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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 06-22-010  
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BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

IN RE THE MARRIAGE OF: ) 1 CA-CV 09-0512  
)  
ROBERT S. LIVERMORE, JR., ) DEPARTMENT D  
)  
Petitioner/Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules  
) of Civil Procedure)  
CHERYL LIVERMORE, )  
)  
Respondent/Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-053992

The Honorable Linda H. Miles, Judge

**AFFIRMED**

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Phoenix

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O R O Z C O, Judge

¶1 Cheryl Livermore (Wife) appeals the family court's denial of her motion for new trial. For the reasons that follow, we affirm the judgment of the family court.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Robert S. Livermore, Jr. (Husband) and Wife were married in 1988.<sup>1</sup> Husband filed a petition for dissolution of marriage on November 26, 2007. Both parties retained attorneys. Counsel for Wife sought permission, and was ultimately allowed, to withdraw because Wife had "fail[ed] to abide by the contract terms" regarding the representation.<sup>2</sup>

¶3 Both parties filed motions for temporary orders. The family court ordered Husband to pay Wife \$1000 per month in temporary spousal maintenance. In a February 5, 2008 minute entry, the family court also ordered the sale of a horse trailer, with the sales proceeds to be held in an interest bearing account

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<sup>1</sup> Wife maintains that the parties were married in 1989 and not 1988 as Husband states.

<sup>2</sup> Counsel for Wife filed, but then subsequently withdrew his motion to withdraw. A second motion to withdraw was filed, but was denied by the court because Wife was not properly "endorsed" pursuant to Arizona Rule of Family Law Procedure 9.A.2.b. Counsel for Wife filed a third motion to withdraw, which was granted. Wife's counsel also filed a motion to appoint a guardian ad litem. The court vacated its prior order that granted Wife's counsel's request to withdraw based on the motion to appoint a guardian ad litem. A hearing on the motion to appoint a guardian ad litem was held, but the motion was ultimately withdrawn. At the same hearing, held on May 6, 2008 and per Wife's request, counsel for Wife was "relieved" from his representation of Wife.

until the parties agreed which debts should be paid. The family court set the matter for a June 25, 2008 trial. On May 6, 2008, after Wife's counsel withdrew, the family court continued trial until September 9, 2008, to allow Wife to retain counsel.

¶4 In a proposed stipulation, Husband offered to borrow \$15,000 from his 401(k) account and lend those funds to Wife for purposes of retaining an attorney. Wife refused the terms of Husband's stipulation and on June 4, 2008, she filed a motion requesting funds to retain an attorney. Husband filed a letter with the court to enter an order as "follow-up" to the court's February 5, 2008 order regarding the sale of the horse trailer as Husband alleged Wife was hindering the sale. In its June 4, 2008 minute entry addressing both issues, the court denied Wife's motion to provide her with attorney fees based on the fact that it ordered the immediate sale of the horse trailer "which would make monies available to both parties for attorney's fees." On August 12, 2008, Husband filed an emergency motion seeking to approve the sale of the horse trailer based on his assertion that Wife would not approve the sale. The court approved the sale of the horse trailer the same day.

¶5 Based on Wife's allegation that she had not received "all" of the funds from the sale of the horse trailer and because the attorneys with whom she consulted needed additional time to prepare for trial, Wife moved for a continuance on August 22,

2008. The family court denied Wife's request to continue and trial began on September 9, 2008. Although the trial was originally scheduled for one-half day, the family court continued the matter for another day "[i]n fairness to [Wife]" because she was not given as much time as Husband was. Wife called no witnesses, did not prepare or present any exhibits and generally presented no evidence.

¶16 The decree was filed on November 13, 2008. Despite the fact that the family court noted Wife had "taken unreasonable positions . . . which have significantly increased [Husband's] attorney's fees," the court ordered each party to pay his or her own attorney fees and costs. On November 25, 2008, Wife moved for a new trial. After considering Wife's motion, Husband's response and Wife's reply, the family court denied Wife's request.

¶17 Wife timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B (2003).

#### **DISCUSSION**

¶18 Wife raises various issues on appeal: (1) whether the family court abused its discretion by denying Wife's request for attorney fees during the proceedings so she could obtain counsel and by denying her request for a continuance of the trial date; (2) whether the family court erred in awarding spousal maintenance that was only approximately one-third of the amount

suggested by the Arizona guidelines; (3) whether the amount of spousal maintenance was based on incorrect facts and therefore not supported by the record; (4) whether the family court erred in holding Wife in contempt for exercising a civil standby on September 5, 2008; and (5) whether the trial court erred in permitting Wife's former attorney's paralegal to testify at trial on behalf of Husband.

¶9 A family court has broad discretion in determining whether to grant or deny a motion for a new trial and its decision will not be disturbed absent an abuse of that discretion. *Pullen v. Pullen*, 223 Ariz. 293, \_\_\_, ¶ 10, 222 P.3d 909, 912 (App. 2009). A family court abuses its discretion if, in reaching its determination, it misapplies the law. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). The burden is on the party seeking to overturn the family court's decision to show the court abused its discretion. *Pullen*, 223 Ariz. at \_\_\_, ¶ 10, 222 P.3d at 912.

#### ***I. Wife's attorney fees at trial***

¶10 Wife contends the family court erred by not granting her money pursuant to A.R.S. § 25-324 (Supp. 2009)<sup>3</sup> for attorney fees so she could retain an attorney for trial. Wife also argues

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<sup>3</sup> We cite to the current version of the applicable statute because no revisions material to this decision have since occurred.

that the family court erred by denying her motion to continue the matter to allow Wife to obtain community funds to retain counsel.

¶11 On appeal, we review a family court's decision whether to award attorney fees for an abuse of discretion. *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8, 200 P.3d 1043, 1045 (App. 2008).

(a) *Lack of funds to retain an attorney*

¶12 At the trial, J.T., a friend of Wife's, testified that he loaned Wife \$14,000 specifically for attorney fees and bail. J.T. also testified that he gave Wife a second check in the amount of \$26,000 to deposit into her account "to show that she had funds so that she could actually get an apartment." J.T. testified that in total, he had loaned Wife \$40,000 and none of the money had been repaid. On cross examination, Wife did not contest that J.T. had loaned her \$40,000. Instead, Wife questioned J.T. about why the promissory note was for \$19,000 and he had only given her \$14,000. Wife never explained why these funds were not used to retain an attorney.

¶13 In a letter to Wife dated May 20, 2008, Husband offered to loan her \$15,000 from his company 401(k) plan to help pay her attorney fees. This loan was conditioned on stipulations regarding the use of the proceeds from the sale of the horse trailer to pay certain debts. Because Wife did not agree to the

terms of the loan from Husband, no money was borrowed from Husband's 401(k).

¶14 On June 4, 2008, Wife filed an emergency motion requesting Husband be required to provide immediate funding for an attorney for Wife. She requested funds to pay for an attorney because "Wife's previous legal counsel withdrew representation due to Wife's inability to pay." In a letter to the court dated June 4, 2008, Husband requested approval to transport the horse trailer to a dealer in California for sale, alleging Wife was not cooperating. In a June 4, 2008 minute entry, the family court ordered Husband to take the horse trailer to California to sell it to "make monies available to both parties for attorney's fees." Because the court ordered the trailer sold, it denied Wife's motion. After an emergency request by Husband to approve the sale because Wife allegedly would not sign the paperwork, the court signed an order on August 12, 2008 permitting the sale of the horse trailer for \$30,000 with the proceeds to be distributed equally between Husband and Wife. At trial, Wife presented no evidence as to how much of the money she had received or when she received the money and did not dispute that she delayed the sale of the horse trailer.

¶15 Husband also testified that Wife withdrew all the money in the parties' joint checking accounts, except \$1.96, after Husband filed the petition for dissolution. Wife did not dispute

she took monies from the joint accounts nor did she explain why these funds were unavailable for her use to retain an attorney.

¶16 Based on these circumstances, we determine the family court did not abuse its discretion in denying Wife's request to provide fees for her to retain counsel at trial.

(b) *Denial of motion to continue*

¶17 Wife contends that the family court erred when it denied her motion to continue trial to allow her additional time to retain counsel. A trial court has broad discretion in determining whether to grant a motion to continue, and we will not disturb its decision absent an abuse of discretion. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 431, 438, 868 P.2d 1014, 1021 (App. 1993), *vacated on other grounds*, 180 Ariz. 148, 882 P.2d 1274 (1994). The Arizona Rules of Family Law Procedure state that "[w]hen an action has been set for trial, hearing or conference on a specified date by order of the court, no continuance of the trial, hearing or conference shall be granted except upon written motion setting forth sufficient grounds and good cause." Ariz. R. Fam. Law P. 77.C.1.

¶18 The family court set the matter for trial on June 25, 2008. On May 6, 2008, the court permitted Wife's counsel to withdraw and ordered that the trial be continued until September 9, 2008 "[t]o enable [Wife] to obtain new counsel." On August 22, 2008, Wife filed an expedited motion to continue trial for



"no less than" 120 days because she had not "received all of the funds" from the sale of the horse trailer and was still unrepresented by counsel. Wife indicated that although she had attempted to retain three attorneys, each told her they would need additional time to prepare for trial. The court denied Wife's request to continue.

¶19 Wife offers no argument regarding how proceeding with trial prejudiced her, because she does not contend that specific evidence or arguments were unavailable for her use at trial. In fact, Wife admitted in her motion to continue that, even if she was given money to retain counsel, she was unprepared to go forward because "[a]dditional time is needed so that discovery requests can be prepared and obtained, and depositions can be conducted." In the family court's minute entry dated March 25, 2008, the parties were instructed on guidelines for discovery, disclosure and pretrial statements. Wife chose not to testify or present any evidence at trial.

¶20 Wife does argue, however, that because she was not able to retain counsel for trial, she "did not have a meaningful opportunity to present her version of the relevant facts." It is well established that "[o]ne who represents herself in civil litigation is given the same consideration on appeal as one who has been represented by counsel. She is held to the same familiarity with court procedures and the same notice of

statutes, rules, and legal principles as is expected of a lawyer." *Higgins v. Higgins*, 194 Ariz. 266, 270, ¶ 12, 981 P.2d 134, 138 (App. 1999); see *In re Marriage of Williams*, 219 Ariz. at 549, ¶ 13, 200 P.3d at 1046. Wife cannot complain on appeal that the record is "truncated" because she did not have an opportunity to develop relevant facts.

¶21 Under these circumstances, we determine the family court did not abuse its discretion in denying Wife's motion to continue.

## **II. Spousal maintenance**

¶22 Wife argues the spousal maintenance award of \$1400 per month for six years was in error because (1) the award is not supported by the evidence and (2) the award is based on "improper evidence" including an expert's report and an understatement in Husband's income.

¶23 The family court has "substantial discretion" to determine the amount and duration of spousal maintenance under A.R.S. § 25-319.B (2007). *Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993). Absent an abuse of that discretion, we will not disturb the family court's award. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998). To determine whether the family court properly considered the factors set forth in A.R.S. § 25-319.B, we review the duration and amount of the spousal maintenance award. *Id.* at

¶ 15. A family court is not necessarily required to apply every factor listed in section 25-319.B. *Rainwater*, 177 Ariz. at 502, 869 P.2d at 178. The determination by the court is done on a case-by-case basis and some statutory factors will not apply. *Id.*; see also *Elliott v. Elliott*, 165 Ariz. 128, 131 n.1, 796 P.2d 930, 933 n.1 (App. 1990) (concluding A.R.S. § 25-319.B did not require a court to make a specific finding regarding each factor listed prior to awarding spousal maintenance; rather, the statutes themselves only require the court to consider the factors in question).

*(a) Spousal maintenance award was supported by evidence*

¶24 The family court found that Wife was entitled to an award of spousal maintenance because she "lack[ed] sufficient property, including property apportioned to her, to provide for her reasonable needs" pursuant to A.R.S. § 25-319.A. Additionally, the family court found "after considering all relevant factors including the factors set forth in A.R.S. § 25-319(B)" that Wife should receive an award of \$1400 per month for six years.

¶25 Wife contends, in part, the spousal maintenance award "is not supported by reasonable evidence" because she received only about thirty-seven percent of what the spousal maintenance guidelines recommend.

¶26 The spousal maintenance guidelines (Guidelines) are distributed by the Superior Court of Arizona, Maricopa County, Family Court Department and were implemented to remedy the unpredictability of spousal maintenance awards. *Spousal Maintenance Guidelines* at 1-2 (Oct. 2002). The Guidelines provide the court and the parties with a "starting point for discussion, negotiation or decision-making." *Id.* at 1. The Guidelines do not replace a family court's duty to consider relevant statutory factors and evidence. *Id.* The family court can, but is not required to, utilize the Guidelines to help in determining duration and amount of maintenance. *Cullum v. Cullum*, 215 Ariz. 352, 353, ¶ 1, 160 P.3d 231, 232 (App. 2007). The ultimate decision on the duration and amount of the award must be consistent with the A.R.S. § 25-319.B factors. *Leathers v. Leathers*, 216 Ariz. 374, 377 n.1, ¶ 10, 166 P.3d 929, 932 n.1 (App. 2007).

¶27 In this case, the court indicated that it had "considered all relevant factors" including the statutory factors set forth in A.R.S. § 25-319.B. Wife asserts that she has epilepsy and accompanying seizures, however, at trial she presented no expert testimony or other evidence documenting a continuing condition that would prevent her from working. See A.R.S. § 25-319.B.3. Husband testified that over the course of their almost twenty-year marriage Wife was active and to his

knowledge she did not take any medication related to epilepsy or receive treatment for seizures. See A.R.S. § 25-319.B.2-3. Husband's vocational expert reported that Wife could earn an income of between \$24,193.06 and \$33,217.60 annually as a customer service representative or a receptionist. See A.R.S. § 25-319.B.5. Although Husband makes approximately \$12,818 per month, Husband was ordered to pay and indemnify Wife for over \$190,000 in community debt. See A.R.S. § 25-319.B.4-5. Wife was ordered to pay and indemnify Husband for \$300 in community debt. Wife was also ordered to pay "any debts she incurred since service of the Petition for Dissolution of Marriage, including, but not limited to" the \$40,000 she had borrowed from J.T. Additionally, Husband's monthly expenses are in excess of \$8000, not including payments for any of the community debts or a spousal maintenance payment. See A.R.S. § 25-319.B.4. The financial affidavit Wife filed in January 2008 reflected monthly expenses for the marital residence, which she had not occupied since November 2007, and other expenses Husband was ultimately responsible for. Wife failed to file an updated financial affidavit prior to trial, despite requests from Husband. Furthermore, Wife was awarded \$50,000 from Husband's 401(k) account, which was valued at \$185,000 at the time of trial.<sup>4</sup> See A.R.S. § 25-319.B.9.

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<sup>4</sup> Husband filed a motion for reconsideration challenging the

¶128 Wife chose not to present any evidence or testify at trial and the family court properly relied on the record in awarding spousal maintenance. The evidence before the family court supported its award to Wife. The court did not abuse its discretion in calculating the spousal maintenance. Additionally, because the family court has continued jurisdiction over the issue of spousal maintenance for the duration of the maintenance award, Wife may request modification if supported by the facts. A.R.S. § 25-319.D.

*(b) Spousal maintenance award based on incorrect evidence*

¶129 Wife argues that the spousal maintenance award was based on factually incorrect evidence. First, Wife asserts that the vocational expert's report on her earning capacity is based on an affidavit and incorrect resume provided by Husband. Second, Wife asserts Husband appears to have understated his income.

¶130 At the trial, Wife did not object to either admission of the expert's vocational report, which she alleges was prepared

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amount Wife was awarded from his 401(k) account. Husband argued that due to financial market changes, the current value of the account had reduced in value from the \$185,000 value stated at the time of trial to approximately \$136,000 at the time of his motion for reconsideration. Husband noted the court awarded Wife approximately twenty-seven percent of the account's value and Wife's share had risen to over thirty-six percent due to fluctuating market changes in the account. The family court denied Husband's motion stating it could only consider evidence and testimony presented at trial.

based on Husband's affidavit and false resume, or Husband's financial affidavit or paystubs. Wife objected both to the expert's vocational report and Husband's alleged understated earnings for the first time in her motion for new trial. Issues raised for the first time in a motion for new trial are waived. *Conant v. Whitney*, 190 Ariz. 290, 293-94, 947 P.2d 864, 867-68 (App. 1997).

¶31 Accordingly, we do not address Wife's arguments regarding the expert's vocational report or Husband's earnings.

### ***III. Contempt for civil standby***

¶32 Wife contends that the family court erred as a matter of law for holding her in contempt for exercising a civil standby on September 5, 2008.

¶33 In general, we do not have jurisdiction over appeals from civil contempt orders. *Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35, 36 P.3d 749, 759 (App. 2001). Because the finding of contempt was in the decree, which is a final and statutorily appealable order, the finding of contempt and sanction imposed is appealable. See *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 145 n.3, 146-47, ¶¶ 13, 15-16, 211 P.3d 16, 23 n.3, 24-25 (App. 2009). We review a finding of civil contempt for an abuse of discretion. See *Munari v. Hotham*, 217 Ariz. 599, 605, ¶ 25, 177 P.3d 860, 866 (App. 2008). On appeal, we accept the factual findings of the family court unless they are clearly erroneous.

*Strait v. Strait*, 223 Ariz. 500, \_\_\_, ¶ 6, 224 P.3d 997, 999 (App. 2010).

¶134 On November 29, 2007, Wife was served with an order of protection that gave Husband exclusive use of the marital residence. That same day, Wife arrived at the parties' residence accompanied by a sheriff's deputy to retrieve her personal effects. Wife contends that because she was not allowed to enter the residence and Husband packed her bags for her, this did not constitute a civil standby. On September 5, 2008, Wife entered the marital residence in Husband's absence, accompanied by a police officer who had no knowledge of Wife's prior civil standby or the order of protection. The family court specifically found: there was a valid order of protection against Wife; Wife was served with the order; the order gave Husband exclusive use of the marital residence; Wife was entitled to one civil standby; Wife was given her civil standby on November 29, 2007; Wife was notified she was not entitled to a second civil standby; Wife had the ability to comply with the order of protection; and Wife "willfully failed and refused to do so." The family court found Wife in contempt of the order of protection for entering the marital residence on September 5, 2008 and ordered Wife to pay \$1000 to Husband for his attorney fees "associated with litigating the issue of contempt" and "interest at the legal rate from the date of judgment until paid in full."



¶135 In this case, the family court's factual findings are supported by the record. Wife received the order of protection, and Husband provided her with some of her personal belongings on the same day. Wife contends she "had nothing more than an impromptu receipt of her property from Husband" and that she did not have a "meaningful chance to gather her own personal belongings." At trial, Husband testified that soon thereafter, he also packed up "pretty much all of [Wife's] clothes [and] all her personal belongings" and delivered them to where Wife was living. Because Wife continued to request to return to the marital residence, Husband requested Wife provide a list of the items she wanted from the home. No list was provided. Instead, Wife entered the home in Husband's absence with a police officer who was neither aware she had previously been to the residence nor that an order of protection was in effect.

¶136 The record supports both the finding of contempt and the sanction imposed. Accordingly, we conclude there was no abuse of discretion.

#### ***IV. Paralegal's testimony against Wife***

¶137 Wife argues that the family court erred in permitting Wife's former attorney's paralegal (the Paralegal) to testify at trial. Specifically, Wife contends that the Paralegal's testimony was: (1) in violation of A.R.S. § 12-2234 (2003); (2)

in violation of her attorney client privilege; and (3) irrelevant.

¶138 Wife did not object to the Paralegal's testimony on any of these bases at trial. Instead, Wife objected to the Paralegal's testimony on the basis that she was not included on Husband's witness list. Wife also objected to the Paralegal's testimony on the basis that the Paralegal knew "third hand" as to Wife's understanding of the exercise of her civil standby.<sup>5</sup>

¶139 "The only objection which may be raised on appeal . . . is that made at trial." *Romero v. Sw. Ambulance*, 211 Ariz. 200, 203-04, ¶ 6, 119 P.3d 467, 470-71 (App. 2005) (quoting *Selby v. Savard*, 134 Ariz. 222, 228, 655 P.2d 342, 348 (1982)). An objection at trial on one ground does not preserve an objection on another ground on appeal. See *id.* Therefore, these arguments are deemed waived on appeal. See *Woodworth v. Woodworth*, 202 Ariz. 179, 184, ¶ 29, 42 P.3d 610, 615 (App. 2002). Accordingly, we do not address Wife's arguments regarding the testimony of the Paralegal.

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<sup>5</sup> Wife requested that her former attorney be permitted to testify regarding whether Wife had exercised her one civil standby on November 29, 2007. Wife even cross examined the Paralegal as to the availability of Wife's former attorney to testify telephonically at trial.

**V. Attorney fees on appeal**

¶40 Both parties request attorney fees on appeal pursuant to A.R.S. § 25-324. Section 25-324 requires us to examine both the financial resources of the parties and the reasonableness of the positions of each party. After doing so, in our discretion, we determine each party should bear their own attorney fees on appeal. As the prevailing party on appeal, however, Husband is entitled to his costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21(c).

**CONCLUSION**

¶41 For the foregoing reasons, we conclude the family court did not abuse its discretion in denying Wife's motion for a new trial and affirm the judgment of the family court.

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

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DIANE M. JOHNSEN, Judge

/S/

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JON W. THOMPSON, Judge