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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000510-MR

STANLEY K. SPEES — APPELLANT

v.

APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
CIVIL ACTION NO. 04-CI-01109

KENTUCKY LEGAL AID AND
ESMERALDA MARIE VASQUEZ-OROSCO — APPELLEES

OPINION AND ORDER
DISMISSING IN PART
AND AFFIRMING IN PART

** ** ** ** **

BEFORE: BARBER AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

MINTON, JUDGE:

"A lawyer's time and advice are his stock in trade."

—*Abraham Lincoln*

Stanley Spees asks us to reverse the family court's order that denied him a fee for services he performed as a

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

warning order attorney in a dissolution of marriage case. While we agree with Spees that he is statutorily entitled to be paid for his services, we must affirm the family court order because no responsible party exists to pay Spees.

Esmeralda Marie Vasquez-Orosco filed a petition for dissolution of her marriage to Gonzalo Orosco. An attorney with Kentucky Legal Aid represented Esmeralda. Because Esmeralda had minimal assets, the family court granted her motion to litigate without payment of costs—*in forma pauperis* (IFP) status under KRS 453.190. Based upon Esmeralda's affidavit stating that Gonzalo was a nonresident of Kentucky, the family court also granted her motion for appointment of a warning order attorney under Kentucky Rules of Civil Procedure (CR) 4.06-4.08 to notify Gonzalo of the pending action. The family court appointed Spees to act as the warning order attorney.

As required by CR 4.07, Spees filed his warning order attorney report in a timely manner. According to that report, Spees sent a letter addressed to Gonzalo at his last two known addresses in Illinois. Those letters were both returned with a postal notation stating "No Such Number." With his report, Spees filed a motion for a fee of $150, asking the family court to require either Esmeralda or Kentucky Legal Aid to pay the fee as costs of the action. Esmeralda responded that her pauper status exempted her from paying the warning order attorney's

fee. Instead, Esmeralda argued that Spees's fee be taxed as costs to either Gonzalo, who was not personally before the court, or to the Commonwealth of Kentucky, Finance and Administration Cabinet, Office of Management and Budget, Fiscal Section, who was not a party.

The family court denied Spees's motion for a warning order fee. In doing so, the family court found that Esmeralda's indigent status prevented her being assessed the warning order attorney fee and, furthermore, that the Finance Cabinet was not required to pay the fee because the dissolution proceedings did not involve child abuse or termination of parental rights. The family court's order made no mention of whether Spees's request for a $150 fee was a reasonable fee for his services, nor did it address Spees's claim that Kentucky Legal Aid should be responsible for his fee. Before the dissolution action was concluded, Spees filed this appeal naming Esmeralda and Kentucky Legal Aid as appellees. Slightly over two weeks later, the family court granted the dissolution of marriage.

Before we may focus on the merits of this appeal, we must address Kentucky Legal Aid's and Esmeralda's pending motion to dismiss. According to their motion, we lack jurisdiction over Kentucky Legal Aid because that entity was not a party to the dissolution proceeding in family court. We agree. Simply put, an appeal may not be taken against "one who was not a party

to the proceedings in which the judgment was rendered."[2] And Legal Aid cannot be considered a party to the action simply because one of its lawyers represented Esmeralda in the dissolution proceeding. Consequently, Legal Aid may not now be converted into an appellee. So we must grant Legal Aid's motion to be dismissed from this appeal.

We disagree, however, that Spees has no standing to bring this appeal. Like Legal Aid, he was not a party to the family court proceedings. But we have consistently required attorneys, both appointed and retained, to become parties to appeals from judgments involving attorney fee disputes despite the fact that the attorneys were not parties to the underlying actions.[3] Thus, we believe that Spees has such a vital, personal interest in the warning order attorney fee dispute that he has standing to bring this appeal.

Finally, we find that it is immaterial whether Spees erred by not waiting until the underlying dissolution proceeding was concluded before filing his notice of appeal. Even if we assume, for the sake of argument, that Spees's notice of appeal was prematurely filed, we would not dismiss this appeal. First, the dissolution proceedings have now concluded. Second, and more importantly, a premature notice of appeal generally "is

[2] White v. England, 348 S.W.2d 936, 937 (Ky. 1961).

[3] *See, e.g.,* Commonwealth v. Coleman, 699 S.W.2d 755 (Ky.App. 1985); Munday v. Munday, 584 S.W.2d 596 (Ky.App. 1979).

deemed simply to relate forward and become effective on the date the trial court tenders its final judgment."[4] In the case before us, the appellees have demonstrated no prejudice resulting from application of the "relation forward" doctrine, nor do we believe that Spees acted completely unreasonably in filing his premature notice of appeal.[5] Though better practice might have been for Spees to wait until the dissolution proceedings were final, we will apply the relation forward doctrine and, consequently, decline to dismiss Spees' appeal against Esmeralda.

Having granted in part and denied in part the motion to dismiss, we now turn our attention to the merits of Spees's appeal. At its core, this case presents a conflict between KRS 453.190, which governs whether a litigant may be granted *in forma pauperis* status, and KRS 453.060, which governs attorney's fees for warning order attorneys. KRS 453.190(1) states in relevant part that a person who is granted indigent litigant status shall be allowed to

> file or defend any action or appeal therein without paying costs, whereupon he shall have any counsel that the court assigns him and shall have from all officers all needful services and process, including the preparation of necessary transcripts for appeal, without any fees, except such as are

[4] Clark v. Commonwealth, Cabinet for Health and Family Services, 170 S.W.3d 426, 428 (Ky.App. 2005).

[5] *See id.*

> included in the costs recovered from the adverse party[.]

We have held that the costs mentioned in KRS 453.190(1) "are those which are necessary to allow indigent persons access to the courts."[6]

CR 4.05(e) requires the clerk, in a case involving a party to be summoned who is a nonresident of Kentucky, to "make an order upon the complaint warning the party to appear and defend the action within 50 days." Similarly, CR 4.07(1) provides that "[t]he clerk at the time of making a warning order shall appoint, as attorney for the defendant, a practicing attorney of the court."

In the case at hand, Esmeralda submitted her affidavit stating that Gonzalo's last known address was in Illinois but that she had no knowledge of his whereabouts. So a warning order attorney was necessary for the action to proceed. Accordingly, the costs of the warning order attorney were necessary to allow Esmeralda access to the courts. So by virtue of her indigency, Esmeralda is exempted from paying the warning order attorney fees.[7]

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[6] Cummins v. Cox, 763 S.W.2d 135, 136 (Ky.App. 1988).

[7] *See* Francis v. Taylor, 593 S.W.2d 514 (Ky. 1980) (holding that mandamus was proper when circuit court refused to permit indigent plaintiff to continue with dissolution of marriage action until warning order attorney fee was paid).

But KRS 453.060(2) says that “[a] guardian ad litem or warning order attorney shall be allowed by the court a reasonable fee for his services, to be paid by the plaintiff and taxed as costs.” Similarly, CR 4.07(6) says that “[t]he court shall allow the warning order attorney a reasonable fee for his services, to be taxed as costs.” Spees argues that these provisions require that he be reasonably compensated for his efforts as a warning order attorney and that a failure to compensate him would be an unconstitutional taking of his property. We agree with Spees in theory; but, practically speaking, this is a hollow victory.

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." And Section 13 of the Kentucky Constitution mirrors that provision: "nor shall any man’s property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." Esmeralda argues that Spees’s property was not taken in this case. We disagree.

Before the adoption of the Kentucky Public Defender Act in 1972, attorneys in Kentucky were routinely appointed by the courts to represent indigent defendants. Those appointed attorneys served without compensation. Kentucky’s high court

found that the "burden of such service [was] a substantial deprivation of property and constitutionally infirm."[8] We perceive the case before us to be analogous to the situation denounced by the high court in Bradshaw because Spees was compelled to perform legal services for which he was denied any compensation. Such action represents the Commonwealth of Kentucky's taking of Spees's private property, in the form of his time and legal talent, without just compensation, a conclusion reached by many other state courts, albeit in a variety of factually distinguishable cases.[9] Indeed, though she does not believe a taking occurred in this case, Esmeralda agrees that Spees is entitled to be paid for his time and efforts as warning order attorney.[10]

So we are faced with a situation in which Spees has suffered a taking where no party has the resources with which to compensate him for what was taken from him. As previously noted, Esmeralda is exempted from paying the warning order

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[8] Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972).

[9] *See* State ex rel. Scott v. Roper, 688 S.W.2d 757, 764 (Mo. 1985) (noting the history of appointing attorneys to serve as uncompensated counsel in civil actions and collecting cases where courts have held that an attorney "may not be appointed to render gratuitous service.").

[10] Appellees' brief, p. 13 ("Appellees do not refute Appellant[']s argument that the statute [KRS 453.060] requires that some entity pay the Appellant.").

attorney fees by virtue of her indigent status. And Kentucky Legal Aid is not responsible for the fees because it is not a party to this appeal, nor was it a party to the dissolution proceeding. Gonzalo cannot be held responsible for the fees because he never made an appearance in the dissolution proceeding, meaning that the family court had jurisdiction over the dissolution but not personal jurisdiction over Gonzalo.[11] Finally, the Commonwealth cannot be held responsible for the fees because it was not a party to the dissolution action. Thus, regrettably, we are confronted with a deprivation for which no remedy lies.

We commend the members of the bar who voluntarily perform services on behalf of the indigent without any expectation of remuneration, including those who act as warning order attorneys in cases involving indigent plaintiffs. Conversely, we also recognize that attorneys cannot survive on *pro bono* work. Were it in our power to do so, we would order some entity to recompense Spees. We are without authority to order Spees to be compensated since "it is the duty of the executive department to enforce the . . . laws, and it is the duty of the legislative department to appropriate sufficient funds to enforce the laws which they have created. The proper

[11] *See, e.g.,* Dalton v. First National Bank of Grayson, 712 S.W.2d 954, 958 (Ky.App. 1986) ("Constructive service via warning order attorney will not subject nonresidents to personal judgment.").

duty of the judiciary, in the constitutionally ideal sense, is neither to enforce laws nor appropriate money. The judiciary's reason for existence is to *adjudicate*."[12]

It is our hope and belief that the members of the bar of this state will continue to perform as warning order attorneys in cases involving indigent parties without any expectation of compensation. But any attorney who believes that performing such services will lead to financial hardship may seek to decline an appointment under the auspices of Rules of the Supreme Court (SCR) 3.130(6.2). The commentary to that rule states that "[a] lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust." Therefore, unless granting such a motion would work a hardship, we urge the judiciary of this state to grant motions to withdraw made under SCR 3.130(6.2). As we see it, this opportunity to challenge the appointment that presents an undue hardship protects and preserves the attorney's due process rights. But until such time as funds are appropriated to cover these situations, any attorney appointed as a warning order attorney in a case involving indigent parties will continue to be uncompensated for their efforts.

[12] Bradshaw, 487 S.W.2d at 299 (emphasis added).

In conclusion, we hold that Kentucky Legal Aid should be dismissed as a party to this appeal; that Spees has suffered a taking of his property without just compensation; and that neither Esmeralda, Gonzalo, nor the Commonwealth may be required to compensate Spees.

Accordingly, we order that Kentucky Legal Aid's motion to be dismissed as an appellee is granted; and the order denying Spees's request for warning order attorney fees from Esmeralda and the Commonwealth of Kentucky is affirmed.

ALL CONCUR.

ENTERED: June 30, 2006

/s/ John D. Minton_____
JUDGE, COURT OF APPEALS

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