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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



DIVISION ONE
FILED: 01-28-2010
PHILIP G. URRY, CLERK
BY: DN

In re the Matter of:) 1 CA-CV 09-0146
) 1 CA-CV 09-0192
BONNIE DUDA,) (Consolidated)
)
Petitioner/Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
PAUL MICHAEL DUDA,) (Not for Publication -
) Rule 28, Arizona Rules of
Respondent/Appellant.) Civil Appellate Procedure)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2007-050717

The Honorable Ruth H. Hilliard, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

Paul Duda Phoenix
Respondent/Appellant *In Propria Persona*

Schneider & Onofry, PC Phoenix
By Luane Rosen
Attorneys for Petitioner/Appellee

B A R K E R, Judge

¶1 In these consolidated appeals, Paul Duda ("Husband")
challenges the superior court's post-decree order concerning an

equalization payment he received from Bonnie Duda ("Wife"), and further challenges the attorneys' fees awarded to Wife. Husband argues the court erred by failing to compel responses to his discovery requests, admitting evidence over his objections, affirming Wife's calculation of the equalization payment, and awarding Wife attorneys' fees. For the reasons that follow, we affirm in part, vacate in part, and remand for a new calculation of the equalization payment.

Facts and Procedural Background

¶2 Husband and Wife were married in February 1990. Their marriage was dissolved pursuant to a decree of dissolution dated April 15, 2008. In the decree, the court awarded each party one-half of the equity in the marital residence, explaining:

Value of the marital residence shall be based on an appraisal to be done for Wife's refinancing or on the net proceeds from a sale to a third party.

[Wife] is granted the exclusive right to purchase the family residence within 60 days from this date. As of the date of trial the community equity in the marital residence is approximately \$501,127 and that figure will be used only as an approximation in order to determine an equalization payment.

¶3 On June 20, Wife filed a notice of making an equalization payment and paid Husband \$82,026.97. According to the accounting attached to the notice, Wife subtracted from the appraised value of the residence 1) mortgage and equity loan

payoffs, 2) one-half of the mortgage and equity loan payments from January 15 through June 15, 2008, 3) five insurance policy premium payments, and 4) sixty percent of an orthodontia expense for the parties' children.¹ There was no documentary evidence attached to the notice. Husband objected to the notice, contesting the lack of support for the values and deductions, and requested an evidentiary hearing, which was set for October 27.

¶14 On July 23, 2008, Husband filed a motion to compel Wife to produce information, data, and documents used to prepare the accounting for the equalization payment. Wife responded that the information would be provided within five days. The court denied Husband's motion, finding Wife "has or will provide [Husband] with the requested documents in a timely manner." On July 28, Wife sent multiple emails to Husband and attached an

¹ Wife calculated the equalization payment as follows: appraised value of residence (\$590,000.00) less mortgage payoff (\$129,732.35) and equity loan payoff (\$763.70) equals \$459,503.95 of equity. One-half of the equity equals \$229,751.97. This amount (\$229,751.97) less undisputed equalization payment awarded to Wife in the decree (\$134,770.00) equals \$94,981.97. From \$94,981.97 the following amounts were deducted: 1) one-half of mortgage payments from January 15 through June 15, 2008 (\$4,952.00); 2) one-half of the equity loan payments from January 15 through June 15, 2008 (\$275.00); 3) undisputed spousal maintenance (\$4,000.00); 4) undisputed child support (\$197.00); 5) five John Hancock policy payments (\$557.00); and 6) sixty percent of an orthodontia expense for the children (\$2,974.00). The balance of \$82,026.97 was paid to Husband.

appraisal of the marital residence and an orthodontia contract. Husband did not open the attachments.

¶15 Husband then noticed Wife's deposition to take place in October. Wife moved for a protective order contending Husband received all of the documents he requested and his actions were an attempt to "run up" her attorneys' fees. The court granted Wife a protective order.

¶16 On October 3, Husband filed a second motion to compel requesting the same documentation he previously requested. Wife responded that Husband was in possession of all the documents he sought and his motion was improper under Arizona Rule of Family Law Procedure ("Rule") 51(F).² According to Rule 51(F), "[n]o discovery motion will be considered . . . unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter." The court denied Husband's motion, explaining there was no evidence of Husband's good faith efforts to resolve the discovery disputes and was not persuaded Wife failed to comply with the discovery requests.

¶17 On October 24, Husband filed a motion to preclude Wife from presenting any evidence at the hearing that had not been

² Although Rule 65(B)(2)(c) is often cited in a motion to compel discovery, Rule 65(B)(2)(c) and Rule 51(F) mandate the same requirement of the moving party.

provided to him. At the hearing, the court denied Husband's motion and admitted into evidence, over Husband's objections, the appraisal, the orthodontia contract, a settlement statement containing mortgage and equity loan payoff information, and bank statements showing mortgage and insurance premium payments. The court, however, granted Husband thirty days to supplement his objection to the equalization payment and to the evidence admitted.

¶18 On November 25, Husband filed a motion for extension of time requesting an additional fifteen days to obtain records and supplement his objection. The court ordered Husband to submit any supplements by December 8. The court also awarded Wife \$300.00 for attorneys' fees incurred responding to Husband's motion. Husband timely appealed this fee award.

¶19 Thereafter, the court, having received no supplement from Husband, issued a ruling affirming Wife's calculation of the equalization payment and overruling Husband's objection. Additionally, Husband was ordered to pay a portion of Wife's attorneys' fees incurred since entry of the decree. Husband timely appealed this ruling.³ We have jurisdiction over both

³ The amount of fees awarded was not specified until March 5, 2009, after Husband filed his notice of appeal. Wife requested \$4,194.00 in attorneys' fees. Husband objected and the court ultimately awarded Wife \$750.00 in fees. Although Husband's notice of appeal regarding this fee award was premature, it was followed by entry of an appealable judgment.

appeals pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).

Discussion

I. Discovery and Evidence

¶10 Husband argues the court erred by failing to grant his discovery requests, denying his motion to preclude evidence, and admitting the appraisal and settlement statement into evidence over his objections to authenticity, foundation, and hearsay. We review the superior court's rulings on discovery matters and the admission of evidence for an abuse of discretion. *Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982); *State v. Leyvas*, 221 Ariz. 181, 184, ¶ 9, 211 P.3d 1165, 1168 (App. 2009) *Link v. Pima County*, 193 Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App. 1998). A court abuses its discretion when "the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001). We will not reverse a court's ruling on discovery requests or the admission of evidence unless substantial prejudice results. *Selby*, 134 Ariz. at 227, 655 P.2d at 347; *Dykeman v. Ashton*, 8 Ariz. App. 327, 329, 446 P.2d 26, 28 (1968).

Barassi v. Matison, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981); *Schwab v. Ames Constr.*, 207 Ariz. 56, 58, ¶ 9, 83 P.3d 56, 58 (App. 2004). Accordingly, this appeal became effective on March 5.

¶11 The court's discovery rulings did not constitute abuse of its discretion. First, the record supports the court's finding that Husband did not comply with Rule 51(F) in filing his discovery requests. Husband did not file a statement certifying he personally consulted with Wife's attorney in good faith. Contrary to Husband's argument, his two letters to Wife's attorney, service of interrogatories, and repeated requests for information were not evidence of good faith efforts to resolve the discovery disputes.⁴ The record shows Husband refused to accept documents from Wife and demanded all the information come directly from her attorney.⁵ Moreover, Wife's attorney asserted Husband had been provided with all the requested documentation, except the bank statements, multiple

⁴ In fact, in one letter Husband wrote "I look forward to your unusual prompt and courteous response." Such communications serve only to amplify, not resolve, discovery disagreements.

⁵ At oral argument, Husband contended that he was uncomfortable receiving discovery responses directly from Wife, because she was represented by counsel and he (though appearing pro per) is an attorney and had ethical concerns about such communications. We find this contention baseless. First, Arizona Rule of the Supreme Court 42, Ethical Rule 4.2 prohibits attorneys from communicating with represented persons "[i]n representing a client" - it does not diminish the ability of a pro per litigant to communicate with a represented party merely because the litigant holds a license to practice law. If the rule were otherwise, joint custody of children of divorced lawyers would become problematic at best. We also note that contrary to his representation at oral argument, the record reveals Husband did in fact communicate with Wife by email about issues concerning the divorce - instructing her only to use his personal address rather than his business address.

times before the hearing. Husband failed to respond to this assertion. The court acted within its discretion on these bases alone.

¶12 Further, the record shows the appraisal and orthodontia contract were emailed to Husband on July 28. Husband denied receiving these documents, but also testified he received the emails and did not open the attachments. We cannot accept Husband's argument that he did not receive the appraisal or orthodontia contract when the record establishes both were emailed to him and he chose not to open the attachments. The record supports the court's finding that Wife did not fail to comply with discovery requests with respect to the appraisal and orthodontia contract because both were disclosed to Husband almost three months before the hearing.

¶13 Finally, the settlement statement was sent to Husband before the hearing as an exhibit to one of Wife's pleadings filed on September 10 and mailed to Husband.

¶14 The only documents apparently not timely disclosed were the bank statements.⁶ In general, a party who fails to timely disclose information shall not be permitted to use the evidence at trial unless such error is harmless. Ariz. R. Fam.

⁶ As a joint account holder, Husband could have obtained the bank statements himself. See Ariz. R. Fam. L.P. 51(B)(1)(a)(use of discovery methods may be limited if discovery sought is duplicative or obtainable from some other source).

L.P. 65(C)(1). Husband argues he was prejudiced by being deprived of the ability to review and oppose the evidence. We disagree. Even assuming the bank statements, or any other documents, were not timely disclosed, the "error" of admitting the documents as evidence was harmless because Husband was given ample opportunity after the hearing to review and object to the evidence. Husband failed to file any objection with the court.

¶15 Similarly, Husband's challenge to the admission of the appraisal and settlement statement over his objections to authenticity, foundation, and hearsay fails for lack of prejudice.⁷ Husband failed to submit evidence showing the exhibits were incomplete, inaccurate, or unreliable, despite being given over forty days after the hearing to do so. *Id.* 2(B)(3)(a) (explaining records of regularly conducted activity

⁷ There is a more expansive standard for admissibility of evidence in a family law proceeding than in other types of proceedings. Ariz. R. Fam. L.P. 2. Rule 2 replaces the hearsay and authentication rules set forth in the Arizona Rules of Evidence. *Id.* 2(B)(2). In a family law proceeding, a party may require strict compliance with the Arizona Rules of Evidence by filing a notice with the court prior to the hearing. *Id.* 2(B)(1). If no notice is filed, all relevant evidence is admissible subject to certain exceptions including lack of timely disclosure and lack of reliability. *Id.* 2(B)(2). Here, neither party filed a notice requesting compliance with the Arizona Rules of Evidence, thus strict compliance was not necessary. Further, the court apparently concluded the documents were complete, accurate, relevant, and reliable on their face. *Id.* 2(B)(3)(a). Husband submitted no controverting evidence showing otherwise. Thus, the court did not err in admitting the documents over Husband's authenticity, foundation, and hearsay objections.

may be admitted into evidence in a family law proceeding without the testimony of a custodian or other qualified witness if the document appears complete, relevant and reliable on its face, and is seasonably disclosed). If Husband believed the appraisal or settlement statement were inaccurate, unreliable, or fraudulent, he could have obtained and submitted information showing such inaccuracy after the hearing concluded. He chose not to. Husband was not prejudiced by the admission of the documents over his objections to authenticity, foundation, and hearsay.

II. Deduction of Expenses

¶16 Husband argues the court abused its discretion by affirming Wife's subtraction of the following from the equalization payment: 1) one-half of the pre-decree mortgage and equity loan payments; 2) the life insurance premium payments; and 3) sixty percent of the orthodontia expense. We address each deduction in turn.

A. Pre-Decree Mortgage and Equity Loan Payments

¶17 The decree, dated April 15, 2008, provides "[e]ach party shall be responsible for one-half of the mortgages on the family residence until purchased by Wife or sold." We agree. Husband moved out of the marital residence in February 2004. Since that time, the parties pooled their earnings into a joint account and paid the expenses of each household with funds from

that account. Husband argues the decree did not make the mortgage or equity loan payments retroactive to any date before April 15 and no evidence supports the deduction of pre-decree mortgage obligations from the equalization payment. Wife argues this cost-sharing arrangement provides support for her pre-decree mortgage and equity loan payment deductions. We agree with Husband.

¶18 First, there is no accounting in the record regarding the disbursement of funds from the joint account. The record shows Wife paid the pre-decree mortgage payments with funds from the joint account. Husband's earnings therefore had already helped pay some of the mortgage payments before the decree, and Wife's deduction of the payments from the equalization gives Husband no credit for his pre-existing contributions.

¶19 Second, Wife submitted no evidence showing why she designated January as the month to begin deducting one-half of the mortgage payments. Specifically, Wife does not argue Husband stopped depositing money into the joint account in January or stopped paying for one-half of the mortgages in January. Indeed, in her position statement filed on February 15, Wife requested Husband "to continue paying for one half of the mortgages until the residence is sold." If anything, Wife's use of the word "continue" implies that Husband paid for one-half of the mortgages at least through February 2008. Finally,

there were no temporary orders issued regarding the mortgage payments, and the decree did not make responsibility for payments retroactive.

¶20 Because there is no evidence to support the deductions, the court erred by allowing them. Accordingly, we vacate these deductions from the equalization payment and remand to the superior court with instructions to deduct only those mortgage and equity loan payments starting from the date the decree was entered.

B. Insurance Premium Payments

¶21 In the decree, the court awarded Husband certain life insurance policies and gave Wife a credit of \$23,750.00 toward her interest in those policies. Wife deducted from the equalization payment \$557.00 for “[f]ive John Hancock policy payments which should have been paid by [Husband].” The court approved this deduction. Husband argues Wife failed to present any evidence that the deduction from the equalization payment was warranted. Again, we agree.

¶22 The testimony regarding the premium payments is as follows:

Wife: Exhibit 6 shows the two John Hancock policy premiums that are automatically coming out of our joint checking account.

Wife’s Attorney: All right. And those cover what months?

Wife: January through June.

. . . .

The Court: Why would January up to the date of the decree be subject to equalization?

Wife's Attorney: I believe [co-counsel] included that in the calculation because [Husband] received the two John Hancock accounts in the decree. Meanwhile, [Wife] had been paying the premiums on them for several months.

The Court: I didn't say there should be an equalization for anything prior to the decree, did I? I don't believe so.

Later, the following exchange took place:

Wife's Attorney: Finally, we already briefly addressed that [Wife] paid for the John Hancock policies January through June. Those are [Husband's] policies, and she wants reimbursement for having to pay the premiums on the property that [Husband] owns.

The Court: Didn't I order that part of the equalization payments she gets credit from January to April?

Wife's Attorney: It's not in the decree, Your Honor.

The Court: Okay.

¶23 Wife has not shown why she is entitled to a credit for payments made prior to entry of the decree, when those policies had not yet been awarded to Husband. More importantly, she has neither shown that the court intended the decree to provide such an offset nor sought to modify the decree. Accordingly, we

vacate the allowance of this pre-decree deduction and remand to the superior court with instructions to deduct from the equalization payment only premium amounts paid by Wife after entry of the decree.

C. Orthodontia Expense

¶24 In the decree, the court ordered all "orthodontia expenses incurred for the health and protection of the children not covered by insurance shall be paid 60% by [Husband] and 40% by [Wife]." Wife deducted from the equalization payment \$2,974.00 for "60% of orthodontic expenses for child(ren) which [Husband] has not paid." Husband argues there was no evidence showing the expense was incurred. We disagree.

¶25 Wife submitted into evidence a contract for the children's orthodontia work showing a cost of \$4,965.00 not covered by insurance. The contract shows the amount would be financed by Wife over twenty months.⁸ As previously discussed, this exhibit was properly admitted into evidence. See *supra*

¶ 7. Further, contrary to Husband's argument, there was more

⁸ To the extent Husband argues that the orthodontia expense was not yet "incurred" because Wife financed the expense, we disagree. Regardless of financing, the entire expense was actually incurred by Wife for the children's orthodontia treatment. The contract provides "[m]onthly installments represent a convenient method of payment and are not based on the number of appointments . . . or length of treatment." Wife was therefore liable to pay the full amount under the contract regardless of subsequent treatments. Thus, contrary to Husband's argument, the contract amount was not merely an estimate.

than one reference to the orthodontia contract during the hearing. Therefore, there is evidence supporting such expense was incurred.

III. Attorneys' Fees

¶26 Last, Husband challenges the two attorneys' fee awards to Wife. We review an award of attorneys' fees for an abuse of discretion. *Breitbart-Napp v. Napp*, 216 Ariz. 74, 83, ¶ 35, 163 P.3d 1024, 1033 (App. 2007).

A. Fees Incurred Since Entry of Decree

¶27 In its ruling on the equalization payment, the court stated:

Wife has requested sanctions against Husband for the unreasonable positions taken by him since entry of the Decree as well as the frivolousness of motions filed by him since that date. The Court finds that Husband has extended the litigation in this matter unnecessarily and unreasonably since entry of the Decree. The Court has considered the relative financial resources of the parties and finds, pursuant to A.R.S. § 25-324, that Husband should pay a portion of Wife's attorney fees since entry of the Decree. IT IS SO ORDERED.

IT IS FURTHER ORDERED that Wife shall submit an affidavit of attorney fees and costs she believes was incurred due to the unreasonable actions of Husband. The Court will enter its award after Husband has had an opportunity to enter his objection to specific amounts requested.

Wife subsequently requested \$4,194.00 for attorneys' fees and Husband objected. The court awarded Wife \$750.00.

¶128 Pursuant to A.R.S. § 25-324(A), a court may award reasonable attorneys' fees "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) (Supp. 2009).

¶129 Husband argues the fee award was erroneous because the court did not have any evidence of the parties' financial resources and cites *Breitbart-Napp* for support. The facts of this case are distinguishable from *Breitbart-Napp*. In *Breitbart-Napp*, the superior court abused its discretion by awarding attorneys' fees pursuant to A.R.S. § 25-324 because the evidence was inadequate to determine the parties' financial status and because the court imposed a prevailing party standard. *Breitbart-Napp*, 216 Ariz. at 84, ¶ 39, 163 P.3d at 1034. The financial information in that record was limited to the parties' affidavits of financial information; one filed three years earlier and the other filed eight months earlier. *Id.*

¶130 Here, the record contains recent and substantial financial information including affidavits of financial information filed by Wife and Husband in October 2007 and January 2008, respectively. Further, the joint pretrial

statement filed in February 2008, contains information concerning the parties' financial resources as does the child support worksheet entered in April 2008. The court also took into account Husband's spousal maintenance obligation before calculating his child support obligation. Subtracting Husband's child support obligation from his adjusted gross income still leaves a disparity of income between the parties.⁹

¶31 Husband also argues there was no factual basis for concluding he took unreasonable positions and that the court erroneously left it up to Wife to identify Husband's unreasonable actions. See *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 10, 200 P.3d 1043, 1045 (App. 2008) (holding A.R.S. § 25-324(A) "requires that the propriety of a litigant's legal position be evaluated by an objective standard of reasonableness"). We disagree.

¶32 The court specifically found Husband unreasonably and unnecessarily extended the litigation, and the record supports this finding. For instance, filing the second motion to compel and motion to preclude, in addition to noticing Wife's deposition, were unreasonable in light of the fact the majority

⁹ According to the child support worksheet, Husband has income of \$10,000.00 per month and Wife has income of \$3,226.00 per month. After the adjustment for spousal maintenance, the adjusted gross incomes are \$8,000.00 for Husband and \$5,226.00 for Wife. Husband's child support obligation is \$797.81 per month, leaving Husband with more income than Wife.

of evidence Husband requested was submitted to him. Further, Husband refused to communicate with Wife, and insisted her attorney communicate everything with him. The court's order was for Wife to submit an affidavit for fees she believed were incurred due to Husband's unreasonable actions, not what Husband's unreasonable actions were. Thus, the court objectively determined Husband was unreasonable and did not delegate the responsibility to Wife.

¶133 The court appropriately considered the financial resources of the parties and determined Husband's actions were unreasonable before awarding Wife a portion of her attorneys' fees. There was no abuse of discretion.

B. Fees Incurred for Motion to Extend

¶134 One day before the expiration of Husband's thirty-day extension to supplement his objection to the equalization payment, he filed a motion for an extension of time. Husband stated he was unable to obtain records because of other commitments during the month of November. Wife objected, and requested sanctions. The court granted Husband's motion and explained:

The Court did not have the opportunity to review the Motion for Extension of Time until December 3, already a week past the November 26, 2008 deadline. The Court notes that [Husband] waited until the day before the due date for his supplemental pleading to seek a continuance. The Court finds that

this practice is not appropriate and has resulted in [Wife] having to pay additional attorney fees in order to respond to the Motion for Extension of Time.

IT IS ORDERED that [Husband] shall pay [Wife's] attorney fees incurred with respect to [Husband's] Motion for Extension of Time. The Court will allow an avowal to be made by counsel as to the amount incurred solely as a result of responding to this current motion. The Court will enter its order for attorney fees thereafter.

Wife requested \$450.00 in attorneys' fees. Husband objected and the court awarded Wife \$300.00.

¶35 The court did not abuse its discretion in making this fee award. Husband did not explain what "commitments" he had during the entire month of November that rendered him unable to get the records he sought. Indeed, the court found no good cause for Husband's motion. Moreover, there was no reason why Husband could not obtain the records he sought in the four months prior to the hearing. Accordingly, we affirm this award of attorneys' fees.

IV. Attorneys' Fees on Appeal

¶36 Wife requests attorneys' fees and costs on appeal. Pursuant to A.R.S. § 25-324, we have considered the financial resources of each of the parties and the reasonableness of the positions that they took on appeal and determine that Wife is entitled to an award of attorneys' fees upon compliance with Arizona Rule of Civil Appellate Procedure 21. Though each party

prevailed on some issues, we deem Wife the prevailing party and also award her costs on appeal.

Conclusion

¶37 For the foregoing reasons, we vacate the deductions from the equalization payment consisting of one-half of the pre-decree mortgage and equity loan payments and the pre-decree insurance premium payments. We remand to the superior court for a new calculation of the equalization payment in accordance with these modifications. We affirm the remaining portions of the equalization payment and both attorneys' fee awards.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

PETER B. SWANN, Judge