Affirmed in Part, Reversed and Remanded in Part, and Opinion filed September 7, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00246-CV

CAROL HARTLEY FORD, Appellant

V.

ROBERT W. FORD, III, Appellee

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 92-30292

O P I N I O N

In this post-divorce proceeding, Carol Hartley Ford ("Carol") appeals the denial of her motion to enforce part of her property division with Robert W. Ford, III, ("Robert") on the grounds that the motion was not barred by limitations. We affirm in part and reverse and remand in part.

Background

The parties' divorce decree (the "decree") was signed on April 15, 1994.[1] Among other things, it awarded Carol "$44,000.00 from the Merrill Lynch IRA Account Number 420-80008 [the "account"], said account to be liquidated by [Robert] and funds disbursed by date of entry of the Decree of Divorce." In addition, Robert was ordered to pay all taxes for the "amounts removed from [the account] which are not rolled over into individual IRA accounts."

On July 7, 1998, Carol filed a motion for enforcement (the "motion") alleging that Robert had failed to comply with the divorce decree by failing to: (a) liquidate and disburse to her, in liquid form, the full amount of $44,000 from the account; and (b) pay the taxes associated with the withdrawal, liquidation, and disbursement of that amount to her. The motion further alleged that, as a result of Robert's actions, Carol incurred approximately $20,000 in taxes and penalties for receipt of funds from the account. Carol requested that the court: (1) order Robert to pay the $20,000 in penalties and taxes, and any part of the $44,000 which he had not disbursed; (2) reduce the unpaid amounts to judgment; (3) hold in contempt, jail, and fine Robert; and (4) award pre-judgment interest, post-judgment interest, attorneys fees, and costs. After a brief hearing, in which Robert argued that the motion was barred by section 9.003 of the Texas Family Code, the court denied the motion.

Timeliness of the Motion

On appeal, Carol argues that the trial court abused its discretion in determining that the motion was barred by Section 9.003 of the Texas Family Code because: (1) the cash award and Robert's obligation to pay any taxes attributable to it are not "tangible personal property"; (2) the taxes to be paid by Robert were not property in existence at the time of the decree; and (3) a contempt proceeding is not subject to section 9.003.

To enforce a division in a divorce decree of specific, existing property, a court may order the property to be delivered. *See* TEX. FAM. CODE ANN. § 9.009 (Vernon 1998). If delivery of such property is no longer an adequate remedy for a failure to comply with the decree, the court may render a money judgment for the damages caused by that failure to comply. *See id*. § 9.010(a). Similarly, if money

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[1] The trial court set aside the April 15 judgment on April 18, but reinstated it on May 16.

awarded in a divorce decree has not been paid, the court may render judgment against the defaulting party for the unpaid amount. *See id*. § 9.010(b).

"A suit to enforce the division of *tangible personal property in existence at the time of the decree of divorce* . . . must be filed before the second anniversary of the date the decree was signed or becomes final after appeal, whichever date is later, or the suit is barred." TEX. FAM. CODE ANN. § 9.003(a) (Vernon 1998) (emphasis added). "A suit to enforce the division of *future property not in existence at the time of the original decree* must be filed before the second anniversary of the date the right to the property matures or accrues or the decree becomes final, whichever date is later, or the suit is barred." *Id*. § 9.003(b) (emphasis added).[2]

"Tangible personal property" is not defined in the Family Code. The Tax Code defines it as: "personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner . . . ." TEX. TAX CODE ANN. § 151.009 (Vernon Supp. 2000). Although "goods" are tangible personal property,[3] money is not a "tangible chattel" or "goods" but is instead a currency of exchange that enables the holder to acquire goods. *See Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980); *see also Great Southern Life Ins. Co. v. City of Austin*, 112 Tex. 1, 11, 243 S.W. 778, 781 (1922) (listing "money"as an example of intangible property); BLACK'S LAW DICTIONARY 809, 1217 (6th ed. 1990) (defining "tangible property" as "all property which is touchable and has real existence (physical) whether real or personal . . . ." and defining "intangible property" as "such property as has no intrinsic and marketable value, but is merely the representative or evidence of value . . . .").

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2 In addition, section 9.003 is applicable only to suits to enforce a *division* of property. *See Jenkins v. Jenkins*, 991 S.W.2d 440, 445-46 (Tex. App.–Fort Worth, pet. denied) (concluding that because a bankruptcy trustee sought only a reduction of an award of a specific amount of alimony, it did not fall within the two year statute of limitations under section 9.003 as it was not a suit to compel a division of property); *Bowden v. Knowlton*, 734 S.W.2d 206, 208 (Tex. App.–Houston [1st Dist.] 1987, no writ) (determining that section 3.70(c) applied only to suits seeking to compel a division of property).

3 *See* TEX. FIN. CODE ANN. § 371.003 (Vernon 1998).

The record in this case reflects that the motion was filed after the second anniversary of the date the decree was signed. *See* TEX. FAM. CODE ANN. § 9.003(a) (Vernon 1998).[4] Although the $44,000 awarded to Carol was to come from a specific source, *i.e.*, the account, it was an award of cash; the decree awarded Carol no interest in the account itself. Because cash is not tangible personal property, but, rather, intangible property, any amount remaining unpaid from the original $44,000 award was not subject to the two year limitations period in section 9.003(a). Similarly, the obligation to pay any tax liabilities resulting from withdrawing funds from the account was a debt[5] and as such, was also not tangible personal property subject to section 9.003. *See Arnold v. Eaton*, 910 S.W.2d 181, 183 (Tex. App.–Eastland 1995, no writ) (concluding that debts are not tangible personal property subject to the limitations period set forth in section 3.70(c), predecessor to section 9.003). Another reason the tax liabilities were not subject to section 9.003(a) was that they were not in existence at the time of the decree. Moreover, because there is no evidence in the record as to the dates the funds were withdrawn or the alleged tax liabilities were assessed, there is no evidence that the motion was filed more than two years after the obligation to pay it matured such that the claim for taxes could be barred by section 9.003(b) (*i.e.*, even assuming that such a debt could be considered future property at all). Therefore, we sustain Carol's contention with regard to her claim for the unpaid amounts.

With regard to Carol's action for contempt, an obligation to pay a tax liability is a debt, the payment of which is not enforceable by contempt.[6] Therefore, the trial court's denial of the motion was

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4 Our record does not reflect whether the decree was ever appealed and thus whether the motion was filed before or after the second anniversary of the date the decree became final after appeal, if any. *See* TEX. FAM. CODE ANN. § 9.003(a). The trial court would have been authorized to take judicial notice of the court's record reflecting whether the case had been appealed. *See* TEX. R. EVID. 201; *Trimble v. Texas Dept. of Protective & Regulatory Serv.*, 981 S.W.2d 211, 215 (Tex. App.–Houston [14th Dist.] 1998, no pet.). However, in the absence of any indication in the record that he did so or was even requested to, we have no basis to infer whether it was ever considered. Because section 9.003 is in the nature of an affirmative defense, it appears that Robert had the burden to prove its elements. However, because Carol has not assigned error to any lack of evidence of this fact, it is not before us for determination.

5 *See Grimes v. Grimes*, 612 S.W.2d 714, 715 (Tex. Civ. App.–Houston [14th Dist.] 1981, no writ) (noting that tax liabilities are personal obligations and thus, debts).

6 *See Grimes*, 612 S.W.2d at 715; *Ex parte Sutherland*, 515 S.W.2d 137, 141 (Tex. Civ. App.–Texarkana 1974, writ dism'd w.o.j.); *see generally* TEX. FAM. CODE ANN. § 9.012 (Vernon 1998).

proper as to the contempt action on the unpaid taxes and penalties,[7] and Carol's point of error challenging that portion of the judgment is overruled.

Regarding the contempt action on the alleged unpaid portion of the $44,000 award, to whatever extent section 9.003 otherwise applies to contempt actions,[8] which we do not decide, we do not believe that section can bar a contempt action to enforce a property division where an action seeking delivery or payment of the underlying property or money is itself not barred by section 9.003. Applied to this case, for example, it would be illogical to conclude that a contempt action to enforce payment of the cash award could be barred even before an action to order payment of that award was required to be filed. Thus, Carol's point of error regarding her contempt action on the alleged unpaid cash award is also sustained. Accordingly, the judgment of the trial court is affirmed as to the contempt action to enforce payment of taxes and penalties and reversed and remanded for further proceedings as to the remainder.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 7, 2000.

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7 *See Custom Leasing, Inc. v. Texas Bank & Trust Co. of Dallas*, 516 S.W.2d 138, 142 (Tex. 1974) (noting that a trial court's judgment must be sustained if it is correct on any theory of law applicable to the case).

8 *Compare Burton v. Burton*, 734 S.W.2d 727, 729 (Tex. App.–Waco 1987, no writ) (concluding that section 3.70(c) does not apply to contempt actions) *with Dechon v. Dechon*, 909 S.W.2d 950, 961 (Tex. App.–El Paso 1995, no writ) (determining that 3.70(c) "makes little sense unless it applies to all methods of enforcement, " including contempt); *and Gonzales v. Gonzales*, 728 S.W.2d 446, 447 n.1 (Tex. App.–San Antonio 1987, no writ) (stating that *Goad* interpreted section 3.70(c) to apply to contempt actions). Notably, in *Goad*, the court determined that section 3.70(c) did not bar a contempt action to enforce payment of retirement benefits because that action was filed prior to the effective date of section 3.70(c). *See Ex parte Goad*, 690 S.W.2d 894, 896-97 (Tex. 1985). We do not believe any inference can be drawn from *Goad* as to whether section 3.70(c) would have applied to the contempt action had it been filed after that effective date.

Panel consists of Justices Anderson, Edelman, and Draughn.[9]

Do not publish — TEX. R. APP. P. 47.3(b).

[9] Senior Justice Joe L. Draughn sitting by assignment.