

No. 36599-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

IRL M. DAVIS,

Appellant,

v.

SUSAN E. DAVIS,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
08 APR 21 AM 9:05
STATE OF WASHINGTON
BY DEPT. CLERK

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE LISA WORSWICK

BRIEF OF RESPONDENT

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I. INTRODUCTION

The trial court properly rejected the husband's request to modify his spousal maintenance obligation, which the parties agreed would be nonmodifiable. The trial court also properly rejected the husband's request to relieve him of his obligation to pay certain debts as part of the property distribution, which as a matter of law was nonmodifiable absent specific circumstances that neither exist nor were alleged here. This court should affirm the trial court's decision and award attorney fees to the wife for having to respond to this frivolous appeal.

II. RESTATEMENT OF FACTS

A. **After A 23-Year Marriage, The Parties Entered Into A Stipulated Decree Awarding The Wife Nonmodifiable Maintenance And Requiring The Husband To Pay The Underlying Debt On The House Awarded To The Wife.**

Respondent Susan Davis and appellant Irl Davis were married for 23 years. (CP 70) Their marriage was dissolved on March 16, 2001, after they reached a CR 2A agreement that was embodied in the Decree of Dissolution signed by the court. (CP 1-18, 211-14)

The husband was the founder and Chief Executive Officer of A/D Electronics, Inc. (CP 36, 38, 64) The parties owned an 80%

interest in this company. (CP 16) The parties' interest in A/D Electronics was "conservatively" valued at \$2 million when they divorced. (CP 32-33) The husband was awarded a 65% interest in A/D Electronics; the wife was awarded a 15% interest. (CP 4-5, 8-9) Although the wife retained an interest in the business, she had no input in its management. (CP 33)

In addition to her minority interest in A/D Electronics, the wife was awarded a home valued at \$600,000. (CP 10-11) This home had been gifted to the wife by her mother during the parties' marriage. When the parties divorced, the obligation on the home was over \$500,000. (CP 12) The majority of this debt was associated with A/D Electronics. (CP 33)

The husband agreed to pay the obligation on the home awarded to the wife, including property taxes and homeowner's insurance. (CP 7-8, 33, 213) While the wife recognized that she could have required the husband to pay the obligation on the home at the time of dissolution, she agreed to allow the debt to remain on her home so as to not disrupt the business. (CP 33, 46) The husband was ordered to pay approximately \$5,000 per month towards the mortgage on the wife's home. (CP 12)

In light of the parties' disparate earning capacities and the length of their marriage, the parties agreed and the wife was awarded nonmodifiable maintenance of \$3,000 per month for ten years. (CP 2, 16, 213) The parties agreed that maintenance would continue even if the wife remarried. (CP 16, 213) The maintenance obligation was secured by the husband's shares of stock in A/D Electronics. (CP 16) The wife was to retain the shares of stock pledged "and not less than annually release to petitioner/husband a *pro rata* share of said stock as his obligations are reduced by his payments to the respondent/wife." (CP 16)

The husband's assumption of the business debt, as represented by his obligation to pay the mortgage, taxes, and insurance on the wife's home, was a "significant issue in [their] negotiations" at mediation. (CP 46) The wife made significant concessions based on the husband's agreement to pay nonmodifiable maintenance and to assume the business debt against the home awarded to her. (CP 46, 61-62)

B. Six Years After The Decree Was Entered, The Husband Sought To Modify His Nonmodifiable Maintenance Obligation And To Avoid His Debt Obligations Under The Decree.

In February 2007, six years after the stipulated decree of dissolution was entered, the husband sought to terminate his obligation to pay spousal maintenance and his obligation to pay the outstanding obligation on the wife's home, claiming that business had declined and that he no longer had the ability to pay his court-ordered obligations. (CP 20-21, 29) The wife asked the court to deny the husband's motion, as both obligations were nonmodifiable. (CP 45) The wife also questioned the husband's claims that he no longer had the ability to pay these obligations (CP 47), pointing out that for tax years 2003 through 2005, the husband had earned an average annual income of \$340,000 (CP 64) and that the business the husband claimed was facing bankruptcy was in fact taking in significant gross receipts.¹ (CP 48)

¹ In 2003, A/D Electronics had gross receipts of \$3,131,535, providing the husband with annual compensation of \$300,000. (CP 48) In 2004, the company had gross receipts of \$7,202,960, providing the husband with annual compensation of \$369,000. (CP 48) In 2005, the company had gross receipts of \$6,319,236, providing the husband with annual compensation of \$351,000. (CP 48)

Pierce County Commissioner David H. Johnson denied the husband's motion to terminate his monthly obligations under the decree and awarded the wife \$1,500 in attorney fees. (CP 101) Pierce County Judge Lisa Worswick denied the husband's motion for revision and awarded the wife an additional \$1,500 in attorney fees. (CP 186-88)

C. Even Though His Motions To Modify His Obligations Were Denied, The Husband Ceased Paying His Obligations Under The Decree, And Was Found In Contempt.

The husband stopped paying his monthly obligations under the parties' decree starting in March 2007. (CP 34) On April 25, 2007, the husband was found in contempt for failing to pay spousal maintenance and the mortgage on the wife's home for the months of March and April. (CP 141-47) On July 19, 2007, the husband was found in contempt for failing to pay spousal maintenance and the mortgage on the wife's home for the months of May, June, and July. (CP 200-07) The wife was awarded \$6,000 in attorney fees for the husband's latter contempt. (CP 205)

The husband appeals the trial court's order denying his motion for revision of the commissioner's ruling denying his motion to terminate his monthly obligations under the decree. (CP 189-93)

While the husband's notice of appeal also attached the trial court's July 19, 2007, order finding him in contempt (CP 200-07), he has not assigned error to this ruling, nor does he make any argument why this court should reverse the trial court's order on contempt.

III. MOTION TO DISMISS

This motion is made pursuant to RAP 10.4(d) and RAP 17.4(d). This court should dismiss the husband's appeal because he has been found in contempt for failing to comply with the decree. *Pike v. Pike*, 24 Wn.2d 735, 167 P.2d 401 (1946). The husband did not seek to stay the trial court's orders, and has failed to comply with the court's order, resulting in two contempt citations. (CP 141-47, 200-07)

In *Pike*, the mother appealed a custody decree designating the father as the primary residential parent, removed the children from the jurisdiction, and refused to reveal their location. The Supreme Court entered an order dismissing the appeal unless the mother complied with the decree, noting that it had "the right to dismiss an appeal in a case where the appellant is guilty of contempt of court." *Pike*, 24 Wn.2d at 742.

This court likewise should dismiss this appeal because the husband is in contempt. The husband should not be allowed to

pursue his appeal despite defying compliance with the court's order without supersedeas or stay.

IV. RESPONSE ARGUMENT

A. The Trial Court Did Not Err In Refusing To Modify The Husband's Nonmodifiable Spousal Maintenance Obligation.

"A separation contract which precludes or limits the court's power to modify an agreed maintenance award, once approved by the court and embodied into a decree, is to be enforced in accord with its terms." *Marriage of Glass*, 67 Wn. App. 378, 390, 835 P.2d 1054 (1992), *citing* RCW 26.09.070(7). The trial court did not err in refusing to modify the husband's nonmodifiable maintenance obligation. Had the trial court modified the husband's maintenance obligation as the husband requested, the trial court would have committed reversible error. *Marriage of Hulscher*, ___ Wn. App. ___, ¶ 18, ___ P.3d ___ (April 1, 2008).

In *Hulscher*, this court upheld a provision in the parties' stipulated decree that made the husband's spousal maintenance obligation nonmodifiable, reversing the trial court's order reducing the husband's obligation to pay lifetime maintenance to the wife. ___ Wn. App. at ___, ¶ 8, 18. This court noted that the parties had "extensively negotiated the terms of the decree, including

maintenance,” and that these pleadings “created a contract” between the parties, which prevented the trial court from modifying the husband’s maintenance obligation. *Hulscher*, ___ Wn. App. at ___, ¶ 15.

The husband’s claims of a “substantial change in circumstances” and “impossibility” are irrelevant. (App. Br. 6-8, 11-12) “Even in the event of changed circumstances of either party a non-modifiable spousal maintenance award is exactly that: it is non-modifiable.” *Glass*, 67 Wn. App. at 390. The trial court erred by granting a one-year moratorium on the wife’s collection of spousal maintenance from the husband if it intended to reduce the overall maintenance award or to change the duration of the award in *Glass*, 67 Wn. App. at 391. The court affirmed the trial court’s decision only to the extent it merely adjusted the payment schedule but did not reduce the full amount to be paid, without changing the duration of the award. *Glass*, 67 Wn. App. at 391.

The husband in this case did not ask the court for a “temporary” reprieve from his spousal maintenance obligation, as in *Glass*. Instead, he sought to entirely terminate his obligation four years short of its duration. (See CP 29) The trial court properly rejected the husband’s demand to terminate his maintenance

obligation, which was inconsistent with his prior agreement precluding modification of this obligation.

This court must also reject the husband's claim that the wife is "required to utilize the security instrument" provided in the decree before she can pursue the husband on this obligation "personally." (App. Br. 7) In making this argument, the husband asks this court to read into the parties' agreement a provision that simply does not exist – that his maintenance obligation is "nonrecourse." Absent specific language requiring the wife to enforce her maintenance obligation against the husband's stock, the wife was entitled to enforce the agreement in any manner available to her, including contempt. RCW 26.09.070(6) (the terms of a property agreement may be "enforced by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms"). There is nothing in the agreement or decree that states or implies that the wife can only seek to satisfy the husband's maintenance obligation through the collateral securing the obligation, and not out of other assets. (See CP 15-18, 212-14)

B. The Trial Court Did Not Err In Refusing To Modify The Husband's Debt Obligations Under The Decree.

The husband could not, six years after the decree was entered, seek to modify the property disposition by avoiding his debt obligations under the decree. The husband's obligation to pay the underlying debt on the residence awarded to the wife was part of the property division in the decree. RCW 26.09.080 (requiring court to dispose of "the liabilities of the parties."). Under RCW 26.09.170(1), the trial court was barred from revoking or modifying the husband's obligation *unless* it found the "existence of conditions that justify the reopening of a judgment under the laws of this state." See *Millheisler v. Millheisler*, 43 Wn.2d 282, 261 P.2d 69 (1953).

In *Millheisler*, the Supreme Court affirmed the trial court's refusal to modify the parties' property settlement agreement, which required the husband to pay the wife one-half of oil royalties and crop rental proceeds received by the husband post-dissolution. Regardless of the husband's claims of changed conditions, the property settlement agreement providing payments by the husband to the former wife was "not subject to modification by the court." *Millheisler*, 43 Wn.2d at 289.

The Supreme Court also affirmed the trial court's dismissal of the husband's petition to modify his payments to the wife under the parties' property settlement agreement based on his claim of changed circumstances in ***Kinne v. Kinne***, 82 Wn.2d 360, 366, 510 P.2d 814 (1973), reversing the Court of Appeals decision to the contrary, 7 Wn. App. 350, 498 P.2d 887 (1972). The property settlement agreement "signed by the respondent and incorporated in the decree with his consent, is his contract. He is bound under the decree and the contract." ***Kinne***, 82 Wn.2d at 366.

The husband seeks to avoid the plain language of RCW 26.09.170(1) and these cases by citing a series of inapt decisions, which he falsely claims hold that a property settlement agreement between spouses is subject to modification post-decree. (App. Br. 8) In ***Wagner v. Wagner***, 95 Wn.2d 94, 98-99, 621 P.2d 1279 (1980) (App. Br. 8, 9), the Supreme Court simply acknowledged that when parties do not specifically contract to preclude the modification of maintenance, a court is free to modify the obligation as long as it finds a substantial change in circumstances. ***Wagner*** does not address the instant situation, where a party seeks to modify a property division and the parties specifically contracted to preclude the modification of maintenance. (CP 2, 16, 213)

Higgins v. Stafford, 123 Wn.2d 160, 166-67, 866 P.2d 31 (1994) and **Marriage of Fox**, 58 Wn. App. 935, 939-40, 795 P.2d 1170 (1990) (App. Br. 8) address the parties' ability to modify previously executed agreements either through the subsequent execution of inconsistent wills or through mutual conduct rescinding the earlier agreement. These cases have no application here to an agreed division of property when the wife resists modification of the husband's obligation.

The husband's reliance on alleged "impossibility" to pay his court-ordered debts as a basis to modify the parties' property settlement agreement also is misplaced. (App. Br. 11-15) First, there is no legal support, nor does the husband allege any, for the proposition that a trial court may modify an agreement embodied in a decree dissolving the parties' marriage based on a party's subsequent claimed inability to fulfill his obligations under the decree. Instead, RCW 26.09.170(1) and the decisions in **Millheisler** and **Kinne** are to the contrary. Second, the husband's claim that he can no longer meet his obligations under the decree cannot discharge his obligation. Current financial inability to perform does not amount to impossibility. **Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System**,

104 Wn.2d 353, 364, 705 P.2d 1195, 713 P.2d 1109 (1986).
“Financial inability is not the equivalent of legal impossibility. The fact performance becomes more expensive than originally anticipated does not justify setting the contract aside.” **Carpenter v. Folkerts**, 29 Wn. App. 73, 77, 627 P.2d 559 (1981) (*citations omitted*).

C. The Trial Court Properly Awarded Attorney Fees To The Wife Based Both On Her Need And On The Lack Of Merit Of The Husband’s Claims.

The husband’s attempt to modify a maintenance award, which by the parties’ agreement was nonmodifiable, and to modify a property distribution, which by statute is also nonmodifiable, was baseless. The trial court properly awarded attorney fees to the wife under RCW 4.84.185, CR 11, and RCW 26.09.140.

It is apparent from both the commissioner and trial court’s comments during the initial hearing and the revision hearing that the attorney fee award was in part based on their determination that the husband’s requests for relief lacked legal merit:

Let me just ask you this: Cutting to the chase, does any of this matter? I mean, didn’t they enter into a binding – I couldn’t have seen a maintenance that was any more tightly – how could it be modified?

(3/21 RP 3-4)

I think that I have heard enough. Quite frankly I know that you both want to discuss this case, but quite frankly I think the legal issues are such that I think that my hands are tied. I'm going to deny the motion, and I'm awarding \$1,500 in attorney's fees.

(3/21 RP 10)

If that were the case, anybody who runs up credit card debt and couldn't pay it would be able to get out of that contract because it's impossible for them to pay... I'm not only going to grant his [wife's attorney] request that Commissioner Johnson's order not be modified, but I'm going to grant him attorney fees in the amount of \$1,500.

(6/22 RP 14) The trial court properly awarded attorney fees based on the meritless nature of the husband's arguments, which caused the wife to incur attorney fees in responding. RCW 4.84.185; Civil Rule 11; ***Marriage of Greenlee***, 65 Wn. App. 703, 708, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992) (trial court may award attorney fees based on one party's intransigence).

Further, there was substantial evidence to support an award of attorney fees to the wife based on her need and the husband's ability to pay. The wife earns \$50,000 a year as a realtor. (CP 46) The husband historically earned an average of \$340,000 annually. (CP 48, 64) The trial court also properly awarded attorney fees to the wife under RCW 26.09.140.

D. This Court Should Award Attorney Fees To The Wife.

This court should award attorney fees on appeal based on the wife's need, the husband's ability to pay, and the lack of merit in this appeal. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1; RCW 26.09.140 (court may award fees considering the financial resources of the parties on any appeal); ***Marriage of Healy***, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied* 100 Wn.2d 1023 (1983). The husband complains of trial court decisions that were not only consistent with but compelled by statutory and case law. The husband's appeal lacks merit and this court should award attorney fees to the wife for having to respond to it.

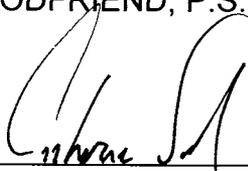
V. CONCLUSION

This court should affirm the trial court's order denying the husband's motion to modify the decree. The maintenance obligation is nonmodifiable as a matter of fact and law based on the parties' agreement and RCW 26.09.070(7). The property distribution, including its disposition of debts, is nonmodifiable as a matter of law under RCW 26.09.170(1). This court should affirm the trial court's order and award attorney fees to the wife for having to respond to this appeal.

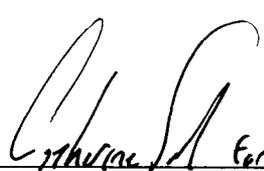
Dated this 18th day of April, 2008.

EDWARDS, SIEH, SMITH
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 18, 2008, I arranged for service of the foregoing Brief of Respondent to the court and the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 18th day of April, 2008.


Tara D. Friesen

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