IN THE UTAH COURT OF APPEALS

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Van O. Peterson, Petitioner and Appellee, v. Korrin Peterson, Respondent and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20050472-CA F I L E D (May 18, 2006) 2006 UT App 199

Sixth District, Manti Department, 034600189
The Honorable Paul D. Lyman

Attorneys: Bruce L. Nelson and Jenaveve Arnoldus, Orem, for Appellant
Douglas L. Neeley, Manti, for Appellee

Before Judges Bench, Billings, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Respondent Korrin Peterson appeals the trial court's denial of her motion to set aside the divorce decree. Our review of the denial is limited because "[t]he district court judge is vested with considerable discretion under Rule 60(b) in granting or denying a motion to set aside a judgment." Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986) (per curiam). See also Utah R. Civ. P. 60(b). Thus, "before we will interfere with the trial court's exercise of discretion, abuse of that discretion must be clearly shown." Katz, 732 P.2d at 93.

Respondent first argues that the notice of hearing sent to her did not comply with the five-day notice requirement of rule 6(d) of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 6(d). But "[t]he five-day notice provision of Rule 6(d) . . . is not a hard and fast rule, and the trial court may dispense with

technical compliance thereof if there be satisfactory proof that a party had actual notice and time to prepare to meet the questions raised by the motion of an adversary." Jensen v. Eames, 30 Utah 2d 423, 519 P.2d 236, 238 (1974).

It is clear from the language of the district court's ruling that the court addressed this issue and determined actual notice had been received and was "adequate." We do not see an abuse of discretion here. There is certainly evidence from which the trial court could determine that Respondent received actual notice. And since the stated purpose of the evidentiary hearing was to determine the respective incomes of the parties for purposes of child support, vast amounts of time or keen legal insights were not necessary to prepare for the hearing. Further, such information was previously requested in interrogatories submitted to Respondent several months earlier, so this was in no way a surprise request.

Respondent also argues that the trial court abused its discretion by not granting her motion based on mistake and excusable neglect, fraud and misrepresentation, and ineffective assistance of counsel. It is not apparent from the trial court's ruling that the court even addressed these issues in its determination, which is an error that would usually require remand to the trial court to make appropriate findings. See Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 622 (Utah 1989). "However, a remand is not necessary if the evidence in the record is undisputed and the appellate court can fairly and properly resolve the case on the record before it." Id. Thus, in the interest of judicial economy, and because Respondent's arguments are unsuccessful even if we accept the facts as she has presented them, we address her additional arguments.

First, Respondent's mistake and excusable neglect claims are unavailing. Excusable neglect requires that Respondent exercise "'due diligence'" as would "a reasonably prudent person under similar circumstances." Mini Spas, Inc. v. Industrial Comm'n, 733 P.2d 130, 132 (Utah 1987) (per curiam) (citation omitted). A reasonably prudent person under similar circumstances would not, after notification of the hearing and previous warnings of sanctions by the court, choose to miss the hearing, regardless of a clearly adverse party's insinuations that attendance would be unnecessary because of ongoing settlement efforts. And it goes without saying that lack of legal experience and failure to procure legal representation do not excuse a party from personally appearing at a hearing. Furthermore, the Respondent's physical difficulties did not rise to the level required for excusable neglect. See Black's Title, Inc. v. Utah State Ins.

Dep't, 1999 UT App 330,¶10, 991 P.2d 607 ("A movant seeking relief may not simply rest on the assertion that he was ill to excuse his inaction; he must show that the nature of the illness incapacitated him such that he was unable to act.").

Second, Respondent's fraud and misrepresentation claims are also ineffectual. These claims require a showing that Respondent reasonably relied on a material misrepresentation. See Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1066-67 (Utah 1996); Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980). It is unclear whether the possibility of a settlement would qualify as a material fact for these purposes, as Respondent was still required to appear at the hearing notwithstanding any negotiations between the parties. But even assuming the mere prospect of a settlement would qualify as a material fact, Respondent's reliance on Petitioner's verbal promise to sign a settlement was not reasonable under the circumstances.

As to the claim of fraud against the court, Respondent has failed to show that Petitioner made a misstatement to the court when he answered that the real estate in question was premarital property. Respondent simply argues that the property was marital property because the mortgage "was secured shortly before the parties were married." But any property acquired by one party prior to marriage is premarital property. See Walters v. Walters, 812 P.2d 64, 67-68 (Utah Ct. App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992).

Finally, the ineffective assistance of counsel claim is misplaced. Although it appears that less than inspiring legal assistance was rendered here by Respondent's prior counsel, it is difficult to see how this would justify relief under rule 60(b) when counsel terminated his representation four months before the trial court entered a default divorce as a sanction. Moreover, if counsel renders deficient performance in the context of a civil proceeding, the deficiency, regrettable as it is, generally does not give rise to a true ineffective assistance of counsel claim. The right to effective assistance of counsel is usually not directly enforceable in civil cases. Rather, a malpractice action "is frequently suggested as the appropriate remedy for the client whose counsel's performance falls below the standard of professional competence." Davis v. Grand County Serv. Area, 905 P.2d 888, 894 (Utah Ct. App. 1995).

Accordingly, as Respondent has failed to show any grounds for relief under rule 60(b), we affirm the trial court's denial

of the motion to set aside the default divorce decree. The parties shall bear their own attorney fees incurred on appeal.

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Gregory K. Orme, Judge

WE CONCUR:

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Russell W. Bench,
Presiding Judge

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Judith M. Billings, Judge