DIVISION ONE
FILED: 08/30/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 11-0451
	)	
ELIZABETH GATSEOS BUCKINGHAM,	)	DEPARTMENT E
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	(Rule 28, Arizona Rules of
WILLIAM BRENT BURNS,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FN2010-050341

The Honorable Douglas Gerlach, Judge

AFFIRMED IN PART, VACATED IN PART AND REMANDED

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O R O Z C O, Judge

¶1 Respondent/Appellant William Brent Burns (Father) appeals from the judgment entered in favor of Petitioner/Appellee Elizabeth Gatseos Buckingham (Mother). For the following reasons, we affirm in part, vacate in part, and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The parties' marriage was dissolved by a Utah Decree of Divorce (Decree) in 1997. Pursuant to the Decree, Father was required to pay child support for the parties' child (Daughter), to pay all of Daughter's dental expenses not covered by insurance, and to pay one-half of the costs associated with Daughter's college education.

¶3 Father alleges that in June 2008 he stopped making child support payments to Mother. He contended his child support obligation ended because Daughter was considered emancipated under Utah law. In 2010, Mother registered the Decree in Arizona and petitioned to enforce it in Arizona family court. In May 2011, the court held an evidentiary hearing. Mother presented evidence that Daughter should not be considered emancipated as of May 2008 due to delays in the course of her education, specifically that: (1) the parties agreed Daughter should repeat fourth grade; (2) Daughter withdrew from high school following her junior year in 2007; and (3) with Father's

agreement, Daughter studied to sit for the General Educational Development (GED) test from 2007 to 2009, passing the test in 2009 and earning a high school diploma equivalency certificate. Mother testified that she paid approximately $18,000 in uninsured dental expenses for Daughter and over $24,000 in expenses related to Daughter's college education.

¶4 Following the hearing, the family court entered judgment against Father for $6338.16 in unpaid child support, $3250 in unpaid dental expenses, and $12,106 in unpaid college education expenses. Father timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.2 (Supp. 2011).

DISCUSSION

¶5 Pursuant to A.R.S. § 25-1304.A (2007), we must apply the substantive law of Utah in deciding what amount Father owes Mother under the Decree.

Unpaid Child Support

¶6 In Utah, a parent's order of support automatically adjusts when a child is emancipated by operation of law. *See* West's Utah Code Annotated (U.C.A.) § 78B-12-219(1) (West 2012)[1] (providing that a base child support award is automatically

[1] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

adjusted "[w]hen a child becomes 18 years of age or graduates from high school during the child's normal and expected year of graduation, whichever occurs later"). Both parties agree that whether Father owes Mother any unpaid child support turns on the meaning of the child's "normal and expected year of graduation." This phrase is not defined in the statute or Utah case law.

¶7 We review the interpretation and application of statutes de novo. *Schwarz v. City of Glendale*, 190 Ariz. 508, 510, 950 P.2d 167, 169 (App. 1997). Our goal in interpreting a statute is to determine and give effect to legislative intent. *Mail Boxes, Etc., U.S.A. v. Indus. Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). We begin with the statute's language, *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994), but if the language is ambiguous, we may employ other tools of statutory construction. *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

¶8 Because the phrase "normal and expected year of graduation" is not plainly obvious, we turn to other sources to guide our interpretation of U.C.A. § 78B-12-219(1). The only authority of which we are aware to define "normal and expected year of graduation" is the Utah Office of Recovery

Services/Child Support Services (ORS/CSS).[2] In 1989, the ORS/CSS issued child support guidelines (Guidelines) interpreting § 78B-12-219(1). The relevant Guidelines were revised in 2010 and define "normal and expected year of graduation" as kindergarten plus twelve years.

¶9 "Judicial deference should be given to agencies charged with the responsibility of carrying out specific legislation" and we give great weight to "an agency's interpretation of a statute or regulation it implements." *U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989). "Administrative rules and regulations and statutes are read in conjunction with each other and harmonized whenever possible." *Thomas & King, Inc. v. City of Phoenix*, 208 Ariz. 203, 206, ¶ 9, 92 P.3d 429, 432 (App. 2004).

¶10 Nevertheless, child support "guidelines are not law; they are merely aids to application of the law in accordance with current economic and social facts." *In re Marriage of Pac.*, 168 Ariz. 460, 466, 815 P.2d 7, 13 (App. 1991). Furthermore, "we are free to draw our own legal conclusions in determining if the [agency] properly interpreted the law,"

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[2] U.C.A. § 62A-11-107 (West 2012) authorizes ORS/CSS to adopt, amend, and enforce rules related to the collection of child support.

Capitol Castings, Inc. v. Ariz. Dep't of Econ. Sec., 171 Ariz. 57, 60, 828 P.2d 781, 784 (App. 1992) (citation and internal quotation marks omitted), and we "remain the final authority on critical questions of statutory construction." *U.S. Parking Sys.*, 160 Ariz. at 211, 772 P.2d at 34.

¶11 Based on the kindergarten plus twelve years standard, Father argues Daughter's "normal and expected year of graduation" at the time of the entry of the Decree was 2008. Accordingly, Father contends his support obligation ended in June 2008, the month he stopped making child support payments.

¶12 Under the Guidelines, however, the kindergarten plus twelve years standard is rebuttable if a parent provides documentation to support a different date. *See* Guidelines at 3 ("[P]resume that an 18 year old is in school and pursuing timely graduation unless you are notified by the parent(s) to the contrary" and "have received proper documentation from the parent(s).").

¶13 Mother contends the kindergarten plus twelve years standard is inapplicable in this case because Daughter was held back in the fourth grade after entry of the Decree. If Daughter's repetition of the fourth grade is taken into account when determining her "normal and expected year of graduation," Father's support obligation would be extended by one year to May

2009. The family court apparently took the repetition into account when it found that Daughter's "anticipated graduation date was May, 2009."

¶14 Upon review of § 78B-12-219(1) and the family court ruling, it appears that the family court did not consider the Guidelines in making its findings. Because the Guidelines are relevant authority that should have been considered in this case, we therefore conclude the court erred by not considering the Guidelines when determining whether Daughter's repetition of the fourth grade impacted her "normal and expected year of graduation." *See* Guidelines at 2, Example 2 (stating that when a child is held back a grade, the repetition does not affect the normal and expected year of graduation even though the child will likely graduate a year later). We therefore remand the child support issue for the family court to reconsider Daughter's "normal and expected year of graduation" in light of the Guidelines.

¶15 Upon remand, the court should also consider Rule R527-250 (Rule) of the Utah Administrative Code (U.A.C.), which ORS/CSS adopted to explain how the agency will interpret and apply U.C.A. § 78B-12-219, particularly in determining a child's

"normal and expected year of graduation."[3] U.A.C. R527-250-1.2. Pursuant to the Rule, "the normal and expected year of graduation is based on kindergarten plus twelve years of school, unless an exception is listed," U.A.C. R527-250-2.1, and "ORS/CSS will presume that the normal and expected month of graduation is May of the expected graduating year." U.A.C. R527-250-2.2. Furthermore, "[i]f a deviation to the 'kindergarten plus twelve years' standard is not known until after the entry of the child support order, the 'expected' year of graduation is not altered based on the new facts unless the child receives an early high school diploma or other high school equivalency diploma." U.A.C. R527-250-2.4.

¶16 Because this case presents particularly complex and difficult issues of fact and law, we provide further analysis to help guide the family court upon remand. If the court determines Daughter's "normal and expected year of graduation" should have remained 2008 based on the kindergarten plus twelve years presumption, to rebut the presumption Mother would need to prove some other reason to delay Daughter's "normal and expected

[3] Although the Rule was not adopted until July 2011, three months after the hearing in this case was held, we find the Rule to be applicable because we remand for a redetermination regarding the meaning of "normal and expected year of graduation."

year of graduation" aside from Daughter's repetition of the fourth grade.

¶17 At the hearing, Mother presented evidence that Daughter withdrew from high school in 2007 to pursue her GED. Based on this evidence, the family court found that Daughter's pursuit of a GED was "the best alternative available for her" and that her pursuit of a GED was "sufficient to allow a continuation of child support under [U.C.A.] section 15-2-1."

¶18 Again, the Guidelines provide relevant guidance concerning whether a child's pursuit of a GED impacts that child's "normal and expected year of graduation." Pursuant to the Guidelines, if a child is working toward a GED instead of attending high school, she is considered emancipated when her normal class graduates. *See* Guidelines at 3. Thus, according to the Guidelines, the pursuit of a GED does not affect the child's "normal and expected year of graduation" or date of emancipation. Therefore, if the issue is raised on remand, the family court should consider the Guidelines when determining whether Daughter's pursuit of a GED obligated Father to pay child support beyond May 2008.

¶19 In any event, U.C.A. § 15-2-1 (West 2012) is not applicable to the facts of this case. That section provides that "courts *in divorce actions* may order support to age 21."

(Emphasis added). As this case is not a divorce action, the court had no authority to "allow a continuation of child support" pursuant to § 15-2-1. *See Thornblad v. Thornblad*, 849 P.2d 1197, 1198-99 (Utah App. 1993). Modification of the child support order could only be entered upon a petition for modification and pursuant to U.C.A. §§ 30-3-5(3) (West 2012), 78B-12-104 (West 2012) and 78B-12-112(4) (West 2012).

¶20 Moreover, under Arizona law, "[m]odification of a registered child support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tribunal of this state." A.R.S. § 25-1311.B (2007). In addition, "a tribunal of this state may not modify any aspect of a child support order that may not be modified under the laws of the issuing state, including the duration of the obligation of support." A.R.S. § 25-1311.C. The relevant statutes of both Utah and Arizona provide that the modification of a child support order becomes effective, at the earliest, on the date of service of a petition to modify. *See* A.R.S. §§ 25-327.A (2007), 25-503.E (Supp. 2011); U.C.A. § 78B-12-112(4); *Guerra v. Bejarano*, 212 Ariz. 442, 443-44, ¶ 7, 133 P.3d 752, 753-54 (App. 2006); *Ball v. Peterson*, 912 P.2d 1006, 1011 (Utah App. 1996); *Thornblad*, 849 P.2d at 1200. Because this action flows from Mother's petition

to enforce and there is nothing in the record to indicate that Mother served Father with a petition to modify, the court had no authority to retroactively modify the terms of the child support order to include the period at issue here.[4]

¶21 The family court also found, "as a matter of equity, having encouraged [Daughter] without disclosing his intention to discontinue paying child support, Father ought to be required to remain responsible for child support" until Daughter obtained her GED. Under these facts, the court erred in applying the doctrine of equitable estoppel to order Father to pay child support from May 2008 through December 2009.

¶22 There are three elements to equitable estoppel: "(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." *Flying Diamond Airpark, LLC v.*

[4] Even if we assume Mother's petition to enforce could be treated as a petition to modify, Mother did not serve Father with the petition until February 2010. Thus, under both Arizona and Utah law, a retroactive modification of the support order could not be made effective until February 2010, at the earliest. *See* A.R.S. §§ 25-327.A, 25-503.E; U.C.A. § 78B-12-112(4); *Guerra*, 212 Ariz. at 443-44, ¶ 7, 133 P.3d at 753-54; *Ball*, 912 P.2d at 1011; *Thornblad*, 849 P.2d at 1200. It would therefore be legally impermissible for the court to modify the support order to cover the time period at issue here because Mother sought child support for the period between May 2008 and December 2009, a period that ended several months before she served the petition in this case.

Meienberg, 215 Ariz. 44, 50, ¶ 28, 156 P.3d 1149, 1155 (App. 2007). Father's support of Daughter in her pursuit of a GED, standing alone, cannot reasonably be interpreted as an act that conveys an intent to extend his child support obligation. There is no evidence in the record to suggest that Father made a promise to Mother that Daughter's pursuit of her GED would extend his child support obligation. Thus, there was no evidence that Father took any position regarding whether Daughter's pursuit extended his support obligation, and Mother therefore could not rely to her detriment on Father's position. The court's belief that Father "ought to be required to remain responsible for child support," without more, is an insufficient legal basis to extend Father's child support obligation in this case. Because the elements of equitable estoppel cannot be satisfied, the court erred, as a matter of law, in applying the doctrine to this case.

¶23 For the foregoing reasons, we vacate the family court's judgment for unpaid child support in the amount of $6338.16, and we remand the child support issue for a redetermination of Daughter's "normal and expected year of graduation" consistent with this decision.

Daughter's Dental Expenses

¶24 Father next argues the family court erred by ordering him to reimburse Mother for $3250 in dental expenses for Daughter. We disagree.

¶25 The Decree requires Father to pay all of Daughter's dental expenses not covered by insurance. At trial, Mother presented evidence that she paid almost $18,000 in uncovered dental expenses for Daughter. Although, Mother admittedly did not comply with U.C.A. § 78B-12-212(8) (West 2012) by providing Father with evidence of these expenses within thirty days of payment, the consequence of this failure is that a court *may* – not *must* - deny Mother the right to reimbursement. U.C.A. § 78B-12-212(9). It is thus within the discretion of the court to award Mother judgment for uninsured dental expenses pursuant to the Decree regardless of her failure to provide the receipts to Father within thirty days of the expenditures. *See* U.C.A. § 78B-12-212(9).

¶26 Father argued below that because the dental expenses for which Mother seeks reimbursement were largely for cosmetic procedures, he should bear no responsibility to contribute toward those expenses. The court rejected Father's argument, finding "the evidence established that expenses for dental work that was necessary and not cosmetic exceeded $3,250.00."

Because Father expressly agreed to pay $3250 of Daughter's dental expenses, we find the court did not err in awarding Mother judgment for Daughter's uninsured dental expenses incurred in that amount.

Daughter's College Expenses

¶27 Father maintains the family court erred when it ordered him to pay one-half of the costs expended for Daughter's college education. Regarding Daughter's college expenses, the Decree provides:

> Each party shall be responsible for one-half of the costs associated with higher education (post-high school) of [Daughter], including, but not limited to the costs of tuition, books and living expenses. The parties shall agree upon the nature and extent of such costs prior to the time they are incurred. Neither party shall be liable for any such costs unilaterally incurred by the other without consultation.

The family court found that "Mother has incurred $24,212.00 in expenses related to [Daughter's] college education for which Father has not paid any share" and ordered Father to pay half of those expenses.

¶28 Father first argues that even if the Decree requires him to pay half of Daughter's college expenses, he has the right to refuse to do so pursuant to *Carlson v. Carlson,* 584 P.2d 864 (Utah 1978). Father's reliance on *Carlson* is misplaced,

however, because the support order in that case did not require the father to contribute toward the child's college expenses. *Id.* at 864. Here, Father expressly agreed to pay for half of Daughter's college expenses in the Decree, thereby creating a contractual obligation that Mother simply seeks to enforce. *See LaPrade v. LaPrade*, 189 Ariz. 243, 246-47, 941 P.2d 1268, 1271-72 (1997). We thus find Father's argument based on *Carlson* to be unpersuasive.

¶29 Father next seeks to avoid his contractual obligation by invoking the condition precedent that the parties must agree on the expenses prior to incurring them. Father argues that because he did not agree in advance to any of Mother's claimed expenditures for Daughter's college education, he should not be required to contribute toward any of the expenses.

¶30 The family court rejected Father's argument, finding his interpretation of the Decree to be unreasonable because it would provide him with the power to "veto" Daughter's college expenses and thereby "the power to deny [Daughter] a college education altogether (or at least avoid having to pay for any part of it)." The court therefore interpreted the Decree to provide that "neither party could unilaterally incur expenses that were unreasonable" and concluded "Father failed to present

persuasive evidence showing that [the expenses claimed by Mother] were unreasonable." We find no error.

¶31 Mother also presented evidence that she repeatedly attempted to consult with Father regarding Daughter's college expenses and Father refused to engage in any meaningful discussion regarding those expenses. Father cannot unilaterally frustrate the very purpose of the contractual provision by refusing to discuss and agree to the payment of Daughter's college expenses. *See Cannon v. Stevens Sch. of Bus., Inc.*, 560 P.2d 1383, 1385 (Utah 1977) (holding that a party to a contract may not "avail himself of the nonperformance of a condition precedent, who has himself occasioned its non-performance." (citing Restatement (First) of Contracts § 295 (1932))). Mother thus fulfilled her obligation under the contract to consult with Father prior to incurring any college-related expenses for Daughter.

¶32 Furthermore, Mother provided evidence that she incurred almost $25,000 in expenses related to Daughter's college education for which Father has not paid any share. Accordingly, the court's findings are supported by the record and we find no error in the award of $12,106 to Mother for unpaid college expenses.

Attorney Fees

¶33 Awards of attorney fees generally are subject to an abuse of discretion standard. *See ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 52, 952 P.2d 286, 290 (App. 1996). However, the interpretation of Arizona Rule of Family Law Procedure (Family Law Rule) 78.D.1 is a question of law and thus is subject to our de novo review. *See In re Reymundo F.*, 217 Ariz. 588, 590, ¶ 5, 177 P.3d 330, 332 (App. 2008) ("Issues concerning the proper interpretation of statutes and rules are questions of law, which we review de novo.").

¶34 Mother complied with Family Law Rule 78.D.1 by requesting attorney fees under A.R.S. § 25-324 (Supp. 2011) in her amended petition. She may establish the claim for attorney fees by itemized affidavit or, "at the discretion of the court, by testimony." Ariz. R. Fam. L.P. 78.D.3. Mother supported the initial award of attorney fees by testifying that she had spent "close to" $10,000 in fees and submitting an itemized statement of $3493.27 from her former Arizona attorney who registered the Decree and attempted to settle the parties' dispute prior to litigation. Those attorney fees are recoverable regardless of whether Mother retained new counsel to prosecute her petition for enforcement.

¶35 Likewise, Father's objection to the amount of the award is unfounded. Mother testified that she had expended approximately $10,000 in attorney fees, including fees to her current Arizona counsel, former Arizona attorney, and prior Colorado counsel. Initially, the trial court awarded Mother $5000 in attorney fees upon finding Father had made no meaningful efforts to settle, had not always been reasonable, and had income substantially greater than Mother's. After the hearing, Mother submitted an itemized statement from her trial counsel for $8561.11 and asked that additional fees be awarded. Excluding the unknown amount Mother paid to her former Colorado attorney, she submitted itemized statements demonstrating that she had paid more than $12,000 to her current and former Arizona counsel. The trial court awarded an additional $3000 in attorney fees, for a total fee award of $8000.

¶36 Pursuant to A.R.S. § 25-324, a court has discretion to award attorney fees in a dissolution proceeding "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." The record is clear that Father's financial resources far exceed Mother's. Ascertaining the reasonableness of the parties' positions pursuant to A.R.S. § 25-324 is a factual determination to be made by the family court based on

the issues raised and the evidence presented by the parties during trial. Based on the record before us, we cannot say the court abused its discretion by awarding fees to Mother.

¶37 Finally, Mother and Father both request attorney fees incurred on appeal pursuant to A.R.S. § 12-341.01 (2003). As that statute has no application here, we decline to award fees to either party.

CONCLUSION

¶38 For the foregoing reasons, we affirm in part, vacate in part, and remand for further proceedings consistent with this decision.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PHILIP HALL, Judge

/S/
_____
JOHN C. GEMMILL, Judge