

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00453-CV
NO. 09-11-00654-CV

DREW CONGLETON, Appellant

V.

DARCIE SHOEMAKER, Appellee

and

IN RE DREW CONGLETON

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 00-01-00301 CV
and
Original Proceeding

MEMORANDUM OPINION

In a final divorce decree dissolving the marriage of Drew Congleton and Darcie Shoemaker, Congelton was ordered to assume certain financial obligations. The trial court later entered agreed orders, which granted judgment in favor of Shoemaker for amounts owed by Congleton. In November 2009, the trial court signed a turnover order

and appointed a receiver. In August 2011, the trial court signed a second turnover order, which required Congelton to deliver certain property to the receiver and redefined the receiver's powers. Congleton filed an appeal and a petition for writ of mandamus to challenge the trial court's turnover orders. We address both proceedings in this opinion. We affirm the trial court's 2011 order in part, and we reverse in part and remand the cause to the trial court.

In issues one and two in the appeal and issue one in the petition for writ of mandamus, Congleton attacks the trial court's appointment of a receiver and its decision to vest the receiver with certain powers. He argues that the receiver was not ordered to collect a valid existing judgment and that the full extent of the receiver's powers was unknown until the 2011 order.

We possess appellate jurisdiction to consider orders that resolve discrete issues in connection with a receivership, including a receivership contained in a turnover order. *Bahar v. Lyon Fin. Servs.*, 330 S.W.3d 379, 385 (Tex. App.—Austin 2010, pet. denied); *see* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(1) (West Supp. 2011). The trial court first appointed a receiver in November 2009, but redefined the receiver's powers in August 2011. Because Congleton did not appeal from the 2009 order, we do not consider the trial court's initial appointment of the receiver. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(1); *see also* Tex. R. App. P. 26.1(b). Nevertheless, we may review the

new receivership powers granted in the 2011 turnover order.¹ *See Bahar*, 330 S.W.3d at 385-87, 391.

In issues three, four, and five in the appeal and issues two and three in the petition for writ of mandamus, Congleton argues that the trial court abused its discretion by vesting the receiver with powers that are not supported by Texas law. He argues that the trial court erred in granting the receiver the authority of a master in chancery.

Shoemaker contends that Congleton's complaint is not preserved for our review. At the hearing on Shoemaker's post-judgment application for turnover relief, Congleton argued that section 31.002(b) of the Civil Practice and Remedies Code did not authorize the powers listed in the proposed order. Congleton's objection was sufficiently specific to advise the trial court of the basis for his complaint. *See Tex. R. App. P. 33.1(a)*. Additionally, we construe Congleton's complaint as a challenge to the sufficiency of the evidence to support the trial court's order, which is a relevant factor in assessing whether the trial court abused its discretion. *See Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991); *see also Europa Int'l, Ltd. v. Direct Access Trader Corp.*, 315 S.W.3d 654, 656 (Tex. App.—Dallas 2010, no pet.).

The trial court may appoint a receiver to take possession of nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the

¹ A right to appellate review is especially compelling where the trial court set aside the 2009 turnover order in January 2010, reinstated the receiver in May, granted Congleton's motion to vacate the receiver's master in chancery powers in June, and redefined the receiver's powers in August 2011.

judgment. Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b)(3) (West 2008). A receiver is an “officer of the court, the medium through which the court acts.” *Sec. Trust Co. v. Lipscomb Cnty.*, 142 Tex. 572, 180 S.W.2d 151, 158 (1944). A receiver must act only on the authority of the court appointing him. *Knox v. Damascus Corp.*, 200 S.W.2d 656, 659 (Tex. App.—Galveston 1947, no writ). The receiver derives his authority from the trial court and has only those powers that the appointing court may confer upon him. *Id.* The trial court cannot confer the exercise of non-delegable judicial discretion and power to the receiver. *Seagraves v. Green*, 116 Tex. 220, 288 S.W. 417, 424 (1926). As the trial court’s agent, the receiver is subject to the trial court’s authority, decrees, and orders at all times and in all things pertaining to the administration of the receivership. *Knox*, 200 S.W.2d at 659. A receiver has no constitutional authority to adjudicate parties’ rights. *Seagraves*, 288 S.W.at. 239. We review a turnover order containing receivership powers for abuse of discretion. *Bahar*, 330 S.W.3d at 391; *Moyer v. Moyer*, 183 S.W.3d 48, 51 (Tex. App.—Austin 2005, no pet.).

Congleton first contends that the following provisions improperly equate the receiver’s authority with that of the trial court:

- b. Examinations and testimony. Scheduling hearings and meetings and directing parties and witnesses to give testimony at such hearings and meetings and to rule upon the admissibility of evidence at such hearings[.]
- c. Administering Oaths. Placing witnesses under oath and examining them himself or through his agents[.]

- e. Binding effect of Receiver's order. An order from the Receiver, made pursuant to this order, is a Court Order.

These three provisions disregard the requirement that the receiver must at all times be subject to the trial court's authority and orders. *See Knox*, 200 S.W.2d at 659. Provision (e) improperly equates the receiver's orders with the trial court's orders, and provisions (b) and (c) are so overly broad as to delegate to the receiver the non-delegable authority to adjudicate rights. *See Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981); *see also Seagraves*, 288 S.W. at 424. These three provisions give the receiver authority to make decisions without further consultation with or approval of the trial court. *See Seagraves*, 288 S.W. at 424. Essentially, under the court's order, the receiver would be paid a percentage fee for collections while ruling on objections. The trial court cannot delegate enumerated judicial powers to the receiver and abused its discretion by attempting to do so. *See Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 645 (1933) (“[T]he power [] confided to our trial courts must be exercised by them as a matter of nondelegable duty[.]”); *see also Seagraves*, 288 S.W. at 424; *Tabor v. Hogan*, 955 S.W.2d 894, 897 (Tex. App.—Amarillo 1997, no pet.).

Congleton next challenges the following provisions regarding the receiver's authority to obtain assets:

- g. Turnover of all assets, present and future, to the Receiver, at his office. Duty to supplement. The Respondent is ordered to turnover all of the listed items, and all similar items. All portions of this order continue until the judgment is paid. For example, the duties to disclose, supplement, turnover, etc., continue. If the items are not

presently in existence, or the control of [Congleton], [Congleton] with knowledge of such assets [is] ordered to turnover the items to the Receiver, immediately upon taking control[.] If [Congleton] does not have control of an asset, but receives knowledge of its existence, [Congleton] is ordered to notify the Receiver, in writing, immediately, by fax, personal delivery or certified mail.

- j. Law Officers to assist. Every security officer, constable, deputy constable, sheriff, deputy sheriff, United States Coast Guard employee and every other peace officer with notice of this order is authorized to accompany the Receiver to any location designated by the Receiver where Receiver believes assets or documents of [Congleton] may be located, without the necessity of issuing a writ of execution, and is ordered to prevent any person from interfering with the Receiver (or any person under the direction of the Receiver) from carrying out any duty under this order or interfering with any property in control of the Receiver, or any property subject to this order. The Receiver may seize and sell any of [Congleton's] maritime vessels and may re-title same. The Receiver is authorized to direct any sheriff or constable to seize and sell property under writ of execution or to assist the Receiver under a writ of turnover.
- k. Access to assets. The Receiver is authorized to take all action necessary to gain access to real property, leased premises, storage facilities, mail and safety deposit boxes, in which real or personal property of [Congleton] may be situated, whether owned by [Congleton] or not.

Congleton argues that (1) provision (g) violates due process by requiring the turnover of assets that may exist in the future; (2) provision (j) improperly exempts authorities from obtaining a writ of execution and improperly requires a branch of the military to perform tasks; and (3) provision (k) authorizes impermissible mail obstruction and improperly authorizes the receiver to take possession of property owned in whole or in part by third parties.

To obtain relief under section 31.002, a judgment creditor must prove that (1) the debtor owns property, including present or future rights to property; (2) the property is not exempt from attachment, execution, or seizure; and (3) the property cannot be readily attached or levied on by ordinary legal process. *Moyer*, 183 S.W.3d at 52; *see* Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a). To satisfy section 31.002, an order must be specific in both identifying the non-exempt property that is susceptible to turnover relief and in tailoring the turnover relief to that property. *Moyer*, 183 S.W.3d at 54. Identifying broad categories of assets does not constitute a reference to specific assets that is required in a turnover order. *Roebuck v. Horn*, 74 S.W.3d 160, 163 (Tex. App.—Beaumont 2002, no pet.). Because a turnover order is in the nature of a mandatory injunction and is enforceable by contempt, such orders implicate due process concepts. *Moyer*, 183 S.W.3d at 53.

These three provisions do not sufficiently identify non-exempt property that is subject to the order, do not tailor relief to non-exempt property, and assume that assets are non-exempt and not readily subject to ordinary execution. *See* Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b)(3); *see also Moyer*, 183 S.W.3d at 55; *Roebuck*, 74 S.W.3d at 163. They do not sufficiently limit assets to those either owned by Congleton or subject to his possession or control, as required by the turnover statute. *See Moyer*, 183 S.W.3d at 52; *see also generally Parks v. Parker*, 957 S.W.2d 666, 670 (Tex. App.—Austin 1997, no pet.). That the provisions may encompass property whose existence was

supported by evidence is insufficient to cure the lack of specificity in the trial court's order. *See Moyer*, 183 S.W.3d at 55. Moreover, to the extent provision (j) purports to order a branch of the military to perform certain functions, it is improper, as the legislative and executive branches of government are vested with authority over the military. *See AKTEPE v. USA*, 105 F.3d 1400, 1403 (11th Cir. 1997). Additionally, provision (k) encompasses confidential and private information that is not subject to disclosure. *See Maryland Am. Gen. Ins. Co. v. Blackmon*, 639 S.W.2d 455, 458 (Tex. 1982) (Attorney-client communications are not subject to disclosure.). The trial court abused its discretion by incorporating provisions into the turnover order that do not comply with section 31.002's specificity requirement and that reach far beyond the authority necessary to effectuate the purpose of the turnover statute.

Congleton further contends that the following provision gives “[b]lanket immunity” to the receiver:

1. Third party liability. The Receiver, and all persons acting under the direction of the Receiver, are immune from liability for all actions taken by them, to the extent that such actions are permitted by this order.

A receiver acting as an arm of the court and within the scope of his authority is entitled to derived judicial immunity. *Davis v. West*, 317 S.W.3d 301, 307 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Derived judicial immunity applies when the person seeking immunity is intimately associated with the judicial process and exercises discretionary judgment comparable to that of the trial judge. *Id.* Even when a receiver is appointed by

the trial court and acts pursuant to a court order, these facts alone do not conclusively establish the receiver's entitlement to derived judicial immunity for all of his functions as receiver. *Alpert v. Gerstner*, 232 S.W.3d 117, 131 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). This “functional approach” focuses on the nature of the function performed, not the identity of the actor, and considers whether the court officer's conduct is like that of the delegating or appointing judge. *Davis*, 317 S.W.3d at 307; *Alpert*, 232 S.W.3d at 131.

In this case, the immunity provision exempts the receiver from liability for actions taken in accordance with the order, even though the existence of a court order does not confer immunity for all functions as receiver. *See Davis*, 317 S.W.3d at 307; *Alpert*, 232 S.W.3d at 131. Additionally, derived judicial immunity is lost when the court officer acts “in ‘the clear absence of all [his] jurisdiction’” and outside the scope of his authority. *Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex. 1992); *see Davis*, 317 S.W.3d at 307. The trial court, therefore, abused its discretion by failing to limit the receiver's immunity to discretionary actions taken as an arm of the court and within the scope of his authority.

Finally, Congleton contends that the trial court abused its discretion by including the following provision regarding the receiver's fees:

- q. Receiver's fees. Receiver may pay himself fees not less than 25 percent of all proceeds coming into his possession (before deducting out of pocket costs), which the Court finds to be a fair, reasonable, and necessary fee, and distribute all remaining proceeds to [Shoemaker's] attorney in trust for the benefit of [Shoemaker] (not to exceed the total payoff of the judgment), without any further

order. If Receiver must pay a prior lien, Receiver shall receive his fee on the portion recovered for the benefit of the lien holder, as the payment benefits [Shoemaker] and advances collection of the judgment. Receiver's fees in excess of 25 percent of the judgment may be awarded after application and a separate order. If [Congleton] files bankruptcy, the Receiver's fee shall be equal to 25 percent of the debt owed at the time the bankruptcy is filed. The Receiver's fees and costs are taxable court costs.

The receiver's fee should be measured by the value of the services rendered; the results that the receiver accomplishes must be considered in determining a reasonable fee. *Moyer*, 183 S.W.3d at 57. There must be evidence to establish reasonableness of the fee. *Id.* at 58. Before a final accounting and the receiver's discharge, "only a partial advance toward a final fee may be made because the reasonableness of the fee is measured in light of the value of the receiver's work." *Id.* Because the record in this case contains no evidence establishing what percentage or amount constitutes a fair, reasonable, or necessary fee, the trial court abused its discretion by pre-setting the receiver's fee at 25%. *See id.* at 57-58. We grant the relief requested in issues three, four, and five of the appeal, and issues two and three in the mandamus.

In issue six, Congleton contends that the trial court abused its discretion by requiring him to deliver his BMW vehicle to the receiver.² Congleton argues that the BMW constitutes exempt property.

² We note that this issue does not involve any action taken by the receiver, the receiver's authority to take any action, or any discretion on the part of the receiver regarding the BMW. This issue solely addresses the trial court's decision to find the BMW to be non-exempt property. The trial court's finding regarding the BMW precedes any action taken by the receiver pursuant to the powers given in the turnover order.

A trial court may not enter or enforce a turnover order that requires the turnover of exempt property. Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a)(2), (f). Exempt property includes a motor vehicle for each family member or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the nonlicensed person's benefit. Tex. Prop. Code Ann. § 42.002(a)(9) (West 2000). The debtor bears the burden of proving that property is exempt from attachment. *Europa Int'l, Ltd.*, 315 S.W.3d at 656.

At the hearing on her post-judgment application for turnover relief, Shoemaker admitted Congleton's answers to interrogatories into evidence. In his answers, Congleton stated that he is married, has a driver's license, and both a BMW and a Chevrolet Avalanche are titled in his name. Congleton's counsel argued that Congleton is allowed two motor vehicles per a household of two licensed drivers and that the BMW is one of those two vehicles. The trial court found the BMW to be non-exempt property.

The record does not indicate that Congleton presented evidence at the hearing to show that his wife either holds a driver's license or does not hold a driver's license but relies on Congleton to operate the vehicle for her benefit.³ Tex. Prop. Code Ann. § 42.002(a)(9). The record does not demonstrate that Congleton sustained his burden of

³ After the trial court entered its turnover order, Congleton filed a motion to reform the order and attached copies of his driver's license, his wife's driver's license, his affidavit, and his wife's affidavit to the motion. Our review, however, is limited to the record before the trial court at the time of its ruling. *See Stephens Cnty. v. J. N. McCammon, Inc.*, 122 Tex. 148, 52 S.W.2d 53, 55 (1932); *see also French v. Gilbert*, No. 01-07-00186-CV, 2008 Tex. App. LEXIS 8884, at *22 n.15 (Tex. App.—Houston [1st Dist.] Nov. 26, 2008, no pet.) (mem. op.).

proving that the BMW constitutes exempt property. *See Europa*, 315 S.W.3d at 656. Thus, we conclude that the trial court did not abuse its discretion by finding the BMW to be non-exempt property. We overrule issue six.

Having granted the relief requested in part and denied the requested relief in part, we conditionally grant the petition for writ of mandamus in part and remand the case to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED; PETITION
CONDITIONALLY GRANTED IN PART.

STEVE McKEITHEN
Chief Justice

No. 09-11-00453-CV Submitted on December 27, 2011
No. 09-11-00654-CV Submitted on December 6, 2011
Opinion Delivered April 12, 2012

Before McKeithen, C.J., Gaultney and Horton, JJ.