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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
KENNETH KUSH,)	of Du Page County.
)	
Petitioner-Appellant,)	
)	
and)	No. 92-D-1215
)	
ALICE KUSH,)	Honorable
)	Brian J. McKillip,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court’s judgment enforcing the college expenses provision of the parties’ marital settlement agreement was affirmed where petitioner consented to child’s choice of college; where the parties’ agreement as to choice of college was not missing a “price term”; and where trial court properly rejected petitioner’s affirmative defenses.
- ¶ 2 Sixteen years after her marriage to petitioner, Kenneth Kush, was dissolved, and two years after the parties’ daughter, Kathryn Kush, graduated from college, respondent, Alice Kush, filed a petition to enforce the college expenses provision of the parties’ marital settlement agreement.

Following a bench trial, the court granted Alice's petition and entered a judgment against Kenneth in the amount of \$27,456.15. Kenneth appeals. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 Alice and Kenneth were married in August 1972 and had one child, Kathryn, born in September 1984. Kenneth filed for divorce, and in August 1993 the court entered a judgment of dissolution, which incorporated the parties' marital settlement agreement and joint parenting agreement. The marital settlement agreement provided that Kenneth and Alice agreed to share equally the cost of Kathryn's "post-high school education and any related expenses," including "the costs of tuition, supplies, books, registration and other required fees, board and room, assessments, and charges." The agreement then stated:

"The decisions affecting the education of [Kathryn], including the choice of college, shall be made by the parties jointly, and the parties shall consider the expressed preference of the child, the cost of education, the parent's financial means and other reasonable criteria. Neither party shall unreasonably withhold his consent to the expressed preference of the child."

The parties further agreed to each restrict \$50,000 of their respective retirement plans towards the costs of Kathryn's college education. The agreement provided that the parties' obligation to fund Kathryn's college education would be offset to the extent that Kathryn qualified for "scholarships, grants, G. I. Bill of Rights (Veteran's Benefits) or the like." The agreement then stated, "In the event that the parties are unable to agree concerning this [a]rticle on higher education, then a [c]ourt of competent jurisdiction shall make a determination upon proper [p]etition and [n]otice."

¶ 5 In November 2009,¹ Alice filed a petition to enforce the marital settlement agreement's college expenses provision, and in March 2010, she filed a supplement to that petition.² Alice alleged that Kathryn had attended Claremont McKenna College in Claremont, California, from 2003 to 2007 at a cost that ranged between \$18,440 and \$22,142 per semester. Alice further alleged that Kenneth had paid only \$6,500 per semester towards Kathryn's expenses despite the provision of the parties' marital settlement agreement requiring Kenneth to share equally the cost of Kathryn's college education. She sought a judgment against Kenneth to the extent that Kenneth had not paid his one-half share of Kathryn's college expenses.

¶ 6 Kenneth denied the pertinent allegations of Alice's petition and asserted six affirmative defenses. The first and second of Kenneth's affirmative defenses raised the doctrine of *laches*. The third and fourth affirmative defenses asserted claims of equitable estoppel. The fifth affirmative defense alleged that Alice had failed to comply with a provision of the parties' joint parenting agreement requiring the parties to submit any disputes concerning Kathryn to mediation. The sixth affirmative defense alleged that, because the marital settlement agreement's college expenses provision lacked a "price term," a reasonable price was implied.

¶ 7 The court conducted a bench trial on Alice's petition. Kathryn testified that she had applied to four colleges and was accepted at two. She chose Claremont McKenna because it was her "dream school." Kathryn testified that she discussed the colleges she was interested in with her father and

¹The postdissolution proceedings began earlier, in May 2009, when Alice filed a contempt petition related to Kenneth's alleged failure to comply with the marital settlement agreement's college expenses provision, but the trial court dismissed the contempt petition as "premature."

²For simplicity, we will treat the petition and the supplement as a single petition.

that he did not have any objections to them. Regarding Claremont McKenna in particular, Kathryn testified that her father never told her he could not afford half the cost of her attending the school. Kathryn testified that, although she researched scholarships “pretty extensively,” she applied for one only but was not awarded it.

¶ 8 Kathryn testified that she had only one conversation with her father concerning finances during the time she was a student at Claremont McKenna. During the fall semester of 2003, the registrar contacted her to tell her she could not register for classes until her tuition was paid in full. Kathryn called her father, who told her he could not afford to pay more than \$6,500 per semester towards tuition and that she would have to take out loans to cover the rest. Kathryn testified that her mother ended up covering the tuition shortfall each semester except for the semesters that Kathryn took out loans. Kathryn took out two loans during the time she attended Claremont McKenna. She used one for personal expenses and the other loan, which totaled \$7,681, went entirely towards tuition. Kathryn also testified that, at the time of trial, she still had an outstanding balance at Claremont McKenna in the amount of \$4,431.92, which represented unpaid tuition.

¶ 9 Alice testified that Kenneth had expressed no objections to the schools to which Kathryn applied. After Kathryn was accepted at Claremont McKenna, Alice received a letter from Kenneth in which he set out a “financial plan” for funding Kathryn’s attendance at the school. In the letter, dated April 7, 2003, Kenneth noted that the cost of Claremont McKenna would be approximately \$35,000 per year plus \$2,000 for books, and he proposed a “financial plan” under which Kenneth and Alice would each pay \$13,000 per year and Kathryn would fund the remainder through financial aid and earnings from summer employment. Alice testified that she did not accept Kenneth’s proposed financial plan. In a letter to Kenneth dated April 17, 2003, Alice reminded Kenneth that

the marital settlement agreement was “the financial plan.” Alice testified that Kenneth responded to her letter with another “financial plan.” In a letter dated April 27, 2003, Kenneth proposed that he would pay \$13,000 per year, Alice would pay \$18,500 per year, and Kathryn would fund the remainder through earnings from summer employment. Alice responded with a letter dated August 7, 2003, in which she again reminded Kenneth that the marital settlement agreement “clearly states that each of us will pay half of [Kathryn’s] college costs.”

¶ 10 Alice testified that, when it came time to pay a \$500 deposit to hold Kathryn’s seat at Claremont McKenna, she waited until she received Kenneth’s check for \$250 before sending in the deposit because she wanted to ensure that Kenneth was “on board.” Once Kenneth sent Alice his check for \$250, she mailed Kenneth’s check along with her check to the college.

¶ 11 Alice admitted that she paid more than half of Kathryn’s tuition for several semesters but testified that she did so because otherwise Kathryn could not have registered for classes. Alice also testified that, some semesters, she never received a call from Kathryn regarding the need for an additional tuition payment, so she assumed Kenneth had paid his full share those semesters.

¶ 12 Kenneth testified that he had very limited participation in choosing a college for Kathryn. He testified that he had no objection to Kathryn attending Claremont McKenna. Kenneth testified, however, that “all along” he had said that there was a “limited amount of financial support” he could provide. His objection was not to the school itself, just to how much he could afford. Regarding Alice’s letter in which she rejected his first “financial plan,” Kenneth testified that he interpreted the letter to mean that Alice was willing to pay half of the cost of Claremont McKenna. When asked about the marital settlement agreement’s college expenses provision, Kenneth testified that sharing equally the cost of Kathryn’s college education was only his “initial proposal.” Kenneth admitted

to receiving Alice's August 7, 2003, letter and to sending the \$250 check to reserve Kathryn's seat at Claremont McKenna. Kenneth testified that he paid exactly \$6,500 per semester to Claremont McKenna for the four years Kathryn attended the school. Kenneth further testified that, when Kathryn began attending Claremont McKenna, he thought Alice had accepted his financial plan under which he would pay less than half of the cost and that he never heard otherwise "until this lawsuit was filed." He testified that he did not go to court to seek modification or clarification of the judgment of dissolution because he thought he and Alice had reached an agreement.

¶ 13 On July 28, 2011, the trial court granted Alice's petition and entered a judgment against Kenneth in the amount of \$27,456.15, which represented one-half of the difference between the college expenses that Alice paid and the college expenses that Kenneth paid. The court found that Kenneth concurred in Kathryn's choice of college and was fully aware of what it would cost. The court reasoned that Kenneth's proposed "financial plan" was an improper attempt "to unilaterally modify" the judgment of dissolution. The court further found that the plan "was clearly not accepted by Alice." Kenneth timely appeals.

¶ 14 ANALYSIS

¶ 15 On appeal, Kenneth argues that the judgment was error because (1) Alice, through her conduct, accepted his proposed "financial plan" to pay less than half of Kathryn's college education expenses; (2) Kenneth and Alice never reached an "enforceable agreement" as to the choice of college for Kathryn because "price" was an "essential term" of any such agreement and the parties never agreed on a price; (3) the trial court should have followed *In re Marriage of Schmidt*, 292 Ill. App. 3d 229 (1997), and *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483 (1987), and construed the parties' marital settlement agreement as containing an "implied reasonable price term"; and (4) the

trial court erred in rejecting Kenneth's six affirmative defenses, including the defenses of *laches* and equitable estoppel.

¶ 16 A marital settlement agreement is construed in the same manner as any other contract. *In re Marriage of Coulter and Trinidad*, 2012 IL 113474, ¶ 19; *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009). A court's primary objective is to give effect to the intent of the parties, and, absent an ambiguity, a court must determine the parties' intent from the language of the agreement. *Coulter and Trinidad*, 2012 IL 113474, ¶ 19; *Blum*, 235 Ill. 2d at 33. To the extent that we are required to interpret the terms of the parties' marital settlement agreement, our review is *de novo*. *Coulter and Trinidad*, 2012 IL 113474, ¶ 19. To the extent that we are required to review the trial court's factual findings, we look to whether the findings were against the manifest weight of the evidence. *In re Marriage of Gibson-Terry and Terry*, 325 Ill. App. 3d 317, 322 (2001). A court's findings are against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings are unreasonable, arbitrary, or not based on evidence. *In re Marriage of Levinson*, 2012 IL App (1st) 112567, ¶ 32.

¶ 17 A term of a marital settlement agreement pertaining to the payment of a child's college expenses is in the nature of child support. *In re Marriage of Peterson*, 2011 IL 110984, ¶ 13. We reject Kenneth's argument pertaining to Alice's purported "acceptance" of his proposed "financial plan" to pay less than half of Kathryn's college expenses because child support obligations are not subject to extrajudicial modification. See *In re Marriage of Smith*, 347 Ill. App. 3d 395, 400 (2004) ("The modification of a child support obligation is a judicial function, administered exclusively by the court as a matter of discretion."); see also *Peterson*, 2011 IL 110984, ¶ 18 (holding that section 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510 (West

2006)) applies to the modification of provisions of a judgment of dissolution pertaining to payment of a child's education expenses). The only avenue available to a party seeking to modify such a provision is to file a petition to modify the judgment of dissolution. 750 ILCS 5/511 (West 2010); *Smith*, 347 Ill. App. 3d at 399-400. "Modification" includes anything that would "adjust, change or alter" the obligations of a party to a judgment of dissolution. *Peterson*, 2011 IL 110984, ¶ 16. Paying \$6,500 per semester towards college expenses that exceeded \$18,000 per semester clearly was an attempt to "adjust, change or alter" Kenneth's obligation to pay half of Kathryn's college expenses. Accordingly, even if Alice had accepted Kenneth's "financial plan," the extrajudicial agreement would have been unenforceable.

¶ 18 Also unavailing is Kenneth's argument that he and Alice never reached an "enforceable agreement" regarding Kathryn's choice of college. While the evidence is clear that Kenneth complained about the cost of Claremont McKenna, it is also clear that he nevertheless consented to Kathryn attending the school. When Alice's attorney asked Kenneth if he had any objection to Kathryn attending Claremont McKenna, Kenneth said no. Alice and Kathryn also testified that Kenneth did not object to Kathryn attending Claremont McKenna. Kenneth testified that he had no objection to the school itself, just to how much he could afford. He testified that "all along" he had said there was "a limited amount of financial support" he could provide towards Kathryn's expenses at Claremont McKenna. Alice testified that, when it came time to pay a \$500 deposit to hold Kathryn's seat at Claremont McKenna, she waited until she received Kenneth's check for \$250 before sending in the deposit because she wanted to ensure that Kenneth was "on board." Once Kenneth sent Alice his check for \$250, she mailed Kenneth's check along with her check to the

college. Based on this testimony, the trial court's finding that Kenneth concurred in Kathryn's choice of college was not against the manifest weight of the evidence.

¶ 19 Kenneth nevertheless maintains that "price" was an "essential term" of any agreement as to Kathryn's choice of college because "the law is absolutely clear" that a price term is an "essential element[]" for a legally-enforceable agreement." According to Kenneth, because he and Alice never agreed on a "price," they never reached an "enforceable agreement" that Kathryn could attend Claremont McKenna.

¶ 20 Kenneth's "price term" argument misses the mark. Once Kenneth consented to Kathryn attending Claremont McKenna, the parties' agreement no longer was missing a price term. The record indicates, and the trial court found, that Kenneth was aware of the cost of Claremont McKenna when he consented to Kathryn attending the school. In his email to Alice containing his proposed "financial plan," Kenneth noted that the estimated cost of Claremont McKenna would be \$35,000 per year plus \$2,000 for books. Kenneth could not consent to Kathryn attending Claremont McKenna without also consenting to the cost of the school as the price for Kathryn's college education. Thus, the parties' agreement was not missing a price term.

¶ 21 The language of the marital settlement agreement further supports our conclusion that Kenneth's consent to Claremont McKenna carried with it a price term. Kenneth and Alice agreed in the marital settlement agreement jointly to decide on a college for Kathryn. While they agreed to consider cost, Kathryn's expressed preference, the parties' financial means, and any other reasonable criteria, they further agreed not to unreasonably withhold their consent to Kathryn's expressed preference. Here, Kenneth did not withhold his consent to Kathryn's expressed

preference; instead, he gave his consent. Having done so, Kenneth could not later argue that the parties had not adequately considered cost in reaching their choice of college.

¶ 22 We also reject Kenneth's argument that the trial court should have construed the marital settlement agreement as containing an implied reasonable price term. Kenneth cites *Schmidt*, in which the court, relying on *Ingrassia*, held that it was proper to imply a reasonable price term into a marital settlement agreement providing for shared college expenses that was "silent as to price or another, more specific method of determining price." *Schmidt*, 292 Ill. App. 3d at 237.

¶ 23 *Schmidt* and *Ingrassia* are not controlling given the facts of this case. In *Schmidt*, the parties' settlement agreement, which was incorporated into the judgment of dissolution, provided, "in the event that the minor children of the parties shall evidence the aptitude and desire for a college education, [r]espondent shall contribute one-half of such educational expenses." *Schmidt*, 292 Ill. App. 3d at 232. After the parties' daughter was accepted to a private university that would cost approximately \$17,000 per year, but before she began attending, the mother filed a petition to enforce the settlement agreement. *Schmidt*, 292 Ill. App. 3d at 231-32. Notably, the mother and daughter had not consulted the father when choosing a college. *Schmidt*, 292 Ill. App. 3d at 233. Relying on *Ingrassia*, the trial court determined that the settlement agreement was like a contract that was missing a price term and concluded that a reasonable price was implied. *Schmidt*, 292 Ill. App. 3d at 234. After hearing evidence of the parents' financial status and the cost of comparable public universities, the trial court found that the father's one-half share of a reasonably priced college education was \$4,014 per year. *Schmidt*, 292 Ill. App. 3d at 234.

¶ 24 Also relying on *Ingrassia*, the appellate court affirmed. *Schmidt*, 292 Ill. App. 3d at 237. The court held that, because the settlement agreement's college expenses provision was "silent as

to price or another, more specific method of determining price,” it was proper to imply a reasonable price term. *Schmidt*, 292 Ill. App. 3d at 237. The court also held that the factors found under section 513(b) of the Act³ were applicable to determining what constituted a reasonable price. *Schmidt*, 292 Ill. App. 3d at 239 (citing 750 ILCS 5/513(b) (West 1996)). The court reasoned:

“There is no evidence it was the intent of the parties when they entered into the agreement for college expenses that [their daughter] could attend *any* college, regardless of cost. This agreement took place 10 years before their child was ready for college. If the parties had not been divorced, they likely would have discussed the best college situation for [their daughter] and taken into consideration their income, [their daughter’s] interests and aptitudes, and the costs of the various schools [their daughter] was interested in attending. One of the spouses would not have simply gone out with [the daughter] and chosen a school without input from the other parent other than asking him to write a tuition check. The only way to determine a reasonable price would be to use the same factors two married parents would use.” (Emphasis in original.) *Schmidt*, 292 Ill. App. 3d at 239.

The court determined that the trial court had appropriately considered the section 513(b) factors, which, presumably, were comparable to the factors two married parents would have considered. *Schmidt*, 292 Ill. App. 3d at 240. Citing the lack of evidence of why it was necessary for the daughter to attend the private university as opposed to one of the public universities to which she had

³The factors under section 513(b) of the Act are (1) the financial resources of both parents; (2) the standard of living the child would have enjoyed had the marriage not been dissolved; (3) the financial resources of the child; and (4) the child’s academic performance. 750 ILCS 5/513(b) (West 2010).

been accepted, as well as the father's evidence of the lower cost of the public schools and of his limited financial resources, the court affirmed the trial court's determination of what constituted the father's share of a reasonable price. *Schmidt*, 292 Ill. App. 3d at 240.

¶ 25 *Ingrassia* involved facts similar to those of *Schmidt*. The marital settlement agreement between the parties in *Ingrassia* provided “[t]hat the [h]usband shall pay for the college education of the minor child of the parties provided that, at that time, the child has the desire and aptitude for a college education.” *Ingrassia*, 156 Ill. App. 3d at 494. The mother enrolled the daughter at Mundelein College without consulting the father and then filed a petition to enforce the marital settlement agreement. *Ingrassia*, 156 Ill. App. 3d at 493. The trial court ordered the father to pay for the daughter's college education, but limited his obligation to the cost of four years of full-time study at Mundelein. *Ingrassia*, 156 Ill. App. 3d at 493. The mother appealed, arguing that the father was required to pay the cost of whatever education the daughter wanted, even if she attended a more expensive school than Mundelein or attended for more than four years. *Ingrassia*, 156 Ill. App. 3d at 493. The appellate court noted the rule that, “[w]hen parties to a contract have been silent as to a price term, it will be implied that they intended a reasonable price.” *Ingrassia*, 156 Ill. App. 3d at 494. The court then stated, “The term missing from the settlement agreement's college education provision is essentially a price term, so a reasonable price is implied.” *Ingrassia*, 156 Ill. App. 3d at 494. The court determined that the trial court's limitation of the father's obligation to the cost of four years of full-time study was a reasonable interpretation of the term “college education.” *Ingrassia*, 156 Ill. App. 3d at 496. The court also cited the “dearth of evidence” that the cost of any more expensive schools would have been reasonable. *Ingrassia*, 156 Ill. App. 3d at 496. The court

then affirmed the trial court's determination that Mundelein's cost was reasonable. *Ingrassia*, 156 Ill. App. 3d at 496.

¶ 26 We conclude that the rule from *Schmidt* and *Ingrassia* is inapplicable where, as here, both parents have participated in the process of choosing a college and have consented to a child's choice of school. In both *Schmidt* and *Ingrassia*, one parent chose a college for the child without consulting the other parent. *Schmidt*, 292 Ill. App. 3d at 233; *Ingrassia*, 156 Ill. App. 3d at 493. Although the courts in both cases, relying on a principle of contract law, determined that what the settlement agreements were missing was a price term, a more accurate description of what was missing would have been cooperation between the parents when it came to choosing a college for their child. The court in *Van Nortwick v. Van Nortwick*, 87 Ill. App. 2d 55, 57 (1967) —a case decided 20 years before *Ingrassia* in which two parents were unable to cooperate in choosing a school for their son despite a provision in a divorce decree requiring such cooperation—explained the problem this way:

“[T]he decree—and common sense—required a joint decision of the parents. It does not contemplate that one parent select a school, enroll the child, pay the tuition, and then present both the Court and the other parent with a *fait accompli* and a request to impose the financial burden on the one who was not consulted.” *Van Nortwick*, 87 Ill. App. 3d at 58.

Faced with the situation that the *Van Nortwick* court described, in which one parent had been deprived of the opportunity to participate in choosing a college for a child, the courts in *Schmidt* and *Ingrassia* resorted to implying a reasonable price term to remedy the situation and turned to the section 513(b) factors to determine a reasonable price. *Schmidt*, 292 Ill. App. 3d at 233, 237-39; *Ingrassia*, 156 Ill. App. 3d at 493-96.

¶ 27 Here, Alice did not unilaterally decide where Kathryn would attend college. Rather, Alice and Kenneth both consented to Kathryn attending Claremont McKenna, and Kenneth even paid his one-half share of the deposit required to hold Kathryn's seat after she was accepted. Again, Kenneth's act of consenting to Claremont McKenna necessarily carried with it a price term—*i.e.*, the cost of attending Claremont McKenna. Thus, the rule from *Schmidt* and *Ingrassia* does not apply here. We conclude that implying a “reasonable price term” under these circumstances would be to improperly impose an additional term upon the parties to which they did not agree.

¶ 28 In sum, the trial court correctly concluded that Kenneth's act of consenting to Claremont McKenna while simultaneously complaining about its cost was an unenforceable extrajudicial attempt to modify his obligation under the marital settlement agreement to pay half of Kathryn's college expenses. If Kenneth believed he could not afford half of the cost of Kathryn's attendance at Claremont McKenna, the appropriate course would have been either to withhold his consent and to petition the court for resolution of the impasse as the settlement agreement permitted, or to petition to modify the settlement agreement, not to give his consent while simultaneously protesting the cost. See *In re Marriage of Sreenan*, 81 Ill. App. 3d 1025, 1030 (1980) (holding that, where marital settlement agreement provided that the father would have “a voice in the selection of schools” for the parties' children, but where the mother's attempts to reach an agreement with the father regarding choice of school were unsuccessful, the mother followed the “preferred procedure” by petitioning the court for resolution of the impasse prior to the beginning of the school year); *Van Nortwick*, 87 Ill. App. 2d at 57 (“In the event that the parties were unable to reach a new agreement [regarding choice of school for the parties' son], the proper remedy was to seek direction and relief from the court which entered the decree.”).

¶ 29 Kenneth next argues that the trial court erred in either failing to address or rejecting his six affirmative defenses.

¶ 30 Initially, we reject Kenneth's assertion that it was "reversible error" for the trial court to "fail to even address" his affirmative defenses. A trial court in a nonjury civil case is not required to make specific findings, and, in their absence, a reviewing court will assume that the trial court found in favor of the prevailing party on all issues and controverted facts. *Nemeth v. Banhalmi*, 125 Ill. App. 3d 938, 959 (1984). Here, in its August 17, 2011, order, which the court entered after Alice withdrew a pending petition for attorney fees and Supreme Court Rule 137 sanctions, the trial court clarified that its July 28, 2011, order had resolved "all matters in controversy." Thus, the record makes clear that the court not only found in Alice's favor on her petition to enforce the settlement agreement's college expenses provision but also found in her favor on Kenneth's affirmative defenses.

¶ 31 Kenneth's first and second affirmative defenses raised the doctrine of *laches*. The equitable doctrine of *laches* "precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party." *In re Marriage of Smith*, 347 Ill. App. 3d 395, 401 (2004). "The party citing *laches* as a defense to a claim must prove two elements: (1) lack of diligence by the party asserting the claim and (2) injury or prejudice to the opposing party resulting from the delay." *Smith*, 347 Ill. App. 3d at 401. A reviewing court will not reverse a trial court's decision whether to apply the doctrine of *laches* absent an abuse of discretion. *Smith*, 347 Ill. App. 3d at 401. "A trial court abuses its discretion when it acts arbitrarily, acts without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores

recognized principles of law, resulting in substantial injustice.” *In re Marriage of Pond and Pomrenke*, 379 Ill. App. 3d 982, 987-88 (2008).

¶ 32 Kenneth’s *laches* argument lacks merit. Kenneth contends that Alice’s delay in filing her petition had the effect of denying Kenneth the opportunity to petition the court to decide the issue of the reasonableness of Kathryn’s choice of college because Alice waited to file her petition until it was too late for a court to decide the issue. We reject this argument, because, as we alluded to above, it was Kenneth’s own act of consenting to Kathryn’s attendance at Claremont McKenna that resulted in his inability later to raise the issue of the reasonableness of Kathryn’s choice of college. Again, if Kenneth could not share equally the cost of Kathryn’s attendance at Claremont McKenna, the burden was on him either to file a petition to modify the judgment of dissolution or to object to Kathryn’s choice of college and seek judicial resolution of the impasse pursuant to the terms of the settlement agreement.

¶ 33 Kenneth’s third and fourth affirmative defenses raised claims of equitable estoppel. Similar to his *laches* affirmative defenses, Kenneth alleged that Alice should be equitably estopped from enforcing the settlement agreement’s college expenses provision because, by paying more than half of Kathryn’s college expenses and by not objecting to the amount of Kenneth’s tuition payments during the years Kathryn attended Claremont McKenna, Alice deprived Kenneth of the opportunity to seek timely resolution of the issue of the reasonableness of Kathryn’s college expenses before they were expended. Kenneth alleged that he did not timely file a petition seeking resolution of the issue because he reasonably relied “on his payment proposal and lack of negative response from [Alice].”

¶ 34 The doctrine of equitable estoppel applies “where a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the

first person.” *Blisset v. Blisset*, 123 Ill. 2d 161, 169 (1988). The person asserting a claim of equitable estoppel must have reasonably relied “ ‘upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts.’ ” *Blisset*, 123 Ill. 2d at 169 (quoting *Dill v. Widman*, 413 Ill. 448, 456 (1952)). A party must prove equitable estoppel by “clear and unequivocal” evidence. *Hoos v. Hoos*, 86 Ill. App. 3d 817, 821 (1980); see also *In re Marriage of Heady*, 398 Ill. App. 3d 582, 585 (2010) (citing *Hoos* for this standard). A reviewing court will not disturb a trial court’s decision concerning application of the doctrine of equitable estoppel unless it is against the manifest weight of the evidence. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 26.

¶ 35 Courts have been reluctant to apply the doctrine of equitable estoppel in the child support context. The court in *In re Marriage of Homan*, 126 Ill. App. 3d 133 (1984), stated:

“The test of equitable estoppel in the child support context generally focuses on conduct of the petitioner and change of position by the respondent. Cases which have found a change of position for the worse have involved egregious circumstances where the respondent has acted in good faith and the petitioner has received an unwarranted benefit.” *Homan*, 126 Ill. App. 3d at 135-36.

Courts generally decline to apply the doctrine in the child support context where doing so would frustrate the purpose of child support to promote the best interests of a child. See *Blisset*, 123 Ill. 2d at 170 (declining to give effect to an unenforceable agreement to modify child support, in part, because doing so would permit parents to “look past the best interests of their children” and would “frustrate the intent” of child support orders). For example, the court in *In re Marriage of Jungkans*, 364 Ill. App. 3d 582 (2006), held that a parent could be equitably estopped from pursuing past-due

child support where the obligor parent had ceased child support payments only after agreeing to take custody of the child. *Jungkans*, 364 Ill. App. 3d at 584-586. While the parents' agreement to reduce the child support payments was unenforceable, applying the doctrine of equitable estoppel was permissible, because the unenforceable extrajudicial agreement did not interfere with the child's right to support. *Jungkans*, 364 Ill. App. 3d at 586. Furthermore, permitting the parent who had given up physical custody of the child to recover the past-due child support would have been a windfall. *Jungkans*, 364 Ill. App. 3d at 586.

¶ 36 Here, the reasoning of the *Jungkans* court is inapplicable. Even assuming *arguendo* that Kenneth is correct that he reasonably believed that he and Alice had reached an extrajudicial agreement under which Kenneth would pay only \$6,500 per semester towards Kathryn's college expenses, and that he declined to file a petition on that basis, it would have been error for the trial court to apply the doctrine of equitable estoppel in this context. This was not a situation in which Kenneth's and Alice's purported agreement to reduce Kenneth's college expenses obligation would have had no effect on Kathryn's right to that support. Nor would permitting Alice to recover from Kenneth the college expenses she paid in excess of her one-half share be a windfall for Alice. Rather, giving effect to the parties' purported extrajudicial agreement would condone what our supreme court in *Blisset* explicitly condemned—the “untenable” result of giving effect to an unenforceable extrajudicial agreement that “would circumvent and undermine a court's role in the establishment and modification of a child support obligation.” *Blisset*, 123 Ill. 2d at 170.

¶ 37 Furthermore, we disagree with Kenneth that the evidence established that he reasonably relied on Alice's “silence” in believing that she had accepted his proposed “financial plan” to pay less than half of Kathryn's college expenses. The evidence at trial was that Kenneth sent a letter to

Alice on April 7, 2003, in which he proposed a “financial plan” under which Kenneth and Alice would each pay \$13,000 per year and Kathryn would pay the rest of her college expenses through financial aid and earnings from summer employment. Alice responded to Kenneth’s letter on April 17, 2003, and reminded Kenneth that the marital settlement agreement was “the financial plan.” Kenneth responded in a letter dated April 27, 2003, in which he ignored the marital settlement agreement but proposed a second “financial plan” under which he would pay \$13,000 per year, Alice would pay \$18,500 per year, and Kathryn would pay the rest through earnings from summer employment. Although Kenneth contends that Alice then remained silent and paid more than half of Kathryn’s college expenses without objection, the evidence indicates otherwise. In a letter to Kenneth dated August 7, 2003, Alice again reminded him that the marital settlement agreement “clearly states that each of us will pay half of [Kathryn’s] college costs.” Moreover, although Alice testified that she paid more than her one-half share of tuition several semesters so that Kathryn could register for classes, Alice also testified that there were some semesters where she never received a call from Kathryn concerning the need for an additional tuition payment, so she assumed Kenneth had paid his full share those semesters. Thus, the evidence does not suggest that Alice “accepted” Kenneth’s proposed “financial plan” but, rather, that she continued to insist that Kenneth was obligated to pay one-half of Kathryn’s college expenses and only paid more than her one-half share when it was necessary for Kathryn to be able to register for classes. Based on these considerations, the trial court’s decision not to apply the doctrine of equitable estoppel was not against the manifest weight of the evidence.

¶ 38 Kenneth’s fifth affirmative defense was that Alice should be barred from bringing her claim because she failed to submit the dispute to mediation as required by the parties’ joint parenting

agreement. Kenneth cites a provision of the joint parenting agreement providing that “in the event the parties disagree concerning [Kathryn], any aspects of the custody arrangements or about this [j]oint [p]arenting [a]greement, *** they shall jointly choose a mediator in an attempt to reasonably resolve their differences.” Kenneth ignores that the mediation provision is located in the joint parenting agreement, while the college expenses provision is located in the marital settlement agreement. Furthermore, the article of the marital settlement agreement governing payment of college expenses specifically provides, “In the event that the parties are unable to agree concerning this [a]rticle on higher education, then a [c]ourt of competent jurisdiction shall make a determination upon proper [p]etition and [n]otice.” A specific contract provision always controls over a general one. *Grevas v. U.S. Fidelity and Guaranty Co.*, 152 Ill. 2d 407, 411 (1992). Therefore, the court did not err in denying Kenneth’s fifth affirmative defense.

¶ 39 Kenneth’s sixth affirmative defense was that, because the marital settlement agreement lacked a price term, a reasonable price was implied. We have already addressed this issue. The trial court did not err in denying Kenneth’s sixth affirmative defense.

¶ 40 As a final matter, after briefing in this case was completed, Alice filed a motion to strike portions of Kenneth’s reply brief. We previously ordered the motion taken with the case. In her motion, Alice takes issue with Kenneth’s assertion in his reply brief that Alice made a false statement in her appellee’s brief. She also includes approximately five pages of responses to various arguments Kenneth raised in his reply brief. Alice does not cite any failure on Kenneth’s part to comply with Illinois Supreme Court Rule 341 (eff. July 1, 2008), which governs the format and content of briefs filed in the appellate court. In substance, Alice’s motion is a surreply, which she did not have leave of court to file, not a proper motion to strike. Therefore, Alice’s motion is denied.

¶ 41

CONCLUSION

¶ 42 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 43 Affirmed.