

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of MARK AND
SERENA ANZALDUA.

MARK ANZALDUA,

Respondent,

v.

SERENA ANZALDUA,

Appellant.

E053268

(Super.Ct.No. FAMMS1000122)

OPINION

APPEAL from the Superior Court of San Bernardino County. Debra Harris,
Judge. Reversed.

Jill M. Church for Appellant.

No appearance for Respondent.

Serena Anzaldua appeals an order denying her motion for relief from default on her husband's petition for dissolution of their marriage. (Code Civ. Proc., § 473, subd. (b).) The judgment entered following her default fails to include spousal support,

as agreed upon by the parties in a written marital settlement agreement, and also fails to distribute the community property interest in Mark Anzaldua's pension. We conclude that it was an abuse of discretion to deny the motion.

PROCEDURAL HISTORY

On February 24, 2010, Mark Anzaldua filed a petition for dissolution of his nine-year marriage to Serena Anzaldua.¹ Serena did not file a response, and on April 28, 2010, Mark filed a request to enter default.

After a default hearing on May 28, 2010, the court granted the petition for dissolution and divided the community assets and debts as requested in the petition—with the exception, as we discuss below, of Mark's military pension which he listed as a community asset in his petition. The court did not award spousal support and terminated jurisdiction over spousal support.

On September 17, 2010, Serena filed a motion for spousal support and a motion to set aside the default. Mark filed a responsive declaration. On October 15, 2010, after a hearing, the family law court denied the motion.

Final judgment was entered on November 8, 2010. Serena did not appeal from the judgment. On March 14, 2011, she filed a notice of appeal from the order denying her request to set aside the default.

¹ As is customary in family law cases, we will hereafter refer to the parties by their first names. No disrespect is intended.

LEGAL ANALYSIS

DENYING THE MOTION TO SET ASIDE THE DEFAULT WAS AN ABUSE OF DISCRETION

Background

In her declaration in support of her motion to set aside the default, Serena stated that she and Mark had agreed to the dissolution and had entered into a contract which provided that Mark would pay her \$1,500 a month in spousal support for five years, with the amount to be revised when Serena had found employment. The contract also provided that Serena would be entitled to her portion of Mark's military pension and that he would be entitled to his portion of her retirement. She stated that she took his word that he would abide by the contract but that she "now realize[s]" that Mark's petition for dissolution did not list the contract or state that she would get her portion of his military pension. She contended that this constituted mistake, inadvertence, surprise or excusable neglect within the meaning of section 473, subdivision (b) of the Code of Civil Procedure (section 473(b)).

Spousal Support

At the hearing on the motion, Serena's attorney² argued that Serena was relying on the contract, in part because Mark had been paying her the agreed-upon \$1,500 a month at the time he served her with the petition and had continued to do so until after the

² Mark represented himself throughout the proceedings. Serena represented herself in preparing the motion to set aside the default, but was represented by counsel at the hearing on the motion.

judgment was rendered. In response to the court's question as to how she was misled by the petition into thinking that the contract was to be incorporated into the dissolution proceedings, counsel pointed out that the petition requests both that spousal support be reserved and that the court terminate jurisdiction to award spousal support. She also stated that Serena believed that the "paperwork" was just a formality and that she did not believe that termination of jurisdiction over spousal support "was actually what was going to happen."

At the hearing, although not in his declaration in response to the motion, Mark admitted that he and Serena "did in fact have an agreement." He seemed to say that he entered into the agreement "because we wanted to proceed on with the divorce and to get stuff going" and because his agreement to pay Serena support would enable her to move out, thus avoiding more conflict.

The court apparently found that Serena had notice from the petition that no award of spousal support would be made. It denied the motion.

Section 473(b) provides that a court may, "upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." Granting or denying a request for relief under section 473(b) is within the trial court's discretion. However, "the trial court's discretion is not unlimited and must be "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'" [Citation.]"

(*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) “Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473[b] must be resolved in favor of the party seeking relief from default[.] [Citations.] Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting a trial on the merits.” (*Ibid.*)

Here, Mark admitted that he had made an agreement to pay Serena support for five years. He offered no explanation for his failure to request an order adopting what the parties termed a “divorce settlement agreement” or even to mention the agreement in his petition. Allowing Mark to benefit from his dishonesty is not an exercise of discretion “in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.” (*Elston v. City of Turlock, supra*, 38 Cal.3d at p. 233.) Furthermore, Mark’s petition both asked that the issue of spousal support be reserved and asked the court to terminate jurisdiction to award spousal support. Giving Serena the benefit of the doubt, as we must (*ibid.*), we conclude that she could reasonably have interpreted the petition to mean that the contract for spousal support would be provided at a later date and that the court would terminate jurisdiction to award spousal support thereafter. For both reasons, we conclude that it was an abuse of discretion to deny the motion to set aside the default, and we will reverse the order to permit Serena to litigate her entitlement to spousal support under the parties’ agreement.

Pension

In her motion, Serena also stated that Mark had failed to request that his military pension be divided as community property. The petition does list the pension as community property, but it contains no request as to how the pension is to be awarded. However, in the community property declaration which Mark filed with his request to enter default, he asked to have the pension awarded solely to him. Serena's motion does not explain how any mistake, inadvertence, surprise, or excusable neglect with regard to the pension caused her to fail to respond to the petition. Consequently, her motion provided no basis for setting aside Serena's default on any ground related to the pension.

Nevertheless, because we will order the trial court to vacate the judgment with respect to spousal support, Serena will have the opportunity to litigate the division of the pension. The pension is community property and must be divided equally. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 841-842, 848; Fam. Code, § 2550.) The judgment does not, however, either award the pension to either party or divide it between them.³ Family Code section 2556 provides that the court permanently retains jurisdiction to divide community assets which have not been adjudicated, and that it must do so on motion by a party to the dissolution. Consequently, upon remand, Serena may move for an order dividing the pension to the extent that it is community property.

³ Mark asserted in his response to Serena's motion to set aside default that the issue of the pension was reserved in the judgment. The judgment omits any mention of the pension. The judgment does contain a general reservation of jurisdiction to divide any community assets not listed in the judgment.

DISPOSITION

The order denying Serena Anzaldua's motion to set aside her default is reversed. On remand, the trial court is directed to set aside the default, vacate the judgment and afford Serena Anzaldua 30 days to file a response to the petition for dissolution of the marriage.

Costs on appeal are awarded to Serena Andalzua.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

HOLLENHORST
Acting P.J.

RICHLI
J.