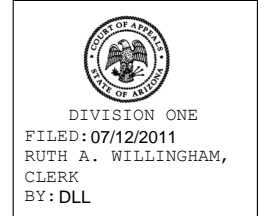


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



JOHNA STORY aka JONA PETERS, a ) No. 1 CA-CV 10-0221  
single woman; SHARON TRINOSKY, a )  
single woman, ) DEPARTMENT D  
)  
Plaintiffs/Appellees, ) **MEMORANDUM DECISION**  
)  
v. ) Not for Publication -  
) (Rule 28, Arizona Rules  
JOHN D. PETERS and TINA PETERS, ) of Civil Appellate Procedure)  
husband and wife; JOHN D. PETERS, )  
as successor trustee of the )  
JOHN D. PETERS TRUST, )  
)  
Defendants/Appellants. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-090199

The Honorable Larry Grant, Judge

**AFFIRMED**

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G E M M I L L, Judge

¶1 John D. Peters<sup>1</sup> and his wife, Tina Peters, appeal the trial court's grant of injunction and order of specific performance. Among other things, Peters challenges the trial court's jurisdiction to decide such matters. For the following reasons, we affirm the trial court's order of injunction.

#### BACKGROUND

¶2 The John W. Peters Trust (the "Trust") was created in 1993. At the time of John W. Peter's death in 2006, the Trust included the following primary assets:

- 1) Cash held in a Northern Trust account, in the approximate amount of \$7,630,000;
- 2) 100% of the stock of J.W.P. Holdings, Inc., valued at \$9,690,000; and
- 3) 99.6% interest in Honcho Company, L.L.C., valued for estate tax purposes at \$1,111,000.

¶3 Johna Story and Sharon Trinosky (collectively "Appellees") are beneficiaries of the Trust. Appellees, along with several others, entered into a Settlement Agreement ("Agreement") with Peters in June 2009. The Agreement was meant to resolve a long standing dispute over terms of the Trust. Peters was to become the trustee of the Trust, replacing Northern Trust. Pursuant to Paragraph III.II of the Agreement,

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<sup>1</sup> "Peters" refers only to Appellant John D. Peters, and not also to his wife, Tina Peters, unless the context requires otherwise.

Peters was to pay Story \$500,000 from the Trust within ten business days of receipt of the Trust funds from Northern Trust. Similarly, Peters was to pay Trinosky \$1,400,000 within ten business days of the receipt of funds from Northern Trust. The Agreement specified that any amount of the \$500,000 or \$1,400,000 not paid within ten business days was to accrue interest at a 10% annual rate starting July 1, 2009.

¶4 On January 5, 2010, pursuant to the Agreement, Northern Trust transferred cash in the amount of \$2,575,878.73 to Peters.

¶5 After payment had not been made to either Story or Trinosky, Story filed a complaint against Peters on January 22. The complaint alleged breach of contract, breach of trust, breach of duty of good faith and fair dealing, unjust enrichment, and entitlement to preliminary and permanent injunctions. The complaint prayed for: compensatory, incidental, and consequential damages in an amount to be proven at trial, but not less than \$500,000, plus interest, at 10% per year; a preliminary and permanent injunction ordering Peters to immediately pay Story \$500,000, plus interest; a preliminary and permanent injunction to freeze Peters' bank accounts; and attorneys' fees and costs.

¶6 Also on January 22, Story moved for a preliminary injunction, arguing that a preliminary injunction was necessary

in order to prevent irreparable harm to herself and other beneficiaries of the Trust. Story additionally moved for a temporary restraining order ("TRO"), arguing that she had no adequate remedy at law other than to freeze the funds and order Peters to pay her the money pursuant to the Agreement. Story also submitted to the court an affidavit in support of a TRO without notice, stating that "no notice should be provided because of the risk that [Peters] will remove the Trust Funds at issue . . . and not pay [Story] and others." The court issued the TRO on January 25, ordered that Peters make the distributions as described in Paragraph III.II of the Agreement, and enjoined Peters from using any proceeds received from Northern Trust until such distributions had been made.

¶7 Trinosky joined in Story's complaint and motion for preliminary injunction, requesting compensatory, incidental, and consequential damages in an amount to be proven at trial, but not less than \$1,400,000, plus interest, at 10% per year. Trinosky also requested the court order a preliminary and permanent injunction freezing Peters' bank accounts and ordering him to pay her \$1,400,000, plus interest.

¶8 On January 28, 2010, Peters filed a motion to dismiss, arguing that the estate did not have enough assets to pay its taxes and that the taxes could not be avoided by an agreement of the parties. The taxes owed on the estate totaled approximately

\$4,400,000. Peters admitted that the estate had arranged a payment plan that allowed the estate to pay only the interest on the taxes owed and annual payments then amortized so that the final payment would be due fifteen years. Peters also argued that the superior court had no jurisdiction to hear the case, and that injunctive or TRO relief was inappropriate.

¶9 On February 5, 2010, the court held a one-day evidentiary hearing. Peters presented four witnesses, including himself, an employee of Western Block,<sup>2</sup> a CPA, and Trinosky.

¶10 Following the hearing, the trial court ordered that there be an "immediate distribution of the proceeds" according to the terms of the Agreement. The court concluded that the Agreement made it "absolutely clear" that a distribution was to be made within ten days and that Peters had committed to pay the taxes. According to the trial court, there had been "no change of circumstances," but, rather, Peters "just [did not] want to make the distribution." The court initially ordered that the distribution be made no later than close of business February 8, but later extended the deadline to February 9, upon Peters' request. Also upon Peters' request, the court granted a stay of the proceedings and ordered the assets be frozen until a decision had been made by this court on appeal.

¶11 Peters timely appealed and we have jurisdiction

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<sup>2</sup> Western Block is an asset of the Trust.

pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(F) (2003).

### **ANALYSIS<sup>3</sup>**

#### **A. Jurisdiction**

¶12 Peters argues that the trial court lacked jurisdiction because only the probate court should have jurisdiction over this case. We disagree. First, the trial court here was interpreting and enforcing a contract, not deciding probate matters. Furthermore, even if the court was deciding probate matters, our supreme court has found the superior court to have jurisdiction over such matters. *Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 100, 907 P.2d 67, 69 (1995) ("First, in Arizona there is no such thing as a distinct probate court. The single trial court of general jurisdiction is the superior court. Second, the Arizona Constitution grants subject matter jurisdiction in probate matters to the superior court.").

#### **B. Taxes**

¶13 Peters argues that the taxes owed take priority and circumvent any agreement between the parties. We disagree.

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<sup>3</sup> Peters' opening brief does not comply with Rule 13 of the Arizona Rules of Civil Appellate Procedure because the issues presented do not match the issues discussed in the arguments section of his brief. See ARCAP 13 (Appellant's brief should contain "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented."). Our analysis addresses the issues analyzed in the argument section of Peters' opening brief.

¶14 Peters admitted that a Section 6166 payment plan had been arranged with the IRS that required the payment of the taxes over a fifteen year period, starting from the date of John W. Peters' death. Wanda Tang, a CPA, testified at the hearing that the estate would be required in years 2010 and 2011 to pay only the interest owed to the IRS, which she estimated to be approximately \$110,000 to \$120,000, depending on the fluctuation of the interest rates. Then, the estate would be required to pay the principal amount due in equal, ten-year installments. Tang also testified that, if an estate failed to pay its taxes, the IRS would trace the funds and "go to the beneficiary who received the money to recover [the] taxes."

¶15 Peters' argument that the payment of taxes prevents the distribution of money to the Trust beneficiaries is unpersuasive. As far as we can determine from the record, there is no claim from the IRS that the balances of the taxes owed are *currently* due. The fact that the Trust may have difficulty making future payments to the IRS does not prevent the Trust from making the distributions currently owed to Story and Trinosky. We are not persuaded by Peters' contention that making such distributions -- especially under court order -- will trigger any criminal liability for him.

¶16 Furthermore, Peters agreed that he personally and the Trust would be solely responsible to pay all taxes, in Paragraph

III.XVII of the Agreement:

The Parties acknowledge that Trust B or Doug<sup>[4]</sup> as the beneficiary thereof shall be solely responsible for the payment of all expenses incurred and taxes due from the Family Trust and/or the Estate, and Doug shall hold the other Parties harmless against any liability for expenses incurred by the Family Trust or the Estate for taxes payable by the Family Trust or the Estate.

And Peters acknowledged this obligation in his testimony. Peters, in other words, agreed to the distributions to Story and Trinosky at the same time he agreed to be personally responsible, along with the Trust, for payment of all taxes owed. He cannot now avoid the obligation to make the distributions by objecting that he may become personally liable for any unpaid taxes.

**C. Injunction**

¶17 Peters argues that an injunction is not appropriate here because any hardship would be placed upon him, and that the Agreement is unclear.

¶18 A trial court's decision to grant injunctive relief is reviewed for an abuse of discretion. *County of Cochise v. Faria*, 221 Ariz. 619, 621, ¶ 6, 212 P.3d 957, 959 (App. 2009). "A court abuses its discretion if its decision is based on an incorrect interpretation of the law." *Id.* at 622, ¶ 6, 212 P.3d at 960. A party seeking a preliminary injunction must establish

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<sup>4</sup> Peters is referred to as "Doug" in the Agreement.



the following four criteria:

- 1) a strong likelihood that he will succeed at trial on the merits;
- 2) the possibility of irreparable injury to him not remediable by damages if the requested relief is not granted;
- 3) a balance of hardships favors himself; and
- 4) public policy favors the injunction.

*Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990).

¶19 We address first Peters' argument that the payment of taxes from his personal funds would create a balance of hardships favoring him. As President of Western Block, Peters received approximately \$325,000 a year as his base salary, not including a \$100,000 accrued bonus. Peters also admitted to taking an additional \$1,000,000 from Western Block in order to remodel his personal home. Finally, as previously mentioned, Peters agreed to pay the taxes due on the estate under Paragraph III.XVII of the Agreement. See *supra* ¶ 16. In contrast, Story agreed to reduce her interest in the estate, by foregoing a twenty percent residuary bequest, as a compromise under the Agreement. The balance of hardships favors Story and Trinosky, and not Peters, because Story and Trinosky may never receive the money allotted to them under the Agreement if Peters again depletes the Trust for his own personal use or never makes the appropriate distributions.

¶20 Second, Peters argues that the Agreement recognized

that a Federal Tax lien could delay or prohibit payment and "[i]t is impossible to say on this record that it is 'certain' that the contract required payment regardless of whether taxes are owed." The standard for determining whether to grant injunctive relief is the same as for specific performance. *The Power P.E.O., Inc. v. Employees Ins. of Wausau*, 201 Ariz. 559, 563, ¶ 21, 38 P.3d 1224, 1228 (App. 2002). Generally, there are five requirements for a court to grant specific performance: (1) the existence of a contract; (2) the terms of that contract are certain and fair; (3) the party seeking specific performance did not act inequitably; (4) specific enforcement does not inflict hardship on the other party in such a way to outweigh the anticipated benefit to the party seeking specific performance; and (5) there is no adequate remedy at law. *Id.* at ¶ 22. We review de novo the interpretation of contracts. *Id.* "The purpose of contract interpretation is to determine and enforce the parties' intent." *US W. Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996).

¶21 Pursuant to Paragraph III.XII of the Agreement:

The Family Members acknowledge that some or all of the distributions contemplated in this Agreement may not be paid until the estate tax is finally determined with respect to the estate and property of John W. Peters. The parties also understand that Doug may be prevented from making certain distributions to Family Members because it may violate the terms of Section 6166 of the

Internal Revenue Code or the provisions of lending agreements entered into by JWP. If distributions are delayed for any reason, the Interest shall continue to accrue on any unpaid amount as set forth above until the amounts are paid in full.

¶22 As an initial matter, we note that Paragraph III.XII does not apply to Trinosky. Specifically, the Agreement defines "Family Members" to include Peters, Story, Robert Peters, another descendent of John W. Peters, and John W. Peters' grandchildren. As it relates to Story, however, under the plain language of the Agreement, we find this provision to clearly set forth that distributions may be delayed until the taxes were to be determined. As conceded by Peters, a Section 6166 agreement had been arranged with the IRS regarding the payment of taxes by the time of the hearing. We do not find upon this record, however, that this arrangement would prohibit distributions *at this time* because the taxes due were to be paid over many years. See *supra* ¶¶ 14-16. We also interpret this concession to mean that the tax on the estate had been determined. The inclusion of a provision regarding the payment of interest clearly indicates that the distributions were intended to be made at some point after the tax had been determined. Because the taxes due have been determined, and an arrangement made with the IRS, we do not find this provision to inhibit Peters' distribution of monies to Story, nor do we find this provision to be unclear.

#### **D. Procedural Issues**

¶23 Peters argues that the court erred by issuing the TRO because Peters was never afforded proper notice. Peters also asserts that the trial court erred by not entering findings of fact or conclusions of law. We disagree.

¶24 A TRO may be granted, without notice to the adverse party, if "it clearly appears from specific facts shown by affidavit . . . that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." Ariz. R. Civ. P. 65(d). Story submitted an affidavit in support of a TRO without notice that stated "no notice should be provided because of the risk that [Peters] will remove the Trust Funds at issue . . . and not pay [Story] and others." Further, Story alleged that "[i]f [Peters] removes the Trust Funds and leaves the state or country, [Story] will be irreparably harm[ed] because she will have no expectation of ever receiving what she is entitled to under the Trust." We do not find that the trial court erred in granting the TRO, as Story complied with the requirements as outlined in Rule 65(d).

¶25 Pursuant to Arizona Rule of Civil Procedure 52(a):

[I]n granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action. . . . It will be sufficient if the findings

of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence[.]

Ariz. R. Civ. P. 52(a). A trial court's findings are adequate when they are "pertinent to the issues and comprehensive enough to provide a basis for the decision," *Gilliland v. Rodriguez*, 77 Ariz. 163, 167, 268 P.2d 334, 337 (1954) (citation omitted), and they "encompass all of the 'ultimate' facts—that is, those necessary to resolve the disputed issues in the case." *Elliott v. Elliott*, 165 Ariz. 128, 132, 796 P.2d 930, 934 (App. 1990) (citing *Ellingson v. Fuller*, 20 Ariz. App. 456, 459, 513 P.2d 1339, 1342 (1973)).

¶26 The trial court made oral findings at the conclusion of the hearing. Specifically, the court stated "we look at the settlement agreement and that settlement agreement is absolutely clear. There's nothing ambiguous about it." The court interpreted the Agreement to make it clear that Peters had agreed to undertake the responsibility of paying the taxes, and that Peters needed to make the distributions to Story and Trinosky upon ten days of the receipt of funds. The court further concluded that Appellees had reason to be fearful and apprehensive after Peters had used \$1,000,000 of the Trust's funds to remodel his home. The court concluded that the "beneficiaries have no obligation to pay [the] taxes," and that Peters "just [did not] want to make the distribution[s]." The

trial court therefore provided findings comprehensive enough to provide a basis for its decision.

¶27 Furthermore, even if the findings were insufficient, Peters did not object to the findings after the hearing, and thus has waived any right to protest them on appeal. See *Elliott*, 165 Ariz. at 134, 796 P.2d at 936 ("A litigant must object to inadequate findings of fact and conclusions of law at the trial court level so that the court will have an opportunity to correct them."); see also *Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994) (by failing to complain to the trial court about lack of findings, litigant waives appellate review of lack of findings).

#### **E. Attorneys' Fees**

¶28 The parties each request an award of attorneys' fees and costs on appeal. According to Paragraph III.XXI of the Agreement, the prevailing party in an action to enforce the Agreement "shall be entitled to recover from the other party all of its costs and reasonable attorneys' fees." In accordance with this contractual provision, we will award Story and Trinosky their costs and an amount of reasonable attorneys' fees upon their compliance with ARCAP 21, to be paid by Peters from his personal funds and not from funds of the Trust.

**CONCLUSION**

¶29 For the foregoing reasons, we affirm the trial court's ruling.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA A. OROZCO, Judge