IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 08/18/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

In the Matter of:	)	No. 1 CA-CV 10-0388
	)	
JOHN M. POPE,	)	DEPARTMENT D
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	Not for Publication
	)	(Rule 28, Arizona Rules
MARGARET T. POPE,	)	of Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. DR1998-017125

The Honorable Paul A. Katz, Judge (Retired)

AFFIRMED

Benjamin T. Wiesinger — Phoenix
Attorneys for Petitioner/Appellant

Rose Law Firm — Phoenix
By David L. Rose
Attorneys for Respondent/Appellee

G E M M I L L, Judge

¶1 John Pope ("Father") appeals from the family court's order denying his petition to terminate child support. Father argues the court erred by finding his children are severely

disabled and by failing to consider his alternative request to modify his child support obligation based on his children's financial resources. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Margaret Pope ("Mother") are the parents of twin daughters born in 1990. The children have mild cerebral palsy, developmental delays, attention deficit disorder, anxiety disorder, and nonverbal learning disorder. Father and Mother divorced in 2001, and in the dissolution decree, the court ordered Father to pay $3,500 per month in child support. At that time, the court declined to rule on whether child support should continue past the age of majority, finding such issue premature. *See* Arizona Revised Statutes ("A.R.S.") section 25-320(E) (Supp. 2010)[1] (a family court can order child support to continue past the age of majority for mentally or physically disabled children provided certain criteria are met); and *Ferrer v. Ferrer,* 138 Ariz. 138, 139-40, 673 P.2d 336, 337-38 (App. 1983) (whether child support should continue past the age of majority should be determined at a time when the issue can be properly evaluated based on the extent of the disability and how it affects the child's life after high school). In June 2002, the court reduced Father's child support obligation to $1,219

[1] We cite to the current version of A.R.S. § 25-320(E) because the statute has not been amended in any way that changes the relevant provision.

per month.

¶3 On May 29, 2009, Father petitioned the court to terminate child support because the girls attained the age of majority and graduated from high school. Mother responded that child support should continue based on the girls being severely disabled and unable to live independently or be self-supporting. After an evidentiary hearing, the family court issued a detailed minute entry order concluding the girls qualified for continued child support under A.R.S. § 25-320(E) and therefore, denied Father's petition. Father timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

DISCUSSION

I. Standard of Review

¶4 Generally, we review child support awards for an abuse of discretion. *Fuentes v. Fuentes,* 209 Ariz. 51, 54, ¶ 10, 97 P.3d 876, 879 (App. 2004). A court abuses its discretion if there is no competent evidence to support its decision or if the court commits an error of law. *Id.* at 56, ¶ 23, 97 P.3d at 881; *Little v. Little,* 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). We accept the family court's factual findings unless clearly erroneous or unsupported by any credible evidence. *Hrudka v. Hrudka,* 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995) (citation omitted). Statutory interpretation and application are questions of law we review de novo. *Thomas v.*

Thomas, 203 Ariz. 34, 36, ¶ 7, 49 P.3d 306, 308 (App. 2002).

II. Severely Disabled Under A.R.S. § 25-320(E)(2)

¶5 Father first argues the family court erred in interpreting and applying A.R.S. § 25-320(E)(2) by finding the girls are severely disabled. Section 25-320(E) (2010) gives a court authority to order child support past the age of majority if all of the following are true:

> 1. The court has considered the factors prescribed in subsection D of this section.[2]
>
> 2. The child is severely mentally or physically disabled as demonstrated by the fact that the child is unable to live independently and be self-supporting.
>
> 3. The child's disability began before the child reached the age of majority.

¶6 No Arizona cases have interpreted A.R.S. § 25-320(E)(2). When interpreting a statute, our goal is to determine the legislature's intent by first looking at the plain language of the statute as the best indicator of that intent. *Bither v. Country Mut. Ins. Co.,* 226 Ariz. 198, 200, ¶ 8, 245 P.3d 883, 885 (App. 2010). If the language of a statute is unambiguous, we give effect to the language without turning to other methods of statutory construction. *Fuentes,* 209 Ariz. at 54-55, ¶ 12, 97 P.3d at 879-80. We give terms their usual and

[2] Subsection D requires the Arizona Supreme Court to establish guidelines based on eight relevant factors for determining the amount of child support. A.R.S. § 25-320(D).

ordinary meanings unless the legislature clearly intended different meanings. *Bilke v. State,* 206 Ariz. 462, 464-65, ¶ 11, 80 P.3d 269, 271-72 (2003).

¶7 By its plain language, A.R.S. § 25-320(E)(2) defines "severely mentally or physically disabled" as being unable to live independently or be self-supporting due to such disability. *See also* Ariz. Sen. Fact Sheet, House Bill 2249, 47th Leg., 1st Reg. Sess. (2005) (adopting the present version of A.R.S. § 25-320(E)(2) and stating a court is permitted "to order child support past the age of majority for a disabled child only if the disability makes the child unable to live independently and be self-supporting"). "Independent" means "[n]ot subject to the control or influence of another" or not dependent on someone else. Black's Law Dictionary 774 (7th ed. 1999). "Self-supporting," in this context, means the ability to provide oneself with sustenance including "food and clothing that allow one to live in the degree of comfort to which one is accustomed." Black's Law Dictionary 1453; *see also* A.R.S. § 25-320(Q)(5) ("support" has the same meaning as in § 25-500); and A.R.S. § 25-500(9) (Supp. 2010) (defining "support" as "the provision of maintenance or subsistence").

¶8 Here, the family court correctly found "the test in defining 'severely mentally disabled' is not whether the children from a medical prospective have a mild versus severe

mental health disability, but whether the effect of said disability causes the child or children to be unable to live independently and be self-supporting." Accordingly, although the children in this case have been diagnosed as "moderately disabled" that does not prevent them from being considered "severely disabled" under A.R.S. § 25-320(E)(2).

¶9 There is sufficient evidence supporting the court's finding that the girls are severely disabled within the meaning of A.R.S. § 25-320(E)(2). For instance, Dorothy Fune, a vocational counselor and life care planner, opined the girls could not live independently, nor could they be self-supporting.[3] Based on the vocational testing and interviews with the girls, Fune explained they would be candidates for supported job placement in which a vocational specialist would help place the girls with employers who would understand and make accommodations for their limitations. Fune believes the girls do not have the ability to obtain and maintain employment on their own. Additionally, the girls' pediatrician opined the children are unable to live independently and are not capable of self-sustaining employment. Even Father testified the girls

[3] Contrary to Father's argument, the court did not accept this testimony as a legal conclusion. In fact, the court sustained Father's objections to questions concerning whether the girls were considered severely disabled within the meaning of A.R.S. § 25-320(E)(2) and stated Fune's opinion would not be beneficial in that area.

need some help before they will be independent and are not currently self-supporting. Although the girls are left home alone while Mother works full-time, and are able to feed themselves and clean, such evidence does not demonstrate the girls could live independently and be self-supporting.

¶10 Father argues the girls are capable of earning an income, and by obtaining employment, will be able to become self-supporting. The evidence shows the girls' earning capacity is entry level wages, approximately $10,000 per year, working part-time.[4] Fune testified, however, that the girls' potential income would be below the federal poverty guidelines. Thus, the girls' potential earning ability does not show how they can be self-supporting and live independently. Moreover, at the time of the hearing the girls did not earn any income and thus, cannot be considered self-supporting at this time.

¶11 Father also argues the girls' potential to develop their abilities to live independently and be self-supporting is hindered by Mother's refusal to apply for available resources, and the court's order allows this to continue. We disagree.

¶12 Although Mother has not enrolled the girls in any job placement programs, the record shows she is interested in the girls obtaining employment. One year prior to their graduation

[4] Fune testified the majority of supported employment positions are part-time.

from high school, Mother enrolled the girls in a "transitional plan" to help them get jobs when they graduated in hopes of them obtaining long-term positions with benefits. Mother obtained letters of recommendation from the girls' job coach and teachers in order to help find them jobs when they graduated. The girls indicated they wanted to be aides in a special education classroom, however, Mother testified due to school budget cuts many districts eliminated this position.[5] Mother explored vocational rehabilitation with the girls in 2009, but due to the waiting periods involved, did not pursue it because she thought she could help the girls find jobs. Ultimately, however, Mother could not find them jobs. Mother inquired about whether the girls could work at a school they previously volunteered at, but transportation was an issue because the girls do not drive, and Mother is concerned about them taking the bus.

¶13 In its ruling, the court ordered that within 30 days:

> Mother and Father shall arrange a joint meeting or appointment with Ms. Fune for purposes of working out with her a plan for the children to become enrolled as quickly as possible in a proper program or programs of vocational rehabilitation, job development/job coaching, life skills training and possible future placement in a supervised independent or group living situation. Once properly enrolled in appropriate vocational and independent living programs, this Court would

[5] During their senior year, the girls volunteered as teacher's aides in a kindergarten class, and also worked for two summers at Vacation Bible School.

> expect both parents to be actively involved in said education and training as may be requested by Ms. Fune or the persons and organizations with whom the children may become enrolled to provide them each with the best opportunities for independent living.

Thus, contrary to Father's argument, the court's order does not allow the "situation to continue." The court set a 30-day deadline for the parties to meet with Fune in order to develop a plan to enroll the girls in some type of job placement program. If Mother does not cooperate, there is nothing preventing Father from either seeking relief in court or fostering the girls' independence himself.

¶14 Because the evidence supports the court's finding that the girls are currently unable to live independently and be self-supporting, the family court correctly concluded the girls were severely disabled under A.R.S. § 25-320(E)(2).

III. Financial Resources of the Children

¶15 Father argues the court erred as a matter of law by not considering his alternative request to modify child support in light of the girls' financial resources. In its order, the court stated it did "not believe that either party has requested that the amount of child support be recomputed, and accordingly . . . has not ruled on this issue at this time."

¶16 In the joint prehearing statement, one contested issue was if child support continues, how much the support amount

should be. Both parties submitted proposed child support worksheets. Father's worksheet showed his child support obligation should be between $1,455 and $1,505 per month and Mother's worksheet showed Father's obligation should be $1,710 per month. Mother argues any error in failing to recalculate Father's child support obligation was harmless because Father suffered no prejudice in that his child support obligation would have increased from the previously ordered $1,219 per month. *See, e.g., Nichols v. Baker,* 101 Ariz. 151, 155, 416 P.2d 584, 588 (1966) ("When the trial court errs in favor of the complaining party, this court will consider such error harmless and insufficient to require reversal."); *accord Graham County Elec. Coop., Inc. v. Town of Safford,* 95 Ariz. 174, 182, 388 P.2d 169, 174 (1963). Based solely on this evidence, we agree Father has not shown any prejudice and thus, the court's decision not to recalculate Father's child support obligation is not reversible error.[6]

¶17 Father contends, however, the court erred by failing

[6] Contrary to Father's argument, whether he suffered any prejudice is relevant to determining whether relief is appropriate. *See Ariz. Dep't of Econ. Sec. v. Valentine,* 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997) (to justify reversal, an error must be prejudicial to the appealing party's substantial rights, and any harmless error will not warrant reversal); and Arizona Rule of Family Law Procedure 86 (The court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

to consider the girls' financial resources, specifically, their eligibility for Supplemental Security Income ("SSI") and their ability to earn income, which would have decreased his child support obligation. In considering whether to order continued child support after a child reaches the age of majority, the court must consider the factors listed in A.R.S. § 25-320(D), including "[t]he financial resources and needs of the child." A.R.S. § 25-320(D)(1); A.R.S. § 25-320(E)(1).

¶18 Although the term "financial resources" is not specifically defined, our case law and the Arizona Child Support Guidelines indicate a court is not strictly limited in the items it may consider as financial resources. *Cummings v. Cummings,* 182 Ariz. 383, 386, 897 P.2d 685, 688 (App. 1994); A.R.S. § 25-320 app. ("Guidelines") § 5 (2007)[7] (listing many items included in gross income). A court may consider all aspects of a person's income and assets that are not part of income. *Strait v. Strait,* 223 Ariz. 500, 502, ¶ 8, 224 Ariz. 997, 999 (App. 2010); *Fuentes,* 209 Ariz. at 55, ¶ 14, 97 P.3d at 880; *see also Fee v. Fee*, 496 A.2d 793, 796 n.6 (Pa. Super. Ct. 1985) ("Financial resources encompass the full nature and extent of

[7] The Arizona Supreme Court adopted revised child-support guidelines to take effect on June 1, 2011. Ariz. Sup.Ct. Admin. Order No. 2010–116 (Nov. 15, 2010), *available at* http://www.azcourts.gov/Portals/22/admorder/Orders10/2010-116.pdf. The revised guidelines contain identical language for the provisions we cite in this decision.

each parent's property, earning capacity, and direct and indirect income from whatever source.").

¶19 The Guidelines provide "income earned or money received by or on behalf of a person for whom child support is ordered to continue past the age of majority . . . *may* be credited against any child support obligation." Guidelines § 26(A) (emphasis added). "Gross income includes income from any source" such as salaries, wages, pensions, trust income, capital gains, social security income, and insurance benefits. Guidelines § 5(A). The Guidelines, however, specifically exclude SSI from the definition of gross income and from being considered "benefits" received by a child. Guidelines §§ 5(B); 26(C).

¶20 The record shows the girls may qualify for SSI, but have not applied for such benefits. Fune testified it is not in the girls' best interests to apply for SSI because

> an individual who receives SSI benefits is basically determined to be unemployable and is relegated to a category where they are completely unable to function in the world at large. And once individuals start receiving those benefits, they tend to stay on the dull, so to speak. Which does not really serve a constructive purpose for the girls who are at the beginning of their lives. It would be much more beneficial for both of them to be involved with rehabilitation services to maximize their ability to be independent. . . .

Should the girls obtain jobs, the parties stipulated they would

each earn $819.75 per month after taxes.

¶21 Contrary to Father's argument, the court expressly considered the evidence concerning the girls' potential financial resources, and the evidence supports the court's decision not to attribute income or SSI to the girls for purposes of calculating Father's child support obligation. At the time of the hearing, the girls were not employed and thus, not earning any income. It is within the court's discretion whether to attribute income to a person. Guidelines § 26(A); *see also* Guidelines § 5(E)(1) ("The court may decline to attribute income" to a parent if "[a] parent is physically or mentally disabled."). Because the girls are disabled and have not been able to find jobs, the court did not abuse its discretion by not attributing income to them. *See Little,* 193 Ariz. at 521, 975 P.2d at 111 (A court may impute income up to full earning capacity if the "earnings are reduced voluntarily and not for reasonable cause."). Additionally, as previously noted, the court ordered the parties to enroll the girls in vocational rehabilitation or a job development program. *See supra* ¶ 13. Thus, going forward, it is not entirely within Mother's control whether the girls will take advantage of their potential to earn income. Should the girls earn income in the future, it might be appropriate for the court to recalculate child support at that time.

¶22 Likewise, regarding SSI, at the time of the hearing, the girls did not receive SSI.[8] Moreover, because the Guidelines specifically exclude SSI from the definition of income and from benefits received, the court was well within its discretion not to attribute this potential monetary source to the girls. Additionally, the court expressly considered Fune's testimony about how applying for SSI might not be in the girls' best interests. Accordingly, the court did not abuse its discretion by not attributing SSI to the girls.

¶23 Father also argues the court failed to make appropriate findings of fact. This argument is waived because it is raised for the first time in Father's reply brief. *See Wasserman v. Low,* 143 Ariz. 4, 9 n.4, 691 P.2d 716, 721 n.4 (App. 1984) ("An issue first raised in a reply brief will not be considered on appeal."). Additionally, *Reid v. Reid,* 222 Ariz. 204, 213 P.3d 353 (App. 2009) is distinguishable because that case involved child custody, not child support. *See Reid,* 222 Ariz. at 209-10, ¶¶ 19-20, 213 P.3d at 358-59 (declining to find waiver despite a party's failure to raise lack of A.R.S. § 25-403 findings in the family court proceedings). Further, the court is not required to make specific findings on the A.R.S. § 25-320(D) factors, but is only required to consider them. *See*

[8] The evidence showed, however, the girls received approximately $45 to $50 per month from Social Security while they were minors, which Mother put into a savings account for the girls.

A.R.S. § 25-320(E)(1) (court must *consider* "the factors prescribed in subsection D"); *accord Elliot v. Elliot,* 165 Ariz. 128, 131 n.1, 796 P.2d 930, 933 n.1 (App. 1990); *but see* Guidelines § 22 (requiring findings on the record as to gross income, adjusted gross income, basic child support obligation, total child support obligation, each parent's share of the obligation, and the child support order).

¶24 Accordingly, although Father did request the amount of child support to be recalculated, his argument was based on imputing SSI or income to the girls. Because the court considered these items, but was not required to impute them to the girls, there was no error in not recalculating Father's child support obligation.

IV. Attorneys' Fees

¶25 Father requests an award of attorneys' fees on appeal, but does not cite a basis for such award. Therefore, we deny his request. *In re Wilcox Revocable Trust,* 192 Ariz. 337, 341, ¶ 21, 965 P.2d 71, 75 (App. 1998). Mother requests attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2010). Section 25-324(A) gives a court discretion to award reasonable attorneys' fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." After considering the financial resources of the parties and the reasonableness of the

positions throughout these proceedings, we exercise our discretion and decline to award fees to Mother. As the prevailing party, however, we award Mother her costs on appeal. *See* A.R.S. § 12-341 (2003) (successful party in a civil action shall recover costs).

CONCLUSION

¶26 For the foregoing reasons, we affirm the family court's order.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
PATRICK IRVINE, Presiding Judge

___/s/_____
PHILIP HALL, Judge