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

In the Matter of the Marriage of	)	No. 64739-3-I
	)	
CORRIE WEBER,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
BLAINE J. WEBER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: May 23, 2011
	)	

Ellington, J. — Blaine Weber sought to vacate portions of his dissolution decree under CR 60(b), contending that extraordinary circumstances justify relief from the judgment. The community's chief asset was Blaine's interest as a principal in an architecture firm. The asset was awarded to him and a series of equalizing transfer payments was awarded to his former wife. Blaine contends the collapse of the housing industry caused the business to lose nearly all its value, and seeks to vacate the payment obligation. Recent economic events have been extraordinary in a vernacular sense, but we adhere to settled law that postjudgment changes in asset value are not extraordinary circumstances for purposes of vacating a judgment under CR 60(b). We therefore affirm the trial court's denial of relief. Because Blaine's appeal is not frivolous, we deny Corrie's request for attorney fees on appeal.

BACKGROUND

After 32 years of marriage, Blaine and Corrie Weber separated in May 2006 and commenced dissolution proceedings in 2007.

The parties reached a mediated settlement in March 2008 under which Corrie was awarded 56 percent of the community property, then worth just over $2 million. The largest asset was the community's interest in shares of Weber & Thompson Architects PLLC, an architectural firm of which Blaine is a principal, specializing in high-rise residential projects. His shares were valued at $700,000 at the time of the settlement. The shares were awarded to Blaine, representing 79 percent of his total award. To achieve the agreed distribution of community property, Blaine was to make transfer payments to Corrie totaling $465,000, payable according to an agreed schedule over the course of five years. Blaine agreed to pay maintenance of $6,000 per month for 72 months, then $4,000 per month for the next 36 months. The agreement was incorporated in a decree of dissolution.

Shortly after the decree was entered, the housing market changed drastically and Blaine's firm began to struggle. Many projects were cancelled or placed on hold. Two-thirds of the firm's employees were laid off and the firm vacated two of the three floors it had occupied. Partner draws were reduced in early 2008 and suspended altogether in March 2009. Since the date of the settlement, the firm has made no profit distributions. By the second quarter of 2009, the value of Blaine's shares had dropped from the agreed value of $700,000 to $148,000. Blaine reported a loss of $112,286 on his 2008 tax return.

Blaine remained current on his maintenance payments until June 2009, when the

court suspended them at his request. He made his interest payments until September 2009, when he filed the motion to vacate. In order to make the payments, Blaine says he had to liquidate the assets awarded to him in the dissolution and incur debt.

In September 2009, Blaine moved to vacate the decree under CR 60(b)(6) and CR 60(b)(11). A commissioner denied the motion, noting:

> The court's denial is not based on any fault of either party or the arguments of husband that wife should go to work or her current circumstances or [of] the wife that the husband is living a high standard of living. Current circumstances are [the] fault of the global economy. The court's ruling is based on the legal standard set forth in Civil Rule 60(b). The court finds that if this motion were granted, it would open the floodgates of litigation as the change in value of an asset is not a basis to set aside the property settlement agreement.[1]

The superior court denied Blaine's motion for revision.

DISCUSSION

We review the denial of a motion to vacate under CR 60(b) for "clear abuse of discretion."[2] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.[3]

Blaine argues the premise of the settlement agreement—that the equalizing transfer payments would be made from his earnings from the firm—is now impossible. Because the firm has lost most of its value, and now furnishes no income, he contends CR

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[1] Clerk's Papers at 231.

[2] Flannagan v. Flannagan, 42 Wn. App. 214, 222, 709 P.2d 1247 (1985).

[3] In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) ("A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.").

60(b) permits relief from his transfer payment obligation.

The rule states, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
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> . . . .
>
> (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
>
> . . . .
>
> (11) Any other reason justifying relief from the operation of the judgment.[4]

We have found no cases discussing application of the rule in the current economic situation. Decisions involving CR 60(b)(6) are few, and no Washington cases appear to have arisen in the family law context.[5] As to CR 60(b)(11), courts have held that "[a] change in a party's financial circumstances will not justify application of CR 60(b)(11) to vacate a dissolution decree."[6] For example, in In re Marriage of Knutson, the court declined to vacate a decree requiring payment of a certain sum from a retirement account when the account lost value, even though the trial court clearly intended the parties to share the proceeds equally.[7] "While the [account's] value change was certainly

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[4] Civil Rule 60(b).

[5] Blaine identifies In re Marriage of Giroux as a case involving CR 60(b)(6), but although the court observed that a motion under CR 60(b)(6) was one procedure by which to obtain relief under the facts there, the case actually arose under CR 60(b)(11). 41 Wn. App. 315, 321, 704 P.2nd 160 (1985).

[6] In re Marriage of Knutson, 114 Wn. App. 866, 873, 60 P.3d 681 (2003).

[7] Id.

unfortunate from Mr. Knutson's point of view, it was not an extraordinary event for purposes of CR 60(b)(11)."[8]

Blaine points out that courts have granted CR 60(b)(11) relief where circumstances beyond the parties' control significantly undermined the decree, contending the unprecedented economic downturn constitutes such circumstances. But the cases on which Blaine relies are distinguishable. Each involved either a change in law or an action of third parties specific to the asset.

In In re Marriage of Giroux, a change in federal law allowed division of an asset not available at the time of the decree.[9] In In re Marriage of Jennings, the Veterans' Administration unilaterally reallocated the husband's benefits such that a former community asset was no longer, under federal law, subject to the distribution set forth in the decree.[10] In In re Marriage of Thurston, a third party refused to convey the partnership units that were the basis of the parties' settlement agreement.[11] In each case, an event unrelated to the value of the marital property substantially interfered with implementation of the decree.[12] In contrast here, there was no change in law and no action of third parties specific to the asset. The only change is in the value of an asset.

Blaine contends the unprecedented economic downturn represents more than a simple change in a party's financial circumstances or the value of an asset. It is surely

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[8] Id.

[9] 41 Wn. App. 315, 704 P.2d 160 (1985).

[10] 138 Wn.2d 612, 980 P.2d 1248 (1999).

[11] 92 Wn. App. 494, 963 P.2d 947 (1998).

[12] See In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (CR 60(b)(11) requires circumstances relating to "irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings").

true that the economic environment and its widespread and devastating impacts are unusual and, at least in recent years, unprecedented. But Blaine cannot point to any decision from any court applying CR 60(b) in this situation, and our research reveals none. Further, affording relief here would effectively invite every person affected by collapsing financial markets to reopen final judgments. Finality of judgments is a strong public and judicial concern.[13] Finally, Blaine's motion seeks only to vacate the transfer payment obligation, not to revisit the entire property division, which is unlikely to lead to a fully fair result. As Blaine now acknowledges, it is unreasonable to vacate only the transfer payment without addressing the remaining assets, most of which have been converted, consumed, or disposed of.

Blaine also contends he is entitled to relief under CR 60(b)(6) because the settlement agreement presumed his continuing income from the firm. Because that presumption has failed through no fault of his own, he invokes the doctrines of contract impossibility and commercial frustration to argue it is inequitable to enforce the judgment. But again, Blaine has not cited, and we have not found, any case where those doctrines have been applied to the property division in a dissolution decree.

Further, even if these defenses provided grounds to avoid obligations under a marital separation agreement, neither is persuasive here. Contract impossibility excuses performance only by "a showing of 'extreme and unreasonable difficulty, expense, or injury.'"[14] A party's financial inability to pay is "not the legal equivalent of inability to

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[13] Stanley v. Cole, 157 Wn. App. 873, 887, 239 P.3d 611 (2010) ("In Washington, there is a strong policy favoring the finality of judgments on the merits.").

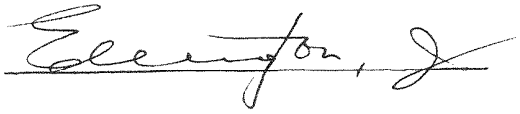
[14] Tacoma v. Northpark, LLC v. NW, LLC, 123 Wn. App. 73, 81, 96 P.3d 454 (2004) (quoting Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys., 104

perform," even when payment has become more difficult.[15]

Likewise, for relief under the commercial frustration doctrine, "'[i]t is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.'"[16] In this case, the decline of Blaine's firm poses significant challenges to his ability to make the transfer payment. But any risk to the firm's profitability was a risk that followed the asset. Further, the firm remains a going concern that may return to profitability as the economy recovers, and it is entirely unclear how this possibility should or could be accounted for.

There being no basis for relief under CR 60(b), we affirm.

Corrie seeks attorney fees, arguing that Blaine's argument is "without sufficient legal basis."[17] Although we disagree with his analysis, Blaine's argument is not without merit. Corrie is not entitled to fees.



WE CONCUR:

Wn.2d 353, 364, 705 P.2d 1195 (1985)).

[15] Pub. Util. Dist. No. 1, 104 Wn.2d at 364.

[16] Felt v. McCarthy, 130 Wn.2d 203, 208, 922 P.2d 90 (1996) (quoting Restatement (Second) of Contracts § 265 cmt. a (1979)).

[17] Resp't's Br. at 26.

Becker, J.

Grosse, J.