DIVISION ONE
FILED: 01/26/2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 07-0895
	)	
MARCIA NASEMAN,	)	DEPARTMENT C
	)	
Petitioner/Appellee/ Cross-Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
DAVID NASEMAN,	)	
	)	
Respondent/Appellant/ Cross-Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. FN 2004-005136

The Honorable J. Kenneth Mangum, Judge

AFFIRMED IN PART AS MODIFIED; VACATED IN PART AND REMANDED

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B R O W N, Judge

¶1 David Naseman ("Husband") appeals from the family court's decree of dissolution ("decree") dissolving his marriage to Marcia Naseman ("Wife"). Husband contests the amount and duration of spousal maintenance awarded to Wife, orders concerning his separate property, and a modification of the joint pretrial statement. Wife cross-appeals the court's rulings on certain promissory notes, the treatment of a bank account as Husband's separate property, payment of a wedding dinner expense incurred during the marriage, and reimbursement to Husband for golf memorabilia. Both parties contest the award of attorneys' fees to Wife. For the following reasons, we affirm the decree in part as modified, vacate in part and remand for further proceedings.

BACKGROUND

¶2 Husband and Wife married in June 1993, and initially resided in Massachusetts. In 1995, Husband purchased property in Arizona ("Lot 56") and the parties subsequently moved to Arizona. Prior to the marriage, Husband had accumulated substantial wealth and property. Husband had been retired prior to the parties' marriage; however, in 1998, he returned to work. Wife owned her own business prior to the marriage, a bridal shop in Massachusetts called "Elegantly Yours," which was sold in

2001. She currently operates a business which provides cellulite reduction treatments and facials.

¶3 In November 2004, Wife filed a petition for dissolution of marriage. A four-day trial was held in October 2006. The contested issues included spousal maintenance, the amount (if any) Wife owed Husband on certain promissory notes, whether Husband's Wachovia bank account contained commingled funds, whether Husband was entitled to reimbursement for the cost of Wife's son's wedding dinner and for golf memorabilia Wife sold, whether certain furniture in Wife's possession needed to be returned to Husband, and attorneys' fees.

¶4 The family court (1) awarded Wife spousal maintenance of $4,200 per month for six and a half years; (2) concluded that Wife owed Husband $69,491.17 plus interest on the promissory notes; (3) determined there was no commingling in Husband's Wachovia bank account; (4) found Wife responsible for the entire cost of her son's wedding dinner; (5) credited Husband with $6,000 for the golf memorabilia; and (6) awarded Wife $75,000 in Wife's attorneys' fees. Additionally, the court explained that rather than increasing Wife's spousal maintenance, it would allow Wife to keep furniture she removed from Lot 56.

¶5 Both parties moved for reconsideration. After oral argument, the court modified its order to reflect that Wife was to reimburse Husband $2,059 for one-half of the cost of her

son's wedding dinner and Husband would be credited with $3,000 for the golf memorabilia. The court directed Wife to file an affidavit in support of the attorneys' fees to be awarded. In response, Husband requested specific findings concerning those portions of the fee award based on financial resources and those portions based on reasonableness.

¶6 The decree was entered on August 30, 2007. However, the court retained jurisdiction to determine the amount of attorneys' fees to be awarded and to specify calculations of amounts due and owed to each party. Wife filed a motion for new trial. The court subsequently entered a signed minute entry awarding Wife $80,000 in attorneys' fees. Thereafter, the court denied Wife's motion for new trial via an unsigned minute entry. Husband filed a notice of appeal and Wife filed a notice of cross-appeal. The court then entered a signed order denying the motion for new trial.[1] We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(B), (F)(1) (2003).[2]

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[1] Although Husband's notice of appeal and Wife's notice of cross-appeal were premature, they were followed by a final appealable judgment. A premature notice of appeal takes effect when the court enters the final judgment. *See Barassi v. Matison,* 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). Accordingly, the appeal and cross-appeal became effective on January 29, 2008.

[2] We cite to the current version of the applicable statutes if no material changes relevant to this case have been made.

DISCUSSION

A. Spousal Maintenance

¶7 Husband argues the family court failed to make sufficient findings regarding spousal maintenance pursuant to Rule 82, Arizona Rules of Family Law Procedure. "In all family law proceedings tried upon the facts, the court, if requested before trial, shall find the facts specially and state separately its conclusions of law thereon[.]" *See* Ariz. R. Fam. Law P. 82(A). When a party timely requests findings of fact, the family court's factual findings must be sufficient to allow an appellate court to examine the family court's basis for its decision. *Elliott v. Elliott,* 165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990). However, a litigant must object to inadequate factual findings and conclusions of law to give the court an opportunity to correct them. *Id.* at 134, 796 P.2d at 936. "Failure to do so constitutes waiver." *Id.* Husband did not challenge the sufficiency of the findings in the family court. Thus, he has waived this argument.

¶8 We review an award of spousal maintenance for an abuse of discretion. *Gutierrez v. Gutierrez,* 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998). We view the evidence in the light most favorable to upholding the award and will affirm the family court's judgment if there is any reasonable evidence to support it. *Id.* Additionally, we accept the family court's

factual findings unless clearly erroneous or unsupported by any credible evidence. *Hrudka v. Hrudka,* 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995).

¶9 To determine the appropriate duration and amount of spousal maintenance, the court must consider the relevant factors listed in A.R.S. § 25-319(B) (2007). *Leathers v. Leathers,* 216 Ariz. 374, 377, ¶ 10, 166 P.3d 929, 932 (App. 2007). Here, the court listed all of the factors pursuant to A.R.S. § 25-319(B), issued findings under each, and concluded spousal maintenance of $4,200 per month for six and a half years was appropriate because it would "allow an adjustment for Wife to raise her own income, or to moderate her return to a more standard lifestyle."

¶10 Regarding Wife's financial needs, Wife presented two affidavits of financial information which indicated a range of monthly expenses from $5,000 to $6,200. At trial, she testified her expenses were approximately $5,000 per month. She also testified she has extensive debt. The court determined Wife is still building her current business and noted she currently makes only $150 per month. Additionally, the court found Husband had sufficient earnings to assist Wife, Wife's property will be modest, and Wife cannot live without assistance while she works on improving her business. *See* A.R.S. § 25-319(B)(4),(9). Wife's reasonable needs were sufficiently

established through testimony and documentary evidence, and the court did not abuse its discretion taking this evidence into account when awarding $4,200 per month in spousal maintenance.

¶11 The court's order as to the duration of the maintenance award is also supported by the record. A vocational expert's report in evidence indicated it would take more than five years for Wife to reach an income level that would enable her to experience a reasonable standard of living. Thus, the court did not abuse its discretion ordering six and a half years of spousal maintenance.

¶12 Husband also argues the parties' incomes contradict the amount and duration of the maintenance award. We disagree. The court found Husband's income in 2006 was $275,000, and in previous years, his annual income averaged $250,000. Wife, on the other hand, testified that her income is $150.00 per month.

¶13 Further, the court appropriately considered evidence of the parties' luxurious lifestyle while married. *See* A.R.S. § 25-319(B)(1). Wife explained that her lifestyle diminished significantly since the petition for dissolution. Husband did not believe his standard of living should be affected by the dissolution because his lifestyle predated the marriage and he funded the parties' way of life during marriage. However, "divorce often requires a lesser standard of living for both

parties." *Rainwater v. Rainwater,* 177 Ariz. 500, 504, 869 P.2d 176, 180 (App. 1993).

¶14 As Husband points out, however, the high standard of living was not solely a product of the marriage. *See id.* (explaining the necessary consideration of A.R.S. § 25-319(B)(2),(6) and (7) in determining whether standard of living should be deemed a product of the marriage). The first five years of marriage were funded by Husband's sole and separate property. When Husband returned to work in 1998, the parties' lifestyle was funded by his wages as well as his separate property. Notwithstanding Husband's significant contributions of separate property, the court properly considered the relevant statutory factors, noting the marriage lasted 13 years and Wife's decision not to work was a "mutual decision" to accommodate the parties' lifestyle. *See* A.R.S. § 25-319(B)(2),(7). Wife reduced her earning ability by giving up the opportunity to develop her bridal business in Massachusetts because of the marriage. Further, the court noted Wife would undergo a significant change in lifestyle. Nevertheless, the spousal maintenance award does not give Wife anything close to the luxurious lifestyle she had. *See Kelsey v. Kelsey,* 186 Ariz. 49, 53, 918 P.2d 1067, 1071 (App. 1996) (recognizing the relevancy of a spouse's reasonable needs with the marital standard of living). The amount awarded is less than Wife's

expenses, but provides enough to assist Wife in becoming self-sufficient. The family court did not abuse its discretion.

B. Furniture

¶15 Regarding Husband's sole and separate furniture which Wife removed from Lot 56, the family court concluded:

> While the furniture moved by Wife from Lot 56 was Husband's, if Wife were dispossessed of it, she would be left with almost nothing to sit, eat or sleep on. Rather than increase her alimony or allocation of other assets to compensate her for the loss of the furniture, the court will order that Wife shall keep the removed furniture.
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> . . .
>
> Because the Court has no authority to do other than to confirm to each party its sole and separate property, said property is affirmed to each person[.] If Husband requests the return of his furniture and other household furnishings, the Court will revisit the issue of spousal maintenance to compensate Wife for the expense of having to replace the furnishings she will relinquish.

Husband argues the court erred in imposing a condition on his right to recover his sole and separate property. We disagree.

¶16 A court shall assign to each spouse his or her sole and separate property. A.R.S. § 25-318(A) (Supp. 2009). However, the court has equitable powers and is in the best position to tailor an appropriate spousal maintenance award. *See Wick v. Wick*, 107 Ariz. 382, 384, 489 P.2d 19, 21 (1971).

¶17 Although Wife admitted the furniture was Husband's sole and separate property, Wife requested additional

maintenance if she was ordered to return the furniture. The family court properly exercised its discretion by noting Wife would have additional expenses if she had to return the furniture she was using. *See, e.g., Reeves v. Reeves,* 146 Ariz. 471, 473, 706 P.2d 1238, 1240 (App. 1985) (finding a proper exercise of discretion in considering the possibility of retirement when making a spousal maintenance award); *Perkins v. Superior Court*, 100 Ariz. 186, 188, 412 P.2d 476, 477 (1966) (noting a divorce decree which specifically conditioned the amount of support on payment of community obligations). Thus, we cannot conclude the court abused its discretion.

C. Golf Memorabilia

¶18 During the marriage, Husband purchased autographed golf memorabilia for $6,000 at a charity event. Wife sold the memorabilia in April 2005 for $750. The family court initially determined Husband should receive a credit of $6,000 for the item, but later the court *sua sponte* reduced the credit to $3,000. Husband challenges the court's decision to lower the credit. Wife counters it was inappropriate for the court to assess any judgment against her for the value of the memorabilia.

¶19 The first issue is whether the golf memorabilia was community property. Generally, all property acquired by either spouse during marriage is presumed to be community property

unless a spouse establishes the property is separate by clear and convincing evidence. A.R.S. § 25-211 (2007). Although the court did not make any findings regarding the community or separate nature of the golf memorabilia, it impliedly found the memorabilia was community property when it credited Husband for one-half of the value.

¶20 Husband argues the golf memorabilia was his separate property because he purchased the item with funds from his "DMN Investment Account" which had an account number ending in 2769. However, Husband did not meet his burden of proving that the "DMN Investment Account" was his separate property. Notably, the parties agreed in their joint pretrial statement Husband would pay Wife one-half of the account balance in account ending in 2769. Accordingly, we find that the court correctly treated the memorabilia as community property.

¶21 Moreover, the court did not err by acting on its own initiative and changing the credit from $6,000 to $3,000. The trial court has discretion to change prior orders to render a correct decision. *See Reid v. Reid*, 20 Ariz. App. 220, 221, 511 P.2d 664, 665 (App. 1973). Because the memorabilia was community property and a $6,000 value was established, Husband was entitled to a $3,000 credit for the item.[3]

[3] Wife challenges the value of the golf memorabilia. She argues $6,000 was paid for the memorabilia as well as a golf

¶22 Wife nonetheless argues that Husband should not receive any credit because she was entitled to sell the memorabilia and use the monies for the necessities of life. *See* A.R.S. § 25-315(A)(1)(a) (2007) (providing an exception to a preliminary injunction in which a party may dispose of community property if related to the necessities of life). We disagree.

¶23 The family court did not find Wife's testimony credible on this issue. In fact, the court found it "hard to believe that the action in selling the item wasn't vindictive." Additionally, the court determined "Wife had no right to sell the autographed, golf memorabilia." We are bound by the family court's findings of fact unless clearly erroneous, "giving due regard to the opportunity of the court to judge the credibility of witnesses." *In re Estate of Zaritsky,* 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000).

D. Joint Pretrial Statement

¶24 Husband challenges the court's allowance of an amendment to an uncontested issue in the joint pretrial statement after the close of evidence. We review a court's decision to allow an amendment of the pleadings for an abuse of

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foursome. However, husband testified he paid $6,000 for the item, the item was "priceless" and could not be easily duplicated. The court thus acted within its discretion in deeming the value of the related golf game "*de minimus.*"

discretion. *See Cont'l Nat'l Bank v. Evans,* 107 Ariz. 378, 381, 489 P.2d 15, 18 (1971).

¶25 In the joint pretrial statement, listed under "uncontested issues of law and fact," the parties agreed Husband would receive a credit for Bank One account no. 6574 in Wife's name. During trial, on redirect examination, Wife testified briefly that she opened the Bank One account after severance. On Husband's cross-examination, the Bank One account was mentioned once:

> Q [By Wife's attorney]: And your attorney added in two other accounts which we contest that Bank One 6574 is a community account, but even if they were, there's only less than $3,500 there that you're suggesting that [Wife] had in her control at the date of severance; right?
>
> A [By Husband]: Okay.

On October 10, 2006, after the close of evidence, Wife submitted a "Correction to Joint Pretrial Statement" withdrawing her agreement that the Bank One account should be deemed community property. At that point, only closing arguments remained. Husband objected to the "Correction" at closing arguments and the court indicated it would review the matter. The court ultimately did not include the Bank One account in the decree, thus allowing Wife's correction. Husband argues the court erred

in treating the Bank One account differently than the parties agreed to in the joint pretrial statement. We agree.

¶26 The joint pretrial statement "controls the subsequent course of the litigation[.]" *Carlton v. Emhardt,* 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983). Parties are bound by their stipulations unless relieved by the court. *Harsh Bldg Co. v. Bialac,* 22 Ariz. App. 591, 593, 529 P.2d 1185, 1187 (App. 1975). Here, Husband and Wife expressly agreed in the joint pretrial statement that Husband would receive a credit for the Bank One account. In her "Correction to Joint Pre-Trial Statement," Wife did not allege the existence of any factor which would justify setting aside the stipulation in the joint pretrial statement. *See id.* at 594, 529 P.2d at 1188. Thus, the family court erred by allowing Wife to change her mind and withdraw her consent from the uncontested issue in the joint pretrial statement.

¶27 This error is correctable on appeal and not the type for which further proceedings are necessary. *See* A.R.S. § 12-2103(A) (2003). Accordingly, we modify paragraph 94 of the decree to add the following: Bank One Acct. ending in #6574, $3,247.00.

E. Promissory Notes

¶28 Husband loaned money to Elegantly Yours and to Wife personally before and during the marriage, as evidenced by five promissory notes. The first four promissory notes were made in

1992 and 1993, in the amounts of $50,000, $27,000, $14,000, and $8,000. Wife signed these notes as president and owner of Elegantly Yours, and personally guaranteed them. Principal and interest on all four notes was due on January 2, 1994. The fifth promissory note, for $5,300, was made in 1993, and was a personal loan to Wife due and payable at the conclusion of litigation unrelated to the divorce.

¶29 Throughout the proceedings, Husband referenced the promissory notes, though he never filed a separate action to collect on them. At trial, Wife argued all five promissory notes were paid in full in October 2001, when she sold Elegantly Yours and deposited $123,500 into the parties' bank account. Although Husband disputed the $123,500 payment on the promissory notes, he nevertheless maintained that if the court applied such payment, the outstanding principal plus interest was $69,491.17. The family court concluded the loans were from Husband's separate property and Wife owed Husband $69,491.17 plus interest on the promissory notes.

¶30 In her motion for reconsideration, Wife argued for the first time that collection on the promissory notes was barred by the contract statute of limitations. *See* A.R.S. § 12-548 (2003). The court found the notes were not barred by the statute of limitations based on Massachusetts law, but in any event, such argument was waived. Wife then filed a motion for

new trial reiterating her statute of limitations argument and also challenging the court's subject matter jurisdiction to consider the promissory notes. The court denied Wife's motion.

¶31 Wife argues the family court lacked subject matter jurisdiction to enter a judgment on the promissory notes and thus erred in denying her motion for new trial. Subject matter jurisdiction is the right of the court to exercise judicial power over the cause of action and to order the relief sought. *Lee v. Lee*, 133 Ariz. 118, 125, 649 P.2d 997, 1004 (App. 1982). As a question of law, our review of this issue is de novo. *In re Marriage of Crawford,* 180 Ariz. 324, 326, 884 P.2d 210, 212 (App. 1994).

¶32 A court's jurisdiction in a marital dissolution proceeding is derived from statutes. *See Thomas v. Thomas,* 220 Ariz. 290, 292, ¶ 8, 205 P.3d 1137, 1139 (App. 2009). Although equitable standards apply in a dissolution proceeding, "it remains a statutory action, and the trial court has only such jurisdiction as is granted by statute." *Weaver v. Weaver,* 131 Ariz. 586, 587, 643 P.2d 499, 500 (1982). A family court's jurisdiction regarding separate property is specifically limited by statute to assigning each spouse his or her separate property and impressing a lien. *Id.*; *see also* A.R.S. § 25-318(A),(E) (Supp. 2009). Thus, our supreme court has held that a trial court has no jurisdiction to enter a money judgment against one

spouse for damage to separate property of the other spouse. *Weaver,* 131 Ariz. at 587, 643 P.2d at 500.

¶33 In the present case, it is undisputed that the promissory notes were Husband's separate property. Thus, the family court's jurisdiction was limited to assigning the value of the promissory notes, if any, to Husband.[4] Husband argues that two cases decided after *Weaver* support a finding of jurisdiction in this case. We disagree.

¶34 In *Marvin Johnson, P.C. v. Myers,* 184 Ariz. 98, 102, 907 P.2d 67, 71 (1995), our supreme court held the superior court has the power to consolidate a probate proceeding with a related civil action. Here, there was no separate civil action on the promissory notes. If Husband had filed a claim against Wife on the promissory notes for breach of contract, the family court could have consolidated that action with the dissolution case. *See In re Marriage of Berger*, 140 Ariz. 156, 160, 164, 680 P.2d 1217, 1221, 1225 (App. 1983) (determining indebtedness of a husband on promissory notes in a dissolution proceeding after wife filed a civil complaint against husband on such notes and the two actions were consolidated).

¶35 We also find this case distinguishable from *Roden v. Roden,* 190 Ariz. 407, 949 P.2d 67 (App. 1997). That case

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[4] Husband does not contend he was entitled to imposition of a lien pursuant to A.R.S. § 25-318(E).

involved a dispute between the husband and wife as to the ownership of a corporation. *Id*. at 409, 949 P.2d at 69. Wife argued she was entitled to a one-half interest in the corporation due to an oral agreement made before the parties were married. *Id*. Husband claimed the corporation was his sole and separate property and argued the superior court lacked jurisdiction over the oral contract claim. *Id*. We rejected husband's argument, finding that husband's argument assumed the corporation was his separate property, which was actually the issue for decision. *Id*. We also concluded that whether the corporation was husband's separate property was "intertwined with the equitable division of the couple's property." *Id*. at 410, 949 P.2d at 70. In this case, there was no dispute the promissory notes were Husband's separate property. Further, unlike the situation in *Roden,* Husband's claims on the promissory notes were not intertwined with the equitable division of the property.

¶36 The family court had no jurisdiction to adjudicate Husband's claim for payment on the promissory notes. Accordingly, we vacate the portion of the decree ordering Wife to pay Husband for the promissory notes. We do not address the validity of the promissory notes or the statute of limitations defense.

F. Wachovia Account

¶37 Prior to the marriage, Husband established a bank account now known as the Wachovia account.[5] As of June 1993, there was in excess of $2.7 million in the account. In April 2001, Husband deposited $164,596 of his sole and separate funds into the DMN Investment Account. In February 2002, Husband transferred $100,000 from his DMN Investment Account into his Wachovia account. When the petition for dissolution was served, there was approximately $56,000 left in the Wachovia account. Wife argues that the $100,000 transfer from the DMN Investment Account into the Wachovia account was not traceable to the $164,596 deposit. Accordingly, she claims the commingled funds in the DMN Investment Account, which were subsequently deposited into the Wachovia account, makes the Wachovia account community property. Husband counters that the $100,000 transfer was sufficiently traceable to his sole and separate property of $164,596 and the Wachovia account therefore remains his separate property.

¶38 When community and separate funds are commingled to the extent the identity of such funds are lost, they are presumptively community property. *Martin v. Martin,* 156 Ariz. 440, 443, 752 P.2d 1026, 1029 (App. 1986). However, mere "commingling of separate and community funds into one account

[5] The account was formerly a Prudential Securities account.

does not transmute the entire account into a community account so long as the funds remain traceable." *Noble v. Noble,* 26 Ariz. App. 89, 95, 546 P.2d 358, 364 (App. 1976) (citation omitted).

¶39 Wife argues that Husband did not present any evidence showing the $100,000 transfer from the DMN Investment Account into the Wachovia account could be traced to the $164,596 deposit. We disagree.

¶40 Wife relies on her expert who testified he could not specifically trace the $100,000 transfer to the $164,596 deposit. However, Wife's expert also stated there was sufficient separate money in the DMN Investment Account to cover the $100,000 transfer. Further, Husband testified he never deposited funds from any joint account into the Wachovia account, nor did he deposit any wages into the account. Additionally, Husband explained the $164,596 was deposited into his DMN Investment Account, which he considered his separate account, and from that he transferred $100,000 back to his Wachovia account. In fact, Husband stated that was the "one and only" transaction transferring money from his DMN Investment Account into his Wachovia account.

¶41 Because Husband presented evidence demonstrating the $100,000 deposit was traceable to his separate funds, we cannot

say the court erred in determining the Wachovia account was Husband's separate property.

G. Son's Wedding Dinner

¶42 Wife argues the family court erred by ordering her to reimburse Husband for one-half the cost of her son's wedding dinner in August 2004. We disagree.

¶43 A spouse who expends separate funds on community expenses is entitled to reimbursement from the other spouse if there is an agreement to that effect. *Baum v. Baum,* 120 Ariz. 140, 146, 584 P.2d 604, 610 (App. 1978). Husband testified Wife specifically agreed to pay for her son's wedding dinner. The family court accepted Husband's testimony. Wife disputes that there was an agreement, but acknowledges if there was, Husband would be entitled to reimbursement. The family court, as the trier of fact, is in the best position to assess the credibility of witnesses and we will defer to the family court's decision. *Standage v. Standage,* 147 Ariz. 473, 479, 711 P.2d 612, 618 (App. 1985). Accordingly, we affirm this portion of the decree.

H. Attorneys' Fees

¶44 Both Husband and Wife challenge the award of attorneys' fees. In a dissolution proceeding, a court may award reasonable attorneys' fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings."

A.R.S. § 25-324(A)(Supp. 2009).[6] Further, upon request of a party, "the court shall make specific findings concerning the portions of any award of fees and expenses that are based on consideration of financial resources and that are based on consideration of reasonableness of positions." A.R.S. § 25-324(A). We review an award of attorneys' fees for an abuse of discretion. *Breitbart-Napp v. Napp*, 216 Ariz. 74, 83, ¶ 35, 163 P.3d 1024, 1033 (App. 2007).

¶45 In December 2006, the court determined Husband should assist Wife with attorneys' fees because of his greater earning power and income and initially awarded Wife $75,000. At that time the court noted neither side "acted with perfect fairness in trying to reach a settlement." In May 2007, the court directed Wife to file a *China Doll* affidavit, which she did. *See Schweiger v. China Doll Rest. Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983) (explaining the requirement to submit affidavit outlining types of legal services provided, date of service, attorney providing service, and time spent providing service in order to support fee award). Husband subsequently requested specific findings pursuant to A.R.S. § 25-324(A). On October 19, the family court issued the following findings and conclusions regarding attorneys' fees:

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[6] A.R.S. § 25-324 was amended effective September 19, 2007. 2007 Ariz. Sess. Laws, ch. 166, § 1 (1st Reg. Sess.).

> The Court acknowledges that Wife prevailed on relatively few of the disputed issues at trial, but did prevail on the significant issue of spousal maintenance. Moreover, Wife's property and income are significantly less than Husband's. When the Court entered [its] initial award of attorney's fees and costs, it took into consideration these issues as well as the fact that the amount awarded ($75,000) was less than that incurred by Wife. Wife's *China Doll* affidavit showed attorney's fees and costs of approximately $125,000 and about $30,000 in expert witness fees. After consideration of all of the above, the Court finds that an award of $80,000 is appropriate.

¶46 Husband argues the court erred in awarding any fees to Wife because it did not place more weight on Wife's "failed arguments," which he connects with reasonableness. Additionally, Husband argues the court's findings were insufficient and he should have been awarded fees. Wife argues the court abused its discretion by not awarding her the full amount of fees she requested. It is within the court's discretion to determine an appropriate amount of fees to award. *In re Marriage of Williams*, 219 Ariz. 546, 549, ¶ 14, 200 P.3d 1043, 1046 (App. 2008).

¶47 The record supports the court's finding that Wife's property and income are significantly less than Husband's. However, A.R.S. § 25-324(A) also requires the court to consider the reasonableness of the parties' positions, which the court failed to do here. Instead, the court considered and applied a

prevailing party standard when determining the amount of fees to award. Section 25-324 does not authorize an award of fees based on a prevailing party standard, nor is it a factor to be considered. *See Burnette v. Bender,* 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995) (stating the prevailing party is irrelevant to a fee award under A.R.S. § 25-324). Thus, the court abused its discretion in relying upon the relative success of each party.

¶48 In addition, the court failed to make findings as required by § 25-324. Husband requested that the court issue findings regarding the apportionment of fees based on financial disparity and reasonableness of positions. Accordingly, we vacate the award of attorneys' fees and remand for the family court to determine the appropriate amount of attorneys' fees to be awarded, if any, and to issue findings as to what portion of the award was based on the financial disparity between the parties and what portion was based on the reasonableness of the positions taken by each party.

¶49 Both parties request attorneys' fees on appeal pursuant to A.R.S. § 25-324(A). Upon consideration of the financial resources of the parties and the reasonableness of the positions taken on appeal, in the exercise of our discretion, we decline to award fees to either party. We do, however, award

costs to Wife upon her compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶50 For the foregoing reasons, we vacate the family court's ruling regarding the promissory notes because the court lacked jurisdiction to adjudicate those claims. Additionally, we vacate the award of attorneys' fees to Wife and remand for a determination of a fee award, if any, consistent with our findings in ¶ 48. We affirm the remaining portions of the decree, except as outlined in ¶ 27, modifying page 17, paragraph 94, subparagraph b of the decree by adding the following language at the end thereof: 2. Bank One #6574 $3,247.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Acting Presiding Judge

/s/
_____
PATRICK IRVINE, Judge