

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001419-MR

DESIRE LETE

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 07-CI-500271

MARGARETTE LETE

APPELLEE

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,¹ SENIOR JUDGE.

KELLER, JUDGE: Desire Lete (Desire) appeals from the Jefferson Family

Court's order holding him in contempt for failure to pay to Margarette Lete

(Margarette) the amounts that were awarded to Margarette by an Indiana superior

court. On appeal, Desire argues that the family court erred in holding him in

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

contempt of a court order from another jurisdiction; that the family court did not have sufficient evidence to hold him in contempt; and that the family court violated his constitutional rights by imprisoning him without first conducting an investigation into his ability to satisfy the Indiana court's judgment. Margarette argues that this matter is now moot; that the Indiana court's judgment, once properly registered in Kentucky, became a Kentucky judgment; and that the family court had the inherent power to enforce that judgment. Because we agree with Margarette that this matter is moot, we dismiss Desire's appeal.

FACTS

On January 8, 2004, the Floyd County Indiana Superior Court (the Indiana court) entered a decree dissolving the marriage of Desire and Margarette (the decree). The decree dissolving the parties' marriage also made provision for the disposition of various assets, the most significant of which for purposes of this appeal involved Desire's TARC pension, which is administered through the Kentucky Retirement System. The Indiana court awarded Margarette half of that pension and signed a qualified domestic relations order (QDRO) requiring the Kentucky Retirement System to make monthly payments of \$1,039.00 to Margarette. However, the Kentucky Retirement System is not subject to division by QDRO; therefore, no monthly distributions were made to Margarette.

In December of 2005, Margarette filed a motion in the Indiana Court to enforce the decree and to hold Desire in contempt based on Desire's failure to make payments awarded to Margarette in the decree. At the May 2006 hearing on

these motions, Desire made an oral motion seeking relief from the decree. The Indiana court, in its September 21, 2006, order and judgment (the judgment), declined Desire's request to re-weigh the evidence and found that Desire had "knowingly and willingly failed to abide by this Court's orders." Based on that finding, the Indiana court found for Margarette and ordered Desire to pay her \$64,477.01 plus interest. The amount ordered represented more than two years of past due monthly pension payments as well as other assets that had been awarded to Margarette in the decree. The Indiana court also ordered Desire to immediately begin making monthly payments of \$1,039.00 to Margarette as her share of Desire's TARC pension. Desire did not take any actions in Indiana after receiving this order and did not make any of the payments ordered.

On January 23, 2007, Margarette registered the Indiana Court's judgment in Jefferson County, Kentucky. On May 2, 2007, Margarette filed a motion to compel the Kentucky Retirement System to make payments under Desire's pension plan directly to Margarette. Margarette also filed a motion to hold Desire in contempt for failure to pay the amounts due under the judgment. Subsequently, Margarette filed a third motion seeking an order requiring the Kentucky Retirement System to place each monthly retirement benefit payment into an escrow account, with the funds to be equally distributed from that account to the parties.

On June 15, 2007, the family court held a hearing on Margarette's motions. During the hearing, which consisted primarily of discussion among

counsel and the judge regarding whether Desire's TARC pension benefits were subject to division, Desire admitted that he had made only one payment to Margarete from those pension benefits. At the end of the hearing, the family court held that Desire was in contempt for failing to make the payments ordered by the Indiana court. The family court ordered Desire to serve 180 days in jail for his contempt; however, the court stated that Desire could obtain his release from incarceration and purge his contempt by paying \$10,000 to Margarete. The court noted that it had no authority to order the Kentucky Retirement System to pay any benefits directly to Margarete or to any person or entity other than Desire. Therefore, the court denied Margarete's motions to that effect. The court then entered a written order on June 25, 2007, setting forth the findings it had made on the record at the hearing. Desire filed a motion to alter, amend, or vacate the order holding him in contempt, which the family court denied.

On June 21, 2007, Desire moved the court for emergency relief, noting that he suffered from a heart condition. The court denied that motion. On July 2, 2007, the court entered an agreed order noting that Desire had paid Margarete an amount sufficient to purge his contempt. Therefore, the court ordered Desire's release from incarceration.

As noted above, Desire raises several issues on appeal. However, we agree with Margarete that this matter is now moot; therefore, we will only summarily address those issues.

ANALYSIS

A moot case is one which seeks a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy. *Hudspeth v. Commonwealth*, 204 Ky. 606, 265 S.W. 18; *Benton v. Clay*, 192 Ky. 497, 233 S.W. 1041. As falling within that category it is well established that where, pending an appeal, an event occurs which makes a determination of the question unnecessary or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed. *Hudspeth v. Commonwealth*, 204 Ky. 606, 265 S.W. 18; *Logan County Fiscal Court v. Childress*, 196 Ky. 1, 243 S.W. 1038; *Board of Education of Cumberland County v. Jones*, 194 Ky. 603, 240 S.W. 65; *Williams v. Howard*, 193 Ky. 848, 237 S.W. 1062; *Wheeler v. Patrick*, 192 Ky. 529, 233 S.W. 1054; *King v. Tilford*, 70 S.W. 1064, 24 Ky. Law Rep. 1270; 4 C.J.S., Appeal and Error, § 1362.

Louisville Transit Co. v. Dept. of Motor Transp., 286 S.W.2d 536, 538 (Ky. 1956).

Desire asks this Court (1) to “reverse the finding of contempt entered by the Jefferson Family Court, and [to] set aside any and all orders entered in this cause that arise from the contempt finding;” (2) to “find that the remedies available to Appellee under this cause are limited to those available to judgment-creditors in collection actions;” (3) to “find that the Jefferson Family Court violated the rights afforded to Appellant by the Kentucky Constitution;” and (4) to “find that any orders entered in this cause shall be consistent with Kentucky law applicable to collection of money debts.” We will address each in order.

Because Desire has purged himself of the contempt, is no longer incarcerated, and was not subject to any fines or other penalties, there is no

existing controversy. Furthermore, if there were an existing controversy, reversing the family court's finding of contempt would have no practical effect. Desire's request that we limit Margarette's ability to collect what she is owed to the remedies available to a judgment-creditor, seeks an advisory opinion, which we are not permitted to give. *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007).

Desire's request that we limit the scope of the orders of the family court, likewise seeks an impermissible advisory opinion. Finally, even if we were to hold that the family court violated Desire's rights, such a holding would have no effect.

Therefore, we hold that the issues raised by Desire are moot.

However, our analysis cannot stop there. As noted by Desire, matters that are moot but are capable of repetition while evading review may be reviewed by this Court. In order to determine if a case is capable of repetition while evading review, we must address two questions: "whether (1) the 'challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) [whether] there is a reasonable expectation that the same complaining party would be subject to the same action again.'" *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992) citing *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir. 1988); see also *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005); and *Commonwealth v. Hughes*, 873 S.W.2d 828 (Ky. 1994).

In support of his position, Desire states that he "does not challenge the money judgment itself, as registered." However, he argues that "the court cannot imprison him for the mere failure to pay money without adequate proof, taken in a

Kentucky court, that he has the ability to pay and simply fails to do so. Otherwise, the scenario that played out in June of 2007 could be repeated again and again without the ability to review the trial court's actions."

This argument fails for three reasons. First, Desire had notice that the family court would be addressing Margarette's motion to hold him in contempt. Despite having that notice, Desire did not file a response to Margarette's motion. Furthermore, Desire did not introduce any evidence that he was incapable of paying the amounts owed to Margarette under the decree. In fact, Desire's deposition transcript and records attached thereto indicate that he had \$44,682 in adjusted gross income for tax year 2005. Furthermore, Desire testified that he receives approximately \$3,800 monthly in pension benefits and has expenses, less credit card debt, of approximately \$1,000. Therefore, Desire's argument that the family court imprisoned him without adequate proof is incorrect.

Second, the challenged action, imprisonment for contempt, is not inherently too short in duration to be fully litigated prior to its cessation. In this case, had Desire not managed to find the funds necessary to purge his contempt, he would have remained imprisoned for at least 180 days. Within that time frame, Desire could have sought a writ of prohibition or other appropriate relief. Therefore, we hold that the challenged action is not too short to be fully litigated prior to its cessation.

Third, while Desire is correct that he may be subject to imprisonment for contempt in the future, he can avoid that by simply paying the amounts he

owes. Therefore, unless Desire is admitting that he intends to violate the family court's order, there is no reasonable expectation that he will be subject to contempt in the future. For these reasons, we hold that Desire's case is not capable of repetition while evading review.

Although the preceding disposes of Desire's appeal, we will briefly address Desire's objection to the family court's use of contempt to compel him to pay the amounts owed under the judgment. Initially, we note that KRS 426.955 provides that a foreign judgment, properly registered in Kentucky, "has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner."

A court has the authority "to enforce its own judgments and to remove any obstructions to such enforcement." *Akers v. Stephenson*, Ky., 469 S.W.2d 704, 706 (1970). See also, *E.I.C., Inc. v. Bank of Virginia*, Ky.App., 582 S.W.2d 72 (1979), and *Lincoln Bldg. & Loan Assn. v. Humphreys*, 274 Ky. 359, 118 S.W.2d 736 (1938); and see generally, 46 Am.Jur.2d *Judgments*, Sec. 898, p. 1032 (1969). It also has, as the authorities cited point out, "the right to invoke the contempt power in enforcing a judgment." *Akers v. Stephenson*, *supra* at 706.

Shelby Petroleum Corp. v. Croucher, 814 S.W.2d 930, 933 (Ky. App. 1991). See also KRS 426.384. Based on the above, the Indiana judgment, once properly registered in Kentucky, was enforceable by the family court as if the judgment had been rendered in Kentucky. The family court has the right to use the contempt

power to enforce its judgments. Therefore, the family court had the right to use the contempt power to enforce the domesticated Indiana judgment.

CONCLUSION

As set forth above, the issues raised by Desire are moot. Furthermore, if the issues remained viable for appellate review, the family court had the right to hold Desire in contempt. Therefore, we dismiss Desire's appeal as moot.

ALL CONCUR.

ENTERED: August 15, 2008

/s/ Michele M. Keller
JUDGE, COURT OF APPEALS

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