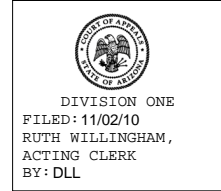


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WADE KETCHUM,) No. 1 CA-CV 10-0042
)
Respondent/Appellant,) DEPARTMENT B
)
v.) MEMORANDUM DECISION
)
JULIE D. MALCOLM,) (Not for Publication -
) Rule 28, Arizona Rules of
Petitioner/Appellee.) Civil Appellate Procedure)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2001-011248

The Honorable Michael D. Gordon, Judge

REVERSED AND REMANDED

Gerald D. Sherrill Phoenix
Attorney for Appellant

Underwood Law Office Phoenix
By Sonya E. Underwood
Attorneys for Appellee

J O H N S E N, Judge

¶1 Wade Ketchum ("Father") appeals from the superior court's judgment denying his request for reimbursement of overpayment of a child support obligation. We reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶12 Father and Julie D. Malcolm ("Mother") are the parents of a son born in June 1991. On April 15, 2003, the court entered a Stipulated Order Re: Paternity, Custody, Child Support and Other Issues. The order required Father to pay \$525 a month in child support beginning February 1, 2003. The court also entered judgment against Father in the amount of \$24,904.37 plus ten percent annual interest for child support arrearages and other expenses. The court ordered Father to pay \$250 per month on the judgment until paid in full. The court also entered an order of assignment for \$775 a month, which was intended to encompass the monthly child support obligation and the monthly arrearage payment. The order of assignment was directed to "Current and future employers or other payors" of Father and specified that it would remain in effect "until further Order of the Court."

¶13 Father paid \$19,294.19 against the judgment in July 2003. At some point thereafter, Father's monthly \$250 payments (made through the order of assignment) satisfied the judgment in full, but neither he nor Mother moved to modify the order of assignment, nor did either party move to modify the child support obligation.

¶14 On July 30, 2009, Father filed an Agreement to Stop Order of Assignment, in which the parties agreed Father's child

support obligation was terminated because the child was emancipated. On August 11, 2009, Father filed a request for a judgment against Mother for overpayment of child support pursuant to Arizona Revised Statutes ("A.R.S.") section 25-527 (2007). Father based his motion on a support payment history showing he had overpaid his child support obligation by \$12,209.72 through July 23, 2009.

¶15 The superior court denied Father's request for judgment. The court directed the Family Court Conference Center to calculate any overpayment, but found that Father was seeking "redress through judgment but [was] essentially asking for a retroactive modification." After the Family Court Conference Center reported that Father had overpaid his child support obligation in the amount of \$19,784.71, the court entered an order stating:

Although this Court denied the Motion for Judgment, this Court's order should not be construed to preclude Father from: (1) exercising any other rights and remedies that may be available under Arizona law; (2) seeking review of the Court's order from Arizona's Appellate Courts.

¶16 After the court entered a signed order reflecting its ruling, Father timely appealed. This court has jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶7 We review *de novo* a superior court's interpretation and application of a statute. *Thomas v. Thomas*, 203 Ariz. 34, 36, ¶ 7, 49 P.3d 306, 308 (App. 2002). The superior court's decision regarding reimbursement of an overpayment of child support is within its discretion. A.R.S. § 25-527. The court abuses its discretion, however, when it makes an error of law in reaching its discretionary decision. *Grant v. Ariz. Public Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982) (supp. opinion).

¶8 Arizona Revised Statutes § 25-527 provides:

A. An obligor whose obligation to pay support has terminated may file a request for reimbursement against the obligee for support payments made in excess of the amount ordered. The obligor must file the request with the clerk of the superior court within twenty-four months after the termination of obligation.

B. The court may enter a judgment for reimbursement against the obligee if the court finds that the obligor's obligation to pay support has terminated and that all arrearages and interest on arrearages have been satisfied. The court shall send a copy of the judgment to the department or its agent for title IV-d cases.

A.R.S. § 25-527.

¶9 Father argues he met all the requirements of the statute to receive reimbursement of a child-support overpayment. In response, Mother contends the superior court acted within its

discretion in denying Father's motion. The court, however, did not exercise its discretion in denying Father's motion; instead, it rejected Father's request as a matter of law after it decided the motion constituted a prohibited request for a retroactive modification of child support. See A.R.S. § 25-327(A) (2007).¹

¶10 Father's request for reimbursement did not constitute a request for retroactive modification of child support. Father did not seek a change in the amount he was ordered to pay. Instead, having complied with the order for child support, he sought reimbursement of sums he paid over and above the amount required by the judgment and child support order. Reimbursement to Father of the excess paid would not reduce or modify the amount the court had ordered Father to pay;

¹ A.R.S. § 25-327 provides in part:

[T]he provisions of any decree respecting maintenance or support may be modified or terminated only on a showing of changed circumstances that are 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 or terminate. . . . Modifications and terminations are effective on the first day of the month following notice of the petition for modification or termination unless the court, for good cause shown, orders the change to become effective at a different date but not earlier than the date of filing the petition for modification or termination.

A.R.S. § 25-327(A).

therefore, it would not be a retroactive modification of the court's order.

¶11 Mother argues the child support order was entered prior to the child's twelfth birthday and that she refrained from seeking a modification of the order when the child turned 12 because Father had not moved to modify the order of assignment after the arrearages judgment was satisfied.² By this argument, she implies she would have sought an upward modification in child support if Father had moved to reduce the order of assignment.

¶12 The child support order and the judgment for arrearages and expenses, however, represented two separate obligations of Father. The former could be modified; the latter could not. See A.R.S. § 25-327(A); *Guerra v. Bejarano*, 212 Ariz. 442, 444, 133 P.3d 752, 754 (App. 2006). Mother's right to seek modification of the support order was independent of any payment of arrearage; the arrearage represented payments owed by Father for a period before entry of the original order. Mother could have sought modification of the support order based on

² The Arizona Child Support Guidelines allow the court to increase child support by up to ten percent for a child who has reached the age of twelve years. A.R.S. § 25-320 app. 9(B)(4) (2007). (Although these guidelines were amended after the relevant date, the revisions are immaterial to the disposition of this appeal. Thus, we cite to the current published version of the guidelines.)

changed circumstances, regardless of the status of the judgment on the arrearages.

¶13 Mother also argues that Father's request constituted a request for modification because the order of assignment directed payment of \$525 per month in child support and \$250 per month in payment on arrears "until further Order of the Court." The order of assignment, however, is a directive to Father's employers and constitutes a means of collecting the funds ordered in the court's Stipulated Order Re: Paternity, Custody, Child Support and Other Issues. That order directed that the judgment on arrearages and expenses should be paid at the rate of \$250 per month with interest "until paid in full." When the judgment was paid in full, Father's obligation to continue to pay on the judgment ceased. See, e.g., *Guzman v. Guzman*, 175 Ariz. 183, 185-86, 854 P.2d 1169, 1171-72 (App. 1993) (minor's marriage automatically terminated support obligation without need to seek modification; father entitled to recover overpayment).

¶14 Accordingly, we conclude Father is eligible pursuant to A.R.S. § 25-527 to be reimbursed for the amount overpaid. As Mother argues, under A.R.S. § 25-527, whether to order reimbursement to Father is within the discretion of the superior court. We therefore remand the matter to the superior court for further proceedings.

CONCLUSION

¶15 We conclude Father's request for reimbursement of funds overpaid did not constitute a request for a retroactive modification of child support. We therefore reverse the superior court's ruling and remand for further proceedings. In our discretion, we decline Father's request for an award of attorney's fees pursuant to A.R.S. § 25-324 (2009).

/s/

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JOHN C. GEMMILL, Judge