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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

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 01/25/2011  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

STEVE LANGSTON; JUDY ANSCHUETZ; ) No. 1 CA-CV 09-0758  
and LANGSTON FAMILY FOUNDATION, )  
 ) DEPARTMENT A  
 )  
Judgment Creditors/Appellees, ) **MEMORANDUM DECISION**  
 )  
 ) (Not for Publication -  
v. ) Rule 28, Arizona Rules  
 ) of Civil Appellate Procedure)  
CHRISTOPHER LIPPS, )  
 )  
Garnishee/Appellant.)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-050540

The Honorable Gerald Porter, Commissioner

**AFFIRMED**

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W I N T H R O P, Judge

¶1 Christopher Lipps ("Appellant") appeals from an order of garnishment requiring him to pay the judgment creditors \$37,000 and their costs and attorneys' fees. Appellant argues that the court erred in awarding judgment in the amount of \$37,000 and that at least a portion of the garnished amount was exempt from garnishment. Further, Appellant argues that costs and attorneys' fees should not be awarded in this case. For the following reasons, we affirm on all grounds.

#### FACTS AND PROCEDURAL BACKGROUND

¶2 In 2009, Appellant and Kimberly Ann Lipps ("Lipps") annulled their marriage. As part of the annulment, the parties entered a settlement agreement. Under a section of the agreement entitled "SPECIFIC PROVISIONS," Appellant agreed to make three lump sum "Equalization Payment[s]" to Lipps over a period of time. In that same section, the parties agreed that Appellant would have sole possession of the marital property and all personal property therein. Appellant agreed to make the following equalization payments to Lipps: \$20,000 on November 17, 2008; \$25,000 on July 17, 2009; and \$20,000 on March 17, 2010.<sup>1</sup>

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<sup>1</sup> Because the first equalization payment of \$20,000 was made well before the writ of garnishment was served, the Creditors did not seek to garnish that amount from Appellant.

¶13 In January, 2007, Lipps began an extramarital romantic relationship with Steve Langston. On January 30, 2009, Langston, along with his sister Judy Anschuetz and the Langston Family Foundation (collectively "the Creditors"), filed a complaint against Lipps seeking damages of \$116,464.92 plus interest, attorneys' fees and costs, and punitive damages. Lipps failed to file an answer or otherwise respond to the complaint, and on April 28, 2009, a default judgment was entered. Lipps was ordered to pay the Creditors a total of \$116,464.92 and \$401.00 in costs.

¶14 Subsequently, the Creditors applied for a writ of garnishment against Appellant in hopes of collecting the remaining amounts owed to Lipps pursuant to their settlement agreement. On May 29, 2009, at 9:19 A.M., Lipps was served with an order of appearance at a judgment debtor's examination. That same day, at 9:37 A.M., Appellant was served with a writ of garnishment and summons. Appellant contested the writ of garnishment, and an initial hearing was held on August 18, 2009. At that hearing, Appellant testified that he had, at Lipps' request, already made a series of early payments totaling \$8,000 in partial satisfaction of his second equalization payment.<sup>2</sup> These early payments were deducted from the amount due to Lipps

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<sup>2</sup> The Creditors do not dispute the validity of the payments totaling \$8,000 and do not seek to collect those payments in this action.

on July 18, 2009. Appellant also testified that the day before the writ of garnishment was served, he and Lipps modified their settlement agreement ("new contract") in which he made another "early" payment of \$14,000 in exchange for a \$1,000 reduction in the amount owed for the second equalization payment ("the disputed payments"). Appellant testified that he made the disputed payments by giving Lipps a \$9,000 check and \$5,000 in cash. Accordingly, Appellant argued that the Creditors could only garnish a total of \$22,000 - consisting of the \$2,000 he still owed Lipps to satisfy the second equalization payment due on July 17, 2009 and \$20,000 owed to Lipps to satisfy the third equalization payment due on March 17, 2010. A second hearing was set to allow Appellant to present evidence supporting the validity of the alleged new contract and the disputed payments.

¶15 At the subsequent hearing on September 1, 2009, Appellant submitted a copy of the new contract dated May 28, 2009 (one day before the writ of garnishment was served), in which Appellant agreed to make an early payment totaling \$14,000 in exchange for a \$1,000 reduction of the amount he owed Lipps for the second equalization payment.<sup>3</sup> He also presented a copy of the \$9,000 check he had made out to Lipps, dated May 28, 2009, and a bank statement documenting that he had transferred

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<sup>3</sup> Although the new contract was signed and dated by both parties, it was not notarized.

\$9,000 from other accounts into his checking account. The transfers were accompanied with the notation "Kim Payoff." Appellant also offered a bank statement showing that he had withdrawn \$11,000 on May 23, 2008; he testified he kept the \$11,000 in his office, and that the \$5,000 in cash that he paid to Lipps on May 28, 2009, came from the money stashed in his office. The court then took the matter under advisement.

¶6 Before the court made its ruling, the Creditors obtained and submitted a bank statement showing that Lipps had not deposited Appellant's check for \$9,000 into her account until 2:04 P.M. on May, 29, 2009, several hours after Appellant had been served with the writ of garnishment.

¶7 On October 1, 2009, the court issued an order of garnishment in the amount of \$37,000; \$17,000 due at the time the order was filed and, subject to proof of reimbursed medical and dental expenses for the children, \$20,000 due on March 18, 2010, the due date of the third equalization payment.<sup>4</sup> The court

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<sup>4</sup> At trial and on appeal, Appellant argued that, pursuant to his divorce decree and a signed agreement between he and Lipps, he was entitled to an offset for any payments he made towards his children's unreimbursed medical and dental expenses. The court properly determined that the amount of money Appellant could offset for medical and dental expenses was to be determined on March 17, 2010, the date of the final equalization payment. Because the final equalization payment was not due at the time Appellant filed his Notice of Appeal, we also decline to consider Appellant's arguments regarding any offsets potentially due to him. We note, however, that Appellant may petition the court to dissolve, modify, or amend the writ of

also awarded the Creditors' costs and reasonable attorneys' fees upon submission of a *China Doll* affidavit. Appellant timely appealed.

¶8 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A) and (F) (2003).

#### DISCUSSION

¶9 On appeal Appellant contends that the court erred in finding the Creditors were entitled to garnish and recover the disputed payments. Further, he argues that the court erred in failing to characterize the equalization payments as child support payments exempt from garnishment.

##### *I. Disputed Amount*

¶10 In essence, Appellant argues the court clearly erred in not accepting his testimony and the new contract at face value. "We will uphold the court's findings of fact absent clear error." *Kelsey v. Kelsey*, 186 Ariz. 49, 51, 918 P.2d 1067, 1069 (App. 1996). Further, "we will not substitute our opinion thereof for that of the trial court" and "if there is any reasonable evidence to support the judgment of the lower court, it will be sustained." *A.N.S. Props., Inc. v. Gough Indus., Inc.*, 102 Ariz. 180, 182, 427 P.2d 131, 133 (1967) (citations omitted). We defer when reviewing the findings of

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garnishment to reflect any offsets to which he may be entitled or may request reimbursement from Lipps in a separate proceeding.

the trial court because it is in "the best position to assess and resolve the conflicting evidence." *Leveraged Land Co., L.L.C. v. Hodges*, 224 Ariz. 442, 447, ¶ 15, 232 P.3d 756, 761 (App. 2010).

¶11 In the instant case, the record shows that the court considered both the new contract and Appellant's testimony regarding the disputed payments. The Creditors, however, also presented evidence to cast doubt on the validity of the new contract and the disputed payments. The Creditors' evidence indicated that the disputed payments were uncharacteristic of Appellant's prior dealings with Lipps; that Lipps did not deposit the \$9,000 check until after both she and Appellant had been served with documents relating to the instant proceedings; suggested that Appellant and Lipps may have deliberately predated the new contract and the \$9,000 check; and highlighted the lack of corroboration for Appellant's claim of a \$5,000 cash payment. Given the conflicting evidence presented, we cannot find that the court clearly erred in making a credibility determination and rejecting Appellant's testimony on these issues. The court was entitled to accept and rely on the Creditors' evidence and inferences therefrom in reaching its decision, and did not abuse its discretion in doing so. Accordingly, we cannot say the court erred finding that the disputed payments were subject to garnishment.

## II. Characterization of Payments

¶12 Alternatively, Appellant argues that the equalization payments should properly have been characterized as additional child support and, therefore, exempt from garnishment pursuant to A.R.S. § 33-1126(A)(3) (2007).

¶13 In support of his alternative argument, Appellant cites two cases, *In re Gianakas*, 917 F.2d 759, 762-63 (3d Cir. 1990) and *Steiner v. Steiner*, 179 Ariz. 606, 611, 880 P.2d 1152, 1157 (App. 1994). He argues that these decisions require a trial court to consider the totality of the circumstances of the settlement agreement, and that the plain language of a settlement agreement can be set aside to give effect to the intent of the parties. We note that both *Gianakas* and *Steiner* involve scenarios in which the respective courts held that, despite contrary language used in the incorporated settlement/separation agreements, debts owed to an ex-spouse were "in the nature of alimony, maintenance, or support," and therefore, non-dischargeable in federal bankruptcy proceedings. See *Gianakas*, 917 F.2d at 764; *Steiner*, 179 Ariz. at 610-12; 880 P.2d at 1156-58. Accordingly, these cases are neither on point nor persuasive.

¶14 Assuming without deciding, however, that the rationales in *Gianakas* and *Steiner* apply here, we still cannot find that the court erred by declining to characterize the

equalization payments as additional child support. The relevant portion of the settlement agreement states that the payments are "Equalization Payment[s] To Kim" and makes no mention of the funds being used directly or indirectly to support the children. In that same section, Lipps agrees to quitclaim her interest in their former marital residence and personal property therein to Appellant. The new contract, signed the day before the service of the writ of garnishment, also makes no mention whatsoever of the equalization payments being for the benefit of the children. Nothing in the record supports Appellant's uncorroborated testimony that these equalization payments were intended to constitute additional child support.<sup>5</sup> Accordingly, we hold that

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<sup>5</sup> On January 8, 2010, Appellant filed with this court a copy of his "Consent Decree of Annulment" which also included full copies of the incorporated "custody agreement and parenting plan" and "settlement agreement" between he and Lipps. We note that, with the exception of one page of the settlement agreement concerning the equalization payments, none of these documents were entered into the record below. Our review is generally limited to the record that was before the trial court, and therefore, consideration of these documents would be inappropriate. See *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990). We also note, however, that the Creditors did not object to the filing of these documents. Even if these documents are properly before us, they would not support Appellant's proposition that the equalization payments were intended to be characterized as additional child support. In fact, the documents suggest otherwise. These documents show that Appellant was already ordered to make monthly child support payments through a clearinghouse. Further, our review of the entire settlement agreement reveals that neither the children nor child support were mentioned throughout the entire document.

the court did not err in finding that the equalization payments were subject to the writ of garnishment.

### III. Cost and Attorneys' Fees

¶15 Finally, Appellant argues that he should be excused from paying the Creditors' taxable costs and attorneys' fees accrued because they have not yet filed a *China Doll* affidavit as required by the court. See *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983). Despite his failure to cite any legal authority in support of his claim, Appellant contends that the submission of such an affidavit at this point in the proceedings would be untimely, and therefore, should be barred. We disagree.

¶16 The court's order did not specify a time by which the *China Doll* application was required to be filed. Even assuming that a subsequent filing of the Creditors' *China Doll* application would arguably be untimely, the trial court has the discretion to accept and/or grant untimely applications for costs and attorneys' fees. See, e.g., *Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 218, ¶ 38, 119 P.3d 477, 485 (App. 2005). We defer, therefore, to the court when and if the Creditors submit the *China Doll* affidavit.

¶17 The Creditors request an award of costs and attorneys' fees on appeal based on a number of theories. Assuming compliance with Rule 21, ARCAP, we grant their request for costs

pursuant to A.R.S. § 12-341 (2003), but in our discretion, deny their request for attorneys' fees on appeal.

**CONCLUSION**

¶18 For the reasons set forth above, we affirm the judgment and order of garnishment in favor of the Creditors and award the Creditors their allowable costs on appeal.

\_\_\_\_\_/S/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Judge

CONCURRING:

\_\_\_\_\_/S/\_\_\_\_\_  
PHILIP HALL, Presiding Judge

\_\_\_\_\_/S/\_\_\_\_\_  
JON W. THOMPSON, Judge