

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: 06-10-2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 09-0535
)
CAROLYN M. MUNHALL,) DEPARTMENT B
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
MARK E. MUNHALL,) Appellate Procedure)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2007-002103

The Honorable Colleen L. French, Judge Pro Tempore
The Honorable Hugh E. Hegyi, Judge

AFFIRMED

Carolyn M. Munhall, *In Propria Persona* Phoenix
Collins & Collins LLP Phoenix
By Joseph E. Collins
Attorneys for Respondent/Appellant

N O R R I S, Judge

¶1 Mark Munhall ("Father") timely appeals the family court's denial of his request under Arizona Rule of Family Law Procedure ("Rule") 85(C) to set aside an order granting Carolyn

Munhall ("Mother") her attorneys' fees and costs relating to a child support dispute. While the court's failure to explain its denial of Father's motion makes our review on appeal difficult, we nevertheless find there was a reasonable basis for denying Father's motion. Thus, we affirm the family court's decision.

FACTS AND PROCEDURAL BACKGROUND

¶12 In a Consent Decree of Dissolution of Marriage with Children filed March 17, 2008, Mother and Father confirmed Father's child support obligation to Mother was "\$1,200 per month." Father filed a Request to Modify Child Support Order in September 2008, and Mother disputed the basis of Father's request and counter petitioned for increased support. Mother "further request[ed] that costs and fees incurred in responding to this matter be ordered to be paid by the other party."¹ The family court held a modification hearing on January 28, 2009, and in a signed minute entry, ordered Father to pay Mother "\$1,250.00 per month" in child support and "\$1,300.00" in child support arrearages, but did not address the issue of attorneys' fees and costs.

¶13 On February 25, 2009, Mother filed an "Application for Attorney's [sic] Fees and Costs Re: Dissolution of Marriage," and a "Motion for Attorneys [sic] Fees." See Ariz. Rev. Stat.

¹We therefore reject Father's argument Mother failed to request attorneys' fees before the January 28, 2009 hearing.

("A.R.S.") § 25-324 (Supp. 2009). Although the billing invoices attached to Mother's application reflected billings totaling approximately \$3,330, she only requested \$2,166.50 in fees and costs.² On April 7, 2009, having received "no response" from Father, the court entered judgment against Father for the \$2,166.50 Mother requested. On April 20, 2009, Father filed a "Motion to Set Aside Judgment and Request to Respond" ("set aside motion"), alleging he had not received Mother's application until April 7. Father also filed objections to Mother's application on April 27, 2009. Mother responded to Father's set aside motion (but not to his objections), asserted the application was properly mailed, and requested the court affirm the judgment. After receiving Father's reply, which reiterated his previous objections, the family court denied Father's set aside motion.

²Although the first page of the application requested attorneys' fees and costs totaling \$2,166.50, the signed affidavit of Wife's attorney, attached as exhibit A, requested attorneys' fees of \$2,166.50 and costs of \$105.54, for a total of \$2,272.04. The family court's minute entry stated it awarded "Mother her attorney's [sic] fees and costs in the amount of \$2,166.50."

DISCUSSION³

¶4 The family court's order denying the set aside motion stated the court had "received and reviewed [Father's] April 20, 2009 Motion to Set Aside Judgment and Request to Respond, [Mother's] May 15, 2009 Response to Motion to Set Aside Judgment and Request to Respond, and [Father's] June 1, 2009 Reply thereto." Having reviewed these documents, the court could have denied Father's motion on either procedural or substantive grounds, deeming Father to have received Mother's application, or rejecting Father's substantive objections to Mother's application. As we explain below, given the state of the record, we are unable to determine whether Father is entitled to relief on procedural grounds; however, the family court would not have abused its discretion in denying the set aside motion on substantive grounds. *See Watson v. Apache County*, 218 Ariz. 512, 517, ¶ 23, 189 P.3d 1085, 1090 (App. 2008) (appellate court may affirm on any basis supported by the record).

I. Procedural Grounds

¶5 In his motion and reply, Father asserted relief under Rule 85(C) was appropriate because he "**did not get a copy of**

³We review a family court's denial of a motion to set aside for an abuse of discretion. *See Maher v. Urman*, 211 Ariz. 543, 550, ¶ 21, 124 P.3d 770, 777 (App. 2005) (interpreting Ariz. R. Civ. P. 60(c) which is substantially similar to Ariz. R. Fam. L.P. 85(C)).

[Mother's fee] **application**" until April 7, 2009, and thus his "failure to act was the result of excusable neglect" as required under Rule 4(B)(2). (Emphasis in original.) In Mother's response, her counsel described her "standard practice" of mailing documents, which included mailing "any filed document to opposing counsel the same day it is filed with the court as is indicated on the certificate of mailing," and ensuring "a staff member has a second look at the recipient of the envelope and can cross reference with the client" before the document is mailed. On this conflicting record, we believe it would have been impossible for the family court to determine, without further inquiry, whether Father timely received the application and whether relief was warranted on procedural grounds.⁴

II. Substantive Grounds

¶16 Nevertheless, the family court could have denied Father's motion on substantive grounds: the court was within its

⁴Because we affirm the family court's denial of the set aside motion on substantive grounds, we need not address Father's constitutional due process arguments as they rest on his assertion he should not have been assessed fees and costs because he did not receive Mother's application.

discretion to deny certain of Father's objections,⁵ and other objections raised by Father did not affect the reasonableness of Mother's request.⁶ Thus, the family court did not abuse its discretion on substantive grounds in denying the set aside motion.

III. Additional Matters

¶7 In his reply brief, Father argues the family court, in its January 28, 2009 order, actually awarded Mother \$1,300 in attorneys' fees and further suggests Mother stipulated to this amount. This argument was not raised in the family court, and it is not, in any event, well taken. First, the record is quite clear the \$1,300 was, according to a signed minute entry correcting the modified child support order, "to bring child support arrears current." Second, the parties' stipulation only

⁵In his reply, Father argued certain attorneys' fees listed in Mother's application were unrecoverable because they were unrelated to child support "enforcement." Most of these fees appear related to child support or the modification hearing, however, and the family court had discretion to deny Father's objections as to these fees.

⁶Father also contended "charges" relating to the consent decree were not recoverable because the parties agreed each "shall be responsible for their own attorney's [sic] fees and costs incurred in connection with this dissolution proceeding." Subtracting the decree-related fees and costs from Mother's total attorneys' fees and costs, see *supra* ¶ 3, and even subtracting other sums not clearly related to child support or the modification, the remaining amount (approximately \$2,406) is greater than the sum Mother requested and the court awarded (\$2,166.50).

pertained to the \$1,300 and to medical insurance coverage for the parties' children. Simply put, the January 28 order does not address attorneys' fees and costs.

¶8 Father also asserts Mother failed to comply with various procedural rules governing attorneys' fees. Not only did Father fail to raise this argument in the family court, but he only raised it on appeal in his reply brief, and thus we deem it waived. See *Tripati v. Forwith*, 223 Ariz. 81, ___, ¶ 26, 219 P.3d 291, 296 (App. 2009) ("we usually do not consider arguments raised for the first time in a reply brief"); *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007) ("Generally, arguments raised for the first time on appeal are untimely and deemed waived.").

¶9 Finally, in his opening brief, Father argues we should reverse the family court and find that upon these facts, Mother is not entitled to attorneys' fees. Insofar as Father is asserting Mother was not entitled to attorneys' fees under A.R.S. § 25-324, we deem this argument waived. Although in the family court Father objected to specific sums requested by Mother, see *supra* note 5, he never argued she was not entitled to fees under § 25-324. See *Odom*, 216 Ariz. at 535, ¶ 18, 169 P.3d at 125.

CONCLUSION

¶10 For the foregoing reasons, we affirm the family court's denial of Father's set aside motion. As the prevailing party, Mother is entitled to her costs on appeal subject to her compliance with Arizona Rule of Civil Procedure 21. See A.R.S. § 12-341 (2003).

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

MAURICE PORTLEY, Judge