

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LEILA PATE, *Petitioner/Appellee*,

v.

FRANK PATE, *Respondent/Appellant*.

No. 1 CA-CV 17-0152 FC
FILED 12-14-2017

Appeal from the Superior Court in Yavapai County
No. P1300DO201600295
The Honorable Rhonda L. Repp, Judge *Pro Tempore* (Retired)

VACATED AND REMANDED

APPEARANCES

Frank Pate, Littleton, CO
Respondent/Appellant

Leila Pate, Prescott
Petitioner/Appellee

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which
Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

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HOWE, Judge:

¶1 Frank Pate (“Husband”) appeals the family court’s judgment of default in favor of Leila Pate (“Wife”) after he failed to appear. For the following reasons, we vacate and remand.

FACTS AND PROCEDURAL HISTORY

¶2 In April 2016, Wife petitioned for dissolution of a non-covenant marriage from Husband in an Arizona family court. At the time, they had three minor children. On May 11, 2016, Husband, incarcerated in a Texas state prison, received service from a Texas sheriff’s officer. The Summons stated that Husband had 30 calendar days to respond from the date he received service; thus, his response was due on June 10, 2016. On June 10, 2016, the clerk’s office received Husband’s response in the form of a letter to the family court judge, which the clerk’s office rejected as improper. The clerk’s office explained to Husband that his response could not be processed because his letter to the judge was impermissible, the document did not contain a case number, and the clerk’s office could not identify a case number relating to Frank Pate or Leila Pate. The clerk’s office informed Husband how to file a proper response and also gave instructions about applying for a filing fee deferral because the fee was required before Husband could file a response.

¶3 On June 28, 2016, Husband applied for a fee deferral, and he listed his address in Bonham, Texas. The family court granted his deferral request the next day, but the order was mailed to an incorrect address in Frisco, Texas. On July 15, 2016, Wife filed an application and affidavit for default because Husband had not responded to the petition, and she sent the application of default to the Bonham address pursuant to Arizona Rule of Family Law Procedure (“ARFLP”) 44. On July 26, 2016, the clerk’s office received return mail regarding Husband’s fee deferral sent to the wrong address, and the clerk’s office stated that “[u]ntil further notice, the clerk’s office will not send out any mail to this party until a new address is provided.” On July 27, 2016, the court sent notice that Wife’s application and affidavit for default were set aside because of insufficient service, but the family court sent notice to Wife only. On August 12, 2016, however, the family court issued another notice stating that Wife had in fact properly served Husband based on an affidavit of service, and default was entered. Again, Husband did not receive the default notice.

¶4 The family court set a default hearing for October 5, 2016, and only Wife received notice from the court. Without Husband’s appearance,

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the family court dissolved the marriage and ordered that Wife have sole legal decision-making with no parenting time for Husband. The default hearing results were sent to Husband, who then resided in Littleton, Colorado. In November 2016, Husband filed another application for a fee deferral, and the family court granted the request. In January 2017, Husband moved to reverse the family court's judgments as void because he was present at the Colorado address on July 27, 2016, and Wife had knowledge of his location. Thus, he argued that he should have received notice of the default proceedings at that address rather than the Texas address. The family court denied Husband's motion. Husband timely appealed.

DISCUSSION

¶5 Husband argues that the family court erred by not vacating the entry of default or the judgment of default against him because his due process rights were violated multiple times throughout the dissolution proceedings due to lack of notice. The decision whether to vacate the entry or judgment of default is within the sound discretion of the family court and will not be set aside unless the court has abused its discretion. *See Ruiz v. Lopez*, 225 Ariz. 217, 220 ¶ 8 (App. 2010) (analyzing Arizona Rule of Civil Procedure 55, which is the rule that Arizona Rule of Family Law Procedure 44 is based upon). Sufficient evidence must be present in the record to set aside the entry of default or a default judgment from which the family court can exercise that discretion. *Id.*

¶6 ARFLP 44(A)(1)(c) states that "[i]f the whereabouts of a party claimed to be in default are unknown to the party requesting the entry of default . . . the application for entry of default shall so state and shall be mailed to the unrepresented party's last known address." After entry of default, the respondent has ten days to file a responsive pleading. Ariz. R. Fam. Law P. 44(A)(4). Under ARFLP 44(B)(2), if the party against whom default judgment is sought has appeared in the action, then that party shall receive written notice at least three days before the hearing. Whether a party has appeared is construed liberally and generally applies to any action taken by the respondent in which he recognizes that the case is in court and submits himself to the court's jurisdiction. *See Tarr v. Superior Court*, 142 Ariz. 349, 351 (1984) (analyzing default judgment under Arizona Rule of Civil Procedure 55). ARFLP 85(C)(1)(d) states that the family court may relieve a party from a final judgment if the judgment is void. Because Husband appeared in this case and did not receive three days' notice of the default hearing, the family court abused its discretion by not vacating the default judgment.

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1. Entry of Default

¶7 Here, Husband received proper service in Bonham, Texas on May 11, 2016. He attempted to file a response on June 10, 2016, but the clerk's office deemed that the form of Husband's response was improper. Wife subsequently applied for entry of default on July 15, 2016. Husband claims that at the time Wife applied for entry of default that she knew Husband was no longer living in Bonham. Other than Husband's self-serving statements in his motions, however, no evidence in the record supports his assertion that Wife knew he was not living in Bonham when she sent the copy of the default application on July 15. Based on the evidence in the record, Wife complied with ARFLP 44(A)(1)(c) by sending notice to Husband's last known address in Bonham, and Husband did not file a response within ten days. As such, the family court did not abuse its discretion by finding that the notice of default and entry of default were proper.

2. Notice of Hearing and Default Judgment

¶8 Husband also claims that the family court violated his due process rights by failing to provide notice of the default hearing date, the judgment of default, and the decree of the family court. Here, Husband applied for a fee deferral on June 28, and the family court granted his request the next day. Husband's fee deferral request demonstrated his knowledge that the case was in court and subject to the court's jurisdiction. Thus, Husband's action was sufficient for an appearance, and he was entitled to receive three days' notice of the default hearing. *See* Ariz. R. Fam. Law P. 44(B)(2). After the clerk's office mistakenly mailed Husband's fee deferral approval to an incorrect address, the office declined to mail anything else to Husband until a new address was provided. Consequently, Husband did not receive notice of default that was entered on August 12, and he did not receive notice of the default hearing set for October 5. Accordingly, because Husband did not receive three days' notice of the default hearing, the family court abused its discretion by not vacating the void default judgment.¹

¹ Husband also argues that the family court violated his due process rights by striking his "Objections for Record" and generally denying "his right to be heard" regarding his children. Because we vacate and remand the default judgment, we need not address these issues.

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CONCLUSION

¶9

For the foregoing reasons, we vacate and remand.



AMY M. WOOD • Clerk of the Court
FILED: AA