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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BARBARA WILTSE, *Petitioner,*

v.

THE HONORABLE CYNTHIA J. BAILEY, Judge of the SUPERIOR
COURT OF THE STATE OF ARIZONA, in and for the County of
MARICOPA, *Respondent Judge,*

DEAN A. WILTSE, *Real Party in Interest.*

No. 1 CA-SA 17-0132
FILED 6-20-2017

Petition for Special Action from the Superior Court in Maricopa County
No. FN2011-051675
The Honorable Cynthia Bailey, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Dickinson Wright PLLC, Phoenix
By Leonce A. Richard, III and Michelle N. Khazai
Counsel for Plaintiff/Appellant

Dean A. Wiltse, Raleigh, North Carolina
Real Party in Interest

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Jon W. Thompson joined.

M c M U R D I E, Judge:

¶1 Barbara Wiltse (“Wife”) seeks special action relief from the limited award she received after the superior court found Dean Wiltse (“Husband”) in contempt.¹ For the following reasons, we accept jurisdiction and grant relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Wife divorced in August 2012. Part of the community property, which was divided pursuant to the terms of the divorce decree, was stock in a closely-held company named CINT. The CINT stock was listed in Husband’s name. The decree required Husband to divide the stock and transfer one-half of the shares to Wife, and provide her with any contact information for a representative in the company who could assist with the transfer.

¶3 After the dissolution of the marriage, Husband continued to maintain all CINT stock in his name, including Wife’s shares. Therefore, Husband was acting as a constructive trustee for Wife’s benefit as it related to Wife’s share of the community stock. However, as early as March 2013, Wife requested Husband to transfer her shares and put them in her name. Husband did not comply. In the fall of 2013, Husband sold his shares of CINT stock, but still did not transfer Wife’s shares as mandated under the decree. Husband told Wife that they were in his E-Trade account. Wife

¹ Husband’s counsel filed a Motion to Withdraw from this case after being served a copy of the petition for special action and the superior court granted the motion. Accordingly, we now recognize Husband as a *pro se* litigant. Husband has not filed a response, and while the failure to do so generally constitutes a confession of error, we exercise our discretion and address the merits of Wife’s petition. See *Gibbons v. Indus. Comm’n of Ariz.*, 197 Ariz. 108, 111, ¶ 8 (App. 1999).

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specifically told Husband via an email in October 2013 not to sell her shares and that she wanted them transferred to her.

¶4 In April 2014, after establishing her own E-Trade account, Wife again asked Husband to transfer her shares to her and gave him information about her E-Trade account. Husband again refused to transfer the shares, and in April or May of 2015 Husband sold Wife's CINT shares for \$79,000 without notice to Wife or obtaining her permission. Thereafter, Husband refused to transfer any of the proceeds from the sale to Wife.

¶5 In February 2016, CINT was purchased by another company and the value of the stock increased dramatically. Wife was aware CINT might be purchased, and her intention was to keep her CINT shares in anticipation of an increase in the value of the stock. Her shares at the time of the sale in February 2016 would have been worth \$359,855.36. Accordingly, in July 2016, Wife filed a Petition for Contempt and For Enforcement of Decree of Dissolution in the superior court, and an evidentiary hearing was held in February 2017.

¶6 The superior court found Husband in contempt of court for "failing to transfer the stock to Wife and subsequently selling the shares without Wife's knowledge or consent and then failing to provide Wife with the proceeds from the sale." However, instead of ordering Husband to reimburse Wife for the value of the shares at the time of the February 2016 sale, the superior court ordered Husband to reimburse Wife in the amount of \$79,000, which was the value at the time he sold the shares without Wife's consent. Wife then filed this special action seeking review of the superior court's ruling regarding the remedy for Husband's contemptuous behavior.

JURISDICTION AND STANDARD OF REVIEW

¶7 Special action jurisdiction is discretionary and appropriate when no "equally plain, speedy, and adequate remedy by appeal" exists. Ariz. R.P. Spec. Act. 1(a).² Contempt orders generally cannot be reviewed by way of appeal. *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 145, ¶ 13, n.3 (App. 2009). This leaves a party seeking review of a contempt action with no adequate remedy by appeal except by way of a petition for special action. See *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18 (App. 2003) (citing *Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35 (App. 2001)). Thus, in the exercise of our discretion, we accept special action jurisdiction pursuant to

² We cite to the current version of applicable statutes or rules when no revision material to this case has occurred.

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A.R.S. § 12-120.21(A)(4) and Arizona Rule of Procedure for Special Action 1(a).

¶8 We review a superior court's imposition of contempt sanctions for an abuse of discretion. *Henderson v. Henderson*, 241 Ariz. 580, 587, ¶ 16 (App. 2017) (citing *Lund v. Donahoe*, 227 Ariz. 572, 578, ¶ 19 (App. 2011)).

DISCUSSION

¶9 Wife argues the superior court failed to appropriately compensate her for Husband's breach of his fiduciary duty as trustee of her CINT stock, and seeks equitable sanctions that account for the appreciated value of the stock at the time of the February 2016 sale. We agree and remand for the superior court to modify Wife's judgment against Husband to the amount of \$359,855.36 instead of \$79,000.

A. Wife Was Entitled to be Fully Compensated for Husband's Contemptuous Behavior.

¶10 Husband's contemptuous behavior while acting as constructive trustee for Wife's share of the CINT stock warrants an award of damages in an amount that takes into account the appreciated value of the stock. Husband repeatedly violated his fiduciary duty to Wife as trustee of her shares. Under the Restatement (Third) of Trusts § 100, a beneficiary can charge a trustee with either "the amount required to restore the values of the trust estate . . . to what they would have been if the portion of the trust affected by the breach had been properly administered," or "the amount of any benefit to the trustee personally as a result of the breach." *See In re Naarden Trust*, 195 Ariz. 526, 528, ¶ 8 (App. 1999) (in the absence of either a statute or common law Arizona courts are guided by the Restatements). Here, Wife is entitled to be restored to the same position she would have been in had the sale not taken place. *See Restatement (Third) of Trusts § 100 cmt. (2017)* ("[R]ecovery is to be based on the alternative that is more beneficial to the trust and its beneficiaries . . .").

B. Husband's Defenses and the Amount of Compensatory Sanctions.

¶11 Limiting Wife's amount of compensatory sanctions, the superior court found Wife's statement that she would not have sold the stock if Husband had transferred it to her "speculative," and further found Wife's decision not to file her petition for contempt until a year after the sale "concerning." Thus, the court deemed Wife's suggested sanction amount as "not equitable for the contempt committed." We disagree.

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¶12 Wife testified at the evidentiary hearing that if Husband had transferred her shares of CINT stock into her E-Trade account, she would not have sold the stock until after CINT was purchased in February 2016. This is supported by her testimony regarding emails between herself and the CEO of CINT advising her about the pending sale and encouraging her not to sell the shares because their value was going to increase. Emails between Husband and Wife also showed Wife telling Husband the shares were not his to sell, which supported Wife's testimony that she did not intend to sell her shares. Furthermore, Husband did not controvert Wife's testimony regarding her intent not to sell the shares at any point during the evidentiary hearing. Accordingly, Husband did not establish that Wife's statements regarding her intent not to sell her CINT shares until after the company was purchased were speculative.

¶13 The fact that wife did not file her petition for contempt immediately after receiving notice of Husband's sale of the stock in May 2015 is not determinative. Wife brought an equitable claim by petitioning for contempt sanctions, but could have filed a civil claim for conversion or breach of trust. Either civil claim would have been well within the statute of limitations. A.R.S. §§ 12-542(5), 14-11005(C); *see also O'Hara v. Robbins*, 432 N.E.2d 560, 563 (Mass. App. Ct. 1982) (allowing a claim in equity to proceed because the comparable two-year statute of limitations had not run); *cf.* Restatement (Third) of Trusts § 98 (2017) (a beneficiary may be barred from bringing a claim against a trustee if the statutory period of limitation has run). Claimants are not required to rush to the courthouse for relief without first attempting to solve their disputes extrajudicially. Most importantly, Husband did not argue he was prejudiced by Wife's decision to wait, nor did the court find any prejudice. To the contrary, the period after the sale and before Wife's filing of the petition gave Husband ample opportunity to render her contempt claim moot by transferring the proceeds of the sale to her.³

¶14 Husband did not raise any argument regarding the amount of damages at the hearing, instead arguing only whether his actions were contemptuous. Because Husband made an unauthorized sale of Wife's property, of which he was a constructive trustee, sanctions are appropriate

³ While giving Wife the proceeds of the sale would have rendered her contempt claim moot, Wife still could have pursued a separate civil claim for the breach of Husband's fiduciary duties and claimed the appreciated value of the stock as damages.

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in the amount Wife would have realized as the beneficiary of the trust but for Husband's contemptuous behavior.

CONCLUSION

¶15 We accept special action jurisdiction and grant relief because the superior court erred by not valuing the shares of CINT stock sold by Husband without consent or notice at the price they would have sold for in February 2016, or \$359,855.36. Accordingly, we remand for the superior court to modify Wife's judgment against Husband to the amount of \$359,855.36.



AMY M. WOOD • Clerk of the Court
FILED: AA