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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JUDITH DAVIS RAINBOW-HUSER, ) 1 CA-CV 07-0731  
)  
Petitioner/Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JIMMY D. HUSER, ) Rule 28, Arizona Rules  
) of Civil Appellate  
Respondent/Appellant. ) Procedure)  
) **FILED 10-30-2008**

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Appeal from the Superior Court in Maricopa County

Cause No. FN 2006-090555

The Honorable Connie Contes, Judge

**VACATED AND REMANDED**

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Cates, Hanson, Sargeant & Rakestraw, P.L.C. Phoenix  
By William P. Sargeant III  
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W I N T H R O P, Presiding Judge

¶1 Jimmy D. Huser ("Husband") appeals from the trial court's denial of his motion for new trial and post-decree order setting aside a non-modifiable spousal maintenance provision in a consent decree of dissolution of marriage and incorporated

marital settlement agreement. For the following reasons, we vacate the trial court's order and remand for further proceedings consistent with this decision.

#### FACTS AND PROCEDURAL HISTORY

¶2 On March 8, 2006, Judith Davis Rainbow-Huser ("Wife") filed a petition for dissolution of the parties' marriage. Pursuant to Arizona Revised Statutes ("A.R.S.") section 25-319 (2007),<sup>1</sup> Wife sought an award of indefinite spousal maintenance.

¶3 Wife later filed an application for entry of default, and the court entered a default decree of dissolution of marriage, in which Wife was to receive an award of spousal maintenance in the amount of \$2,419.00 per month for a term of eleven years. Wife's attorney then withdrew as counsel. Husband retained an attorney, who filed a motion to set aside the entry of default. After Wife filed a *pro se* response, the trial court set aside the entry of default.

¶4 On September 12, 2006, the parties signed a "Marital Settlement Agreement," in which Husband agreed to pay Wife a non-modifiable award of spousal maintenance in the amount of \$600.00 per month for a term of thirty-six months. A "Consent Decree of Dissolution of Marriage," expressly incorporating the marital settlement agreement and signed by the parties,

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<sup>1</sup> We cite the current version of the statute because no revisions material to our analysis have since occurred.

Husband's counsel, and the trial court, was filed on September 26, 2006.

¶15 Wife hired a new attorney, and on February 16, 2007, counsel for Wife moved to set aside the consent decree pursuant to Rule 85(C)(1)(f) of the Arizona Rules of Family Law Procedure.<sup>2</sup> Wife argued that, at the time the marital settlement agreement was reached and the consent decree was signed, she had hired and was represented by new counsel "who had given notice of representation, [but] was not in attendance and did not approve the Consent Decree nor Marital Settlement Agreement." Wife also argued that, when she signed the marital settlement agreement, she "was suffering mental episodes and memory loss and was under the care of a doctor," and was therefore incompetent and incapable of making financial or legal decisions at that time.<sup>3</sup> Husband's response noted that Wife's purported counsel had never filed a notice of appearance, and both Wife and her proposed counsel had confirmed that Wife had cancelled her check and terminated counsel's services before Husband and

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<sup>2</sup> Rule 85(C)(1) provides that the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for several enunciated reasons. Subsection (f) is a catch-all provision providing for relief for "any other reason justifying relief from the operation of the judgment." Ariz. R. Family Law P. 85(C)(1)(f).

<sup>3</sup> Wife argued within the body of the motion that the court should set aside only the spousal maintenance portion of the decree.

Wife met and negotiated the consent decree. Husband also argued that Wife had freely entered the marital settlement agreement and consent decree after reading and negotiating the terms within both documents, and that her allegation that she was mentally incapable of understanding the decree was not supported by the evidence or her own actions.

¶6 On June 7, 2007, the trial court held an evidentiary hearing regarding Wife's motion. At the hearing, Wife's sister-in-law, Wife, and Husband testified, and an affidavit of Wife's sister-in-law was admitted in evidence. Wife argued that, due to duress or coercion, her mental incapacity, general unfairness and the parties' lack of full financial disclosure, and the parties' failure to initial the bottom of each page as provided for in the marital settlement agreement, Wife was changing her position and requesting that the court set aside the entire decree rather than only the spousal maintenance provision as previously requested. Husband argued that the trial court needed to find extraordinary circumstances of hardship or injustice before it could set aside the decree; that no expert or medical testimony had been presented to support such a finding; that Wife's numerous actions, including entering a legal contract with her attorney, showed that she was competent; that Wife's prior attorney "never was really retained" before Wife signed the marital settlement agreement and consent decree;

and that, as the court had noted, Wife had only sought to set aside the spousal maintenance provision of the decree. After hearing the testimony and argument and receiving the affidavit, the court granted Wife's motion to the extent of striking the "non-modifiable" language of the spousal maintenance order in the consent decree and marital settlement agreement. The court made no factual findings and provided no legal reasoning for its decision.

¶7 Husband filed a "Motion for New Trial Pursuant to Rule 83(A)(6)/Motion to Amend Findings Pursuant to Rule 82(B),"<sup>4</sup> arguing that Wife had provided no expert or medical testimony or evidence to meet the standard for relief under Rule 85; the court had failed to specify a factual or legal basis for its modification; and, if the court believed that Wife was incompetent to enter the consent decree, the court should have granted Wife's request to set aside the entire decree rather than just modifying one provision. Wife's response argued that the court's decision was supported by her testimony, her sister-in-law's affidavit, and documentary evidence, including medical

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<sup>4</sup> Rule 83(A)(6) provides that a court's ruling, decision, or judgment may be vacated and a new trial granted on motion of an aggrieved party who can show "that the ruling, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law." Ariz. R. Family Law P. 83(A)(6). Rule 82(B) provides that "the court may amend its findings or make additional findings and may amend the judgment accordingly," and such motion "may be made with a motion for a new trial pursuant to Rule 83." Ariz. R. Family Law P. 82(B).

records. Additionally, Wife noted that Husband had not requested findings before the hearing. Husband replied that Wife had failed to respond to his assertion that the court could not simply modify the consent decree in light of the allegations of mental incompetence made by Wife to set aside the decree. Husband further noted that, although marked as exhibits, the doctors' notes and medical report proffered by Wife were not entered in evidence.

¶8 In a minute entry filed August 8, 2007, the trial court denied Husband's motion for new trial or to amend the findings. On September 25, 2007, the court issued a signed order denying Husband's motion and entering final judgment regarding the decree. We have jurisdiction to decide Husband's appeal pursuant to A.R.S. § 12-2101(C), (F)(1) (2003).

#### **ANALYSIS**

¶9 Husband argues that the trial court erred in denying his motion for new trial and in setting aside the non-modifiable spousal maintenance provision in the consent decree and incorporated marital settlement agreement. We agree.

¶10 In general, we review for an abuse of discretion the trial court's decision to grant or deny a motion to set aside a judgment. See *De Gryse v. De Gryse*, 135 Ariz. 335, 336, 661 P.2d 185, 186 (1983). The trial court abuses its discretion when it acts arbitrarily or inequitably, makes a decision

unsupported by the facts, or misapplies the law. See *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985). In this case, the parties' arguments hinge on questions of law, or mixed questions of law and fact, which we review *de novo*. See *In re Marriage of Waldren*, 217 Ariz. 173, 175, ¶ 6, 171 P.3d 1214, 1216 (2007); *Huskie v. Ames Bros. Motor & Supply Co.*, 139 Ariz. 396, 401, 678 P.2d 977, 982 (App. 1984).

¶11 Our analysis is guided primarily by our supreme court's recent holding in *Waldren*.<sup>5</sup> In *Waldren*, the parties entered a dissolution decree that included a settlement agreement, which contained a spousal maintenance provision purporting to make the spousal maintenance payments non-modifiable. 217 Ariz. at 174, ¶ 2, 171 P.3d at 1215. Due to changed circumstances, the husband later moved under Rule 60(c), Ariz. R. Civ. P., to terminate the spousal maintenance award. *Id.* at ¶ 3. On petition for review, our supreme court held that A.R.S. §§ 25-317(G) (2007) and 25-319(C) deprive the trial court of jurisdiction to modify or terminate a statutorily non-modifiable spousal maintenance provision in a dissolution decree. *Id.* at 175, ¶¶ 9-10, 171 P.3d at 1216.<sup>6</sup> The supreme

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<sup>5</sup> We recognize that the trial court did not have the benefit of our supreme court's *Waldren* opinion at the time of the June 2007 hearing and when the court issued its subsequent order.

<sup>6</sup> In a footnote, however, the court noted that it was not addressing "whether fraud or duress in the making of a non-

court further concluded that the divestiture of jurisdiction superseded the trial court's equitable authority pursuant to Rule 60(c)(5) to grant the husband relief from the judgment. *Waldren*, 217 Ariz. at 177, ¶ 22, 171 P.3d at 1218.

¶12 We conclude that the reasoning of *Waldren* applies to this case. The parties executed the consent decree and marriage settlement agreement, which contained the non-modifiable spousal maintenance clause pursuant to A.R.S. §§ 25-317(G) and 25-319(C). Accordingly, at the time of execution, all statutory conditions appear to have been met. Consequently, the trial court lacked jurisdiction to grant Wife relief by setting aside the non-modifiable portion of the spousal maintenance provision in the consent decree and incorporated marital settlement agreement. We therefore vacate the trial court's modification order.

¶13 Further, because Wife presented numerous arguments why she believed the consent decree should be set aside or modified, and the trial court failed to make any findings of fact or state the legal basis for its order, we cannot determine the court's reasoning.<sup>7</sup> At the time the consent decree was executed, the

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modification agreement may render such a provision void." *Waldren*, 217 Ariz. at 175 n.3, ¶ 10, 171 P.3d at 1216 n.3.

<sup>7</sup> Although Wife argues that the trial court found she was not competent at the time she signed the marital settlement

trial court approved the provisions of the decree as fair and equitable, and found that each party believed that no duress or coercion was involved. The issue properly before the trial court was whether Wife presented sufficient evidence to justify relief from operation of that decree. Accordingly, we remand for the trial court to further consider Wife's motion to set aside the consent decree pursuant to Rule 85(C)(1)(f), Ariz. R. Family Law P., based on the facts and circumstances existing at the time the parties executed the decree and the marital settlement agreement. We express no opinion as to the merits of that motion.

¶14 Finally, both Husband and Wife request an award of attorneys' fees and costs associated with this appeal. Wife has failed to cite proper authority, show that Husband has taken an unreasonable position, or show that economic disparity exists between the parties. We therefore deny her request. Husband requests an award of attorneys' fees pursuant to A.R.S. § 25-324 (Supp. 2007). In our discretion, we deny his request without prejudice to reconsideration by the trial court after consideration of the merits on remand. We do, however, grant Husband his request for costs, contingent on his compliance with ARCAP 21(a).

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agreement and consent decree, the trial court made no such finding.

**CONCLUSION**

¶15 For the aforementioned reasons, we vacate the trial court's post-decree order setting aside the non-modifiable spousal maintenance provision in the consent decree and incorporated marital settlement agreement. Additionally, we remand for further proceedings consistent with this decision.

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LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

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PATRICK IRVINE, Judge

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PHILIP HALL, Judge