IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF:

DAMARYS C. HEREDIA,
Petitioner/Appellee,

AND

ADRIAN HEREDIA,
Respondent/Appellant.

No. 2 CA-CV 2013-0070
Filed December 5, 2013

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NOT FOR PUBLICATION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); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Santa Cruz County
No. DO12187
The Honorable Anna M. Montoya-Paez, Judge

**AFFIRMED IN PART; VACATED IN PART;
REMANDED WITH INSTRUCTIONS**

COUNSEL

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Counsel for Respondent/Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this dissolution of marriage action, Adrian Heredia appeals from the trial court's order denying his motion to reconsider its denial of his motion to set aside entry of default and his motion to set aside default judgment in favor of appellee Damarys Heredia. On appeal, Adrian argues the court erred by refusing to set aside the entry of default when he had demonstrated his willingness to litigate the matter on the merits and by precluding him from participating at the default judgment hearing. For the reasons that follow, we affirm the entry of default, vacate portions of the default judgment, and remand with instructions.

Factual and Procedural Background

¶2 Damarys and Adrian were married in November 2002. They have one minor child. On August 9, 2012, Damarys filed a petition for dissolution of marriage in Santa Cruz County. She served Adrian with the petition on August 15. The same day, Adrian filed a separate petition for dissolution of marriage in Pinal County but never served Damarys with the petition.

¶3 Damarys filed an application for entry of default after Adrian failed to respond to her petition. Adrian was mailed a copy of the application. After the default became effective, Damarys requested a hearing for entry of default judgment, which was set for October 23, 2012. *See* Ariz. R. Fam. Law P. 44(A) and (B)(2). On October 1, Adrian filed a motion to dismiss, arguing venue was improper in Santa Cruz County because the parties had resided and acquired real property in Pinal County during their marriage. On

October 19, Adrian filed a response to Damarys's petition for dissolution and a motion for temporary orders.

¶4 On the morning of the default judgment hearing, Adrian filed a motion to set aside the entry of default "for the reasons stated in his Motion to Dismiss." After hearing argument, the trial court denied the motion to dismiss and the motion to set aside the entry of default.[1] The court then proceeded with the default judgment hearing, permitting Adrian to be present but precluding him from participating. On November 7, the trial court entered an under-advisement ruling, effectively the default judgment in this case, dividing the parties' community property and awarding Damarys sole physical and joint legal custody of the child, as well as child support and spousal maintenance.

¶5 On November 29, Adrian filed a combined motion to reconsider the denial of the motion to set aside the entry of default and motion to set aside the default judgment pursuant to Rule 85(C), Ariz. R. Fam. Law P. That same day, he also moved the court to stay the child support and spousal maintenance order, claiming the court's child support calculation was "contrary to the Arizona Child Support Guidelines" and spousal maintenance was "not properly address[ed] per Arizona law."

¶6 The trial court denied the motion to reconsider its ruling on the entry of default in a signed order entered December 17.[2] However, the court set a hearing on Adrian's motion to set aside the default judgment and the motion to stay. At that hearing, Damarys conceded errors in the calculation of child support, and the court directed her to prepare a revised worksheet and order. However,

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[1]After the trial court contacted the judge assigned to the Pinal County case to discuss the dual filings, the Pinal County court apparently dismissed Adrian's petition, which had been filed after Damarys's petition and never served upon Damarys. Adrian also had not filed a motion to transfer venue to Pinal County.

[2]Although the record indicates a signed order of the court denying the motion for reconsideration was entered on December 17, 2012, the trial court again addressed the motion and denied it in its January 31, 2013 under-advisement ruling.

Damarys argued that spousal maintenance had been addressed properly and opposed the motion to set aside the default judgment.

¶7 In an under-advisement ruling entered January 31, 2013, the trial court denied the motions. The court noted that it had "corrected issues" in the child support calculation and concluded that Adrian had not timely filed the motion to set aside the entry of default. This appeal followed.

Discussion

I. Appellate Jurisdiction

¶8 On February 28, 2013, Adrian filed a notice of appeal challenging the trial court's "January 31, 2013 Under Advisement Ruling denying his Motion to Reconsider Rule 85(C)(1)(f) Motion to Set Aside Default Entered Against [Him], and from the denial of his Rule 85(C)(1)(a), (c), & (f) Motion to Set Aside Divorce Decree." He asserts this court has jurisdiction over the appeal pursuant to A.R.S. § 12-2101. Damarys contends a trial court's denial of a motion to reconsider is not a judgment or order that may be appealed from.

¶9 Generally, only final judgments are appealable. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991). But, we also have jurisdiction to review special orders made after judgment pursuant to § 12-2101(A)(2). "To be appealable, a special order after judgment must raise different issues than those that would be raised by appealing the underlying judgment." *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 3, 9 P.3d 329, 331 (App. 2000). "[A]n order setting aside or refusing to vacate default judgment is a special order made after judgment and is therefore appealable." *Hanen v. Willis*, 8 Ariz. App. 175, 178, 444 P.2d 732, 735 (1968). Although an order denying a motion to set aside entry of default is not appealable, *Rueda v. Galvez*, 94 Ariz. 131, 133, 382 P.2d 239, 240 (1963), we may nevertheless address arguments challenging the entry of default to the extent they are urged as grounds to set aside the default judgment, *see BYS Inc. v. Smoudi*, 228 Ariz. 573, ¶¶ 3-6, 269 P.3d 1197, 1198-99 (App. 2012) (addressing challenge to entry of

default argued as ground for setting aside judgment). We therefore have jurisdiction to consider the issues in this appeal.[3]

II. Denial of Rule 85(C) Motion to Set Aside Judgment

¶10 Although Adrian has raised numerous issues on appeal, his arguments can be distilled to two: (1) whether the trial court erred by refusing to reconsider denying his motion to vacate the entry of default; and, (2) whether the court erred in denying his motion to set aside the default judgment because it improperly precluded him from participating at the default judgment hearing.

¶11 We review a trial court's denial of a motion to set aside under Rule 85(C) for an abuse of discretion.[4] *See Judge v. Judge*, 18 Ariz. App. 320, 320, 501 P.2d 948, 948 (1972). "A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or 'the record fails to provide substantial evidence to support the trial court's finding.'" *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 27, 156 P.3d 1149, 1155 (App. 2007), *quoting Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982). We review de novo a trial court's interpretation of court rules, *Balestrieri v. Balestrieri*, 232 Ariz. 25, ¶ 3, 300 P.3d 560, 561 (App. 2013), and whether a default judgment is

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[3]Because Damarys made several requests for attorney fees, which the trial court did not address and she failed to pursue, *see* Ariz. R. Fam. Law P. 78(B); *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶ 10, 161 P.3d 1253, 1257 (App. 2007) (final judgment prior to special order must dispose of all claims and parties), we consider those claims waived. We note a split in the cases concerning the finality of dissolution decrees. *See Reeck v. Mendoza*, 232 Ariz. 299, ¶¶ 6-10, 304 P.3d 1122, 1124-25 (App. 2013); *but see Ghadimi v. Soraya*, 230 Ariz. 621, ¶¶ 7-11, 285 P.3d 969, 970-71 (App. 2012).

[4]"Wherever the language in [the 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 cmt.; *compare* Ariz. R. Fam. Law P. 44, 85(C), *with* Ariz. R. Civ. P. 55, 60(c).

void and should be vacated, *BYS Inc.*, 228 Ariz. 573, ¶ 18, 269 P.3d at 1202.

¶12 To establish that a default judgment should be set aside pursuant to Rule 85(C), the defaulting party must demonstrate: (1) the presence of one or more of the reasons enumerated in Rule 85(C)(1); (2) prompt action in seeking relief; and, (3) a meritorious defense to the petition. *See Blair v. Burgener*, 226 Ariz. 213, ¶ 7, 245 P.3d 898, 901 (App. 2010); *see also Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 189-90, 836 P.2d 398, 402-03 (App. 1992).

A. Entry of Default

¶13 First, apparently relying on Rule 85(C)(1)(a), Adrian argues the trial court erred by entering a default judgment because his motion to set aside entry of default was both timely and supported by good cause.[5] Specifically, he maintains the fact that he filed the separate action in Pinal County showed a willingness to litigate the matter on its merits and demonstrated a meritorious defense to the claims asserted by Damarys. Under Rule 85(C)(1)(a), a court may set aside the entry of default for "mistake, inadvertence, surprise, or excusable neglect." *See Ruiz v. Lopez*, 225 Ariz. 217, ¶¶ 8-9, 236 P.3d 444, 447 (App. 2010) (considering trial court's decision whether to vacate the entry of default under Rule 60(c)). Rule 85(C)(2) provides that such a motion must "be filed within a reasonable time, and for reasons 1(a), 1(b) and 1(c) not more than six (6) months after the . . . order was entered."

¶14 Although Adrian's Rule 85(C) motion may have been timely, the trial court did not abuse its discretion in determining that his motion to set aside the entry of default was not. *See Judge*, 18 Ariz. App. at 320, 501 P.2d at 948. Adrian's motion to set aside the entry of default was filed on the morning of the October 23 hearing for entry of the default judgment. At the start of the hearing, the court addressed that motion as well as Adrian's motion to dismiss. Adrian relied upon the motion to dismiss as the central basis for his

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[5]Adrian's motion to set aside the entry of default included a reference to Rule 85(C)(1)(f) but did not substantively discuss how that rule would apply independently to the entry of default in this case.

arguments on the motion to set aside. He essentially argued that because of the "dual" filing in Pinal County, it was not "appropriate to default [him] seeing there were two open cases at the same time." And, on the issue of timeliness, he further argued that he "did file his motion to dismiss [the Santa Cruz County case] before the [sixty-]day cooling off period." In response, Damarys pointed out that the motion to set aside was not filed until that morning. She further noted that the motion to dismiss was not filed within twenty days after Adrian was served with the petition or within "ten days after the application for default was filed and served." Damarys argued that the motion to dismiss therefore was untimely under Rule 32, Ariz. R. Fam. Law P. In denying both motions on timeliness grounds, the court correctly determined:

> [S]ervice was completed August 15 and default was entered September 6; [Adrian] had 10 days to respond and nothing was filed until October 1st.
>
> A motion to dismiss was not filed until October 1st and we have a motion to set aside default. That [motion] doesn't come until the date of the hearing[,] . . . which is clearly untimely.

¶15 The trial court also determined correctly that Adrian's subsequent motion to reconsider its denial of the motion to set aside entry of default was untimely. Rule 35(D), Ariz. R. Fam. Law P., states that "[a] motion for reconsideration shall be filed not later than thirty (30) days after the date of filing of the ruling sought to be reconsidered." Here, the trial court denied Adrian's motion to set aside entry of default by minute entry order dated October 23, 2012, and filed October 25. Adrian's motion to reconsider was not filed until November 29, more than thirty days after the date the court's ruling was filed.

¶16 Adrian nevertheless contends the trial court's order denying his motion to reconsider its denial of the motion to set aside entry of default does not comport with Arizona's public policy favoring judgments on the merits. Although Arizona has long favored "trial[s] upon the merits," *Marquez v. Rapid Harvest Co.*, 99

Ariz. 363, 366, 409 P.2d 285, 287 (1965), our current civil and family rules of procedure already protect this public policy consideration by requiring that respondents be given a ten-day grace period and additional notice after default has been entered, *see Gen. Elec. Capital Corp.*, 172 Ariz. at 189-90, 836 P.2d at 402-03.

¶17 Adrian is not entitled to rely on public policy when his actions demonstrate he was capable of responding timely in the Santa Cruz County action and simply chose not to do so. *Miller v. Nat'l Franchise Servs., Inc.*, 167 Ariz. 403, 406, 807 P.2d 1139, 1142 (App. 1991) ("The movant generally bears the burden of demonstrating his entitlement to have a default judgment set aside."). Damarys served Adrian with the petition on August 15. However, he did not respond or appear until fifteen days after the entry of default had become effective, when he filed his motion to dismiss. In the meantime, Adrian sought temporary orders and attempted to serve Damarys in the Pinal County action. He did not move to set aside the entry of default in Santa Cruz County until the morning of the default judgment hearing on October 23.

¶18 Adrian has provided no authority for the proposition that filing an action in one county demonstrates a willingness to litigate on the merits in another. And none of the authorities Adrian relies upon support his position. Rule 32, Ariz. R. Fam. Law P., provides that a motion to dismiss should be made before a responsive pleading which, in turn, must be filed within twenty days after the respondent has been served with the summons and petition. Section 12-406(A), A.R.S., states that a change of venue may be requested only "after [an] answer has been filed." Section 12-404, A.R.S., similarly states that a court with improper venue still has jurisdiction to hear a case until a party requests a transfer, so long as the request occurs "before expiration of the time allowed to answer."

¶19 Adrian's misapprehension of the rules of procedure and statutes does not constitute a valid reason for setting aside the entry of default under Rule 85(C)(1)(a). *See Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). Nor does his public policy argument explain his failure to timely appear in the Santa Cruz action. *See Richas v. Superior Court*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982) ("some substantial evidence" required). Adrian therefore has not established "mistake, inadvertence, surprise, or excusable neglect,"

and his motion to reconsider was untimely. Thus, the trial court did not abuse its discretion in denying it. *See Judge*, 18 Ariz. App. at 320, 501 P.2d at 948 (we review denial of motion to set aside for abuse of discretion).

B. Participation at Default Judgment Hearing

¶20 Again citing Rule 85(C)(1)(a), Adrian next argues that he "was entitled to present rebuttal testimony at the default hearing but was precluded from doing so because the trial court erroneously misapplied Rule 44(C)," Ariz. R. Fam. Law P. And he contends he is entitled to "relief from the divorce decree on the basis of [the court's] mistake."[6] Because this issue involves the interpretation and application of court rules, our review is de novo. *See Breitbart-Napp v. Napp*, 216 Ariz. 74, ¶ 13, 163 P.3d 1024, 1029 (App. 2007); *Balestrieri*, 232 Ariz. 25, ¶ 3, 300 P.3d at 561.

¶21 It appears that both the trial court and Damarys believed that because Adrian was not entitled to relief under Rule 44(C), he was not entitled to participate at the default judgment hearing. Under Rule 44(B), a hearing is required prior to the entry of a default judgment in dissolution matters whenever the parties have minor children or the petitioner requests spousal maintenance. Ariz. R. Fam. Law P. 44(B)(1)(b). And, Rule 44(B)(2) provides that "[o]nce a defaulted respondent has made a motion under the provisions of this rule, the trial court shall allow respondent to participate in the hearing to determine what, if any, is appropriate relief to be awarded petitioner pursuant to the Petition, or to establish the truth of any statement."

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[6]Although Adrian argues the judgment is void and should be vacated pursuant to Rule 85(C)(1)(f), that subsection does not apply when the reason is contained in one of the other subsections. And Rule 85(C)(1)(d) expressly provides that a party may be relieved from a judgment or order if "the judgment is void." *See Webb v. Erickson*, 134 Ariz. 182, 186, 655 P.2d 6, 10 (1982); *Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶ 20, 994 P.2d 1030, 1036 (App. 2000) (Rule 60(c)(4), Ariz. R. Civ. P., provides "a separate and mutually exclusive basis for setting aside a judgment").

¶22 Damarys suggests that Adrian has waived this argument because he failed to "ma[k]e a motion under the provisions of [Rule 44]" before participating in the default hearing. She contends the only motion a defaulted respondent can make "under the provisions of [Rule 44]" is a motion to set aside default pursuant to Rule 44(C). She therefore maintains that Adrian could not participate in the hearing because he "failed to file any [such] motion citing Rule 44."[7] We disagree.

¶23 "[W]e look to substance rather than form," *Rodriquez v. Williams*, 104 Ariz. 280, 283, 451 P.2d 609, 612 (1969). In his motion to set aside default, Adrian cited Rule 85, requesting that the trial court set aside the entry of default in favor of a trial on the merits. *See Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 194 Ariz. 117, ¶ 18, 977 P.2d 839, 843 (App. 1999) (treating letter as request for rehearing, overlooking technical defects). Moreover, at the October 23 hearing after the court denied Adrian's motion to set aside the entry of default and stated it would proceed with the default judgment hearing, Adrian noted, consistent with the language of Rule 44, that his "concern is the best interest of the child and what typically govern[s] or should be considered." He further noted that "[t]here has been a request for spousal maintenance," and he asked to "be allowed to provide testimony today if [the court is] entering permanent orders." When the court informed Adrian he could remain in the courtroom and could later file any appropriate motions, Adrian again asked if the court would permit him "to testify and present evidence . . . in terms of the [A.R.S. § 25-403 best interests] factors and spousal maintenance." We conclude that this was sufficient to "ma[k]e a motion under the provisions of" Rule 44. Ariz. R. Fam. Law P. 44(B)(2).

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[7]Rule 44(C) provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 85(C)." And, we have already determined that Adrian's motion for reconsideration of the order refusing to set aside the entry of default was untimely pursuant to Rule 35. But, contrary to Damarys's argument, Rule 44 neither provides that the rule must be expressly invoked nor that the only motion a defaulting party can make is one under Rule 44(C) in order for the party to participate at the hearing.

¶24 Adrian's motion to set aside the divorce decree also stated sufficient grounds under Rule 85(C)(1)(a) to establish the trial court made a mistake by not allowing him to participate at the default judgment hearing. *See Blair*, 226 Ariz. 213, ¶ 7, 245 P.3d at 901 (movant has burden to demonstrate entitlement to have default judgment set aside); *see also Martin v. Martin*, 182 Ariz. 11, 15, 893 P.2d 11, 15 (App. 1994) (noting "Rule 60(c)(1) . . . [would have] permit[ted] a trial court to grant relief from a final judgment or order upon a finding of 'mistake, inadvertence, surprise or excusable neglect'" where judgment was "based on calculation errors [made by a family law referee or commissioner]"). Both in his motion and at the hearing thereon, Adrian asserted he was entitled to participate at the default judgment hearing pursuant to Rule 44 and the court's precluding his participation resulted in the court's failure to consider all the relevant factors in deciding the issues of custody, child support, and spousal maintenance. Specifically, at the hearing, Adrian argued that under Rule 44 and Rule 85(C) he should have been afforded an opportunity to present testimony and evidence on the issues of spousal maintenance, division of debts, child support, and best interests factors relating to custody and parenting time.

¶25 The trial court ultimately denied Adrian's motion to set aside the default judgment, apparently on the basis that the earlier motion to dismiss and motion to set aside the entry of default were untimely. Although the court was correct that the earlier motions had been filed untimely, Adrian's Rule 85(C) motion was timely filed. Rule 85(C)(2) provides that such a motion must "be filed within a reasonable time, and for reason[] 1(a), . . . not more than six (6) months after the . . . order was entered." Here, Adrian's twenty-eight-page motion, filed approximately three weeks after the court issued the default judgment, was filed "within a reasonable time" after the court entered the default judgment as required by Rule 85(C)(2). *Cf. Richas*, 133 Ariz. at 514-15, 652 P.2d at 1037-38 (thirty-four-day delay in filing six-page motion not prima facie reasonable).

¶26 Lastly, Adrian made the requisite showing that he had a meritorious defense to the judgment entered. A defaulted party's defense "need not be strong" but must show "'from all the material facts set forth in the affidavit[s] . . . that there is a substantial defense to the action.'" *Richas*, 133 Ariz. at 517, 652 P.2d at 1040, *quoting*

Union Oil Co. of Cal. v. Hudson Oil Co., 131 Ariz. 285, 640 P.2d 847, 851 (1982) (alteration in *Richas*). The affidavits submitted in support of Adrian's motion to set aside the judgment support our conclusion that the court would have been assisted by Adrian's participation during the default hearing. Notably, pursuant to Adrian's motion to stay child support order and spousal maintenance order, filed with his motion to set aside default judgment, the trial court ordered that a new parent's worksheet be prepared and made some changes to the child support order.

¶27 In sum, the trial court abused its discretion by denying Adrian's motion to set aside the default judgment. *See Judge*, 18 Ariz. App. at 320, 501 P.2d at 948. Adrian has established grounds under Rule 85(C)(1)(a) to vacate the court's November 7 ruling and the related portions of the court's unsigned decree of dissolution entered November 5, concerning custody, child support, and spousal maintenance.[8] *See Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶ 32, 994 P.2d 1030, 1039 (App. 2000) (setting aside only those portions of the default judgment that warrant vacating under Rule 60(c)).

Attorney Fees

¶28 Both parties request their attorney fees and costs on appeal. A.R.S. § 25-324(A) authorizes an award of attorney fees and costs based upon either the financial resources of the parties or the reasonableness of the positions each party has taken throughout the proceedings. In our discretion, we deny both parties' requests for attorney fees. However, Adrian is entitled to his costs incurred on appeal subject to his compliance with Rule 21, Ariz. R. Civ. App. P.

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[8]Citing Rule 85(C)(1)(c), Adrian also argues we should review the court's division of property, but he fails to cite to the record or clearly apply the law to his allegations. "A casual reference to the entire record is insufficient" to raise the issue on appeal. *Gillard v. Estrella Dells I Improvement Dist.*, 25 Ariz. App. 141, 148, 541 P.2d 932, 939 (1975); *see Jones v. Burk*, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990).

Conclusion

¶29 For the reasons stated above, we affirm the trial court's order refusing to reconsider its order denying the motion to set aside entry of default; vacate only those portions of the default judgment concerning child custody, child support, and spousal maintenance; and remand for further proceedings in accordance with Rule 44(B)(2).