

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



DIVISION ONE
FILED: 06/16/09
PHILIP G. URRY, CLERK
BY: DN

In re the Marriage of:)
)
ANNAROSA ARCHER,) 1 CA-CV 08-0543
)
Petitioner/Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
FERNANDO MANUEL ARCHER,) - Rule 28, Arizona Rules
) of Civil Appellate
Respondent/Appellant) Procedure)
)
)
)
)

Appeal from the Superior Court of Maricopa County

Cause No. FC 2006-006492

The Honorable Susanna Pineda, Judge

AFFIRMED

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T H O M P S O N, Presiding Judge

¶1 This is a domestic relations matter. Appellant
Fernando Manuel Archer (husband) appeals from the decree of

dissolution following the lodging of a consent decree by AnnaRosa Archer (wife). The judgment is affirmed.

¶12 Husband and wife entered into a settlement agreement pursuant to Arizona Rules of Family Law Procedure (Rule) Rule 69, which resolved all disputed matters. The consent decree of dissolution lodged with the court divided the community property and debts of husband and wife and set out their respective rights and responsibilities with regard to their minor child.

The decree states:

In lieu of spousal maintenance, Wife shall receive a lump sum property distribution of \$100,000.00. This amount shall not be considered spousal maintenance and should be considered a property transfer incident to divorce and free of any taxes or penalties. This property division shall be paid in two parts: within 90 days of signing the decree, Husband shall obtain adequate financing and refinance the Chestnut Drive property. During the refinance, Husband shall remove Wife's name from all liability and pay to Wife the first installment, \$70,000.00. ... The \$100,000.00 listed above shall be considered a judgment in favor of Wife and against Husband. ... Should Husband not be able to refinance or comply with the above listed terms, the judgment shall incur interest at the legal rate of 10% per annum. Husband shall make payments to Wife of no less than \$2000.00 per month should he be unable to refinance.

Between the time of the lodging of the consent decree and the signing of the consent decree, husband filed a simultaneous objection to the lodging of the decree, motion to set aside their Rule 69 settlement agreement or relief under Rule 85 on the basis that his financial circumstances have sufficiently

changed as to make fulfillment of the agreement "impractical, if not impossible" and requesting a evidentiary hearing. The trial court held a status conference but not an evidentiary hearing.¹ The trial court ordered a response and a reply to husband's motion. The trial court signed the consent decree and found as to husband's motion:

THE COURT FINDS that the parties are bound by Rule 69 of the Arizona Rules of Family Law Procedure. Respondent acknowledges that he entered the agreement and that the property settlement reached was fair and equitable. He further admits that the Decrees submitted by Petitioner accurately reflects that agreement. However, he asks this Court for permission to breach that agreement.

IT IS HEREBY ORDERED denying Respondent's Motion to Set Aside the Rule 69 Agreement. The Court signs the Consent Decree prepared in accordance with the Rule 69 Agreement reached by the parties.

Husband timely appealed.

¶13 Arizona Revised Statutes (A.R.S.) section 25-317(B)

(2007) provides:

In a proceeding for dissolution of marriage or for legal separation, the terms of [a] separation agreement, except those providing for the support, custody and parenting time of children, are binding on the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unfair.

¹ On appeal, husband did not provide a transcript of the status conference. We presume that what occurred during that status conference supported the trial court's determination not to hold an evidentiary hearing. See Ariz. R. Civ. App. Pro. 11(b)(1); *Walker v. Walker*, 18 Ariz. App. 113, 114, 500 P.2d 898, 898 (1972).

The language of A.R.S. § 25-317(B) permits a trial court to invalidate a separation agreement only to the limited extent such an agreement is deemed to be "unfair." Absent such a finding the statute provides that the terms of a written separation agreement related to the disposition of property or spousal maintenance are "binding on the court." *Id.* It is the trial court's duty to ensure that any settlement agreement reached by the parties is fair and equitable. *Sharp v. Sharp*, 179 Ariz. 205, 211, 877 P.2d 304, 310 (App. 1994). We view the evidence in the light most favorable to sustaining the trial court's factual findings and determine whether there was evidence that reasonably supports those findings. *Mitchell v. Mitchell*, 152 Ariz. 317, 323, 732 P.2d 208, 214 (1987).

¶14 Here the parties had an agreement to pay money. That agreement contemplated that the money would be paid via a refinancing of a home assigned to husband as part of the property settlement but the agreement specifically contemplated other pay-out options if refinancing did not occur.² Husband admits the agreement was fair and equitable at the time it was entered into; however he argues that his changed circumstances

² On appeal, husband asserts for the first time that the agreement he signed did not have the alternative payment schedule in it. This issue is waived. Husband did not raise this argument below and we do not find any other version of the agreement in the record. See *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994).

make it impractical or impossible for him to perform.³ We disagree. If husband cannot refinance, other payment options exist under the terms of the agreement. Husband's financial situation does not rise to the level of "impracticability" contemplated under the Restatement Second of Contracts, § 261.

Section 261 reads:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Section 261, comment (b) states the Rule of Impracticability:

is simple enough in the cases of the death of a person or destruction of a specific thing necessary for performance. The continued existence of the person or thing (the non-occurrence of the death or destruction) is ordinarily a basic assumption on which the contract was made, so that death or destruction effects a discharge. Its application is also simple enough in the cases of market shifts or the financial inability of one of the parties. *The continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section.* (Emphasis added.)

Comment (d) states:

A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to

³ We note husband did not attach an affidavit or submit other evidence as to his changed circumstances following his unemployment.

impracticability since it is this sort of risk that a fixed-price contract is intended to cover.

See also, *7200 Scottsdale Rd. v. Kuhn FarmMach.*, 184 Ariz. 341, 345, 909 P.2d 408, 412 (App. 1995). The contingency raised by husband, an economic downturn or the lack of financing, was not an unforeseen event. For these reasons, the trial court did not err in denying husband relief under either Rule 69 or Rule 85.

¶15 Wife requests attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324 (2007) and specifically asserts that husband's positions are unreasonable. Section 25-324 requires us to examine both the financial resources and the reasonableness of the positions of each party. After doing so, we find that husband's position was not unreasonable. The parties should bear their own fees and costs on appeal.

¶16 Finding no abuse of discretion, we affirm.

JON W. THOMPSON, Presiding Judge

CONCURRING:

DONN KESSLER, Judge

MARGARET H. DOWNIE, Judge