

71327-2

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No. 71327-2-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

IN RE MARRIAGE OF:

MICHAEL D. PEASE,
Appellant,

and

ELEANOR M. RANDECKER-PEASE,
Respondent.

FILED
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APPELLANT'S BRIEF

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ORIGINAL

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INTRODUCTION

This is an appeal of a decision made by a judge, revising a commissioner's order, finding the Appellant in contempt for willful failure to pay spousal maintenance and health insurance premiums to his wife¹. The hearing was based solely upon declarations and other written materials, and oral argument by the attorneys. No oral testimony was taken.

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by finding that the Appellant intentionally failed to make his maintenance payments (CP 144).

2. The trial court erred by finding that the Appellant used his severance package inappropriately (CP 144) which contradicts the fact the severance package was used to continue making the maintenance payments to Respondent after Appellant was laid off from his job in July of 2008 (CP 88).

3. The trial court erred by finding that e-mails sent to Respondent, several years ago (CP 27), "spoke volumes to the court of [Appellant's] intention not to pay his maintenance" (CP 144), and did not address Appellant's current ability to pay maintenance.

¹ The original decision by the commissioner found the Appellant did not act willfully in failing to pay because he did not have the ability to pay; therefore, Respondent's motion for contempt was denied (CP-117). Also, it is unclear if Appellant was found in contempt for failure to pay the health insurance premiums. The judge found the health insurance premiums were not part of maintenance, and terminated Appellant's requirement to pay them.

4. The trial court erred by finding that the Appellant did not show a good faith effort to work and conserve assets (CP 144).

5. The trial court erred by finding that the Appellant “held out” for a higher paying job before lowering expectations and pursuing a wider range of possibilities in the Seattle job market (CP 144).

6. The trial court erred and abused its discretion by concluding that the Appellant has the present ability to pay maintenance but is unwilling to do so (CP 144).

7. The trial court erred and abused its discretion by concluding that the Appellant’s failure to pay maintenance was intentional and he is therefore in contempt (CP 144).

8. The trial court erred and abused its discretion by not providing a viable method for the Appellant to purge contempt, and comply with the non-modifiable maintenance order (CP 144).

9. The trial court erred by finding that Appellant’s non-payment of health insurance premiums were evidence of his contempt (CP 144) when in fact the health insurance payments were not maintenance per the CR2A and the judge’s own findings, and were therefore terminated by court order (Sub # 82A CP Provided when available).

Issues Pertaining to Assignments of Error

1. How did the trial court reach the conclusion that the Appellant used his severance package inappropriately, when in fact it was used to pay the Respondent her spousal maintenance until the severance

monies were exhausted?

2. Did the Appellant show good faith in trying to find work and conserve assets by reducing his housing expenses and moving to San Jose, California, where he could live rent free?

3. The trial court did not have documented evidence of the e-mails used to support the courts findings. The trial court used only the Respondent's declaration and hence failed to meet the requisite evidentiary standard.

4. How did the trial court reach its conclusion that the Appellant "held out" for a higher paying job rather than to try and find other employment for less pay?

5. How did the trial court reach its conclusion that the Appellant made the wrong decision in choosing to reduce expenses by not fulfilling CLE requirements and choosing inactive status in the WSBA in an effort to save money and conserve assets?

6. Was the Appellant's inability to pay maintenance intentional or due to his substantially reduced unemployment earnings?

7. How did the trial court reach its conclusion that the Appellant has the ability to pay \$5,724.33 per month in maintenance (CP 147) when his income has not exceeded \$2,517.00 per month since December 2008, when his severance package was exhausted?

8. How is the Appellant supposed to purge contempt when the trial court avoids the issue that to be in compliance with the court orders

he has to pay \$5,724.33 per month yet does not have the ability to pay it, and then provides for the Respondent to determine how to purge contempt regarding the hundreds of thousands of dollars in back maintenance.

9. The judge can not find the Appellant in contempt for non-payment of health insurance premiums because the payment of health insurance is not considered maintenance under the separation agreement and the CR2A (CR2A-3), and was terminated by that same judge.

10. In light of all the evidence and circumstances were the orders entered by the trial court appropriate and based upon sufficient evidence?

B. STATEMENT OF THE CASE

Facts/Procedure:

Appellant (Michael Pease, husband) filed for and was granted a legal separation from Respondent (Eleanor Randecker-Pease, wife) per the Property Agreement negotiated and referred to in the Findings of Fact and conclusion of Law (CP 5-9) in November of 2007. In the Separation Contract and CR2A Agreement (SC & CR2A) Respondent received the following significant martial assets:

- Family Residence (located at 4320 SW Holgate) (CR2A-1)
- 2001 Mercedes 280C, unencumbered (CR2A-5)
- Monthly Maintenance of \$1200 per month (CR2A-2-3)
- Health Insurance as provided by the Appellant's employer, Panasonic Avionics (CR2A-3)
- Beneficiary of \$500,000+ term life insurance property provided by Appellant's employer (CR2A-3)

- Any separate property inherited from her Mother and Father's estate (CR2A-4)
- Personal property as per the final separation agreement (SC-2-3)

Appellant received the following martial obligations:

- Solely responsible for daughters living and college education expenses (CR2A-5)
- Mortgage payments (including taxes and insurance) on the Holgate Residence (CR2A-1-2)
- Additional principal payments of \$1,000.00 per month (CR2A-2)
- Paid for health and life insurance by payroll deduction (CR2A-3)
- Retained title to 2007 Ford Escape and 1994 Ford Explorer (CR2A-5)
- Paid maintenance of \$5,724.33 per month (CR2A-2-3, CP 147)
- Payments to Respondent began in August of 2007; personal property distribution was completed by April 2008.

The Appellant became ill (CP 89) suffering from the following conditions beginning in January of 2008:

- Lymphedema and leg ulcers in both legs
- Severe blood infections due to the leg ulcers
- Pulmonary Embolisms
- Atrial Fibrulation
- Diabetes
- Hypertension

Appellant went on paid medical leave in April of 2008 for treatment of his Lymphedema and still made all payments owed to Respondent during that period of time. Appellant returned to work in July of 2008. On the first day returning to work he was laid off from Panasonic Avionics, receiving a six month severance package (CP 89). Appellant applied for and received unemployment compensation from the State of Washington and immediately began searching for work in the greater

Seattle area (CP 187). During the next six months the Appellant applied for a variety of different jobs but received no offers. During this time the Appellant made all payments to Respondent as required until November of 2008 (CP 88). Appellant received his last severance package payment in December of 2008 and used that money to pay rent for the next 3 months so he could complete his apartment lease and not get evicted (CP 89).

In February of 2009 the Appellant's sister offered him a room to live in, in San Jose, California. With no prospects of employment in Seattle, he completed his apartment lease in March of 2009, packed up his belongings and moved to San Jose, Ca. (CP 89) leaving the majority of his personal items in storage. After getting settled in San Jose in early April of 2009, Appellant expanded his employment search to include the Bay Area cities, New York, Boston, Seattle and Portland (CP 89). This expansion was done to try and find a city where growth was occurring after the economic recession and where the Appellant, who was over 50 years old, might be a desired candidate (CP 90).

During the time of the Appellant's unemployment, July of 2008 to present (CP 90-116), he saw his income go from \$10,000.00+ per month in November of 2008 (Severance package running out) to \$2,000.00 per month in January of 2009 (CP 187) and to \$0.00 per month in June of 2010 (unemployment running out, CP 207) and finally \$2480.00 per month in October of 2012 (Social Security Disability begins, including an award of back Disability) (CP 253-268). After November of

2008, it was simply not possible to pay the maintenance based on the income available. Payments of \$5,724.33 per month for maintenance (CP 147) were impossible on the \$2,000.00 per month unemployment income.

Despite all of the above, the Appellant was still optimistic that he could find work and get back on his feet; hence he encouraged his daughter to stay in school and co-signed for her federal guaranteed student loans. The Appellant's daughter also contributed by becoming a Resident Assistant (RA) in the dormitory thereby earning free room and board. She completed her studies in May of 2011 and graduated. On the trip to New York to attend her graduation, the Appellant chose to drive in order to save money. On the return trip, the Appellant was in an accident, totaling his 2007 Ford Escape Hybrid on the Pennsylvania Turnpike and was taken to the hospital. Total cost of the hospital stay was \$27,000.00 (CP 17). Without health insurance the Appellant had no way to pay the hospital. His car insurance only paid \$2,000.00 in medical expenses, but did pay off the car loan and eliminated a \$400.00 car payment from the Appellant's monthly budget.

To further conserve assets and expenses and because he had not practiced law in any capacity in years (including when he was employed by Panasonic), Appellant went inactive in the Washington State Bar Association to save on bar dues and CLE expenses (CP 91). Since the Appellant was primarily seeking IT employment (his primary field of employment for the last 30+ years) and living outside the state of

Washington, deactivating his bar license seemed prudent to do (CP 89).

Appellant worked tirelessly for 4+ years to find work in the IT field. His loss of income ruined his credit rating to the point where his credit score was so low he would not be considered by Visa and other companies for interviews or positions in his field of expertise, IT security, and network design and network management. Appellant, also, applied to retail locations like Radio Shack, 7-11 and 24 hour gas stations to desperately earn money, but to no avail (CP 91). Having no income from June 2010 to October of 2012 was extremely difficult. The Appellant needed to borrow money from his mother and sister to pay basic necessities of life - car payments, storage fees, and job hunting expenses. To alleviate this situation Appellant tried to start a tax preparation business and tutor students (CP 90), however his health kept getting in the way. Numerous hospital stays plunged him deeper in debt and forced appellant to file for public assistance to get his medications and attempt to regain his health (CP 89). This led to the Appellant filing for Social Security Disability so he would have a means to pay for his health care and cover his basic expenses, not to avoid work as the Respondent has suggested (CP 91).

In October of 2012, the Appellant qualified for Social Security Disability. That same month he began receiving \$2,480.00 in benefits and 4 months of back pay retroactive to June of 2012 (CP 157). The new income would finally let the Appellant finalize his divorce, pay some

outstanding debts and to pay for health care expenses (CP 15-16). Specifically one of the debts paid off was the Shell bill that was in both the Appellant's and Respondent's names and if not cleared up would have impacted the Respondent's credit report (CP 15).

Appellant filed for modification, and conversion of the legal separation into divorce in January of 2013. In response, Respondent filed a motion for an Order to Show Cause Re Contempt/Judgment (CP 18-58) for failure to pay maintenance and health insurance. Appellant was initially successful at defeating the Motion for Contempt, because the court found he had no current ability to pay maintenance (CP 117), but was denied his requested modification since the maintenance provisions were deemed to be non-modifiable (CP 91). Respondent files a Motion for Revision of the Contempt Motion in April of 2013 (CP 118-121) and is successful. In November of 2013, the Order of Contempt is granted (CP 142-147) and Appellant files a Notice of Appeal in December of 2013 (CP 148-155). The Order Granting Motion for Revision of Order Denying Respondent's Motion of Contempt (CP 142-147) is what is appealed because there are no facts in the record that the Appellant has the present ability to comply with the court ordered maintenance (CP 122) or to purge contempt within his current income.

C. SUMMARY OF ARGUMENT

The Appellant's monthly income from January of 2009 until June of 2010 was less than \$2,300.00 per month (Washington

unemployment insurance), his income from July of 2010 to October of 2012 was \$0.00 per month and his disability income which started in October of 2012 (retroactive to June of 2012) is currently \$2,517.00 per month (CP 256-258). The order of contempt should never have been revised by the judge. The Appellant does not have a present ability to pay the court ordered maintenance of \$5,724.33 (CP 147), a requirement for finding him in contempt per RCW 7.21.030(2) and Britannia Holdings Ltd. V Greer, 127 Wn. App. 926, 933-934, 113 P.3d1041 (2005) (CP 122-123). The Appellant also cannot purge contempt because (1) he has no ability to pay \$5724.33, the current monthly amount of maintenance, and (2) the court has allowed Respondent to determine how much Appellant must pay in addition to the current maintenance payment for the hundreds of thousands in maintenance arrears (CP 145). The judge's finding of contempt is supported neither by the evidence, nor Washington state law.

D. ARGUMENT

1. WHAT IS THE STANDARD OF REVIEW?

1. The standard of review is de novo when no oral testimony is taken, and decisions are based upon written documentation.

Decisions based on declarations, affidavits, and written documents are reviewed de novo. *In re Estate of Nelson*, 85 Wn.2d 602 , 605-06, 537 P.2d 765 (1975) (where the trial court did not have an "opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony," appellate review of factual findings and legal conclusions is de novo). *In re Estate of Estate of Bowers*, 132 Wn. App. 334, 339, 132 P.2d 916 (2006).

When the record consists entirely of written material, an appellate court stands in the same

position as the trial court and reviews the record de novo. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994); Amren v. City of Kalama, 131 Wn.2d 25, 32, 929 P.2d 389 (1997). Hous. Auth. v. Pleasant, 126 Wn. App. 382, 387, 109 P.3d 422 (2005).

2. THE TRIAL COURT ERRED BY FINDING THE APPELLANT IN CONTEMPT AND FINDING HE HAD A PRESENT ABILITY TO PAY.

The judge was required to determine if the Appellant had the present ability to pay the monthly maintenance per RCW 7.21.030(2), and Britannia Holdings Ltd. v. Greer, 127 Wn. App. 926, 933-934, 113 P.3d1041 (2005).

"It is well settled that "the law presumes that one is capable of performing those actions required by the court ... [and the] inability to comply is an affirmative defense.'"^[18] But exercise of the contempt 1045*1045 power is appropriate only when "the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform."^[19] Thus, a threshold requirement is a finding of current ability to perform the act previously ordered." Britannia Holdings Ltd. v. Greer, 127 Wn. App. 926, 933-934, 113 P.3d1041 (2005).

The court's findings that the Appellant had and continues to have the present ability to pay in excess of \$5,724.33 per month in maintenance (CP 147) are not supported by any evidence. It is undisputed that the Appellant has been unemployed since July of 2008. Appellant's current monthly income is \$2,517.00, and he has not made more than \$2,517.00 (CP 178) per month since December of 2008, hence his present ability to pay the current monthly maintenance amount of \$5,724.33 is impossible (CP 256-258).

In Britannia, Britannia obtained an \$11 million judgment against the Greer's, then there were subsequent 2003 orders, via supplemental proceedings, requiring the Greer's to deliver money and property to Britannia or the court. In 2004, the court found that after the 2002 \$11 million judgment, the Greer's had control over at least \$635,000.00, and instead of transferring any of the money to Britannia or the Court, they transferred the monies to Nicaragua and Belize, and doing so, the Greer's knowingly disobeyed the multiple 2003 court orders, therefore, were in contempt of court. To purge contempt, the Greer's were ordered to pay \$635,000.00 to Britannia, or be jailed. On appeal, the contempt was reversed because, even though the Greer's conduct might have been contemptuous, but because the Greer's did not have a present ability to pay the \$635,000.00 as it had already been transferred back in 2002, there was no finding of present ability to pay the \$635,000.00, so the contempt finding and threat of jail were not coercive, but rather penal in nature. *Id.* 127 Wn. App. at 928 – 930, and 933 – 934.

The case at hand very closely parallels Britannia. When the Appellant was working in 2008 (even on medical leave) the Appellant continued making \$10,000.00 per month, and paying his maintenance as ordered. After being laid off in July of 2008, the Appellant continued making \$10,000.00 per month due to his severance package which ended in December of 2008. During this period, the Appellant had the present ability to pay and did pay the Respondent her monthly maintenance (CP

121) until his severance package ended and he no longer had the income to make a \$5,724.33 payment each month. It is undisputable, once Appellant's severance pay ended; he no longer had the ability to pay the extremely high amount of monthly maintenance. Respondent's claims the Appellant sent e-mails stating he would not pay her (CP 144) were not supported by the evidence and are immaterial, because Appellant still did not have the income or other monies to make the monthly maintenance payment.

There is no evidence to support the court's finding that the Appellant "held out" for a higher paying job rather than to find other work. To "hold out" implies the Appellant had received job offers for less than \$10,000.00 per month in salary or wages. The Appellant has yet to receive any job offer for any amount. In fact, the Appellant supplied ample evidence including articles and studies showing how workers over 50 were being ignored in the work force and unable to find even under-employed work (work for a lesser amount) (CP 260-268). Again, even if true, there is no evidence in the record showing the Appellant has the present ability to pay \$5,724.33 in monthly maintenance (CP 147).

The trial court provided no evidence to support its finding that the Appellant failed to conserve assets. There is no evidence in the record even suggesting the Appellant had any assets to conserve. The primary asset the parties' had was their house, which was awarded to the Respondent. Appellant had a car, which was subsequently totaled in an

accident, and the insurance company paid the creditor. And even if this were all true, none of it proves the Appellant has the present ability to pay \$5,724.33 in monthly maintenance (CP 147).

The trial court ignored evidence that showed how becoming disabled further hampered the Appellant's efforts to find steady employment (CP 257). Likewise, there was no evidence to support the court's findings that the Appellant lacked good faith to find work and to earn money (CP 257). Furthermore the trial court can not use Appellant's failure to pay health insurance premiums as evidence of contempt. The health insurance premiums are not maintenance under the CR2A, the requirement to pay the premiums was terminated by the same court finding the Appellant in contempt.

The trial court ignored the evidence, and only focused on the Respondent's argument. The proper standard to be applied by the trial court is there must be **substantial evidence** to support the findings of fact and conclusions of law. **Substantial evidence** "is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise" Perry v. Costco Wholesale, Inc. 123 Wn. App 783, 792 P3d 1264 (2004). There was no disputing Appellant's unemployment status; he was unemployed from July 8, 2008 to the present. The Appellant provided tax returns from 2009 to 2011 and many months of bank statements all showing Appellant earned no more then \$2,517.00 per month during the last 5 years (CP 178). The court was critical of Appellant's signing for federal guaranteed

student loans used by their daughter's for her college education. Even if he could, which no evidence was submitted to even suggest he could (the university controls the disbursement of the student loans), it would be illegal to divert any of those funds to Respondent to pay the maintenance owed her. A fair-minded person would conclude that it was impossible to make a \$5,724.33 payment of maintenance (CP 147) to Respondent and that the student loans had no credible impact on Appellant's present ability to pay Respondent. Therefore the substantial evidence standard is met, but in favor of Appellant not the Respondent and the Appellant does not have the present ability to pay hence the finding of contempt is error and must be reversed.

The trial court erred by not providing a means for the Appellant to purge the contempt; "An order of remedial civil contempt **must contain a purge clause** under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for non-compliance". In re Detention of Rebecca K., 101 Wn. App. 309, 314, 2 P.3d 501 (2000) "A **sanction is remedial** and civil when a person has failed or refused to perform an act that is yet within his or her power to perform." RCW 7.21.030(2) the language used by the trial court in the purge contempt clause was in error because it did not allow Appellant the ability to "perform an act that is within his power to perform". The Appellant was unable to pay the \$5,724.33 as required by the maintenance (CP 147) order in question (he only makes \$2,517.00 per month CP 178) and the order also allowed the

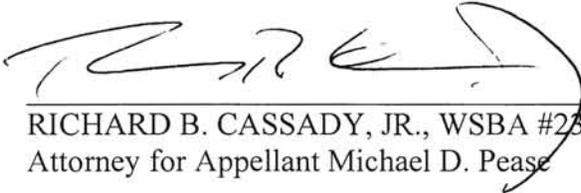
Respondent to have a say in how much the Appellant would have to pay towards the past due amounts. Britannia, states that the [Appellant] “carries the keys of his prison in his own pocket” Britannia, 127 Wn. App. at 933; the language of the order in question gives the “keys” to the Respondent and that is in error and must be reversed.

E. CONCLUSION

Based upon the facts of this case presented to the Trial Court, the entry of the Order of Contempt and the resulting orders was wrong. By doing so the Trial Court abused its discretion, and produced a result that is not supported by the evidence, facts, or law.

Respectfully submitted this 29th day of April, 2014.

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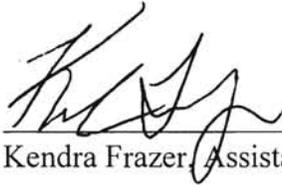
DECLARATION OF SERVICE

I, KENDRA FRAZER, AM OVER THE AGE OF 18, NOT A PARTY TO THE PROCEEDINGS, AND DECLARE:

I sent, via ABC Legal Messengers, the APPELLANT'S BRIEF to be personally delivered no later than April 30, 2014 to Respondent's attorney of record, Osgood S. Lovekin, 119 First Avenue S., #200, Seattle, WA 98104, and to the Court of Appeals, Division I.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington, on April 29, 2014.



Kendra Frazer, Assistant to the Attorneys

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