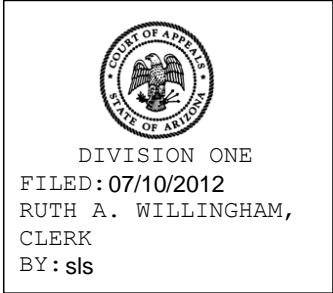


NOTE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.34



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Matter of: )  
CHRISTOPHER SCHMIT, ) 1 CA-CV 11-0506  
 ) DEPARTMENT E  
 )  
 ) Petitioner/Appellee, ) **MEMORANDUM DECISION**  
 )  
 ) (Not for Publication -  
 ) v. ) Rule 28, Arizona Rules  
 ) of Civil Appellate  
 ) Procedure)  
SHAWNNETTE SCHMIT, )  
 ) Respondent/Appellant. )

Appeal from the Superior Court in Maricopa County

Cause No. FN 2010-001928

The Honorable Thomas L. LeClaire, Judge

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH  
INSTRUCTIONS**

Christopher Schmit Surprise  
Petitioner/Appellee

Law Offices of Scott David Stewart PLLC Phoenix  
By Aaron T. Blase  
Attorneys for Respondent/Appellant

J O H N S E N, Judge

¶1 Shawnette Schmit ("Wife") appeals the superior court's decree of dissolution of her marriage to Christopher

Schmit ("Husband"). She argues the superior court abused its discretion by denying her request for spousal maintenance, by failing to sanction Husband for violating a preliminary injunction that required him to maintain her health insurance, by not granting her half of the couple's 2009 tax refund and by refusing her request for attorney's fees. For the reasons that follow, we affirm in part, reverse in part and remand.

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

¶12 Wife and Husband married in 2001. In July 2010, Husband filed a petition for dissolution. The court issued the customary preliminary injunction that stated, "Both parties shall maintain all insurance coverage in full force and effect" and enjoined both parties from "removing, or causing to be removed" the other "from any existing insurance coverage." See Arizona Revised Statutes ("A.R.S.") section 25-315(A) (West 2012).<sup>1</sup> Wife filed a motion for temporary orders, requesting, among other things, that the court order Husband to pay her spousal maintenance and pay her health insurance premiums. The court denied Wife's request for temporary spousal maintenance but acknowledged Husband's agreement to continue paying Wife's health insurance.

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<sup>1</sup> Absent material revision after the date of the events at issue, we cite a statute's current version.

¶13 After the parties reached agreement on certain issues, the superior court set trial on spousal maintenance, attorney's fees, treatment of a tax refund and Wife's contention that Husband had violated the preliminary injunction by failing to maintain her health insurance. In the judgment and decree issued after trial, the court denied Wife's request for spousal maintenance and ordered the refund for "Tax Year 2010" to be prorated, with Wife to receive one-half of 58 percent of the tax return, or \$5,036. The court did not address Wife's request that Husband be sanctioned for violating the preliminary injunction, and ordered each party to bear his or her own attorney's fees.

¶14 Wife timely appealed.<sup>2</sup> We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. § 12-2101(A)(1) (West 2012).

## DISCUSSION

### A. Spousal Maintenance.

¶15 "An award of spousal maintenance is within the sound discretion of the trial court and we will reverse only upon a

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<sup>2</sup> Husband failed to file an answering brief on appeal. We could construe this as confession of error. *Thompson v. Thompson*, 217 Ariz. 524, 526, ¶ 6, n.1, 176 P.3d 722, 724 (App. 2008). In an exercise of our discretion, however, we will decide the appeal on its merits. See *Gibbons v. Indus. Comm'n of Ariz.*, 197 Ariz. 108, 111, ¶ 8, 3 P.3d 1028, 1031 (App. 1999).

finding of an abuse of that discretion." *In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 31, 5 P.3d 911, 917 (App. 2000) (quotations omitted). "We view the evidence in the light most favorable to the superior court order and will affirm the judgment if there is any reasonable evidence to support it." *Cullum v. Cullum*, 215 Ariz. 352, 354, ¶ 9, 160 P.3d 231, 233 (App. 2007).

¶6 Under A.R.S. § 25-319 (West 2012), the superior court may award maintenance if it finds the spouse seeking maintenance falls within any of the following categories:

1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.
2. Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.
3. Contributed to the educational opportunities of the other spouse.
4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

¶7 Wife argues that because she meets the first two criteria, the court should have awarded her spousal maintenance. She recounts the considerable evidence presented at trial about her low earning history and her inability to work as a hair

stylist due to carpal tunnel syndrome. But it is not sufficient to meet one or more of the criteria listed in the statute; when a spouse meets one of the criteria, the court then may exercise its discretion to grant an award of spousal maintenance. See A.R.S. § 25-319(A); *Cullum*, 215 Ariz. at 354, ¶ 11, 160 P.3d at 233 ("spousal maintenance may be awarded when any one of four factors is present").

¶18 We hold the superior court did not abuse its discretion and did not act arbitrarily in denying Wife's request for maintenance. Although Wife cites evidence calling into question a number of the court's statements in the decree, in reviewing a decision on spousal maintenance, we "may infer from any judgment the findings necessary to sustain it if such additional findings do not conflict with express findings and are reasonably supported by the evidence." *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984) (quotations omitted).

¶19 During the two years prior to the dissolution, Wife, a licensed cosmetologist, had pursued an ultimately unsuccessful mobile hair-styling business. Husband testified he had "[c]ontinuously" encouraged Wife to seek other employment. Husband also testified the reason Wife's business was failing was a lack of motivation on Wife's part; he said that instead of vigorously trying to expand the business, she "was watching TV."

¶10 Wife testified that since the filing of the petition for dissolution, she had applied for a number of retail and clerical positions without success. Wife had experience working at Starbucks, but she only applied to one Starbucks store for work, and she testified she had never considered applying to more stores. Although Wife's primary work experience is in cutting hair, the record does not reveal that she applied for such a position since the filing of the petition for dissolution. Notwithstanding the court's skepticism during the temporary orders hearing about the validity of Wife's complaints of pain, the record at the March 2010 trial clearly establishes that she was diagnosed with carpal tunnel syndrome. Nevertheless, Wife testified that since a corrective surgery on her right hand, she had "done a couple of haircuts."

¶11 In the decree, the superior court quoted at some length from the order it issued denying temporary maintenance, in which the court expressed skepticism at Wife's testimony during the temporary orders hearing that she suffered from carpal tunnel syndrome that might preclude her from working as a hair stylist. The court then stated:

The medical documents submitted at trial merely annotate Wife's claim based on her assertion of the injury to the examining physician. To the extent that Wife does, however, suffer from carpal tunnel syndrome or other similar condition, that condition is readily treatable and not debilitating to

the degree of requiring spousal maintenance. The Court does not view the request for spousal maintenance as a contest of medical diagnoses. The issue is whether Wife could have and should have sought and obtained outside employment rather than pursue an obviously unsuccessful business venture for two years. The Court again finds that Wife could and should have abandoned the hair styling business and obtained outside employment. Having obtained appropriate employment, Wife would be able to support herself in accordance with A.R.S. § 25-319.

¶12 Wife does not dispute that properly treated, her carpal tunnel syndrome would not preclude her from working as a hair stylist. Although she argues that Husband's post-dissolution income far exceeds her own, we cannot conclude the superior court abused its discretion in concluding that because she can support herself, spousal maintenance was not appropriate.<sup>3</sup>

**B. Cancellation of Wife's Health Insurance.**

¶13 Wife next argues the superior court abused its discretion by failing to sanction Husband for violating the preliminary injunction that required him to maintain her health insurance in place during the dissolution proceedings.

¶14 At trial, Wife presented undisputed evidence that Husband quit his job in November 2010, thus ending her group

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<sup>3</sup> The superior court's decision to deny spousal maintenance is premised on its conclusion that Wife's carpal tunnel syndrome "is readily treatable." That presupposes that Wife can afford the treatment or has insurance that will cover it. See *infra* ¶¶ 13-18.

health insurance coverage. Unaware that her insurance had been canceled, Wife underwent carpal tunnel surgery on her right hand on December 9, 2010. The surgery on her right hand was therefore not covered by insurance, and when she discovered she had no health insurance, she was forced to cancel a similar surgery scheduled to be performed on her left hand on January 6, 2011.

¶15 On January 27, 2011, Wife filed a notice seeking sanctions against Husband for violating the preliminary injunction. She asked the court to order him to provide her with health insurance and reimburse her for the medical bills she incurred while uninsured. At trial in March, Wife again asked that the court sanction Husband. Husband took the position that Wife should have to pay the medical bills herself because "it's her . . . surgery." The court did not rule on the motion during trial, and the decree of dissolution was silent on the issue. The failure to rule implies that the motion was denied. See *Atchison, Topeka & Santa Fe Ry. Co. v. Parr*, 96 Ariz. 13, 15, 391 P.2d 575, 577 (1964); *Pearson v. Pearson*, 190 Ariz. 231, 237, 946 P.2d 1291, 1297 (App. 1997).

¶16 The preliminary injunction the court entered upon filing of the petition for dissolution "has the force and effect of an order of the superior court signed by a judge and is enforceable by all remedies made available by law, including



contempt of court.” A.R.S. § 25-315(A)(5). We review the superior court’s decision on whether to impose sanctions for violation of a court order for an abuse of discretion. *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 153, ¶ 40, 211 P.3d 16, 31 (App. 2009); *Woodworth v. Woodworth*, 202 Ariz. 179, 184, ¶ 30, 42 P.3d 610, 615 (App. 2002).

¶17 The injunction plainly enjoined Husband from causing Wife to be removed from their existing medical insurance and required him to “maintain all insurance coverage in full force and effect.” Husband argued at trial that he did not intend to terminate Wife’s insurance coverage when he quit his job and took a new position. Regardless of Husband’s intentions, he caused Wife to be removed from her existing health insurance when he quit his job and failed to take whatever action was required to continue her coverage. As a direct result of his violation of the injunction, Wife incurred expenses in connection with her first carpal tunnel surgery and was compelled to cancel the second. Without the second surgery, she suffered persistent numbness in that hand, impairing her ability to work in her profession.

¶18 We conclude the superior court abused its discretion by failing to sanction Husband for violating the preliminary injunction that required him to maintain Wife’s health insurance. On remand, the court shall enter an appropriate

order requiring Husband to hold Wife harmless against any injury she suffered as a result of his breach.

**C. The 2009 Tax Refund.**

¶19 Wife next argues the superior court erred in awarding her 29 percent rather than 50 percent of the couple's 2009 tax refund.

¶20 At trial, Wife presented evidence that the 2009 refund, which totaled \$17,306, was deposited in Husband's bank account. In the decree of dissolution, however, the superior court referred to a \$17,365 refund received for "Tax Year 2010." The court calculated Wife's entitlement by the percentage of the year prior to the filing of the petition for dissolution on July 26, 2010. This percentage was 58 percent of the year, and the court awarded Wife half of that, or 29 percent of the refund.

¶21 Wife argues the court likely was mistaken as to the tax year of the refund, and we agree. It was clear during the March 2010 trial that the parties were referring to the 2009 tax refund, not the 2010 tax refund. The only discussion of 2010 taxes occurred at the beginning of trial, when Husband and Wife agreed it would be mutually beneficial to file their 2010 tax return jointly and "split any refund." The tax refund for 2010 was not in dispute, as it was subject to a binding agreement under Arizona Rule of Family Law Procedure 69, and the parties' 2010 tax statement was not in evidence. We therefore vacate the

superior court's order regarding the "Division of Tax Refund for Tax Year 2010" and remand for the court to consider the division of the refund for tax year 2009.

**D. Attorney's Fees.**

¶122 Finally, Wife argues the superior court abused its discretion when it declined to award her attorney's fees. Specifically, she contends the court failed to consider the financial disparity in the parties' assets and income. The superior court may award attorney's fees and costs in dissolution proceedings pursuant to A.R.S. § 25-324 (West 2012) after considering the parties' financial resources and the reasonableness of their positions throughout the proceedings.

¶123 Although the superior court possesses discretion to award attorney's fees in a dissolution proceeding, *Medlin v. Medlin*, 194 Ariz. 306, 309, ¶ 17, 981 P.2d 1087, 1090 (App. 1999), it abuses that discretion when it denies attorney's fees "to the spouse who has substantially fewer resources, unless those resources are clearly ample to pay the fees." *In re Marriage of Robinson & Thiel*, 201 Ariz. 328, 335, ¶ 21, 35 P.3d 89, 96 (App. 2001) (quotations omitted). As long as a party has taken reasonable positions in the litigation, whether he or she has prevailed is irrelevant under a § 25-324 analysis. *Breitbart-Napp v. Napp*, 216 Ariz. 74, 84, ¶ 39, 163 P.3d 1024, 1034 (App. 2007). Rather, "[r]elative financial disparity

between the parties is the benchmark for eligibility.” *Id.* at ¶ 37 (quotations omitted).

¶124 There is no dispute in the record that Wife has substantially fewer financial resources than Husband. Husband testified at trial that at his current position, he earns \$12,300 per month, which is approximately what he earned at his previous job. Wife’s last steady employment was at Starbucks in 2006 and 2007, where she earned \$5,112 in 2006 and \$6,783 in 2007. She then operated her hair-styling business at a loss for the next two years. At the time of trial, Wife was unemployed and, given her carpal tunnel syndrome, could not earn a living as a hair stylist. Moreover, the superior court did not find and the record does not show that either party took unreasonable positions over the course of the litigation.

¶125 Accordingly, on the record presented, we hold the superior court abused its discretion in denying Wife’s request for attorney’s fees. We reverse the court’s order on fees and remand with directions that the court award Wife reasonable attorney’s fees.

¶126 Wife also requests an award of attorney’s fees on appeal pursuant to § 25-324. The statute applies not only to attorney’s fees in the superior court, but also to attorney’s fees on appeal. *Countryman v. Countryman*, 135 Ariz. 110, 111,

659 P.2d 663, 664 (App. 1983). For the reasons stated above, we award Wife her attorney's fees in this appeal.

#### CONCLUSION

¶27 We affirm the superior court's order denying Wife's request for spousal maintenance. We reverse the court's denial of Wife's request for sanctions for Husband's violation of the preliminary injunction and direct the court to order Husband to hold her harmless against the injury his breach caused her. We vacate the court's order regarding the 2010 tax refund and remand for the court to consider the proper distribution of the 2009 tax refund. Finally, we reverse the court's order denying Wife's request for attorney's fees and remand for the court to enter an award of reasonable attorney's fees in Wife's favor. We award Wife her costs and her attorney's fees on appeal, conditioned on her compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/  
\_\_\_\_\_  
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
MAURICE PORTLEY, Presiding Judge

/s/  
\_\_\_\_\_  
PHILIP HALL, Judge