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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

KATHRYN E. SPENCER, *Petitioner/Appellant*,

v.

MATTHEW C. SPENCER, *Respondent/Appellee*.

No. 1 CA-CV 19-0606 FC

FILED 5-19-2020

Appeal from the Superior Court in Maricopa County

No. FC2018-093715

The Honorable Laura M. Reckart, Judge

AFFIRMED

COUNSEL

Kathryn E. Spencer, Gilbert
Petitioner/Appellant

Gillespie Shields Goldfarb & Taylor, Mesa
By Mark A. Shields
Counsel for Respondent/Appellee

SPENCER v. SPENCER
Decision of the Court

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Chief Judge Peter B. Swann joined.

H O W E, Judge:

¶1 Kathryn E. Spencer (“Mother”) appeals the family court’s decree dissolving her marriage to Matthew C. Spencer (“Father”). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Father were married in 2000 and have five minor children. During the marriage, they opened a private school, American Family Education (“AFE”), which was originally organized as a limited liability company, later converted to a non-profit organization. Mother filed the petition for dissolution in 2018.

¶3 After a temporary orders hearing, the family court ordered, as relevant, that Father would have final decision-making authority regarding educational issues pending the dissolution trial. Father later asked the court to hold Mother in contempt, arguing that she refused to abide by the temporary order. After a hearing, the court found that Mother had not complied with the temporary order’s directive granting Father legal decision-making authority regarding education. It ordered that Mother pay the reasonable attorneys’ fees Father incurred in bringing the contempt action, but later denied his application for attorneys’ fees without prejudice.

¶4 After the dissolution trial, the family court issued the decree in which, as relevant, it (1) ordered Mother to make an equalization payment to Father for one-half of a \$26,000 loan the marital community made to AFE; (2) ordered Mother to reimburse Father for a \$856.56 child support overpayment; and (3) awarded Father \$4,000 for the attorneys’ fees he incurred in the contempt proceeding. Mother timely appealed.

DISCUSSION

¶5 Mother argues that the family court erred by (1) awarding Father \$13,000 for his share of a community property loan, (2) directing

SPENCER v. SPENCER
Decision of the Court

Mother to return \$856.56 to Father for his overpayment of child support, and (3) awarding Father \$4,000 for attorneys' fees incurred in the contempt proceeding. "We view the evidence in the light most favorable to sustaining the trial court's findings and determine whether there was evidence that reasonably supports the court's findings." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346 ¶ 5 (App. 1998).

1. Marital Community Loan to AFE

¶6 At trial, Father agreed that Mother should retain AFE but asked the court to award him a portion of the organization's value. The family court found that the parties had not produced sufficient evidence of AFE's value, but the evidence did support Father's claim that the community had lent the school \$26,000. The court ordered Mother to pay Father an equalization payment of \$13,000 for that loan.

¶7 Mother argues that the family court erred because no reliable evidence showed that the community lent AFE funds. Father testified that Mother told him AFE owed the community \$26,000 for the purchase of equipment, and submitted a text message exchange in which Mother acknowledged that AFE owed the community money. This evidence is sufficient to support the court's finding that the community loaned \$26,000 to AFE and Father was entitled to an equalization payment of \$13,000.¹

2. Child Support Overpayment

¶8 The family court ordered Father to pay \$845 per month to Mother as child support during the pendency of the dissolution. Father paid Mother by check for his October 2018 obligation, but the October payment was also deducted from Father's paycheck and paid to Mother. Father offered evidence of this double payment at the dissolution hearing and asked the court to order Mother to reimburse him for the overpayment.

¶9 Mother did not object to Father's evidence at trial, but argues on appeal that the court erred by awarding this amount to Father because he did not testify about the overpayment or offer any "official record or proof" showing the payment. Father offered an email from him to Mother dated October 25, 2018, in which he detailed the overpayment and requested a refund from Mother. He was not required to offer additional

¹ We reject Mother's argument that AFE's non-profit nature precluded the court's award of this equalization payment to Father.

SPENCER v. SPENCER
Decision of the Court

evidence to establish his claim, particularly because Mother did not object to the exhibit or offer any testimony to controvert his assertion.

¶10 Further, we reject Mother’s argument that she had no opportunity to rebut Father’s claim because he did not identify this issue in his pre-trial statement or refer to his exhibit during the hearing. Although Father did not include the overpayment issue in his pre-trial statement, he properly submitted it to the court by offering relevant evidence at trial. *See* Ariz. R. Fam. L. P. 28(b)(2) (“When an issue not raised by the pleadings is tried by the parties’ express or implied consent, it must be treated in all respects as if it had been raised in the pleadings.”). Mother had the opportunity at trial to object to Father’s exhibit, cross-examine him about it, or offer her own testimony on the issue, but did not do so.

¶11 Because Mother did not object to Father’s evidence or present any evidence to rebut his claim, the family court did not err in ordering Mother to reimburse Father for his child support overpayment.

3. Attorneys’ Fees

¶12 Finally, Mother argues the court erred by awarding \$4,000 to Father for the attorneys’ fees he incurred in the contempt proceedings. We review Father’s entitlement to fees de novo as an issue of law. *Thompson v. Corry*, 231 Ariz. 161, 163 ¶ 4 (App. 2012).

¶13 Arizona Rule of Family Law Procedure (“Rule”) 92(e)(2) allows the court to order a party who is in contempt of an order to pay the attorneys’ fees incurred by another party to obtain compliance with the order. Father initiated the contempt proceeding by petitioning the court for an order to appear, asserting that Mother refused to abide by the court’s orders regarding parenting time and legal decision-making authority. After a hearing, the court found that it had entered a temporary order regarding legal decision-making authority, Mother had notice of the order, and Mother failed to comply with the order.² *See* Ariz. R. Fam. L. P. 92(d) and (e)(1).

¶14 The family court ordered that Mother pay Father’s attorneys’ fees and directed Father to submit a *China Doll* affidavit, but later denied the application without prejudice. Thereafter, in the decree, the court noted that it had “previously awarded Father attorney fees and erred in denying

² The court determined that neither party was in contempt of its order regarding parenting time exchanges.

SPENCER v. SPENCER
Decision of the Court

his previously filed request.” The court granted Father’s request and ordered Mother to pay \$4,000 of his attorneys’ fees.

¶15 We reject Mother’s argument that the family court erred by relying on A.R.S. § 25-408(J) for its award. Although Father cited § 25-408(J) in his written closing argument, the court did not cite that statute or otherwise indicate that it relied on the authority for the attorneys’ fees award. Rather, the court’s rulings indicate that it ordered Mother to pay Father attorneys’ fees based on its inherent contempt power. *See Hirschfeld v. Superior Ct. In & For Cty. of Maricopa*, 184 Ariz. 208, 215 (App. 1995) (“the court has inherent powers, beyond any bestowed by statute or rule, to punish for contempt.”); A.R.S. § 12-864 (stating failure to obey a lawful court order may be punished in accordance with the common law); Ariz. R. Fam. L. P. 92(e)(2) (court may impose sanctions, including attorneys’ fees, for obtaining a contemnor’s compliance with a court order).

¶16 We also reject Mother’s argument that once the family court denied Father’s application for an award of attorneys’ fees, it could not award those fees absent a motion for reconsideration. As noted, the court denied Father’s request for fees without prejudice and, pursuant to Rule 78(b), its ruling was subject to revision at any time before entry of the decree.

¶17 Accordingly, we find no error in the court’s order directing Mother to pay \$4,000 to Father for the attorneys’ fees he incurred in bringing the contempt proceedings.

CONCLUSION

¶18 For the foregoing reasons, we affirm. Father requests an award of the attorneys’ fees he has incurred on appeal pursuant to A.R.S. § 25-324. After considering the parties’ financial resources and the reasonableness of their positions, we deny Father’s request. Because Father has prevailed on appeal, we award him costs on appeal upon his compliance with Arizona Rule of Civil Procedure 21.

