DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of: JAYNE MARIE BRANIGAN, Petitioner/Appellant, v. JOHN CHRISTOPHER FREDRICKSON, Respondent/Appellee.	No. 1 CA-CV 10-0552 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. FC2003-013024

The Honorable Paul A. Katz, Judge

REVERSED IN PART; AFFIRMED IN PART; REMANDED

Jayne Branigan — Phoenix
Petitioner/Appellant Pro Se

Ivy L. Kushner — Scottsdale
Attorney for Respondent/Appellee

I R V I N E, Presiding Judge

¶1 Jayne M. Branigan ("Mother") appeals the family court's ruling that she had waived her reimbursement claims against John Christopher Fredrickson ("Father") for medical and extracurricular activity costs incurred prior to their July 2009

settlement agreement. For the reasons that follow, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶2 The parties dissolved their marriage by consent decree in 2004. According to the Marital Settlement Agreement ("MSA"), Mother was responsible for the children's health insurance and one-third of their uncovered medical and extracurricular activity costs. Father was responsible for the remaining two-thirds of these costs.

¶3 In 2008, Father filed a petition for order to show cause, alleging Mother violated parenting arrangement provisions of the MSA relating to "Parental Communication Guidelines," "Life Insurance," and "Exchange of Financial Information." At a hearing in July 2009, the parties advised the court that they had reached a settlement, which was made binding pursuant to Arizona Rule of Family Procedure ("Rule") 69. Father withdrew his petition, and the court entered an order memorializing the terms of the settlement ("Rule 69 agreement").

¶4 A few months later, Mother filed a petition pro per for order to show cause, alleging Father was in contempt of different parenting arrangement provisions of the MSA regarding: "Medical, Dental and Vision Insurance," "Uninsured Medical Expenses" and "Clothing, Allowances, and Extra-Curricular Activities Costs." She argued he failed to reimburse her several

thousand dollars for these costs. In the joint pretrial statement filed in April 2010, Mother alleged Father owed her $9145.48 for these costs, and $840.54 in child support arrearage. Father argued the only reimbursements at issue were "from July 2009 to present" because reimbursement had been "discussed" prior to the settlement.

¶5 At the evidentiary hearing, the family court did not recall whether reimbursement of medical costs was within the scope of the Rule 69 agreement. The following discussion occurred:

> THE COURT: Was there any agreement that said that neither party would make a claim for those reimbursement expenses?
>
> [Father's Counsel]: No, it is not --
>
> THE COURT: Because I don't know if that issue was one that did or didn't get resolved.
>
> [Father's Counsel]: Except to the extent . . . that the last hearing resolved everything that was at issue before you on July 7th. . . . [E]xcept as expressly set forth in your order, it did not reserve any other accrued issues going forward. And the fact – I mean, I'm looking at the list of exhibits, and there is a bill from Sonora Quest for $74.77 in the July 7th Joint Pretrial, and that's the same bill that [Mother] is seeking to include in her claim from [sic] reimbursement in this proceeding.
>
> So basically, what we're trying to say is, [the] parties reached a global resolution back in July, and now she's trying to re-argue or re-urge matters that

> were part of the dispute that were [sic] resolved by the stipulation and your order.

Mother admitted that she asked to include "past out-of-pocket" expenses in the Rule 69 agreement, but explained: "We didn't agree to any of the medical expenses. They didn't want to address it because he wasn't suing me for that."

¶6 Father testified there was "[v]ery little" discussion about reimbursement before the July 2009 hearing and cited one instance in 2005 when Mother handed him a "large pile of stuff," which he offset and wrote a $28 check for that was never cashed. Father reasserted, however, that they "reached a settlement in July of '09 that covered everything prior to that point." Father argued that after offsets, Mother owed him $517.16 for medical costs incurred after July 2009.

¶7 The family court stated that it was clear "the parties did reach a global settlement, so to speak, of issues that were presented to the Court as of July 7th of 2009," but because Father was the one who filed the petition in 2008, it asked:

> Had Mother, in response to Father's petition, raised issues by way of a response or a cross-motion . . . for enforcement of medical expenses? Because the question I have is, if neither party raised the medical expenses as an issue in pleadings or in discovery, was that – were all issues resolved?

Father's counsel responded: "Yes, Your Honor. And the reinforcement of that is – if you were to look at the Joint

Pretrial Statement from the July ’09 hearing, you would see that [Mother] has listed as an invoice – invoice from Sonora Quest laboratories in the amount of $74.77, dated 4/3/09.”

¶8 The family court took the matter under advisement. Two months later, it ruled that “any medical expenses incurred by either party prior to July 1, 2009, have been waived as a result of the settlement the parties reached at the time of the then pending litigation.” As to costs incurred from July 1, 2009 to April 12, 2010, the court concluded that Mother owed Father $517.16. The court modified child support and awarded Mother $840 in arrearage, which it reduced by the $517.16 it found Mother owed. Mother timely appeals.

DISCUSSION

1. Reimbursements Before July 1, 2009

¶9 Mother contends that the family court erred in determining that she waived all her medical reimbursement claims prior to July 1, 2009, as a result of the Rule 69 agreement. We agree.

¶10 The interpretation of a contract is a question of law that we review de novo. *Rand v. Porsche Fin. Servs.*, 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007). General contract principles govern the construction and enforcement of a settlement agreement. *Emmons v. Superior Court*, 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585 (App. 1998). When interpreting a

contract, "the court must ascertain and give effect to the intention of the parties at the time the contract was made if at all possible." *Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975). The parties' intent is best ascertained by the language in the contract itself. *See Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966). "The court must give effect to the contract as it is written, and the terms or provisions of the contract, where clear and unambiguous, are conclusive." *Id.* When the written language is ambiguous, we should consider the surrounding circumstances at the time the agreement was made. *Polk*, 111 Ariz. at 495, 533 P.2d at 662.

¶11 In this case, Father agrees the language of the Rule 69 agreement is not ambiguous. The Rule 69 agreement reads, in pertinent part:

> 10. Pursuant to the Rule 69 Agreement of the parties set forth above, *Father withdraws his Petition for Order to Show Cause Re: Contempt and Modification of Parenting Arrangements in its entirety*.

(Emphasis added.) The preceding nine paragraphs address details concerning co-parenting counseling, child therapy; communication and "substantially equal" responsibility for "arranging, scheduling, transportation and attending . . . medical and dental appointments, school activities and [extracurricular] activities," agreement on health care providers; communication regarding school-related matters; and life insurance. Despite

such specific provisions, the Rule 69 agreement is silent as to unreimbursed medical and extracurricular expenses. There is also no broad language indicating that the settlement was "global" or otherwise intended to extend beyond the issues specifically addressed in the Rule 69 agreement or raised by Father's petition. *See Goodman*, 101 Ariz. at 472, 421 P.2d at 320 ("It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement."). As written, the Rule 69 agreement did not settle Mother's reimbursement claims.

¶12 Even assuming an ambiguity exists, the circumstances surrounding the Rule 69 agreement do not show that the parties intended to settle all reimbursement claims. Father's petition only alleged violations of "Parental Communication Guidelines," "Life Insurance," and "Exchange of Financial Information." These provisions appear at paragraphs D, K and N of the parenting arrangement section of the MSA. Mother's petition alleged violations of "Uninsured Medical Expenses" and "Clothing, Allowances, and Extra-Curricular Activities Costs," which appear at paragraphs I and J. Neither Father's petition nor Mother's response discussed paragraphs I or J. Violations of these provisions were not raised until Mother filed her petition.

¶13 Furthermore, the July 2009 joint pretrial statement regarding Father's petition framed the contested issues as follows:

> A. Whether Mother should be held in contempt of Court for failure to follow the [MSA] and Parenting Arrangements concerning the following?
>
> 1. Parental Communications Guidelines
> 2. Life Insurance
> 3. Exchange of Financial Information
>
> B. Whether either party pay [sic] for the other party's attorney fees and costs?

The parties' position statements did not discuss reimbursement of medical costs.

¶14 Nor are we convinced that a single invoice listed by mother as an exhibit in July 2009, proves otherwise. Mother explained to the family court that she initially attempted to include reimbursement claims in the Rule 69 agreement, but Father "didn't want to address it because he wasn't suing me for that." Father's own statements about the settlement negotiations in the July 2009 joint pretrial statement seem to corroborate this:

> Counsel for the parties have participated in settlement negotiations, but have been unable to reach a resolution of the issues. *The impediment to settlement is Mother's demand that issues unrelated to this litigation be incorporated in a stipulation*.

(Emphasis added.) While Father argues Mother's invoice is conclusive proof that Mother's reimbursement claims were litigated in July 2009, he listed no exhibits of his own as offsets that would show that he was prepared to rebut her claims. Father's position in the April 2010 joint pretrial statement also contradicts that argument, stating: "Mother did not raise any [reimbursement] issues in her response to Father's prior petition nor did she raise these issues with the court at the time of the Evidentiary hearing in July 2009." Based on the evidence before the trial court,[1] we find that the surrounding circumstances reinforce our reading of the Rule 69 agreement. The court erred in finding that settlement waived Mother's claims prior to July 2009.

¶15 Father urges this Court to affirm on the independent ground that Mother's reimbursement claims were untimely pursuant to Guideline 9A because she did not demand payment "within 180 days after the services occur[red]." Father did not raise this objection at trial, but argues the family court's comments show that it considered this as a factor. We disagree. The transcript reveals the family court was uncertain whether such a statute even existed because he was "unable to find [one]." Father

[1] Father objects to Exhibit 3 in the appendix to the opening brief because it was not admitted at trial. We have not considered it in this decision.

concedes, however, that the family court did not find on this ground, and his response, "I don't know off the top of my head, Your Honor," did not inform the court of Guideline 9A or otherwise preserve the issue for appeal. *Winters v. Ariz. Bd. of Educ.,* 207 Ariz. 173, 177, ¶ 13, 83 P.3d 1114, 1118 (App. 2004) (holding that challenges not raised with specificity and addressed at trial are waived on appeal). We express no opinion, however, as to whether this issue should be addressed upon remand.

2. Reimbursements After July 1, 2009

¶16 Mother argues that the family court miscalculated the reimbursements incurred after July 1, 2009, because it credited Father with offsets that were supported only with "self-serving testimony" and not documented in violation of Rule 91(C)(4). Mother also requests an $80.21 reimbursement not presented at trial. Because these issues were not timely presented to the family court, Mother may not raise them for the first time on appeal. *Winters*, 207 Ariz. at 177, ¶ 13, 83 P.3d at 1118; *Banales v. Smith*, 200 Ariz. 419, 420, ¶ 6, 26 P.3d 1190, 1191 (App. 2001).

¶17 Mother appears to argue that the family court should have disregarded offsets in Father's "John After July" exhibit that she later discovered were incorrect. To the extent Mother

challenges the exhibit itself, her claim is waived because it was admitted without objection at trial.

¶18 Mother argues, however, that we should consider her notice, filed after the hearing and before the ruling, that Father gave false testimony about his offsets. Because the family court did not rule on Father's motion to strike the notice, we agree with Mother that her notice is properly before this Court. *See McElwain v. Schuckert*, 13 Ariz. App. 468, 470, 477 P.2d 754, 756 (1970) (holding a motion not ruled upon is deemed denied by operation of law). Her objection in the notice to Father's testimony and claims as "hearsay and false" because he did not present receipts, however, was untimely raised and deemed denied.

¶19 We assume, however, that the family court considered the evidence Mother offered that Father falsely claimed two expenses that she had in fact paid, and that another offset for "$61" was actually "only $52.63." Because the family court ultimately found in favor of Father on those issues, we defer to its assessment of his credibility. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). Therefore, we affirm the trial court's ruling regarding the claimed reimbursements for after July 1, 2009.

3. Attorneys' Fees on Appeal

¶20 Mother requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324. Because Mother represented herself, we deny her request. *See Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983) (holding that party filing pro per cannot claim attorneys' fees because of the absence of the attorney-client relationship). Mother has been successful in part in overturning the trial court's ruling, so we do award her costs incurred on appeal upon her compliance with Rule 21, Arizona Rules of Civil Appellate Procedure.

¶21 Husband also seeks attorneys' fees on appeal pursuant to ARCAP 21, citing the provision in the MSA requiring the parties to make "reasonable efforts" to mediate before filing a court action. Father did not raise this argument below, when its assertion might have led to a mediated settlement in lieu of further litigation. Therefore, we deny Father's request for fees.

CONCLUSION

¶22 We reverse the portion of the family court's order that the Rule 69 agreement waived all of Mother's reimbursement claims prior to July 1, 2009, and remand for a determination of that amount minus any offsets proven by Father. We affirm the

award of $517.16 in favor of Father for reimbursement claims after July 1, 2009.

/s/
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Judge

/s/
ANN A. SCOTT TIMMER, Chief Judge