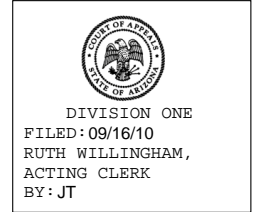


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:) No. 1 CA-CV 09-0435
)
MICHAEL V. POPE,) DEPARTMENT B
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
KRYSTAL D. LARMY, F/K/A) Procedure)
KRYSTAL D. POPE,)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. DR2000-019822, DR2000-019959
(Consolidated)

The Honorable Carey Snyder Hyatt, Judge

AFFIRMED

Michael V. Pope
Petitioner/Appellee *In Propria Persona*

Glendale

Law Office of Joel L. Brand
By Joel L. Brand
Attorney for Respondent/Appellant

Phoenix

B R O W N, Judge

¶1 Krystal Larmy, f/k/a Krystal Pope ("Wife"), appeals the trial court's order awarding attorneys' fees and costs to

Michael V. Pope ("Husband"). For the following reasons, we affirm.

BACKGROUND

¶2 Husband and Wife are the parents of two minor children. Wife filed for dissolution of the marriage in November 2000. Based on a dissolution decree entered in October 2003, Husband was entitled to claim both children as exemptions on his tax returns until Wife obtained full-time employment. Thereafter, each party was allowed to claim the tax exemptions in alternate years.

¶3 In September 2008, Husband filed a motion to compel Wife to sign certain tax forms, alleging that Wife had taken the children as exemptions during tax years 2005, 2006, and 2007 in violation of the decree. As a result of Wife's conduct, the IRS would not allow Husband to claim deductions for the children during those years. Husband's motion also requested attorneys' fees and costs he incurred relating to the motion to compel and his efforts in defending the tax proceedings. In October 2008, the trial court granted Husband's motion, but made no mention of Husband's request for fees.

¶4 In February 2009, Husband filed an application for attorneys' fees and costs incurred as a result of the motion to compel. Wife objected on the grounds that Husband's application was untimely under Arizona Rules of Family Law Procedure

78(D)(1) and (2). The trial court granted Husband's request for fees over Wife's objection and Wife filed this appeal.

DISCUSSION

¶15 Wife contends the trial court erred by awarding Husband his attorneys' fees and costs because the request was untimely. We disagree.

¶16 We generally review an award of attorneys' fees for an abuse of discretion; however, we review the application of a fee statute or rule de novo. *Phoenix Newspapers, Inc. v. Ariz. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997) (reviewing discretionary basis for award under abuse of discretion standard and reviewing application of mandatory fee statute de novo); see *Aksamit v. Krahn*, 224 Ariz. 68, ____, ¶ 8, 227 P.3d 475, 477 (App. 2010) (recognizing that review of Arizona Rules of Family Law Procedure is de novo).

¶17 Here, Wife challenges the trial court's application of Rule 78(D), which states in pertinent part:

1. Claims for Attorneys' Fees, Costs, and Expenses. A claim for attorneys' fees, costs and expenses initially shall be made in the pleadings, pretrial statement, or by motion filed prior to trial or post-decree evidentiary hearing. Costs and expenses also shall be claimed by an itemized statement.
2. Time of Determination. Except as to temporary awards of attorneys' fees and costs, when attorneys' fees are claimed, *the determination as to the claimed*

attorneys' fees shall be included with a decision on the merits of the case or as otherwise ordered by the court.

Ariz. R. Fam. L.P. 78(D)(1), (2) (emphasis added). Specifically, Wife argues that subsection (D)(2) requires a request for attorneys' fees and costs to be addressed in the trial court's decision on the merits of the underlying matter. She also suggests that the court's failure to address Husband's request for fees at the time it ruled on his motion to compel precluded Husband from requesting such fees later and rendered the trial court without jurisdiction to make an award after the fact.

¶8 We find the language of Rule 78 clear and unambiguous and therefore reject Wife's attempt to read into it limitations that are not stated. *See Fragoso v. Fell*, 210 Ariz. 427, 430, ¶ 7, 111 P.3d 1027, 1030 (App. 2005) (stating that if the language of a statute or rule is unambiguous, we give effect to the language without turning to other methods of statutory construction). Under Rule 78(D)(1), a party seeking fees must make a claim initially in a pleading, pretrial statement, or by motion filed prior to trial or post-decree evidentiary hearing. In his motion to compel, Husband satisfied the requirements of Rule 78(D)(1) by requesting that the court "[o]rder that [Wife]

pay [Husband's attorneys'] fees and costs incurred in this matter."¹

¶19 Subsection (D)(2) requires that a determination of a claim for fees "be included with a decision on the merits or as otherwise ordered by the court." (Emphasis added.) After the court's ruling on the merits of the motion to compel, Husband filed an application for fees and costs, accompanied by a *China Doll*² affidavit. Although Husband filed the application approximately three months after the trial court issued its decision on the merits, it was within the court's discretion to award fees and costs at that time. Use of the disjunctive "or" between "included with a decision on the merits" and "as otherwise ordered by the court" indicates the two phrases are alternatives and either may be applied when the determination is made. Thus, the plain and ordinary meaning of Rule 78(D)(2) is that a trial court may determine a fee request *either* as part of a decision on the merits *or* as otherwise ordered by the court.

¹ We note that Husband did not include a reference to any statute, rule, or other legal authority in support of his fee request. Wife, however, did not challenge Husband's request on that basis in the trial court nor does she make any contention on appeal that Husband's request was insufficient due to the lack of citation to authority.

² See *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983) (finding that a fee application must contain sufficient detail to permit the court to assess the reasonableness of the time incurred).

¶10 Nothing in Rule 78(D) suggests that a court must issue a single ruling addressing both matters in order to preserve its jurisdiction to award fees and costs after a determination on the merits has been made. See *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133, 407 P.2d 91, 93 (1965) (stating that courts will not “inflate, expand, stretch[,] or extend a statute to matters not falling within its expressed provisions”). If the drafters of the rule intended such a limitation, they could have expressly included language to that effect, but chose not to. *Fragoso*, 210 Ariz. at 431, ¶ 12, 111 P.3d at 1031; cf. Ariz. R. Civ. P. 54(g)(2) (“The motion for attorneys’ fees shall be filed within 20 days from the clerk’s mailing of a decision on the merits[.]”). Thus, the trial court did not err in granting Husband’s request for attorneys’ fees and costs.

¶11 Husband requests that we sanction Wife under Arizona Rule of Civil Appellate Procedure 25 for pursuing a frivolous appeal. In the exercise of our discretion, we decline to impose a sanction against Wife. Husband also requests an award of fees on appeal as the prevailing party pursuant to A.R.S. § 12-341.01(A). Because this matter does not arise out of contract, Husband is not entitled to fees under that statute. See *In re Estate of Patterson*, 167 Ariz. 168, 176, 805 P.2d 401, 409 (App. 1991) (holding that a divorce decree does not provide a contractual basis to award attorneys’ fees). Moreover, Husband

is not entitled to fees because no attorney has appeared in this appeal on his behalf. See *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983) (recognizing that a party filing pro per cannot claim attorneys' fees due to the absence of the attorney-client relationship). Husband is entitled, however, to an award of costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶12 For the foregoing reasons, we affirm the trial court's order granting attorneys' fees and costs to Husband relating to his motion to compel.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

JOHN C. GEMMILL, Judge