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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001833-MR
AND
NO. 2011-CA-002077-MR

JEFFREY B. FORTWENGLER — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 09-CI-500277

SHANNON DOYLE FORTWENGLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Jeffrey B. Fortwengler has appealed from two post-decree rulings by the Jefferson Family Court related to rights of third parties to enforce a judgment in a dissolution proceeding. Because we agree with the family court that a judgment had to be obtained or a collection attempted by a separate action before seeking enforcement, we affirm the orders on appeal.

Jeffrey and Shannon Doyle Fortwengler were married in 2002 and separated in 2008. The family court dissolved their marriage by decree entered in October 2009 and reserved several issues for trial related to the division of assets and debts as well as costs and attorney fees. Following the entry of its findings of fact and conclusions of law in May 2010 deciding the reserved issues, Shannon appealed the ruling to this Court. One of the issues raised and decided in the prior appeal related to the division of the debt that is the subject matter of this appeal. In a recently rendered opinion, this Court affirmed the family court's finding of a marital debt owed to Jeffrey's father, Phil Fortwengler, as well as the family court's decision to split the debt equally between Jeffrey and Shannon:

> We now turn to the trial court's finding that the parties owed Jeffrey's father a debt of $20,000 and that each party was liable for one half of this debt.
>
> There is no statutory authority for the assignation of debts in an action for dissolution of marriage. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Rather, debt is assigned as a matter of common law in divorce actions. *Neidlinger*, 52 S.W.3d at 522. Further, there is no presumption as to whether debts incurred during the marriage are marital or nonmarital. *Id*.; *Bodie v. Bodie*, 590 S.W.2d 895 (Ky. App. 1979). Moreover, there is no presumption that debts be divided in any particular way. Debts incurred during the marriage are generally assigned, however, by considering such factors as who received the benefits of the credit or loans, and the extent of each party's participation in incurring the debt. *Neidlinger*, 52 S.W.3d at 523.
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> Jeffrey's father testified at trial that the parties owed him $20,000. Jeffrey also testified that this amount was owed to his father. Proof of a debt is not held to the same high standard or burden as a claimant wishing to

> prove a nonmarital interest. Under CR 52.01, due regard must be given to the trial court's ability to judge the credibility of the witnesses. The trial court found Jeffrey's father's testimony concerning the debt to be credible and we will not reverse this finding on appeal.
>
> With respect to the division of the debt on an equal basis, we note that the trial court is afforded broad discretion to divide debts in a manner it sees fit and just. In the present case, it was not unreasonable or arbitrary for the trial court to find that the parties bear equal responsibility for a debt incurred during the marriage and used for general living expenses of the family. Finding no abuse, we affirm on this ground.

Fortwengler v. Fortwengler, 2012 WL 4464435 at *3-4 (Ky. App. 2012)(2010-CA-001315-MR).

In September 2011, while the above appeal was still pending, Jeffrey filed a non-wage garnishment against Shannon to partially collect on Shannon's portion of the $20,000.00 debt that had been awarded to Jeffrey's father. Jeffrey sought to garnish $1,200.00, the amount of his maintenance payment to her, since these payments represented a source of income for Shannon. In her motion to quash the garnishment, Shannon stated that Jeffrey and his parents had "concocted a scheme" whereby the parents transferred the $10,000.00 debt to Jeffrey. Shannon pointed out that this particular debt assignment was pending on appeal and that the family court did not have jurisdiction to approve the order of garnishment. In addition, Shannon pointed out that there was no judgment entered in favor of Jeffrey's parents because they were not parties to the case and did not have standing. Shannon also filed an affidavit to challenge the non-wage

garnishment, in which she stated that Jeffrey's parents did not have a judgment against her and that Jeffrey was attempting to evade his maintenance obligation. A hearing was scheduled for September 21, 2011.

In response, Jeffrey argued that the payment of the debt was an enforceable judgment and that the family court had jurisdiction to enforce this judgment, despite the pending appeal, because Shannon had not posted a supersedeas bond. He further suggested that the court should treat Shannon's motion to quash as a challenge to the garnishment and then set a hearing on the challenge, with the issue to be decided being whether the $1,200.00 maintenance payment was reasonably necessary for her support, which would make the maintenance payment exempt from garnishment.[1]

Following a hearing,[2] the court entered an order on September 23, 2011, addressing, in part, Shannon's motion to terminate the garnishment. The court held:

> At the outset of the hearing, the Court addressed [Shannon's] motion to terminate a non-wage garnishment obtained by [Jeffrey.] The Court ordered, on the record, that the garnishment was improper and would be terminated. In support of its position, the Court addressed three separate points.
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> . . . .

[1] By agreed order entered October 23, 2009, Jeffrey was ordered to pay Shannon $1,200.00 per month in maintenance until her death, her cohabitation with a male who was not a relative, her remarriage, or December 31, 2011, whichever occurred first. We note that the record on appeal reflects continued disputes between Jeffrey and Shannon regarding maintenance.

[2] The digital recording of the September 21, 2011, hearing is not included in the certified record on appeal.

> [Shannon's] counsel correctly argues that no common law judgment has been entered herein nor has a lawsuit been filed by a third party seeking to collect on a judgment. [Jeffrey] maintains that [Shannon's] portion ($10,000.00) of the $20,000.00 debt owed to his parents, which was found to be marital in nature and divided between the parties, has been assigned to him for purposes of collection. As such, he maintains that in collecting the debt he must garnish the maintenance which he pays as it is a source of income to the Petitioner.
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> The Court disagrees. While the Court appreciates the statement by counsel for [Jeffrey] that the assignment was his idea in an attempt to procedurally effect collection of the debt for individuals who are not parties to the action, it is not the proper procedure by which to do so. Again, a common law judgment or judgment resulting from a lawsuit attempting collection of the debt is the proper course of action.
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> Finally, the Court noted on the record that the act of attempting to have [Shannon's] debt assigned to him for purposes of collection creates an appearance of impropriety. In effect, by attempting to collect a judgment from his ex-wife on behalf of a debtor who is a close family member and to which he also is indebted, by withholding his own payment of maintenance looks, at least on the surface, as an attempt to avoid making the maintenance payment, thereby circumventing the Court's Orders. Thus, in light of the foregoing, the Court orders that the garnishment shall be terminated.

Jeffrey timely filed a notice of appeal from this order (appeal No. 2011-CA-001833-MR).

Less than a month later, Jill and Phil Fortwengler, Jeffrey's parents, moved the family court to be joined as parties to the dissolution action for the limited purpose of setting a payment reschedule in order to effectuate repayment of

Shannon's portion of the $20,000.00 debt. The Fortwenglers noted that they had made repayment arrangements with Jeffrey and that he had already repaid them $5,000.00 of the $10,000.00 he owed. They requested that the family court order Shannon to repay them at a rate of $250.00 per month beginning on November 1, 2011. The family court denied the motion by order entered October 20, 2011,[3] and made that ruling final and appealable by order entered shortly thereafter. Jeffrey timely filed a notice of appeal from this ruling (appeal No. 2011-CA-002077-MR). On Jeffrey's motion, this Court consolidated the two appeals for all purposes.

On appeal, Jeffrey raises three issues: 1) that it was not necessary for Phil Fortwengler to obtain a separate common law judgment prior to seeking enforcement of the $20,000.00 debt; 2) that he was entitled to an evidentiary hearing on the issue of the non-wage garnishment; and 3) that Phil Fortwengler should have been permitted to intervene for enforcement purposes.

As our first consideration, we shall address the fact that Shannon did not file a brief in this matter. We note that this Court permitted her attorney to withdraw because she had not been hired to represent Shannon in these appeals, abated the appeals for thirty days to permit Shannon to retain new counsel, and, when no entry of appearance was filed at the expiration of the thirty days, permitted Shannon to proceed *pro se*. Shannon did not file a *pro se* brief. Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) permits this Court to impose a penalty if the appellee does not file a brief:

[3] Again, the record does not contain the digital recording of the October 17, 2011, court date when we presume this motion was debated.

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

"The decision as to how to proceed in imposing such penalties is a matter committed to our discretion." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). We note that Jeffrey has not requested that we impose any sanction on Shannon for not filing a brief, and we shall not do so in this appeal. Rather, we shall continue with our review of the merits.

Our next consideration concerns another procedural matter; namely, whether Jeffrey properly identified how and where in the record he preserved each issue raised in his appeal. CR 76.12(4)(c)(v) requires the appellant to include an argument "with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." *See Elwell v. Stone*, 799 S.W.2d 46, 47-48 (Ky. App. 1990), for this Court's discussion of CR 76.12(4)(c)(v).

At the beginning of each argument, Jeffrey states, "This assignment of error was preserved for appellate review." He then states that he timely filed a notice of appeal and provides the page in the record where each notice of appeal may be found. However, Jeffrey fails to show where in the record he raised each issue

before the trial court by identifying a specific motion or response in which he argues or raises each specific issue he includes in his brief. His reference to the filing of the notice of appeal is not sufficient to meet the requirement set forth in CR 76.12(4)(c)(v). While he did include the front page of the non-wage garnishment and the motion to intervene filed by his parents in the appendix to his brief, he did not include any other documentary records to support his statements that the issues he raised were properly preserved. Despite this deficiency, we shall continue with our review of the merits.

For his first argument, Jeffrey argues that his father did not need to obtain a separate common law judgment in order to enforce his rights in the domestic judgment.

In support of his argument, Jeffrey cites to *Crowder v. Rearden*, 296 S.W.3d 445 (Ky. App. 2009), in which the family court permitted the former husband to enforce the assignment of a debt to the former wife through a contempt proceeding when she failed to pay the mortgage on the marital residence as ordered. As Jeffrey appears to concede, this case is inapplicable to the issue before us because a third party was not seeking enforcement, but rather a party to the dissolution proceeding was doing so.

Jeffrey also cites to Kentucky Revised Statutes (KRS) 403.150(6), which provides that "[t]he court may join additional parties proper for the exercise of its authority to implement this chapter." He suggests that the family court should be able to join the creditor under this statute. Jeffrey then urges this Court to

recognize that in a case such as this one, where the creditor has testified regarding the debt and the debtors have had the opportunity to cross-examine the creditor and raise any defense they might have, it should not be necessary for the creditor to have to obtain a judgment in a separate proceeding in order to enforce his rights. We decline to extend the law as Jeffrey has suggested in the instant case.

In *Medical Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491-92 (Ky. 2008), the Supreme Court of Kentucky addressed the application of KRS 403.150(6) and whether a family court should join business entities to effectuate a dissolution decree.

> Despite this finding of mootness, we note that there is most likely a continuing question in this case as to whether the trial court can exercise control over Dr. Dudee's business entities in order to effectuate the dissolution decree. Because this issue could arise again in this case, we briefly acknowledge the authority provided to trial courts in divorce proceedings by KRS 403.150(6). As this Court recognized in *Lewis LP Gas, Inc. v. Lambert*, 113 S.W.3d 171, 173, n.1 (Ky. 2003), *overruled on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004), KRS 403.150(6) states that in a dissolution proceeding, the trial court "may join additional parties proper for the exercise of its authority to implement this chapter." Given the facts and circumstances of this case, it would be proper for the trial court to join MVG and Schatzie under KRS 403.150(6) so that it could ensure that Ms. Dudee receives the property judgment to which she is entitled.
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> Two factual elements present in this case entitle the trial court to invoke KRS 403.150(6) and join MVG and Schatzie as additional parties. The first element is Dr. Dudee's continued failure to abide by the trial court's orders requiring him to pay Ms. Dudee child support, maintenance, and the $1,299,038 property

> settlement. As noted, since the entry of the dissolution decree in February 2006, Dr. Dudee has refused to pay any amount of the property settlement to Ms. Dudee. Furthermore, Dr. Dudee stopped paying his monthly maintenance requirements in February 2007, even though the trial court ultimately held that he had the resources and the ability to make these payments. The second element is the fact that MVG is solely-owned by Dr. Dudee, and Schatzie is owned jointly by Dr. Dudee and Ms. Dudee. This is not a case where innocent third-party shareholders would be harmed if their corporation were joined as a party to a divorce proceeding. The only owners of the corporations are already parties to the dissolution action and, moreover, both Dr. Dudee and Ms. Dudee consented to the trial court's original appointment of the receiver. It was not until the trial court ordered the receiver to prioritize payments to Ms. Dudee over the regular business expenses that MVG challenged the court's jurisdiction. Although joining corporations under KRS 403.150(6) will not be appropriate in every divorce proceeding where spouses own corporate assets, because of the facts of this case, joining MVG and Schatzie as additional parties is a proper way, and perhaps the best way, for the trial court to enforce its dissolution decree.
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> . . . . [W]e acknowledge that in the future, in cases where one party is consistently noncompliant and the business entities are wholly-owned by the spouses, trial courts could utilize KRS 403.150(6) to join these business entities as additional parties in order to enforce the provisions of the dissolution decree.

Medical Vision Group, P.S.C. v. Philpot, 261 S.W.3d 485, 491-92 (Ky. 2008). Unlike the present case, however, the ruling in *Medical Vision* was meant to benefit a party to the case, the wife, not a third party, and the businesses were wholly owned by the spouses in the dissolution action.

In our view, the additional parties to be joined referenced in KRS 403.150(6) would not be third-party creditors seeking to collect debts through a dissolution proceeding. Such additional parties would more appropriately be other individuals seeking, perhaps, custody of minor children, such as grandparents or *de facto* custodians.

We agree with the family court in this instance that the proper action to take to collect the debt would be for the creditor (either Jeffrey's father or Jeffrey himself, whoever has the right to the debt)[4] to obtain a common law judgment or attempt to collect the debt through a separate lawsuit.

For his second argument, Jeffrey contends that he was entitled to an evidentiary hearing on his order for a non-wage garnishment. While we do not disagree with Jeffrey's assertion that maintenance is subject to garnishment pursuant to KRS 427.150, the family court did not need to reach the issue of whether the $1,200.00 was subject to exemption in the present case. Rather, as we held above, the proper method to enforce the debt would have been for Jeffrey or his father to obtain a separate judgment or collect the debt by a separate lawsuit.

Finally, Jeffrey argues that the family court should have permitted his father to intervene in order to collect the debt owed to him.[5] He cites to CR 24.02, which allows for permissive intervention:

[4] We also agree with the family court's observation that the attempt to have Shannon's debt to his father assigned to Jeffrey for collection creates an appearance of impropriety.

[5] We note that the motion filed below was by both Phil and Jill Fortwengler; the family court's order only finds a debt in favor of Phil Fortwengler.

> Upon timely application anyone may be permitted to intervene in an action: (a) when a statute confers a conditional right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

We are unable to ascertain the basis for Phil and Jill Fortwengler's motion to intervene since they cited no authority in the written motion. And the record on appeal does not contain a recording of the October 17, 2011, hearing date where the parties would have, we presume, argued the merits of the motion. However, the fact still remains that neither Jeffrey's father nor Jeffrey had never obtained a judgment or attempted to collect the debt in a separate action. Therefore, we must hold that the family court did not abuse its discretion in denying the motion to intervene filed by Jeffrey's parents.

For the foregoing reasons, the orders of the Jefferson Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT: NO BRIEF FOR APPELLEE

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