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

DIVISION ONE
FILED: 12/21/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF:	1 CA-CV 09-0741
LISA SMITH,	DEPARTMENT C
Petitioner/Appellant,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
DOUGLAS G. SMITH,	
Respondent/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-051619

The Honorable Alfred M. Fenzel, Judge

AFFIRMED IN PART; MODIFIED IN PART; REMANDED IN PART

Bruce K. Childers, Ltd. — Scottsdale
By Bruce K. Childers
and
Law Offices of Alissa M. Pazmino — Scottsdale
By Alissa M. Pazmino
Co-Counsel Attorneys for Petitioner/Appellant

Cavanagh Law Firm, P.A. — Phoenix
By Christina S. Hamilton
Attorneys for Respondent/Appellee

O R O Z C O, Judge

¶1 Lisa Smith (Mother) appeals from the child support order and the denial of her request for attorneys' fees. We remand Mother's claim to modify the order for past child support and affirm all other orders.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Douglas G. Smith (Father) are the parents of Child. After Child's birth, Mother moved out of Father's home and filed a paternity action seeking child support, sole legal custody, and parenting time orders. The family court ordered Father to pay $1,561 per month in temporary child support beginning September 1, 2008.

¶3 At trial, Mother argued that the family court should deviate upwards from the Child Support Guideline (Guideline) amount because Father earns more than $20,000 per month, the maximum monthly income shown on the Guidelines. She also asked that the court award her an automatic $2,000 monthly increase in child support when she moved out of her parents' home. Father argued that the child's needs were being sufficiently met by the $1,561 temporary child support order. He claimed any deviation above that amount was solely for Mother's benefit. Mother also requested an award of attorneys' fees, to which Father objected.

¶4 The family court ordered Father to pay $2,000 per month in child support and denied Mother's request for attorney

fees. Mother timely appealed.[1] We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B. (2003).

DISCUSSION

Attorney Fees

¶5 Mother's petition requested an award of attorney fees pursuant to A.R.S. § 25-809 (2007). At trial, her attorney cited A.R.S. § 25-324 (Supp. 2010). We review a family court's decision regarding attorney fees pursuant to A.R.S. § 25-324 under an abuse of discretion standard. *See Hrudka v. Hrudka*, 186 Ariz. 84, 94-95, 919 P.2d 179, 189-90 (App. 1995). The language in § 25-809.G. regarding attorney fees is nearly identical to the language in § 25-324.A. We therefore apply the same abuse of discretion standard of review to the denial of attorney fees under § 25-809.G. *See id*.

¶6 Mother argues the family court abused its discretion in denying her request because of the parties' gross disparity in financial resources and because the court made no finding that she acted unreasonably. She contends that because there was no affirmative finding that she acted unreasonably, the only

[1] The order regarding attorney fees was unsigned. Mother's notice of appeal was timely, but because the order was unsigned, this court suspended the appeal to allow the family court to enter a signed, appealable order. The family court entered an appealable order, and this appeal was reinstated.

consideration for the court was the disparity of financial resources.

¶7 Father does not dispute the financial disparity. He contends that Mother is precluded from raising this issue on appeal because she did not cite § 25-809.G. below. We disagree. Mother cited § 25-809.G. in her paternity petition and in her request for temporary orders. Although Mother's proposed findings of fact and conclusions of law, the joint pretrial statement, and her fee application cited § 25-324, the considerations in the two statutes are identical: financial resources of the parties and the reasonableness of the parties' positions. *Compare* A.R.S. § 25-324.A. *with* § 25-809.G. The family court made clear that the issue of attorney fees would be addressed at trial. Indeed, both parties discussed the two statutory factors in the joint pretrial statement.[2] Because

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[2] We distinguish *Leathers v. Leathers*, 216 Ariz. 374, 378, ¶ 19, 166 P.3d 929, 933 (App. 2007). *Leathers* held that, "'The pretrial statement controls the subsequent course of the litigation.'" *Id.* (quoting *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983)). In *Leathers,* the failure to include a life insurance policy as a contested issue in a joint pretrial statement precluded the trial court from allocating that asset in the decree. *Id.* Here, the award of attorney fees and the relevant factors in making that award were fully addressed by both parties in the joint pretrial statement. Both parties merely misstated the appropriate statute in the joint pretrial statement. *See Carlton*, 138 Ariz. at 355, 674 P.2d at 909 ("The pretrial statement controls the subsequent course of the litigation *otherwise modified at trial to prevent manifest injustice*." (emphasis added)).

Father was not prejudiced by the omission, we address Mother's argument.[3]

¶8 Mother contends that the family court was required to make findings because Father requested findings of fact and conclusions of law pursuant to Arizona Rule of Family Law Procedure 82. However, Mother did not remind the court that Father had requested findings and Section 25-809.G. does not require that a family court make findings supporting a fee award. Therefore, Mother waived the request. *See Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990) (holding that "[a] litigant must object to inadequate findings of fact and conclusions of law at the trial court level so that the court will have an opportunity to correct them.").

¶9 Although it is uncontested that there is a significant disparity in the parties' financial resources, disparity alone does not *require* an award of attorney fees to Mother. *See* A.R.S. § 25-809.G. If there is evidence in the record that Mother took unreasonable positions throughout the proceedings, we can affirm the ruling. *See Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17, 141 P.3d 824, 830

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[3] We also note that Father did not object to Mother's fee request in the joint pretrial statement on the grounds that she was citing § 25-324.

(App. 2006) (holding that an abuse of discretion exists when there is "no evidence to support the superior court's conclusion").

¶10 For example, Mother objected several times to the parenting time supervisor, demanding that the supervisor she selected be used instead of one from the court approved list. The parenting coordinator also informed the family court that she thought Mother was using the parenting coordinator's services more than was appropriate. Mother's unreasonableness was outlined in the custody evaluation which noted, "It is clear that Mother seeks to restrict Father's parenting time. She wants to minimize the amount of parenting time Father has, as well as ensure his time [is] supervised. This evaluator saw no objective evidence to support a need for supervision."

¶11 The family court ordered Father to have supervised parenting time because it was alleged by Mother's counsel that Father was diagnosed as bi-polar. Mother's counsel however, later admitted that no such diagnosis existed.

¶12 Father paid for all of the supervisor and parenting coordinator costs, and the cost of the custody evaluation. These fees and costs totaled more than $25,000.

¶13 An appellate court may affirm on any basis supported by the record. *State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d

801, 809 (1987). We conclude that there was evidence that Mother took unreasonable positions throughout the proceedings below. For these reasons we find no abuse of discretion in denying Mother's request for attorneys' fees below.

Child Support Award

¶14 Mother contends that the family court failed to consider her request for a deviation from the Guideline amount of child support based on Child's standard of living. Mother argues that this is a question of the family court's interpretation of the Guidelines that we should review de novo. *See Hetherington v. Hetherington*, 220 Ariz. 16, 21, ¶ 21, 202 P.3d 481, 486 (App. 2008) (holding that interpretation of the Guidelines is a question of law that the court of appeals reviews de novo). We disagree. The family court stated that it was appropriate to deviate from the Guidelines. According to the family court, the Guideline amount would be $1,428.32, and the court awarded Mother $2,000 per month. Thus, the question is not whether the court failed to consider a deviation; rather, it is whether the amount of the deviation was an abuse of discretion. *See id.* (holding that child support awards are reviewed for an abuse of discretion).

¶15 Mother argues that the standard of living Child would enjoy if the parents were living together required a greater upward deviation. Section 8 of the Guidelines provides:

> If the combined adjusted gross income of the parties is greater than $20,000 per month, the amount set forth for combined adjusted gross income of $20,000 shall be the presumptive Basic Child Support Obligation. The party seeking a sum greater than this presumptive amount shall bear the burden of proof to establish that a higher amount is in the best interests of the children, taking into account such factors as the standard of living the children would have enjoyed if the parents and children were living together, the needs of the children in excess of the presumptive amount, consideration of any significant disparity in the respective percentages of gross income for each party and any other factors which, on a case by case basis, demonstrate that the increased amount is appropriate.

¶16 Mother did not offer evidence that the child had any needs in excess of the presumptive amount. *See* GUIDELINE § 8 (2009). Instead she argues that the disparity in the parties' incomes and the standard of living Child would have enjoyed if the parties lived together support a greater upward deviation. The family court calculated support based on Mother working and paying for daycare and, alternatively, based on Mother not working and incurring no daycare expenses. If the parties lived together, it is unlikely that Mother would have worked. The court took that into account in attributing no income or day

care expenses. The result was nearly a $600 per month upward deviation from the Guidelines.

¶17 Mother has not shown any needs of Child that cannot be met with the $2,000 child support order. The fact that Mother and Child would have enjoyed a higher standard of living if they lived with Father does not require the court to increase the child support obligation *even more* than it already has, absent some evidence that Mother is unable to provide for a particular living expense or activity. Therefore, based on the record before us, we cannot say that the family court abused its discretion.

¶18 Mother next contends that the child support order should have been retroactive to the date she filed the paternity petition. The current child support order was effective October 2009. The temporary orders required Father pay $1,561 in child support beginning September 2008.

¶19 The court was not required to order past child support in the same amount as the prospective child support order. *Simpson v. Simpson* held that in making an award under A.R.S. § 25-320.B., "the amount of retroactive child support on a monthly basis may or may not be the same as the amount ordered to begin prospectively." 224 Ariz. 224, 226, ¶ 9, 229 P.3d 236, 238 (App. 2010). Like § 25-320.B., § 25-809.A. provides that the

court shall use a retroactive application of the Guidelines in ordering past child support. *Compare* A.R.S. § 25-320.B. (Supp. 2010) *with* § 25-809.A. Both statutes require that the past support order be effective as of the date the proceedings were commenced. *See* A.R.S. § 25-809.B. However, *Simpson* held, the amount of past support may not necessarily be the amount ordered prospectively. Thus, Mother may not be entitled to a $2,000 per month past child support order.

¶20 Mother filed her petition May 28, 2008. The temporary orders did not take effect until September 2008. Thus, Father paid no support during June, July, and August 2008. Father notes that he was not served with the paternity petition until August 2009. This fact does not relieve Father of the duty to pay support for June, July, and August. "Paternity proceedings are commenced by the *filing* of a verified petition . . . ." A.R.S. § 25-806.A. (Supp. 2010) (emphasis added). Therefore, past support should have been ordered effective June 1, 2008, the date Mother filed her petition. Accordingly, we remand to the family court to enter a modified past child support order to reflect that Father's past support obligation was effective June 1, 2008.

Breach of Promise to Marry

¶21 Mother contends that the family court erred by declining to consider her claim for breach of promise to marry. Although it is not stated in any of the family court's orders, the parties assert that the court declined to consider the claim. However, as we read the petition, Mother did not raise a separate and distinct "claim" for breach of promise to marry. Mother's petition states that Father made promises to marry her to induce her to live with him and have a child with him and that he would support her so she would not have to return to work until the child's third birthday. She bases her request for increased child support on these promises to financially support her while the child is young. She also argues that she suffered financial losses related to pregnancy, child birth, and parenting expenses because Father breached this promise. These expenses, however, are properly addressed in a paternity action. *See* A.R.S. § 25-409.C. Mother did not raise a viable, separate and distinct claim for breach of promise to marry because she has alleged no "damages" that she is not otherwise entitled to recover in the paternity action. We therefore find no error.

Motion to Supplement/Strike

¶22 Father filed a motion to supplement the record and/or motion to strike portions of Mother's reply brief. Mother's

reply brief includes facts from a hearing that occurred after the paternity orders now on appeal. The facts raised in that hearing are not relevant to the issues on appeal. Therefore, we grant the motion to strike these references in page six of Mother's reply brief and appendices two through six of Mother's reply. We deny the motion to supplement the record.

Attorney Fees on Appeal

¶23 Mother requests an award of her attorney fees on appeal pursuant to A.R.S. § 25-809.G. She cites the disparity in the parties' financial resources and the fact that she did not take any unreasonable positions. Father argues that Mother's positions on appeal are so unreasonable that *he* is entitled to an award of attorney fees pursuant to A.R.S. §§ 25-809.G. and 12-349 (2003). In the exercise of our discretion, we order that each party shall pay his or her own attorney fees on appeal under § 25-809.G. We also conclude that Father is not entitled to an award of fees under § 12-349.A.

CONCLUSION

¶24 We remand the past child support order to the family court to enter orders consistent with this decision. In all other respects, we affirm the paternity orders. Each party shall bear his or her own attorney fees on appeal.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge