NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-581

	Opinion Delivered June 3, 2009
STEVEN POLLARD APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. 1991-5389]
V.	HONORABLE COLLINS KILGORE, JUDGE
STEPHANIE POLLARD APPELLEE	AFFIRMED AS MODIFIED

M. MICHAEL KINARD, Judge

This appeal arises from a dispute between the parties as to what amounts appellant, Steven Pollard, owed his ex-wife, Stephanie Pollard, under their divorce decree. Appellant argues that the circuit court erred in (1) failing to follow the "law of the case" set forth at a June 29, 2005 hearing and (2) awarding attorney's fees to appellee. While we do not agree that the law-of-the-case doctrine applies in this case, we do find that the circuit court erred in holding that appellant owed one-half of their son's medical insurance costs and medical expenses not reimbursed by insurance after he reached the age of majority. We affirm the court's order as modified in this opinion.

Steven Pollard and Stephanie Pollard were divorced by decree entered November 12, 1991, in the Chancery Court of Pulaski County. The divorce decree incorporated the parties' separation and property settlement agreement. It awarded

primary physical custody of the parties' minor child, Jason, to Ms. Pollard. It also required Mr. Pollard to pay the following amounts related to the parties' minor child: $25 per week in child support; one-half of the weekly cost of day care; one-half of the monthly premiums for medical insurance; one-half of any medical or dental costs not covered by insurance; one-half of "all reasonable expenses associated with Jason attending [an in-state public university or college]" for four years; one-half of the "costs of all special activities such as Taekwondo." Also, the agreement provided that the parties would split equally (1) their 1990 and 1991 personal property tax and (2) their 1990 federal and state income tax liability.

On November 3, 2004, Ms. Pollard filed a motion for contempt and enforcement of decree, and the circuit court issued an order to show cause. In her motion, appellee alleged that appellant had paid only $11,872 of the $42,571.86 she calculated he owed her under the terms of their divorce decree, leaving a balance of $30,699.86. Appellee claimed that appellant was required under the divorce decree to pay the following, as of the date the motion was filed: $14,125 in child support; one-half of child care costs for the period beginning in 1992 through 1995, in the amount of $2,479; one-half of the monthly premiums for medical insurance for the minor child, in the amount of $3,435.51; one-half of medical and dental costs not covered by insurance, in the amount of $3,324.41; one-half of the child's college expenses, in the amount of $14,751.70; one-half of the cost of all special activities for the minor child, in the amount of $2,393.52; one-half of the $116.54 that appellee paid in property taxes for 1990 and 1991, an amount of $58.27; one-half of

$2,004.45, the amount of the parties' 1990 federal and state income tax liability, or $1,002.22. Appellee also requested that she be awarded attorney's fees and costs.

In his response filed December 1, 2004, appellant denied the allegations and pled the affirmative defenses of laches, payment, set off, accord and satisfaction, and statute of limitations, as well as asserted that plaintiff-appellee had "unclean hands which preclude recovery on the claims." Appellant also stated that the parties had "made and acted upon numerous oral modification[s] to the separation and property settlement agreement dated October 27, 1991[,] which precludes recovery on Plaintiff's claims." On March 9, 2005, appellee filed an amended motion for contempt and enforcement of decree, in which she added expenses that were omitted from her original motion ($337.16) or had been incurred since the filing of the original motion (amounts for medical expenses, tuition, room and board, transportation expenses, cell phone expenses). Appellee acknowledged an error in the original motion and stated that appellant should be given credit in the amount of $1,149.86 against the amount she requested in her original motion. She again requested an award of attorney's fees and costs. Appellant filed his answer to the amended motion on March 25, 2005, and again denied that he owed the amounts claimed.

Both parties submitted pretrial briefs for the circuit court's consideration. Appellant asserted that the parties had made various agreements over the years regarding the payment of reimbursements, including allowing his painting appellee's house and providing hair care services to appellee to offset his obligations under the decree. He also claimed that

appellee had not provided him with receipts as evidence of his obligations until after June 2004.

At the June 29, 2005 hearing, the court directed the parties to organize and summarize the documents submitted into evidence. The final amount owed was to be determined at a later hearing. But the court did make some rulings from the bench regarding what expenses appellant would be responsible for paying, including: that appellant would be responsible for the dollar amount of child care listed in the decree; and that "college expenses" included tuition, fees, books, room, and board for one-hundred twenty-four (124) credit hours and nothing else.

On October 8, 2007, appellant moved to dismiss for failure to prosecute on the basis that appellee had not "provided the best evidence of or documentation or records from the evidence in the record" to support the expenses claimed for day care, health insurance, medical expenses, extra-curricular activities, or college expenses. In the alternative, appellant requested that the court enter a subpoena duces tecum order to obtain evidence of the expenses incurred for which appellee claimed he owed her one-half.

On November 19, 2007, appellee filed a motion for a ruling on the evidence from the June 29, 2005 contempt hearing, and the circuit court issued an order to show cause, which set the matter for hearing on December 17, 2007. Attached to the motion were exhibits showing amounts Ms. Pollard alleged appellant owed, "revised as of June 30, 2006," and reflecting the court's ruling at the June 2005 hearing that certain expenses

would not be allowed. The revised amounts were as follows: $4,016.65 in child support; $2,236.00 in child care costs; $4,403.45 in medical insurance costs; $2,706.61 in medical expenses not covered by insurance; $10,620.64 in college expenses; $1,227.84 in special activities costs; $132.91 in personal property taxes; $1,002.23 in 1990 federal income tax; with the total amount owed listed at $26,346.31. At the hearing, the judge indicated that he perceived the hearing to be a continuation of the June hearing. At this hearing, the court found appellant to be in willful contempt of court for failure to pay the sum of $26,346.31; ordered him to pay that amount; and ordered him held in the county jail until that amount was paid or arrangements were made for it to be paid. The court also awarded attorney's fees in the amount of $12,066.66.

A written order was filed December 18, 2007, finding appellant in civil contempt and ordering him to pay Ms. Pollard the sum of $26,346.31. Appellant was ordered to be held in the Pulaski County Regional Detention facility until the sum was paid to Ms. Pollard. On February 4, 2008, a more detailed order from the December 17, 2007 hearing was entered. The court stated that appellant had failed to file or submit any further evidence on his behalf for the court to consider following the June 29, 2005 hearing. The court found that appellant was indebted to Ms. Pollard in the amount of $26,345.31 beginning on June 29, 2005, together with both prejudgment and post judgment interest as allowed by law. The court stated that this award was based on plaintiff-appellee's Exhibit A and supporting exhibits attached to her motion for a ruling on evidence from the June 29, 2005 contempt hearing. Appellant was found to be in

willful contempt of court for his failure to satisfy his financial obligations under the divorce decree and for his failure to make any substantial payments toward his financial obligations since the last court date of June 29, 2005. He was ordered to immediately report to the Pulaski County Detention Center to be held until he "purges himself of the contempt."

We review traditional chancery cases de novo on the record, but we will not disturb the trial court's findings of fact unless they are clearly erroneous or clearly against the preponderance of the evidence. *See Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993).

First, appellant challenges the court's finding that he was indebted to Ms. Pollard in the amount of $26,345.31 as of June 29, 2005. Appellant does not argue that the contempt finding itself was in error, as he does not challenge the court's findings that he owed appellee for child support. Instead, appellant argues on appeal that the law-of-the-case doctrine precluded the trial court's award of medical insurance expenses, medical or dental expenses not covered by insurance, college expenses (tuition, fees, room, and board), college books and supplies, and parking expenses. He contends that the trial court's oral rulings of June 29, 2005, became the "law of the case," on which he was justified in relying. Appellant points to the following statements by the trial court during the June 2005 hearing: "[T]his is what college expenses are: Tuition, fees, room, and board, nothing else, for a hundred and twenty-four hours…books too[.] And the activity fees. No computer, no T.V., no cell phone, no transportation, no parking, no parking tickets." The judge also informed the parties "if there's no record, there's no obligation."

The law-of-the-case doctrine provides that the decision of an appellate court establishes the law of the case for the trial court upon remand, and for the appellate court itself upon subsequent review, and is conclusive of every question of law and fact previously decided in the former appeal, and also of those that could have been raised and decided in the first appeal, but were not presented. *Turner v. NW Ark. Neurosurgery Clinic, P.A.,* 91 Ark. App. 290, 210 S.W.3d 126 (2005). Our research reveals not a single case where the doctrine has been applied before an appeal was ever taken. In fact, in *West v. Belin*, 314 Ark. 40, 858 S.W.2d 97 (1993), our supreme court found that the doctrine of the law of the case did not apply to require a chancellor to adhere to an earlier decision of a different chancellor in the same court where no appeal was involved.

Appellant cites *Fiori v. Truck Drivers, Local 170*, 354 F.3d 84 (1st Cir. 2004), for the proposition that a "judge is not prevented from changing his mind, so long as there was an explanation and the court took into account justified reliance." The following language provides some context:

> Under these circumstances, we agree that the defense may have been misled, but see no basis for reversal. A stray comment, and one necessarily cryptic in context (the court having refused to give the union's instruction) is not "law of the case"-a doctrine directed primarily to formal legal rulings. *Nor*, as it happens, *would law of the case doctrine prevent the judge from altering his ruling-this happens from time to time-although it would likely require him to take account of justified reliance.*

Id. at 90 (citations omitted; emphasis added). We note that *Fiori* was a federal appeal from the First Circuit, and the opinion is not controlling law for this court. Contrary to appellant's argument, our supreme court has written:

> Pursuant to Administrative Order 2(b)(2), an oral order announced from the bench does not become effective until reduced to writing and filed. This rule eliminates or reduces disputes between litigants over what a trial court's oral decision in open court entailed. If a trial court's ruling from the bench is not reduced to writing and filed of record, it is free to alter its decision upon further consideration of the matter. Simply put, the written order controls.

McGhee v. Arkansas State Bd. of Collection Agencies, 368 Ark. 60, 67, 243 S.W.3d 278, 284 (2006) (internal citations omitted). Based on the foregoing, we find no error pursuant to appellant's law-of-the-case argument.

As an alternative argument for reversal of the award of medical insurance expenses and medical or dental expenses not covered by insurance, appellant argues that under Ark. Code Ann. § 9-14-237(a)(1) his support obligations ceased by operation of law on their son's eighteenth birthday. We agree. Arkansas Code Annotated section 9-14-237 (Supp. 2005) provides that "[u]nless a court order for child support specifically extends child support after these circumstances, an obligor's duty to pay child support for a child shall automatically terminate by operation of law…when the child reaches eighteen (18) years of age unless the child is still attending high school." Nothing in this statute prevents a court from ordering a parent to continue to pay medical insurance and other medical expenses for his child past the child's eighteenth birthday. The issue is whether the divorce decree, comprised primarily of the parties' property settlement agreement, required appellant to continue paying one-half of these medical expenses after their son reached the age of eighteen. We hold that it did not.

Questions relating to the construction, operation, and effect of separation agreements between husband and wife are governed, in general, by the rules and

provisions applicable in the case of other contracts generally. *Sutton v. Sutton*, 28 Ark. App. 165, 167, 771 S.W.2d 791, 792 (1989). Here, the parties' separation and property settlement agreement, which was incorporated into the divorce decree, provides that appellant "agrees to pay one-half (1/2) of the monthly premiums for medical insurance for the parties' *minor* child beginning January 1, 1992" (emphasis added) and that "any medical or dental costs not covered by said insurance shall be divided by the parties equally." We note that while independent property settlement agreements remain subject to judicial interpretation, *Pittman v. Pittman*, 84 Ark. App. 293, 139 S.W.3d 134 (2003), we do not defer to the trial court's determinations of law. When contracting parties express their intention in a written instrument in clear and unambiguous language, it is our duty to construe the written agreement according to the plain meaning of the language employed. *Id.* Because the divorce decree did not specifically provide for medical insurance or other expenses past the son's minority, the issue becomes whether health insurance and medical expenses not covered by insurance should be considered "reasonable expenses" of attending college, which do extend past minority per the parties' agreement. We hold that they should not when the decree does not so state and the parties do not agree. Thus, the trial court erred in awarding appellee $1,973.65 in medical insurance costs and $1,315.37 in medical expenses after their son reached the age of eighteen. Accordingly, we modify the circuit court's order to reflect our holdings and affirm the order as modified.

Appellant argues that the trial court's judgment against him for his one-half share of the tax debts was barred by the doctrine of laches. The laches defense requires a detrimental change in the position of the one asserting the doctrine, as well as an unreasonable delay by the one asserting his or her rights against whom laches is invoked. *Felton v. Rebsamen Med. Ctr., Inc.*, 373 Ark. 472, ___ S.W.3d ___ (2008). Thus, the defense of laches requires more than mere delay in bringing a claim, and appellant has failed to persuade us that laches should apply to bar Ms. Pollard's claim for one-half of the tax debts to which she was entitled under the divorce decree. We affirm the trial court on its judgment that appellant owes one-half of the tax debts.

Finally, appellant contends that the trial court erred in awarding attorney's fees because appellee failed to comply with Arkansas Rule of Civil Procedure 54. However, Rule 54(e), which pertains to a court's award of attorney's fees, was complied with in this case. Appellant asserts that Rule 54(e)(3) requires that "[t]he court shall find the facts and state its conclusions of law, and a judgment shall be set forth in a separate document as provided in Rule 58." However, this requirement applies only where a party has requested an opportunity for adversary submissions with respect to the motion for attorney's fees. *See* Ark. R. Civ. P. 54(e)(3). No such request was made in this case.

Arkansas Code Annotated section 9-12-309(b) (Repl. 2002) provides that a court "may allow either party additional attorney's fees for the enforcement of alimony, maintenance, and support provided for in the [divorce] decree." Our supreme court has recognized that a trial judge has considerable discretion to award attorney's fees in a

divorce case. *See McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). The record shows that appellee's attorney requested an award of attorney's fees in numerous pleadings and submitted an itemized billing statement for the court's review. We find no abuse of discretion in the court's award of attorney's fees and affirm on this point.

Affirmed as modified.

HART and GLADWIN, JJ., agree.