DIVISION ONE
FILED: 8/6/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	No. 1 CA-CV 12-0341
	)	
PETER A. YURKA,	)	DEPARTMENT E
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
BARBARA M. YURKA,	)	
	)	
Respondent/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. DR1996-21240

The Honorable Daniel J. Kiley, Judge

AFFIRMED

Mueller & Drury PC — Scottsdale
By James P. Mueller and Joel M. Mueller
Attorneys for Petitioner/Appellee

Abram Meell & Candioto PA — Phoenix
By Gregory J. Meell
Attorneys for Respondent/Appellant

B R O W N, Judge

¶1 The marriage of Barbara Yurka ("Wife") and Peter Yurka ("Husband") was dissolved in 1998 pursuant to a decree of dissolution. In 2010, Wife filed a petition to modify the

decree based on an alleged mutual mistake as to the parties' retirement benefits. Wife also sought payment for unpaid spousal maintenance, child support costs, and education expenses. The family court denied Wife's petition in its entirety and she appealed. For the following reasons, we affirm.

BACKGROUND

¶2 Husband and Wife divorced in 1998. At the time of dissolution, the parties had two minor children. The decree of dissolution "incorporated" but did not "merge" the parties' Rule 80(d) agreement, which provided that Husband would pay Wife spousal maintenance for four years and child support in the amount of $1,449 per month. The agreement also addressed how retirement benefits would be distributed upon dissolution. Wife's interest in Husband's pension plan was subsequently determined through a Qualified Domestic Relations Order ("QDRO"). Wife was also to receive the entire benefit of her retirement as a teacher and Husband would likewise receive his Cal Trust retirement. The agreement made no additional mention of retirement benefits outside of the agreement and the attached exhibits.

¶3 In December 2010, Wife petitioned to enforce the decree concerning various matters, including spousal maintenance and child support payments. Wife alleged that Husband failed to

comply with the family court's order to pay his spousal maintenance obligation through the Support Payment Clearinghouse. According to Wife, even if the court gave Husband credit for the payments that he made directly to her rather than through the clearinghouse, he still owed a minimum of $12,297.69 based on improper unilateral deductions. Wife also sought consequential damages based on Husband's refusal to make payments through the clearinghouse because she was unable to refinance her home in February of 2000 at "a very advantageous . . . interest rate of 3.75%." Regarding child support costs, Wife argued that Husband had failed to reimburse her for his 75% of the medical expenses and thus owed her a total of $3,580.85. Additionally, Wife alleged that Husband had failed to pay his share of the children's education expenses and refused to transfer Marriott Rewards points to Wife.

¶4 Wife also sought re-opening and modification of the decree based on A.R.S. § 25-327(A). Wife asserted she recently learned that once she became eligible to receive federal Social Security benefits, those benefits would be reduced by "an amount equal to [two-thirds] of her Ohio State Teacher's Retirement System" payments. Wife alleged the parties had entered into their Rule 80(d) agreement "based on the mutual understanding and belief that Wife would receive an amount equal to one-half of Husband's Social Security benefits that accrued during the

marriage." Wife therefore asserted that because the parties were mutually mistaken about a material fact, the agreement could be reopened and modified. Thus, Wife alleged that "fairness and equity require that the Decree be re-opened and that it and the [QDRO] be modified to provide Wife with an additional $840.37 [per month] beginning when Wife reaches the age of 66 and continuing for life thereafter."

¶5 Husband moved to dismiss Wife's petition, arguing that all of Wife's claims were barred by statutes of limitation, waiver, or the doctrine of laches. With respect to Wife's claim for spousal maintenance, Husband pointed to A.R.S. § 25-553(A), which provides that any claim for arrearages must be brought within three years after the date the spousal maintenance order terminates. According to Husband, the terms of the divorce decree and Rule 80(d) agreement made it clear that his spousal maintenance obligations ended, at the latest, in 2002 and Wife's claims related to such payments were therefore untimely. With regard to Wife's claimed medical expenses, Husband cited Section 9A of the Arizona Child Support Guidelines, which provides that "[e]xcept for good cause shown, any request for payment or reimbursement of uninsured medical, dental and/or vision costs must be provided to the other parent within 180 days after the date the services occur." According to Husband, all of the claims for medical expenses that Wife brought related to actions

that occurred "anywhere between four (4) and thirteen (13) years ago" and were untimely.

¶6 The family court partially granted Husband's motion, dismissing Wife's claims with respect to unpaid spousal maintenance and the children's education expenses. Following an evidentiary hearing on Wife's remaining claims, the court found that because Wife's Social Security claim was based on mutual mistake, Rule 85(C)(1)(a) of the Arizona Rules of Family Law Procedure ("ARFLP") barred her claim as untimely because it was filed "more than six (6) months after the judgment or order was entered." As to Wife's claim for consequential damages arising from her alleged inability to refinance her home, the court found that it was without authority under the Arizona Constitution to award such damages without giving Husband the benefit of a jury trial, and alternatively, Wife's claims were barred by statutes of limitation. With regard to the allegedly unpaid medical expenses, the court found the evidence Wife presented during the hearing provided no basis for relief. The court further determined that Wife's claims for medical expenses were barred by the doctrine of laches and by the Arizona Child Support Guidelines. Finally, with respect to certain Marriott Rewards points Wife was seeking, the court found that subsequent to the divorce, Husband transferred to Wife 100,000 points along with $1500 in cash to satisfy the terms of the Rule 80(d)

agreement. The court also denied both parties' requests for attorneys' fees.

¶7 Wife's subsequent motion to amend and/or for new trial was denied by the family court, which determined an award of attorneys' fees to Husband was appropriate because Wife reasserted arguments the court had already rejected. Wife timely appealed and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION[1]

¶8 Wife challenges the family court's rulings denying her requests for (1) modification of the decree to address re-distribution of retirement benefits, (2) payment of consequential damages for unpaid spousal support, (3) reimbursement for medical expenses, and (4) transfer of the Marriott Rewards points. Regarding the retirement issue, we will affirm an order denying a motion to modify a decree of dissolution "unless the record on appeal demonstrates a clear abuse of discretion." *De Gryse v. De Gryse*, 135 Ariz. 335, 336, 661 P.2d 185, 186 (1983). We review de novo, however, questions involving the interpretation of statutes and court rules. *Haroutunain v. Valueoptions, Inc.*, 218 Ariz. 541, 544, ¶ 6, 189

[1] After considering their initial briefs, we ordered the parties to provide supplemental briefs addressing various issues related to distribution of the retirement benefits, which we have also considered.

P.3d 1114, 1117 (App. 2008) (internal quotations and citation omitted). As to Wife's other claims, we view the evidence in the light most favorable to sustaining the court's factual findings and will uphold them unless they are clearly erroneous or unsupported by the evidence. *In re Marriage of Yuro*, 192 Ariz. 568, 570, ¶ 3, 968 P.2d 1053, 1055 (App. 1998).

A. Distribution of Social Security Benefits

¶9 Wife argues the family court erred by relying on ARFLP 85(C) in finding that her request to modify the distribution of retirement assets was untimely. Specifically, Wife asserts that Rule 85 is irrelevant because she petitioned the court to modify the terms of the agreement based on A.R.S. § 25-327(A), which provides, in pertinent part, that "provisions as to property disposition may not be . . . modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." Wife asserts that because the agreement distributing the retirement benefits was incorporated but not merged into the final divorce decree, it maintained its status as an independent contract and is subject to contract law principles, which constitute "laws of this state" under A.R.S. § 25-327(A). We disagree.

¶10 Pursuant to A.R.S. § 25-317(A), "[t]o promote amicable settlement of disputes between parties to a marriage attendant on . . . the dissolution of their marriage, the parties may

enter into a written separation agreement containing provisions for disposition of any property owned by either of them[.]" Before the agreement is binding on the family court, however, it is subject to the court's determination of whether the proposed disposition is fair. A.R.S. § 25-317(C). Thus, regardless of whether the parties accept the terms of the agreement, it is ultimately subject to the family court's approval. *See* A.R.S. § 25-317(B). If the court determines the agreement is not fair, it can "request the parties to submit a revised separation agreement or may make orders for the disposition of property or maintenance." A.R.S. § 25-317(C). Once the court approves the disposition, the agreement may only be modified if the court "finds the existence of conditions that justify the reopening of a judgment under the laws of this state." A.R.S. § 25-327(A).

¶11 In *Breitbart-Napp v. Napp*, 216 Ariz. 74, 163 P.3d 1024 (App. 2007), this court addressed the proper avenue for modifying a court-approved property settlement agreement. In that case, the parties entered into an agreement which, like the one in this case, was incorporated but not merged into the divorce decree. *Id.* at 78-79, ¶ 13, 163 P.3d at 1028-29. As an initial matter, we concluded that "whether a separation agreement has merged is of no consequence in determining that the court can reopen its determination that a separation

agreement is [or is not] unfair."[2] *Id.* at 79, ¶ 13, 163 P.3d at 1029 (internal quotations omitted). In reaching that conclusion, we emphasized that "all separation agreements reflecting property dispositions must be approved by the court." *Id.* at ¶ 15. We then determined that following court approval of a property settlement agreement, A.R.S. § 25-327(A) controlled when a party could seek to modify the terms of that agreement. *Id*. at 79-80, ¶ 16, 163 P.3d at 1029-30. Based on the plain language of the statute, which requires "conditions that justify the reopening of a judgment under the laws of this state," we concluded that Arizona Rule of Civil Procedure ("ARCP") 60(c)(3) governs the reopening of a property disposition. *Id*. at 80, ¶¶ 16-17, 163 P.3d at 1030.

¶12 Applying the reasoning of *Breitbart-Napp* to this case, we conclude that Wife's petition to modify the terms of the property disposition on the basis of mistake was untimely.[3] Under ARFLP 85(C)(2), any motion to reopen a final judgment on the basis of mistake must be filed "not more than six (6) months

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[2] Whether the agreement is merged into the decree is relevant, however, to enforcement of the decree. *See* Section D, *infra.*

[3] Although the court in *Breitbart-Napp* applied ARCP 60(c)(3) rather than ARFLP 85, we find that distinction to be of no consequence. The committee note to ARFLP 85 indicates that it is "based on" ARCP 60. And the comment to ARFLP 1 states that "[w]herever the language in these rules is substantially the same as the language in other statewide rules, the case law interpreting that language will apply to these rules."

after the judgment or order was entered or proceeding was taken." Here, the trial court concluded that Wife's request to reopen the decree was untimely because Wife failed to file her petition until more than twelve years after the final decree was entered. Moreover, even assuming the discovery rule applies to Rule 85(C)(2), the court found that Wife became aware of the Social Security distribution issue in March 2010 but did not file her petition until December 2010, three months after the six-month limitation. Thus, Wife's petition was untimely and the trial court did not err in declining to reopen the judgment.

¶13 Wife's reliance on *Lamb v. Ariz. Country Club*, 124 Ariz. 239, 603 P.2d 510 (App. 1978) is misplaced. According to Wife, *Lamb* "recognized that where a party seeks to re-open and vacate a judgment under ARCP 60(C) based on a claim that the judgment was based on a mutual mistake . . . the real question is whether or not the settlement should be vacated," not whether ARCP 60(C) applies. In that case, however, the parties entered into a settlement agreement outside of the context of family court, and thus A.R.S. §§ 25-327 and -317 simply did not apply. *Id*. at 239, 603 P.2d at 510. While we do not disagree with *Lamb*, in our view it has no application in the family court context, where the court operates within the confines of specific statutes and rules governing the re-opening and modification of judgments.

¶14 We find additional support in the "well-established rule [] that property settlements are not subject to modification or termination." *In re Marriage of Gaddis*, 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (App. 1997) (quoting *De Gryse*, 135 Ariz. at 338, 661 P.2d at 188); *see also Edsall v. Superior Court*, 143 Ariz. 240, 248, 693 P.2d 895, 903 (1984) (noting that "[a] property award is essentially permanent; the well established rule is that property settlements cannot be modified or terminated."). The rationale behind the general prohibition is "[t]he need for finality and stability in marriage and family law[.]" *De Gryse*, 135 Ariz. at 338, 661 P.2d at 188.

B. Consequential Damages for Unpaid Spousal Support

¶15 Wife argues the family court erred in refusing to award consequential damages arising from Husband's failure to make spousal maintenance payments through the clearinghouse and his unilateral deductions from support payments. Wife presented evidence that she was unable to refinance her home at an advantageous interest rate in 2000 because of Husband's decision to make maintenance payments outside of the clearinghouse. The court found Wife's claims were barred by statutes of limitation.

¶16 Wife does not dispute that she waited approximately ten years to bring her claim for damages arising from Husband's alleged failure to make spousal maintenance payments through the

clearinghouse. Nor does Wife dispute the family court's findings that her claims would be barred by statutes of limitation for contempt under A.R.S. § 12-865, for breach of contract under A.R.S. § 12-548, or for any other real property under A.R.S. § 12-550. As we understand Wife's argument, she believes consequential damages are appropriate because Husband violated a court order by improperly making support payments. Thus, Wife's claim is premised on a claim for contempt of court, which would be subject to the one-year statute of limitations prescribed by A.R.S. § 12-865. Even if a longer statute of limitation applies, her ten-year-old claim cannot survive the most lenient time period. The family court did not err in denying Wife's claim for consequential damages.

C. Unpaid Medical Expenses

¶17 Wife argues the family court should have awarded her damages for medical expenses that Husband failed to reimburse but she has not directed us to any evidence supporting her argument that she requested reimbursement for medical expenses in a timely manner. Instead, Wife relies on conclusory allegations that she paid for medical expenses and made timely requests for Husband to make his court-ordered 75% percent contribution. The only evidence that Wife presents is a portion of Husband's deposition testimony from March of 1998, where Husband admitted he failed to reimburse Wife for certain medical

expenses. The date of the deposition, however, precedes the decree of dissolution. Thus, although there is evidence that Husband failed to reimburse for medical expenses prior to the finalization of the divorce decree, Wife has presented no evidence that Husband refused to reimburse any expenses after dissolution.

¶18 Even assuming the truth of Wife's assertions, we conclude that her claims for reimbursement are time-barred. In her opening brief, Wife concedes that Husband's obligation to pay medical expenses terminated fourteen months prior to Wife filing her petition. At that point, the most recent medical expense Husband would have been obligated to reimburse was fourteen months old. Section 9(A) of the Arizona Child Support Guidelines mandates that "[e]xcept for good cause shown, any request for payment or reimbursement of uninsured medical . . . costs must be provided to the other parent within 180 days after the date the services occur." A.R.S. § 25-320. The rationale behind Rule 9(A) is that one parent should not be permitted to "withhold demand unreasonably as expenses mount, thereby depriving the other of the opportunity to cover the expenses with excess monthly benefit payments." *Keefer v. Keefer*, 225 Ariz. 437, 441 n.2, ¶ 15, 239 P.3d 756, 760 n.2 (App. 2010). Accordingly, because any claim for unpaid medical expenses was

at least eight months late, the family court did not err in finding that Wife's claims for such expenses were untimely.

D. Marriott Rewards Points

¶19 Wife also asserts the family court erred in determining that Husband had satisfied his obligation under the Rule 80(d) agreement as to Marriott Rewards points by transferring 100,000 points and giving her $1500 cash. Although we decide the issue on different grounds, we find no error.

¶20 When a property settlement is incorporated but not merged into a divorce decree, "the agreement retains its independent contractual status and is subject to the rights and limitations of contract law." *MacMillan v. Schwartz*, 226 Ariz. 584, 589, ¶ 15, 250 P.3d 1213, 1218 (App. 2011). Claims under contract law are subject to the six-year statute of limitations set forth in A.R.S. § 12-548. In this case, Wife did not file her petition seeking the points until approximately twelve years after the divorce decree and accompanying property settlement were final. Wife does not argue, and nothing in the record suggests, that her claim for the Marriott Rewards points is not subject to the six-year statute of limitations for contracts. *See Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986) (explaining that appellate court will affirm trial court's decision if it is "correct for any reason, even if that reason

was not considered by the trial court"). Accordingly, Wife's claim for the Marriott Rewards points was time-barred.

E. Attorney's Fees

¶21 Finally, Wife argues the family court erred in awarding attorneys' fees to Husband and denying her request. We review a ruling on an attorneys' fee request for an abuse of discretion. *In re Marriage of Magee*, 206 Ariz. 589, 590, ¶ 6, 81 P.3d 1048, 1049 (App. 2004). We find none here. The sole basis for Wife's argument is that the court made "incorrect rulings" when it denied her petition. Because we are affirming the court's denial of Mother's petition, Wife lacks any basis for her argument related to the fee award.

CONCLUSION

¶22 For the foregoing reasons, we affirm the judgment of the family court. We deny, in the exercise of our discretion under A.R.S. § 25-324, both parties' requests for attorneys' fees on appeal. Husband, however, is entitled to an award of costs upon compliance with ARCAP 21.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

_____/s/_____
JOHN C. GEMMILL, Judge