Affirmed and Memorandum Opinion filed March 23, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00365-CV

CHRISTOPHER J. MCCLOSKEY, Appellant

V.

ANNE MIRIAM MCCLOSKEY, MICHAEL A. CRAIG, AND FIDELITY INVESTMENTS D/B/A NATIONAL FINANCIAL SERVICES, L.L.C., Appellees

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On Appeal from the 387th District Court
Fort Bend County, Texas
Trial Court Cause No. 07-CV-160708

MEMORANDUM OPINION

Appellant Christopher Joseph McCloskey ("Chris") appeals from a garnishment judgment in which the garnishee Fidelity Investments d/b/a National Financial Services, L.L.C. ("Fidelity Investments") was ordered to pay funds from his account to the garnishors, appellee Anne McCloskey ("Anne") and one of her attorneys, appellee Michael A. Craig ("Craig"). In seven issues, Chris, the garnishment debtor, contends that (1) the trial court abused its discretion by not complying with the mandate of the appellate court,

(2) the garnishment action violated the automatic bankruptcy stay, (3) the garnishment action is improper because it is the second action for the same fees, (4) the manner in which Chris's assets were taken from two separate-property accounts was improper, (5) this court should stay execution of judgment until this court "rules on the characterization of attorney fees as child support,"(6) Chris was improperly divested of his assets, and (7) the judgment is manifestly unjust. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, Anne began divorce proceedings against Chris, and Chris counter-petitioned for divorce. A jury heard the issues relating to conservatorship and primary residence of the parties' two children. The remaining issues relating to the children and the division of property were tried to the trial court. Chris appealed the divorce decree, and this court issued an opinion in that appeal on June 12, 2003. *McCloskey v. McCloskey*, No. 14-00-01300-CV, 14-00-01307-CV, 2003 WL 21354709 (Tex. App.—Houston [14th Dist.] June 12, 2003, no pet.) (memo. op.). In that opinion, this court found the trial court erred in characterizing $50,398.00 in attorney's fees as child support. *Id.* at *5. This court remanded the issue of Anne's attorney's fees and directed the trial court to correctly characterize the attorney's fees as part of the division of property. *Id.* The trial court held a hearing on remand on March 13, 2006, and modified the original divorce decree, but improperly characterized the $50,398.00 in attorney's fees as "additional child support." *See McCloskey v. McCloskey*, 14-06-00470-CV, 2009 WL 3335868, at *2 (Tex. App.—Houston [14th Dist.] Apr. 2, 2009, pet. denied) (mem. op.). On April 2, 2009, this court issued an opinion, again finding error, and modifying the trial court's decree to delete any reference to the characterization of attorney's fees as additional child support.

In the meantime, on January 26, 2005, Chris filed for bankruptcy. On July 17, 2007, the bankruptcy court issued an order determining that the $50,398.00 in attorney's

fees were not dischargeable in bankruptcy. *See* 11 U.S.C. § 523(a)(5). A few months later, on November 28, 2007, Anne and Craig filed an application for a writ of garnishment against Fidelity Investments seeking to garnish Chris's account to recover the attorney's fees. On January 18, 2008, the trial court signed a garnishment judgment, in which the court ordered Fidelity Investments to deliver from funds it held for Chris in his account at Fidelity Investments the full amount of attorney's fees plus interest. Chris filed a motion to dissolve the writ of garnishment, which the trial court denied. Nothing in our record reflects that Chris superseded the garnishment judgment. Chris appeals from that judgment.

STANDARD OF REVIEW

We review a trial court's ruling on a motion to dissolve a writ of garnishment for abuse of discretion. *See Gen. Elec. Capital Corp. v. ICO, Inc.*, 230 S.W.3d 702, 705 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). A trial court abuses its discretion if it acts without reference to guiding rules and principles or in an arbitrary or unreasonable manner. *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241–42 (Tex. 1985).

ANALYSIS

In his second issue, Chris contends the garnishment judgment was rendered in violation of the bankruptcy stay. On January 26, 2005, Chris filed for bankruptcy, triggering the automatic stay provision of the United States Bankruptcy Code. *See* 11 U.S.C. § 362. Because Chris filed his bankruptcy petition before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("2005 Amendments"), the version of section 362 of the Bankruptcy Code in effect prior to the 2005 Amendments governs Chris's bankruptcy. *See* Pub. L. No. 109-8 § 1501(b)(1); *In re Barner*, No. 09-60394, —F.3d—,—, 2010 WL 517587, at *2 (5th Cir. Feb. 15, 2010). Under the law applicable to Chris's bankruptcy proceeding, section 362(b) of the Bankruptcy Code provided that:

> The filing of a petition under section 301, 302, or 303 of this title, . . . does not operate as a stay—
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> . . .
>
> (2) . . .
>
> (A) of the commencement or continuation of an action or proceeding for—
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> . . .
> (ii) the establishment or modification of an order for alimony, maintenance, or support; or
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> (B) of the collection of alimony, maintenance, or support from property that is not property of the estate[.]

Our record contains documents from Chris's Chapter 7 bankruptcy case showing that, under section 554(a) of the Bankruptcy Code, the bankruptcy trustee abandoned the property that is the subject of the trial court's garnishment judgment. *See* 11 U.S.C. § 554(a). This abandonment meant that this property was no longer "property of the estate." *See Bamburg v. Townsend*, 35 S.W.3d 85, 88–89 (Tex. App.—Texarkana 2000, no pet.). The garnishment action resulted in the collection of attorney's fees as "additional child support" that were awarded in the trial court's decree. After the trial court rendered its garnishment judgment, this court modified the decree so that the fees were not awarded as child support. Nonetheless, this subsequent modification of the decree does not retroactively operate to change the character of the garnishment action. The fees collected in the garnishment action were "alimony, maintenance, or support" within the meaning of former section 362(b)(2)(A)(ii). *See Silansky v. Brodsky, Greenblatt & Renehan*, 897 F.2d 743, 744 (4th Cir. 1990); *Klass v. Klass*, 831 A.2d 1067, 1075 (Md. 2003). Because the garnishment action was an action for the "collection of alimony, maintenance, or support from property that is not property of the estate" under former section 362(b)(2) of the Bankruptcy Code, it did not violate the bankruptcy stay. Accordingly, Chris's second issue is overruled.

Chris argues, in part, under his fifth issue that the trial court lacked jurisdiction over

the garnishment action because the bankruptcy stay applied. Because the stay did not apply, we also overrule this part of the fifth issue.

In his first issue, Chris contends the trial court abused its discretion by not complying with this court's 2003 mandate to characterize the attorney's fees in question as part of the property division rather than as child support. Because the remedy of garnishment is purely statutory, we look to chapter 63 of the Texas Civil Practice and Remedies Code and the Texas Rules of Civil Procedure to determine the respective rights and responsibilities of the parties in a garnishment action. *Jamison v. Nat'l Loan Investors, L.P.*, 4 S.W.3d 465, 468 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). The only real issue in a garnishment action is whether the garnishee is indebted to the judgment debtor, or has in its possession effects belong to the debtor, at the time of service of the writ on the garnishee and at the time the garnishee files its answer. *Rowley v. Lake Area Nat. Bank*, 976 S.W.2d 715, 718 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

Under section 63.001 of the Texas Civil Practice and Remedies Code, a writ of garnishment is available if, among other things, the garnishor has a valid subsisting judgment. A judgment "shall be deemed final and subsisting for the purpose of garnishment from and after the date it is signed, unless a supersedeas bond has been filed." Tex. R. Civ. P. 657. The record reflects that Anne applied for a post-judgment writ of garnishment after the trial court signed a revised decree. The writ recited that Chris was given the proper statutory notice as required by Texas Rule of Civil Procedure 663a. At the time of service of the writ, there were sufficient funds in Chris's account with Fidelity Investments to pay the amount due under the decree, as set forth in the writ of garnishment.

Chris argues that because the trial court improperly characterized the attorney's fees as child support in the decree, the evidence does not support a valid garnishment. However, the fact that the decree was later modified does not change the result. *See Westerman v. Comerica Bank–Texas*, 928 S.W.2d 679, 682 (Tex. App.—San Antonio 1996, writ denied). The garnishee, Fidelity Investments, could not have known that the

underlying decree would be modified. The record reflects that when the trial court signed the garnishment judgment, the decree was a "valid subsisting judgment" within the meaning of the garnishment statutes and rules of procedure. *See* Tex. R. Civ. P. 657. The fact that the decree was modified over a year later does not subsequently render the garnishment proceedings wrongful, nor does that subsequent event invalidate the trial court's garnishment judgment. *See Hobson v. Assoc. Inc. v. First Print, Inc.* 798 S.W.2d 617 (Tex. App.—Amarillo 1990, no writ). Chris's first issue is overruled.

In his fifth issue, Chris argues that this court should "stay execution of judgment until it rules on the characterization of attorney fees as child support." Any request for a stay until this court adjudicates his appeal from the 2006 decree is moot because this court has adjudicated that appeal. *See McCloskey*, 2009 WL 3335868, at *2. Likewise, any request for a stay until this court rules on the characterization of the attorney's fees in the trial court's 2006 decree in this appeal is also moot because this court today adjudicates the instant appeal. More importantly, the propriety of the characterization of the attorney's fees in the 2006 decree is not before the court in this appeal from the trial court's garnishment judgment. Accordingly, we overrule the remainder of the fifth issue.

In issues three, four, six, and seven, Chris argues that the current garnishment action is improper because it is the second action filed to recover the same attorney's fees. Chris claims that his assets were taken from his separate-property IRA accounts at Charles Schwab on September 11, 2000, and October 10, 2000, and his ERISA account at Merrill Lynch on August 7, 2002. Chris argues that those assets were garnished to pay the attorney's fees that are subject to the garnishment judgment.

Chris refers to two orders directing Charles Schwab and Merrill Lynch to release funds in payment of attorney's fees. Those orders were issued in 2000 and 2002 and were for payment of interim fees, not the fees at issue in this appeal. The record does not reflect that the 2000 and 2002 orders were for the same attorney's fees as those ordered to be paid in the garnishment action under review. We overrule Chris's third, fourth, sixth and seventh issues.

Having overruled all of Chris's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Yates, Frost, and Brown.