

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: 04/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) No. 1 CA-CV 11-0326
)
STEVEN ANDERSON,) DEPARTMENT E
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication - Rule 28,
v.) Arizona Rules of Civil Appellate
) Procedure)
SABRINA ANDERSON,)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-004580

The Honorable Robert E. Miles, Judge

AFFIRMED

Law Office of Robert A. Jensen, PLC
By Robert A. Jensen

Phoenix

-And-

Law Office of Scott E. Boehm, PC
By Scott E. Boehm
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Phoenix

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By Elizabeth Feldman
Attorneys for Respondent/Appellant

Scottsdale

H A L L, Judge

¶1 Sabrina Anderson (Mother) appeals from the family court's order denying her motion to set aside the consent decree (Decree) dissolving her marriage to Steven Anderson (Father). Mother contends she was entitled to relief under Arizona Rule of Family Law Procedure (Rule) 85(C)(1).¹ For the reasons set forth below, we affirm.

BACKGROUND

¶2 Father and Mother were married on March 7, 1987, and had two children. Father initiated divorce proceedings by filing a petition for dissolution of marriage on July 6, 2010.

¶3 Upon approval of their respective counsel, the parties subsequently executed the Decree, which provided for the division of real and personal property and awarded joint custody of the children. Pursuant to a worksheet filed with the Decree, Father agreed to pay \$1,409.47 monthly in child support. Further, the Decree set forth the court's finding and order that neither party was entitled to an award of spousal maintenance. The Decree was filed on October 1, 2010. Neither party timely appealed.

¹ Rule 85 is based on Rule 60 of the Arizona Rules of Civil Procedure and provides a party various bases for seeking relief from a final judgment by motion. *Compare* Rule 85 with Ariz. R. Civ. P. 60; *see also* Committee Comment to Rule 85.

¶4 After retaining new counsel, on February 4, 2011 Mother requested that the court set aside the Decree² arguing she was entitled to relief under Rule 85(C)(1)(a), (b)[sic],³ and (f) based on her former attorney's failure to properly advise her. She alleged that there were inequities in the Decree's terms addressing spousal maintenance, division of community property, and the amount of child support. The family court summarily denied Mother's motion without comment by signed minute entry filed March 29, 2011. Mother appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(2) (Supp. 2011).⁴

² Mother concurrently filed a petition to modify child support, which she later withdrew.

³ Although Mother referenced subsection (b) in her motion to set aside, which subsection refers to newly discovered evidence, her substantive argument makes clear she intended to reference subsection (c). She did raise a subsection (b) argument in her reply to Father's response to the motion to set aside, but she does not expressly raise such an issue on appeal. To the extent she implicitly does so, we reject it for the reasons stated herein.

⁴ Father argues that we lack jurisdiction to consider this matter because Mother filed her notice of appeal over six months after the Decree was filed, and a motion under Rule 85(C)(1) does not extend the time by which a notice of appeal must be filed. Although Father concedes that an order denying relief under Rule 85(C) is subject to appellate review, he contends that the record reflects Mother is attempting to appeal from the Decree not the court's order denying her motion to set aside. Notwithstanding the technical deficiencies in Mother's notice of appeal and her docketing statement pointed out by Father, these documents sufficiently indicate Mother's intention to appeal from the court's order denying her relief under Rule

DISCUSSION

¶15 Rule 85(C) provides, in relevant part:

**C. Mistake; Inadvertence; Surprise;
Excusable Neglect; Newly Discovered
Evidence; Fraud, etc.**

1. On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:

a. mistake, inadvertence, surprise, or excusable neglect;

. . . .

c. fraud, misrepresentation, or other misconduct of an adverse party;

. . . . or

f. any other reason justifying relief from the operation of the judgment.

2. The motion shall be filed within a reasonable time, and for reasons 1(a), 1(b) and 1(c) not more than six (6) months after the judgment or order was entered or proceeding was taken.

¶16 We review the denial of a motion to set aside a judgment for an abuse of discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). The superior court's decision will be affirmed unless "undisputed facts and

85(C). Accordingly, we conclude that we have jurisdiction in this appeal. See *Baker v. Emmerson*, 153 Ariz. 4, 8, 734 P.2d 101, 105 (App. 1986) ("[A]n appellate court construes the notice of appeal liberally in order to avoid denying review of issues that the parties clearly intend to appeal").

circumstances require a contrary ruling." *Id.* at 330, 697 P.2d at 1080 (citation omitted). The party seeking to have a judgment vacated bears the burden of "proving the grounds relied upon for relief," and the superior court cannot set aside a judgment "without some evidence to support the claim on which [the Rule 85(C) motion] depended." *Lawwill v. Lawwill*, 21 Ariz.App. 75, 78, 515 P.2d 900, 903 (1973).

¶7 We find no abuse of discretion here. First, Mother's motion to set aside does not point to any evidence supporting her Rule 85(C) claims. Rather, her motion consists entirely of unsubstantiated conclusory statements regarding the Decree's inequities and her former counsel's purported failure to properly advise and represent her. For example, Mother's motion states she "was advised by and relied upon an attorney recommended by Father's attorney, who did not conduct any discovery but informed her that the division of property was fair, and that the Court would not likely award spousal maintenance." Further, in an apparent attempt to explain the timeliness of her motion, Mother asserted:

In this case, Mother promptly sought independent legal advice by consulting with undersigned counsel after the Decree was entered and filed. Mother and counsel then requested that Father reconsider his position and attempt to resolve the issue in an amicable forum, mediation. Father requested additional time, which counsel consented to and then Father failed to

communicate with counsel. Mother then promptly filed the instant motion.

¶18 Mother did not provide evidentiary support by way of an affidavit or copies of letters for the above assertions. Thus, she did not meet her burden to prove the alleged grounds for Rule 85(C) relief. *See id.* Mother then repeats this error in her brief on appeal; her citations to "facts" mostly refer to the unsubstantiated assertions in her motion.⁵ We disregard "facts" that are not properly supported. *See Ariz. Dep't of Econ. Sec. v. Redlon*, 215 Ariz. 13, 15, ¶ 2, 156 P.3d 430, 432 (App. 2007).

¶19 Second, Mother's motion to set aside was untimely under Rule 85(C)(2). She asserts that she received the "final divorce decree" on October 8, 2010 "and for the first time noticed the child support worksheet, which listed Father's income as . . . \$204,000 annually[], which is less than one-half of his true annual income of \$480,000." She provides no reasonable explanation supported by the record for why she waited until February 4, 2011 to seek Rule 85(C) relief based,

⁵ Mother contends on appeal that these "undisputed facts" compelled the superior court, at a minimum, to hold an evidentiary hearing on her Rule 85(C) claims, which hearing would apparently provide the basis for the court to explain its rationale for denying Mother's motion. We reject this argument because Mother herself recognizes that the court was not required to provide a reason for its decision. And, in any event, the court correctly concluded no evidentiary hearing was necessary because Mother did not provide the court with any evidence that disputed the findings in the Decree.

at least in part, on the amount of child support that was determined by Father's purported misrepresentation of income. See *supra* at ¶ 5 (Rule 85(C)(2) requires motion to set aside to "be filed within a reasonable time[.]").

¶10 Finally, we note that Mother's dissatisfaction with her former attorney's representation in this matter does not provide a basis for Rule 85(C) relief from the Decree. "Permitting relief from judgments entered as a result of an attorney's actions clearly undermines the 'undeniable public policy that recognizes the finality of judgments and discourages multiplicitous litigation.'" *Panzino v. City of Phoenix*, 196 Ariz. 442, 448, ¶ 19, 999 P.2d 198, 204 (2000) (quoting *Smith v. Saxon*, 186 Ariz. 70, 74 n.3, 918 P.2d 1088, 1092 n.3 (1996)).

¶11 Based on the foregoing, we cannot conclude that the family court abused its discretion in denying Mother's motion to set aside the Decree.

CONCLUSION

¶12 The family court's order denying Mother Rule 85(C) relief is affirmed. Based on the disparity in income, we deny Father's request for attorneys' fees. However, Father is entitled to his costs upon his compliance with ARCAP 21.

_/s/ PHILIP HALL, Judge

CONCURRING:

_/s/ PATRICIA A. OROZCO, Presiding Judge

_/s/ JOHN C. GEMMILL, Judge