DIVISION ONE
FILED: 12/28/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	1 CA-CV 10-0193
	)	
JOHN WILLIAM AREY, III,	)	DEPARTMENT A
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
MARY LOU AREY,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. V1300DO820030464

The Honorable Michael R. Bluff, Judge

AFFIRMED

Shaw & Schlegel Law Office, P.L.L.C. Cottonwood
By Paul Schlegel
Attorneys for Petitioner/Appellee

The Murray Law Offices, P.C. Scottsdale
By Stanley D. Murray
Attorneys for Respondent/Appellant

K E S S L E R, Judge

¶1 Mary Lou Arey ("Mary") appeals from the family court's denial of her petition to terminate the spousal maintenance

award to John William Arey ("John"), pursuant to Arizona Revised Statutes ("A.R.S.") section 25-327(A) (2007), and the award of attorneys' fees to John. For the following reasons, we affirm the family court's orders and judgment.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mary and John married in 1977. John filed for divorce in 2003. At the time of the divorce, both Mary and John had retired.

¶3 Mary and John entered into a Marital Settlement Agreement ("Agreement"), in which, among other provisions, they agreed:

> The Respondent/Wife shall pay to the Petitioner/Husband the sum of $5,000.00 each month in spousal support (alimony), for the term of his natural life. The Respondent/Wife shall place [sic] purchase an annuity, upon the sale of the community residence, from which to draw the Petitioner/Husband's monthly support payment.

¶4 After they entered into the Agreement, John, Mary, and their respective counsel reviewed and revised the draft Decree of Dissolution of Marriage ("Decree"), evidenced by hand-written changes to the draft decree by Mary's attorney. The Decree incorporated, but did not merge, the Agreement. After the changes made by Mary, the Decree provided the following regarding spousal maintenance, without mentioning the sale of the home:

> By stipulation of the parties, [John] is entitled to an award of spousal maintenance monthly income in the amount of $5,000.00 (FIVE THOUSAND DOLLARS) per month to be paid to him by [Mary] for the duration of his natural life, *beginning no later than the month that this Decree of Dissolution of Marriage is signed by the Court*.

(Emphasis added). The family court also found that John "qualifies for [an] award of spousal maintenance herein in consideration of the stipulation of the parties," and that "[a]ll other matters pertaining to the property, debts and related matters of the parties shall be in accordance with the provisions" of the Agreement and Decree.

¶5 Starting immediately after the decree until June 2008, Mary made monthly payments to John, ranging between $2,000 and $4,000 per month, despite the fact the marital home had not yet sold. Mary claimed she paid John about $130,000 in spousal maintenance before June 2008, after which she stopped making payments. In February 2009, John filed a petition in the family court to enforce the spousal maintenance award.[1] John also requested an award of $40,000 in arrearages for past-due maintenance from June 2008 to February 2009 and attorneys' fees and reasonable costs.

[1] John also petitioned the family court to enforce a different provision of the Agreement regarding long-term health insurance. The family court found that John was not entitled to a judgment against Mary on that matter. John did not appeal the court's ruling.

¶6 Mary filed a counter-petition to modify spousal maintenance to $0 per month because her income could not support the payment. She also alleged she was not supposed to have paid any spousal maintenance unless and until the home sold, proceeds from which were to fund the annuity. Mary asserted that the payments she made to John were advance payments, which would have been reimbursed upon the sale of the home. While Mary also alleged that John was responsible for paying back the $130,000 in maintenance that she paid him because the house had not sold, she did not argue that contention at trial. Finally, Mary opposed John's contention that she should pay his attorneys' fees.

¶7 John responded that the Decree "specifically identified when spousal maintenance was to commence and there was no language in the Decree . . . (or the Settlement Agreement) conditioning the payment of spousal maintenance on the sale of the marital residence."

¶8 After conducting a trial, the family court held: (1) Mary's payments to John were not advanced funds to be reimbursed by the sale of the marital home, and that Mary "was to pay spousal maintenance from her own funds" because it was "not contingent on the sale of the marital residence"; (2) John's "acceptance and non-objection to the reduced amount of spousal maintenance" from the date of the divorce to June 2008

"constitutes a satisfaction of any unpaid spousal maintenance"; and (3) John's spousal maintenance award was reduced to $1,500 per month as of May 2009. In addition, the court awarded John $40,000 in arrearages for unpaid maintenance from July 2008 to April 2009 and $10,500 for unpaid maintenance from May 2009 through November 2009. The court also awarded John $6,364.91 in attorneys' fees under A.R.S. § 25-324 (Supp. 2009).

¶9 Mary timely appealed. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-2101(C) (2003).

DISCUSSION

¶10 On appeal, Mary argues that the family court erred in finding that the spousal maintenance award was not contingent upon the sale of the marital home, in not terminating John's maintenance award, and in awarding John attorneys' fees.

I. The family court did not err in finding that the $5,000 monthly spousal maintenance award was not contingent upon the sale of the marital home.

¶11 Mary and John essentially disagree over the terms of the Agreement and the Decree. Mary contends that the Agreement made it clear that she did not have to pay any maintenance until the home sold, at which time she would buy an annuity from the proceeds to fund the maintenance. John contends that maintenance was not contingent on the sale of the marital home. We hold the family court did not err in construing the Agreement

and Decree to mean that the monthly maintenance payment was not contingent upon the sale of the marital home.

A. Standard of review.

¶12 We review *de novo* a family court's determination of a question of law, such as the interpretation of a contract. *In re Marriage of Pownall*, 197 Ariz. 577, 580, ¶ 7, 5 P.3d 911, 914 (App. 2000). However, because "the intent of the parties is a question of fact left to the fact finder," we will not substitute our discretion for the family court's unless that court's findings are clearly erroneous. *Chopin v. Chopin*, 224 Ariz. 425, 428, ¶ 7, 232 P.3d 99, 102 (App. 2010); *In re Marriage of Berger*, 140 Ariz. 156, 161, 680 P.2d 1217, 1222 (App. 1983).

B. The law of contract interpretation.

¶13 A marriage settlement agreement that is incorporated but not merged into a decree of dissolution retains its "independent contractual status and is subject to the rights and limitations of contract law." *LaPrade v. LaPrade*, 189 Ariz. 243, 247, 941 P.2d 1268, 1272 (1997). A marital settlement agreement is "to be given a reasonable construction so as to accomplish the intention of the parties." *Harris v. Harris*, 195 Ariz. 559, 562, ¶ 15, 991 P.2d 262, 265 (App. 1999). A court must read contracts "in light of the parties' intentions as

reflected by their language and in view of all circumstances." *Id.*

¶14 The first step in construing a contract is to determine if the contract is "reasonably susceptible to the interpretation asserted by the proponent"; if not, the court shall not consider extrinsic evidence. *In re Marriage of Zale*, 193 Ariz. 246, 249, ¶ 9, 972 P.2d 230, 233 (1999) (citing *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993)). However, if the meaning is ambiguous after the trial judge considers evidence presented by the parties, the court may consider the evidence if offered "to explain what the parties truly may have intended" rather than "being offered to contradict or vary the meaning of the agreement." *Taylor*, 175 Ariz. at 154, 854 P.2d at 1140.

C. Under a reading of the Agreement and Decree in unison either with or without guidance from extrinsic evidence the spousal maintenance award was not contingent upon the sale of the marital home.

¶15 At trial, John testified that Mary was to pay the maintenance award from her income until the house sold, after which the proceeds from the sale would fund the maintenance payment, thereby relieving Mary from paying from her income. Mary testified that John was to receive his monthly maintenance payment only from an annuity set up from the proceeds of the sale of the home, which her accountants anticipated would

generate enough profit to buy an $896,000 annuity. She testified she "was relying on selling" the marital home to make the maintenance payments because at the time of the divorce, she could not afford the $5,000 monthly payment based on her income from her pension and trusts.[2] Despite Mary's efforts at marketing the home for sale shortly after the divorce, the house did not sell until June 2009, right before a trustee sale was to be held. Mary made only $1,600 profit on the home.

¶16 To the extent that the family court read the spousal maintenance provisions in the Agreement and the Decree together (*in pari materia*) and found that the provisions were not ambiguous, the family court did not err in finding that the maintenance provision was not contingent upon the sale of the marital home. First, the parties agreed in both the Agreement and Decree that John qualifies for an award of spousal maintenance. Had the maintenance been contingent upon the sale of the home, John would have been without maintenance for at least a few months, or as we know now, over four years.

[2] Mary gave conflicting testimony regarding how much income she received at the time of the divorce. When asked how much she earned at the time of the Agreement, she claimed she made $10,000 per month as a consultant with major corporations. However, when later asked the same question, Mary said she made $10,000 per month until "9/11," presumably referring to September 11, 2001. She testified that her income dropped drastically after 9/11 because "there was no more work for consultants."

¶17 Also, other terms of the Agreement do not support Mary's contention that the maintenance payments were expressly contingent upon the sale of the marital home. One provision in the Agreement provided that "Upon the sale of the residence . . . , [Mary] shall pay an amount, not to exceed $40,000.00, to [John] to serve as a down payment for a residence." After considering that provision, it is fair to assume that John and Mary would have also inserted "upon the sale of the residence" at the beginning of the sentence "The Respondent/Wife shall pay to the Petitioner/Husband the sum of $5,000.00 each month in spousal support (alimony), for the term of his natural life" if they had intended the spousal maintenance to be contingent upon the sale of the home.

¶18 Furthermore, while Mary argued at trial that she understood her obligation was to provide spousal maintenance only after the marital home sold, Mary is bound by her trial counsel's conduct. *See Irvin v. Dwight B. Heard Inv. Co.*, 35 Ariz. 528, 531, 281 P. 213, 214 (1929) (holding that an attorney is the agent of her client, and the client is bound by the attorney's actions when the attorney acted within the scope of her authority); *see also Long v. Ariz. Portland Cement Co.*, 2 Ariz. App. 332, 335, 408 P.2d 852, 855 (App. 1966). Mary's counsel modified provisions of the draft decree, including the spousal maintenance provision, but did not add language to the

maintenance provision to make the monthly payments contingent upon the sale of the home. Nor did Mary's counsel modify the provision in the Decree that the payments would begin "no later than the month that this Decree . . . is signed by the Court." While Mary may have believed that she was agreeing to the maintenance payment being contingent upon the sale of the marital home, Mary is bound by her trial counsel's conduct. Therefore, the family court did not err in finding that the maintenance provision was not contingent upon the sale of the marital home based upon a reading of the Agreement and the Decree together without considering extrinsic evidence.

¶19 However, to the extent that the family court found that the spousal maintenance provisions in the Agreement and the Decree were ambiguous, the court still did not err. First, Mary's argument makes no sense in light of the parties' spousal maintenance agreement and their post-decree conduct. If Mary's contention is true, then she was free to never sell the marital home, with over $900,000 in equity, which would result in John being denied any maintenance. Also, prior to the Agreement and Decree, the family court awarded John $2,000 per month in spousal maintenance while the settlement negotiations and court proceedings were ongoing.

¶20 Additionally, the family court's interpretation is consistent with the parties' post-decree conduct. Despite

Mary's contention that the payment of the maintenance was contingent upon the sale of the home, Mary paid John $130,000 beginning immediately after the divorce until she allegedly ran out of money, without the sale of the home. As the court found, this would indicate that the parties agreed to a reduced amount of maintenance until the home sold and would also reflect that Mary recognized her duty to pay maintenance was not contingent upon the sale of the home.

¶21 Furthermore, the family court acted within its discretion in weighing the credibility of John and Mary as to their contractual intent. A trial court's role is to weigh the evidence and determine the credibility of witnesses, and this Court will not substitute its discretion for the trial court's absent an abuse of discretion. *Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). While Mary claimed that she paid John the spousal support before the home sold because he repeatedly asked for more money to meet his monthly needs, John claimed he accepted less than $5,000 per month to help Mary out until she caught up on the support payments. The court was free to give credence to John, and on appeal we will not review its decision regarding credibility.

¶22 Finally, while Mary argues that John conceded at trial that the maintenance payments were to come from the "estate," we do not so read the record. John did not admit that maintenance was contingent upon sufficient income from the sale of the home, but only that the maintenance was to come from the annuity once the home sold. John testified that in the meantime, Mary was supposed to pay the maintenance from her own funds. In light of the Agreement and Decree's language and the conduct of the parties after the divorce, we agree with John and read the Agreement to mean that Mary was to pay John maintenance immediately after the divorce from her own funds and that once the house was sold, if the profit was sufficient, the payments would come from an annuity.[3]

¶23 For the foregoing reasons, we agree with the family court that the parties did not intend that Mary's payment of spousal maintenance be contingent upon the sale of the marital home.[4]

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[3] We are not persuaded that the second sentence, calling for the creation of an annuity "upon the sale of the community residence [] from which to draw the Petitioner/Husband's monthly support payment" created the contingency that Mary alleges. John testified that they agreed to the $5,000 per month maintenance payment because "[he] couldn't see splitting everything in half." Accordingly, we interpret the second sentence as a security provision to ensure John received his share of maintenance.

[4] Mary does not address the family court's award to John of $40,000 in arrearages independent of her contingency argument. Accordingly, since we reject her contingency argument, Mary

II. The family court did not abuse its discretion in failing to terminate Mary's obligation to pay spousal maintenance or in ordering a modified award of $1,500.

¶24 Mary argues that the family court erred in failing to terminate John's spousal maintenance award because her changed financial circumstances do not support a modified award of $1,500 per month. "[A] substantial change in the financial circumstances of either the husband or wife" may support a modification. *Chaney v. Chaney*, 145 Ariz. 23, 25, 699 P.2d 398, 400 (App. 1985); *see* A.R.S. § 25-327(A). The party seeking modification bears the burden of proving these changed circumstances by a preponderance of the evidence. *Van Dyke v. Steinle*, 183 Ariz. 268, 278, 902 P.2d 1372, 1382 (App. 1995). Whether a substantial and continuing change of circumstances has occurred is a factual question that lies within the family court's sound discretion. *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989) (quoting *Fletcher v. Fletcher*, 137 Ariz. 497, 497, 671 P.2d 938, 938 (App. 1983)). We will not reverse the family court's determination absent an abuse of discretion. *Linton v. Linton*, 17 Ariz. App. 560, 563, 499 P.2d 174, 177 (App. 1972). In general, a court commits an abuse of discretion when the record fails to substantially

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waived any independent objection to the arrearages award. *See* ARCAP 13(A)(6); *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990) (holding that an appellant waives an argument on appeal by failing to properly develop the argument in her opening brief).

support its decision or the court commits an error of law in reaching its decision. *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004).

¶25 When determining whether to modify a spousal maintenance award, a court should consider the same factors set forth in A.R.S. § 25-319(B) (2007), used to consider an original grant of spousal maintenance. *Scott v. Scott*, 121 Ariz. 492, 495 n.5, 591 P.2d 980, 983 n.5 (1979). If the family court grants the request for spousal maintenance, the court, "after considering all relevant factors, shall set the maintenance order in an amount and for a period of time as the court deems just." A.R.S. § 25-319(B); *Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993).

¶26 The only relevant factor in this case is the ability of the spouse from whom maintenance is sought (Mary) to meet that spouse's needs while meeting those of the spouse seeking maintenance (John). A.R.S. § 25-319(B).[5]

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[5] Other seemingly relevant provisions include:

> 1. The standard of living established during the marriage.
> 2. The duration of marriage.
> 3. The age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance.
> . . .
> 5. The comparative financial resources of the spouses, including their comparative earning abilities in the market.
> . . .

¶27 As she continues to argue on appeal, Mary argued to the family court that her "income does not support a spousal maintenance payment to [John], and there has been a significant change to the status of the marital residence." Mary claimed that she used all her assets and ran out of money between paying John $4,000 per month and paying the mortgages on the marital home and her new home. She testified that she was $90,000 underwater in her new home and had $80,000 in credit card debt. Mary claimed her income was about $5,100 per month, from retirement and social security.

¶28 The family court found that Mary's financial situation had changed substantially since the decree, but John's situation had not and "he continue[d] to need financial assistance to meet his reasonable needs." The court considered Mary's "reasonable monthly expenses" (emphasis in original) and determined that

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> 9. The financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently.

However, because Mary did not argue before the family court that John's financial position had changed and that he no longer needed the $5,000 per month, we assume that the John remained in need of $5,000 per month. Indeed, Mary admitted before the trial court in her cross-petition to modify spousal support that John had no assets and was suffering financially. Therefore, the other provisions in A.R.S. § 25-319(B) regarding the "seeking spouse" are not relevant to this case.

Mary could meet her needs and provide John $1,500 per month in financial assistance.

¶29 We review only whether the court abused its discretion in finding that Mary could afford $1,500 per month in spousal maintenance. We will not review the court's finding that John needed continued financial assistance because Mary did not raise this argument before the family court. *See Maher v. Urman*, 211 Ariz. 543, 548, ¶ 13, 124 P.3d 770, 775 (App. 2005) (holding that arguments not raised in the trial court are waived on appeal).

¶30 The record supports the family court's modification of the maintenance award from $5,000 to $1,500 per month. Mary had substantial assets following the divorce, reflected in her tax statements for 2005 to 2007 and some financial documentation for 2008. Between 2005 and 2007, Mary received $261,000 in distributions from two retirement or annuity accounts administered by Merrill Lynch.[6] Additionally, from 2005 through the end of 2008 (and by Mary's admission continuing through 2009), Mary received an annual distribution from her retirement accounts administered by State Street of about $42,550 per year, before taxes.

[6] Mary received about $165,000 from the Merrill Lynch accounts in 2005, about $45,000 in 2006, and about $51,000 in 2007, leaving at least one account with no remaining money. Mary did not submit evidence illustrating whether money remained in the other account.

¶31 In 2009, Mary's estimated annual income, based upon her retirement accounts ($42,550) and social security ($23,484), was about $66,300 before taxes, or $5,500 per month.[7] Mary claimed her net monthly income was about $5,100 and her monthly expenses were about $5,950, not including spousal maintenance. While Mary's monthly expenses are more than her net monthly income, the court emphasized "reasonable" in its determination. It was fair for the court to find some of Mary's expenses unreasonable,[8] such as:

- $952 car payment on an Infiniti FX35;
- $329 combined bill for telephone ($89), cell phone ($181), and internet ($59);
- $598 on "internet and training";
- $139 on "yard work/pool/pest control";
- $100 on clothing; and

[7] Not included in the 2009 annual income estimate is income she receives from Ocotillo MC, LLC, presumably from her real estate business, a venture that she started shortly before the divorce. Her income from this venture fluctuated yearly, from a high of $12,804 in 2007 to a low of $2,605 in 2008.

[8] The family court failed to identify which of Mary's expenses it found unreasonable, and Mary did not object to the court's Findings of Fact, Conclusions of Law, Orders and Judgments. Nor did she ask for more detailed findings. This Court may infer any additional findings needed to support the judgment which do not conflict with the express findings of the trial court. *See Elliott v. Elliott*, 165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990).

- $1,573 per month in credit card statements.[9]

Hypothetically, after deducting $3,000 for her mortgage and HOA fees on the Chandler home ($2,729 plus $71, respectively) and $1,500 spousal maintenance payment from her income of $5,100 per month, Mary would have approximately $900 left to cover her other monthly expenses after the marital home sold. While Mary's budget would be tight, we cannot say the family court erred in holding that she could afford her necessary and reasonable expenses on that budget while also paying $1,500 in monthly spousal maintenance.

III. Mary waived her argument that the family court abused its discretion in awarding John attorneys' fees.

¶32 Mary argues on appeal that the family court erred in awarding John attorneys' fees because: (1) the record is

[9] Mary testified that she incurred the credit card debt and exhausted her assets due to having to pay John's spousal maintenance and two mortgages simultaneously, about $4,600 on the marital home and $2,700 on a home she bought in Chandler. However, Mary's monthly payments of $4,000 to John from September 2004 to June 2008 equal about $180,000. Her payments on the marital home from August 2004 to June 2008 (when she allegedly stopped paying for the home) equal about $211,600. Mary's income from the Merrill Lynch distributions from 2005 to 2007 was $261,000 and from social security and State Street retirement payments from August 2004 to June 2008 were about $230,000. The cost of maintaining the marital home and paying John's maintenance payments was more than covered by Mary's earnings; indeed, she would have approximately $81,000 left. These calculations do not include the income from Ocotillo MC, LLC. That Mary incurred $75,000-80,000 in credit card debt and purchased a new home while she still owned the custom home in Oak Creek Canyon could be considered unreasonable expenses.

inadequate regarding the financial situation of the parties; and (2) she withdrew the argument that the family court found unreasonable before John spent resources responding to the argument. She also asserts that the award must be set aside because John requested attorneys' fees under an invalid standard, not the statutory provision, which left Mary without notice and the opportunity to address whether attorneys' fees should be awarded under A.R.S. § 25-324 (Supp. 2008).

¶33 This Court reviews a family court's award of attorneys' fees for abuse of discretion. *Breitbart-Napp v. Napp*, 216 Ariz. 74, 83, ¶ 35, 163 P.3d 1024, 1033 (App. 2007). Pursuant to A.R.S. § 25-324, a family court may consider "the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings" and award to one party "a reasonable amount . . . for the costs and expenses of maintaining or defending any proceeding under this chapter." *See id.* at ¶ 36. The party seeking attorneys' fees based on financial disparity must provide the family court financial information to illustrate the parties' financial status, and the court cannot make a finding of financial disparity absent this information. *Id.* at 83-84, ¶ 37-39, 163 P.3d at 1033-34; *see also Magee v. Magee*, 206 Ariz. 589, 592, ¶ 17, 81 P.3d 1048, 1051 (App. 2004) (holding a trial court is "obligated to consider factors such as the degree of the

resource disparity between the parties, the ratio of the fees owed to the assets and/or income of each party, and other similar matters" when considering an award of attorneys' fees).

¶34 However, "[b]ecause a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, errors not raised in the trial court cannot be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994); *see also Banales v. Smith*, 200 Ariz. 419, 420, ¶ 6, 26 P.3d 1190, 1191 (App. 2001); *In re Marriage of Pownall*, 197 Ariz. at 583, ¶ 27, 5 P.3d at 917 (holding that husband waived his argument that the trial court's failure to make findings of fact regarding its award of attorneys' fees was error because he did not object in the trial court).

¶35 In his pleadings, John did not state the statutory basis for his request for attorneys' fees. In Mary's cross-petition, she did not address whether the family court should award John attorneys' fees. At trial, John's counsel began to ask Mary whether the Agreement had a provision for an award of attorneys' fees to the prevailing party. Mary's counsel objected, arguing that caselaw did not permit an award of attorneys' fees under a "prevailing party" theory but only under A.R.S. § 25-324. Mary did not present arguments to the court against awarding attorneys' fees.

¶36 The family court awarded attorneys' fees under A.R.S. § 25-324, finding that Mary had greater financial resources than John and that Mary had been unreasonable in seeking reimbursement of prior maintenance payments. Specifically, the family court found:

> At the time of trial, neither party had requested findings of fact concerning which portions of any award of fees and expenses were based on consideration of financial resources and which portion were based on consideration of the reasonableness of the party's [sic] positions . . . . The Court finds that Wife has taken an unreasonable position by seeking reimbursement from Husband for spousal maintenance paid. In addition, the Court finds Wife has superior financial resources and it would be unfair under the circumstances to not require Wife to pay a portion of Husband's fees and costs.

The court awarded John $6,364.91 in attorneys' fees and reasonable costs, the exact amount John had requested. Mary did not object to the court's findings, request specific findings, or make a motion for new trial.

¶37 Mary has waived her objection to the award of attorneys' fees by failing to argue at trial against the award or lodge an objection after the award. Mary never argued to the family court that John's failure to provide an updated financial affidavit precluded the court from awarding attorneys' fees based on financial disparity, nor did she argue that she withdrew any argument that was unreasonable and asserted only

reasonable arguments. Also, she did not argue that John had failed to assert the statutory basis for his fee request. Mary could have raised her arguments in pre-trial pleadings, during trial, or in objections to the family court's findings after trial. Instead, Mary raised her arguments for the first time on appeal; therefore, she has waived her arguments.[10]

¶38 In any event, we disagree with Mary's assertion that John waived his request for attorneys' fees by failing to properly cite A.R.S. § 25-324 in his request. In her opening brief, Mary admits there is no requirement that a party seeking attorneys' fees in the trial court must cite legal authority to support its request. However, in her reply Mary contends that

[10] Regarding the family court's finding that Mary had superior financial resources, even if Mary had not waived her argument by failing to raise it below, the family court did not abuse its discretion. *But cf. Breitbart-Napp*, 216 Ariz. at 84, ¶ 39, 163 P.3d at 1034 (holding that the financial information submitted years before and the record were inadequate to support the trial court's finding of financial disparity between parties); *Chopin*, 224 Ariz. at 431-32, ¶ 22-23, 232 P.3d at 105-06 (holding that the trial court did not err in denying an award of attorneys' fees to wife based on financial disparity because wife failed to submit the financial information of husband to support her request). While it is true that the court had before it information about John's financial situation submitted about four years earlier, it is reasonable to assume that John's financial situation had not substantially changed because if it had, Mary would have argued as much to support her argument to terminate spousal maintenance. There is sufficient evidence demonstrating that Mary could afford $1,500 per month in spousal maintenance, which also demonstrates that Mary could afford to pay attorneys' fees and costs for John partly due to financial disparity (and partly due to the unreasonableness of her arguments).

"a party cannot seek reversal of a trial court's denial of an award of attorney's fees where that party had failed to request such an award pursuant to A.R.S. § 25-324." *See Chopin*, 224 Ariz. at 432, ¶ 22, 232 P.3d at 105.

¶39 In *Chopin*, the family court did not rule on the wife's request for attorneys' fees, but on review, this Court deemed the request denied. *Id*. The wife argued on appeal that the court's denial of her request was an abuse of discretion because a financial disparity existed between her and husband. *Id.* This Court determined that because wife did not request at trial attorneys' fees pursuant to A.R.S. § 25-324 on the basis of financial disparity, she had waived any objection to the denial of her request.

¶40 We find *Chopin* distinguishable. Here, while John did not allege the basis for his request for attorneys' fees, the court was alerted to A.R.S. § 25-324 as the basis for his request. Additionally, if Mary believed that John was required to cite legal authority to support his request, then she should have raised this argument in her cross-petition, at trial, in a motion for retrial, or she should have filed an objection to the family court's findings. Further, we disagree with Mary's contention that she did not have notice of John's request for attorneys' fees under A.R.S. § 25-324. The family court's ability to award attorneys' fees under A.R.S. § 25-324 is ever

present in all modification of spousal maintenance proceedings. Furthermore, Mary's advising the court at trial that it could only award fees under A.R.S. § 25-324, not under the "prevailing party" theory, demonstrates that she had notice of the court's ability to award attorneys' fees under the statute.

¶41 Therefore, we affirm the family court's award of attorneys' fees and reasonable costs to John.

IV. Attorneys' fees and reasonable costs on appeal.

¶42 Both Mary and John request an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324(A) (Supp. 2009). After considering the reasonableness of the parties' positions and the financial positions of the parties, we decline to award attorneys' fees on appeal.

CONCLUSION

¶43 For the foregoing reasons, we affirm the family court's judgments. We award John taxable costs on appeal upon timely compliance with ARCAP 21.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
JON W. THOMPSON, Judge