

NO. 36599-5-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
08 FEB 27 PM 3:34
STATE OF WASHINGTON
BY DEPUTY

IRL DAVIS)
) Petitioner/Appellant,
) vs.)
))
SUSAN DAVIS,)
) Respondent.)

Pierce County Cause No. 99 -3 -02637 -2

BRIEF OF APPELLANT

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Statement of the Case

Irl and Susan Davis were married approximately 23 years. Susan Davis decided she no longer wished to be married to Irl and asked him to leave the house. He did so and filed a Petition for Dissolution of Marriage in 1999. At the time the dissolution was commenced, the parties owned assets including the home later awarded to Susan Davis and a company called A/D Electronics, Inc. Eighty percent (80%) of A/D Electronics was owned by Susan and Irl Davis and 20% was owned by Tom Spencer. The parties conducted substantial discovery in this case and ultimately reached an agreed disposition of the matter. CP 211-214. The agreement was embodied in the Decree of Dissolution signed by the court. CP 1-18. Mr. Davis was awarded 65% of A/D Electronics and Mrs. Davis was awarded 15% of A/D Electronics. Mr. Davis was ordered to pay \$3,000 per month maintenance to Mrs. Davis for a period of ten years. The maintenance was not modifiable.

Mrs. Davis was awarded the family home located on Raft Island in Pierce County, Washington. Although the home was valued at \$600,000 Mrs. Davis' own appraiser valued the home at \$660,000 in the year 2000. The current assessed value of the home is approximately \$900,000 and the fair market value is estimated to be approximately \$1,100,000 to \$1,200,000 with a debt of approximately \$450,000.

During the course of the proceedings Mrs. Davis received \$3,000 per month in maintenance from approximately July, 1999, through the conclusion of the divorce in March, 2001. Her house payments were made throughout this period. These payments alone totalled \$157,500 (21 months X \$3,000 per month = \$63,000 and 21 months X \$4,500 = \$94,500). Mrs. Davis also received \$67,500 in costs and fees paid by Mr. Davis and another \$188,000 + in property distributions during the course of the dissolution. Future spousal maintenance was awarded to Ms. Davis for ten years CP 211-214.

Mr. Davis was ordered to make the payments on the family home of about \$4,500 per month. Mr. Davis remained a title owner on the house in order to have an insurable interest in the house. His obligation to make the house payment existed so long as Susan Davis resided there. Since the Decree was entered the home has been refinanced at least once and Susan Davis continues to reside there.

During the course of pre-trial discovery expert opinion as to the valuation of A/D Electronics varied substantially. The expert retained by the Petitioner valued the company at approximately 1.4 million dollars. The expert retained by the respondent, Susan Davis valued it substantially higher. For purposes of the CR 2A agreement the parties entered into the fixed valuation of \$2,000,000 (\$2 million). CP 211-214.

A/D Electronics was started by the parties approximately 20 years before the dissolution of marriage. They began this company from their home and gradually expanded the company. A/D Electronics purchased low-end electronic parts, adapters, plugs, cables and related materials from overseas manufacturers. The manufacturing capacity was primarily in the Peoples Republic of China. In order to facilitate trade with China, Irl Davis developed a company in Hong Kong. This permitted the purchase in and manufacture of goods in China with onward shipping to the United States. Susan Davis' expert placed no value on the Hong Kong company and it was awarded in its entirety to Mr. Davis. The Hong Kong company has no fixed assets and was needed to facilitate trade with the Peoples Republic of China.

From the time A/D Electronics was founded and all through its operations, the company operated with substantial credit facilities. The credit facility is described in the CR 2A agreement, at page2, and in the Decree at Exhibits A & B, page 10. CP 1-18 and CP 211-214. This credit obligation was the sole responsibility of Mr. Davis. When they started the company the parties utilized credit cards to purchase goods in advance of sale, bring them to the U.S. and then sell them, repaying the credit cards as they went. As the company matured and was incorporated the company developed credit lines with various banks, including Wells Fargo, Bank of

America, and later Key Bank. The credit lines were secured by accounts receivable and all of the assets of the business. The credit lines were absolutely necessary to operate the business. Lenders required Mr. Davis, Mrs. Davis and Mr. Spencer to provide personal guarantees for repayment of the credit line. As the business expanded the need for additional credit facilities continued and the credit lines became larger.

Based on a promise by Key Bank of additional credit limits, A/D Electronics expanded its China operation. Later Key Bank decided to revoke its promise and did not extend the additional line of credit. CP 19-28, 150-153 and 110-115. As a result A/D Electronics was unable to meet its commitment to the bank and to customers without the line of credit. Key Bank called the loan and demanded full repayment. CP 150-1153, 19-28, 148-149 and 110-115. Key Bank initiated a sell-off of the assets in order to recover its loan. This left A/D Electronics unable to do business. CP 110-115.

A/D Electronics accounted for over 95% of the annual income of Irl Davis and, by extension, for payments to Susan Davis. Both parties knew this when the CR 2A Agreement and Decree were entered into. When the sell-off of assets did not produce sufficient revenue for the bank, the bank sued Mr. Davis and Mr. Spencer to seek satisfaction of its loan through the personal guarantees of Irl Davis. CP 148-49. Irl Davis is 58

years old and has been an entrepreneur for at least the last 25 years. He has made diligent efforts to obtain employment through various employment agencies. CP 19-28. However, at his age employment options are few and far between. There is certainly nothing that will pay him sufficient funds to make all of the payments required in this case.

Assuming Mr. Davis has obligations of \$7,500 per month (\$3,000 maintenance plus \$4,500 house payments) Mr. Davis would need annual gross income in excess of \$ 182,000 to meet the obligations. This estimate is computed as follows:

In order to sustain \$7,500 to Susan Davis, Mr. Davis would have to produce \$10,174 in gross income to meet a \$7,500 monthly payment.

Assuming he would substantially cut his own standard of living, as he did, and further assuming he would be entitled to buy groceries and live on some funds, Mr. Davis would have to produce approximately \$15,200 per month or \$182,400 per year. The following table demonstrates the mathematics involved:

Income needed for S. Davis maintenance	\$3,000	
House payment for S. Davis	<u>\$4,500</u>	
TOTAL NET REQUIRED		\$7,500

Medicare/Social Security payments required above net income:		
(.0765 x \$ 7,500 =	\$574	
Federal tax of 28% required above net income	<u>\$2,100</u>	
TOTAL REQUIRED		\$10,174 per month

Irl's living expenses, estimate at month gross	\$5,000 per
Social Security and Medicare on Irl's income	-\$383
Federal Tax at 20% on Irl's income	- \$1,000
Net income to Irl:	\$3,617.00

TOTAL MONTHLY INCOME NECESSARY:

\$15,174.00 x 12 months = \$182,088

There are very few employment opportunities for 58 year old entrepreneurs that readily pay \$182,000 per year. Mrs. Davis has identified no such opportunities although she does not dispute that the company relied on lines of credit, that they were being called and that A/D Electronics could not operate without the line of credit. Mr. Davis could only earn this amount if A/D Electronics continued to operate with lines of credit. Unfortunately, no line of credit was available.

Mr. Davis would have liked nothing more than to have his company be successful and continue to meet his obligations as well as provide for himself and his family. A/D Electronics is unable to do so due to facts beyond Mr. Davis' control.

ARGUMENT

ASSIGNMENT OF ERROR NUMBER 1

1. The Trial Court erred in denying Petitioner's motion to terminate spousal maintenance as a result of changed circumstances.

An analysis of the CR 2A agreement and the Decree of Dissolution demonstrates that there are two separate components of their terms. The terms are set out in separate portions of both the Agreement and the Decree with its Exhibits. On their face the terms that apply to the spousal maintenance do not apply to other provisions of the Decree. Mr. Davis was obligated to pay spousal maintenance. He was obligated to pay this maintenance for a set period of time and this obligation was secured by his shares of stock in A/D Electronics. Should Susan Davis desire to pursue her claims of maintenance over the next four years, she should be required to utilize the security instrument explicitly provided in this Decree of Dissolution. She should levy on the pledge of stock made in the Divorce Decree and which shares have not otherwise been released. She has already executed releases for the first five years of maintenance paid by Mr. Davis and those releases are part of the court file. Only after she has executed on all of her security interest should she be permitted to pursue Mr. Davis personally. The purpose of the security was to secure the performance.

The court will review contracts in their entirety in an effort to determine the meaning and the purpose of the contract. In a dispute as to the terms of the agreement the court will determine the intent of the parties at the time they formed the agreement and with regard to the

circumstances then existing. In Re: Marriage of Siever, 78 Wn. App. 287, 897 P.2d 388 (1995); Berg v. Hudesman, 115 Wn. 2d 657, 801 P.2d 222 (1990). Moreover, Susan Davis remained a shareholder in the company and was apprised of the status of the company during regular annual corporate meetings. Any number of options existed for her over the last five years. She has availed herself of none of them.

ASSIGNMENT OF ERROR NUMBER 2

2. The trial court erred in denying Petitioner's request for relief to terminate the house payments as a result of substantially changed circumstances beyond appellant's control.

The language requiring the Petitioner to pay the house payment can be modified. The language concerning the house payment obligation is stated separately from the monthly maintenance. CP 1-18. This obligation cannot now be performed due to a substantial change in circumstances. An agreement between the spouses is subject to modification or revision. Wagner v. Wagner, 95 Wn. 2d 94, 621 P.2d 1279 (1980); Higgins v. Stafford, 123 Wn. 2d 160, 866 P.2d 31 (1994); In Re: Marriage of Fox, 58 Wn. App. 935, 795 P.2d 1170 (1990).

Modifications can be by either express written agreement or by conduct. Because this is a contract and the decree was entered by agreement, the rules of contract apply in this matter. See L. Rieke, "The Dissolution Act

of 1973: From Status to Contract,” 49 Washington L. Rev. 375, 399 (1974).

Contracts can be incorporated in the Decree of Dissolution and the Washington Supreme Court so ruled. In Re: Marriage of Glass, 67 Wn. App. 378, 835 P.2d 1054, 1060 (1992). The statutes are to be broadly construed, Little v. Little, 96 Wn. 2d 183, 643 P.2d 498, 506 (1981). Separation contracts can be modified by the court. Wagner v. Wagner, 95 Wn. 2d 94, 621 P.2d 1279 (1980). In Glass, supra, the court held that the trial court acted within its power when it extended the time for the maintenance payments. 835 P.2d at 1060. While the parties must express their intent at the time the decree was entered into, the court will also ascertain and effectuate the intent of the parties, particularly where the agreement is different from the expressed language of the decree. Boisen v. Burgess, 87 Wn. App. 912, 943 P.2d 682 (1997). The provision for payment of the debt on the family home did not contain the same language as the provision in the maintenance clauses.

Given the substantial nature of the debts and the known dependence on the sole source income from A/D Electronics, this is not surprising. At the time of the divorce neither party had any substantial additional income sources and certainly nothing that would support Mrs. Davis I the style to which she believed herself entitled. According to the

decree, Mr. Davis has had to forego any potential interest in property his family owned in Oregon and which he would otherwise stand to inherit from his father. CP 211-215; 1-18. Those separate properties have been placed in a trust for the children of the parties, now emancipated and on their own. Mr. Davis is left without income to provide for the debts on the Raft Island home.

The situation the court and the parties confront presents a substantial change in circumstances unforeseen by the parties at the time the decree was entered. At the time the decree was entered the company had annual sales of about \$5 million. Mr. Davis was able to receive sufficient compensation from the company to pay his own bills as well as provide approximately \$7,500 per month in support to Susan Davis. She received a share of the company. She also received approximately \$188,000 by way of other property distributions. Mr. Davis received 65% of the company and the obligation to make certain payments. He did not receive a cash award of the size that Mrs. Davis received. The structure of the agreement makes it apparent that both parties relied upon and anticipated the ongoing success of A/D Electronics, Inc. Both parties were highly dependent upon success of this company. Respondent has shown no malfeasance or misfeasance by Mr. Davis upon which the court could conclude that he deliberately sank his own company.

ASSIGNMENT OF ERROR NUMBER 3

3. The trial court erred in failing to consider the financial and factual impossibility of paying both spousal maintenance and house payments.

The court determines these issues on the basis of all relevant evidence. RCW 26.09.070(3). One of the difficulties in construing these agreements is that blurring of the line between the court's authority to enforce an agreement and its description as an agreement. If this were merely a court order dealing with child support, the court could examine the current economic status of the parties and modify the support based on the court's inherent authority and the statutory authority reserved to the court with respect to child support.

However, if this Decree was truly an agreement then it must be subject to the rules of contract. Modern rules of contract construction excuse performance where it is impossible. See 14 Corbin on Contracts: Impossibility, by J. P. Nehf, J. M. Perillo, editors, Sec. 74.1, at 4, Revised Edition, (Matthew Bender & Co, Inc., Newark, N.J. 2001). Impossibility has been recognized in English common law, Taylor v. Caldwell, 3 Best & S. 826 (1863). Taylor's duty to pay rent for a music hall was discharged when the music hall burned down. Similarly, Caldwell's duty to deliver the music hall was discharged as impossible.

A modern definition of impossibility was provided in Transatlantic Financing v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966), which held:

“A thing is impossible when in legal contemplation it is not impracticable and a thing is impracticable when it can only be done at an excessive and unreasonable cost....The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community’s interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.... First, a contingency---something unexpected---must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, the occurrence of the contingency must have rendered performance commercially impracticable.”

The commentator also suggests that a contract may be frustrated or impossible to perform as a result of a force majeure. An example is where the delivery of citrus crops from certain fields in designated counties was excused when the crops were destroyed by an unexpected freeze. Holly Hill Fruit Products Co. v. Bob Staton, Inc., 275 So. 2d 583, 584 (Fla. App. 1973). Washington has adopted the defense of impossibility in Anthony v. Warren, 28 Wn. 2d 773, 184 P.2d 105, amended 190 P.2d 88 (1941). Warren contracted to buy a going business from Day and make certain payments. Day could not obtain a lease assignment from the landlord. Warren could not operate the business without the lease and the court held the contract void because it could not be performed.

In this case the current performance on these obligations is impossible. Mr. Davis did not simply wait until he was three or six months behind on his payments. He attempted to notify Ms. Davis of the impending problem. He did so orally in their discussions in January, 2007, and by letter in February, 2007. CP 19-28, 116-131 and 148-149. The Respondent has no evidence that this company is not in substantial trouble and in fact cannot prove that. For these reasons, the court has been left with a contractual analysis. If the contractual analysis is correct then the doctrine of impossibility applies. All of these facts are corroborated by independent witnesses. CP 110-115; 150-153; 103-104.

Here are the facts that are not disputed in this matter:

1. A/D Electronics employed Irl Davis full time at the time of the Decree and after.
2. A/D Electronics was the source of over 95% of Irl's income.
3. Susan Davis was a stock holder in A/D Electronics.
4. A/D Electronics always operated with a line of credit and needed a line of credit to operate.
5. This bank line of credit was called and the company could not continue operations.

Here are the facts that are at issue:

1. What is the nature of the house payment? It clearly is not maintenance because it is set out separately.
2. What was the understanding of the parties at the time of the Decree with respect to the obligation?
3. Is the payment impossible?
4. Has Susan Davis executed on her security?

The factual issues which exist in this case which made the summary dismissal of Irl Davis' motion improper. What the trial court did was grant summary judgment when material factual issues existed. This court is urged to reverse and remand for trial.

This court will note that the provisions for spousal maintenance are separate and apart from the provisions for payments of debt. The debt payments are not subject to the same strictures as the maintenance payments. They are in separate paragraphs and in separate portions of both the CR 2A agreement and the Decree of Dissolution. The debt payments are not established as a charge on the estate of Irl Davis and not payable regardless of his death. While Mr. Davis is not dead, the language is important when it comes to deciding the intent of the parties and the contractual understanding of the parties at the time they entered in to the agreement. None of this seems to have been considered.

The court will recall that the parties entered in to a CR 2A agreement before the Decree was entered. Who drafted the pleadings makes no difference. The parties were represented by counsel, they each signed the decree separately from the CR 2A agreement and each understood that the payments were inextricably linked to the continued success of A/D Electronics. These factual issues make the trial court's grant of summary judgment improper and inappropriate. The orders require reversal. CR 56. Not only is the language different but the language is contained in separate parts of the decree and separately addressed. Furthermore, the performance was secured by the shares of A/D Electronics, the most significant asset the parties had. Because the parties appear to have a different understanding of the terms and meaning of the agreement, it is error to grant the Respondent what amounts to a summary judgment. Berg v. Hudesman, 115 Wn. 2d 657, 801 P.2d 222 (1990). This court should revise its ruling as to the house payments because of the differing understandings and the impossibility of the performance.

No evidence was offered that the company was now making money, that Key Bank, holder of a secured credit line, was not calling its loan and refusing to extend further credit, or that the company was now being liquidated by the bank. These facts are unrebutted and, even if disputed, create a factual issue. At the hearing on 25 April, 2007, the

Court was provided something posted on the internet which may have influenced the court's decision. CP 44-60; 132-140. That posting, unverified and not in any newspaper printed for the public, has now been retracted. CP 103-104. Furthermore, no tax returns of Susan Davis were supplied. In fact, the tax returns which were supplied, for A/D Electronics in 2003 and 2005, demonstrate that the company made about \$11,000 in 2003 on total net income of \$1,927,962, or .5% net return on the gross income. In 2005 the company lost \$396,251 and the sales dropped by \$1,000,000. No conclusion other than that advocated by the Petitioner concerning the impossibility of performance can be drawn from the figures supplied by the Respondent.

ASSIGNMENT OF ERROR NUMBER 4

4. The trial court erred in granting attorney's fees to Respondent when there was no showing of need nor any showing of Petitioner's ability to pay.

The court further failed to consider need and ability to pay in awarding attorneys fees to the Respondent. No income figures were received from her other than her estimate of her annual income of \$50,000. While she claims to need the money, she did not demonstrate such a need. Furthermore, this award was made against a person who has no income. None of the Petitioner's claims were rebutted by the Respondent. Mr. Davis had not been hired by any other company despite

efforts to obtain employment. RCW 26.09.140. Mrs. Davis has not suggested any employment which would provide sufficient income to meet the demands she makes. Awarding fees in this instance did not provide substantial justice and ignored the realities of this present situation.

CONCLUSIONS

The trial court erred in failing to grant the appellant relief on both the issue of the maintenance and the house payment. Substantial factual and legal issues preclude the grant of summary judgment. The trial court erred in granting attorney's fees to Respondent. Appellant respectfully requests that this court reverse and remand for trial.

RESPECTFULLY SUBMITTED this 27th day of February, 2008.

A handwritten signature in cursive script, appearing to read "Peter Kram", is written over a horizontal line.

Peter Kram, WSBA #7436
Attorney for Appellant

