

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/29/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 12-0549
)
BARBARA J. VAN VALEN,) DEPARTMENT D
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
GLENN MIDDLETON,) Civil Appellate Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. FN2010-092107 and FN2010-092712 (Consolidated)

The Honorable John R. Hannah, Jr., Judge

AFFIRMED

Barbara J. Van Valen
Petitioner/Appellant *In Propria Persona*

Glendale

Glenn Middleton
Respondent/Appellee *In Propria Persona*

Charlotte, NC

B R O W N, Judge

¶1 Barbara J. Van Valen ("Wife") challenges the amount of attorneys' fees the trial court awarded her in this dissolution action. We conclude that the amount awarded was within the trial court's discretion and we therefore affirm.

BACKGROUND

¶2 In July 2011, the parties entered into a settlement agreement in their dissolution case. The parties placed the basic terms of the agreement on the record in the trial court, which approved the agreement and directed that a "consent decree"¹ be submitted within thirty days. As part of the agreement, Glenn Middleton ("Husband") agreed to pay Wife \$28,000 cash for her share of the community 401(k) account by September 1, 2011. The parties also agreed each of them would pay their own attorneys' fees incurred to date, but if one party believed the other's unreasonableness caused otherwise unnecessary fees, that party could request an award from the court. In addition, Husband's attorney agreed to draft a consent decree.

¶3 Instead of submitting a consent decree reflecting the settlement agreement, Husband filed a motion to modify the agreement because he was unable to obtain a loan against the 401(k) account to pay Wife \$28,000 cash. In response, Wife lodged a "Partial Settlement Agreement" and requested an award of attorneys' fees, arguing that Husband's failure to abide by

¹ The trial court may have intended to direct the filing of a written "settlement agreement" rather than a "consent decree" at that point in the proceedings. Similarly, the parties seem to have referred to these terms interchangeably in the trial court and on appeal. Although the terms have different meanings, the difference is immaterial to the issue presented on appeal.

and draft the consent decree caused her to incur \$12,237.50 in additional attorneys' fees.

¶14 The trial court denied Husband's motion to modify, finding the settlement agreement did not specify that the cash payment to Wife was contingent on Husband obtaining a loan from the parties' 401(k) account. Husband objected to Wife's Partial Settlement Agreement and lodged his own, which stated that Wife would receive \$28,000 by dividing the 401(k) account instead of cash. Husband also argued Wife was not entitled to attorneys' fees for drafting her own proposed agreement and sought fees himself.

¶15 At a status conference to address these issues, the court signed Wife's partial settlement agreement and noted that the \$28,000 cash payment was now a separate issue because Husband did not have the funds to pay as required by the agreement. Husband proposed allocating \$45,000 of the parties' 401(k) to Wife to cover any fees or taxes Wife would incur so she could withdraw \$28,000 cash immediately upon division of the 401(k) account pursuant to a qualified domestic relations order ("QDRO"). The court noted that Wife should consider this proposal in order to "mitigate her damages" or consider the consequences that may fall to her if she refused. The court ordered Wife to submit a consent decree, deferred ruling on

Wife's request for attorneys' fees, and denied Wife's requests to appoint a QDRO attorney and fees to prepare a QDRO.

¶16 Both parties submitted QDROs for the court to sign. Although Wife's attorney moved to withdraw, she submitted a consent decree over Wife's objection. The court signed this consent decree as well as the QDRO Husband submitted. The court granted Wife's pending request for attorneys' fees based on Husband's unreasonable claim that he was not obligated to comply with the parties' settlement agreement that he pay \$28,000 cash to Wife. However, the court reserved ruling on the amount of the fee award until Wife's former attorney submitted a fee affidavit.

¶17 After receiving Wife's fee application for \$15,611.63, Husband's objection, and Wife's reply, the court awarded Wife \$2100 in attorneys' fees. Wife filed a timely notice of appeal.

DISCUSSION

¶18 The trial court awarded fees pursuant to Arizona Revised Statutes ("A.R.S.") section 25-324, which authorizes the court to award a reasonable amount for attorneys' fees and costs after "considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." An award of attorneys' fees is "within the trial court's sound discretion and will not be

disturbed on appeal absent an abuse of discretion." *In re Marriage of Berger*, 140 Ariz. 156, 167, 680 P.2d 1217, 1228 (App. 1983).

¶9 The trial court explained that it awarded Wife only those "fees incurred as a direct result of the dispute over the \$28,000 payment." The court noted that Wife was responsible for the remainder of her attorneys' fees because the parties' settlement agreement provided that each party would pay his or her own fees incurred prior to the date of the agreement (July 26, 2011) and that Wife's other fees were not incurred due to Husband's unreasonable conduct.

¶10 Wife argues she was entitled to the full amount of attorneys' fees she requested because her fee affidavit established a prima facie entitlement to the full amount. Wife relies on *McDowell Mountain Ranch Community Ass'n, Inc. v. Simons*, 216 Ariz. 266, 270-71, ¶ 20, 165 P.3d 667, 671-72 (App. 2007), which held that the fee application meeting the requirements of *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187-89, 673 P.2d 927, 931-33 (App. 1983), established that party's "prima facie entitlement to fees in the amount requested." *McDowell Mountain* also held that "[a]ssuming that the fees requested were facially reasonable, [the opposing party] then had the burden to show that they were clearly

excessive. If such a showing is not made, then the [requesting party] is entitled to receive its full attorneys' fees." 216 Ariz. at 271, ¶ 20, 165 P.3d at 672.

¶11 Wife has waived this argument because she did not raise it at trial. *Dillig v. Fisher*, 142 Ariz. 47, 51, 688 P.2d 693, 697 (App. 1984) (explaining arguments not raised before the trial court cannot be raised for the first time on appeal). In any event, the holding in *McDowell Mountain* does not apply here. In that case, the parties contractually agreed that the prevailing party would be awarded all its fees. 216 Ariz. at 271, ¶ 21, 165 P.3d at 672. This court held that the trial court's discretion to determine what award is reasonable is "more narrowly circumscribed[.]" *Id.* No such provision applies in the case before us. Section 25-324 governs the award of fees in this case and does not require an award of all fees. Pursuant to § 25-324(A), the court has discretion to award a "reasonable amount" of fees after considering the financial resources and reasonableness of the parties.

¶12 Contrary to Wife's arguments on appeal, the court did not find that the overall fees charged were unreasonable, but that Husband was only responsible for those fees incurred as a result of his unreasonable position regarding the \$28,000 payment. The amount awarded to negotiate enforcement of the

parties' settlement agreement was within the court's discretion. The remainder of the fees Wife incurred was not a result of any unreasonable conduct on Husband's part and therefore, properly denied.²

¶13 The trial court correctly noted that many fees were incurred as a result of other disputes Wife initiated. Additionally, after agreeing to the revised settlement, which included dividing the parties' 401(k) account, Wife subsequently claimed Husband violated the preliminary injunction by taking a loan against the 401(k) account. Wife was aware of this loan prior to entering into the initial settlement; thus, it was not reasonable to raise this issue in a post-settlement contempt petition.

¶14 The court also denied any fees Wife incurred after Husband proposed allocating \$45,000 from the 401(k) account to Wife. Wife takes issue with the court's finding that after Husband's proposal, it was Wife who "continued to try to use the dispute as a lever to overturn the settlement agreement." This finding is supported by evidence that Wife attempted to change the terms of the settlement agreement by seeking other expenses

² We decline to consider Wife's argument that Husband acted unreasonably in proceedings that pre-date the July 26, 2011 hearing. Pursuant to the settlement agreement, the parties were responsible for their own attorneys' fees up to and including the July 26, 2011 hearing.

from Husband after he failed to pay \$28,000 on the due date. The court also refused to order Husband to pay fees associated with Wife's frequent communications with her attorney, noting as many as fifteen communications from Wife to her attorney in one day. We agree with the court that such frequent communications were excessive.

¶15 Additionally, the trial court did not award Wife fees incurred for her attorney to draft the settlement agreement. The record supports the finding that Husband's attorney was to draft a consent decree. On appeal, Wife argues this constitutes a binding contractual agreement that Husband would bear all costs, which, according to Wife, include the fees her attorney charged to draft the agreement. First, this argument is waived because Wife did not raise it in the trial court. See *Dillig*, 142 Ariz. at 51, 688 P.2d at 697. Second, the trial court correctly noted that Husband's attorney was to draft a decree, not Wife's attorney, so Husband is not responsible for the fees Wife's attorney charged to do so. The fact that Husband filed a petition to modify the agreement before he filed a written decree does not mean he is responsible for the fees Wife's attorney charged to prepare and file a written settlement agreement without prior court approval. Third, Wife contends that Husband should have to pay fees associated with preparing

the settlement agreement because the court ultimately signed the decree her attorney prepared. As far as the fees associated with the preparation of the subsequent decree, the court was within its discretion to order each party to pay his or her own fees given the ongoing disputes that delayed entry of the decree.

¶16 The trial court also acted within its discretion in concluding that the fees incurred as a result of Wife's objections to Husband's QDRO were not the result of Husband's unreasonable conduct. Although Husband prepared a draft QDRO and submitted it for Wife's approval, Wife took it upon herself to hire her own attorney to prepare a QDRO. We cannot say the court abused its discretion in ordering Wife to bear the cost of having her own QDRO prepared.

¶17 Wife argues the trial court failed to consider the parties' financial resources pursuant to A.R.S. § 25-324(A), which provides that "[o]n request of a party . . . the court shall make specific findings concerning the portions of any award of fees and expenses that are based on consideration of financial resources and that are based on consideration of reasonableness of positions." However, neither party made such a request; therefore, we presume that the trial court's attorneys' fee award is supported by the record. See *Coronado*

Co., Inc. v. Jacome's Dep't Store, Inc., 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981) ("Implied in every judgment, in addition to express findings made by the court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings.").

¶18 In any event, the trial court carefully explained its reasons for awarding Wife less than the full amount of fees she requested. Although the court's findings do not discuss the parties' relative financial resources, the record includes Husband's 2010 and Wife's 2011 Affidavit of Financial Information ("AFI"). Furthermore, despite evidence that Husband had greater financial resources, there was also evidence that a large portion of the fees Wife requested were due to her own unreasonable positions during the proceedings. Section 25-324 requires the court to consider both financial resources *and* the parties' reasonableness throughout the proceedings. The trial court was in the best position to determine the degree to which Wife's unreasonable positions affected the length and cost of the proceedings.

¶19 Finally, Wife argues Husband's objection to her fee request was untimely and therefore the trial court should have summarily granted her fee request in total. Although Wife filed

her request for attorneys' fees in September, the court deferred this issue until final disposition of the case. Husband filed his objection two months before the February 2012 hearing that addressed Wife's fee request and responded in a timely manner to Wife's attorneys' subsequent fee affidavit. The court acted within its discretion in considering Husband's response.

¶20 Wife requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324. We deny Wife's request for attorneys' fees because she appeared *pro per* on appeal. We also decline to award Wife her costs on appeal because, although she has fewer financial resources, neither side took unreasonable positions. Husband is entitled to an award of costs on appeal pursuant to A.R.S. § 12-342(A) upon compliance with ARCAP 21.

CONCLUSION

¶21 Based on the foregoing, we affirm the trial court's order.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
ANDREW W. GOULD, Presiding Judge

_____/s/_____
DONN KESSLER, Judge