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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: TRACY J. SHEEHAN, Petitioner/Appellee, and DAVID P. SHEEHAN, Respondent/Appellant.	2 CA-CV 2009-0161 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100DO200400956

Honorable Brenda E. Oldham, Judge

AFFIRMED

David Sheehan
In Propria Persona

Kingman

E C K E R S T R O M, Judge.

¶1 Appellant David Sheehan appeals from the trial court's orders denying his petition to modify parenting time and partially denying his petition to modify child support. His former wife, Tracy Sheehan, has not filed an answering brief, which we may regard as a confession of error on any debatable issue. *See In re Marriage of Diezsi*,

201 Ariz. 524, ¶ 2, 38 P.3d 1189, 1190 (App. 2002); *Guethe v. Truscott*, 185 Ariz. 29, 30, 912 P.2d 33, 34 (App. 1995). Nevertheless, because we find no error or abuse of discretion in the court's rulings that are properly before us, we affirm.

Factual and Procedural Background

¶2 David and Tracy Sheehan married and had a daughter together in 1998. Tracy filed a petition for dissolution of marriage on September 15, 2004. The couple had been living apart for over a year, and David was served with notice of the action by publication.

¶3 When David failed to appear or answer, default was entered. The trial court subsequently granted dissolution after a hearing in which only Tracy appeared and testified. The court awarded Tracy sole custody and granted David supervised visitation. The court also determined David was required to pay child support, including $10,685.08 in past support.[1] The court ordered David to pay $965.47 in monthly child support beginning June 1, 2005: $763.22 for prospective support, $200 for past support, and a monthly handling fee of $2.25. The court signed and entered the dissolution decree May 16, 2005.

¶4 In early 2008, while he was incarcerated, David filed several motions in this matter. Apart from providing David with copies of certain records he had requested, the trial court took no action on these motions because it determined they were post-

[1]*See* A.R.S. § 25-320(C) (allowing award of past child support to date parties separated).

decree motions that had not been served upon Tracy. The case was transferred to another judge in October 2008.

¶5 In March 2009, David filed a petition to modify child support. And in May 2009, he filed a petition to modify parenting time requesting that his sister—a grade school teacher with over twenty years' experience—be permitted to transport his daughter to prison and supervise their visits. The trial court found service had been properly effectuated and held a hearing in June 2009. Only David appeared and testified at the hearing.

¶6 The trial court subsequently denied the petition to modify parenting time and specifically denied David's request to have his sister facilitate visitation. The court granted the petition to modify child support in part, reducing the child support owed to $268.33 per month beginning April 1, 2009. The court denied David's request that this reduction be applied retroactively to the original child support order. The court also upheld the previous order for past child support and ordered that David continue to pay $200 per month to satisfy this obligation. The court entered its final orders on August 25, 2009. This appeal followed.[2]

[2]David's appeal from the August order was initially dismissed by this court as untimely, as it was technically filed beyond the thirty-day time period prescribed by Rule 9, Ariz. R. Civ. App. P. We later determined he had timely delivered a notice of appeal to prison authorities for mailing, and we reinstated the appeal.

Arrearages and Past Child Support

¶7 David contends the trial court erred in denying his request to reduce his child support obligation retroactively to the date of the original order. He also maintains the court erred in affirming the judgment for over $10,000 in past care and support. But these arguments incorrectly assume that the court had the authority to retroactively modify the child support orders entered in 2005.

¶8 In Arizona, each monthly installment of child support vests when it becomes due, making it "in the nature of a final judgment[,] conclusively establishing the rights and duties of the parties to that installment." *Jarvis v. Jarvis*, 27 Ariz. App. 266, 267-68, 553 P.2d 1251, 1252-53 (1976); *accord Martin v. Martin*, 198 Ariz. 135, ¶ 14, 7 P.3d 144, 147 (App. 2000); *In re Marriage of Ramirez*, 173 Ariz. 135, 137, 840 P.2d 311, 313 (App. 1992). A trial court therefore may not modify a support order retroactively. *See Ray v. Mangum*, 163 Ariz. 329, 332, 788 P.2d 62, 65 (1989); *Hatch v. Hatch*, 113 Ariz. 130, 134, 547 P.2d 1044, 1048 (1976).

¶9 Although our statutes offer obligor parents some relief from support payments that become due while a motion to modify is pending, *see* A.R.S. § 25-327(A), nothing in our code allows the broad retroactive reduction of child support that David sought below. Section 25-327(A) prohibits the modification of a child support provision "as to any amount that may have accrued as an arrearage," and the statute specifies that a modification order will have no effect on support due "earlier than the date of the filing of the petition for modification." A companion statute, A.R.S. § 25-503(E), provides, in

applicable part: "Any order for child support may be modified . . . on a showing of changed circumstance that is substantial and continuing, except as to any amount that may have accrued as an arrearage before the date of notice of the motion or order to show cause to modify . . . ." Accordingly, we have consistently held "under the plain language of §§ 25-327(A) and -503(E), the [trial] court cannot modify a child support award to alter the amount of arrearages accrued before notice of the petition to modify is given to the other parent." *Guerra v. Bejarano*, 212 Ariz. 442, ¶ 7, 133 P.3d 752, 754 (App. 2006).

¶10 Here, the trial court did, in fact, retroactively reduce child support as permitted by § 25-327(A), ordering that the modification take effect April 1, 2009, which was the first day of the month following notice of the petition for modification. However, the court lacked authority to grant the fully retroactive reduction David had requested. Indeed, our supreme court has suggested that a court lacks jurisdiction to do so. *Hatch*, 113 Ariz. at 134, 547 P.2d at 1048. We therefore need not pass upon the court's refusal to "modify" the child support ordered in 2005 by reducing the amount of arrearages owed. Similarly, in regard to the past child support ordered pursuant to A.R.S. § 25-320(C), the absence of a timely appeal deprives this court of jurisdiction to review that award. *See* Ariz. R. Civ. App. P. 9 (specifying time for appeal); *Patterson v. Patterson*, 102 Ariz. 410, 414-15, 432 P.2d 143, 147-48 (1967) (failure to appeal prior support orders deprived appellate court of jurisdiction to review them).

¶11 To the extent David wished to challenge the trial court's support orders entered in 2005, he could have done so either by appeal or by filing a motion for a new trial, *see* Ariz. R. Fam. Law P. 83(G)(1), or a motion to set aside the judgment. *See* Ariz. R. Fam. Law P. 44(C), 85(C).[3] But he may not avoid child support obligations he has already incurred pursuant to those orders by seeking a modification under Rule 91, Ariz. R. Fam. Law P. *See* § 25-327(A); *Ray*, 163 Ariz. at 332, 788 P.2d at 65.

¶12 Ultimately, we have jurisdiction over the trial court's rulings on David's modification petitions pursuant to A.R.S. §§ 12-120.21(A) and 12-2101.[4] *See Cone v. Righetti*, 73 Ariz. 271, 274-75, 240 P.2d 541, 543 (1952) (holding order modifying child support, custody, and visitation appealable "special order" under predecessor statute to § 12-2101). However, any issue relating to arrearages or the award of past child support is not before this court.

Modified Child Support

¶13 David next argues the trial court's modified child support order is erroneous because the court incorrectly determined his adjusted gross monthly income.

[3]Rule 85(C)(3), Ariz. R. Fam. Law P., also expressly allows parties to bring an "independent action" to challenge a judgment. A petition for modification does not initiate an action attacking a prior judgment.

[4]Our courts have identified different subsections of A.R.S. § 12-1201 as rendering rulings on modification petitions appealable. *Compare Engel v. Landman*, 221 Ariz. 504, ¶¶ 3-7, 212 P.3d 842, 845-46 (App. 2009) (finding jurisdiction to consider order modifying child support based on § 12-2101(C), which concerns "special order[s] made after final judgment"), *with Strait v. Strait*, 223 Ariz. 500, ¶¶ 4-5, 224 P.3d 997, 998-99 (App. 2010) (finding jurisdiction based on § 12-2101(E), which concerns a "final order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment").

Specifically, he claims the court failed to take account of his permanent disability and the fact that his incarceration prevented him from earning wages above forty cents per hour. In calculating David's child support obligation, the court determined he had a gross monthly income of $1,247 by "using a figure of $7.25 per hour while [David] is in prison."

¶14 As David suggests, evidence of an obligor parent's incarceration is indeed *prima facie* evidence rebutting the presumption that he or she is capable of earning minimum wage under what is now A.R.S. § 25-320(N). *See State ex rel. Dep't of Econ. Sec. v. McEvoy*, 191 Ariz. 350, ¶¶ 17-18, 955 P.2d 988, 992 (App. 1998). However, "incarceration alone is not a sufficient ground for relieving a parent of his obligation to support his children," but rather one factor to be considered when determining the appropriate amount of child support. *State ex rel. Dep't of Econ. Sec. v. Ayala*, 185 Ariz. 314, 315, 317, 916 P.2d 504, 505, 507 (App. 1996); *accord Ariz. Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 111, 945 P.2d 828, 832 (App. 1997). Other factors include the parent's "available assets and income or possible income," as from jobs obtained in prison or through work-release, as well as the parent's reduced living expenses. *Ayala*, 185 Ariz. at 317-18, 916 P.2d at 507-08; *accord McEvoy*, 191 Ariz. 350, ¶¶ 11, 19, 955 P.2d at 991, 992.

¶15 Because David has not provided us a transcript from the hearing below, we cannot determine whether the trial court erroneously attributed minimum-wage income to him that he was incapable of earning while incarcerated or whether the court properly

determined his gross monthly income based on David's own testimony about his assets, income, potential income, and expenses while in prison—and merely used the minimum wage as a rough framework for doing so. We presume the missing portions of the record support a trial court's ruling. *Valentine*, 190 Ariz. at 110, 945 P.2d at 831. Accordingly, we will not disturb the court's findings or modified support order.

¶16 In regard to David's disability, specifically, we note that he admits in his opening brief he was working for wages while he was imprisoned. We therefore find no basis to disturb the trial court's finding that David was capable of earning some wages in prison. And nothing in the record precludes a finding that David will be capable of earning wages when he is released, notwithstanding his disability.

Parenting Time

¶17 David contends the trial court abused its discretion in refusing to allow his sister to facilitate visitation by bringing his daughter to see him in prison. An incarcerated parent retains his constitutional rights to companionship and association with his children, *Michael M. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 198, ¶ 8, 42 P.3d 1163, 1165 (App. 2002), and we generally review a court's ruling regarding parenting time for an abuse of the court's broad discretion. *See Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970); *Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 375-76, 873 P.2d 710, 713-14 (App. 1994). However, given the incomplete record before us, we are unable to determine whether the court abused its discretion in denying the request here.

¶18 As we have previously noted, David did not include in the record on appeal a transcript of the hearing on his motion. We presume trial courts know and correctly apply the law, *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 32, 97 P.3d 876, 883 (App. 2004), and we assume any missing portion of the record supports a court's ruling. *Hardin v. Hardin*, 163 Ariz. 501, 502-03, 788 P.2d 1252, 1253-54 (App. 1990). Accordingly, we have no basis on the record before us to disturb the court's ruling denying David's motion. We have no indication, for instance, that David's sister was in fact willing to supervise and facilitate his visits with his daughter. We therefore affirm the court's ruling.

Bias

¶19 David suggests throughout his opening brief that the trial court was biased and "demonstrated extreme prejudice toward" him, violating his Fourteenth Amendment right to fair judicial proceedings. We generally presume trial judges are free from bias and prejudice and require that a party seeking to prove otherwise do so by a preponderance of the evidence. *State v. Hurley*, 197 Ariz. 400, ¶ 24, 4 P.3d 455, 459-60 (App. 2000). David did not move below to change judges for cause, *see* A.R.S. § 12-409; Ariz. R. Civ. P. 42(f)(2), and he points to no evidence of judicial bias on appeal other than the court's rulings denying his requested relief. *See State v. Henry*, 189 Ariz. 542, 546, 955 P.2d 57, 61 (1997) (observing opinions based on facts ordinarily not evidence of bias). As noted above, David was granted partial relief on his motion to modify child support. Because he has presented no evidence of bias, much less proof by a

preponderance of the evidence, he has failed to rebut the presumption that the court was fair and impartial.

Disposition

¶20 For the foregoing reasons, we affirm the trial court's orders.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge