

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



DIVISION ONE
FILED: 03/02/2010
PHILIP G. URRY, CLERK
BY: GH

VICKY WOOD,) 1 CA-CV 09-0201
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
LORETTE PITTSCH, as Personal) (Not for Publication -
Representative of the ESTATE OF) Rule 28, Arizona Rules of
ROSS RODENBAUGH,) Civil Appellate Procedure)
)
Appellee.)
)
_____)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV0200400971

The Honorable John Paul Plante, Judge

AFFIRMED

Vicky Wood
Appellant *In Propria Persona*

Yuma

W I N T H R O P, Judge

¶1 Vicky Wood appeals from the trial court's denial of her motion for amendment of judgment and request for relief from

judgment pursuant to Arizona Rules of Civil Procedure 59(a) and 60(c).¹ For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 This case arises from a partition action. As of July 21, 1999, Wood and Ross Rodenbaugh owned the subject property, located in Yuma County, as joint tenants with right of survivorship.

¶3 On December 13, 2004, however, Rodenbaugh filed an application for partition, which Wood opposed, asserting she owned the property outright pursuant to a verbal contract. Wood filed a counterclaim alleging Rodenbaugh owed her \$418,000 as reimbursement for improvements made to the property.

¶4 In February 2006, after a bench trial, the court issued an unsigned minute entry finding the joint tenancy deed valid and concluding Rodenbaugh and Wood held the property as joint tenants with right of survivorship. The court granted Rodenbaugh's application for partition and directed any sale proceeds to be divided equally between the parties. Wood filed a notice of appeal.

¶5 On January 3, 2007, this court suspended the appeal and revested jurisdiction in the trial court to allow Wood to apply for a signed order. *See Comeau v. Ariz. State Bd. of*

¹ Unless otherwise noted, all subsequent references to Rules will be to the Arizona Rules of Civil Procedure.

Dental Exam'rs, 196 Ariz. 102, 106, ¶ 16, 993 P.2d 1066, 1070 (App. 1999) (we obtain jurisdiction over an appeal when an unsigned minute entry is later signed by the trial court). While the appeal was pending, Rodenbaugh quitclaimed his interest in the property to Lorette Pitsch. Pitsch then quitclaimed her interest in the property back to Rodenbaugh. Upon discovering this, Wood filed a "Motion to Vacate Judgment/Dismiss Appellee's Claim Request for Direct Verdict on Appellant's Counterclaim" with this court, alleging the quitclaim deed to Pitsch severed the joint tenancy and rendered the partition judgment invalid. Because this court did not have jurisdiction at that time, we did not rule on the motion. The trial court, however, admonished Rodenbaugh and directed Wood to file a *lis pendens* on the property, which she did.

¶16 Rodenbaugh died on February 18, 2007, and on March 14, 2007, the trial court signed and entered an amended minute entry, consisting of its February 2006 rulings.² We issued a memorandum decision affirming the trial court's rulings. See *Rodenbaugh v. Wood*, 1 CA-CV 06-0117 (Ariz. App. Sept. 27, 2007) (mem. decision).

² The trial court was advised of Rodenbaugh's death prior to entering the amended minute entry. Wood notified this court of Rodenbaugh's death, and as initial personal representative of Rodenbaugh's estate, was substituted as appellee in May 2007, pursuant to Arizona Rule of Civil Appellate Procedure 27(a).

¶17 Wood subsequently filed motions requesting, among other things, reimbursement for improvements made on the property and interest, and that the court quiet title in her name based on the survivorship element of the joint tenancy deed. On June 10, 2008, after a hearing on the matter, the trial court denied "all claims made by Ms. Wood up to this date" via a signed minute entry. Wood moved to set aside the June 10 minute entry pursuant to Rule 60(c). In a signed order entered on September 9, the court denied Wood's motion.

¶18 On September 24, 2008, Wood filed a motion for amendment of judgment and motion for relief from judgment pursuant to Rule 59(a)(6), (8) and Rule 60(c)(6), requesting relief from the March 14, 2007 judgment and the September 9, 2008 "judgment." Wood maintained that because the March 14, 2007 judgment was signed after Rodenbaugh's death, the property passed to Wood as surviving joint tenant. The court denied Wood's motion, finding it untimely and concluding it would be inequitable under the circumstances to dismiss the partition action. Wood timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).

DISCUSSION³

¶9 On appeal, Wood primarily challenges the denial of her Rule 59(a)(6), -(8) and Rule 60(c)(6) post-trial motions. We review the trial court's decision to deny post-trial motions for an abuse of discretion. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998) (post-trial motions); *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985) (Rule 60(c) motion). A court abuses its discretion if there is no evidence supporting the court's conclusion or the reasons given are "clearly untenable, legally incorrect, or amount to a denial of justice." *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17, 141 P.3d 824, 830 (App. 2006) (citation omitted).

I. Rule 59(a)

¶10 Rule 59(a) sets forth the procedure and grounds for vacating a judgment and granting a new trial. Subsection (6) allows relief for "errors of law occurring . . . during the progress of the action." Ariz. R. Civ. P. 59(a)(6). Subsection (8) allows relief if the judgment "is not justified by the evidence or is contrary to law." Ariz. R. Civ. P. 59(a)(8). A

³ Pitsch failed to file an answering brief. Although we could regard this as a confession of error, in our discretion, we decline to do so. *Thompson v. Thompson*, 217 Ariz. 524, 526 n.1, ¶6, 176 P.3d 722, 724 n.1 (App. 2008); see *Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994).

motion to amend a judgment must be filed within fifteen days after entry of judgment. Ariz. R. Civ. P. 59(1).

¶11 The trial court entered its signed judgment for partition on March 14, 2007. The Rule 59(a) motion was filed on September 24, 2008. Because the motion was not filed within fifteen days after entry of the judgment, the motion was untimely.⁴ Accordingly, there was no error in declining to amend the judgment under Rule 59(a)(6) or (8). See *Sanders v. Foley*, 190 Ariz. 182, 186, 945 P.2d 1313, 1317 (App. 1997) (motion for amendment of judgment must be filed within fifteen days from entry of judgment); *Matter of Balcomb's Estate*, 114 Ariz. 519, 521, 562 P.2d 399, 401 (App. 1977) (trial judge is without power to rule on untimely post-trial motions pursuant to Rule 6(b)).

II. Rule 60(c)

¶12 Rule 60(c) is intended to provide relief from judgments that "are unjust because of extraordinary circumstances that cannot be remedied by legal review." *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, ¶ 5, 999 P.2d 198, 201 (2000) (citations omitted). Clauses (1) through (5) of the rule

⁴ In her motion, Wood requested the court to vacate the March 14, 2007 judgment and the September 9, 2008 judgment. The September 9 "judgment" was an order denying Wood's previous Rule 60(c) motion pertaining to the June 10, 2008 judgment. Vacating or amending the September 9 order would have no effect on the actual judgments issued on the merits in this action. See *Engel v. Landman*, 221 Ariz. 504, 510, ¶ 19, 212 P.3d 842, 848 (App. 2009) (to be appealable, a post-judgment order must affect or relate to the underlying judgment).

set forth specific reasons for which a court may grant relief from a judgment. See Ariz. R. Civ. P. 60(c)(1)-(5). Clause (6) sets forth an all-encompassing reason: "any other reason justifying relief from the operation of the judgment." Ariz. R. Civ. P. 60(c)(6). A motion for Rule 60(c) relief must be filed within a "reasonable time" after judgment is entered. Ariz. R. Civ. P. 60(c). Further, to obtain relief under Rule 60(c)(6), a party must demonstrate three things: (1) promptness in seeking relief, (2) extraordinary circumstances of hardship or injustice for a reason other than those listed in Rule 60(c)(1) through (5), and (3) a meritorious claim or defense. *Jepson v. New*, 164 Ariz. 265, 273, 792 P.2d 728, 736 (1990); *Panzino*, 196 Ariz. at 445, ¶ 6, 999 P.2d at 201.

¶13 The trial court found Wood's motion untimely. Rodenbaugh passed away in February 2007 and the signed judgment was entered in March 2007. Wood moved for relief from the judgment in September 2008. Her motion was not filed promptly.

¶14 We recognize the final partition judgment was entered in June 2008, when all of Wood's claims were denied. The judgment, however, did not start the time running for the Rule 60(c) motion for several reasons. First, in her motion, Wood moved to set aside the March 14, 2007 judgment, not the June 2008 judgment. Because Wood is not requesting relief from the June 2008 judgment, we will not grant such relief. See

Wineglass Ranches, Inc. v. Campbell, 12 Ariz. App. 571, 575-76, 473 P.2d 496, 500-01 (1970) (a court cannot adjudicate an issue not raised); *Wall v. Superior Court*, 53 Ariz. 344, 354-55, 89 P.2d 624, 629 (1939) (a court may not grant relief not requested in the pleadings). Second, the June 2008 judgment merely denied Wood's counterclaims and ordered Pitsch to arrange a viewing of the property with a realtor. Setting aside the June 2008 judgment would not set aside the order for partition entered in March 2007. Finally, Wood contends the action abated at Rodenbaugh's death and the error was entering the March judgment after his death. Even assuming any validity to such contention, Wood should have moved within a reasonable time to set aside the March 2007 judgment. A year and a half after Rodenbaugh's death is not a reasonable time. The trial court's conclusion that the motion was not made within a reasonable time was not an abuse of discretion.

¶15 Further, under the facts of this case, Wood has not demonstrated any extraordinary circumstances of hardship or injustice by the denial of Rule 60(c) relief. Wood was aware of Rodenbaugh's death prior to the entry of the March 2007 judgment. She made no claim or motion asserting ownership of the property as surviving joint tenant until more than a year later. Nothing prevented Wood from requesting relief earlier, especially in light of the March 9 and June 11, 2007 hearings.

¶16 In her motion, Wood asserts the balance of equities favor her because she had a common law marriage with Rodenbaugh and because Rodenbaugh did not want to sell the property. The common law marriage argument is irrelevant because Arizona does not recognize common law marriages unless validly entered in another state.⁵ *Barnett v. Jedynak*, 219 Ariz. 550, 553, ¶ 12, 200 P.3d 1047, 1050 (App. 2009). Additionally, the parties ended their relationship prior to the partition action. *Rodenbaugh*, 1 CA-CV 06-0117, at *2, ¶ 3. Furthermore, irrespective of whether Rodenbaugh wanted to sell the property, he asked the court to order a partition and sale of the property and did not withdraw the action prior to his death. Under the circumstances, the trial court's finding that it would be inequitable to dismiss the partition action was not an abuse of discretion.

¶17 Because Wood did not move for Rule 60(c)(6) relief within a reasonable time and because she failed to demonstrate any extraordinary circumstances of hardship or injustice, the court did not abuse its discretion by denying Wood's motion.

¶18 Even if we were to base our decision on the merits of Wood's defense, the quitclaim transaction between Rodenbaugh and

⁵ Wood alleges she and Rodenbaugh lived together as husband and wife during "long vacations" to Montana and Kansas, both of which recognize common law marriages. Taking "long vacations" to common law marriage states does not create a common law marriage.

Pitsch succeeded, as a matter of law, in terminating Wood and Rodenbaugh's joint tenancy arrangement. See *Register v. Coleman*, 130 Ariz. 9, 12, 633 P.2d 418, 421 (1981) (noting that transfer by quitclaim deed of undivided one-half interest in property destroyed joint tenancy and created prima facie case for partition); *In re Estelle's Estate*, 122 Ariz. 109, 111, 593 P.2d 663, 665 (1979) ("Joint tenancy requires the presence of the four unities: time, title, possession, and interest. Severance or destruction of one or more of these unities results in a destruction of the joint tenancy and the failure of the right of survivorship" (citations omitted)); *Lonergan v. Strom*, 145 Ariz. 195, 198, 700 P.2d 893, 896 (App. 1985) ("either party to a joint tenancy may terminate it by conveyance or other disposition of his interest, and the consent of the other tenants is not required"). Rodenbaugh's act of quitclaiming his interest in the property to Pitsch constituted a transfer of his undivided one-half interest in the property and effectively changed the characterization of their ownership from a joint tenancy to a tenancy in common, destroying the survivorship aspect of Wood's interest. See *Register*, 130 Ariz. at 12, 633 P.2d at 421.

¶19 Since Wood and Rodenbaugh were actually tenants in common at the time of his death, the benefits of survivorship are not available to Wood. Like joint tenants, tenants in

common are statutorily permitted to bring an action for partition; thus, the partition remedy remains the same. A.R.S. § 12-1211 (2003) ("The owner or claimant of real property or any interest therein may compel a partition of the property between him and other owners or claimants"). Wood argues that Rodenbaugh's partition action abated upon his death. Regardless of whether her argument has merit, Wood's interest is a *divided* one-half interest in the property, the other one-half belonging to Rodenbaugh's estate for distribution to his heirs.

III. Rule 25(a)

¶20 Wood also argues the action should be dismissed pursuant to Rule 25(a). Rule 25(a) requires dismissal of an action if a motion for substitution of parties is not made within ninety days after a party's death is suggested on the record by proper service of a statement of the fact of the death. Ariz. R. Civ. P. 25(a)(1).

¶21 Wood raised this issue several times in the trial court. After hearings in June and September, 2008, the court denied all of Wood's claims and the first Rule 60(c) motion

where she raised Rule 25(a).⁶ Wood did not appeal from the June 2008 judgment or the September 2008 order. See *Engel*, 221 Ariz. at 510, ¶ 19, 212 P.3d at 848 (an appealable post-judgment order must raise issues different from those that would arise from an appeal of the underlying judgment); see also *Dowling v. Stapley*, 221 Ariz. 251, 264, ¶ 39, 211 P.3d 1235, 1248 (App. 2009) (generally, a party must file a notice of appeal from an appealable order within thirty days). Further, there is no indication in the record that Wood served Pitsch with any of the motions Wood filed regarding Rule 25(a). See Ariz. R. Civ. P. 5(a) (every pleading must be served on each party).

¶122 Under these circumstances, the court did not err in failing to dismiss the action pursuant to Rule 25(a).

IV. Additional Arguments

¶123 Although Wood only appealed from the denial of her post-judgment motions, she raises a number of other, unrelated issues on appeal. Assuming these arguments are properly raised, we reject them. For instance, Wood argues the trial court erred

⁶ At the June 3 hearing, Wood mentioned no one moved for substitution pursuant to Rule 25(a), but did not ask for dismissal. Similarly, at the June 10 hearing Wood mentioned Pitsch had not moved for substitution, and the court stated Pitsch should have moved for substitution. Nevertheless, Wood did not request dismissal at that time. The court directed Pitsch to file the necessary paperwork to be appointed personal representative. Apparently Pitsch was appointed as personal representative at some point between June and September 2008 because in September, the court ordered all future pleadings to be mailed to Pitsch as the real party in interest.

in failing to respond to certain motions within sixty days pursuant to Article VI, Section 21, of the Arizona Constitution. Based on our review of the record, the trial court did not timely respond to two motions - Wood's December 2007 and March 2008 requests for a status hearing. The court, however, held two hearings in June 2008. See *In re Appleton's Estate*, 15 Ariz. App. 490, 493, 489 P.2d 864, 867 (1971) (sixty day provision is directory, not mandatory). Further, Wood does not articulate how the court's failure to hold a status hearing within sixty days of her two requests resulted in prejudice to her. Accordingly, there was no error.

¶24 Wood also appears to argue the trial court erred in denying a trial on her counterclaim. The court held a hearing on June 10, 2008, where Wood presented her counterclaim and other claims. The court denied all of Wood's claims. After that hearing, Wood filed a motion for trial and a motion to set and certificate of readiness on her counterclaim. Because a hearing was held, we find no error. Finally, Wood seems to argue this case would not be on appeal if her probate attorney had not withheld two orders this court sent on June 15, 2007. The only order we issued on June 15, 2007 was the order substituting Wood, as personal representative of Rodenbaugh's estate, as appellee. There is, however, a certification the order was mailed directly to Wood; and the record contains a

letter addressed to Wood enclosing the order. Thus, to the extent we understand Wood's argument, we reject it.

V. Sanctions

¶25 Finally, Wood requests sanctions on appeal pursuant to Arizona Rule of Civil Appellate Procedure ("ARCAP") 25. That rule gives us discretion to impose penalties or damages where a party has been guilty of an "unreasonable infraction" of the rules of appellate procedure. ARCAP 25. Pitsch has not filed an answering brief on appeal, Wood has not cited any appellate rule(s) Pitsch violated, and Wood's allegations concern Pitsch's conduct (or lack thereof) in the trial court. Accordingly, we decline to award Wood sanctions.

CONCLUSION

¶26 For the foregoing reasons, we affirm the trial court's ruling. Further, we decline to award Wood attorneys' fees and costs on appeal.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge