DIVISION ONE
FILED: 03-16-2010
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BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 09-0198
	)	
DEBORAH WIGAND,	)	DEPARTMENT A
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
WAYNE WIGAND,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FN 2008-000878

The Honorable Michael R. McVey, Judge

AFFIRMED

The Harrian Law Firm PLC — Glendale
By Julius Harms
Attorneys for Petitioner/Appellant

Wayne Wigand, Respondent/Appellee — Gold Canyon
In Propria Persona

P O R T L E Y, Judge

¶1 Deborah Wigand ("Wife") appeals from an order vacating a default decree of dissolution. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Wife filed for divorce in February 2008, and requested spousal maintenance, an equitable division of the community property and debts, and attorneys' fees. Her petition also alleged that Wayne Wigand ("Husband") wasted community assets during the marriage. Husband, who was living and working in New Mexico, accepted and waived service of process.

¶3 Although Husband claimed that the parties were discussing a divorce settlement, Wife filed an application and affidavit for default, and the court subsequently entered a default decree.

¶4 The decree awarded Wife $2895 per month in spousal maintenance for twelve years, the community residence (which had approximately $155,000 in equity), all personal property and the vehicle in her possession, the retirement account in her name, any debts that were incurred by her or in her name, and her attorneys' fees. Husband received the car and personal property in his possession, the retirement account in his name, and any debts that were incurred by him or in his name.

¶5 Five months later, Husband sought to set aside and vacate the default decree. After an evidentiary hearing, the family court vacated the decree, in part, pursuant to Arizona Rule of Family Law Procedure 85(C)(1)(a). Wife appealed, and we

have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).[1]

DISCUSSION

¶6 "We review a trial court's ruling on a motion for relief from judgment under Rule 60(c) for an abuse of discretion." *Maher v. Urman,* 211 Ariz. 543, 550, ¶ 21, 124 P.3d 770, 777 (App. 2005). Although the family court cited Rule 85(C)(1)(a) as the basis for its ruling, the rule is analogous to Arizona Rule of Civil Procedure 60(c)(1). Both rules provide that the court may relieve a party from a final judgment for "mistake, inadvertence, surprise or excusable neglect." *Compare* Ariz. R. Fam. L.P. 85(C)(1)(a), *with* Ariz. R. Civ. P. 60(c)(1). Therefore, the cases that interpret Arizona Rule of Civil Procedure 60(c)(1) are applicable to Arizona Rule of Family Law Procedure 85(C)(1)(a). *See* Ariz. R. Fam. L.P. 1, cmt.

¶7 "The purpose of [Rule 60(c)(1)] is to provide relief for those mistakes and errors which inevitably occur despite diligent efforts to comply with the rules." *Maher,* 211 Ariz. at 550, ¶ 21, 124 P.3d at 777 (*quoting City of Phoenix v. Geyler,* 144 Ariz. 323, 332, 697 P.2d 1073, 1082 (1985)). "To obtain relief under Rule 60(c)(1), a party must 'show (1) mistake, inadvertence, surprise, or excusable neglect; (2) that relief

[1] *See also Sanders v. Cobble,* 154 Ariz. 474, 475, 744 P.2d 1, 2 (1987) (holding that "an order setting aside a default judgment is appealable as a special order made after judgment").

was sought promptly; and (3) that a meritorious claim existed.'" *Maher,* 211 Ariz. at 550, ¶ 21, 124 P.2d at 777 (*quoting Copeland v. Ariz. Veterans Mem'l Coliseum & Exposition Ctr.,* 176 Ariz. 86, 89, 859 P.2d 196, 199 (App. 1993)). "The general test of what is excusable is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the same circumstances." *State v. Jackson,* 210 Ariz. 466, 469, ¶ 15, 113 P.3d 112, 115 (App. 2005) (*quoting Coconino Pulp & Paper Co. v. Marvin,* 83 Ariz. 117, 120, 317 P.2d 550, 552 (1957)).

¶8 Regardless of whether Husband's failure to respond to the petition was reasonable, once Wife notified him that there was an upcoming court hearing, he was required to act. At the very least, he should have opened the court notices he acknowledged receiving.

¶9 We find *Beal v. State Farm Mut. Auto. Ins. Co.*, 151 Ariz. 514, 729 P.2d 318 (App. 1986) analogous. In *Beal,* the appellants failed to respond after being served with a summons and complaint which accompanied a notice of dismissal in a related action. *Id.* at 518, 729 P.2d at 322. Their attorney had advised them that nothing further needed to be done. *Id.* However, the appellants only told their attorney of the notice of dismissal and did not read the accompanying summons and complaint. *Id.* The court held it was reasonable for the trial court to have found this conduct unreasonable and that it did

not constitute excusable neglect. *Id.* Similarly, Husband's failure to open and read his mail was not reasonable, particularly after being told of an upcoming hearing.

¶10 At the evidentiary hearing, the court noted the unconscionable nature of the decree. Although the minute entry order did not refer to Rule 85(c)(1)(f), the rule allows relief from a final judgment for "any other reason justifying relief from the operation of the judgment." The rule "may be applied when relief is not available under any of the other subsections to the rule, and 'when our systemic commitment to finality of judgments is outweighed by extraordinary circumstances of hardship or injustice.'" *Birt v. Birt,* 208 Ariz. 546, 551, ¶ 22, 96 P.3d 544, 549 (App. 2004) (*quoting Panzino v. City of Phoenix,* 196 Ariz. 442, 445, ¶ 6, 999 P.2d 198, 201 (2000)) (internal citations omitted).

¶11 As the family court noted, Wife was awarded nearly all of the community assets, including all of the substantial equity in the marital home, her entire retirement account worth approximately $150,000, a car newer than Husband's, and all of the personal property in the marital home. Husband was awarded his older car, which was worth less than Wife's car, and his retirement account with a zero balance. Moreover, Husband was required to pay more than $80,000 in credit card debt. Although Wife claimed she knew nothing about the debt, and Husband

maintained it was for household furnishings and family expenses, the family court found that he had made a prima facie case that the debt was a community obligation. Because the decree only allocated $4000 in debt to Wife, the court stated that a reasonable person willing to risk entry of a default divorce decree would not have reason to expect such an unconscionably unfair division of community assets and debts. We agree.

¶12 Arizona law requires the courts to divide community property equitably. *See* A.R.S. § 25-318(A) (2007). The decree did not divide the community assets and debts equitably. Even if the family court had accepted Wife's allegation that waste created the credit card debt, the division of the community assets was grossly inequitable. The court may exercise its discretion under Rule 85(C)(1)(f) and grant relief where the judgment "is harsh, rather than fair and equitable." *Birt,* 208 Ariz. at 551, ¶ 22, 96 P.3d at 549 (*citing Ulibarri v. Gerstenberger,* 178 Ariz. 151, 164, 871 P.2d 698, 711 (App. 1993)). We can affirm the trial court when it reaches the correct result for any reason supported by the record. *See State v. Wassenaar*, 215 Ariz. 565, 577, ¶ 50, 161 P.3d 608, 620 (App. 2007); *Linder v. Brown & Herrick,* 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997); ARCAP 13(b) (stating that an appellate court can affirm a superior court on any basis adequately presented in the record). As a result, we find that

the family court did not abuse its discretion in setting aside the default decree.

ATTORNEYS' FEES ON APPEAL

¶13 Wife requested an award of her attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2009). Although Husband earns more than Wife, in the exercise of our discretion, we deny Wife's request. We are also denying Husband's request for attorneys' fees on appeal because he was not represented. Husband is, however, entitled to his costs pursuant to A.R.S. § 12-341 (2003) upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶14 Based on the foregoing, we affirm the order setting aside the default decree.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Judge

/s/
_____
ANN A. SCOTT TIMMER, Chief Judge