is no requirement in the statute to include duration. We find her claims unpersuasive for several reasons.

¶11 First, Lewellen failed to complete the portion of the petition regarding the requested duration of spousal maintenance. In fact, she acknowledged in her subsequent motion for spousal maintenance duration that the court could not order maintenance in the decree of dissolution because Lewellen had "failed to add a date on the initial dissolution." Lewellen's petition form contains instructions to check or fill out the portion regarding duration, but she did neither. Because Lewellen failed to

provide the requisite information in her petition, we find no error in the court's decision to defer the issue of duration.

¶12 Lewellen alternatively claims the court commissioner abused its discretion because the duration "would continue as stated" pursuant to A.R.S. § 25-327(B). That statute provides "[u]nless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated on the death of either party or the remarriage of the party receiving maintenance." *Id.* The commissioner, however, expressly stated in the decree that duration was "to be determined," and § 25-327(B) therefore did not apply. Further, Lewellen specifically requested five years of spousal maintenance in her motion and subsequent testimony at the September 2019 hearing. While Lewellen now argues that she was relying on the language in the petition or that she sought to apply the duration set out in § 25-327(B), her own statements in writing and in testimony contradict this assertion. She also failed to object to the subsequent hearing or the court's original deferral of the duration issue. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (argument not made to trial court generally waived). We therefore find no abuse of discretion by the commissioner.

Taking Evidence on Duration of Spousal Maintenance

¶13 Lewellen next argues the trial court erred by allowing Rivera, who was "defaulted," to present evidence in "what was really a trial on spousal maintenance" and "by taking argument and evidence on [Rivera's] motion for reconsideration of spousal maintenance that was never filed." Rivera counters that Lewellen's claim that he was defaulted out of the case "is without merit" and "unsupported by legal authority," and argues that even if he were a defaulted party, the court permitting him to present evidence was "well within the purview" of Rule 44.2(d), Ariz. R. Fam. Law P. As noted above, we review a spousal maintenance award for abuse of discretion, *see Sherman*, 241 Ariz. 110, ¶ 17, but we evaluate the trial court's interpretation of a rule de novo, *Balestrieri v. Balestrieri,* 232 Ariz. 25, ¶ 3 (App. 2013).

¶14 "A default is effective [ten] days after the application for default is filed." Ariz. R. Fam. Law P. 44(a)(4). If a defaulted party appears, however, the trial court must allow him to participate in the hearing to determine "what relief is appropriate." Ariz. R. Fam. Law P. 44.2(d). Rule 44.2(c) permits the court to "conduct the hearing as necessary to resolve factual issues, determine the relief to be granted, and to enable the court to enter an appropriate decree or judgement." The court, however, may only

order a default hearing under Rule 44.2 "[i]f a party does not meet the requirements for obtaining" a default without a hearing under Rule 44.1. Ariz. R. Fam. Law P. 44.2(a). Rule 44.1 requires a party requesting spousal maintenance to "file a form substantially similar to Form 6, Rule 97, Default Information for Spousal Maintenance," with her application for default. Ariz. R. Fam. Law P. 44.1(f). And a "court may not enter a default judgment without a hearing that is different from what the petition requested." Ariz. R. Fam. Law P. 44.1(a)(1).

¶15 Lewellen's petition did not meet the requirements of Rule 44.1. She filed a form substantially similar to Form 6, but did not complete it, failing to provide information regarding duration, *see* Ariz. R. Fam. Law P. 44.1(f). Thus, the court commissioner could not enter a judgment including a duration for spousal maintenance because such a judgment would necessarily be "different from what [Lewellen's] petition requested." *See* Ariz. R. Fam. Law P. 44.1(a)(1). Lewellen filed her application for default in April 2019, and Rivera did not appear until September 2019. Despite the appearance of both parties, the trial court determined it could not enter an appropriate decree or judgment without more evidence and set an additional hearing at which the parties were to produce pretrial statements and various financial information. While Rivera was precluded from contesting other issues, including Lewellen's entitlement to spousal maintenance and its amount, the court allowed him to present evidence on the one issue that had not yet been determined: the duration of the maintenance award. Because these hearings were held to determine that issue, the court was within the purview of Rule 44.2(d) and therefore committed no error in allowing Rivera to participate. *See Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶ 23 (App. 2007) ("[E]ven when a default has been entered, a defaulted party has a right to participate in any further proceedings that will culminate in a judgment."); *see also* Ariz. R. Fam. Law P. 44.2(d) ("[I]f a defaulted party appears, the court must allow that party to participate in the hearing to determine what relief is appropriate.").

Due Process

¶16 Lewellen next argues the trial court violated the due process rights of both parties "by not adhering to any of" the Arizona Rules of Family Law Procedure. Due process claims are reviewed de novo. *Savord v. Morton*, 235 Ariz. 256, ¶ 16 (App. 2014). "Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Cook v. Losnegard*, 228 Ariz. 202, ¶ 18 (App. 2011).

¶17 Lewellen asserts she had a "reasonable expectation under the plain wording of the Default Decree that she would be awarded $500.00 per month until she remarried or deceased or until the death of Respondent," noting the decree has a box checked requiring payments "until all required payments have been made under this Decree" or until remarriage or death, and arguing "[n]one of this wording is stricken from the Decree." The decree, however, was clearly not in its final form. The court had added handwritten language to page two, reading "[d]uration to be determined" and on page seven stated that "there are still remaining issues." The obvious state of the decree, combined with the June 2019 minute entry order stating "this will not be a final judgment pending the Court's ruling re: spousal maintenance," clearly shows the issue of duration was not yet settled. Thus, contrary to Lewellen's assertion, she could not have had "a reasonable expectation" of maintenance until remarriage or death.

¶18 Lewellen also argues that her motion specifying duration was defective and therefore the trial court should have denied it or set a deadline for response, but not have set a hearing on the motion. By doing so, she claims the decree was improperly "re-opened" while the only legal bases to do so are to file a motion to alter or amend, a motion for clarification, a motion for relief from judgment, or a motion to modify under Rules 83, 84, 85, or 91.1, Ariz. R. Fam. Law P. However, because Lewellen challenges an alleged error that she invited, we will not reverse the trial court on this basis. *See State v. Logan*, 200 Ariz. 564, ¶¶ 9, 11 (2001) ("[W]e repeatedly have held, we will not find reversible error when the party complaining of it invited the error."); *In re Marriage of Thorn*, 235 Ariz. 216, ¶ 35 (App. 2014) (once party persuades lower court to take certain action, "he cannot [on appeal] argue it was erroneous").

¶19 Lewellen further claims that by failing to follow Rule 83, the trial court violated the due process rights of both parties and rendered voidable all other actions by the court in subsequent hearings. She asserts "the Court lacked subject matter jurisdiction to enter any order because the matter was not properly before the Court and the Court did not allow the parties their right to file a response and reply to the Petitioner's original Motion." She also claims "even though the court lacked . . . jurisdiction . . . its orders are void."

¶20 Legal issues, including whether a decree is void or voidable and the interpretation of court rules, are reviewed de novo. *Duckstein v. Wolf*, 230 Ariz. 227, ¶ 8 (App. 2012). Pursuant to A.R.S. § 25-319(D), the trial court retains jurisdiction over spousal maintenance for the period of time maintenance is awarded. *Schroeder v. Schroeder*, 161 Ariz. 316, 323 (1989).

Thus, even assuming, arguendo, that Lewellen's earlier claim of a valid and final decree awarding spousal maintenance until death or remarriage were correct, the court retained subject matter jurisdiction over her spousal maintenance award. *See Evitt v. Evitt*, 179 Ariz. 183, 184-85 (App. 1994) (trial court had jurisdiction to consider wife's petition when she filed it during thirty-six-month maintenance period); *see also* § 25-319(D). In fact, however, the issue of duration was not final, and regardless of procedural defects in Lewellen's motion, the requested duration of the spousal maintenance she was directed to provide, which was missing from her petition and proposed decree, was eventually presented in her motion for duration.[2]

Attorney Fees

¶21 Rivera requests attorney fees pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P., arguing Lewellen's appeal is without "sufficient legal support and relies on an improper legal contention." Although we have determined Lewellen's arguments lack merit, we do not find them so unreasonable as to justify being sanctioned and, in our discretion, we decline to award fees. *See In re Marriage of Friedman & Roels*, 244 Ariz. 111, ¶ 45 (2018) (award of attorney fees pursuant to § 25-324 within appellate court's discretion). As the prevailing party on appeal, however, Rivera is awarded his appellate costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶22 For the foregoing reasons, the judgment of the trial court is affirmed.

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[2]Rivera argues that Lewellen's due process claim should be rejected because her noncompliance with court orders and failure to appear "limited and perhaps precluded" the claim under Rule 76.2, Ariz. R. Fam. Law P. Because we resolve this issue on other grounds, we need not consider this argument.