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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



DIVISION ONE
FILED: 11-30-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF:) 1 CA-CV 09-0664
)
PAIGE G. SAMMONS,) DEPARTMENT C
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
ALAN J. PERIL,)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2003-005985

The Honorable Alfred M. Fenzel, Judge

AFFIRMED

Franks, Sheldon & Houser, P.C. Phoenix
by Todd Franks
Steven D. Sheldon
Robert C. Houser
Attorneys for Petitioner/Appellant

Mariscal, Weeks, McIntyre & Friedlander, P.A. Phoenix
by Leonce A. Richard
Dana M. Levy
Attorneys for Respondent/Appellee

P O R T L E Y, Judge

¶1 Paige Sammons ("Mother") appeals from the denial of her request for attorneys' fees arising out of a child custody modification. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Alan Peril ("Father") and Mother were divorced in November 2004, and agreed to joint legal custody of their two children. Their agreement, which is part of the decree, required them to mutually agree to all "major educational decisions, including changes in schools." Mother moved to Peoria a year later, and Father agreed that the children could attend elementary school in Peoria.

¶3 Subsequently, based on their Parenting Coordinator's recommendation,¹ the family court amended the decree to require that the parents attempt to resolve any educational issues before asking the court to resolve the dispute. A different Parenting Coordinator was appointed in August 2006, and the family court ordered that the parents consult with the Parenting Coordinator before filing any petitions regarding parenting time absent an emergency.

¹ A Parenting Coordinator was appointed in September 2004 to help the parents resolve conflicts.

¶14 In September 2008, and before their son started high school, Father and Mother unsuccessfully tried to privately mediate which school he would attend. Father refused to discuss the issue with the Parenting Coordinator. Father, in October 2008, filed a motion and requested a hearing to "(i) resolve the selection of high school, (ii) modify the parenting time schedule, and (iii) enforce financial responsibilities per the divorce decree." Mother moved to dismiss Father's motion.²

¶15 At the February 2009 hearing, and at Mother's request, the family court appointed Dr. Lavit to conduct a full custody evaluation, and scheduled a trial on Father's motion. The parents subsequently settled their custody dispute the day before trial was to begin, but were unable to agree on Mother's request for attorneys' fees. The next day, the family court accepted the settlement agreement that gave Mother sole legal custody and the authority to determine where the children would attend school; required Father to attend therapy; and imposed financial sanctions and reduced visitation if Father violated the custody agreement.

¶16 Before the fee request hearing, Mother submitted a request for \$76,596.34 in attorneys' fees and \$8,786.00 for the cost of the custody evaluator. After the hearing, the family

² Mother filed a response to Father's motion on June 1, 2009.

court ordered both parties to pay their own attorneys' fees and awarded Mother \$2,308.00 for the custody evaluator expenses.

¶17 Mother appeals, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(B) (2003).

DISCUSSION

¶18 Mother contends that the family court erred by failing to award her attorneys' fees under (1) A.R.S. § 25-411(G) (Supp. 2009), (2) A.R.S. § 25-324(A) (Supp. 2009), and (3) A.R.S. § 12-349(A)(3) (2003). We review the facts in the light most favorable to sustaining the family court's decision. *Phx. Newspapers, Inc. v. Dep't of Corrections*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997).

I. Attorneys' Fees Pursuant to A.R.S. § 25-411(G)

¶19 Mother first contends that she should receive attorneys' fees under A.R.S. § 25-411(G), which provides that "[t]he court shall assess attorney fees and costs against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment."

¶10 We review interpretation and application of A.R.S. § 25-411(G) *de novo*. See *Phx. Newspapers*, 188 Ariz. at 244, 934 P.2d at 808. Although fees and costs must be awarded if the family court finds that the modification request is vexatious and constitutes harassment, the court has to make that factual finding. Here, the family court did not make the finding and,

by denying fees to both parties, implicitly rejected the notion that Father's modification petition was vexatious and constituted harassment. See *General Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992) (necessary findings are implied in every judgment). Consequently, the family court evaluated the conduct of the parties to determine whether fees should be awarded pursuant to A.R.S. § 25-411(G), and we will accept the family court's findings unless they are erroneous. See *Phx. Newspapers*, 188 Ariz. at 243, 934 P.2d at 807.

¶11 The family court's determination not to award fees pursuant to A.R.S. § 25-411(G) was supported by substantial evidence. See *Scottsdale Princess P'ship v. Maricopa Cnty.*, 185 Ariz. 368, 379, 916 P.2d 1084, 1095 (App. 1995) (defining clearly erroneous as a finding that is unsupported by any substantial evidence). First, the petition was Father's first request for modification, and he only filed it after the mediation effort failed. Second, Mother expanded the proceedings from where the child should attend high school to whether she should have sole custody and limited parenting time for Father. Consequently, the family court did not err by determining the petition was not vexatious nor did it constitute harassment.

II. Attorneys' Fees Pursuant to A.R.S. § 25-324(A)

¶12 Mother next argues that the family court erred by denying her request for attorneys' fees pursuant to A.R.S. § 25-324(A). Specifically, she contends that the family court should have granted her request for fees because Father took unreasonable positions throughout the proceedings. We review a family court's decision concerning attorneys' fees under A.R.S. § 25-324(A) for an abuse of discretion. See *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8, 200 P.3d 1043, 1045 (App. 2008).

¶13 We find no error. Section 25-324(A) provides that the family court "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 costs and expenses of maintaining or defending any proceeding." The parties, even if self represented, are held to an objective standard of reasonableness. *Williams*, 219 Ariz. at 548-49, ¶¶ 10, 13, 200 P.3d at 1045-46.

¶14 Although Mother argues that Father took unreasonable positions during his settlement negotiations, he settled and gave Mother everything she wanted other than attorneys' fees, even though she rejected his counter-proposals. Therefore, the family court did not abuse its discretion when it rejected

Mother's request for attorneys' fees pursuant A.R.S. § 25-324(A).

III. Attorneys' Fees Pursuant to A.R.S. § 12-349

¶15 Finally, Mother argues that the family court abused its discretion by failing to award her fees pursuant to A.R.S. § 12-349. Specifically, she argues that she is entitled to attorneys' fees because Father unreasonably delayed or expanded the proceedings.

¶16 Section 12-349(A)(3) provides that "the court shall assess reasonable attorney fees . . . if the attorney or party . . . [u]nreasonably expands or delays the proceeding." We will uphold the family court's decision to deny attorneys' fees pursuant to A.R.S. § 12-349 unless it is clearly erroneous. *Phx. Newspapers*, 188 Ariz. at 243, 934 P.2d at 807.

¶17 Although Mother argues that Father made no effort to minimize his claims, to determine if there was a basis for his claims, or make a reasonable effort to settle, Mother expanded the scope of the proceedings when she requested a full custody determination in response to Father's petition about the child's high school. Although Father wanted to continue the proceedings, the family court denied his continuances. Moreover, he settled by conceding to the majority of Mother's requirements.

¶18 Mother also argues that Father's decision to settle the case hours before the trial started suggest that Father sought to increase her expenses. Mother, however, did not provide Father with a settlement offer until May 6, 2009, stating "[w]e did not provide you with a formal settlement proposal at an earlier date, because you were unlikely to consider any such proposals in good faith." After she rejected his counter-proposals, he settled. Because the family court had all the relevant information and considered it, the family court did not err when it rejected Mother's request for attorneys' fees.

ATTORNEYS' FEES ON APPEAL

¶19 Both parties request attorneys' fees on appeal. Because Mother was unsuccessful, we decline to award her attorneys' fees. Father, however, requests attorneys' fees pursuant to A.R.S. § 25-324(A). After considering the parties' financial resources and the reasonableness of their positions on appeal, we grant Father's request for reasonable attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324(A), subject to Father's compliance with ARCAP 21.

CONCLUSION

¶20 Based on the foregoing, we affirm the family court's resolution of the attorneys' fee issue.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

PATRICIA A. OROZCO, Judge