

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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 LINDA RENZULLI, *Petitioner/Appellee*,

v.

ANTHONY RENZULLI, *Respondent/Appellant*.

No. 1 CA-CV 15-0540 FC
FILED 11-1-2016
AMENDED PER ORDER FILED 11-1-2016

Appeal from the Superior Court in Maricopa County
No. FN2013-094084
The Honorable Emmet Ronan, Judge (Retired)
The Honorable Jennifer E. Green, Judge

AFFIRMED

COUNSEL

Anthony Renzulli, Mesa
Respondent/Appellant In Propria Persona

Law Office of Louis Lombardo, PC, Chandler
By Louis Lombardo
Counsel for Plaintiff/Appellee

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Samuel A. Thumma joined.

T H O M P S O N, Judge:

¶1 Anthony Renzulli (husband) appeals from the family court's grant of Linda Renzulli (wife's) Motion to Set Aside the Decree of Dissolution of Marriage, pursuant to Arizona Rule of Family Law Procedure Rule 85(C), which resulted in husband losing his interest in wife's Arizona State Retirement System (A.S.R.S.) pension for her service as a teacher. Finding no error by the family court, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The parties were married in May 1977. Wife filed a petition for dissolution of marriage in September 2013. The trial for the dissolution of marriage was held in June 2014 and the decree of dissolution issued in August 2014.

¶3 That decree divided the then-existing community property and community debts. Included in that distribution were both the allocation of wife's student loan debt and the division of her A.S.R.S. pension. Each party was responsible for one-half of the then-current student loan balance of \$54,150.¹ Each party was also awarded one half of wife's A.S.R.S. pension as it was valued on the date she filed her petition for dissolution.

¶4 In September 2014, one month after the decree was issued, husband filed for Chapter 7 bankruptcy relief. His bankruptcy filing listed the parties' joint credit card debt and car lien as debts to be discharged.

¹ Additional credit card debt was assigned to each party. Wife was assigned the Discover and Sears debt totaling approximately \$9,400 and husband was assigned the Capitol One and Lowe's debt totaling approximately \$6,270. Husband was also assigned the lien on the car he received as part of the division of assets. The credit card debt was discharged as to husband. Husband also defaulted on the car lien, on which wife was apparently a cosigner.

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¶5 Wife filed a Motion to Set Aside the Decree of Dissolution that, among other things, sought to set aside the portion of the decree allocating husband one half of wife’s A.S.R.S. pension. Wife averred husband had not paid any of his allocated share of the student loan debt, and argued that his bankruptcy would also leave her responsible for the entirety of the joint debt allocated in the decree. The family court granted wife’s motion. The court, citing *Birt v. Birt*, 208 Ariz. 546, 96 P.3d 544 (App. 2004), set aside the decree, stating husband’s bankruptcy created a “substantial injustice” as to wife.² The new judgment vacated the division of wife's A.S.R.S. pension, allocating it in its entirety to wife. Husband timely appeals.

DISCUSSION

¶6 We review the court's grant or denial of a motion to set aside a dissolution judgment for an abuse of discretion. *Birt*, 208 Ariz. at 549, ¶ 9, 96 P.3d 547. An abuse of discretion occurs if the court commits an error of law or the record fails to support the court’s factual conclusions. *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007) (citing *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982)).

¶7 Rule 85(C), Arizona Rules of Family Law Procedure, allows a family court to correct a judgment due to “Mistake; Inadvertence; Surprise; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.” That rule reads, in pertinent part:

1. On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:

...

f. any other reason justifying relief from the operation of the judgment.

² In granting wife’s motion, the family court referenced Arizona Rule of Civil Procedure 60(c)(6) (“any other reason justifying relief from the operation of the judgment”) rather than Family Law Rule 85. Rule 85 is based on Rule 60. See comment to Rule 85. No argument is made as to any legal relevance of any distinction between the rules, nor do we find any (other than to note the correct reference would be to Rule 85).

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The family court, in considering whether to set aside the judgment, stated that for wife to go from owing \$27,000 in student loan debt to \$54,000 in student loan debt was "not speculat[ive]" and was "patently unfair" to wife to pay "both halves."³

¶8 Husband asserts on appeal that the family court abused its discretion in granting wife's motion to set aside the decree. He asserts that the court knew when it entered the decree that he was considering bankruptcy but declined to award wife the whole pension. He further asserts he had "no choice but to file bankruptcy" because his sole income is Social Security disability, that it was a marital decision to "build Wife's retirement account instead of Husband's for their future," and that wife is now in a position to file bankruptcy herself. Husband, however, acknowledges that the student loan debt at issue is not dischargeable in bankruptcy.

¶9 Wife asserts that the reallocation of the pension to her, alone, is supported both by the case law and Arizona statutes. Specifically, wife cites to *Birt* and Arizona Revised Statutes (A.R.S.) §§ 25-327⁴ and -318(P)⁵ (2007) as support for her position. We agree with wife that the family court did not abuse its discretion in reallocating wife's pension.

¶10 The decree does indicate that wife had made the court aware that she was afraid husband would not pay his community debts and she would be left with those debts, but there is no specific mention of a pending bankruptcy in the decree. The court stated at the time that while it

³ The family court also took testimony about wife's liability for husband's assigned credit card debt and the car loan.

⁴ Section 25-327(A) "Modification and termination of provisions for maintenance, support and property disposition" reads, in pertinent part, "The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state."

⁵ Section 25-318(P) reads: "If a party fails to comply with an order to pay debts, the court may enter orders transferring property of that spouse to compensate the other party. If the court finds that a party is in contempt as to an order to pay community debts, the court may impose appropriate sanctions under the law. A party must bring an action to enforce an order to pay a debt pursuant to this subsection within two years after the date in which the debt should have been paid in full."

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“empathize[d] with Wife’s concern that she may end up with a larger portion of the community debt, the Court does not believe that is a sufficient reason to inequitably divide the community interest in Wife’s Arizona Retirement Account.”

¶11 On appeal, we do not have a transcript of the 2014 dissolution proceeding. At the hearing to set aside the judgment, husband testified that when the family court asked him if he was going to declare bankruptcy, husband said “Well probably. I want to see what the divorce decree looks like.” Mother’s counsel, however, stated that there was no indication on the record that husband told the court he was going to file for bankruptcy. Describing the prior proceeding, Husband's counsel continued, "What I see is [wife] telling [the court] she was afraid this could happen and [the court] said well that may happen but I don't have any evidence of that so I am just going to rule on the facts as they are."

¶12 As the appellant, husband was responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal. *See* Ariz. R. Civ. App. P. 11. When a party fails to include necessary items, we assume the items support the court's findings and conclusions. *In re Mustonen's Estate*, 130 Ariz. 283, 635 P.2d 876 (App. 1981). Thus we assume that although the family court during the original proceeding knew wife was concerned about husband paying his debts, husband’s bankruptcy was not a certainty.

¶13 Nothing in the record before us shows that as of the date of the decree, the court knew husband had determined to file bankruptcy. “The duty of the trial court was to make a fair and equitable division of assets and debts between the parties *under the circumstances then existing.*” *Birt*, 208 Ariz. at 552, ¶ 25, 96 P.3d at 550 (citing *Toth v. Toth*, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997) (emphasis added)). “The court's equitable division of community debts was effectively and immediately destroyed when Husband's obligation to pay those debts was discharged in bankruptcy, leaving Wife liable for those debts.” *Birt*, 208 Ariz. at 552, ¶ 25, 96 P.3d at 550.

¶14 After husband’s bankruptcy, wife is wholly responsible for the community’s debts. *See Birt*, 208 Ariz. at 552, ¶ 24, 96 P.3d at 550 (citing 11 U.S.C. § 524(e) and *Cty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 631, 898 P.2d 1005, 1009 (App. 1995)). The facts of this case and the law lead us to conclude that the family court did not abuse its discretion in modifying the judgment pursuant to Rule 85(C)(1)(f).

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¶15 Wife requests her attorneys' fees and costs pursuant to A.R.S. § 25-324 (2007) and Rule 21(c), Ariz. R. Civ. App. P. After consideration of the relative financial positions of the parties and the reasonableness of their positions, we decline to make an award of discretionary attorneys' fees. Wife may recover her costs after compliance with Rule 21.

CONCLUSION

¶16 For the following reasons, the family court is affirmed.



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