

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

In re the Marriage of:)	1 CA-CV 04-0722
)	
DOROTHY HULL,)	DEPARTMENT B
)	
Petitioner-Appellant,)	MEMORANDUM DECISION
)	(Not for Publication -
v.)	Rule 28, Arizona Rules
)	of Civil Appellate
PATRICIA HULL, Personal Representative))	Procedure)
of the ESTATE OF JESS S. HULL,)	
)	
Respondent-Appellee.)	FILED 03-09-06
)	

Appeal from the Superior Court in Maricopa County

Cause No. D0085370

The Honorable Roland J. Steinle, III, Judge

AFFIRMED

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T I M M E R, Judge

¶1 In 2004, Dorothy Hull filed a petition seeking enforcement of spousal support and payment of spousal support arrears from her former husband, Dr. Jess S. Hull.¹ She alleged

¹ Dorothy later amended her petition to ask that Jess be held in contempt for converting other life insurance policies to his own use in contravention of the decree.

that the parties' 1965 divorce decree had ordered Jess to provide alimony until Dorothy died or remarried but that Jess had stopped making payments in 1997. After trial, the superior court concluded that Dorothy had no reasonable explanation for her failure to have pursued her rights to support between 1997 and 2004, that Jess had fully performed an oral agreement to transfer a life insurance policy to Dorothy in exchange for terminating spousal support, and that in reliance on that agreement, Jess had changed his position to his detriment.² The court concluded that laches required dismissal of Dorothy's petition. For reasons that follow, we find no abuse of discretion and affirm.

BACKGROUND

¶2 Dorothy and Jess were married in 1956 and divorced in October 1965. The decree adopted and incorporated by reference a property settlement agreement, which provided in part that Jess would pay Dorothy \$750 in alimony and that the payments would continue "until [her] death or remarriage." The agreement further provided that the sum due for spousal support "shall be subject to change in accordance with the changed circumstances of the parties." If either party wished to change the payment amount and the parties could not agree, that party could "submit the question to a Court of competent jurisdiction, and both parties shall be

² Jess was seventy-five-years old at the time of trial in 2004; he passed away in November 2004, and the personal representative of his estate is now a party to this case.

bound by the determination of that Court." But, "[n]o modification or waiver of any of the terms hereof shall be valid unless in writing and signed by both parties."

¶13 In addition, the agreement provided that Jess "shall, as owner, execute a change of beneficiary on" three life insurance policies, including a Connecticut General (CG) policy, to name the trustee of the residuary trust of the Hull Master Trust.³ Jess was obligated to pay all policy premiums, keep the policies in force, and not encumber them or change the primary beneficiary. Although the trust was never funded, Jess continued to pay the CG policy premiums until 1997.

¶14 Between 1965 and March 1996, Jess paid Dorothy \$750 per month. In 1996, Jess was sixty-eight and because income from his ophthalmology practice was declining, he told Dorothy that he could no longer pay her \$750 per month. He asked if she would accept \$500⁴ per month and testified that she agreed. The parties did not put the agreement in writing. Jess testified that by 1997 his practice slowed even further, and in May, his business manager informed him that he could not pay \$500 per month to Dorothy. Jess testified that he called Dorothy and offered her the cash surrender

³ The CG ordinary life policy, issued in 1963, stated that Jess was the insured, and Dorothy was both the beneficiary and owner of the policy "as her sole and separate property."

⁴ Some of the checks were for \$550, but Jess could not recall why they were for more than \$500.

value of the CG policy, which he estimated at more than \$20,000. He said that Dorothy accepted the offer and that the policy was transferred to her. Jess also testified that when the parties purchased the policy in 1963, they had listed Dorothy as owner as an estate planning device so that if he died, she could access the funds immediately. But because he always paid the premiums, the policy was on his life, and he understood that CG would not release the cash value unless he authorized it to do so, he felt that he owned the policy. Dorothy received roughly \$23,000 for the policy.

¶5 Jess said that he felt no need to draft a formal agreement with Dorothy in 1997 because "there was good communication between Dorothy and myself, and there was a meeting of the minds, . . . and there was no thought of making it a legal venture." After 1997, Jess made no further payments, and although he saw Dorothy twice a year until 2003, she never asked for money except on one occasion in March 2000 when he gave her \$105 to visit her grandchildren. He described Dorothy as a very forceful person and angry rather than depressed. He said she drove to his home to pick up the grandchildren and took them to various events and places in the post-1997 years. Jess closed his practice in 2001 when he was seventy-two but continued to work eight hours a week as a medical consultant for the State.

¶6 Dorothy was sixty-three at the time of trial. She testified that in 1997, her check was late in arriving, and she

went to Jess' office. Jess told her that he was reducing his practice, would be closing the office soon, there was only enough income to pay the office manager, and he was going to have to stop paying alimony. She thought she had said, "I see" and thought to herself that she "couldn't do anything." Dorothy also testified that Jess had asked her to accept an annuity for the insurance policy so he could stop paying the premium and that she was sufficiently broke in 1997 that she agreed, although she did not understand that it would substitute for alimony. When Dorothy consulted a lawyer early in 2004, she thought the conversation with Jess had occurred in 2000, not 1997. Dorothy said she "later learned it was 1997, but I completely blanked those three years out. . . . I just didn't remember. I could not remember what happened."

¶7 Dorothy also testified that in 1995, she qualified for Social Security disability and took a leave of absence from work after being diagnosed with a bipolar disorder. But she said that she still went to Jess' office if her check was late and resolved the matter with him. She did not remember having a conversation in 1996 about the reduction to \$500.

¶8 Dorothy returned to work in January 1998 but did not go to court because she "feared it." The divorce had been acrimonious and she did not want to repeat that experience. She said that she

could not take care of her house⁵ or herself most of the time, and "was very depressed, suicidal." She was able to work half-time, but "otherwise, I just ceased everything."

¶9 In July 2002, Dorothy sold her house and received \$187,000. She continued to work about twenty-five hours a week but did not contact an attorney because "I could function by going to work. . . . I have a kind boss and an easy job. Other functions are much harder."

¶10 In addition to depression, Dorothy suffered a concussion in 1999 and a myocardial infarction in December 2002. In February 2003, she had a stomach hemorrhage, and in the summer, she had surgery for breast cancer. In 2004, she began taking a new antidepressant that "tamped down the anxiety and the fear . . . I thought I could do this now." She consulted an attorney and filed her petition in February.

¶11 Dorothy's petition alleged that Jess had wrongfully ceased paying spousal support. In response, Jess argued that changed circumstances justified modification of the decree and in a supplemental response raised the defenses of laches, waiver, and estoppel. Dorothy's reply argued that the property settlement was a contract that the parties intended to be merged into the decree,

⁵ Dorothy's employer said he visited her home in 2000 and found "boxes and papers piled on every available space, there was a walkway . . . to the kitchen and the rooms to the sides were just cluttered with papers and books. . . , boxes strewn around. . . . It was obviously not being taken care of. . . . It was filthy."

and thus, it was an enforceable court order. She also asserted that the court could not retroactively terminate Jess' obligation.

¶12 At the beginning of trial, the court suggested that the parties first try the issue of whether Dorothy's claim was barred by laches or a statute of limitations; if the court found the claim not barred, it would then consider Dorothy's request for enforcement and Jess' request for modification. The court reiterated that laches was a threshold issue. At the end of the second day of testimony, the court stated that "if we go past laches, then the issue is whether or not [Jess is] in contempt and/or we have a valid agreement that was completed upon the payment of the \$23,000."

¶13 Without holding further hearings, the court issued a minute entry based on the testimony, trial memoranda and post-trial briefs, and the witnesses' demeanor. The court found that Jess had paid Dorothy for 32 years and that if a check was late, Dorothy went to his office and obtained a check. The court also found that in December 1996, the parties agreed to reduce Dorothy's payment to \$500 and later entered an oral agreement to surrender the life insurance policy in exchange for an end to spousal maintenance. After June 1997, Jess sent no checks, and Dorothy did not go to his office to try to enforce the obligation.

¶14 The court further found that in June 2001, after full performance of his promise to transfer the policy, and in

substantial reliance on Dorothy's agreement, Jess reduced⁶ his practice. Meanwhile, Dorothy continued to work from 1997 until February 2004 and "[m]ost of the time she worked full time."⁷ Although Dorothy "claimed a psychological condition prevented her from pursuing the matter[,] [s]he produced no expert evidence of her state of mind in the spring of 1997." Her condition did not prevent her from working or from asserting her right to payment, and no evidence supported her claim that she had no memory of 1997 to 2004. Dorothy's delay prejudiced Jess because he could have filed a petition to terminate his obligation in 1997 if Dorothy had not agreed and could have produced evidence of the parties' circumstances at that time. "Further, his economic situation has substantially changed, he is substantially older, and he is unable to continue a medical practice." Thus, Dorothy had not given a reasonable explanation for not pursuing her rights and Jess' "explanation is credible: he entered into an agreement to terminate spousal maintenance, it was fully performed[,] and he changed his position to his detriment." The court dismissed

⁶ He actually closed his ophthalmology practice and did part-time consulting work.

⁷ In his deposition, Dorothy's supervisor, John Woods, testified that from April 1990 through July 1995, Dorothy worked full time. When she returned to work in January 1998, she could perform routine administrative work but was very tentative and barely functional. She improved to "where she got feisty," and by 2000 was able to work twenty-five to thirty hours a week. In 2002, she cut back for health reasons. Dorothy's work records showed that from 2001-2004, her hours decreased over time from approximately thirty-five hours a week to less than twenty in 2003.

Dorothy's petition.

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

DISCUSSION

¶16 Dorothy argues that (a) the court could not terminate her spousal support effective 1997 because Jess did not file a request to terminate his obligation until 2004 (in response to Dorothy's petition) and that retroactive termination constituted an unlawful taking of her property; (b) the superior court erred in finding that an oral agreement could overcome the requirements of the statute of frauds and of the property settlement agreement that changes in the settlement agreement must be in writing; (c) the court failed to consider evidence of Dorothy's mental disorders as an excuse for her failure to have pursued her rights; and (d) the court erred in placing the burden of proof on Dorothy and in not requiring Jess to produce clear and convincing proof of laches. If we find no abuse of the trial court's discretion in the application of laches to Dorothy's petition, we need not address her other contentions. We therefore address that issue first.

A. *Laches*

¶17 Laches is an equitable defense, and we review a finding of laches for an abuse of discretion. *Korte v. Bayless*, 199 Ariz. 173, 174, ¶ 3, 16 P.3d 200, 201 (2001); see also *Brandt v. Brandt*,

76 Ariz. 154, 160, 261 P.2d 978, 981-82 (1953) (whether to accept the defense is committed to trial court's sound discretion, giving due consideration to its ability to see the parties, hear the testimony, and assess credibility); *McFadden v. Wilder*, 6 Ariz. App. 60, 64, 429 P.2d 694, 698 (1967). To assert laches, Jess had to demonstrate unreasonable delay by Dorothy and resulting prejudice to himself through his good faith change of position caused by her delay in asserting her rights. *Ariz. Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Hanlin*, 148 Ariz. 23, 29, 712 P.2d 936, 942 (App. 1985); see also *Felix v. Superior Court of Pima County*, 92 Ariz. 247, 250, 375 P.2d 730, 732 (1962) (laches requires an "intervening change of position . . . induced by the inaction of the party against whom the defense is raised"); *Cauble v. Osselaer*, 150 Ariz. 256, 259-60, 722 P.2d 983, 986-87 (App. 1986) (laches may be asserted when the plaintiff's lack of diligence causes prejudice but assertions of prejudice must be accompanied by supporting evidence).

¶18 Mere delay will not suffice to establish laches, *Hanlin*, 148 Ariz. at 29, 712 P.2d at 942, and our courts do not lightly apply this doctrine. In a case involving a military pension, this court declined to uphold a finding that laches barred the plaintiff's claim to part of her former husband's benefits. *Beltran v. Razo*, 163 Ariz. 505, 507, 788 P.2d 1256, 1258 (App. 1990). The parties' 1981 divorce decree did not mention the

pension. *Id.* at 506, 788 P.2d at 1257. In 1989, the wife sought part of the pension and alleged that the pension constituted community property that should have been divided. At that time, both parties had remarried and her former husband had adopted a child. *Id.* This court acknowledged post-decree changes in divisibility of military pensions and concluded from the lack of express agreement that the pension became property held by the parties as tenants in common and accordingly was subject to division at any time. *Id.* at 507, 788 P.2d at 1258. We also observed that “[e]quity does not encourage laches, and the doctrine may not be invoked to defeat justice but only to prevent injustice.” *Id.* We remanded because even if the former husband could prove that he had spent funds in reliance on the judgment and the former wife was not entitled to retroactively share in the benefits, she might be entitled to a prospective portion. *Id.*

¶19 In a subsequent case, our supreme court clarified that “delay must be unreasonable under the circumstances, including the party’s knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial of relief.” *Flynn v. Rogers*, 172 Ariz. 62, 66, 834 P.2d 148, 152 (1992). In *Flynn*, the former wife was aware that her husband was receiving military benefits during their marriage and that she had no right to them when the parties divorced in 1981. Although

Congress gave her a right in those benefits in 1983, she did not learn of it until 1989 and filed suit four months later. *Id.* Under the circumstances, the supreme court held that the trial court properly rejected the husband's laches defense. *Id.* at 67, 834 P.2d at 153.

¶20 Unlike *Flynn*, in which the former wife had "no knowledge that her rights had been invaded," *id.* at 68, 834 P.2d at 154, after hearing the testimony and assessing the parties' credibility, the court found that despite Dorothy's contentions that she was too depressed to function or even understand what she had agreed to accept, the evidence supported a contrary finding. From our review of the record, credible evidence showed that Dorothy was aware that Jess stopped making payments in 1997, that she received the cash value of the CG policy, and that she never informed Jess of any objection until she brought this action in 2004. Additional credible evidence showed that Jess could believe he was free of further obligation to Dorothy when he closed his practice in 2001 and worked only a few hours a week thereafter.

¶21 Further, although Dorothy offered evidence of her numerous physical ailments, many of them did not occur until well after 1997 and thus they do not explain her inaction between 1997 and 2002. As evidence of her mental difficulties, Dorothy's counselor, Jim Folsom, testified to her condition between December 2003 and June 2004, but well after 1997, and he could shed no light

on her prior mental state. Her psychiatrist, Dr. Richard Schaeffer, had first treated her in 1975, could not recall anything from that time, but began treating her again in September 2002 for a mood disorder. He saw her fifteen minutes a month to prescribe various medications but did not provide psychotherapy. This evidence also related to time periods significantly after 1997 and after Jess had closed his office.

¶22 Furthermore, Dorothy admitted that by 2000 she had improved and that her son suggested she hire a lawyer, but “[she] couldn’t face it [although she] was minimally getting along.” She said she had no money to hire a lawyer, but when she received money by selling her house in 2002, she thought of hiring a lawyer but declined to do so because the move had drained her. Nevertheless, she continued to work, to drive, and to go to appointments.

¶23 When a case has been tried to the court, we view the evidence in a light most favorable to upholding its decision. *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 506, ¶ 9, 114 P.3d 835, 838 (App. 2005). We acknowledge that the evidence in this case was conflicting, but we cannot re-weigh it. *Id.* at 511, ¶ 41, 114 P.3d at 843 (citing *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999)). Instead, we defer to the trial court’s assessment of the evidence and the witnesses’ credibility. *Id.* When a decision resolves “disputed questions of fact or credibility, a balancing of

competing interests, pursuit of recognized judicial policy, or any other basis to which we should give deference,' we will not substitute our judgment for that of the trial court." *Daystar Inv., L.L.C. v. Maricopa County Treasurer*, 207 Ariz. 569, 572, ¶ 13, 88 P.3d 1181, 1184 (App. 2004) (quoting *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992)); see also *Milberger v. Chaney Bldg. Co.*, 146 Ariz. 181, 182, 704 P.2d 822, 823 (App. 1985) (we accept factual findings unless we find them clearly erroneous; we will not overturn findings, even if based on conflicting evidence, that are reasonably supported by the evidence). Viewing the evidence in the light most favorable to sustaining the trial court's ruling, we cannot say that the court abused its discretion by finding laches.

¶24 Moreover, when the court determined that Jess suffered an essentially incurable prejudice from Dorothy's delay in asserting a right to lifetime support by closing his practice, the court necessarily found irrelevant Dorothy's legal objections to her acceptance of the insurance policy and forgiveness of future payments. Had she timely asserted her legal contentions about retroactivity, a taking of her property, or the statute of frauds without having induced a prejudicial change of position by Jess, the court properly could have addressed those legal arguments. But Jess' equitable defense cut off Dorothy's ability to seek a legal remedy, just as a statute of limitations or equitable estoppel

might. Therefore, we need not consider Dorothy's contention that the court failed to adequately consider the testimony of Jim Folsom or of her son to show the extent of her disability. We note, however, that their testimony did not establish without contradiction that Dorothy was unable to function from 1997 to 2004.

¶25 Dorothy also argues that the court placed the burden of proof on her to show that she was unable to pursue her claim against Jess. But the court found credible the testimony of Jess and others that she had always protested if a check was late, and she testified that in May 1997 she went to Jess' office to see why her check was late. Thus, her own evidence established she was not unable to confront Jess.

¶26 Dorothy additionally contends that the court should have required Jess to meet a clear and convincing standard in proving laches as we have done in the context of child support arrearages. See *Schnepp v. State ex rel. Dep't of Econ. Sec.*, 183 Ariz. 24, 30, 899 P.2d 185, 191 (App. 1995); *State ex rel. Dodd v. Dodd*, 181 Ariz. 183, 187, 888 P.2d 1370, 1374 (App. 1994). In those cases, "our concern [was] for the welfare of minor children." *Dodd*, 181 Ariz. at 187, 888 P.2d at 1374. Minor children cannot sue if a parent is failing to pay court-ordered support, but an adult can. We do not agree that the clear and convincing standard should have been applied in this case.

¶27 For these reasons, we decide that the trial court did not abuse its discretion in finding laches. We therefore do not address Dorothy's additional issues.

B. Attorney's Fees on Appeal

¶28 Dorothy requests an award of her attorney's fees and costs incurred on appeal pursuant to A.R.S. § 25-324 (2000) and Arizona Rule of Civil Appellate Procedure 21. In the exercise of our discretion, we decline her request. Dorothy additionally cites the parties' property settlement in which Jess agreed to indemnify Dorothy for all expenses and attorney's fees "resulting from or made necessary by the bringing of any suit . . . to enforce the carrying out" of the terms of the agreement. We reject this contention as Dorothy's suit was not necessary to enforce the terms of the agreement because those terms, as a matter of equity, were not subject to enforcement. We find no basis in the agreement to impose attorney's fees on Jess.

CONCLUSION

¶29 For the foregoing reasons, we affirm.

Ann A. Scott Timmer, Judge

CONCURRING:

Jefferson L. Lankford, Presiding Judge

G. Murray Snow, Judge