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: 10-05-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	No. 1 CA-CV 09-0274
JILL F. VENZA,	DEPARTMENT E
Petitioner/Appellant,	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
PETER J. VENZA,	
Respondent/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. DR1996-007677

The Honorable Carey Snyder Hyatt, Judge

AFFIRMED

Jill F. Venza — Chandler
In Propria Persona

Peter J. Venza — Maynard, MA
In Propria Persona

S W A N N, Judge

¶1 Jill Venza ("Wife") appeals from the superior court's award of $2,150 to Peter Venza ("Husband") for attorney's fees and costs incurred during post-dissolution litigation over spousal support and insurance and military pension benefits. We

conclude that A.R.S. § 25-324, and not its civil counterparts, is the controlling authority in this case. On the limited record available to us, we find no abuse of discretion. We therefore affirm the award.

FACTS AND PROCEDURAL HISTORY

¶2 Wife and Husband dissolved their marriage on June 4, 1997. The consent decree required Husband to pay spousal maintenance until June 30, 2006, and equitably divide his insurance and military pension benefits. By January 2004, Husband had accumulated substantial arrearages on the spousal maintenance obligation and an Order of Assignment was issued against Husband's wages in March 2004.

¶3 After Husband's obligation to pay spousal maintenance ended in June 2006, he continued making monthly payments to satisfy the arrearages. By January 2008, Husband had paid the arrearages, and he initiated proceedings in March 2008 to terminate the Order of Assignment. Wife refused to stipulate that the arrearages had been paid. On September 19, 2008, the superior court ordered the spousal maintenance payments suspended effective January 1, 2008.[1]

[1] Husband had apparently arranged to stop the garnishment of his paychecks at or before this time, and therefore there was no overage paid to Wife during the period between January 2008 and the superior court's September order.

¶4 On October 10, 2008, Wife filed a petition for enforcement of Husband's obligations under the dissolution agreement to provide insurance and military pension benefits to Wife and their son, seeking as remedies past and future attorney's fees, monthly payments of $500, and a $1,000,000 term life insurance policy on Husband to benefit Wife and their son. Husband responded that he had fulfilled his obligations under the decree.

¶5 At a hearing on November 4, 2008, the spousal maintenance issue was resolved by the court's review of the payment history and Husband's payment of a small service fee. Husband then informed the court that he would be seeking attorney's fees and costs related to the just-concluded spousal maintenance termination litigation. At the next hearing on January 8, 2009, the court ordered Husband to provide an affidavit of attorney's fees to include "all fees from this day forward."

¶6 On February 25, 2009, after briefing and argument, the court concluded that Husband had satisfied his insurance and military pension benefits obligations. The court also heard argument concerning Husband's application for attorney's fees, and ordered Wife to pay Husband's attorney's fees and costs of $2,150.

¶7 Wife timely filed a Notice of Partial Appeal regarding the award of attorney's fees on March 27, 2009, and on April 24,

2009, amended the appeal to include the insurance-related issues. Wife's opening brief, however, addressed only the attorney's fees. We have jurisdiction over this appeal pursuant to A.R.S. § 12-2101(B).

¶8 Husband requested and received an extension of time to file Appellee's Brief but did not file one. Although we may regard a failure to respond as a confession of reversible error, we are not required to do so. *Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). Here, the standard of review is highly deferential, and we are therefore not inclined to reverse the trial court's decision because of a procedural default on the part of Appellee.

DISCUSSION

I. THE APPELLATE RECORD IS NOT COMPLETE.

¶9 At the outset, we note that the record in this case is not complete. The record does not contain Husband's motion for attorney's fees and costs. But it does contain Wife's response in opposition to that motion, in which she argued that fees were not warranted under A.R.S. §§ 12-350 and -341.01. The record also does not contain the Affidavits of Financial Information required by Ariz. R. Fam. Law Proc. Rule 91(S) ("In any post-decree/post-judgment proceeding in which an award of attorneys' fees, costs, and expenses is an issue, both parties shall file a completed Affidavit of Financial Information.").

¶10 Finally, though Wife has supplied the court with purported transcripts of several of the hearings, they are not certified transcripts. A party who asserts on appeal that a superior court ruling was not supported by the evidence must provide a certified transcript of the evidentiary hearing and, if he or she fails to do so, we will assume the evidence was sufficient to support the court's findings. *See* ARCAP 11(b)(1); *Retzke v. Larson*, 166 Ariz. 446, 449, 803 P.2d 439, 442 (App. 1990).

¶11 Because Wife has not provided a certified copy of the transcripts from hearings, we assume that the evidence presented in those hearings supports the family court's findings. And when other portions of the record on appeal are incomplete, we assume any missing portion of the record would support the lower court's ruling.

II. A.R.S. § 25-324 GOVERNS THE FEE AWARD IN THIS CASE.

¶12 Wife argues on appeal that the court improperly ignored her self-proclaimed status as the prevailing party. She also argues the court's award did not comply with A.R.S. §§ 12-349 and 25-411(G).

¶13 The superior court was not required to comply with either of these statutes. Section 12-349 provides for sanctions to redress specified misconduct in civil actions. Because A.R.S. § 25-324 (2007) provides a basis for fee awards in family matters,

§ 12-349 is not necessary to the fee award in this case. Section 25-411(G) applies only to parties improperly seeking modification of a child custody agreement -- a remedy not at issue in this case.

¶14 For the first time on appeal, Wife also correctly acknowledges that A.R.S. § 25-324 applies in this case. That statute provides in pertinent part:

> A. The court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter or chapter 4, article 1 of this title.

The statute requires that the court consider the financial situation of both parties and the reasonableness of their positions. *In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 26, 5 P.3d 911, 917 (App. 2000). But unlike some other statutes that authorize awards of attorney's fees, there is no "prevailing party" analysis under § 25-324. *Breitbart-Napp v. Napp,* 216 Ariz. 74, 84, ¶ 39, 163 P.3d 1024, 1034 (App. 2007).

¶15 Wife's arguments in the superior court were not premised on § 25-324, but on §§ 12-350 and -341.01. Section 12-350 concerns awards made under § 12-349, not § 25-324. Section 12-341.01(A) permits an award of attorney's fees to the successful party in contract actions, not family court proceedings.

Section 12-341.01(C), like § -349, permits awards of fees for abusive litigation practices and is not an essential consideration in a family matter.

¶16 Though neither statute upon which Wife relied in the superior court applies, "where the parties have failed to address completely the correct rule of law governing the issues, we are not precluded from doing so." *Decola v. Freyer*, 198 Ariz. 28, 31, 6 P.3d 333, 336 (App. 2000). It is the court that determines which law applies to the facts, not the parties. *See Word v. Motorola, Inc.*, 135 Ariz. 517, 520, 662 P.2d 1024, 1027 (1983). We therefore consider only the arguments that bear on A.R.S. § 25-324.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING FEES TO HUSBAND.

¶17 Wife raises two issues on appeal that bear on § 25-324: she contends that the superior court failed to consider the financial status of the parties, and that the relative reasonableness of positions taken by the parties did not justify the award of attorney's fees. We review de novo pure questions of law, and we review for abuse of discretion a court's decision concerning attorney's fees. *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8, 200 P.3d 1043, 1045 (App. 2008). *See also Graville v. Dodge*, 195 Ariz. 119, 131, ¶ 56, 985 P.2d 604, 616 (App. 1999) (abuse of discretion standard recognizes trial

court's opportunity to observe the reasonableness of the parties' conduct).

¶18 Wife is correct that the court is required to consider the financial resources of the parties in connection with an award of fees pursuant to A.R.S. § 25-324. But nowhere in the record does it appear that Wife made any factual argument to the trial court concerning the financial situation of the parties. "Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). "Extraordinary circumstances" are those involving error that "goes to the foundation of the case or deprives a party of a fair trial." *Id.* No such extraordinary circumstances are present here, and the argument is therefore waived on appeal.

¶19 Wife's second argument, that the court erred in its consideration of the reasonableness of the positions taken by the parties, also fails. Wife does not argue that the superior court failed to consider this factor -- she argues only that the court came to the wrong conclusion.

¶20 Before we may disturb the superior court's evaluation of the reasonableness of the positions "the record must be devoid of competent evidence to support the decision of the trial

court. Further, in testing the sufficiency of the evidence it must be taken in the strongest manner in favor of the appellee and in support of the court's findings, and a judgment will not be disturbed when there is any reasonable evidence to support it." *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963). Here, Appellant has failed to provide certified transcripts of the hearings. "In the absence of a transcript in the appellate record, we presume that whatever occurred at the hearing supported the trial court's ruling." *Schoenfelder v. Ariz. Bank,* 165 Ariz. 79, 88 n.7, 796 P.2d 881, 890 n.7 (1990). Because Wife has failed to present any record support for her contention that the court erred in assessing the parties' reasonableness, we must affirm.

CONCLUSION

¶21 For the foregoing reasons, we affirm the court's award of attorney's fees.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge