RENDERED: March 5, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001830-MR

CHRISTY STONE HALLORAN — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 1985-CI-001359

ROGER T. RIGNEY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Christy Halloran appeals *pro se* from a November 20, 1996, order of the Hardin Circuit Court apportioning between her and her former husband, Roger Rigney, some of the costs of their child-custody dispute, namely fees owing to a guardian ad litem and an expert witness. Halloran maintains that the trial court erred or abused its discretion in assigning any of these costs to her either because she is shielded from liability by a prior bankruptcy or because the disparity between her resources and Rigney's dictates that the entire liability be assigned to him. Rigney has chosen not to respond to Halloran's appeal. We

believe that there is some merit to Halloran's criticism of the trial court's bankruptcy rulings. We are persuaded, however, for reasons explained below, that the result the trial court reached was not unfair to Halloran and thus that she is not entitled to relief. Accordingly, we affirm the order of the Hardin Circuit Court.

Halloran and Rigney were married in October 1984. They had one child together, Taylor Rigney, who was born in September 1985. In December 1985, Rigney petitioned for divorce. A final decree of dissolution was entered the following November. Initially, the parties agreed to Halloran having custody of Taylor, but in 1987 that agreement gave way to an emotionally wrenching dispute that was not resolved until 1995 when this Court affirmed a trial-court ruling that transferred custody to Rigney.[1] During the course of that dispute, the trial court appointed a guardian ad litem (GAL) on behalf of Taylor. The trial court also ordered on a number of occasions that Taylor be interviewed by a psychologist, who then served as an expert witness.

In May 1996, in conjunction with a motion by Halloran to increase her visitation with Taylor, the trial court ordered the parties to address the fee apportionment questions at issue here. At a preliminary hearing on the matter in August 1996, the parties agreed to the reasonableness of the bill for fees and

[1]1992-CA-002962-MR (03/17/95) (discretionary review denied (1995-SC-310 (08/16/95)).

costs submitted by the GAL.[2] That bill totaled nearly $24,000.00. The psychologist's bill could not be determined, so it was agreed that the trial court would write to him for a final statement of his charges. Halloran introduced evidence of her 1992 bankruptcy and argued that her liability for any portion of either the GAL's fee or the psychologist's had been discharged. At most, she claimed, her liability was limited to fees accruing after the termination of the bankruptcy case. Both parties disavowed responsibility for the GAL's involvement. It was agreed, finally, that after hearing from the psychologist the trial court would issue a tentative ruling to which the parties would be given an opportunity to except.

Accordingly, the trial court issued an order on November 20, 1996, which apportioned the two (2) bills as follows: Rigney was made liable for that portion of the GAL's bill which had accrued prior to Halloran's bankruptcy petition (approximately $7,300.00). The court divided the remainder of the GAL's bill evenly (about $8,200.00 apiece). The court also charged Rigney with the amount of the psychologist's bill Halloran had listed on her bankruptcy petition (about $1,400.00), and assigned to Halloran the balance (about $400.00). Both parties were ordered to pay these amounts within six (6) months

[2]We are mindful of Halloran's failure to name either the GAL or the psychologist as parties to this appeal. As we understand the case, however, Halloran does not contest in any way the propriety of the fees awarded. She maintains only that the fees were improperly apportioned between Rigney and herself. Rigney is thus the only other real party in interest, and Halloran's appeal is not invalid for failing to include the other two. Knott v. Crown Colony Farm, Inc., Ky., 865 S.W.2d 326 (1993).

of the order and to pay interest on any balance left outstanding thereafter.

Halloran filed exceptions to this tentative order, in the form of a motion to vacate or modify. The court heard the motion on March 17, 1997. Halloran argued that given the marked disparity in the parties' resources--Rigney having a significantly greater ability to pay--the court had assigned an unjust portion of the bills to her. She also argued that the payment schedule ordered by the court imposed an unjust and unrealistic burden.

By order entered June 26, 1997, the court reaffirmed its apportionment of the GAL's and psychologist's bills, but modified the manner in which they are to be payed. It ordered that Halloran's portion of the psychologist's bill was due by August 1, 1997, and that commencing September 1, 1997, she was to pay her portion of the GAL's bill at a rate of $200.00 per month, plus eight percent (8%) interest on any principal balance outstanding after December 26, 1997 (six months from the date of the ruling). Halloran appeals from this modified November 20, 1996, order.

Halloran first argues that the trial court misconstrued the protection accorded her by her bankruptcy. She petitioned for relief under Chapter 7 of the Bankruptcy Code (11 U.S.C. § § 701 *et seq.*) on March 9, 1992. By that date, the GAL had been appointed, and the psychologist had rendered all of his services. Indeed, by that date, the court had ordered Halloran to pay the psychologist's entire fee. Halloran claims that her bankruptcy

discharge on September 8, 1992, relieved her not only from having to pay any fees accrued by March 9, 1992, but was also meant to apply to the GAL's fees subsequently accruing. The trial court rejected this claim. Not only was Halloran liable for post-petition fees, the court ruled, relying on In re Cox, 33 F.Supp. 796 (1940), a pre-Reform Act case, but she was liable as well for any pre-petition fee, or any portion of a pre-petition fee, she failed to list on her bankruptcy petition. Halloran insists that the trial court misinterpreted the bankruptcy law. Despite a major caveat, we agree.

To give individual debtors a fresh start, "a new opportunity in life and a clear field for future effort," a principal feature of the Bankruptcy Code is its provision for a discharge of the debtor's preexisting debts. Perez v. Campbell, 402 U.S. 637, 648, 91 S. Ct. 1704, 29 L. Ed. 2d 233, 241 (1971) (internal quotation marks omitted). As summarized by the 4th Circuit Court of Appeals,

> [a] discharge in bankruptcy relieves the debtor of personal liability for all pre-petition debts but those excepted under the Bankruptcy Code. 11 U.S.C. § 727. The Code defines "debt" as "liability on a claim." 11 U.S.C. § 101(12). A "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. . . ." 11 U.S.C. § 101(5). Consequently, any right to payment which arises prior to the bankruptcy constitutes pre-petition debt and is discharged, absent an applicable exception. The discharge operates to permanently stay any attempt to hold the debtor personally liable for discharged debts. 11 U.S.C. § 524(a)(2).

In re Rosenfeld, 23 F.3d 833, 836 (4th Cir. 1994). Thus, in resolving Halloran's contention that she may not be held personally liable for the psychologist's or the GAL's fees, a court must address two (2) issues: (1) whether the fees are pre-petition "claims" or "debts" under the Bankruptcy Code such that they are subject to the general discharge provided for under Chapter 7; and (2) whether they are subject to any of the Code's exceptions to discharge. Halloran bears the burden of establishing the first condition, that the fees are pre-petition claims or debts. In re Surface, 133 B.R. 411 (1991). The creditor, however, Rigney in this case, must carry the burden of raising and proving the debt's nondischargeability under a statutory exception. In re Robinson, 193 B.R. 367 (1996).

With respect to the first question, we note that under the Code a debtor's fresh start is to be as unhampered as possible and to that end, Congress adopted "the broadest available definition of 'claim.'" Johnson v. Home State Bank, 501 U.S. 78, 83, 111 S. Ct. 2150, 115 L. Ed. 2d 66, 74 (1991) (citations omitted). That definition extends to obligations that do not ripen until after the bankruptcy petition was filed, provided that the operative facts giving rise to the obligation occurred prior to filing. The phrase "operative facts" has been understood to refer to acts by the debtor, not other, subsequent contingencies affecting the debtor's liability. Rothschild & Co., Inc. v. Angier, 84 B.R. 274 (1988). In general, "bankruptcy was intended to protect the debtor from the continuing costs of pre-bankruptcy acts but not to insulate the debtor from the costs

of post-bankruptcy acts." In re Hadden, 57 B.R. 187, 190 (1986). A distinction may be made, therefore, between claims arising from pre-bankruptcy acts "the costs of which continue to accrue after filing," which are subject to discharge, and claims arising from post-bankruptcy acts, which are not. Id.; In re Sure-Snap Corp., 983 F.2d 1015 (11th Cir. 1993).

As is clear from the record and as the trial court found, all the psychologist's fees and some $7,000.00 of the GAL's fees accrued prior to Halloran's March 9, 1992, bankruptcy petition. Enforcement of her liability for any of those fees was thus presumptively barred by her discharge. Halloran argues, further, that she should not be held liable for any of the GAL's fees because they all accrued pursuant to the pre-bankruptcy appointment of the GAL. The trial court, on the other hand, deemed Halloran potentially liable for any of the GAL's fees that accrued post-petition. In light of the cases cited above, it is likely that Halloran is correct to the extent that bankruptcy would presumptively shield her from having to pay for any of the GAL's fees that accrued independently of her post-bankruptcy acts. Post-petition fees for the GAL's routine administration, therefore, or for his responses to matters raised by Rigney, would likely be subject to Halloran's discharge. Her bankruptcy, however, did not give her a free hand to impose additional costs upon Rigney. To the extent that the GAL's post-petition fees arose as a result of proceedings initiated by Halloran, such as her motions for modified visitation, they are post-petition claims unaffected by Halloran's bankruptcy.

Even assuming, however, that Halloran's bankruptcy applied to more of the GAL's fees than the trial court believed, it is necessary to consider next whether any of the amounts presumptively discharged are subject to statutory exceptions. The trial court excepted a portion of the psychologist's fee on the ground that Halloran had failed to list the entire amount on her petition. In so ruling, the trial court misconstrued the new Bankruptcy Code's notice requirement. Under the former Bankruptcy Act, debtors were required, at their peril, to schedule debts and creditors fully and accurately. Under the current Code, however, this requirement has been significantly lessened. Commenting on the persistence of the old idea despite the change in the statute, one bankruptcy court said,

> [T]he Bankruptcy Code does not require that a debt necessarily be scheduled in order to be discharged. Although the listing of a debt has lost the talismanic status it may have had under the former Bankruptcy Act, old habits die hard.
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> . . .
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> Generally, unlisted debts are discharged unless the creditor did not learn of the bankruptcy in time to file a timely proof of claim . . . . 11 U.S.C. § 523(a)(3).

In re Costa, 172 B.R. 954, 959 (1994). Under the Code, it is the creditor's opportunity to participate in the bankruptcy proceeding that matters, not the debtor's commitment to a specific amount of alleged debt: "Importantly, the statute [11 U.S.C. § 523(a)(3)] does not require actual knowledge of the specifics of a claim; rather, a debt may be discharged if the creditor is informed of the 'case', i.e., the bankruptcy

proceeding as a whole." Rothschild & Co., Inc. v. Angier, *supra*, at 278 nt. 3. There is no suggestion here that Halloran failed to notify the psychologist of her bankruptcy case. The trial court erred, therefore, by excepting a portion of the psychologist's fee from discharge on the ground that the notice Halloran provided was insufficient.

This is the bankruptcy portion of this case as it was presented to and addressed by the trial court. As just explained, the trial court relied upon incorrect grounds for apportioning any of the psychologist's fees to Halloran and very likely was incorrect as well in its reasons for apportioning the GAL's fee as it did. If this were the end of the matter, Halloran would be entitled to relief; but this is not the end.

11 U.S.C. §523(a)(5) excepts from bankruptcy discharge any debts in the nature of child or spousal support. Guardian ad Litem fees and witness fees for custody proceedings have been held subject to this exception. In re Constantine, 183 B.R. 335 (1995); In re Holdenried, 178 B.R. 782 (1995); In re Jones, 9 F.3d 878 (10th Cir. 1993); In re Trembley, 162 B.R. 60 (1993); In re Smith, 207 B.R. 289 (1997); In re Strickland, 90 F.3d 444 (11th Cir. 1996). The trial court likely erred, therefore, by deeming Halloran's bankruptcy a bar to her having to pay any of the fees at issue here. Of course, as noted above, the creditor has the burden of raising this issue. Rigney and the Guardian ad Litem, both of whom are attorneys, participated in the hearings on this matter and had every opportunity to call this statutory provision to the court's attention. We are obliged to interpret

their failure to do so as a waiver, to the extent that this error may not now provide a basis for modifying the trial court's order in a manner disadvantageous to Halloran. CR 52.04; Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997). That waiver, however, does not preclude our noting that the errors by the trial court benefitted Halloran more than they cost her, nor does it require us to ignore the actual merits of Halloran's claim. Vega v. Kosair Charities Committee, Inc., Ky. App., 832 S.W.2d 895 (1992); Entwistle v. Carrier Conveyor Corporation, Ky., 284 S.W.2d 820 (1955). We conclude, therefore, that Halloran's bankruptcy does not entitle her to relief.

Halloran also contends that the trial court abused its discretion by apportioning the psychologist's and GAL's fees in apparent disregard of Rigney's much greater ability to afford them. Halloran's contention has two (2) parts. She maintains that the trial court violated a procedural requirement by not considering the evidence of the parties' disparate financial circumstances. She also maintains that on its merits the trial court's ruling was an abuse of discretion. Rigney's greater wealth, she claims, should make him completely responsible for the fees at issue.

With respect to her procedural complaint, we agree with Halloran that, when apportioning costs in a domestic relations action, the trial court is obliged to consider the relative wealth and earning capacities of the parties. KRS 403.220. We are satisfied, however, that in this case the trial court did so. Indeed, in its response to Halloran's motion to reconsider, the

trial court expressly noted Halloran's limited financial situation and Rigney's greater earning capacity. Halloran complains that the trial court did not make detailed findings on these matters, but CR 52 requires only that the trial court's findings be specific enough to permit meaningful review. Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992). That requirement was satisfied here. Halloran is thus not entitled to relief on procedural grounds.

On the merits of this issue, Halloran presented evidence showing that her gross income as a state employee was approximately $30,000.00 per year. She testified that this amount was barely enough to pay taxes, child support, and other mandatory expenses, and she claimed that the additional burden of the psychologist's and GAL's fees would impose on her an undue hardship. This was especially so, she claimed, in light of the fact that Rigney derives a substantial income from work as both an attorney and a pharmacist as well as from investments, and from the fact that Rigney's net assets amount to several thousands of dollars. The trial court acknowledged the differences in the parties' financial situations, but ruled that Halloran's income was sufficient to enable her to make payments toward her fee obligation. Her obligation should be for a substantial portion of the fees, the trial court explained, because she bore a substantial portion of the responsibility for them.

Cost apportionment under KRS 403.220 is a matter left to the sound discretion of the trial court. Wilhoit v. Wilhoit,

Ky., 521 S.W.2d 512 (1975). This discretion is not unlimited,[3] but as long as the trial court gives due consideration to the parties' financial circumstances, does not impose a grossly unfair burden on either party, and indicates in its findings and conclusions the basis of its decision, this Court may not disturb its ruling. Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986). It is certainly not required that costs be apportioned strictly according to the parties' relative resources. Underwood v. Underwood, *supra*. We are not persuaded that the trial court abused its discretion in this case.

We note, first, that of the total costs apportioned, about $25,500.00, Halloran was ordered to pay only about $8,600.00, or approximately one-third. Given the trial court's findings that Halloran was at least as responsible as Rigney for incurring these costs and that Halloran's income, though modest, is sufficient to permit a meaningful payment--findings that are not clearly erroneous--we believe that this apportionment adequately reflects Rigney's greater resources. In light of the results obtained in these proceedings, moreover, results by-and-large in Rigney's favor, the trial court did not abuse its discretion by deciding that Rigney should bear no more of the costs than Halloran's circumstances necessitated. The trial court's apportionment order thus satisfies the requirements of Poe v. Poe, *supra*, and so affords Halloran no grounds for relief.

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[3] *See* Becker v. Becker, Ky. App., 903 S.W.2d 528 (1995) (holding that the trial court abused its discretion by failing to award attorney fees to an unemployed wife who had no income producing assets and whose ex-husband earned $45,000 per year).

In sum, although Halloran has identified flaws in the trial court's handling of her case, she has failed to identify any errors that would justify changing the result. The trial court's application of bankruptcy law, always a daunting task, was not as well informed as it might have been, but on balance its errors were harmless with respect to Halloran. Nor was Halloran aggrieved by the trial court's apportionment of costs. Her former husband's greater ability to pay those costs is only one of the factors bearing on the trial court's decision. In light of Halloran's equal benefit from and equal responsibility for the GAL's and psychologist's services, the trial court's apportionment of one-third of the costs of those services to her is not unreasonable or an abuse of discretion. For these reasons, we affirm the modified November 22, 1996, order of the Hardin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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No brief for appellee