IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06-17-2010
PHILIP G. URRY, CLERK
BY: PJL

IN RE THE MARRIAGE OF:	)	No. 1 CA-CV 09-0588
	)	
RAY VILLANUEVA,	)	DEPARTMENT B
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	Not for Publication -
	)	(Rule 28, Arizona Rules
LINDA VILLANUEVA	)	of Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. DR1992-003878

The Honorable Randall Warner, Judge

REVERSED AND REMANDED

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Attorneys for Respondent/Appellant

G E M M I L L, Judge

¶1 Linda Villanueva ("Mother") appeals from the trial

court's order denying her motion for a nunc pro tunc child support order and granting Ray Villanueva's ("Father's") motion to dismiss. For the following reasons, we reverse the dismissal of Mother's motion and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Father married in April 1989 and had a child in 1991. Their marriage was dissolved in 1994. The parents were ordered to share custody of the child, and agreed that Mother would be the primary residential parent. In August 1995, Father filed a petition to modify child support and custody. The court granted Father's petition, awarded him sole custody, and ordered Mother to pay Father $274 per month in child support.

¶3 In March 2006, the child went to Mother's house for a regularly scheduled visit and refused to return to Father's care. On June 14, 2006, Mother petitioned the court for a modification of custody. The petition requested that the court grant the parties joint legal custody and designate Mother as the primary residential parent. Mother also requested that the court modify child support.

¶4 Before a hearing was held, the parties reached an agreement that Mother would be the child's primary residential parent and that the issue of child support should be sent to Family Court Administration Expedited Services ("Expedited

Services"). On September 12, 2006, the court entered a signed minute entry order approving and adopting the parties' agreement. The court referred the matter to Expedited Services "for an arrearage calculation and a recommendation for payment of the arrearage, if any." The court also ordered Expedited Services to "assist the parties in calculating a possible modification of child support based on changed circumstances and/or income" and ordered the parties "to comply with all instructions and directives of Expedited Services."

¶5 Expedited Services scheduled a conference for January 19, 2007. Father and his attorney did not attend and the record does not contain a report or transcript from the conference. Mother and her attorney attended the conference. Mother claims that during the conference the Expedited Services Hearing Officer decided that Father's absence indicated his consent to whatever was decided with regard to child support. According to Mother, Expedited Services recommended that Father pay Mother $576 in child support per month. Expedited Services also recommended, according to Mother, that Father's support payments be deferred until January 2008, because Mother owed Father child support arrearages. The court, however, never received a report with the Expedited Services' recommendations and, consequently, no final child support order was entered. Neither party has made child support payments since April 2006.

¶6 On March 31, 2009, Mother filed a motion requesting that the court issue an order nunc pro tunc that would incorporate and endorse "the agreement of the parties reached during the Expedited Services conference on January 19, 2007." Specifically, Mother requested that the court award her $576 in child support from January 2008 until Victor reached the age of majority or graduated from high school. Alternatively, Mother requested that the court set a status conference at the earliest possible date.

¶7 In response to Mother's motion, Father filed a motion to dismiss pursuant Arizona Rules of Family Law Procedure 32(b)(6). In his motion, Father informed the court that he did not attend the January 2007 Expedited Services conference and, as a result, the parties did not reach an agreement regarding child support during the conference. Father argued that the court should dismiss Mother's motion because she failed to prosecute her June 2006 request to modify child support and because she had intentionally abandoned or waived her claim for child support.

¶8 On May 5, 2009, Mother filed a response to Father's motion to dismiss. In the response, Mother's counsel stated that he was mistaken as to Father's attendance at the conference and the existence of a child support agreement. Counsel reasserted that he and Mother attended the conference. Counsel

explained that Expedited Services made a recommendation regarding child support but the recommendation was apparently never forwarded to the court so that it could become a signed order. In the response, Mother requested that the court send the matter back to Expedited Services for a calculation of child support and arrearages or, in the alternative, set an evidentiary hearing on the issues.

¶9 On May 6, 2009, the court heard oral arguments on the parties' motions. On July 28, 2009, the court signed an order "denying [Mother's] Petition for Nunc Pro Tunc Order Regarding Child Support and granting the Motion to Dismiss." The court found that there had "been a waiver and a failure to prosecute." The court also found that there had been reliance on the part of Father and that there would be prejudice if the court retroactively determined child support.

¶10 Mother appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

ANALYSIS

¶11 Mother's motion for a nunc pro tunc child support order and her response to Father's motion to dismiss, considered together, was essentially a motion for retroactive child support dating back to her 2006 petition to modify custody. The court dismissed Mother's motion based upon waiver, failure to prosecute, and prejudice. We review the court's discretionary

decisions regarding the propriety of child support for an abuse of discretion, but we review the court's conclusions of law de novo. *See Gersten v. Gersten*, 223 Ariz. 99, 107, ¶ 23, 219 P.3d 309, 317 (App. 2009). Based upon our review of the record and the unusual circumstances of this case, we conclude that the court erred in granting Father's motion to dismiss and that Mother should be entitled to go forward with her motion for retroactive child support.

A. Waiver

¶12 The court concluded that Mother had waived the right to pursue a claim for retroactive child support from Father, presumably because Mother waited approximately two years to secure a child support order that should have been entered in 2007. Mother argues that there is no evidence that she intentionally and voluntarily waived her right to child support. Although we disagree in part with Mother's position, we conclude that the court erred in dismissing Mother's motion based upon waiver.

¶13 Mother's entire argument regarding waiver relies upon the assumption that she had a *right* to child support. Mother, however, did not have an order requiring child support payments from Father. In 2006, the court modified the custody order and made Mother the primary residential parent. Despite modifying custody, the court did not enter a child support order in favor

of Mother and, "[i]n the absence of a valid . . . order requiring one spouse to pay a fixed sum to the other spouse for child support, no such duty exists, for it is the valid judgment, decree or order that creates the duty and governs its extent." *Lamb v. Superior Court*, 127 Ariz. 400, 402, 621 P.2d 906, 908 (1980). *See also* A.R.S. § 25-503(I) (Supp. 2009) ("The right of a party entitled to receive support . . . as provided in the court order vests as each installment falls due. Each vested child support installment is enforceable as a final judgment by operation of law."). Consequently, Father did not have a duty to pay child support to Mother, and Mother was not entitled to receive support payments from Father, without the entry of a valid support order.

¶14 While Mother did not have a vested right to child support from Father, we disagree with the court's conclusion, seemingly as a matter of law, that she waived the right to pursue a claim for retroactive child support. Neither the parties nor the court have referenced any statutory authority, rule, or case law that would support a conclusion that Mother waived her claim for retroactive child support or that would preclude Mother from receiving retroactive support. Moreover, given the unique circumstances of this case, Mother's delay in seeking a child support order may be understandable.

¶15 Absent what appears to be a clerical error or

oversight by Expedited Services, the court may have entered a child support order in Mother's favor because she was the primary residential parent. *See* A.R.S. § 25-403.09(A) (2007) ("For any custody order entered under this article, the court shall determine an amount of child support in accordance with § 25-320 and guidelines established pursuant to that section."). The court had ordered the parties to meet with Expedited Services to determine child support. Apparently unbeknownst to Mother, her January 2007 conference with Expedited Services never resulted in a final child support order entered by the court. If a child support order had been entered by the court, Mother would have had approximately ten years to collect any child support before Father could claim "unreasonable delay." *See* A.R.S. § 25-503(J) ("If the obligee . . . make[s] efforts to collect a child support debt more than ten years after the emancipation of the youngest child subject to the order, the obligor may assert as a defense, and has the burden to prove, that the obligee . . . unreasonably delayed in attempting to collect the child support debt."). Accordingly, Mother may not have been unreasonable to wait until March 2009, one month after Victor turned 18, to seek what she thought was past due child support.

¶16 We note that Father asserts in his answering brief that the 1996 child support order is still in effect because the

court never entered a new order in 2007. We must address Father's assertion because a court cannot retroactively modify a child support order. *See Ray v. Mangum*, 163 Ariz. 329, 332, 788 P.2d 62, 65 (1989) ("Support payments may not be retroactively modified by a court . . . ."). If the 1996 order is still in effect, then a court cannot award Mother retroactive child support because it would effectively modify the 1996 order. Based upon this record, however, we disagree with Father that the 1996 order is still in effect.

¶17 On July 24, 2006, the court conducted a hearing on Mother's June 14, 2006 petition to modify child custody. Father did not attend the hearing. As a result, the court suspended Mother's child support obligation under the 1996 child support order. In September 2006, the court ordered Mother to become the child's primary residential parent. The court also ordered Expedited Services to "assist the parties in calculating a possible modification of child support based on changed circumstances and/or income." Given the earlier suspension of Mother's child support obligation and the court's September 2006 order, we believe the court effectively set aside the 1996 order, even though the court never entered a new support order in favor of Mother.

b. Failure to Prosecute

¶18 The court also dismissed Mother's motion for failure

to prosecute. The court did not provide a rule or statute upon which it based its conclusion. Father, however, directs us to Arizona Rules of Family Law Procedure 91(R), Dismissal of Petition for Lack of Prosecution, and we presume the court based its conclusion on this rule. Rule 91(R) provides in relevant part:

> If a petition to enforce or modify a prior family court decree, judgment, or order is . . . abandoned by the appearing parties with no activity for one (1) year, and there are no hearings or conferences scheduled with respect to the petition, the court may dismiss the petition without prejudice and without further notice.

Father asserts that, pursuant to Rule 91(R), the court properly dismissed Mother's claim to receive retroactive child support because it had been over two years since the expedited services conference. We disagree with Father's analysis and conclude that the court erred in dismissing Mother's motion for failure to prosecute.

¶19 While Rule 91(R) could perhaps be properly applied to dismiss Mother's original petition to modify child support in 2006, this appeal involves the court's dismissal of Mother's *current motion* for retroactive child support, and Rule 91(R) does not apply to the dismissal of Mother's current motion. The rule allows the court to dismiss a petition if it has been abandoned by the parties with no activity for one year. Here,

Mother filed her motion in March 2009 and in July 2009 the court concluded Mother failed to prosecute her claim. Accordingly, Rule 91(R) does not apply and we conclude the court erred in dismissing Mother's request for retroactive child support for failure to prosecute.

C. Reliance and Prejudice

¶20 Finally, at oral argument below, Father claimed he would be prejudiced if the court allowed Mother to go forward with her request for retroactive active child support. The court agreed and dismissed Mother's motion because it found that there had been reliance on the part of Father and there would be prejudice if the court were to retroactively determine child support. The court, however, did not conduct an evidentiary hearing from which to make these findings. We believe such a hearing is necessary to determine the existence and extent of Father's reliance and prejudice, especially considering that child support is for the benefit of the child.

CONCLUSION

¶21 For the foregoing reasons, we reverse the denial and dismissal of Mother's motion for retroactive child support, and we remand for a hearing, consistent with this decision, on the issue of whether Mother is entitled to past child support, and

if so, in what amount.

/s/
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Judge

/s/
MAURICE PORTLEY, Judge