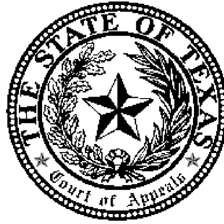
Affirmed and Opinion filed January 31, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00037-CV

GLADYS R. GOFFNEY, Appellant

V.

PRIME BANK and PELICAN CONNECTION MANAGEMENT, L.L.C., Appellees

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On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 95-40177-A

O P I N I O N

Appellant Gladys R. Goffney, an attorney, appeals the trial court's judgment granting a writ of garnishment in favor of Pelican Connection Management, L.L.C. ("Pelican"). We affirm.

BACKGROUND

By writ of garnishment, Pelican sought to satisfy a judgment it acquired against Goffney in an underlying action.[1] The garnishee, Prime Bank, filed an answer to the writ of garnishment in which it identified four accounts Goffney had on deposit: an IOLTA Trust Account and three Certificates of Deposit ("CDs") that were assigned to the Harris County Sheriff. Goffney also filed an answer in which she alleged that the writ was procedurally defective and the funds in the accounts were exempt from garnishment.

On December 2, 1999, the court held a bench trial on the writ of garnishment. At the conclusion of the proceeding, the trial court instructed the parties to submit their closing arguments in writing. The trial court's docket sheet entry for December 8, 1999 records that a judgment for the garnishor was granted, and the court was awaiting proposed findings of fact and conclusions of law, and an order. However, before a final judgment was entered, the Bank discovered a checking account held by Goffney and her husband, Willie Goffney, that it failed to seize when it was served with the original garnishment action. Consequently, on December 29, 1999, Pelican moved for a new trial for the purpose of determining whether the Bank was liable to Pelican for the amount of the funds that the Bank failed to seize. On January 28, 2000, the trial court granted the motion for new trial.

A pre-trial hearing was subsequently set for June 26, 2000, and trial was scheduled to commence July 3, 2001. On the day of the pre-trial hearing, Goffney filed a second amended answer raising additional defenses to the garnishment of the Goffneys' checking account. At the pre-trial hearing, according to Pelican, a settlement agreement was announced between it and the bank under which the bank agreed to a judgment against it in the amount of $11,000 for its failure to seize the checking account. No transcript of the

[1] Pelican is the successor-in-interest to a judgment obtained in an action originally brought by Thomas and Sylvia Rabson.

hearing appears in the record; however, an entry in the trial court's docket sheet for June 26, 2000 reflects "case settled." Goffney admits attending the hearing with her counsel.[2]

On July 7, 2000, the trial court signed a judgment in which it found, among other things, that the funds in Goffney's IOLTA Trust Account were presumed to belong to her clients, and the funds in the three CDs were originally pledged to permit Goffney to post bonds for clients who were in the Harris County Jail, but were not currently pledged. The judgment also reflected that the existence of the Goffneys' checking account was brought to the trial court's attention after the trial, and that Pelican and the Bank agreed that the amount in the account was $11,000. Accordingly, the judgment ordered that Pelican recover a total of $19,500 (plus accrued interest) from the following sources: (1) $8,500 from Goffney's three CDs;[3] and (2) $11,000 from the Bank. The court's judgment did not award Pelican any money from Goffney's IOLTA Trust Account or the checking account.

DISCUSSION

On appeal, Goffney raises the following issues: (1) the judgment is defective and void; (2) the CDs assigned to the Harris County Sheriff were exempt from garnishment as "tools of the trade" under section 42.002 of the Texas Property Code; (3) the CDs and the IOLTA Trust Account were the community property of Goffney and her husband, Willie Goffney, who was neither a judgment debtor nor a party to the original lawsuit, and therefore half of the money in the accounts was not subject to garnishment; (4) the writ of garnishment was filed less than thirty days after the judgment was signed in violation of Texas Rule of Civil Procedure 627; and (5) the funds in the later-discovered account included deposits of Social Security and pension proceeds that were exempt from

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[2] Goffney also asserts that all parties filed "Pre-trial Orders" as instructed by the trial court, but no such orders or pre-trial motions appear in the record.

[3] Pelican was awarded all of the money held in the CDs, except for $1,500 from one of the CDs that was to be used to pay the bank's reasonable attorney's fees.

garnishment under the Texas Property Code, the Employee Retirement Income Security Act of 1974, the Internal Revenue Code, and the Social Security Act.

1. Is the July 7, 2000 judgment void?

Goffney contends that the trial court's July 7, 2000 judgment is defective and void based on the grant of the motion for new trial and the timing of the judgment. Goffney argues that the judgment was entered without notice to her while she was awaiting a trial date, thus depriving her of a fair trial. Further, Goffney argues that the trial court's grant of Pelican's motion for new trial nullified any rulings made in December; therefore, the July 7, 2000 judgment could not have "reinstated" them. Alternatively, Goffney contends that the trial court lost its plenary power 75 days after any ruling made on December 2 or December 8, and therefore the July 7, 2000 judgment was void. Likewise, Goffney argues that the trial court could not "ungrant" the motion for new trial and reinstate any prior rulings after it lost its plenary power.[4]

The gravamen of Goffney's complaint appears to be that the trial court erred by not conducting a new trial on Pelican's claim to her accounts. We find Goffney's complaint, and her characterization of the facts, specious. The record reflects that a bench trial was held December 2, 1999, and after requesting closing arguments in writing from the parties, the trial court recorded a judgment for the garnishor on December 8, 1999. The trial court's entry makes it clear that the court was awaiting final documentation for the judgment. When the bank discovered an additional account that it had failed to seize, Pelican moved for a new trial to "reopen the evidence portion of the above referenced trial to introduce new evidence of additional indebtedness owed by the Bank to Goffney during the time that the garnishment herein was pending." Pelican's motion was directed solely to the Bank's

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[4] Because the trial court made no ruling on December 2, Goffney also concludes that the docket sheet entry for December 8, reflecting a judgment for garnishor, was an erroneous or ex parte entry on the part of the trial judge because no hearing was held on December 8 and no court reporter's record was found for that date. Goffney's premise, that the trial court cannot take a matter under advisement and subsequently render a decision without an additional hearing, defies reason and practice.

liability for failing to seize the additional account. At no time did Goffney request a new trial on Pelican's claims to her accounts. Therefore, any assertion that Goffney anticipated a complete retrial of all of the issues is belied by Pelican's motion and the surrounding events.

Further, Texas Rule of Civil Procedure 320 plainly permits the trial court to grant a new trial on only part of a case: "When it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested." TEX. R. CIV. P. 320. Accordingly, the trial court was authorized to conduct a new trial limited to the issue of the previously undiscovered checking account.

At the pre-trial hearing on June 29, 2000, Pelican and the Bank apparently informed the court that they had settled the dispute over the previously undiscovered account. The settlement is reflected in the docket sheet and in the judgment awarding Pelican $11,000 from the Bank.[5] As a result of the settlement, no trial on the new matter was required, and the trial court did not abuse its discretion in entering judgment several days later. Goffney's characterization of the sequence of events as an "ungranting" of Pelican's motion for new trial and "reinstatement" of the prior findings is plainly incorrect.

Further, any argument that the trial court lacked authority to sign the July 7, 2000 judgment because the court's plenary power had expired is likewise without merit. The Rules of Civil Procedure expressly provide that the trial court's plenary jurisdiction does not begin to run until the date a judgment is signed. *See* TEX. R. CIV. P. 306a(1), 329b(d). The

[5] By her own admission, Goffney attended this hearing, but she makes no mention of the settlement or any other discussions that may have taken place at the hearing. Because Goffney failed to obtain and provide this court with a transcript of the hearing, we have no way to evaluate her complaints regarding the proceeding.

trial court's December 8 docket entry does not constitute a signed judgment for purposes of calculating the period of the trial court's plenary jurisdiction. *See Grant v. American Nat'l Ins. Co.*, 808 S.W.2d 181, 184 (Tex. App.—Houston [14th Dist.] 1991, no writ); *Formby's KOA v. BHP Water Supply Corp.*, 730 S.W.2d 428, 431 (Tex. App.—Dallas 1987, no writ). The docket sheet notation reflects that the court anticipated the preparation of findings of fact and conclusions of law as well as a final written order or judgment. Therefore, the court's plenary jurisdiction could not have expired because there was no signed judgment until July 7, 2000. We overrule Goffney's first issue.

2. Are the CDs exempt from garnishment as "tools of the trade"?

Next, Goffney contends that the funds in the CDs that were assigned to the Sheriff of Harris County were exempt from garnishment as "tools of the trade" under section 42.002(a)(4) of the Texas Property Code. That section provides that "tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession" are personal property exempt from seizure. TEX. PROP. CODE ANN. § 42.002(a)(4) (Vernon 2000). Goffney contends that the CDs are properly considered tools of the trade because they are used solely by her in her business as a criminal defense attorney and are the only device or tool in her practice that permits her to make bonds. Further, she contends that depriving her of the CDs severely restricts her practice and ability to make a living as an attorney.

Goffney directs us to no authority directly addressing whether CDs used by attorneys for the purpose of making bonds may be considered "tools of the trade." However, in determining whether an item may be claimed as an exempt tool of the trade, Texas applies a "use test." *In re Erwin*, 199 B.R. 628, 630 (S.D. Tex. 1996). Under this test, a court considers (1) whether the item is necessary to the debtor's trade, and (2) whether the item is used with sufficient regularity to indicate actual use by the debtor. *See id.* at 630-631. If an item has only a general value in one's trade, it does not fall within the scope of the exemption. *Id.* Additionally, an item that has been disabled or rendered useless cannot

satisfy the use test so as to qualify as an exempt tool of the trade. *In re Hernandez*, 131 B.R. 61, 63 (W.D. Tex. 1991).

At trial, Goffney testified that the CDs were "vital" to her practice of law as a criminal defense attorney. However, she also admitted that she could practice law without posting bonds for her clients, and that only about half of her law practice was devoted to criminal defense matters. The evidence presented at trial indicated that Goffney had posted only four bonds in the preceding five years. Additionally, Deputy Charles Shepard of the Harris County Sheriff's Department, an investigator and custodian of records for the Department's bonding office, testified that an attorney must be in good standing in Harris County to post bonds. Among other things, Deputy Shepard explained, "good standing" means that the attorney has no liens or judgments against her. Consequently, he testified, Goffney could not use the CDs to post bonds so long as the judgment in the underlying case remained unsatisfied.

Given the evidence produced at trial, we hold that the CDs assigned to the Harris County Sheriff were not tools of the trade so as to qualify as exempt personal property under section 42.002(a)(4). At best, the CDs may be said to be of "general value" to her practice of criminal law. Goffney failed to show that the CDs were used with sufficient regularity to indicate actual use, and in fact the evidence showed that she was prohibited from using them to post bonds for her clients because of the judgment entered against her. We overrule Goffney's second issue.

3. Do the CDs contain exempt community property?

In her third issue, Goffney argues that the funds in the CDs and the checking account are her and her husband's community property; therefore, only half of the money in the these accounts should have been subject to garnishment as Goffney's property.[6] As an initial

[6] Goffney also argues, without authority or citation to the record, that the seizure of Willie Goffney's property under the circumstances was without due process of law and in violation of his constitutional rights under the Texas and United States Constitutions.

matter, because no funds were ordered to be seized from the checking account, we will not address that portion of the issue. With regard to the CDs, the only evidence presented was Goffney's testimony that the funds contained in the accounts were community property, and that her husband was not a party to the lawsuit that resulted in the judgment against her.

Although Goffney did not cite to the Texas Family Code, it controls this issue. It provides that "[t]he community property subject to a spouse's sole or joint management, control or disposition is subject to the liabilities incurred by the spouse both before and during the marriage." TEX. FAM. CODE ANN. § 3.202(c) (Vernon 2000). Moreover, community property is generally subject to the joint management, control and disposition of the spouses unless the spouses provide otherwise by power of attorney in writing or other agreement. TEX. FAM. CODE ANN. § 3.102(c) (Vernon 2000). Goffney presented no proof that the CDs were not under her sole or joint management or that she and her husband had provided otherwise by agreement. Additionally, the CDs were in her name and, as she testified, she used them for the sole purpose of posting bonds for her clients; therefore, they were under her control. Deputy Shepard also testified that the Sheriff's Department had no interest in the CDs and would immediately release the funds to Goffney if she requested them. We therefore overrule Goffney's third issue.

4. Did the trial court violate Rule 627?

Goffney next urges that the writ of garnishment was issued in violation of Texas Rule of Civil Procedure 627, which provides:

> If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial or in arrest of judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

TEX. R. CIV. P. 627. Goffney asserts that, under Rule 627, the writ of garnishment could not be issued until thirty days after the judgment. Since it was filed only fifteen days after the judgment was signed, she claims she was deprived of due process. Goffney is misapplying Rule 627. It applies to the time for issuance of a writ of execution upon a judgment, not a writ of garnishment. Goffney cites no authority in support of her contention that Rule 627 is applicable here. Under the Rules of Civil Procedure, executions are governed by Rules 621-656; garnishment is governed by Rules 657-679. Under Rule 658, a plaintiff may file an application for a writ of garnishment at the outset of a lawsuit or at any time during its process. TEX. R. CIV. P. 658. Further, unless a supersedeas bond is filed, a judgment is considered valid and subsisting for the purposes of issuing a post-judgment writ of garnishment on the day the judgment is signed. TEX. R. CIV. P. 657. No supersedeas bond was filed here. We therefore overrule Goffney's fourth issue.

5. Are the funds in the checking account exempt?

Lastly, Goffney urges that the funds in the Goffneys' checking account were exempt on various grounds because the funds included Social Security payments and pension proceeds. Goffney asserts that the trial court's July 7, 2000 judgment allowed the garnishment of all funds in the account, in violation of provisions of the Texas Property Code, the Employee Retirement Income Security Act of 1974, the Internal Revenue Code, and the Social Security Act. However, as we noted above, the judgment did not authorize the garnishment of any funds from that account. Consequently, there is nothing for us to review. We overrule Goffney's fifth issue.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed January 31, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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