

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

JAMES MITCHELL, *Petitioner/Appellant*,

v.

SILVIA MITCHELL, *Respondent/Appellee*.

STATE OF ARIZONA, ex rel., DEPARTMENT OF ECONOMIC
SECURITY, *Real Party in Interest*.

No. 1 CA-CV 20-0677 FC
FILED 9-2-2021

Appeal from the Superior Court in Coconino County
No. S0300DO201100555
The Honorable Elaine Fridlund-Horne, Judge

AFFIRMED

COUNSEL

James Mitchell, Phoenix
Petitioner/Appellant

McCarthy Weston PLLC, Flagstaff
By Philip McCarthy, Jr.
Counsel for Respondent/Appellee

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Arizona Attorney General's Office, Phoenix
By Sandra L. Nahigian, Lauren J. Lowe
Counsel for Real Party in Interest

MEMORANDUM DECISION

Presiding Judge Cynthia J. Bailey delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge Maria Elena Cruz joined.

B A I L E Y, Judge:

¶1 James Mitchell ("Father") appeals the superior court's order denying with prejudice his petition to modify child support (simplified). *See* A.R.S. § 25-320(24)(B). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father was ordered to pay child support for his three minor children in 2011. In October 2019, he moved to modify his monthly child support payment based on his reduced income. At the time, Father's arrears balance was over \$450,000.

¶3 After a hearing, the superior court ordered Father to pay \$0 in child support, an amount that deviated from the Child Support Guidelines ("Guidelines"). *See* A.R.S. § 25-320(20). In considering Father's arrears, the court ordered him to pay \$200 per month, an amount substantially less than the interest accruing on the arrearage. *See* A.R.S. § 25-320(28)(A) (requiring the court to make a finding if ordering an arrears payment in an amount less than the monthly interest). Neither party appealed the order.

¶4 In October 2020, Father petitioned to modify child support (simplified). *See* A.R.S. § 25-320(24)(B) (governing procedure for modification when applying the Guidelines will result in at least a 15% difference from the existing support amount). Father asserted the Guidelines' Self-Support Reserve Test ("Reserve Test") applied to arrears payments and therefore supported his request. *See* A.R.S. § 25-320(15) (defining test to assess whether a parent can pay a child support order and maintain a minimum standard of living). After considering the parties' briefing, the court determined the Reserve Test does not apply to arrears payments and denied Father's petition without holding a hearing.

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¶5 We have jurisdiction over Father’s timely appeal under Article 6, Section 9, of the Arizona Constitution, A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

DISCUSSION

¶6 Father contends the court erred by construing the Guidelines’ references to child support too narrowly, not applying the Reserve Test to his arrears payment, and failing to conduct a hearing. We review *de novo* questions of statutory interpretation as issues of law. *State ex rel. Dep’t of Econ. Sec. v. Munoz*, 223 Ariz. 434, 436, ¶ 6 (App. 2010).

¶7 Nearly every section of the Guidelines applies to establish a current child support payment, including the Reserve Test. *See generally* A.R.S. § 25-320. The Reserve Test expressly provides that it “applies *only to the current child support obligation*, but does not prohibit an additional amount to be ordered to reduce an obligor’s arrears.” A.R.S. § 25-320(15) (emphasis added); *cf. id.* (referencing arrears and giving the court discretion to consider “arrears on child support for children of other relationships”).

¶8 In addition, the Guidelines address arrears separately from child support. *See* A.R.S. §§ 25-320(28) (arrears), -320(4) (differentiating “current child support and arrearage payment”). Section 25-320(28) does not refer to the Reserve Test and instructs the court to consider factors for determining arrears different from those for establishing current child support payments. Specifically, the court must consider the interest accruing on arrears and make a separate finding if the monthly arrears payment is less than the accrued monthly interest. A.R.S. § 25-320(28)(A).

¶9 There is support throughout the statutory scheme for the conclusion that arrears are treated separately from current child support and are not governed by the Reserve Test or the simplified modification procedure. For example, A.R.S. § 25-327(A), governing modification of support, states that “support may be modified . . . except as to any amount that may have accrued as an arrearage.” Likewise, A.R.S. § 25-503(E), governing support orders, states: “Any order for child support may be modified or terminated on a showing of changed circumstance . . . except as to any amount that may have accrued as an arrearage before the date of notice of the motion” *See also* A.R.S. §§ 25-503(F) (providing that “vacating a support obligation is prospective and does not alter the petitioner’s obligation to pay child support arrearages . . . previously ordered by the court”); -502(I) (providing any purge amount must be “credited first to the current child support obligation and then to

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arrearages”); -504(M) (governing orders of assignment and differentiating between support and arrearages); -505.01(A) (governing administrative income withholding orders and providing that a withholding order “shall include payment for current child support . . . and may include an installment payment for arrearages”); -505.01 (L) (“The obligation for current child support shall be fully met before any payments under an order of assignment may be applied to payments of arrearages . . .”).

¶10 To the extent Father faults the court for failing to adhere to federal regulations, *see* C.F.R 302.56, his argument is unavailing. The regulation Father cites pertains to requirements already embodied in the Guidelines—that a child support order is based on evidence of ability to pay and accounts for the needs of a parent by incorporating a calculation method such as the Reserve Test. Nothing about the regulation supports Father’s contention that arrears are subject to the Reserve Test.

¶11 We therefore conclude, based on the express language in the Reserve Test, the section governing arrears, the structure of the Guidelines, and the overall statutory scheme, that the Reserve Test and the simplified modification procedure do not apply to establish arrears payments.

¶12 Finally, we disagree with Father that a hearing was required under the Guidelines. The simplified modification procedure prohibits a court from modifying child support without a hearing. A.R.S. § 25-320(24)(B). For the reasons discussed, Father’s petition did not seek to modify the current child support order but only to reduce his monthly arrears payment. Father’s current child support payment was already at \$0 and could not be reduced further. Thus, under these circumstances, a hearing was not required.

CONCLUSION

¶13 For the reasons stated, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA