

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

---

In re the Marriage of:

DUSTIN J. HAMBY, *Petitioner/Appellee*,

*v.*

COURTNEY ANN HAMBY, *Respondent/Appellant*.

No. 1 CA-CV 19-0498 FC

FILED 8-13-2020

---

Appeal from the Superior Court in Maricopa County

No. FC2015-071603

The Honorable Lisa Ann Vandenberg, Judge

**VACATED AND REMANDED**

---

COUNSEL

Ortecho Law PLLC, Phoenix  
By Christina C. Ortecho  
*Counsel for Petitioner/Appellee*

Joe M. Romley, PC, Phoenix  
By Joe M. Romley  
*Counsel for Respondent/Appellant*

**MEMORANDUM DECISION**

Judge Randall M. Howe<sup>1</sup> delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge D. Steven Williams joined.

---

**H O W E**, Judge:

¶1 Courtney Hamby (Wife) appeals the family court’s denial of her motion for relief from the decree of dissolution awarding shares in Elite Sales & Marketing Group, Inc. (Elite) to Dustin Hamby (Husband). Because the court erred in denying the motion without holding an evidentiary hearing, we vacate the order and remand for further proceedings.

**FACTS AND PROCEDURAL HISTORY**

¶2 Husband and Wife were married in 2005. In 2017, Wife petitioned for dissolution. Wife attached a fully executed property settlement agreement (PSA), wherein the parties agreed Husband would receive the Elite shares, which the parties valued at \$74,000. In November 2017, the family court entered a default decree effectuating the PSA and awarding the Elite shares to Husband.

¶3 Four months later, Wife moved for relief from the decree<sup>2</sup> on the grounds that Husband had misrepresented the value of the Elite shares and secretly arranged to sell them for more than \$650,000. She asked the family court to vacate the award of the Elite shares to Husband and enter judgment in her favor for half the shares’ actual value.

---

<sup>1</sup> Judge Howe replaces the Honorable Kenton D. Jones, who was originally assigned to this panel. Judge Howe has read the briefs and reviewed the record.

<sup>2</sup> The operative rule has been redesignated as Arizona Rule of Family Law Procedure 85(b). Absent material changes from the relevant date, we cite the current version of rules and statutes.

HAMBY v. HAMBY  
Decision of the Court

¶4 After a significant delay related to Husband’s bankruptcy filings, the family court set an evidentiary hearing in March 2019.<sup>3</sup> The court ordered Wife to “file, within 10 days, an addendum to the motion [for relief]” that would: (1) clarify which document Wife sought relief from—the divorce decree or the PSA; and (2) identify authority permitting the court to grant relief only from that portion of the decree that awarded Husband the Elite shares. Wife did not supplement her request as ordered. Husband then asked the court to deny Wife’s motion for relief, and the court did so without awaiting Wife’s response.<sup>4</sup>

¶5 Two days later, Wife provided the requested information within her response to Husband’s motion. After receiving notice that her motion for relief from the decree had already been denied, Wife moved to clarify and to alter or amend the order disposing of her motion, asking the family court to clarify the basis for its disposition. Wife conceded she had not timely filed the addendum but argued the thirteen-day delay was due, at least in part, to Husband’s failure to timely provide discovery and cooperate with court-ordered settlement discussions. At the time Wife filed the additional information, the evidentiary hearing was still thirty-seven days away.

¶6 The family court clarified that it intended to dispose of Wife’s motion on its own initiative in accordance with Arizona Rule of Family Law Procedure 76.2 (authorizing sanctions against a party who fails to participate in a court proceeding). After considering the parties’ filings, the court confirmed its determination that Wife did not timely file the requested addendum, found no good cause for her failure to do so, and affirmed its denial of her motion for relief from the decree. Wife timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) and -2101(A)(2). *See In re Marriage of Dougall*, 234

---

<sup>3</sup> Although the family court announced it would treat Wife’s request “as a petition,” a motion for relief from a decree does not qualify as a matter raisable in a petition under Arizona Rule of Family Law Procedure 23(a).

<sup>4</sup> The family court and the parties repeatedly refer to the disposition of Wife’s motion for relief from the decree as a “dismissal.” However, courts do not dismiss unsuccessful motions filed under Rule 85; they deny them. *See, e.g., Quijada v. Quijada*, 246 Ariz. 217, 220, ¶ 7 (App. 2019) (“We review the *denial* of a motion to set aside a decree for an abuse of discretion.”) (emphasis added).

HAMBY v. HAMBY  
Decision of the Court

Ariz. 2, 5-6, ¶ 9 (App. 2013) (holding the denial of a motion for relief from judgment is appealable as a “special order made after final judgment”).

DISCUSSION

¶7 The Arizona Rules of Family Law Procedure authorize the family court to impose sanctions “upon motion or its own initiative . . . if a party or attorney . . . fails to obey a scheduling or pretrial order.” Ariz. R. Fam. Law P. 76.2(a)(1). Sanctions are available if the disobedient party fails to show good cause for its conduct and include, but are not limited to, “striking pleadings in whole or in part; . . . dismissing the action or proceeding in whole or in part; . . . [and] rendering a default judgment, in whole or in part, against the disobedient party.” Ariz. R. Fam. Law P. 76.2(b)(3), (5).

¶8 Wife argues the family court erred in denying her motion for relief from the decree as a sanction for failing to timely file the addendum the court had requested without making express findings regarding fault or willfulness and without considering the availability and efficacy of less severe sanctions. She further argues the court deprived her of due process by doing so without conducting an evidentiary hearing to determine whether her conduct was willful.

¶9 Although we typically review a choice of sanction for an abuse of discretion, we have held in the discovery context that a court’s discretion “in entering a default for failure to comply with an order compelling discovery is more limited than when it employs lesser sanctions.” *Seidman v. Seidman*, 222 Ariz. 408, 411, ¶ 18 (App. 2009). Further, the “power to employ the ultimate sanctions of dismissal or entry of default is circumscribed by due process considerations.” *Id.* (quoting *Lenze v. Synthes, Ltd.*, 160 Ariz. 302, 305 (App. 1989)); *Nesmith v. Superior Court*, 164 Ariz. 70, 71 (App. 1990) (“There are constitutional limitations on the power of the courts to dismiss an action, even in aid of their own valid processes.”).

¶10 These same principles apply to sanctions imposed for failing to obey a pretrial order that deprives a litigant of disposition upon the merits; sanctions “were not meant to thwart that goal [of maximizing the likelihood of a decision on the merits] by encouraging litigants to lie in wait for their opponents to miss a deadline and then use that momentary transgression to get a case effectively dismissed.” *Allstate Ins. Co. v. O’Toole*, 182 Ariz. 284, 287 (1995) (citing *Gorman v. City of Phx.*, 152 Ariz. 179, 183 (1987)). Indeed, we have long and oft stated a preference for “determin[ing]

HAMBY v. HAMBY  
Decision of the Court

cases on their merits rather than on points of procedure.” *Rodriguez v. Williams*, 104 Ariz. 280, 283 (1969) (citing *Colboch v. Aviation Credit Corp.*, 64 Ariz. 88, 94 (1946)); see also *Green v. Lisa Frank, Inc.*, 221 Ariz. 137, 153, ¶ 40 (App. 2009) (“Arizona courts prefer that claims be adjudicated on their merits.”); see also Ariz. R. Fam. Law P. 1(b) (“Parties and courts should construe [procedural] rules, and courts should enforce them, in a manner that ensures a just, prompt, and inexpensive determination of every action and proceeding.”).

¶11 Under these principles, the family court abused its discretion in denying Wife’s motion. Before a court may deprive a litigant of disposition upon the merits as a sanction, “due process requires that it hold an evidentiary hearing.” *Seidman*, 222 Ariz. at 411, ¶ 19. After considering the evidence:

[T]he court must make express findings as to (1) whether the fault for the violation lies with the client or counsel; (2) whether the violation was committed willfully or in bad faith; and (3) whether the egregiousness of the violation warrants the ultimate sanction of dismissal or some lesser sanction.

*Id.* at 411-12, ¶ 20 (collecting cases). In determining whether a lesser sanction will suffice, the court should focus upon whether the disobedient party’s conduct caused actual prejudice. See *Wayne Cook Enters., Inc. v. Fain Props. Ltd. P’ship*, 196 Ariz. 146, 149, ¶ 13 (App. 1999); see also *State v. Youngblood*, 173 Ariz. 502, 507 (1993) (concluding the mere “possibility of prejudice is not sufficient to justify the ultimate sanction”); *Green*, 221 Ariz. at 153, ¶ 40 (“[A] claim should not be dismissed absent extreme circumstances.”). And a lesser sanction should generally be used if counsel, as opposed to the party, is at fault. See *Wayne Cook*, 196 Ariz. at 149, ¶ 12 (citing *Birds Int’l Corp. v. Ariz. Maint. Co.*, 135 Ariz. 545, 547 (App. 1983)); see also *Nesmith*, 164 Ariz. at 72-73 (encouraging fee shifting as “the rule, not the exception” when the court must intervene to address a party’s conduct).

¶12 Here, the family court declined to schedule an evidentiary hearing or even await a response from Wife and later affirmed its decision based solely upon the parties’ written explanations. The court made no express findings whether Wife was personally at fault or what circumstances, if any, were sufficiently extreme to warrant summarily denying her motion. This disposition denied Wife a meaningful opportunity to be heard, see *Seidman*, 222 Ariz. at 412, ¶ 21 (remanding for an evidentiary hearing to consider whether default was an appropriate

HAMBY v. HAMBY  
Decision of the Court

discovery sanction even where the trial court had found “irresistible evidence against Wife as to dishonesty and manipulation” because that finding “presupposed the result of the hearing”), deprived her of due process, and constitutes reversible error.

**CONCLUSION**

¶13 We vacate the family court’s order denying Wife’s motion and remand for an evidentiary hearing and the entry of factual findings in accordance with the principles articulated herein, followed by reconsideration of the disposition of Husband’s motion to dismiss.

¶14 Husband requests an award of attorneys’ fees incurred on appeal pursuant to A.R.S. § 25-324. Having considered the reasonableness of the parties’ positions and asserted disparity in financial resources, we, in the exercise of our discretion, decline his request.



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