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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona, Division 1.

In re the Marriage of: Martha BURGOYNE, Petitioner/Appellee,
v.
David Harold SMITH, Respondent/Appellant.

No. 1 CA–CV 17–0408 FC
|
FILED May 17, 2018

Appeal from the Superior Court in Maricopa County; No. FC2007–005186; No. FC2007–093839; (Consolidated); The Honorable Stephen M. Hopkins, Judge. **AFFIRMED**

Attorneys and Law Firms

Udall Shumway PLC, Mesa, By Sheri D. Shepard, Counsel for Petitioner/Appellee

Horne Slaton PLLC, Scottsdale, By Thomas C. Horne, Counsel for Respondent/Appellant

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Chief Judge Samuel A. Thumma joined.

MEMORANDUM DECISION

PERKINS, Judge:

***1** ¶ 1 David Harold Smith ("Father") appeals from the superior court's judgment for child support arrearages in favor of Martha Burgoyne ("Mother"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 In 2008, Father and Mother dissolved their twenty-eight year marriage by consent decree. The decree required Father to pay monthly child support of $842 for the parties' two minor children. The decree further provided that "[a]ny and all obligations for child support shall terminate when a minor child attains the age of 18 years ... or, in the event a minor child reaches the age of majority while he is attending high school," support shall continue until the child graduates or turns nineteen.

¶ 3 The older child turned eighteen in 2008 and graduated high school in May 2009. The younger child turned eighteen and, shortly thereafter, graduated high school in May 2011. Father never petitioned the superior court to modify child support.

¶ 4 In 2016, Mother petitioned the superior court to find Father in contempt for non-payment of spousal maintenance and child support. The parties resolved the spousal maintenance claim in a binding agreement not at issue here but were not able to reach an agreement on child support. After considering the parties' briefs on the issue, the court entered final judgment against Father for $9,631.50, plus $6,786.80 in interest. The arrearage calculation was based on monthly payments of $842 through May 2011, when the younger child graduated high school.

DISCUSSION

¶ 5 This Court reviews the superior court's award of child support arrearages for an abuse of discretion. *See Ferrer v. Ferrer*, 138 Ariz. 138, 140 (App. 1983). However, we review *de novo* the court's interpretation of the applicable statutes and Child Support Guidelines, Ariz. Rev. Stat. ("A.R.S.") section 25–320 app. (2018), ("Guidelines"). *Guerra v. Bejarano*, 212 Ariz. 442, 444, ¶ 6 (App. 2006).

I. Application of A.R.S. § 25–327 and the Guidelines

¶ 6 By statute, as applicable here:

> the provisions of any decree respecting maintenance or support may be modified or terminated only on a showing of changed circumstances that are substantial and continuing **except as to any amount that may have accrued as an arrearage before the date of notice of the motion or order to show cause to modify or terminate** .... Modifications and

> terminations are effective on the first day of the month following notice of the petition for modification or termination unless the court, for good cause shown, orders the change to become effective at a different date but not earlier than the date of filing the petition for modification or termination.

A.R.S. § 25–327(A) (emphasis added). Under the plain language of § 25–327(A), a court "cannot modify a child support award to alter the amount of arrearages accrued before notice of the petition to modify is given to the other parent." *Guerra*, 212 Ariz. at 444, ¶ 7. *Guerra* is factually similar to this case, as it involved a child support obligation for two children that was not allocated between them. *See id.* at 442, ¶ 2. In *Guerra*, the older child emancipated in 2002 but the father waited until 2004 to petition the court for a modification of his child support obligation. *See id.* at 443, ¶¶ 3–4. The father requested the modification be retroactive to 2002, arguing the older child's emancipation "automatically terminated [his] duty to support [the older child]." *Id.* at 444, ¶ 8. This Court disagreed, explaining that "although [the older child's] emancipation automatically terminated [f]ather's duty to support him, it could not automatically terminate [f]ather's support obligation because [the younger child] remained unemancipated." *Id.* at 444, ¶ 11. The Court further explained that, because the parties "could not know the proper amount of support due for [the younger child] absent the court's application of the Guidelines, [f]ather was required to seek modification of the order in compliance with A.R.S. §§ 25–327(A) and –503(E)." *Id.*

***2** ¶ 7 *Guerra* applies here. Although the older child's emancipation in 2009 automatically terminated Father's duty to support the child, it did not automatically terminate Father's $842 per month child support obligation, because the younger child remained unemancipated. Moreover, *Guerra* is consistent with Guidelines § 25, which forecloses Father's argument. A child support order "is not automatically reduced" by an emancipated child's share, instead, a party must make a written request to modify child support before the child support obligation can be recalculated. Guidelines § 25. Father made no such request and was therefore obligated to pay the previously ordered $842 per month until the youngest child emancipated.

¶ 8 Father argues *Guerra* was erroneous because it is "contrary to the enabling statute, A.R.S. § 25–320." He likewise argues that § 25 of the Guidelines is "inconsistent with that enabling statute," relying on A.R.S. § 25–320(E), which permits the superior court to order child support for children over the age of majority under certain circumstances. Father points out that the circumstances enumerated in § 25–320(E) are not present here. He then argues that any application of the Guidelines requiring support past the age of majority "as was done here" is contrary to § 25–320(E). Notwithstanding Father's arguments, neither this Court's application of the Guidelines in *Guerra*, nor the superior court's application of the Guidelines here, is contrary to § 25–320(E).

¶ 9 A court has authority to order child support "[e]ven if a child is over the age of majority when a petition is filed or at the time of the final decree" if three conditions are satisfied. A.R.S. § 25–320(E). Contrary to Father's argument, § 25–320(E) is inapplicable because (1) the children were not over the age of majority at the time of the decree and (2) the court did not "order support to continue past the age of majority." A.R.S. § 25–320(E). In 2008, the court ordered monthly child support of $842 for two children who were both minors at the time. When the first child reached the age of majority, it was Father's responsibility to seek a modification of his court-ordered support obligation. He failed to do so. When the superior court determined Father's child support arrearages in 2017, it was merely enforcing its prior order. Moreover, the court lacked authority to retroactively modify the amount of the arrearages that had already accrued. *See* A.R.S. § 25–327(A).

¶ 10 Thus, the superior court did not err in awarding Mother child support arrearages based on the amount of child support established in the decree.

II. Estoppel

¶ 11 Father alternatively argues that Mother's acceptance of reduced payments over four years, without objection, forms the basis of an estoppel defense based on her "inaction or silence" that gave Father no reason to seek relief through a modification request. Father contends Mother "lay in the weeds for years" before filing the enforcement action.

¶ 12 The record reflects that in May 2009, when the older child emancipated, Father owed $1,679 in child support arrearages.

Thereafter, Father made no payments for four months, after which he made a payment of $5,063.25. In December 2009, Father began making sporadic payments of $400, which were interspersed with larger payments. He made his last payment in August 2011, at which point he owed $9,631.50 in arrearages.

¶ 13 A party raising an equitable estoppel defense must prove three elements: (1) "conduct by which one induces another to believe in certain material facts," (2) "the inducement results in acts in justifiable reliance thereon," and (3) "the resulting acts cause injury." *Ray v. Mangum*, 163 Ariz. 329, 333 (1989). If the claim involves child support arrearages, there must be "clear and compelling evidence in the record to support such a determination." *State ex rel. Dep't of Econ. Sec. on Behalf of Dodd v. Dodd*, 181 Ariz. 183, 187 (App. 1994). We review the superior court's determination of equitable estoppel for an abuse of discretion. *Pizziconi v. Yarbrough,* 177 Ariz. 422, 427 (App. 1993).

***3** ¶ 14 Here, the superior court found "no evidence that Mother engaged in any affirmative act post-Decree that may be construed as an intentional relinquishment of a known right." On appeal, Father argues that Mother's silent acceptance of his partial payments is sufficient conduct to form the basis for his estoppel defense. We disagree. Mother's acceptance of Father's unilaterally reduced child support payments hardly provides "clear and compelling evidence" to support an estoppel defense. *See Schnepp v. State*, 183 Ariz. 24, 29 (App. 1995) (prior failure by a parent to make efforts to collect child support arrearages does not mandate a finding of estoppel). Thus, the superior court did not abuse its discretion in finding that Mother's conduct did not rise to the level of an inducement for estoppel purposes under *Ray*.

¶ 15 Accordingly, we affirm the superior court's rejection of Father's equitable estoppel defense.

CONCLUSION

¶ 16 For the foregoing reasons, we affirm the judgment. Mother requests an award of fees pursuant to A.R.S. § 25–324, which authorizes such an award after consideration of the financial resources of the parties and the reasonableness of their positions. A.R.S. § 25–324. Based on Father's greater financial resources and the positions of the parties, we award Mother her reasonable attorneys' fees and costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

All Citations

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