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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: 6/13/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 12-0346
)
SHERI NICOLE KASDAN,) DEPARTMENT D
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
EBAN SAMUEL KASDAN,)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2001-007744

The Honorable Daniel J. Kiley, Judge

JURISDICTION ACCEPTED AND RELIEF DENIED

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And

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O R O Z C O, Judge

¶1 Sheri Nicole Kasdan (Mother) appeals from a judgment requiring her to compensate Eban Samuel Kasdan (Father) for \$142,500 in attorney fees and costs. Because we assume below that the family court's fee award in part constituted a contempt adjudication, we treat Mother's appeal as a petition for special action. Finding no abuse of discretion or legal error, we accept jurisdiction and deny Mother's request for relief.

BACKGROUND

¶2 Mother and Father divorced in 2002. The decree awarded the parties joint legal custody of their daughter, S., who was born in 1997. It also designated Mother as the primary residential parent.

¶3 In December 2009, Mother obtained an order of protection against Father on behalf of herself and then twelve-year-old S. Father has not seen S. since that time.

¶4 Shortly thereafter, Mother petitioned to modify Father's parenting time and to determine whether it was in S.'s best interest to spend any time with Father. Father responded with a motion for contempt and petition for modification of custody.

¶5 The family court conducted an evidentiary hearing on the petitions and motion. It then entered a twenty-seven page "under advisement ruling" in which it found that Mother had "actively undermined" Father's relationship with S. by

unceasingly contacting S. during Father's parenting time and disregarding the family court's express order on Father's parenting time schedule during S.'s winter break. In sum, Mother had engaged in "bad faith efforts to sabotage Father's parenting time." Importantly, the family court found that Mother manufactured text messages attributed to S. and falsely stated to Child Protective Services that Father (1) was bipolar, (2) physically abused Mother during the marriage, (3) used illegal drugs, and (4) was not granted any visitation. Additionally, it found that Mother made false allegations to the court that Father had engaged in sexually inappropriate conduct with S.

¶16 Ultimately, the family court denied Mother's petition, ordered reunification therapy for Father and S., quashed the order of protection, found Mother in contempt of the parenting time order, and ruled that Father was entitled to attorney fees and costs under Arizona Revised Statutes (A.R.S.) section 25-324.A (Supp. 2012). In the under advisement ruling, the family court also found "an award of attorneys' fees to be an appropriate sanction for Mother's contempt." In the judgment, however, the family court awarded Father fees and costs pursuant to A.R.S. § 25-324.A without mentioning contempt. This appeal followed.

DISCUSSION

I. Jurisdiction

¶7 This court lacks jurisdiction over an appeal from a civil contempt citation. *Berry v. Superior Court*, 163 Ariz. 507, 508, 788 P.2d 1258, 1259 (App. 1989). Father argues that this jurisdictional bar applies because the family court cited Mother's contempt of court as a basis for an award of fees.

¶8 In its under advisement ruling, the family court relied upon A.R.S. § 25-324 and found a fee award "to be an appropriate sanction for Mother's contempt." In its judgment, however, the family court only cited A.R.S. § 25-324. Assuming, without deciding, that this judgment constitutes a contempt adjudication, we exercise our discretion to treat Mother's appeal as a petition for special action. See *Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35, 36 P.3d 749, 759 (App. 2001) (treating an appeal as a petition for special action); see also *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 189 Ariz. 369, 375, 943 P.2d 729, 735 (App. 1996) (same); A.R.S. § 12-120.21.A.4 (2003) (expanding the court's jurisdiction to include special actions without regard to appellate jurisdiction).

II. Award of Attorney Fees and Costs

¶9 Mother contends that the family court erroneously awarded attorney fees and costs to Father pursuant to A.R.S. § 25-324.A. We review this award for abuse of discretion. See

Mangan v. Mangan, 227 Ariz. 346, 352, ¶ 26, 258 P.3d 164, 170 (App. 2011).

¶10 Mother has failed to provide a transcript of the evidentiary hearing before the family court. As the appellant, Mother had the duty to order the transcript and transmit it to this court in connection with this appeal.¹ See ARCAP 11(b)(1). In the absence of a transcript, this court assumes that the record supports the family court's decision. *Kline v. Kline*, 221 Ariz. 564, 572, ¶ 33, 212 P.3d 902, 910 (App. 2009).

¶11 Moreover, the existing record fails to support Mother's arguments. Section 25-324.A directs the family court to consider "the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." According to Mother, the family court failed to consider each party's financial resources. To the contrary, the family court recognized that "there is no reason to doubt that Father's income is far higher than Mother's." It found that Father reported monthly income of \$7727.50. The family court also reviewed Mother's employment history and determined that although Mother was currently unemployed, there was "no reason to believe that Mother [was] incapable of holding gainful

¹ After Father filed a motion to strike her opening brief and dismiss the appeal, Mother responded that she had ordered the transcript from the evidentiary hearing and moved for leave to file an amended opening brief once she received the transcript. However, we denied Mother's motion.

employment" as she had been making \$15 per hour at a job she held approximately one year earlier. Additionally, it found that Mother was "not entirely without means" because she was able to consistently spend \$2800 or more each month on her living expenses.

¶12 The parties' income disparity does not disqualify Father from receiving fees in light of Mother's "entirely unreasonable" actions throughout the proceedings. See *Mangan*, 227 Ariz. at 351-53, ¶¶ 25-28, 258 P.3d at 169-71 (upholding the family court's discretionary decision to award fees to the father, who was the financially superior party, in light of the mother's unreasonable positions, including the false allegations and misrepresentations she made in an effort to deny parenting time to father); see also *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶¶ 36-38, 250 P.3d 1213, 1221 (App. 2011) (awarding fees to the husband, even though the wife was the party least able to pay, due to her unreasonable positions at trial). The family court was required to consider and balance the resource disparity along with the reasonableness factors, and the record reflects that it did so. See *Mangan*, 227 Ariz. at 353, ¶ 28, 258 P.3d at 171.

¶13 Mother also argues that the family court's fee award was designed to punish her. Nothing the family court did was inconsistent with A.R.S. § 25-324.A. This court has recognized

that this statute compensates a party for expenses incurred in responding to an adversary's unreasonable positions. See *Magee v. Magee*, 206 Ariz. 589, 591 n.1, ¶ 8, 81 P.3d 1048, 1050 n.1 (App. 2004) (explaining that a party need not show both an unreasonable opponent and a financial disparity to qualify for the A.R.S. § 25-324 award).

¶14 To the extent Mother claims the amount is punitive, we note that this case required Father to defend himself against serious allegations of child abuse. As the family court stated, "One who is falsely accused of committing heinous acts against his own child can hardly be faulted for mounting a vigorous defense." Father had requested \$157,406 in attorney fees, \$3000 in fees for criminal defense counsel, and \$11,425 in expert witness fees. He ultimately received an award of \$142,500 in fees and costs, which included \$7500 the court had previously assessed in Mother's favor. The family court "is in the best position to observe and assess the conduct of the parties before it," and we find no basis for reversal.² See *MacMillan*, 226 Ariz. at 592, ¶ 38, 250 P.3d at 1221.

² Father cites to A.R.S. § 25-414.C (2007) as an alternative basis for affirming the family court's award. Because Father failed to raise A.R.S. § 25-414.C in the family court and we are affirming on other grounds, we decline to consider that argument as a basis for sustaining the family court's award. See *Crowe v. Hickman's Egg Ranch, Inc.*, 202 Ariz. 113, 116, ¶ 16, 41 P.3d 651, 654 (App. 2002).

¶15 Equally unavailing is Mother's reliance upon A.R.S. § 25-403.08 (Supp. 2012). That statute applies to parties with insufficient resources who may obtain attorney fees, costs, and expert witness fees "to allow adequate preparation." A.R.S. § 25-403.08.B. It does not apply to final fee determinations.

CONCLUSION

¶16 Based on our assumption above that the family court's fee award in part constituted a contempt adjudication and our decision to treat this appeal as a petition for special action, we accept jurisdiction and deny Mother's request for relief. Father requests an award of attorney fees pursuant to A.R.S. §§ 12-349 (Supp. 2012), 25-324.A, and -414.C. After considering the parties' resources and the reasonableness of their positions on appeal, we deny the request in the exercise our discretion under A.R.S. § 25-324.A. In addition, we find that A.R.S. §§ 12-349 and 25-414.C do not apply. We award Father his costs on appeal, contingent upon his compliance with ARCAP 21(a).

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

ANDREW W. GOULD, Presiding Judge

/S/

LAWRENCE F. WINTHROP, Chief Judge