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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/29/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:)	No. 1 CA-CV 10-0898
)	
PAMELA CHASE WICKSTROM,)	DEPARTMENT D
)	
Petitioner/Appellee,)	MEMORANDUM DECISION
)	(Not for Publication -
v.)	Rule 28, Arizona Rules of
)	Civil Appellate Procedure)
KARL THEODORE WICKSTROM,)	
)	
Respondent/Appellant.)	
)	
)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300D020080625

The Honorable Ralph Matthew Hess, Judge Pro Tempore

AFFIRMED

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S W A N N, Judge

¶1 This case involves a divorcing couple's dispute about the validity of their settlement agreement. After considering the evidence, the trial court found the agreement to be a valid contract. Because nothing in the record suggests that the court's finding was clearly erroneous, we affirm its ruling. The court also ordered Husband to pay the medical expenses Wife incurred because of his violation of the preliminary injunction under A.R.S. § 25-315. Finding no abuse of discretion, we affirm that order as well.

FACTS AND PROCEDURAL HISTORY

¶2 Pamela Wickstrom ("Wife") and Karl Wickstrom ("Husband") married in 1965. Wife petitioned for divorce in July 2008. After the divorce proceeding began, Husband and Wife participated in several mediation sessions. As a result of those mediation sessions, Husband and Wife, as well as their respective counsel, signed a Marital Settlement Agreement ("MSA") on June 9, 2009.

¶3 The MSA declared that Husband and Wife "had given full and mature thought" to its making and that it had been "bargained for at arm's length." Husband and Wife each acknowledged reading the entire MSA and understanding its "legal and practical effect." In particular, they acknowledged that the MSA irrevocably divided their real and personal property "effective immediately." The MSA embodied "all agreements and

understandings between the parties" and was intended, following an entry of a consent decree, to "survive as an independent contract of the parties." Any modifications to the MSA would be effective only if they were made in writing and executed with the same formality as the MSA. Husband and Wife initialed each page of the MSA, and their signatures were witnessed by a notary public.

¶4 One of the MSA's final provisions noted that Husband's and Wife's signatures served as their consent for the dissolution to proceed by consent decree. On the same day that the MSA was signed, Husband and Wife also signed a stipulated consent decree. The MSA contemplated that certain duties would be performed before that consent decree would be filed:

Prior to such time as a stipulated Consent Decree for dissolution of marriage is signed by [Wife] and subsequently presented to the court with this Agreement, [Husband] shall provide to [Wife]: a) proof that the indebtedness on the MedWise business real property in the joint name of [Wife] and [Husband] has been either refinanced or made the subject of a novation such that [Wife] no longer has personal liability on the obligation, and b) reasonable access to review of new loan of [sic] novation documents.

¶15 MedWise, P.C. ("MedWise") was one of the four business entities owned by Husband and Wife.¹ MedWise was formed in 1998 as a professional corporation to provide medical imaging services. Husband, a medical doctor, practiced radiology and supervised the medical staff; Wife, who holds an MBA and who earlier worked as an executive for Blue Cross Blue Shield, managed the company as the executive director.

¶16 According to the MSA, Husband would receive Wife's interest in MedWise and Wife would receive \$1,430,000 of MedWise's cash assets.² The MSA provided that a separate transactional attorney would facilitate the "transfer of partnership and corporate entities or the property owned by the same." And in the MSA, Husband and Wife agreed that "each shall, at any time, make, execute and deliver all instruments, conveyances, powers of attorney, authorizations and all other documents or assigns reasonably required" to give effect to the MSA. Additionally, the MSA required Husband to provide Wife with updated financial statements for their other business entities so that Wife could calculate her 2009 tax obligations.

¹ The other three were Paragon Strategies, LLC; Odyssey West, LP; and Horizon, LLC. Under the MSA, Horizon went to Wife while the other entities went to Husband.

² At an evidentiary hearing, Husband admitted that although he "demanded tender of the corporate interest," he "never tendered the 1.4 million."

¶17 After the signing of the MSA, Husband and Wife exchanged numerous letters and e-mails regarding the transfer of their property. A major point of contention was the financing of MedWise. Before entry of the consent decree, Wife wanted to receive documentation proving that she would no longer be liable for loans on MedWise real estate. Husband told Wife that he needed to quickly obtain a new \$1.3 million loan to replace outdated medical imaging equipment. He asked Wife to authorize immediate entry of the consent decree and to relinquish all interest in MedWise so that the loan could go through in July 2009. Wife also asked Husband for financial information regarding their other business entities so that she could prepare for possible audits; he did not provide the documents she wanted.

¶18 Finally, on September 29, 2009, Wife demanded that Husband submit to the court the consent decree that had been signed at the June 9 mediation. On November 9, 2009, she filed a motion to enter and enforce the consent decree. Husband responded on December 22, arguing that the MSA did not embody a true meeting of the minds and that enforcing it would be unfair. In August 2010, they participated in an evidentiary hearing that addressed the MSA's validity.

¶19 The August 2010 hearing addressed an additional issue: Husband's alleged contempt. In July 2008, the preliminary

injunction under A.R.S. § 25-315 went into effect. That injunction stated: "Do not remove the other party . . . from ANY existing insurance. Both parties shall maintain all insurance coverage in full force and effect." It also restricted Husband and Wife from transferring property before the entry of the decree of dissolution, but allowed the transfer of joint or community property as "part of the everyday running of a business."

¶10 During the divorce proceedings, Wife had submitted two petitions for contempt: one before the parties signed the MSA and one after. The earlier petition, submitted May 8, 2009, alleged that Husband cancelled Wife's access to their commercial checking accounts; that he cancelled one of her credit cards; that he changed the locks at MedWise without her consent or the court's permission; and that he cancelled her medical insurance coverage by removing her as an employee from one of the partnerships. The second petition, filed September 14, 2009, alleged that Husband withdrew or transferred more than \$1,000,000 from their joint account at MedWise.

¶11 At the hearing, Husband admitted that he had spent \$1.7 million of the MedWise funds on new imaging equipment at a bankruptcy sale.³ He said that it was a "critical business

³ Wife claims that the record shows Husband admitting to spending the funds on equipment "in late May or early June,

decision" and that he had only one hour "to respond to the availability of the bankruptcy assets." He admitted that he did not receive Wife's authorization for the expenditure.

¶12 On the medical insurance issue, Husband presented evidence that Wife had been insured under the MedWise coverage, not as his dependent but as the company's executive director. He also presented evidence that if Wife had continued to receive coverage after her resignation, which became effective March 2008, then MedWise would have had its insurance policy revoked for fraud.⁴ Wife testified that she could have been made a dependent under their insurance policy during the divorce proceedings. She also said that she received notice that she would no longer be covered by the policy, but only received that notice "the day before it expired." And she said that she had

2009." A letter from Husband's counsel to Wife's counsel, dated May 29, 2009, says that Husband received an "end of life" notification from the "servicing entity" for the MedWise C.T. scanner and M.R.I. equipment. The letter states: "In order to protect the viability of the ongoing MedWise business, [Husband] was required to invest in replacement equipment. Accordingly, significant liquid funds formerly referenced in the asset listing were depleted." When asked about the May 29, 2009 letter, Husband testified that it represented "the time frame" in which the equipment was purchased.

⁴ Wife testified that her February 2008 resignation letter did not indicate that she was resigning from all of her responsibilities at MedWise. She emphasized that she had only resigned from her duties as executive director. The letter itself states that she would continue to work as a co-owner and consultant for MedWise.

"medical issues," at least one of which had to be treated after her coverage was lost.

¶13 On October 25, 2010, the court issued a ruling containing findings of fact and conclusions of law. It found that Wife had presented clear and convincing evidence that the MSA executed on June 9, 2009, was an enforceable contract. It found that the MSA was equitable and fair, and it granted Wife's motion to enter and enforce the consent decree.

¶14 On the contempt issue, the court found that Husband had willfully violated the preliminary injunction by using community funds as though the injunction were "nonexistent." It found that Husband had willfully violated that injunction by failing to maintain Wife's healthcare insurance coverage. The court also found that Husband had violated the injunction by transferring out of Wife's control access to business accounts that they had historically used for personal expenses. Additionally, the court found that Husband violated the injunction by expending funds to rebuild their airplane's engine, to satisfy a lien on a piece of property, and to replace MedWise equipment.

¶15 The court ordered Husband to pay all Wife's healthcare expenses incurred between the lapsing of the old insurance coverage and the obtaining of new coverage. It also ordered Husband to pay Wife's attorney's fees incurred in prosecuting

the contempt. The court, however, ordered nothing with regard to Husband's expenditure on the medical equipment because the expenditure did not change the allocation of debts and property provided in the MSA. Nor did it order any sanctions related to Husband's expenditures on the property lien or the airplane engine.

¶16 On November 5, 2010, the court signed and entered the consent decree Husband and Wife had signed on June 9, 2009. Husband timely filed a notice of appeal. He argues here that the court erred both in finding the MSA to be a valid, enforceable contract and in holding him in contempt. We have jurisdiction under A.R.S. § 12-2101.

STANDARD OF REVIEW

¶17 We are not bound by the trial court's conclusions of law. *Lee Dev. Co. v. Papp*, 166 Ariz. 471, 476, 803 P.2d 464, 469 (App. 1990). Nor are we bound by any findings that combine both fact and law if there is an error as to the law. *Id.* But this court will not set aside the trial court's findings of fact unless those findings are clearly erroneous. *In re Marriage of Berger*, 140 Ariz. 156, 161, 680 P.2d 1217, 1222 (App. 1983) (citation omitted). And it is well established that "where the evidence is conflicting, we will not disturb the findings of the trial court." *Hanner v. Hanner*, 95 Ariz. 191, 194, 388 P.2d 239, 241 (1964) (citation omitted).

DISCUSSION

I. THE MSA AGREEMENT

¶18 For a settlement agreement to be binding, a party must establish all the elements of a valid contract. *Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997) (citing *Malcoff v. Coyier*, 14 Ariz. App. 524, 526, 484 P.2d 1053, 1055 (App. 1971)). A valid contract's essential elements are: "an offer, acceptance, consideration, a sufficiently specific statement of the parties' obligations, and mutual assent." *Id.* (citing *Savoca Masonry Co., Inc. v. Homes & Son Constr. Co.*, 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975)). Determining whether mutual assent existed is largely a question of fact, and "[c]ourts may look at the writing, the conduct of the parties, and the surrounding circumstances in deciding whether a contract existed or whether a meeting of the minds occurred." *Id.* (citing *Malcoff*, 14 Ariz. App. at 526, 484 P.2d at 1055).

¶19 Here, the trial court found that the MSA satisfied all of the elements of a contract. It emphasized that before Husband and Wife signed it, each was fully aware of the other's financial status, each was represented by experienced counsel, and each participated in lengthy mediation sessions to arrive at an agreement. It explained the conflict that arose after they had signed the MSA by finding that Husband and Wife's behavior

"demonstrate[d] frustration" stemming from each spouse's "perceived failure of the other to perform in furtherance of the requirement if [sic] the MSA."

¶20 In response, Husband argues that conduct alone can establish whether a contract exists, and he asserts that the couple's post-signature conduct is "not consistent with the existence of an agreement." In attempting to prove that conclusion, he says that "[o]ne fact stands out among all others: Following execution of the MSA, neither party filed the settlement documents with the trial court." But the court's explanation of that fact is certainly not clearly erroneous: "[Wife] withheld authorization to submit the Consent Decree and MSA to the Court due to concern with [Husband's] compliance with the provisions of the MSA requiring the exchange of additional documents in furtherance of the agreement terms."

¶21 Appellant's other arguments attacking the validity of the MSA likewise turn on an interpretation of the facts. He argues that Wife repudiated the MSA by refusing to perform without certain assurances that she allegedly demanded from Husband. But to hold that a party repudiated an agreement requires finding "a 'positive and unequivocal manifestation' that the party will not perform when his or her duty to perform arises." *Ratliff v. Hardison*, 219 Ariz. 441, 443, ¶ 9, 199 P.3d 696, 698 (App. 2008) (quoting *Diamos v. Hirsch*, 91 Ariz. 304,

307, 372 P.2d 76, 78 (1962)). Nothing in the record suggests the existence of anything that qualifies as an unequivocal manifestation of Wife's intent not to perform her duties under the MSA. The court, therefore, did not err in that respect.

¶122 Husband also argues that the parties mutually rescinded the MSA. A court's finding of mutual rescission depends on a "question of intent to be ascertained from the facts and circumstances of the transaction from which rescission is claimed." *Bazurto v. Burgess*, 136 Ariz. 397, 399, 666 P.2d 497, 499 (App. 1983) (citations omitted). In its findings, the trial court acknowledged that rescission seemed to have been "suggested" at one point, but it ultimately found that the MSA was not in fact rescinded and remained binding. And the trial court, as the trier of fact, "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (citation omitted). Because nothing in the record suggests that the court's finding was clearly erroneous, we leave that finding undisturbed and conclude that the MSA was a valid contract.

II. HUSBAND'S CONTEMPT

¶123 On appeal, Husband argues that the trial court erred in multiple ways by finding that he violated the preliminary

injunction and by holding him in contempt. Although contempt orders are not appealable, this court can treat an appeal from a contempt order as a petition for special action and review the order by accepting special action jurisdiction. *Munari v. Hotham*, 217 Ariz. 599, 601, ¶ 7, 177 P.3d 860, 862 (App. 2008) (citing *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18, 66 P.3d 70, 73 (App. 2003)).

¶24 Here, though, we find that the exercise of special action jurisdiction is unnecessary because the order from which Husband appeals is not a fully fashioned contempt order. Traditionally, "civil contempt requires that the contemnor be given an opportunity to avoid punishment through compliance." *Trombi v. Donahoe*, 223 Ariz. 261, 267, ¶ 26, 222 P.3d 284, 290 (App. 2009) (citing *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994)). The opportunity to avoid punishment allows the contemnor to "purge" the contempt and provides "a motive to comply." *Korman v. Strick*, 133 Ariz. 471, 474, 652 P.2d 544, 547 (1982).

¶25 The trial court found that Husband failed to maintain Wife's insurance and that that failure constituted a violation of the preliminary injunction. It ordered Husband to pay Wife's medical expenses for the period when she lacked coverage. Under our analysis, the court's order to pay the medical expenses gave Husband an opportunity to comply with the original injunction.

The order to pay the medical expenses was not itself a punishment for contempt. The order to pay would have served as a "purge," but only for a coercive sanction that the court never imposed. A contempt order would have provided that if Husband did not pay Wife's medical expenses, then he would be jailed or fined. Because the order was not fashioned that way, we conclude that it was not a contempt order. It was an order issued to restore the post-petition, pre-decree status quo that the preliminary injunction issued under A.R.S. § 25-315 was intended to maintain.

¶26 Husband, however, argues that A.R.S. § 25-315 provides no legal basis for the court's order that Husband pay Wife's medical expenses. We disagree. Under that statute, a preliminary injunction issued in a dissolution action requires that "both parties shall maintain all insurance coverage in full force and effect." ⁵ A.R.S. § 25-315(A)(1)(c). The language of the court's preliminary injunction comported with those provisions: "Do not remove the other party . . . from ANY existing insurance. Both parties shall maintain all insurance coverage in full force and effect." Given the language of § 25-315(A)(1)(c), there was no abuse of discretion when the court

⁵ Additionally, the standard preliminary injunction in a dissolution action prohibits both parties from "[r]emoving or causing to be removed the other party . . . from any existing insurance coverage." A.R.S. § 25-315(A)(1)(iii).

found that Husband willfully violated the injunction "by failing to maintain [Wife's] healthcare insurance." Nor did the court abuse its discretion by ordering Husband "to pay all medical, dental, and other healthcare expenses" that Wife incurred during the period when she was without coverage.⁶

¶27 Furthermore, that the court's intent was to compensate Wife, rather than to punish Husband, is clear from what the court did not do -- it imposed no sanctions in response to Husband's major expenditures. Accordingly, the court's order that Husband pay Wife's reasonable attorney's fees spent on the "contempt" issue is not an improper "penalty," as Husband asserts on appeal.⁷ Instead, the court seems to have properly exercised its discretion "after considering the financial resources of both parties and the reasonableness of the

⁶ The MSA contains a paragraph in which Wife "waives . . . any cause of action that she may now or hereafter have." The question whether the MSA waived Wife's right to file a contempt petition was touched on only at oral argument. But we note that the waiver applies to claims against Husband's property, not to any claims against Husband for violating the preliminary injunction and thereby unilaterally disturbing the status quo.

⁷ On appeal, Husband also argues that Wife's contempt motions never alleged anything about the airplane engine, the property lien, or the replacement of the MedWise equipment; that he never received any form of notice of those allegations; and therefore that holding him in contempt on the basis of those actions deprived him of constitutional due process. But the one item for which Husband was ordered to pay money -- i.e., Wife's loss of insurance coverage -- was specifically mentioned in the May 8 motion. For that reason we consider his due process argument unpersuasive.

positions each party has taken throughout the proceedings."
A.R.S. § 25-324(A).

CONCLUSION

¶28 We affirm the trial court's ruling that the MSA was a valid contract. We affirm its order that Husband pay Wife's medical expenses during the period she was without medical insurance. And we affirm its order that Husband pay Wife's attorney's fees stemming from the contempt petitions.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge