

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DANETTE MILLER,) 1 CA-CV 12-0567
) 1 CA-CV 12-0679
Petitioner/Appellant,) (Consolidated)
)
v.) DEPARTMENT B
)
THOMAS A. MILLER,) **MEMORANDUM DECISION**
)
Respondent/Appellee.) (Not for Publication -
) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. FC2007-008371

The Honorable Christopher T. Whitten, Judge
The Honorable Veronica W. Brame, *Judge Pro Tempore*

VACATED AND REMANDED

McCulloch Law Offices
by Diana McCulloch
Attorney for Petitioner/Appellant

Tempe

Thomas A. Miller
Appellee *In Propria Persona*

Phoenix

T H U M M A, Judge

¶1 The family court fairly noted that this case involves a "tangled web" of filings. In this consolidated appeal, Danette Miller (Mother) challenges post-decree rulings denying her

objection to an arrears calculation for a Texas judgment against Thomas A. Miller (Father) and denying requests for attorneys' fees and costs. For the reasons set forth below, the orders are vacated and the matter remanded for further proceedings.

FACTS AND PROCEDURAL HISTORY

I. Objection To Arrears Calculation.

¶12 The parties' divorce decree issued in July 2009. By late 2010, the State appeared pursuant to Arizona Revised Statutes (A.R.S.) § 25-509 and filed an arrears calculation. Mother objected that the State's calculation did not include interest on a Texas child support judgment against Father, as authorized by Texas law. The merits of that objection have never been addressed.

¶13 At a February 2012 evidentiary hearing, the superior court ruled that any motions not yet decided were denied as untimely. In May 2012, the State filed an updated arrears calculation. In June 2012, Mother objected that the State's updated arrears calculation did not include interest on a Texas child support judgment against Father, as authorized by Texas law. In August 2012, a Title IV-D commissioner found the superior court denied Mother's objection to the arrears calculation at the February 2012 evidentiary hearing and, therefore, "den[ied] the request regarding the issue of the State's arrears calculation."

II. First Request For Attorneys' Fees And Costs.

¶14 At the February 2012 evidentiary hearing, the superior court (1) denied Father's petition to modify spousal maintenance and child support; (2) granted Mother's petition to enforce support and maintenance; (3) found Father owed past due support, maintenance and medical expenses totaling nearly \$70,000 (\$52,000 of which was maintenance) and (4) held Father in contempt for failing to pay medical expenses. Mother filed a timely motion for \$29,537.50 in attorneys' fees and \$625 in costs incurred in enforcing those obligations, Father opposed the motion and the court summarily denied Mother's motion.

III. Second Request For Attorneys' Fees And Costs.

¶15 In June 2012, the IV-D commissioner found Father was in contempt for failing to pay support and maintenance. Noting Mother's oral request for attorneys' fees, the commissioner directed Mother to make a written request. Mother filed a timely motion for \$3,500 in attorneys' fees and \$141 in costs incurred in enforcing those obligations, Father did not file a written objection and the commissioner summarily denied Mother's motion.

¶16 Mother timely appealed from these rulings and this court has jurisdiction pursuant to A.R.S. § 12-2101(A)(2).¹

¹ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

DISCUSSION

I. The Parties' Appellate Briefs.

¶17 On appeal, Father filed an amended answering brief without court order after Mother filed her reply, which is not authorized by the Arizona Rules of Civil Appellate Procedure. Accordingly, Father's amended answering brief is stricken.

¶18 Mother's briefs contain statements that are not supported by citations to the record as required by ARCAP 13(a) and Father's answering brief does not contain any citations to the record as is required by ARCAP 13(b). Although the briefs by both parties refer to testimony, no certified transcripts were provided on appeal as is required by ARCAP 11(b). Accordingly, this court disregards factual allegations in the parties' briefs that are unsupported by the record on appeal and does not consider the partial uncertified transcripts Mother attempted to provide.² *State Farm Mut. Auto. Ins. Co. v. Arrington*, 192 Ariz. 255, 257 n.1, 963 P.2d 334, 336 n.1 (App. 1998).

II. Objections To Arrears Calculation.

¶19 Mother filed her first objection to the arrears calculation in October 2010. After Father responded, the

² Mother's reply brief argues Father did not include certificates of compliance or service. Father, however, filed such certificates on January 24, 2013, which indicate they were mailed to Mother. Although Father apparently did not serve his answering brief on the State, the State did not appear in this appeal.

superior court set a hearing date that was continued several times and then vacated. At the February 2012 evidentiary hearing, the superior court summarily denied all pending motions as untimely, which the IV-D commissioner interpreted as including Mother's objection to the arrears calculation.

¶10 Mother registered a 1999 Texas support judgment in this case in March 2009. Father did not object until November 2010, when the State included the Texas judgment in a notice of arrears. Notwithstanding Father's objection, the validity of the Texas judgment was accepted by the State and there is no indication any court has ever invalidated the Texas judgment.

¶11 Arizona courts are obligated to enforce a foreign support order "and collect arrears and interest due" on foreign judgments pursuant to A.R.S. § 25-1304(C). Although Mother has twice objected and asked to have interest determined and added to the Texas judgment, the merits of her objections have never been addressed. Interest on the Texas judgment continues to accrue, however, and the merits of Mother's position need to be resolved.³ Accordingly, the denial of Mother's objection to the State's arrears calculation for the Texas judgment is vacated and the matter remanded for the appropriate judicial officer to consider the merits of Mother's objection.

³ Although not subject to this appeal, the State has filed a third arrears calculation to which Mother objected, thereby again raising the issue.

III. Mother's Requests For Attorneys' Fees And Costs.

¶12 In a family court case, a judicial officer may order one party to pay attorneys' fees and costs of the other party after "considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324(A). Although subject to an abuse of discretion standard of review, *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 36, 250 P.3d 1213, 1221 (App. 2011), the orders denying Mother's requested fees and costs were summary and provided no rationale. The limited record before this court does not provide helpful insight into the denials.

¶13 Mother argues she was entitled to fees and costs because Father's income was substantially higher than hers and his conduct was unreasonable. According to the most recent child support worksheet, Father's monthly income is \$8,000 and Mother's is \$2,000. Although Father was ordered to pay Mother \$2,600 in monthly maintenance through 2011, Father failed to pay \$52,000 in maintenance (20 months' worth). Given this failure, along with the income disparity, Mother's financial resources in 2012 were substantially less than Father's.

¶14 Turning to the reasonableness of the parties' positions throughout the litigation, see A.R.S. § 25-324(A), the superior court properly described this case as vexatious. The docket lists more than 500 filings, with filing titles

suggesting that neither party has been shy in making filings. As particularly relevant here, however, Father has caused a significant part of the strife by repeatedly failing to make court-ordered payments, resulting in repeated contempt findings as a result of Mother's motions and Father repeatedly paying the minimum purge amount to avoid being taken into custody. Mother's attempts to collect appear justified and the record does not indicate that Father has established any legitimate basis for his failure to make those court-ordered payments.

¶15 The record also does not indicate any position Mother took that warranted a complete denial of her fees and costs in enforcing the court's orders. Of particular note is Mother's second fee request, which applies only to those fees incurred in attempting to obtain court-ordered payments in the first five months of 2012. Father did not object to this request and, on appeal, Father points to nothing unreasonable Mother did in seeking to enforce those court-ordered obligations.

¶16 More generically, Father does argue Mother has taken unreasonable positions. In making this argument, however, Father points to Mother's motions that the court granted (including to change venue to consolidate proceedings before one judicial officer). Father's argument regarding Mother's objection to discovery similarly does not appear to carry the day, as many of Mother's objections were sustained. Nor does Mother's opposition

to Father's motion to allow both parents to select emergency contacts for the children's school appear to completely defeat Mother's fee requests as the court's ruling does not suggest that Mother's objection was unreasonable.⁴

¶17 It bears repeating that the parties have provided no proper transcripts from any potentially relevant hearing. On this limited record, given Father's consistent failure to pay court-ordered obligations necessitating Mother to file successful enforcement motions resulting in contempt findings, the request for fees and costs incurred in doing so appear to be meritorious at least in part. Stated differently, this limited record does not reflect a basis for denying Mother's requests in their entirety. Accordingly, the denials are vacated and the matter remanded so that the appropriate judicial officer can consider what amount of fees and costs are reasonable for Mother's attempts to enforce the valid support orders.⁵

⁴ Father's remaining assertions that Mother was unreasonable are not supported by any citations to the record and are not considered here. See *State Farm Mut. Auto Ins. Co.*, 192 Ariz. at 257 n.1, 963 P.2d at 336 n.1.

⁵ Given this remand, the court does not address Mother's alternative arguments regarding fees and costs. In remanding, this court is not rendering an opinion whether awarding even substantially all fees and costs requested by Mother is justified. Among other things, Mother's fee application appears to include fees that had already been denied for litigating: (1) Father's unsuccessful motion to set aside the maintenance order; (2) Father's unsuccessful motion to protect documents from discovery and (3) Mother's motion to compel and for sanctions.

ATTORNEYS' FEES ON APPEAL

¶18 Mother requests attorneys' fees on appeal pursuant to A.R.S. § 25-324. The record does not indicate that the parties' financial resources have changed since the February 2012 evidentiary hearing, meaning Mother's resources are not comparable to Father's. Furthermore, Father's attempt to reargue the merits of the foreign judgment on appeal is unreasonable. For these reasons, in exercising this court's discretion, Mother is awarded reasonable attorneys' fees on appeal upon compliance with ARCAP 21.

CONCLUSION

¶19 The orders specified above denying Mother's objections to the arrears calculation and denying in their entirety Mother's first and second requests for attorneys' fees and costs are vacated and the matter is remanded for further proceedings consistent with this decision.

/S/ _____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/ _____
MAURICE PORTLEY, Presiding Judge

/S/ _____
DONN KESSLER, Judge