IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF:

ALINA MAHOUNGOU,
Petitioner/Appellant,

and

DANIEL MAHOUNGOU,
Respondent/Appellee.

No. 2 CA-CV 2015-0022
Filed September 14, 2015

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NOT FOR PUBLICATION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. D20141574
The Honorable Deborah Pratte, Judge Pro Tempore

AFFIRMED

COUNSEL

Southern Arizona Legal Aid, Inc., Tucson
By Walter Anthony Wisz
Counsel for Petitioner/Appellant

West, Elsberry, Longenbaugh & Zickerman, PLLC, Tucson
By Anne Elsberry
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this post-dissolution-of-marriage matter, Alina Mahoungou appeals from the trial court's order terminating appellee Daniel Mahoungou's obligation to pay spousal maintenance and denying her motion to continue a hearing on Daniel's petition for modification of spousal maintenance. Alina argues the court erred by vacating the spousal maintenance order pursuant to Rule 85(C), Ariz. R. Fam. Law P., because Daniel did not cite that rule in his petition for modification and the grounds for granting relief under the rule were not established. She also contends the court misapplied the spousal maintenance guidelines and erred by not granting her request for a second evidentiary hearing. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Alina and Daniel married in April 2009. In May 2014, Alina filed a petition for dissolution of marriage without children. She requested spousal maintenance of $800 per month. When Daniel did not file a response to the petition, Alina filed an application for entry of default. Following a default hearing, the trial court entered a decree of dissolution in September 2014, awarding Alina $800 per month in spousal maintenance. Less than a

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

month later, Daniel filed a petition for order to appear and modification of spousal maintenance, claiming he "did not understand the Summons he received or the process for divorce, and expected to receive something that would tell [him] when to go to court." He requested that the court order Alina to "appear and show cause why spousal maintenance is appropriate." The court granted the petition for order to appear and scheduled an evidentiary hearing on the petition for modification for December 15, 2014.

¶3 Alina filed a response to Daniel's petition, as well as a motion to continue the hearing. In her motion to continue, she stated she had been out of the country since before the trial court's order setting the hearing date and had a return flight booked for January 12, 2015. She also stated she "requires an interpreter, making any telephonic appearance difficult." The court did not rule on the motion to continue before the evidentiary hearing, which took place as scheduled on December 15. Alina did not appear, and her attorney stated she was in Russia. The court denied the motion to continue and heard testimony and received evidence.

¶4 The trial court found there was a "sufficient basis to relieve [Daniel] from the spousal maintenance order" and that there had been, "pursuant to Rule 85(C)(1)(a)[,] excusable neglect, and pursuant to Rule 85(C)(1)(c)[,] fraud or misrepresentation or other misconduct of an adverse party." Thus, the court vacated the spousal maintenance order and ordered Alina to reimburse Daniel for the spousal maintenance he already had paid. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).

Discussion

Motion to Continue

¶5 Alina argues the trial court erred by denying her motion to continue the hearing. We review a court's denial of a motion to continue for an abuse of discretion. *Ornelas v. Fry*, 151 Ariz. 324, 329, 727 P.2d 819, 824 (App. 1986). A motion to continue based on the unavailability of a party or witness must state:

> a. why the testimony of such witness is material to the proceedings;
>
> b. that the party has used due diligence to obtain such testimony;
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> c. when the party learned of the witness'[s] or the party's unavailability; and
>
> d. that the postponement is not sought only for delay, but is based on good cause.

Ariz. R. Fam. Law P. 77(C)(2).

¶6 Daniel filed his petition for modification of spousal maintenance on September 15, 2014. On October 3, the trial court issued its order to appear, setting an evidentiary hearing for December 15. On November 7, Alina filed a response to Daniel's petition. At that time, she already was in Russia. However, she did not state in her response that she could not be present for the hearing. And, she did not file her motion to continue until December 4. In that motion, she stated only that it would be difficult for her to appear telephonically. However, she did not request to appear telephonically. The court noted in denying the motion to continue that it would have granted a motion for telephonic appearance. Thus, the record shows that Alina had notice of the December 15 hearing date, that the hearing would be an evidentiary hearing, and that she delayed filing a motion to continue until shortly before the hearing. In addition, she could have but did not file a motion to appear telephonically.

¶7 Moreover, Alina's counsel conceded at the start of the hearing that he did not think Alina needed to be present because he would primarily be presenting argument. Daniel's counsel opposed the continuance, noting the length of time it had taken to schedule the matter for a hearing and that Daniel had begun working a second full-time job to fulfill his spousal maintenance obligation. His counsel also stated she did not think it was "absolutely necessary" that she be able to cross-examine Alina. In denying the

motion to continue, the trial court noted "the time it's taken to get to hearing and the harm to Mr. Mahoungou to just continue this matter." Based on the foregoing, we cannot say the court abused its discretion in denying the motion to continue. *See Ornelas*, 151 Ariz. at 329, 727 P.2d at 824.

Rule 85 Relief

¶8 Alina next argues the trial court erred by vacating the spousal maintenance order pursuant to Rule 85 because "the motion was not properly before the court, there was no excusable neglect, and there was no fraud or misrepresentation sufficient to vacate the judgment." Rule 85(C)(1)(a) and (c) provides that the court may "relieve a party . . . from a final judgment, order or proceeding" due to "mistake, inadvertence, surprise, or excusable neglect" or "fraud, misrepresentation, or other misconduct of an adverse party." We review the grant of a motion to set aside a judgment for an abuse of discretion.[2] *Johnson v. Elson*, 192 Ariz. 486, ¶ 9, 967 P.2d 1022, 1024 (App. 1998).

¶9 Specifically, Alina contends Daniel did not cite Rule 85 in his motion, and it was not "clear to either party that it was the basis for the motion." Thus, she argues, the rule was "never properly before the court." We disagree. First, nothing in the language of Rule 85(C) requires a party to specifically cite the rule in a motion seeking relief under the rule. It provides only that the trial court may relieve a party from a final judgment "[o]n motion." In addition, we have found no authority—and Alina has directed us to none—to support her argument that a court may not grant relief under Rule 85 if the party requesting relief does not cite the rule. And, although Alina orally moved for reconsideration without any grounds after the court ruled, she did not object to the court's use of Rule 85 or state that she had been surprised. The court here

[2]Rule 85 is substantially the same as Rule 60, Ariz. R. Civ. P. "Wherever the language in [the Arizona Rules of Family Law Procedure] is substantially the same as the language in other statewide rules, the case law interpreting that language will apply to these rules." Ariz. R. Fam. Law P. 1 committee cmt.

specifically cited the testimony and evidence it had considered in granting relief under Rule 85. *Cf. Schmidt v. Schmidt*, 158 Ariz. 496, 498, 763 P.2d 992, 994 (App. 1988) (party seeking modification of decree need not file motion pursuant to Rule 60(c), Ariz. R. Civ. P., as long as trial court finds at least one Rule 60(c) condition exists).

¶10 Moreover, based on the reason Daniel had given for not responding to the petition for dissolution of marriage—that he did not understand the summons he had received and expected to receive something from the court informing him when to appear—the trial court could only have considered his argument as a motion under Rule 85. *See id.* And it is clear the court treated Daniel's petition as a Rule 85 motion because the court specifically noted it could grant relief under Rule 85 and found there had been "excusable neglect" and "fraud or misrepresentation or other misconduct of an adverse party." *See* Ariz. R. Fam. Law P. 85(C)(1)(a), (c).

¶11 Alina also argues she was "unable to present evidence of her disability," which Daniel challenged during the evidentiary hearing, because her counsel did not know her ability or inability to work would be an issue.[3] She maintains Daniel's failure to cite Rule 85 and the trial court's decision to vacate the judgment based on that rule prejudiced her. Alina alleged in her petition for dissolution of marriage that she is disabled. And, she testified at the default hearing that she was ill and had no income. However, when

[3]Alina argued in her response to Daniel's petition that "[*r*]*es judicata* bars [Daniel] from obtaining a modification of the award based on facts which he could have raised during the dissolution." Although she cites *Craig v. Superior Court*, 141 Ariz. 387, 389, 687 P.2d 395, 397 (App. 1984), for the proposition that "[t]he princip[le] of res judicata prevents the real party in interest from obtaining a modification of the award based upon facts which could have been raised at the dissolution hearing," she has not adequately developed an argument that res judicata barred the trial court from vacating the spousal maintenance order. Accordingly, we do not consider the argument further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal waives claim).

Daniel testified at the hearing on his motion that Alina had been employed both while they were living together and after they separated and that he did not know about her illness, Alina's counsel did not object or request a continuance so that she could appear. Because she did not object to that testimony on lack of notice and resulting prejudice grounds below, she has waived her argument on appeal.[4] *See State v. Thomas*, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981) ("[F]ailure to object to evidence, testimony or arguments waives these matters on appeal."). Moreover, as discussed above, Alina had notice that the hearing would be evidentiary in nature; she could have filed a request to appear telephonically, which the court suggested it would have granted. Thus, she was not deprived of an opportunity to present evidence. We cannot say the court erred by conducting the hearing without Alina being present.

Fraud, Misrepresentation or Other Misconduct

¶12 Citing *Welch v. McClure*, 123 Ariz. 161, 598 P.2d 980 (1979), Alina nevertheless argues that the trial court erred in granting relief pursuant to Rule 85(C)(1)(c) based on its determination that there had been fraud, misrepresentation, or other misconduct on her part. In *Welch*, our supreme court stated: "If the motion does not set forth a basis recognized by the rule for setting aside a judgment, relief must be denied." 123 Ariz. at 165, 598 P.2d at 984. *Welch* is distinguishable from this case. There, the court's comment was in the context of discussing whether an untimely motion for new trial under Rule 59 could be treated as one filed under Rule 60(c), the civil rule counterpart to Rule 85. *Id.* at 164-65, 598 P.2d at 983-84. The court pointed out that the trial court did not "treat[] the motion as one under [R]ule 60(c); nor does it appear that [it] should have." *Id.* at 165, 598 P.2d at 984. Unlike a motion for new trial, a "[R]ule 60(c) motion is not a device for weighing evidence or reviewing legal errors." *Id.* Here, the trial court did not

[4]Alina's counsel objected to Daniel's testimony on grounds of relevance and res judicata. *See State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground.").

use Rule 85 for either of these improper purposes. And although Daniel did not allege fraud and misrepresentation as a basis for setting aside the award of spousal maintenance, Alina did not make this argument below and, thus, has waived it on appeal. *See Thomas*, 130 Ariz. at 435, 636 P.2d at 1217.

¶13 Moreover, the trial court's ruling was based on the evidence presented at the hearing on Daniel's motion. Alina did not object to that evidence on the basis that Daniel had not alleged fraud or misrepresentation in his motion. And "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Ariz. R. Fam. Law P. 34(B). "Failure to object to the introduction of evidence on the ground that it is not within the issues is sufficient to imply consent to try such issues." *In re Estate of McCauley*, 101 Ariz. 8, 18, 415 P.2d 431, 441 (1966); *see also Parker v. City of Tucson*, 233 Ariz. 422, ¶ 51, 314 P.3d 100, 117 (App. 2013).

¶14 The trial court found that it had "received believable testimony from [Daniel] that [Alina] was gainfully employed" during the time he knew her in Russia and that it had "received credible testimony from [Daniel] that [Alina] was self-sufficient while living in the United States and not living with [Daniel]." Although Alina had asserted in her petition for dissolution of marriage that she was disabled and testified at the default hearing that she had lymphoma and had no income, Daniel testified at the hearing on his motion that Alina had been employed as a legal assistant when he knew her in Russia, and that she had been employed as a caregiver in Tucson. He testified that he sometimes would give her rides to or from work and that she had been able to support herself apart from several occasions on which Daniel gave her money. He also testified he had no knowledge that Alina suffered from lymphoma.

¶15 "We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998). Alina cites no authority to support her suggestion that the court could have considered her previous "multiple references to [her] disability" in ruling on Daniel's petition for modification. We

cannot conclude the court abused its discretion in granting relief under Rule 85(C)(1)(c).[5]

Spousal Maintenance Guidelines

¶16 Alina argues the trial court abused its discretion by ruling on her entitlement to spousal maintenance after vacating the judgment. She contends the court "failed to properly apply the spousal maintenance guidelines and should have set a hearing on the issue." But Rule 85(C) allows the court to relieve a party from a final judgment. Thus, the issue before the court at the evidentiary hearing encompassed more than just the amount of spousal maintenance, it also included Alina's entitlement to any spousal maintenance. *See* A.R.S. § 25-319(A); *Gutierrez*, 193 Ariz. 343, ¶ 15, 972 P.2d at 681. And, the threshold question for the court was "whether [Alina] 'me[t] the statutory requirements for maintenance set out in A.R.S. § 25-319(A).'" *Gutierrez*, 193 Ariz. 343, ¶ 15, 972 P.2d at 681, *quoting Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984). Only if the court had determined she met those requirements, would it have been necessary for it to determine "'the amount and duration of the award'" based on "'the factors listed in A.R.S. § 25-319(B).'" *Id.*, *quoting Thomas*, 142 Ariz. at 390, 690 P.2d at 109. The court received testimony and evidence regarding Alina's entitlement to spousal maintenance, and based on its finding that she had misrepresented her disability and illness, determined she was not so entitled. Alina has cited no authority to support her argument that she was entitled to a second evidentiary hearing on that issue. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992).

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[5]Alina also claims Daniel was not entitled to relief because the fraud alleged did not prevent him from responding to her petition for dissolution. But she has failed to cite any authority to support her argument. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992) (argument waived if made without supporting authority). And because we conclude the trial court did not err in granting relief under Rule 85(C)(1)(c), we need not address Alina's arguments that the court erred in determining there had been excusable neglect that warranted relief under Rule 85(C)(1)(a).

Attorney Fees

¶17 Both parties request attorney fees pursuant to A.R.S. § 25-324 and Rule 21(a), Ariz. R. Civ. App. P. In our discretion, we decline to award attorney fees. Daniel also requests costs, and, as the prevailing party on appeal, he is entitled to an award of statutory, taxable costs upon compliance with Rule 21.

Disposition

¶18 For the foregoing reasons, we affirm.