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OPINION OF APRIL 10, 2015, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001214-MR
&
NO. 2013-CA-001253-MR

JILL LEANN STANLEY, F/K/A LEE — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. BAILEY TAYLOR, JUDGE
ACTION NO. 08-CI-504095

JOHN DAVID LEE — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jill Leanne Stanley (f/k/a Lee) appeals, and John David Lee cross-appeals, from the Jefferson Circuit Court's order entered June 20, 2013. After a review of the record and applicable law, we affirm in part, reverse in part and remand.

John and Jill were married in July 1991 and separated in November 2008. The parties divorced via a limited decree of dissolution on April 22, 2009. The record shows that Jill initially requested, in a June 2011 motion, that the 2007 tax debt to the Commonwealth of Kentucky be split evenly between the parties. As a result, the trial court entered an order stating:

> Finally [Jill] has a pending motion to require [John] to contribute one-half of the parties' outstanding **state tax liability for 2007**. [John] believes that the tax liability assessment is in error, and he has hired an accountant to review the parties' tax liability. **The parties agreed** on the record to equally divide the accountant's fees and **to equally divide any tax liability due to the Commonwealth for 2007**, and the Court so orders.

Order, June 16, 2011 (emphasis added). The trial court appended language to make that order final and appealable. CR[1] 54.02(1).

In December 2012, John filed a motion with respect to tax liabilities. In this motion, he alleged that 2007 **federal** tax liabilities had been assessed as a result of an IRS audit, and 2007 Kentucky taxes had been overpaid. With respect to the federal taxes, John claimed Jill's share was $10,009.64 and requested a judgment according. As to 2007 state taxes, John claimed he had overpaid Jill $312.80, and requested a refund in that amount. John also requested Jill reimburse $2,845.59 interest and penalties assessed by the IRS for a late filing on John's 2010 federal income tax return, which John claimed was due to Jill's failure to sign and submit federal tax Form 8332. In response, Jill did not deny owing John her

[1] Kentucky Rules of Civil Procedure.

portion of the 2007 federal tax liability as well as the overpayment for the 2007 Kentucky income taxes, but she proffered that John owed her substantially more for unpaid marital debts and attorney fees.

As a result of this December 2012 hearing, the trial court entered an order which included the following: "[t]he issues of outstanding tax liabilities and existing common law judgments' [sic] will also be heard on the February 15, 2013 date." Following the February 15 hearing, the court entered an order on that date referring the parties to "mediation regarding all issues." The court did not specifically address tax issues in its order.

At some point in early 2013, John filed a non-wage garnishment in the amount of $10,687.25, setting forth the following:

> [Jill] agreed to paying [sic] equal amounts of a 2007 tax debt and associated attorney fees. Order was granted on June 16, 2011 from Jefferson Family Court Nine (9) by the honorable Stephen M. George. Order was final and appealable, no just cause for delay. [Jill] failed to file an appeal and has not paid debt. Amount of debt is undisputed by [Jill] and testified to in Family Court on December 17, 2012.

Jill filed a motion to quash the garnishment, to which John responded. In an order entered April 24, 2013, the trial court noted the parties' competing garnishments and admonished the parties "to negotiate in good faith with an experienced mediator in order to resolve all issues involving the parties' finances and what is due and owed." The court further stated "[i]f the issue involving the Garnishments and other financial matters are not resolved by mediation, those

issues will be heard on June 7, 2013[.]" As a result of the June hearing, the trial court's June 20, 2013, order denied Jill's motion to quash John's garnishment. This appeal followed.

"Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. However, a "trial court's legal conclusions are reviewed *de novo* as an issue of law." *Smith v. Smith*, 450 S.W.3d 729, 734 (Ky. App. 2014).

Jill argues that the trial court never entered a judgment with respect to the 2007 federal income tax debt, and without a judgment ordering her to pay, John cannot obtain an order of garnishment. We agree. The record shows Jill initially requested that the 2007 tax debt to the Commonwealth of Kentucky be split evenly between the parties. John agreed, and the trial court entered an order accordingly. The record is clear, however, that order only memorialized the parties' agreement to pay equally the 2007 income tax liability to the Commonwealth. Federal income tax liability was not a part of that order. The fact that Jill did not appeal that order has little to no bearing on the challenged garnishment which is based almost entirely on amounts claimed for federal income taxes.

> Regarding the garnishment order, KRS[2] 425.501(1) states:
>
> Any person in whose favor a final judgment in personam has been entered in any court of record of this state may, upon the filing of an affidavit by him or his agent or

[2] Kentucky Revised Statutes.

> attorney in the office of the clerk of the court in which the judgment was entered, and in the same cause in which said judgment was obtained showing the date of the judgment and the amount due thereon, and that one (1) or more named persons hold property belonging to, or are indebted to, the judgment debtor, obtain an order of garnishment to be served in accordance with the Rules of Civil Procedure.

This statute does not explicitly require that the underlying judgment name a specific dollar amount in order to obtain an order of garnishment,[3] but a careful review of the record discloses the trial court never entered any order determining the rights and obligations of the parties with respect to 2007 federal income taxes. John did not raise the matter until December 2012, and the trial court at that time deferred a decision to a subsequent hearing. While Jill may have agreed that a portion of the 2007 federal income tax debt was properly payable by her, she at all times argued in favor of a setoff due to her claim that John owed her a greater amount. At the subsequent hearing, in February 2013, the trial court again did not enter an order resolving the issue, but merely referred the parties to mediation. A similar mediation order was entered in April.[4] The trial court, thus, never entered a written order or judgment resolving the parties' claim regarding 2007 federal income taxes.

We hardly need citation for the proposition that trial "courts speak 'only through written orders entered upon the official record.'" *Oakley v. Oakley*,

[3] No doubt, a better practice is for a final judgment to state a specific dollar amount.

[4] The trial court may have implicitly rejected Jill's claim in its June 2013 order denying her motion to quash John's garnishment, but the fact still remains that John's garnishment was never supported by an underlying written, final judgment.

391 S.W.3d 377, 378 (Ky. App. 2012) (quoting *Kindred Nursing Centers Ltd. P'ship v. Sloan*, 329 S.W.3d 347, 349 (Ky.App. 2010)). As no written final judgment or order was entered regarding the parties' 2007 federal income tax liability, John's garnishment was improperly entered, and the trial court erred in denying Jill's motion to quash garnishment

In his cross-appeal, John argues that because the trial court destroyed Dr. Crumbo's records which were originally submitted under seal, KRS 422.240(1) now requires the court to replenish destroyed evidence. In July 2010, the court held a trial to determine various issues, including matters concerning the parties' minor children. At this trial, John attempted to introduce medical records from the children's former psychologist, Dr. Ginger Crumbo, but was denied. The trial court judge at the time destroyed the subpoenaed information from Dr. Crumbo, finding it irrelevant for John's purpose of proving that Dr. Crumbo was biased against him. In April 2013, John filed a motion to replenish the destroyed records pursuant to KRS 422.240(1). The trial court denied his motion in its June 20, 2013, order, finding that the original trial court judge had already found the records to be irrelevant.[5]

KRS 422.240(1) states:

> If the records or papers of any court are lost, destroyed, defaced, or obliterated, the court shall appoint a

[5] Jill has not filed an appellee's brief with this court in reply to John's cross-appeal. Under these circumstances, the provisions of CR 76.12(8)(c) permit the panel to reverse the trial court's order if the appellant's brief reasonably appears to support such a result. We do not believe John's brief justifies the reversal he seeks.

> commissioner, who shall have power and authority to fix on a convenient place to meet for the purpose of hearing evidence in regard to the lost records or papers, giving reasonable public notice thereof.

John claims the "shall" language in this statute requires the court to appoint a commissioner to determine whether the medical records need to be replaced. We do not believe this statute applies in this situation. At the time, the original trial court judge found these records to be irrelevant since John wanted the records to prove that Dr. Crumbo was biased against him. The trial court only destroyed the records because they were irrelevant. John has not presented a new rationale for these records to be introduced, and we fail to see any unwarranted bias against him by Dr. Crumbo. We do not believe KRS 422.240(1) applies where the records have been destroyed because the court has previously deemed them irrelevant. Hence, we find no error in the court's decision to deny John's motion to replace the records.

For the foregoing reasons, the Jefferson Circuit Court's order dated June 20, 2013, is affirmed in part and reversed in part, and this matter is remanded to that court for further proceedings consistent herewith.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jill Leann Stanley f/k/a Lee, *Pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

Steven D. Yater
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