COLORADO COURT OF APPEALS

DATE FILED: June 17, 2021
CASE NUMBER: 2020CA284

Court of Appeals No. 20CA0284
Douglas County District Court No. 09DR822
Honorable Gary M. Kramer, Judge
Honorable Cynthia Mares, Judge

In re the Marriage of

Donald Saltzman,

Appellant and Cross-Appellee,

and

Tena Saltzman,

Appellee and Cross-Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE DUNN
Fox, J., concurs
Pawar, J., dissents

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 17, 2021

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¶ 1 In this dissolution of marriage proceeding between Donald Saltzman (husband) and Tena Saltzman (wife), husband appeals the district court's ruling vacating the parties' decree of legal separation. He also appeals the court's property division in its permanent orders. Wife cross-appeals, challenging the maintenance and attorney fees portions of the court's permanent orders. We affirm the judgment and remand the case to the district court to determine wife's request for appellate attorney fees.

I. Background

¶ 2 Husband and wife were married in 1981. In 2009, the Denver District Attorney's Office began investigating wife for allegedly misappropriating approximately $1 million from her employer. During this investigation, husband petitioned for legal separation, and the parties executed a separation agreement that gave husband most of the parties' marital assets, including the marital home (Ranch Trail home). The parties presented the separation agreement to the court along with an affidavit of non-appearance attesting that their marriage was irretrievably broken. The court issued the decree of legal separation and incorporated the

separation agreement into the decree. Wife later pleaded guilty to theft and was ordered to pay restitution.

¶ 3 Then, in 2016, wife filed a motion to set aside the separation agreement as unconscionable because she received only a small portion of the parties' marital estate. She also represented that husband insisted on the legal separation even though they never "separated," they had continued to live together as a married couple until 2016, the marriage was not irretrievably broken in 2009, and they did not intend to enforce the separation agreement.

¶ 4 Husband disputed wife's allegations and filed his own motion to convert the decree of legal separation to a decree of dissolution of marriage.

¶ 5 Judge Kramer held a three-day hearing on the motions. The court found that, in 2009, the parties knowingly misrepresented to the court that their marriage was irretrievably broken to obtain the decree of legal separation. It explained that, after 2009, the parties continued to live together in the marital home, share the same bedroom, engage in sexual relations, celebrate their wedding anniversaries, jointly pay their expenses, function as a married couple, care for each other when ill, and present themselves to

others as husband and wife. It further found that the parties made their misrepresentation as part of a scheme to protect their assets from potential creditors related to wife's theft. Concluding that husband and wife had committed a fraud upon the court, it vacated the decree of legal separation.

¶ 6 The court then denied wife's motion to set aside the separation agreement as unconscionable because she participated in the fraud, and it denied husband's request to convert the decree of legal separation to a decree of dissolution of marriage. And it entered temporary orders.

¶ 7 Judge Mares took over the case and, after a hearing, the court dissolved the marriage and entered permanent orders. The court first declined to enforce the separation agreement, finding that it had been invalidated by Judge Kramer's order. It then divided the marital estate so that wife received approximately $1,478,500 in net equity from the estate and husband received the remaining $827,300. In doing so, the court allocated the Ranch Trail home to wife and directed her to apply to refinance its mortgage.

¶ 8 The court declined to award wife maintenance, finding that she did not meet the threshold need for maintenance. And it

declined wife's request for attorney fees, except that it ordered the parties to equalize the amount of attorney fees paid with the marital assets and awarded wife attorney fees related to an issue she raised before permanent orders.

II. Husband's Appeal

¶ 9 Husband challenges the district court's determinations that (1) vacated the decree of legal separation; (2) declined to enforce the separation agreement at permanent orders; (3) allocated the Ranch Trail home as marital property; and (4) ordered wife only "to apply" to refinance the Ranch Trail home and did not credit husband for expenses he incurred before wife refinanced the mortgage. We consider and reject his contentions.

A. Vacating Decree of Legal Separation

1. Governing Legal Standards

¶ 10 Under C.R.C.P. 60(b), a district court has the inherent authority to set aside a judgment when the parties obtained that judgment through a fraud upon the court. *See Carbajal v. Wells Fargo Bank, N.A.*, 2020 COA 49, ¶ 17; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (recognizing the court's inherent power "to vacate its own judgment upon proof that a fraud has been

perpetrated upon the court"). And a court may set aside a judgment for fraud upon the court at any time. *See Carbajal*, ¶ 17 (stating that this provision is not "subject to a time limit"); *see also* C.R.C.P. 60(b).

¶ 11 We generally review a court's C.R.C.P. 60(b) ruling for an abuse of discretion. *Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 314 (Colo. 2010). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or it misapplies the law. *Id.*; *see also Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 19. We review de novo the court's application and interpretation of the law. *See Tallman v. Aune*, 2019 COA 12, ¶ 21.

2. Irretrievably Broken Marriage

¶ 12 Husband argues that the district court erred by finding that the parties knowingly misrepresented that their marriage was irretrievably broken. We are not persuaded.

¶ 13 Fraud occurs when (1) a party makes a false representation of a material existing fact; (2) the party knows that the representation is false; (3) the one to whom the representation is made is ignorant of its falsity; (4) the party makes the representation with an intention that it be acted on; and (5) the representation results in

damages. *See Colo. Water Conservancy Dist. v. Cache Creek Mining Tr.*, 854 P.2d 167, 172 (Colo. 1993).

¶ 14 To obtain a decree of legal separation or a decree of dissolution of marriage, the court must find that the marriage is "irretrievably broken." § 14-10-106(1)(a)(II), C.R.S. 2020; *see also* § 14-10-102(2)(c), C.R.S. 2020 (providing that the underlying purpose of the Uniform Dissolution of Marriage Act is to make irretrievable breakdown the sole basis for dissolution). An irretrievably broken marriage occurs when the marriage has broken down to the point where "it seems improbable that the couple will again resume the relationship of husband and wife." *In re Marriage of Franks*, 189 Colo. 499, 507, 542 P.2d 845, 851 (1975).

¶ 15 Whether a marriage is irretrievably broken is a question of fact for the district court based on the circumstances of the particular marriage, including what "gave rise to the filing of the petition and the prospect of reconciliation." § 14-10-110(2), C.R.S. 2020; *see Franks*, 189 Colo. at 507, 542 P.2d at 851; *In re Marriage of Baier*, 39 Colo. App. 34, 37, 561 P.2d 20, 22 (1977).

¶ 16 Husband contends that, because the decree of legal separation does not completely terminate the parties' marital relationship, the

court improperly relied on the parties' conduct after the decree that was consistent with maintaining a marital relationship when it determined that they knowingly misrepresented the marriage was irretrievably broken.

¶ 17 True, a legal separation does not terminate all legal aspects of a marriage. *See* § 14-10-120(2), C.R.S. 2020; *see also* § 14-10-106(1)(a); 19 Frank L. McGuane, Jr. & Kathleen A. Hogan, *Colorado Practice Series, Family Law & Practice* § 7:4, Westlaw (2d ed. database updated June 2021). But we see no indication in the plain language of section 14-10-106 that "irretrievably broken" means anything different for a legal separation compared to a dissolution of marriage. § 14-10-106(1)(a)(II); *see In re Marriage of Schmitt*, 89 P.3d 510, 511 (Colo. App. 2004) (We apply a statute as written and avoid creating "an exception that the plain language does not suggest, warrant, or mandate."). The statute imposes the same requirement for an "irretrievably broken" marriage before acquiring either decree.

¶ 18 Nor do we agree with husband that the court must defer to the parties' belief that the marriage was irretrievably broken. While the parties' affirmations that the marriage is irretrievably broken create

a presumption of such fact, that presumption may be controverted by the evidence. § 14-10-110(1). And the obligation to determine that a marriage is irretrievably broken falls upon the district court, not the parties. § 14-10-106(1)(a)(II); *see also Franks*, 189 Colo. at 509, 542 P.2d at 852 ("[T]he actual granting of the decree is not automatic or perfunctory . . . .").

¶ 19 The parties' request for a decree of legal separation, instead of a decree of dissolution of marriage, therefore, is merely a factor for the court to consider in determining whether the parties' marriage is irretrievably broken. *See* § 14-10-110(2); *see also Franks*, 189 Colo. at 507, 542 P.2d at 851. It does not impose a different meaning to an "irretrievably broken" marriage or prevent the court from considering conduct consistent with the continuation of the marital relationship. The district court here applied the well-established meaning of an irretrievably broken marriage and determined that, based on the evidence presented, the parties did not believe in 2009 that their marriage was irretrievably broken. *See Franks*, 189 Colo. at 507, 542 P.2d at 851. It, instead, found, after a three-day evidentiary hearing, that the parties knowingly "colluded with each other" to obtain the decree of legal separation

"for the sole purpose of protecting [their] assets from creditors," not because their marriage was irretrievably broken. And the evidence supports the court's findings.

¶ 20 In particular, wife testified that "nothing changed" in their relationship after the decree of legal separation and she did not believe that their marriage was irretrievably broken at that time. She also described their continued conduct that was consistent with an intact marital relationship, including residing together in the Ranch Trail home, sleeping in the same bed, engaging in sexual relations, wearing their wedding rings, celebrating their wedding anniversaries, professing their love for each other, and presenting themselves to others as husband and wife.

¶ 21 The parties' family and friends confirmed that they observed no change in husband and wife's marital relationship after 2009. Their children also testified that husband told them the legal separation was "temporary," he and wife were "not splitting apart," and the decree of legal separation and separation agreement were done to protect their assets from wife's potential financial liability related to her criminal case.

¶ 22 Although husband disputed this evidence, the court did not find him credible. *See In re Parental Responsibilities Concerning D.T.*, 2012 COA 142, ¶ 17 ("It is the trial court's role to evaluate the credibility of witnesses and resolve factual conflicts in the evidence, . . . and we are bound by the court's factual findings unless they are clearly erroneous and not supported by the evidence.").

¶ 23 Because the evidence supports the district court's finding that husband and wife knowingly misrepresented that their marriage was irretrievably broken, we may not disturb it.

3. Fraud Upon the Court

¶ 24 We also reject husband's argument that the parties' fraudulent conduct was "insufficient[ly] egregious" to constitute a fraud upon the court.

¶ 25 A fraud upon the court is defined by its effect on the judicial process. *In re Marriage of Gance*, 36 P.3d 114, 118 (Colo. App. 2001). It involves more than intrinsic fraud or a mere fraud between the parties. *Carbajal*, ¶ 33. It is a fraud "that 'seriously' affects the integrity of the normal process of adjudication" and "interferes with the judicial machinery itself." *Gance*, 36 P.3d at 118 (citation omitted); *see also Chambers*, 501 U.S. at 44 (Fraud

upon the court "is a wrong against the institutions set up to protect and safeguard the public." (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), *departed from on other grounds by Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976))).

¶ 26 Husband attempts to characterize the parties' fraudulent conduct as mere perjury, which is an intrinsic fraud that generally does not amount to a fraud upon the court. *See Gance*, 36 P.3d at 118. Fraud is intrinsic when it pertains to an issue in the original action or where the acts constituting the fraud could have been litigated in the original action. *Id.* at 117. But husband does not explain how the fraud could have been litigated in the very action where the fraud was used to deceive the court. Instead, the court found that husband and wife deliberately tampered with the administration of justice and defrauded the court itself in the original action. And it determined that the parties' deliberate scheme induced the court into issuing the decree of legal separation as part of their plan to shield their assets from creditors. Thus, the record supports the court's finding that the parties' conduct was indicative of fraud upon the court. *See Foxley v. Foxley*, 939 P.2d

455, 459 (Colo. App. 1996) (determining that a party's participation in a conspiracy to present false evidence to the dissolution court may amount to extrinsic fraud upon the court); *see also Hazel-Atlas Glass*, 322 U.S. at 245 (concluding that a fraud upon the court existed when a party fraudulently prepared and published an article in support of a pending patent application because it was "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals"); *Fernandez v. Fernandez*, 358 P.3d 562, 568 (Alaska 2015) (concluding that the party's "sham" dissolution of marriage to shield marital property from bankruptcy was a fraud upon the court).

¶ 27 Nor are we persuaded by husband's general assertion that the court "was not damaged by any fraud." The parties' conduct directly interfered with the judicial system's ability to adjudicate the matter. *See Hazel-Atlas Glass*, 322 U.S. at 246; *see also In re C.L.S.*, 252 P.3d 556, 561 (Colo. App. 2011).

¶ 28 We thus discern no abuse of discretion in the court's ruling that vacated the decree of legal separation based on its factual findings that the parties committed fraud upon the court.

B. The Separation Agreement

¶ 29 Husband next contends that Judge Mares erred by declining to enforce the parties' separation agreement in the court's permanent orders. He argues that (1) the separation agreement remained in effect at permanent orders because Judge Kramer had denied wife's motion to set aside the separation agreement as unconscionable; and (2) the doctrine of unclean hands prevented wife from receiving more from the marital estate than what was provided under the separation agreement because she participated in the fraud. We see no error.

¶ 30 Judge Mares determined that it was "clear from Judge Kramer's order that as a result of the legal separation being held void [due to the] fraud on the part of both parties that we start over on this case."

¶ 31 A review of Judge Kramer's findings supports the court's conclusion that Judge Kramer implicitly invalidated the parties' separation agreement. *See People in Interest of C.L.T.*, 2017 COA 119, ¶ 36 (recognizing that the court's findings may be implicit in its ruling).

¶ 32 A separation agreement is intended "[t]o promote the amicable settlement of disputes between the parties to a marriage *attendant upon* their separation or the dissolution of their marriage." § 14-10-112(1), C.R.S. 2020 (emphasis added). Thus, the execution of a separation agreement occurs "under circumstances accompanying, connected with, or surrounding a contemplated divorce or separation." *In re Marriage of Bisque*, 31 P.3d 175, 178 (Colo. App. 2001). Whether that occurred is a question of fact for the district court, and we defer to the court's finding when supported by the record. *See In re Marriage of Lafaye*, 89 P.3d 455, 459 (Colo. App. 2003).

Judge Kramer found that

- "the purpose of the Separation Agreement was asset protection," not an intent to separate;
- the parties intended to continue to "live together in an intact marriage"; and
- they never intended to act on or enforce the separation agreement.

¶ 33 Judge Kramer thus determined that the separation agreement was not created in contemplation of husband and wife's marital

separation. *Bisque*, 31 P.3d at 178. Instead, as Judge Kramer found, husband and wife executed the separation agreement to commit a fraud upon the court. *See Armstrong v. Gresham*, 73 Colo. 13, 16, 213 P. 114, 115-16 (1923) ("An agreement to perpetrate a fraud on a third person is . . . void.").

¶ 34 Still, husband argues that the doctrine of unclean hands must apply to prevent wife from benefiting from the invalidation of the separation agreement. Under this doctrine, a district court may, within its discretion, deny a party equitable relief when that party engaged in improper conduct related to his or her request. *See Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000). The court, however, was not granting wife equitable relief at permanent orders related to the separation agreement; it was enforcing Judge Kramer's prior order invalidating the separation agreement. *See Wilson v. Prentiss*, 140 P.3d 288, 293 (Colo. App. 2006) (noting that the doctrine of unclean hands applies only to equitable remedies); *see also Vogan v. County of San Diego*, 193 P.3d 336, 338 (Colo. App. 2008) (recognizing that a court has the inherent power to enforce its own orders). Thus, we cannot conclude that the court

abused its discretion by not applying the equitable defense of unclean hands.

¶ 35 Accordingly, we reject husband's argument that the court erred by not enforcing the parties' separation agreement in its permanent orders.

C. The Ranch Trail Home

¶ 36 Husband next contends that the district court erred by allocating the Ranch Trail home because, in his view, it was his separate property. We disagree.

¶ 37 All property acquired during the marriage is presumed marital. § 14-10-113(3), C.R.S. 2020; *In re Marriage of Blaine*, 2021 CO 13, ¶ 2. This presumption may be overcome only when a party shows that the property was (a) acquired by gift, bequest, devise, or descent; (b) acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent; (c) acquired by a spouse after a decree of legal separation; or (d) excluded by the parties' valid agreement. § 14-10-113(2)(a)-(d); *Blaine*, ¶¶ 2-3; *In re Marriage of Balanson*, 25 P.3d 28, 36 (Colo. 2001).

¶ 38 The classification of property as marital or separate is a legal determination and depends on the district court's resolution of factual disputes. *In re Marriage of Morton*, 2016 COA 1, ¶ 5. We defer to the court's factual findings and review its legal determination de novo. *Id.*

¶ 39 Husband argues that the Ranch Trail home was his separate property because wife gifted the property to him by executing a deed after the decree of legal separation that conveyed her interest in the home to him. *See In re Marriage of Bartolo*, 971 P.2d 699, 700-01 (Colo. App. 1998); *see also* § 14-10-113(2)(a). The evidence does not support his characterization. An interspousal deed alone does not demonstrate an intent to gift property or overcome the presumption of marital property. *Blaine*, ¶ 1; *see also In re Marriage of Howard*, 42 Colo. App. 457, 458, 600 P.2d 93, 94 (1979) ("The form in which title is held is not dispositive in determining whether property is marital."). To qualify as a gift, the spouse transferring property must simultaneously intend to make the gift. *Balanson*, 25 P.3d at 37. However, wife testified that she did not have such donative intent. She stated that her execution of the deed was intended to be "temporary," she did it at husband's request, and she continued

to live in the home. *See In re Marriage of Dale*, 87 P.3d 219, 227 (Colo. App. 2003) (recognizing that donative intent is a factual question for the district court to resolve); *cf. Bartolo*, 971 P.2d at 700 (determining that husband's donative conduct, which included permanently vacating the premises, supported determination of separate property).

¶ 40 Husband also notes that he used his separate property to purchase and construct the Ranch Trail home. *See* § 14-10-113(2)(b). While he described using property that he inherited from his father to pay for the home, he provided no evidence at the hearing that traced his use of that separate property. *See Dale*, 87 P.3d at 227 ("To claim separate ownership successfully under the exchange provision, a spouse must trace the property by proving a series of exchanges back to an original asset."). As well, other evidence at the hearing showed that the parties contributed marital funds toward the Ranch Trail home and jointly owned it after its purchase. *See In re Marriage of Corak*, 2014 COA 147, ¶ 11 (noting that separate property commingled with marital property becomes marital property when it cannot be traced back to its original separate form); *In re Marriage of Krejci*,

2013 COA 6, ¶ 4 (placing separate property in joint ownership during the marriage creates the presumption of marital property).

¶ 41 To the extent husband suggests that he acquired the Ranch Trail home after the decree of legal separation or the parties excluded it by valid agreement, *see* § 14-10-113(2)(c)-(d), we have affirmed the court's determinations that vacated the decree of legal separation and declined to enforce the separation agreement. *See Bisque*, 31 P.3d at 180. And husband does not otherwise develop an argument to support either of these exceptions to the presumption of marital property. *See In re Marriage of Drexler*, 2013 COA 43, ¶ 27 (declining to address undeveloped argument).

¶ 42 We thus discern no error in the court's allocation of the Ranch Trail home as marital property.

D. Wife's Refinance of Ranch Trail Home

¶ 43 Husband then argues that the court erred by (1) requiring that wife only "apply" to refinance the mortgage on the Ranch Trail home and (2) not reimbursing him for expenses he incurred on the property before wife completed the refinancing. We disagree.

1. Preservation

¶ 44 Wife contends that we should not address husband's arguments because they were not properly preserved. To preserve an issue for appeal, the party must bring it to the district court's attention so that the court had an opportunity to rule on it. *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010). While husband did not present these issues at the permanent orders hearing, he raised them in his proposed permanent orders, and the court had an opportunity to rule on them before it issued its written permanent orders. Husband therefore sufficiently preserved his appellate arguments for our review.

2. Discussion

¶ 45 The district court has great latitude to effect an equitable distribution of marital property based upon the facts and circumstances of each case, and an appellate court must not disturb its decision absent a clear abuse of discretion. *Balanson*, 25 P.3d at 35.

¶ 46 The court allocated to wife the Ranch Trail home "subject to the mortgage" and directed her to apply for refinancing within sixty days "to get Husband's name off of it." While husband argues that

the court's written order was incomplete because it did not require wife to complete the refinancing or pay off the mortgage, the court's oral ruling also stated that wife "ha[d] to refinance [the mortgage] to get [husband's] name off of it." Because this oral ruling, which did not conflict with the written order, supplemented the court's directive on the refinancing, we cannot agree with husband that wife had no obligation to complete the refinancing or pay off the mortgage. *See Friends of Denver Parks, Inc. v. City & Cnty. of Denver*, 2013 COA 177, ¶¶ 36-37 (recognizing that the district court's oral rulings may supplement its written order); *In re Marriage of Cespedes*, 895 P.2d 1172, 1176 (Colo. App. 1995) (same); *cf. People in Interest of S.R.N.J-S.*, 2020 COA 12, ¶ 16 (noting that a court's written order controls over its oral ruling when they conflict).

¶ 47 As for husband's request for reimbursement of expenses, he neither addressed this issue at the permanent orders hearing nor presented any evidence regarding his expenses. Absent such evidence, we cannot conclude that the court abused its discretion by not addressing husband's request for reimbursement in its permanent orders. *See In re Parental Responsibilities Concerning*

N.J.C., 2019 COA 153M, ¶ 49 (providing that the parties must present the relevant evidence to the court, and their failure to do so does not provide grounds for reversal).

¶ 48 Accordingly, we see no error by the district court in addressing wife's refinance of the Ranch Trail home mortgage and declining to order reimbursement for husband's expenses.

III. Wife's Cross-Appeal

A. Maintenance

¶ 49 In her cross-appeal, wife contends that the district court erred by not awarding her monthly maintenance. We disagree.

¶ 50 Husband first responds that wife did not preserve this issue because she requested an award of marital property in lieu of maintenance. But wife alternatively requested an award of monthly maintenance from the district court. The issue is preserved. *See Berra*, 251 P.3d at 570.

¶ 51 We review the court's maintenance determination for an abuse of discretion. *Balanson*, 25 P.3d at 35. The district court "shall award maintenance only if it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to him or her, to provide for his or her reasonable

needs and is unable to support himself or herself through appropriate employment . . . ." § 14-10-114(3)(d), C.R.S. 2020; *see also* § 14-10-114(3)(a)(II)(C).

¶ 52 The district court found that the distribution of marital assets allowed "both parties to do well separately without the need for maintenance." While it recognized that husband's economic circumstances were more secure than wife's and that his income, $9,859 per month, was higher than wife's income, "at least $1,175 a month," it concluded that wife did not meet the threshold need for maintenance because she could provide for her own reasonable needs.

¶ 53 The record supports the court's determination. The court allocated to wife over $1.4 million from the marital estate. Specifically, she received the Ranch Trail home, which was valued at $1,279,000 and had a $190,000 mortgage; multiple vehicles worth a total of approximately $18,500; $1,111 from the marital bank accounts; $370,000 from husband's Schwab IRA; and an investment account worth approximately $1,900. She also received none of the parties' marital debt. In addition, the court found that wife had an income of "at least $1,175 a month," which

corresponded to her social security payment, and the evidence showed that she was earning an additional $1,000 per month from working. Given the significant value of marital property allocated to wife and her monthly income, we are not persuaded that the court erred by finding that she could meet her reasonable needs.

¶ 54 Wife argues, however, that the court may not require her to deplete her share of the marital property to qualify for maintenance. *See In re Marriage of Nordahl*, 834 P.2d 838, 842 (Colo. App. 1992). True, but the amount of marital property apportioned to wife was a relevant factor for the court's determination on whether she established the need for maintenance. *See* § 14-10-114(3)(d). The court also "may award additional marital property to the recipient spouse or otherwise adjust the distribution of marital property or debt to alleviate the need for maintenance." § 14-10-114(3)(f).

¶ 55 As well, wife asked the court to award her the Ranch Trail home and a substantial portion of the Schwab IRA in lieu of monthly maintenance. While she did not receive as much of the Schwab IRA as she requested, her request necessarily contemplated the use of marital property for her living expenses. Thus, any error resulting from wife's need to use some of the allocated marital

property was injected into the case by her, and she may not now claim that was improper. *See Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002) (recognizing that a party may not raise an issue on appeal that he or she injected into the case).

¶ 56 Wife also argues that she did not, in fact, receive a significantly disproportionate share of the marital estate to warrant no award of maintenance. But she received over $1.4 million from the approximately $2.3 million estate, which resulted in her getting $651,000 more than husband. Wife attempts to dilute the court's unequal allocation by adding into the marital estate the value of husband's disability pension from the police department and money that he withdrew from his Schwab IRA during the dissolution proceeding, which according to her totaled almost $600,000. The court, however, declined to include these additional funds in the marital estate. It rejected wife's argument that husband had improperly dissipated the Schwab IRA. *See In re Marriage of Jorgenson*, 143 P.3d 1169, 1173 (Colo. App. 2006) (discussing a spouse's economic fault from the dissipation of marital assets). And it considered husband's disability pension as an economic circumstance, not a marital asset. *See In re Marriage of Peterson*,

870 P.2d 630, 632 (Colo. App. 1994) (excluding the husband's police disability benefits from marital property). While wife attempts to add these funds back into the marital estate, she developed no legal argument in her opening brief explaining how the court erred by making these determinations. Any attempt by her to do so in her reply brief was too late. *See Drexler*, ¶ 24 (declining to address an issue not raised in a party's opening brief).

¶ 57 We therefore cannot conclude the court abused its discretion by not awarding wife monthly maintenance.

B. Attorney Fees in the District Court

¶ 58 Wife next argues that the district court's attorney fees determination was improper. We see no error.

¶ 59 Section 14-10-119, C.R.S. 2020, empowers the district court to equitably apportion attorney fees between the parties based on their relative ability to pay. *In re Marriage of Gutfreund*, 148 P.3d 136, 141 (Colo. 2006). Courts have great latitude to craft attorney fees orders appropriate to the circumstances in a given case. *Id.* The district court's decision whether to award fees under section 14-10-119 is discretionary, and we will not disturb its decision

absent a showing that the court abused its discretion. *In re Marriage of Davis*, 252 P.3d 530, 538 (Colo. App. 2011).

¶ 60 The district court declined to award wife attorney fees under section 14-10-119 based on its unequal division of the marital assets, with two exceptions. It ordered the parties to equalize the amount of attorney fees paid with marital assets and awarded wife attorney fees for having to raise the issue of husband's withdrawal of money from the Schwab IRA before the permanent orders hearing.

¶ 61 Wife first argues that the court's order concerning the equalization of attorney fees paid out of the marital estate was ambiguous because "the court did not clarify what 'marital assets' are to be included in this accounting." But, in dividing the marital property and debts, the court specifically determined the parties' marital assets. As well, section 14-10-113(2) provides a clear definition of marital property. Given this guidance, we perceive no ambiguity in the court's order.

¶ 62 Wife next contends that the disparity of their incomes warranted an award of attorney fees in her favor. To be sure, husband had a higher income than wife. But wife also received

over $651,000 more from the marital estate. *See* § 14-10-119 (directing the court to consider "the financial resources of both parties"). In addition, before the permanent orders, husband had paid wife $30,000 toward her attorney fees, and the court ordered husband to pay additional fees related to his withdrawal from the Schwab IRA. Beyond this, the court also ordered the equalization of attorney fees paid from the marital assets, which, according to the record, may result in an additional $33,000 to $47,000 to wife.

¶ 63 Accordingly, the district court's attorney fees order was neither ambiguous nor an abuse of its broad discretion.

C. Attorney Fees on Appeal

¶ 64 Wife requests an award of appellate attorney fees under section 14-10-119. Because this issue requires a consideration of the parties' current financial resources, the district court is better equipped to determine the factual issues related to wife's request. *See In re Marriage of Alvis*, 2019 COA 97, ¶ 30. We therefore remand the case to the district court to determine wife's request for appellate attorney fees under section 14-10-119. *See* C.A.R. 39.1.

IV. Conclusion

¶ 65 We affirm the judgment and remand the case for the district court to determine wife's section 14-10-119 request for appellate attorney fees.

JUDGE FOX concurs.

JUDGE PAWAR dissents.

JUDGE PAWAR, dissenting.

¶ 66 I respectfully dissent from the majority's opinion. A decree of legal separation is a final judgment. Wife moved to set aside that final judgment under C.R.C.P. 60(b). But that motion was untimely and the district court should have denied it without conducting a hearing. Instead, the district court entertained the motion and ultimately vacated the judgment, over seven years after it entered, on a ground not asserted by either party: that the judgment was based on a fraud upon the court. Although district courts have the authority to vacate final judgments based on fraud upon the court at any time, I conclude that doing so here was error. I would therefore reverse the district court's order vacating the decree of legal separation, vacate the newly entered permanent orders, and instruct the district court to resolve husband's motion to convert the decree of legal separation to a decree of dissolution of marriage.

I. Background

¶ 67 The majority clearly and thoroughly lays out the factual and procedural background of this case. What follows is a brief summary of the facts and procedural history relevant to my dissent.

¶ 68 Husband petitioned for legal separation after wife was charged with theft. The parties executed a separation agreement, filed it with the court, and asked the court for a decree of legal separation by way of non-appearance affidavit. In 2009, the court issued the decree of legal separation and incorporated the separation agreement into the decree.

¶ 69 Over seven years later, wife filed a motion to set aside the separation agreement under C.R.C.P. 60(b)(5). Husband objected, arguing, among other things, that wife's motion was untimely. Husband then filed a motion to convert the decree of legal separation to a decree of dissolution of marriage.

¶ 70 After an evidentiary hearing, the court denied wife's motion to set aside the separation agreement. Nevertheless, it concluded sua sponte that the parties obtained the decree of legal separation through a fraud upon the court; the court found that husband and wife falsely represented that their marriage was irretrievably broken in 2009 and that they made this misrepresentation to insulate their assets from potential penalties in wife's theft case. The court vacated the decree of legal separation and, as a result, denied

husband's request to convert it to a decree of dissolution of marriage.

¶ 71 Two years later, the court dissolved the marriage and entered permanent orders. In doing so, the court declined to enforce the parties' prior separation agreement, allocated wife a greater share of the marital estate, and declined to award wife maintenance or attorney fees.

II. Setting Aside the Decree of Legal Separation

¶ 72 Husband argues that the district court erred by vacating the decree of legal separation. He argues that the court lacked authority to do anything but summarily deny wife's motion to set aside the decree. He also argues that the court erred by finding fraud upon the court. I agree. I conclude that because wife's motion to set aside was untimely, the court erred by not summarily denying the motion. Further, I agree with husband that the facts as found by the court do not support the legal conclusion that the parties committed a fraud upon the court.

A. C.R.C.P. 60(b) and Finality

¶ 73 We generally review a court's C.R.C.P. 60(b) ruling for an abuse of discretion. *Goodman Assocs., LLC v. WP Mountain Props.,*

LLC, 222 P.3d 310, 314 (Colo. 2010). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or it is a misapplication of the law. *Id.*; *see also Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 19. However, we review de novo the court's application and interpretation of the law. *See Tallman v. Aune*, 2019 COA 12, ¶ 21.

¶ 74 A decree of legal separation is a final judgment when entered and subject to the right of appeal. § 14-10-120(1), C.R.S. 2020. "Once a final judgment has entered and the time for review has passed, the judgment is generally conclusive between the parties." *People in Interest of J.A.U. v. R.L.C.*, 47 P.3d 327, 330 (Colo. 2002); *see also E.J.R. v. Dist. Ct.*, 892 P.2d 222, 226 (Colo. 1995) (noting the "definite public interest" in assuring the finality and conclusiveness of judgments). This compelling need for finality of a judgment "is particularly pronounced in domestic relations cases." *In re Marriage of Durie*, 2020 CO 7, ¶ 36; *see also Est. of Burford v. Burford*, 935 P.2d 943, 954 (Colo. 1997) (recognizing the sound public policy for the finality of a decree).

¶ 75 Accordingly, the district court generally loses its authority to alter, amend, or vacate a final judgment unless, as relevant here, an

appropriate motion is presented under C.R.C.P. 60. *Koch v. Dist. Ct.*, 948 P.2d 4, 7 (Colo. 1997); *see also J.A.U.*, 47 P.3d at 330 ("A court's power to modify or vacate a final judgment is limited, even if aspects of that final judgment are erroneous."). *But see In re Marriage of Stroud*, 631 P.2d 168, 172 (Colo. 1981) ("[I]t is not a prerequisite to the court's subject matter jurisdiction under C.R.C.P. 60(b) that the grounds asserted in the motion to set aside a judgment be legally adequate."). The court therefore may not set aside or modify a separation agreement's division of property, incorporated into a decree, "unless the conditions of C.R.C.P. 60 are met." *In re Marriage of Seely*, 689 P.2d 1154, 1159 (Colo. App. 1984); *see also* § 14-10-122(1)(a), C.R.S. 2020.

¶ 76 C.R.C.P. 60(b) creates a balance between the finality of judgments and the ability to provide relief in the interests of justice. *See J.A.U.*, 47 P.3d at 331; *In re Marriage of Roddy*, 2014 COA 96, ¶ 29. It does not give the court an unfettered ability to disturb a final judgment; the rule sets forth specific parameters under which the court may grant relief. *See Murray v. Bum Soo Kim*, 2019 COA 163, ¶ 11; *see also J.A.U.*, 47 P.3d at 331.

¶ 77 Under C.R.C.P. 60(b), the court may set aside a final judgment based on (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud, misrepresentation, or other misconduct of the adverse party; (3) a void judgment; or (4) the satisfaction or release of the judgment. C.R.C.P. 60(b)(1)-(4).

¶ 78 In addition, C.R.C.P. 60(b)(5) allows the court to set aside a judgment for "any other reason justifying relief." This residuary provision applies "only in extreme situations or extraordinary circumstances." *Davidson v. McClellan*, 16 P.3d 233, 237 (Colo. 2001); *see also Harriman*, ¶ 50 ("[T]he errors that courts will consider under the residuary clause must be very rare and very serious, because the consideration of less serious errors would undermine the important interest in the finality of judgments.").

¶ 79 Importantly, a C.R.C.P. 60(b) motion must "be made within a reasonable time," and for subsections (1) and (2) not more than 182 days after the entry of judgment. C.R.C.P. 60(b). A party may not use C.R.C.P. 60(b)(5) to assert an untimely C.R.C.P. 60(b)(1) or (2) request. *See Roddy*, ¶ 30; *see also Davidson*, 16 P.3d at 237 ("[T]o prevent [C.R.C.P. 60(b)(5)] from swallowing the enumerated reasons and subverting the principle of finality, it has been construed to

apply only to situations not covered by the enumerated provisions. . . ."); *Seely*, 689 P.2d at 1159 ("[W]here the only grounds for relief established are those covered by either C.R.C.P. 60(b)(1) or (2), the six-month time limitation applicable to these clauses may not be circumvented by reliance on other provisions of the rule.").

¶ 80 Beyond these provisions, the court may also set aside a judgment for fraud upon the court. *See Carbajal v. Wells Fargo Bank, N.A.*, 2020 COA 49, ¶ 17.

B. Court Should Have Summarily Denied Wife's Untimely Motion

¶ 81 Wife framed her motion to set aside as requesting relief under only C.R.C.P. 60(b)(5). It alleged the following grounds for relief:

- the agreement was unconscionable because husband received over $1.6 million in marital assets but she received only approximately $350,000;
- she executed the agreement without an attorney;
- husband did not disclose the value of certain assets before she executed the separation agreement;

- the court approved the agreement "without any apparent scrutiny"; and
- the parties continued to reside together as husband and wife in the marital home after executing the agreement.

¶ 82 In her reply to the motion, wife supplemented her allegations for relief, asserting that husband did not provide full disclosures under C.R.C.P. 16.2, he induced her to sign the non-appearance affidavit, and their marriage had not been irretrievably broken for the past seven years.

¶ 83 Based on the relief wife requested in her motion, it was not timely. Many of wife's requests for relief, while framed under C.R.C.P. 60(b)(5), in fact fell under other avenues for post-trial relief for which the deadline to assert them had passed. In particular, wife's motion suggested husband's fraud, misrepresentation, and misconduct. All these allegations fall squarely within C.R.C.P. 60(b)(2). *See Roddy*, ¶¶ 20-22 (recognizing a party's failure to disclose financial information under C.R.C.P. 60(b)(2)); *In re Marriage of Eisenhuth*, 976 P.2d 896, 900 (Colo. App. 1999) (considering allegations a party undervalued, omitted, or otherwise hid marital assets under C.R.C.P. 60(b)(2)). And wife filed her

motion seven years after the final judgment, well after the 182-day time period for these claims had expired. The court was therefore "without authority" to entertain these allegations. *Murray*, ¶ 12 (quoting *Love v. Rocky Mountain Kennel Club*, 33 Colo. App. 4, 6, 514 P.2d 336, 337 (1973)); *see also J.A.U.*, 47 P.3d at 332 (noting that an untimely filed C.R.C.P. 60(b)(2) motion is "absolutely barred").

¶ 84 Similarly, wife appears to seek untimely relief under C.R.C.P. 16.2(e)(10) for husband's alleged misstatements and omissions in his C.R.C.P. 16.2 disclosures. *See Durie*, ¶ 15. Such a request must be filed within five years of the final judgment, which wife did not do. C.R.C.P. 16.2(e)(10). Reframing her request under C.R.C.P. 60(b)(5) does not allow her to sidestep the statutory deadline.

¶ 85 To the extent wife's allegations were beyond these provisions, C.R.C.P. 60(b)(5) provided the only possible avenue for wife to disturb the finality of the separation agreement. But remember, a C.R.C.P. 60(b)(5) motion still must be filed within a reasonable time. *See* C.R.C.P. 60(b); *Robledo v. Exec. Dir. of the Colo. Dep't of Corr.*, 2020 COA 135, ¶ 9.

¶ 86 I conclude that wife's attack on the validity of the separation decree — a final judgment — seven years after it entered was not reasonable. The allegations in wife's motion were all circumstances that were within her knowledge when she executed the separation agreement or shortly thereafter. And she did not allege any recently discovered information that would have explained her delay. Wife simply sat on her objections to the separation agreement for over seven years. Allowing wife to proceed on such an untimely motion conflicts with the compelling need for finality in domestic relations judgments. *See Durie*, ¶ 36; *see also J.A.U.*, 47 P.3d at 330-31 (recognizing that there must be a point when the judgment is considered conclusive, and the parties can be assured that the outcome will not change). The district court therefore had no authority to entertain wife's motion and erred by doing so. *See Haskell v. Gross*, 145 Colo. 365, 368, 358 P.2d 1024, 1026 (1961) (concluding that a C.R.C.P. 60(b)(5) motion was not filed in a reasonable time when the moving party knew of the underlying action but took no steps to vacate or otherwise attack the validity of the judgment until seventeen years later); *Robledo*, ¶ 9 (concluding that waiting six years to file a C.R.C.P. 60(b) motion was not a

reasonable time); *Tripp v. Parga*, 764 P.2d 367, 369 (Colo. App. 1988) (concluding that a C.R.C.P. 60(b) motion was untimely filed when it was based on a settlement agreement negotiated four years earlier).

C. Court Erred by Finding Fraud Upon the Court

¶ 87 I recognize that, *after* the hearing on wife's motion, the court sua sponte concluded that the parties had committed a fraud upon the court by knowingly and falsely attesting that their marriage was irretrievably broken for purposes of obtaining a decree of legal separation. C.R.C.P. 60(b). It is true that a court can alter a final judgment based on fraud upon the court at any time. *Id.* ("This Rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court . . . ."). But I conclude, as a matter of law, that the facts as found by the court do not support the determination that the parties committed a fraud upon the court.

¶ 88 Fraud upon the court is more than mere fraud. *See Se. Colo. Water Conservancy Dist. v. Cache Creek Mining Tr.*, 854 P.2d 167, 176 (Colo. 1993). First, the fraud must be extrinsic, not intrinsic. *Id.* Fraud is intrinsic if it "pertains to an issue involved in the original action" or "the acts constituting the fraud were or could

have been litigated in the original action." *Id.* In contrast, fraud is extrinsic if it "goes to the jurisdiction of the court, or constitutes a fraud upon the law of the forum." *Id.* (quoting *Fahrenbruch v. People ex rel. Taber*, 169 Colo. 70, 76, 453 P.2d 601, 605 (1969)).

¶ 89 But even if fraud is extrinsic, it is not necessarily fraud upon the court. *See Carbajal*, ¶ 32 ("Fraud on the court is . . . even narrower than[] extrinsic fraud."). To constitute fraud upon the court, extrinsic fraud must corrupt the judicial power and turn a court of law into an instrument of injustice. *Se. Colo. Water Conservancy Dist.*, 854 P.2d at 176. Examples of extrinsic fraud that rise to the level of fraud on the court are "bribery or other corruption of the court or of a jury, or where an attorney is an accomplice to the fraud." *In re Marriage of Gance*, 36 P.3d 114, 118 (Colo. App. 2001).

¶ 90 Based on the district court's factual findings, I conclude that any fraud here was intrinsic, not extrinsic, and certainly not fraud upon the court. I accept the court's findings that (1) husband and wife affirmed that the marriage was irretrievably broken and sought a decree of legal separation to protect assets; and (2) they carried on with their lives as though they were married even after obtaining

the decree of legal separation. For the purpose of this analysis, I will even accept the district court's conclusion that husband and wife "falsely represent[ed] to the Court that their marriage was irretrievably broken."[1] But if this was fraud, it was intrinsic fraud because it could and should have been uncovered by the court before issuing the decree of legal separation.

¶ 91 Courts are not obliged to accept, without question or review, parties' joint affirmation that a marriage is irretrievably broken. Section 14-10-110(1), C.R.S. 2020, provides that "[i]f both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken . . . , there is a presumption of such fact, and, unless controverted by evidence, the court shall, after hearing, make a finding that the marriage is irretrievably broken." Under this statute, when presented with a joint affirmation, courts must nevertheless hold a hearing on

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[1] I question, however, whether it is ever appropriate for a court to accuse parties of fraud based on the court's assessment that it does not believe the parties' sworn characterization of the state of their marriage. This is especially so when parties are statutorily required to swear that the state of their marriage satisfies a legal standard — not a simple fact question — so undefined and open to interpretation as "irretrievably broken."

whether there is an irretrievable breakdown and may still find that one does not exist based on other evidence. Indeed, "[t]he court shall not be bound to enter a decree [of legal separation] upon the affidavits of either or both parties." § 14-10-120.3(3), C.R.S. 2020.

¶ 92 Thus, the statutory scheme contemplates that a district court will evaluate the veracity of the parties' joint affirmation by reviewing the affidavit and separation agreement and, if necessary, conducting a hearing and receiving contradictory evidence. §§ 14-10-110(1), 14-10-120.3(3). This means that husband and wife's purportedly fraudulent affirmations that their marriage was irretrievably broken could and should have been exposed and resolved by the court that issued the decree of legal separation. Indeed, the parties' separation agreement expressly reflected that they lived together at the time they executed the agreement and anticipated continuing to do so. And their agreements for maintenance and for property division contemplated their continued indefinite cohabitation. Accordingly, at the time the court issued the decree of legal separation, the court had before it much of the information that it later used to find a fraud upon the court. If the court was uncertain about whether the marriage was

irretrievably broken before issuing the decree of legal separation, it had the authority — indeed the obligation — to take additional evidence to resolve that issue. Consequently, any purported fraud was intrinsic and was not fraud upon the court. *See Se. Colo. Water Conservancy Dist.*, 854 P.2d at 176; *In re Levander*, 180 F.3d 1114, 1120 (9th Cir. 1999) (fraud that could and should be exposed in the normal course of proceedings is not fraud upon the court). The district court erred by holding otherwise.

III. Conclusion

¶ 93 I would reverse the court's ruling vacating the separation agreement and I would vacate the court's permanent orders and dissolution decree. I would remand the case for reinstatement of the decree of legal separation and the parties' separation agreement incorporated into that decree. And because the court's ruling vacating the decree of legal separation was the only basis for its denial of husband's motion to convert the decree of legal separation to a decree of dissolution of marriage, I would also reverse that ruling and direct the court to address husband's motion on remand. *See* § 14-10-120(2).

Court of Appeals

STATE OF COLORADO
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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

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