

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

MICHAEL VAN ARDOY,
Petitioner/Appellant,

and

TRACY JO VAN ARDOY,
Respondent/Appellee.

Nos. 2 CA-CV 2016-0173-FC and 2 CA-CV 2016-0231-FC (Consolidated)
Filed April 27, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20121167
The Honorable Laurie B. San Angelo, Judge Pro Tempore

AFFIRMED

COUNSEL

The Reyna Law Firm, P.C., Tucson
By Ron Reyna
Counsel for Petitioner/Appellant

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Liberty & Associates, P.C., Tucson
By Edward W. Booker
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Howard and Judge Vásquez concurred.

ECKERSTROM, Chief Judge:

¶1 Michael Van Ardoy appeals from the trial court’s ruling dismissing his motion to modify the decree of dissolution of his marriage to Tracy Van Ardoy and the correlated Qualified Domestic Relations Order (QDRO).¹ For the following reasons, we affirm the judgment of the trial court.

Factual and Procedural Background

¶2 In 2012, Michael filed a petition for dissolution of his marriage to Tracy. In July 2013, the trial court entered a decree of dissolution of the marriage. In the decree, the court ordered that Michael would have “[a]ll right, title and interest in and to any pension, . . . retirement and/or other employee benefit plans,” but that this was “subject to” Tracy’s “right, title and interest in and to her community property portion of [Michael]’s retirement/401k/deferred compensation.” The court entered a QDRO that contained a formula for calculating the percentage of Michael’s pension that Tracy would receive.

¹On the cover page of his opening brief, Michael has included a line stating “Oral Argument Requested.” In the court of appeals, parties must file a “separate request for oral argument” and may not include the request in the opening brief. *Ariz. R. Civ. App. P. 18(a)*; *see Svendsen v. Ariz. Dep’t of Transp., Motor Vehicle Div.*, 234 Ariz. 528, n.8, 323 P.3d 1179, 1186 n.8 (App. 2014). Accordingly, we deny the request.

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¶3 In December 2015, Michael filed a petition to modify the decree of dissolution, claiming there was no community interest in his pension. The trial court denied the motion, finding it was not proper under Rules 85 and 91, Ariz. R. Fam. Law P.² The court also awarded Tracy her attorney fees in the action, finding that Michael’s “petition was not grounded in fact or based on law.” This appeal followed.

Motion to Modify Decree

¶4 On appeal, Michael claims that his motion was proper under Rule 91(A) because “[t]here is no time limit indicated anywhere within” that rule. But Michael has not addressed the trial court’s conclusion that his motion was improper under Rule 91(A) in light of Rule 91(H), which states that “[a]ny party seeking any other post-decree or post-judgment relief not specifically addressed in this rule shall file a petition . . . setting forth . . . the specific legal authority that confers subject matter jurisdiction upon or authorizes the family court to grant the relief requested,” and Michael’s motion did not do so. We therefore deem the issue waived. See *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009).

¶5 Although Michael’s written motion to modify the decree did not address Rule 85, he claimed at the hearing on his motion that it was proper under Rule 85(C).³ On appeal, Michael first attempts to claim his motion was proper under Rule 85(A). Michael did not assert this as a basis for his motion in the trial court and has therefore waived this issue. See *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (“[A]bsent extraordinary

²Rule 85 authorizes motions to correct clerical mistakes and for relief from a judgment or order in certain circumstances. Rule 91 provides for post-decree, post-judgment proceedings for the modification or enforcement of prior orders.

³Michael actually claimed the motion was proper under the analogous rule of civil procedure, Rule 60(C), Ariz. R. Civ. P., but the trial court and opposing counsel clearly understood this as meaning Rule 85(C).

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circumstances, errors not raised in the trial court cannot be raised on appeal.”).

¶6 Michael then argues his motion was proper under Rule 85(C)(1)(f). In the trial court, he stated that his motion could be brought due to “mistake or inadvertence or some sort of injustice that’s occurred by simple—a simple mistake of the parties.” To the extent this claim was based on Rule 85(C)(1)(a), (b), or (c), which address mistake, newly discovered evidence, and fraud, those claims must be raised within six months of entry of the judgment or order, and are clearly untimely.

¶7 To the extent Michael intended to seek relief from judgment pursuant to Rule 85(C)(1)(f), such a claim must establish “extraordinary hardship or injustice,” and it must be for a reason other than those specifically listed in Rule 85. *Rogone v. Correia*, 236 Ariz. 43, ¶ 12, 335 P.3d 1122, 1127 (App. 2014) (applying analogous rule of civil procedure); see *Kline v. Kline*, 221 Ariz. 564, ¶ 12, 212 P.3d 902, 906 (App. 2009); see also Ariz. R. Fam. Law P. 85 cmt. Michael has neither asserted nor made any showing of hardship or injustice. Furthermore, the fact that a “judgment taken may rest upon an erroneous application of substantive law is not, standing alone, a reason for which relief will be granted” under this rule. *Int’l Ass’n of Machinists & Aerospace Workers v. Petty*, 22 Ariz. App. 539, 541, 529 P.2d 251, 253 (1974). Michael’s argument is simply that the trial court made an error of law in calculating the percentage of his pension that belonged to Tracy, and thus it is not cognizable under Rule 85(C)(1)(f). Accordingly, we conclude the trial court did not err in denying Michael’s motion to modify the decree of dissolution.

Attorney Fees

¶8 Michael next challenges the trial court’s award of attorney fees to Tracy. The court awarded fees pursuant to A.R.S. § 25-324(B) “because the petition was not grounded in fact or based on law.” We review a trial court’s grant of attorney fees under this provision for an abuse of discretion. *Murray v. Murray*, 239 Ariz. 174, ¶ 20, 367 P.3d 78, 83 (App. 2016). Michael contends the court abused its discretion in awarding fees because he did not take unreasonable positions during the litigation, citing A.R.S.

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§ 25-324(A). The trial court's award was based on § 25-324(B), which is an entirely separate ground for such an award. Michael has not established that the court abused its discretion in awarding Tracy her attorney fees.

¶9 Tracy has requested an award of attorney fees on appeal pursuant to A.R.S. §§ 25-324 and 12-349. An award under § 25-324 requires that this court consider both the financial positions of the parties and the reasonableness of the positions they have taken. *Leathers v. Leathers*, 216 Ariz. 374, ¶ 22, 166 P.3d 929, 934 (App. 2007). There is a substantial disparity in income between the parties, with Michael earning an hourly wage more than twice that of Tracy. Moreover, Michael has failed to put forth any substantial argument that the trial court erred in its conclusion and has therefore failed to show the reasonableness of his position. We award Tracy her attorney fees on appeal, pending compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶10 For the foregoing reasons, we affirm the judgment of the trial court, and we award Tracy her attorney fees on appeal.