

FILED
COURT OF APPEALS
DIVISION II

No. 37028-0-II

08 MAY 21 AM 11:58

STATE OF WASHINGTON
BY 
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

MARILYN ANGELO,
RESPONDENT,
v.
SAMUEL ANGELO,
APPELLANT.

Appeal from the Superior Court of Clark County
The Honorable Robert Harris, Judge

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

The trial court erred in finding the husband in contempt for non-compliance with provisions of a separation contract that required him to make payments on a real estate contract for property awarded to the wife because performance on such provisions had been rendered impractical after the trial court vacated the property award.

SECOND ASSIGNMENT OF ERROR

The trial court erred in finding the appellant in contempt for non-compliance with so-called "maintenance" provisions of a separation contract that required him to make payments on a real estate contract for property awarded to the wife because the wife was judicially estopped from claiming that such payments were spousal maintenance.

THIRD ASSIGNMENT OF ERROR

The trial court erred in ordering contempt sanctions against the husband because the "maintenance" provisions of Section 6 of the Separation Contract actually relate primarily to division of property, thus violating the rule in that contempt proceedings may not be used to enforce property awards.

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II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was performance on "maintenance" provisions of a separation contract that required the husband to make payment on a real estate sales contract pertaining to property awarded to the wife rendered "impractical" after the trial court vacated the property division portions of the Decree of Dissolution, including the award of the property subject to the real estate contract?

2. Is the wife judicially estopped from asserting contempt remedies for enforcement of ostensible "spousal maintenance" provisions in a Separation Contract which relate to payment of a real estate contract by the Husband if the Separation Contract if these same "maintenance" provisions give the wife benefits inconsistent with spousal maintenance?

3. Are "maintenance" provisions of a separation contract that require the appellant to make real estate contract payments on property awarded to the wife and which confer other benefits of ownership upon the wife actually part of a property settlement and therefore unenforceable in contempt proceedings under *Decker and Decker*, 52 Wn.2d 456, 326 P.2d 332 (1958) and its successor cases?

III. STATEMENT OF THE CASE

This highly contentious case was recently reviewed by the court in *In re Marriage of Angelo*, 2008 WACA 35548-5-012908.

After the parties separated in January, 2000, the husband filed for divorce on June 28, 2001. *Id.*, 2008 35548-5-012908 at _____. His

attorney of record, Michael Roe, filed a Notice of Withdrawal on January 14, 2002. On February 11, 2002, while he was unrepresented by counsel, the Husband signed a Separation Contract and final dissolution orders drafted by counsel for the wife. (CP 4; CP 13) On February 12, 2002., these documents were presented to a judicial officer, signed, and entered with the Clark County Superior Court.(CP 4) The Separation Contract, which was incorporated into the Decree of Dissolution and filed separately with the court, provided for regular spousal maintenance payments by the husband to the wife. (CP 9) It also awarded the parties' interest in real estate located on Bridge Road in Woodland, Washington to the wife. (CP 7) The parties possessed this property through a real contract purchase contract between the Husband and the title owner of the property. (Motion/Declaration for Order to Show Cause re Contempt. (CP 19; CP 36)

Section 6 of the Separation Contract was captioned as "Provisions for Maintenance." (CP 9) It provides for the following:

As maintenance, the husband agrees to pay to the wife payments of \$600.00 each and every month, commencing March 1, 2002, and continuing for 60 consecutive months.

In lieu of additional spousal maintenance, the husband shall continue to pay off the contract on the real property located at 4203 NW Bridge Road, Woodland, Washington 98674, until such property is paid in full. The husband shall assume responsibility for, timely pay, and hold the wife harmless from the debt on that Bridge Road property, in addition to any and all debts incurred by him after the date of separation. This debt is being assumed by the husband in lieu of the husband paying additional direct spousal maintenance to the wife. The parties are agreeing to this and the court is ordering it because the wife has no financial ability to make the payments on the

real property, which is being assumed by the husband. The wife would need additional spousal maintenance payments from the husband in order to make the payments on the property, and it is more efficient for the husband to simply pay off that contract directly.

Any payment made by the husband on this debt on the real property awarded to the wife [,] he is assuming in lieu of making additional direct maintenance payments to the wife, thus this should not be considered taxable income to the wife, nor deductible by the husband.

Because this payment is being made in lieu of the husband making direct maintenance payments to the wife, his obligation is not dischargeable in bankruptcy and is subject to the court's contempt powers.

In the event any party, including the husband or person interested in any bankruptcy action that may be filed by the husband, attempt to argue that the assumption of this debt by the husband is not maintenance and is therefore dischargeable in bankruptcy, the husband and wife shall inform the bankruptcy court, and tak the position that the assumption of this debt is in fact a maintenance obligation and should not be dischargeable.

The husband shall be required to pay any attorney fees and costs incurred by the wife in connection with any proceedings the wife may be involved in regarding any attempts by the husband to discharge this debt he is assuming in lieu of maintenance, or in any action by creditors who may, for whatever reason, pursue the wife for any debts the husband is assuming. The wife shall be entitled to modify the provisions of this Separation Contract and Decree and obtain a judgment against the husband for the amount the wife is required to pay on this debt, including attorney fees and costs. In the event the husband does not make any payments timely on an account, the wife shall, at her election, be entitled to obtain a judgment against the husband for the full amount due on the account.

The husband's obligation to make this payment in lieu of direct maintenance should not terminate on his death, or on the death of the wife, or on the remarriage of the wife. The obligation shall last until the contract on the wife's property is paid in full. The obligation in lieu of direct maintenance is non-modifiable by the court without the written permission of both parties.

Likewise, the parties wish to avail themselves of § 17 of Ch. 157 and agree that maintenance shall not be terminated by the death of either party, or by the remarriage of wife.

To secure the payment of maintenance, and of the debt of the Bridge Road property in lieu of maintenance, the wife shall hold a Deed of Trust on the three real properties located on Brandt Road, at 1903 NE Brandt Road, 1921 Brandt Road, and 1811 NE Brandt Road, which are awarded to the husband. Once the husband has paid off the

contract on the wife's property in full, the wife shall relinquish that Deed of Trust on those properties. (CP 9-10)

Shortly after entry of final orders, the wife alleged misrepresentation and fraudulent transfer of property by the Husband prior to the dissolution. See Angelo, 2008 WACA 35548-5-012908 at _____. As part of this lengthy litigation, the wife successfully moved in April, 2003 to vacate the property division set forth in the Decree and the Separation Contract. (CP 15) The vacation order states, in part:

1. The Respondent's Motion to Vacate the Property portion of the Decree is granted.. Both parties shall have continued used of the properties awarded by the Decree.

2. All other provisions of the Decree of Dissolution entered on February 12, 2002, and the Separation Contract incorporated therein shall remain in full force and effect.

3. The determination of final property distribution to Petitioner and additional property to be distributed to Respondent is reserved pending determination of the civil suit, Clark County Cause No. 02-2-03635-3.

(CP 15) The property portion of the Decree of Dissolution described in the vacation order is found in Sections 1, 2, 3, and 4 of the Separation Contract, incorporated by reference into the Decree of Dissolution. (CP 5-8) The Bridge Road property referenced above in Section 6 of the Separation Contract is awarded to the wife in Section 2 of the Separation Contract. (CP 7)

At present, the property division, including disposition of the Bridge Road property, remains unresolved and awaits trial following disposition of the wife's motion for Supreme Court review of the

decision by the Court of Appeals in In re Marriage of Angelo, 2008 WACA 35548-5-012908.

On September 11, 2007, the wife filed a Motion/Declaration for an Order to Show Cause re Contempt. (CP 18-20) The wife alleged that the husband had violated the Separation Contract by failing to make payments on the Bridge Road real estate contract, especially a balloon payment that would pay off the contract and , effectively, give her title to the property. (CP 19) Hearings on the motion were held on September 21, 2007, October 5, 2007, and October 19, 2007. At the October 19 hearing, the court found the husband in willful non-compliance with the Separation Contract and ordered him to conform with the order. (CP 111; CP 112) Essentially, it ordered the Petitioner make the payments on the contract as contemplated in the Separation Contract and thereby deliver the house to the wife, notwithstanding the vacation of the property division in the Decree of Dissolution and the Separation Contract. (CP 111) The contempt order was entered on November 2, 2007 and included a judgment for \$130,093, the unpaid balance of the Bridge Road contract. (CP 110; CP 112) A Notice of Appeal was filed on December 2, 2007. (CP 115)

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IV. LAW AND ARGUMENT

A. The trial court erred in ordering the husband to comply with "maintenance" provisions of the parties' Separation Contract as it related to payment on a real estate contract for the Bridge Road property awarded to the wife because this property award had been previously vacated by the court, thereby rendering performance of this "maintenance" obligation impractical.

In April, 2003, the trial court vacated the property division awards in the Decree of Dissolution, which were primarily set forth in the Separation Contract, including the award of the parties' interest in the Bridge Road property to the wife. (CP 15; CP 17) A final division of the parties' property now awaits retrial. Since the husband's obligation to make the Bridge Road contract payments "in lieu of additional spousal maintenance" is based on an award of the Bridge Road property to the wife, it may now be said that the purpose of such payments is now "frustrated" or "impossible," as those terms are used in contract law, but only so long as this case awaits a final division of property. Under those circumstances, it may be more appropriate to treat the husband's performance on the Bridge Road real estate contract (as contemplated under Section 6) as "**impractical**" rather than impossible. Impracticality of performance is recognized in Section 269 of the Restatement (Second of Contracts):

Impracticality of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticality or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticality or frustration would be materially more

burdensome than had there been no impracticality or frustration. Restatement (Second) of Contracts, § 269 (1981). Based on this principle, the husband 's obligation "in lieu of additional spousal maintenance "should be deemed suspended by the operation of the vacation order. If and when the Bridge Road property is re-awarded to the wife, the husband's obligation under Section 6 could be re-instituted. However, so long as the property award is open, the husband's obligation should be suspended. If it is suspended, non-compliance and contempt with "maintenance" orders are non-issues.

Suspension of the obligation under Section 6 should not, however, leave the wife defenseless. Pending a final determination of the property issue, payment of the Bridge Road contract by the husband could be continued until the trial, such as temporary maintenance or as a debt payment under a temporary order. (Fn.1) Furthermore, the husband could be held liable for waste of community property if, for example, he defaulted on the Bridge Road real estate contract. However, he should not be deemed to have violated any current orders which could not be carried out.

1. The wife may be reluctant to approach the trial court to re-assign the Bridge Road contract payments as temporary maintenance under a temporary order pending final disposition of the property. This is because the payments may then be seen as deductible to the husband and taxable to the wife, like the usual maintenance payments. This contrasts with the treatment of the payments in the separation contract, where, notwithstanding their identification as "maintenance," they are specifically identified as "non-taxable" events.

B. The trial court erred in ordering the husband to comply with so-called maintenance provisions in the parties' Separation Contract as related to payment on a real estate contract for the Bridge Road property awarded to the wife because the enforcement of the maintenance provisions was judicially estopped by previous positions of the wife relating to tax benefits which treated the Bridge Road real estate contract payments like a property award.

A party is not permitted to take inconsistent positions in judicial proceedings. Once a judgment has been entered on particular grounds promoted by a party, that party may not, as a matter of manifest justice and judicial order, attempt to gain advantage by maintaining a contradictory position. See *Raymond v. Ingham*, 47 Wn.App. 781, 785, 737 P.2d 314, 316 (1987). The essence of judicial estoppel is that the party to be estopped must be asserting a position that is inconsistent with an earlier position; the party seeking estoppel must have relied on and been misled by the other party's first position; and it must appear unjust to permit the estopped party to change positions. *Save Columbia v Columbia*, 134 Wn.App 175, 186, 139 P.3d 386, 391-392(Div 2, 2006). As a part of the Separation Contract incorporated into the Decree of Dissolution, Section 6 is a judgment of the court to which judicial estoppel could apply.

At its simplest, the wife is judicially estopped from enforcing "maintenance" payments on property awarded to the wife, as required by Section 6 of the Separation Contract, if the wife has previously caused the actual award of property to the wife, as set forth in Section 2, to be vacated. It is clearly inconsistent to vacate a property award and then demand support for such awards. Second,

after the property division was vacated, the husband had every reason to believe that he was not required to perform any obligations related to ownership of the Bridge Road property under the Separation Contract. He therefore could rely on the vacation order to assume, at least for purposes of Section 6 of the Separation Contract, that he did not have an obligation to the wife to, for example, make timely payments on the Bridge Road contract or even to continue payments on the contract. Third, it would plainly be unjust to enforce a property award for the wife if that award has been vacated at her request.

Even if the property awards under the Separation Contract had not been vacated, the wife is judicially estopped from enforcing the property awards under Section 6 of the Separation Contract as maintenance. The wife wants the benefit of treating the Bridge Road contract payments as maintenance, thereby enforcing that portion of Section 6 through contempt proceedings. However, the wife drafted Section 6 to treat the Bridge Road contract payments as a non-taxable event. This position is inconsistent with spousal maintenance but consistent with property division. The wife signed the Separation Contract drafted by the wife's counsel, thereby relying on her treatment of the payments as property division, and was correspondingly misled as to the general expectations of performance in the Separation Contract. In other words, because the relevant portions of the Separation Contract focused on property division, the husband had

no reason to believe that he was out of compliance unless he defaulted on the real estate contract or otherwise defeated the ultimate pay-off on the real estate contract. Neither of these events happened. Finally, it is unjust to allow the wife receive substantial benefits from non-taxability of the Bridge Road contract payments by treating them as property division (a characterization that works to the husband's detriment by depriving him of tax deductions), and then to grant her a windfall by accelerating payment of the Bridge Road contract, which she is claiming as her right by enforcing Section 6 through contempt. The wife's position is unlawful, unjust, and overreaching.

C. The trial court erred by enforcing a property award in the parties' Separation Contract, namely the payments on the Bridge Road real estate contract by the husband, and ultimate delivery of title to the wife, through contempt proceedings.

The contempt remedy is not available to enforce terms of a property division except when such terms can be reasonably related to support of children or spouses. See *Marriage of Young*, 26 Wn.App 843, 844-845, 615 P.2d 508, 509 (1980), citing *Decker and Decker*, 52 Wn.2d 456, 326 P.2d 332 (1958). In determining whether a written settlement between divorcing spouses relates to property or spousal maintenance, future payments provided for by an agreement in writing can be either alimony and support money or a property settlement depending upon the circumstances and intent of the parties. However, if the contract is unambiguous on its face, the meaning of the contract is determined from its language and not from

parol evidence. *Kinne and Kinne*, 82 Wn.2d 360, 362, 510 P.2d 814, 816 (1981). A written contract is ambiguous with its terms are uncertain or capable of being understood in more than one manner, but an ambiguity will not be read into a contract where it can be reasonably avoided by reading the contract as a whole. Even though some of the words may be said to be ambiguous, if the terms of the contract taken as a whole are plain and unambiguous, the meaning should be deduced from the language alone without resort to parol evidence. *Universal/Land Constr. v. Spokane*, 49 Wn.App. 634, 636-637, 745 P.2d 53, 55 (Div. 3, 1987). A contract susceptible to a reasonable or unreasonable construction should be given a reasonable one. Contract language is to be interpreted most strongly against the party who drafted the contract. *Id.*, 49 Wn.App at 638, 745. P.2d at 55.

8. The Separation Contract was drafted by the wife's counsel and should be interpreted against the wife if its terms are ambiguous. The provisions for the real estate contract payment are found in Section 6 of the Separation Contract, which is captioned "Provisions for Maintenance." Section 6 specifically awards the wife \$600/month in maintenance for 60 months, which is not disputed by the husband. In addition, however, Section 6 states that:

In lieu of additional spousal maintenance, the husband shall continue to pay off the contract on the real property located at 4203 NW Bridge Road, Woodland, Washington, 98674., until such property is paid in full. ...This debt is being assumed by the husband in lieu of the husband paying additional direct spousal maintenance to the wife. The parties are agreeing to this

because the wife has no financial ability to make payments on the real property, which is being assumed by the husband. The wife would need additional spousal maintenance payments from the husband in order to make the payments on the property, and it is more efficient for the husband to simply pay off the contract directly.

(CP 9) The wife was awarded the parties' interest in the Bridge Road property under Section 2 of the Separation Contract. (CP 7)

Insofar as it relates to the obligations of the parties, the terms of Section 6 are largely unambiguous; the ambiguity arises in the characterization of the Bridge Road contract payments by the husband as "maintenance." Except for the captioning of Section 6 as "provisions for maintenance," a reasonable construction of the Bridge Road provisions favors interpretation of the provisions as property division. For example:

- Section 6 clearly states that the contract payments are "*in lieu* of additional spousal maintenance." (CP 9) (emphasis added)
- Section 6 characterizes the payment obligation as "[t]his *debt*" [emphasis added] and states that the payments are being "assumed" by the husband, which is language more consistent with a debt than a maintenance obligation; (CP 9)
- The Bridge Road portions of Section 6 are inconsistent with spousal maintenance because, unlike maintenance, it does not terminate upon the husband's death or the wife's remarriage or death, and that the obligation should continue until "the wife's property is paid in full." (CP 10) A post-mortem, post-nuptial spousal maintenance obligation is unusual and contrary to law without the express consent of the parties or order of the court, see RCW 26.09.170(3), but would be the norm for a property division in which the obligor was paying off the encumbrances for real estate awarded to the obligee;
- Section 6 provides that the wife's Bridge Road contract payments would be treated as a non-taxable

event. (CP 9) Non-taxability of the payments is consistent with a transfer pursuant to property division, while a spousal maintenance payment would be taxable to the wife and deductible by the husband.

Finally, when the contract is paid in full, the wife will have something more than years of free rent to show for it; she will own the property. Thus the Bridge Road provisions of Section 6 go far beyond "support" and are, in fact, intended eventually to vest "property" with the wife. This purpose is shown by the final provision of Section 6, which gives the wife a Deed of Trust on real estate awarded to the Husband to secure her right to payments on the Bridge Road property. (CP 10) Foreclosure on a Deed of Trust as a remedy for non-payment is consistent with property division, not maintenance. If maintenance were the purpose of the Bridge Road provisions, the wife should look only to the court for relief. Upon a judgment for back maintenance, a judgment lien would lie upon the husband's real property, but not until the court acts.

If Section 6 is ambiguous to the extent that it identifies the Bridge Road payments as "in lieu" of maintenance but identifies the payments as financially supportive of the wife, these ambiguities should be decided against the wife, whose counsel drafted the Separation Contract. *Universal/Land Constr.*, 49 Wn.App. at 638, 745 P.2d at 55. Freedom from housing costs would, of course, reduce the wife's expenses, but this effect is a by-product of property division and not the main purpose of the Bridge Road payments.

V. ATTORNEY FEES

Because this appeal is the fruit of the contradictions within an over-reaching and even unconscionable contract drafted by the wife's counsel, the husband requests an award of reasonable attorney fees and costs.

VI. CONCLUSION

It is absurd and unjust for the trial court to hold the husband in contempt for failing to make real estate contract payments on property awarded to the wife, as required by the Separation Contract incorporated into the Decree of Dissolution, if such property awards had been previously vacated on the motion of the wife. Vacation of the property awards and the pending re-trial of property issues should be deemed to render his performance on the Separation Contract "impractical" and thereby excuse any non-compliance. Furthermore, the wife should be judicially estopped from asserting that the real estate contract payments should be enforced as "maintenance " because she has previously claimed the benefits of property division for the payments.

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Finally, because payment of the real estate contract is structured in the Separation Contract primarily as a property award and only nominally as maintenance, *Marriage of Young*, 26 Wn.App 843, 615 P.2d 508 (1980), among other cases, prohibits enforcement of the disputed provisions through contempt proceedings.

RESPECTFULLY SUBMITTED THIS 19TH DAY OF MAY, 2008.

A handwritten signature in black ink, appearing to read "Mark D.", written over a horizontal line.

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SAMUEL ANGELO,

Appellant,

and

MARILYN ANGELO,

Respondent.

NO. 37028-0-II

DECLARATION RE SERVICE
OF BRIEF OF APPELLANT
TO COURT OF APPEALS,
DIVISION II

I, Mark Didrickson, declare:

On May 19, 2008, I served each of the persons identified below with a copy of the Brief of Appellant to the Washington State Court of Appeals, Division II, Cause # 37028-0-II (with citations to the record per instructions of the clerk's office) by causing a full, true, and exact copy of the same to be deposited, postage prepaid, in the U.S. Mail for delivery as follows:

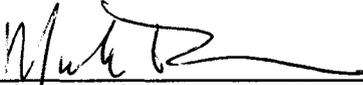
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington on May 19, 2008



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