

Affirmed in part, Reversed and Rendered in part, and Reversed and Remanded in part; Opinion filed May 24, 2001.



In The
Fourteenth Court of Appeals

NO. 14-99-01402-CV

NAOMI ANN BALL, Appellant

V.

THOMAS ALLEN BALL, Appellee

**On Appeal from the 246th Judicial District Court
Harris County, Texas
Trial Court Cause No. 97-59327**

OPINION

Appellant, Naomi Ann Ball filed a motion for contempt, a motion for enforcement, and an original petition for damages and other relief, alleging that her ex-husband Thomas Allen Ball failed to comply with several provisions of their divorce decree and that he violated the terms of the temporary orders issued by the trial court prior to its rendering of the divorce decree. The trial court denied all relief sought by Naomi. Naomi forwards five arguments on appeal: (1) the trial court erred by failing to file findings of facts and conclusions of law; (2) the trial court erred by failing to require Thomas to specifically perform an obligation imposed

by the divorce decree; (3) the trial court erred by failing to award Naomi damages for Thomas's failure to fulfill the obligations imposed by the divorce decree; (4) the trial court erred by failing to award her judgment for Thomas's non-payment of support obligations imposed by the temporary restraining order issued prior to the divorce decree; and (5) the trial court erred by failing to award Naomi her attorney's fees. We affirm in part, reverse and remand in part, and reverse and render in part.

Thomas and Naomi were married on May 13, 1989. In 1992, Naomi gave birth to C.B., the only child of the marriage. Naomi filed a petition for divorce and a request for a temporary restraining order in December of 1997. In April of 1998, the trial court issued a temporary order requiring Thomas to pay \$1,250.00 per month in child support and to pay fifty percent of all of C.B.'s health care expenses not covered by her insurance. The trial court issued a final decree of divorce in March of 1999. In the decree, the trial court named Naomi and Thomas as C.B.'s joint managing conservators, but Naomi was given primary custody. Two months later, Naomi brought this action alleging that Thomas failed to fulfill obligations imposed by the temporary restraining order and the divorce decree. The trial court rejected all of Naomi's motions and claims.

After the trial, Naomi filed a timely request for findings of fact and conclusions of law pursuant to Texas Rule of Civil Procedure 296. In accordance with Texas Rule of Civil Procedure 297, Naomi later submitted notice of past due findings. The trial court failed to make the requested findings. In her first issue, Naomi alleges that the trial court's decision not to file findings constitutes error. A trial court's failure to make properly requested findings does not constitute harmful error if the record before the appellate court affirmatively evinces that the complaining party suffered no injury. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996). A trial court's failure to file findings constitutes error if it prevents an appellant from properly presenting her case on appeal. *Id.* The record in this case clearly demonstrates the bases for the trial court's decision to deny the relief sought by appellant. Accordingly,

appellant was not prevented from presenting her case on appeal and the court's failure to make findings was not harmful. Appellant's first issue is overruled.

In her second and third issues, Naomi asserts that the trial court's refusal to require Thomas to comply with an order contained within the divorce decree and the trial court's failure to award her the damages that she alleges arose from Thomas's failure to comply with the court's order violated section 9.007 of the Texas Family Code and constitutes error. Section 9.007 prohibits a trial court from amending, modifying, altering, or changing a division of property made or approved in a divorce decree. TEX. FAM. CODE ANN. § 9.007 (Vernon 1998). Naomi alleges that the divorce decree required Thomas to deliver to her a stock certificate representing 200 shares of Commercial Coatings Services, Inc. common stock and that his failure to deliver said certificate constituted a breach of his agreement and the trial court's order. She further alleges that the trial court's subsequent refusal to compel Thomas to deliver the stock certificate constituted an illegal modification of the division of property contained within the divorce decree.

The divorce decree awards Naomi 200 of the 400 shares of Commercial Coatings Services, Inc. ("CCSI") contained within the Ball's marital estate. The divorce decree requires Thomas to deliver a stock certificate for 200 shares of CCSI's common stock to Naomi's attorney of record within twenty days of the issuance of the divorce decree. At the time of their divorce, the only controversy before the court was a dispute concerning the amount of child support Thomas would have to pay. Thomas agreed to the provision requiring him to deliver to Naomi a stock certificate for 200 shares of CCSI common stock. Thomas's response to Naomi's motion for contempt for failure to deliver the stock certificate and motion for enforcement of the decree was that he simply lacked the authority and ability to issue such a certificate. The record before this court clearly establishes the trial court's decision not to hold Thomas accountable for his failure to deliver the stock certificate was based upon the court's conclusion that Thomas lacked the authority and ability to issue Naomi a CCSI stock certificate.

It is well settled that inability to comply with a court order based on a cause not attributable to the party charged provides a defense to the consequences of contempt. *Ex parte Gonzales*, 414 S.W.2d 656, 657 (Tex. 1967); *Ex parte Carlile*, 783 S.W.2d 672, 673 (Tex. App.—Houston [14th Dist.] 1989, no writ). Thus, the trial court correctly denied Naomi's motion to hold Thomas in contempt for his failure to deliver the stock certificate. The court, however, had no authority to deny Naomi's motion for enforcement based upon the court's belief that Thomas was unable to comply with the agreed disposition of the marital state contained within the divorce decree. If Thomas was unable to obtain a CCSI stock certificate for 200 shares of common stock in Naomi's name and deliver such a certificate to her attorney of record within twenty days of the rendering of the divorce decree, he should not have agreed to do so. The trial court's denial of Naomi's motion for enforcement concerning Thomas's failure to deliver the stock certificate constituted a prohibited modification of the property division of the divorce decree. *See* TEX. FAM. CODE ANN. § 9.007 (Vernon 1998). Thomas's admitted inability to comply with the divorce decree simply requires the trial court to reduce the award to a money judgment pursuant to section 9.010 of the Texas Family Code. Accordingly, we find that the trial court committed error by denying Naomi's motion to enforce the divorce decree.

Moreover, the interpretation of a marital property agreement incorporated into a final divorce decree is governed by contract law. *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986). A person that enters into a contract to perform an act warrants that he can perform the act. 14 Tex.Jur. *Contracts* § 312 (3rd ed. 1981). If Thomas was unable to deliver a stock certificate representing 200 shares of CCSI common stock to Naomi at the time the agreement was made, and he was aware of his inability to deliver the certificate, he may not urge impossibility of performance as an excuse for his subsequent failure to perform. *See Embry v. Lewis*, 19 S.W.2d 87, 88 (Tex. Civ. App. Austin 1929, no writ). Further, a party whose promise to perform is dependent upon the cooperation of a third party assumes the risk of the third party's noncooperation in the absence of an express provision in the contract to the contrary. *Toyo*

Cotton Co. v. Cotton Concentration Co., 461 S.W.2d 116, 118 (Tex.1970); *Juarez v. Hamner*, 674 S.W.2d 856, 860 (Tex. App.—Tyler 1984, no writ); 14 Tex.Jur. *Contracts* § 312 (3rd ed. 1981). Thus, the defense of impossibility provides Thomas no defense from liability irrespective of whether he knew when he made the agreement or if he found out after the rendering of the decree that he could not deliver the certificate.

Additionally, we must recognize that once an agreement has been approved by the court and incorporated into a judgment, the agreement ceases to be a contract between two private parties and becomes the judgment of the court. *Spradley v. Hutchinson*, 787 S.W.2d 214, 218-19 (Tex. App.—Fort Worth 1990, writ denied). Accordingly, we must respect the finality of that judgment and the application of contract law is limited to the extent that a contract defense may not be pled against the enforcement of a judgement. *Id.* at 220. Instead, a contract defense may only be considered when assessing the damages that result from a party's breach. *Id.* Consequently, had the contractual defense of impossibility not been wholly inapplicable it would not have provided Thomas a shield from liability, instead it would have served only as a mitigating factor in the court's assessment of Naomi's damages.

Naomi's third issue also complains that the trial court refused to consider Mrs. Ball's testimony concerning the value of the 200 shares of CCSI stock. We find this complaint to be without merit. A close reading of the record demonstrates that although the trial court initially refused to allow Mrs. Ball to give testimony about her opinion as to the value of the stock, he subsequently reversed himself and allowed the testimony immediately after she gave the testimony in a bill of exception.

Naomi's fourth issue asserts the trial court erred by failing to award her judgment for Thomas's non-payment of support obligations imposed by the temporary restraining order issued prior to the final divorce decree. Naomi presented the trial court with evidence that Thomas failed to pay \$966.92 of the child support obligations imposed by the temporary orders. The trial court rejected Naomi's request for a judgment for the unpaid support. On

appeal, Thomas mistakenly maintains that language contained within the divorce decree negated his obligation to pay any child support arrearage that accrued prior to the entry of the decree. The divorce decree did not nullify Thomas's obligation to satisfy the support obligations imposed by the temporary orders up to the time of the decree. *See Coke v. Coke*, 802 S.W.2d 270, 273 (Tex. App.—Dallas 1990, writ denied). Section 157.262 of the Texas Family Code prohibits a trial court from reducing or modifying a child support arrearage. TEX. FAM. CODE ANN. § 157.262 (Vernon 1996). Accordingly, the trial court had no discretion to refuse Naomi's motion to reduce Thomas's arrearage to a judgment.

Naomi's fifth issue asserts that the trial court erred by failing to award Naomi her attorney's fees. Naomi successfully presented evidence that Thomas failed to make court ordered child support payments. Thus, absent a finding of good cause by the court for Thomas's failure to make the child support payment coupled with a statement by the trial court supporting the finding of good cause, Thomas is responsible for Naomi's attorney's fees and court costs incurred in her effort to force Thomas to satisfy his support obligations. TEX. FAM. CODE ANN. § 157.267 (Vernon 1996). Furthermore, the Family Code allows the trial court to order attorney's fees as costs in a successful effort to enforce a divorce decree. TEX. FAM. CODE ANN. § 9.014 (Vernon 1996). Thus, the trial court must revisit the issue of attorney's fees upon the remand of this case for a new trial.

Accordingly, we affirm the trial court's denial of Naomi's motion for contempt, we reverse the trial court's denial of Naomi's motion for enforcement of the temporary orders and render judgment for Naomi for \$966.92, and we reverse the trial court's denial of Naomi's motion to enforce the divorce decree and her original petition for damages and other relief and remand this case for further proceedings consistent with this opinion.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed May 24, 2001.

Panel consists of Justice Hudson, Senior Chief Justice Murphy, and Former Justice Amidei.*

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* Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.