

**ORAL ARGUMENT – 11/19/03**  
**03-0766**  
**SHESHTAWY**

RAMSEY: We are here on a writ of habeas corpus filed by myself on behalf of \_\_\_\_\_ Sheshtawy. The question before the court today on this writ is simply whether or not a TC has jurisdiction to enforce by contempt an order in a final decree of divorce that is the subject of appeal and that has not been the subject of temporary orders under various provisions of the family code.

It is our position that based on the prior ruling of this court in 1983 in *ex parte Boniface*, that the TC does not have such jurisdiction and therefore the contempt order entered in this case is void and should not be enforced.

Mr. Sheshtawy and his wife, the real party in this case, were involved in a divorce proceeding in Harris County, Texas. A divorce proceeding without children, a final decree after a long and fairly contentious pending suit was finally filed by the court in Sept. 2002, after almost 2 years of litigation. Both parties at that point were pro se and represented themselves pro se. Mr. Sheshtawy has continued to do so up until the time we have filed this writ.

Following the entry of that decree, there was a motion filed to amend the court's orders, which was never ruled on. That was filed after the appeal. An amended motion was subsequently filed. It was never ruled on. Having failed to obtain a ruling from the court on that, Mr. Sheshtawy filed a notice of appeal in Dec. 2002. He filed that appeal based in part on his dispute with orders for spousal maintenance that had been entered by the TC based on a finding of family violence.

Subsequent to that notice of appeal, a motion to enforce was filed by the real party, which ultimately led to Mr. Sheshtawy being found in contempt for failure to pay those spousal maintenance payments. That order was entered by the TC in May of 2003. Prior to that Mr. Sheshtawy had, on his own pro se filed, a writ of mandamus prohibition in the CA basically raising these same issues that the TC lacked jurisdiction. There was a \_\_\_\_\_ opinion entered by the 14<sup>th</sup> CA. After Mr. Sheshtawy was held in contempt, I filed a writ of habeas corpus in the 14<sup>th</sup> CA. In a one page per curium memorandum opinion they referred to that earlier opinion, all of which is in the appendix that have been filed in this court.

Basically our position is simply that the ruling in *Boniface* says that once an appeal is perfected, the power to enforce by contempt shifts from the TC to the AC.

HECHT: As a practical matter isn't the CA going to have to shift it back to a trial judge to hear it? It's going to be very difficult for a 3-judge court to hear evidence and resolve credibility disputes and that sort of thing.

RAMSEY: That is one of the issues raised both in the CA's opinion, Bivins which is cited in the briefs, as well as real party in interest. Yes. As a practical that's what I would call or term there judicial convenience, judicial practicality argument. Yes. If it requires an evidentiary hearing they would have to refer it back to the TC.

HECHT: And if they did that wouldn't they have to be guided necessarily by the trial judge's credibility determinations and that sort of thing once they get the record back from the trial judge on the evidence?

RAMSEY: They would much like a CA has to be guided if you're reviewing the sufficiency of the evidence question. When you have this same issue. It's a court's interpretation based on the testimony, the demeanor of the witnesses, that type of thing that transpires in the TC.

HECHT: So if the trial judge is going to do it all why not just let them do it?

RAMSEY: I would say first of all because the statute doesn't authorize that. And then you can make a similar argument on property issues for example. It's the argument that's practical and certainly family cases are unique and occupy a unique role in our litigation process. But the practicality are there. The proper forum argument lose itself to if you have a property issue. It would be probably more convenient and the TC again would probably be the preferred forum to review that. Accept there's a longstanding history that property issues are those types of issues once placed on appeal shifts to the CA, to the appellate court. I would argue the same thing.

WAINWRIGHT: If the trial judge, however, has entered a damages judgment, which is appealed, and no supersedeas bond is filed, as none was filed in Boniface, in that damages action the trial judge could proceed with rulings and aid of execution on the judgment even though the matter is on appeal. Correct?

RAMSEY: That's correct.

WAINWRIGHT: I don't see a rationale or explanation as to why when no action has been taken to suspend enforcement of the TC's judgment while it's on appeal. What's the rationale for treating the situation Boniface different in opinion from the situation of a trial judge that enters a damages judgment, which is not superseded?

RAMSEY: I think the difference in this case as a practical matter deals with the ability to enforce by contempt and incarcerate in prisons as opposed to allowing them to execute on a judgment. My point in this case is, I believe under the statute the real party has a right, which she has taken a judgment and executed on that judgment. She has a right to attempt to garnish wages, file writs of garnishment, which she has. But I think the difference is on an issue such as this where you have a spousal maintenance issue that is highly contested, in his own appeal I think the Boniface ruling says that in that particular case, the decision to enforce by contempt or possibly imprison somebody should be heard by the CA that's is hearing that appeal issue.

WAINWRIGHT: So it is fair to say that the difference between proceeding and the situation I hypothesized involving damages from this situation is liberty, jails involved?

RAMSEY: Liberty due process arguments. In my opinion that is correct. And I think that's a large distinction, a vital distinction.

HECHT: In a regular civil damage case if there were a turnover order after the case to enforce the judgment while the case was on appeal, and it was to turnover a piece of personal property say to the judgment creditor, and the debtor refused, is it your view that the trial judge would hear that contempt case or would you go to the CA?

RAMSEY: I think Schultz v. 5<sup>th</sup> Judicial District addresses that. And if I understand that rule it says that the CA if - it really turns on whether the turnover order has been appealed. So I would draw that distinction. If the turnover order has not been appealed, then I think the power to enforce remains or is retained by the TC. If the turnover order is itself an issue on appeal, I think under the prior ruling of this court in Schultz v. 5<sup>th</sup> Judicial District, it would have to be heard by the appellate court.

HECHT: In your answer to J. Wainwright you said, that the prospect of loss of liberty was one thing that made it different. But isn't your position really that if you're being held in contempt for violating the very order that you are repealing that has to go to the CA?

RAMSEY: That's correct. Our position is, again contrary to some rulings in the CA and I think a position also urged by real party, is that Boniface is the rule not the exception. There is some language that says Boniface should be considered an exception in this field, and we would disagree with that. We believe that the exceptions, if any, have arisen solely in regard to child support cases or really cases involving children under Title V of the Family Code.

The reason I would say if exceptions should be applied to those cases, and when I say an exception, exception allowing the TC to enforce by contempt those types of orders, I would refer again it has been raised in the briefs to the specific statutory language in Title V, 109.002 which says even orders that have been appealed, final orders that have been appealed, the TC retains jurisdiction. In 157 it vests that jurisdiction in the TC. Also under Title 1, 6.709 and also Title V 109.001, they address a situation where after an appeal has been filed, the party that has not appealed has 30 days within which to seek temporary orders. That creates another statutory exception to that, and in those situations the language says TC does retain jurisdiction to hear those matters even if they are on appeal. That does not apply in this case. The real party in this case did not avail herself of that opportunity, and that is not an issue.

So we come back to the language in Boniface and the language that is also cited by this court in Ghandi, which was a writ case filed by opposing counsel. Where they repeat that on final judgments, not judgements that are subject to temporary orders after appeal, but on final judgments the power to enforce by contempt shifts to the appellate court and is no longer retained

by the TC. That is the essence in this case.

OWEN: Why would she need temporary orders for spousal support pending appeal if it was already included in the judgment? It was an ongoing obligation.

RAMSEY: Our position is, that this is distinct. This is a spousal maintenance order that was ordered by the court. Granted. It was not an order in the decree that says temporary support is to be paid pending appeal. That would create another issue that has been addressed in other instances, but not this. I believe that the reason that provision is there, in this case 6.709, is to cover just this type of situation where there is an appeal of a final decree, an order and a final decree that has been appealed. And it gives the TC judge then the option to decide whether to impose additional orders at that time that could not be or would be enforceable by the TC and not transferred to the appellate court.

OWEN: Are you saying that pending appeal the underlying divorce decrees award of spousal support is superseded automatically?

RAMSEY: If it's not appealed obviously it's not superseded. If it is appealed my argument would be the ability to collect a judgment unless there's a supersedeas bond filed is not superseded. But the ability to enforce by contempt, and imprison somebody for the failure to follow an order which it is of itself the subject of appeal, I would say yes. That supersedes the TC's...

OWEN: Where is the statute that supersedes the spousal support pending appeal? Where is that? Is there anything that says superseded?

RAMSEY: I am not aware of a specific statute that says that this spousal support order if it is a subject of appeal would be superseded. That is the language of Boniface and a number of others that says final orders, once they are subject of appeal the authority to enforce by contempt is transferred and the authority to deal with those cases in many ways is transferred to the appellate court.

I guess my argument would be there is no language in the family code that if the order has been appealed and is the subject of appeal, the TC automatically retains or retains the jurisdiction to enforce by contempt.

OWEN: There is a specific statute of course on enforcement of maintenance order. It doesn't really speak to whether it's on appeal or not.

RAMSEY: That's correct. And that would fall under the general authority of a TC to enforce a final order that is not the subject...

OWEN: It doesn't say final. I'm just having trouble piecing all the statutes together.

RAMSEY: I understand that, and I do too. My argument would be that then that allows the trial court judge on property issues and every issue to modify, to change and to enforce by contempt things that have been filed or are subject of the appeal. And I don't think that this is the state law. It's the case law based on Boniface and others says otherwise.

HECHT: Does relator remain incarcerated?

RAMSEY: The relator has been released by order of this court. He was incarcerated from May 29 until Oct. 14 when this court allowed bond.

HECHT: But the underlying obligation has not been discharged?

RAMSEY: That's correct. He remains subject to a civil contempt. Until he pays these arrears, he will have to remain incarcerated.

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REAL PARTY

CASEY: First off, I want to point out that he keeps talking about part of the appeal is the appeal of the support order itself. His appeal was filed back on Dec. 10, 2002. To date I have yet to see a brief or anything indicating what the points are on this particular appeal. In his notice of appeal, which he's got under Tab 4, there is nothing in there that indicates specifically that he is appealing. This is a spousal support award. In his document sheet to the CA, which he filed approximately 1 month or so after the filing of the notice of appeal, no where in there does it indicate. It sits there and talks about property division. And there's a space there says for other. But again, the only word that we have that he's actually going to appeal the spousal support order is what he's presented to this court in this original proceeding.

That's not to say that I doubt that he's going to do it. But the fact of the matter is, is if we wait until there's that one case that I indicated in my brief where it says well the test is whether or not it's actually the subject of appeal. I mean at this point in time, I have no verification that this is actually even the subject of the pending appeal.

HECHT: So do you think the Schultz rule is unworkable because it turns on that distinction?

CASEY: Yes. I think it's unworkable as it relates, and which is again why I think that the definition or the delineation if you will should be jurisdiction lies in terms of support orders, and one is the category verses property division orders and in another category.

I don't think it's a matter of whether it's in Title 1 or Title where it's located in the code book. But I think it's a matter of what is the actual affect and what is the purpose of the order that's being enforced? That O'Caroline v. Hopper(?) clearly shows that they have defined that

spousal support is not a property division. It's about taking money from future interest as opposed to dividing up what was divided during the decree.

Counsel continues to chastize us for the fact that we did not ask for temporary orders pending appeal. Quite frankly, that never crossed my mind because to me that would be double dipping. What would be the purpose of when we've got an order that says we're getting \$600/month commencing immediately, they file an appeal, and within 30 days I say oh by the way give me some more money. What would the facts that would be different at that point in time that would be different than this? And the idea that we are supposed to in order to somehow avoid some serious jurisdictional hoopla, to sit there and have two orders for \_\_\_\_ amounts of money.

HECHT: There's a real possibility for TC proceedings to disrupt the appeal. Why shouldn't you have to go to the CA first even if the trial judge is going to hear the contempt proceeding?

CASEY: Again because it's in terms of support and the fact of the matter is it's just a \_\_\_\_ in which the CA in terms of what they are used to and what they are doing. I have filed and pointed out to this court in this very case, the property division part, which I have filed a contempt and then nonsuited, in terms of transferring an execution of a document that was \_\_\_\_ decree. And I filed that back on May 26 to the CA in San Antonio, and they have done nothing. And they say well we're just going to take it up with the regular appeal. And I mean my hands are tied at this point in time.

HECHT: Maybe the court wants them to be tied.

CASEY: I understand that. Is that correct that they get the right to decide when there's no supersedeas filed? That they get to decide whether or not support which the TC is the one that's going to be the judge of the character and the veracity and so on and so forth, that they make that decision without giving us a time and place for hearing?

HECHT: If you had just proceeded in the TC, and the CA thought that that was disruptive or impairing the subject of the appeal, do you think the CA could stay the proceedings?

CASEY: I think the CA can always stay a TC. We keep talking about statutory authority. In the statutory authority, he's saying we don't have any express statutory authority to do what we do. But the fact of the matter is in the situation of child support, my understanding is there's no express statutory authority either unless you're talking about this post-divorce temporary order. The old cases, those were done by common knowledge. They say basically from a practical standpoint, the TC should be allowed to enforce this portion of the order without having to go to the CA first. And so what I convinced J. \_\_\_\_ at the time was that because this is a support order and it falls under that same category, that the court should go forward and does have jurisdiction.

And again this is not something where there's express statutory authority on.

But this is just the way that in terms of common law that the courts have treated these support awards. And again the reasons are very clear and make a whole lot of common sense by the very fact that in order to go the extra steps when we're sitting here talking about support for people that obviously the TC believe are deserving of support. Counsel indicates that well since she's not a child and is not under \_\_\_\_\_, that spouse is not deserving of the same treatment of getting necessary support the children are. I just don't think that's a good public policy or a stance that can be taken particularly in a case such as this one where the court made a finding of domestic violence, and there was actually a conviction, attempted appeal on this sort of stuff and the amount of support that we're talking about is a relatively modest amount.

OWEN: Is there a mechanism to supersede spousal support pending appeal?

CASEY: Not that I'm aware of. Because I think if it walks like a duck, talks like a duck, it's the same as the child support provision.

PHILLIPS: If we're dealing in an area with no express authority, what are we to make of the statutory difference between child support and spousal maintenance? Nothing? They just added that in for child support for belt and suspenders purposes.

CASEY: I don't think there is any, because I don't think there is an statutory authority for child support either, except on pending appeal when you've got those temporary orders. He keeps point out that. But if you go back to the Bivins case, there was no statutory authority back then. If you go back to the other cases that said child support can be enforced at the TC level, again we're talking about child support, not pending appeal, not temporary orders. But we're talking about child support in the final decree of divorce. And that final decree of divorce is now on appeal.

OWEN: Well there is a statute. I thought 109.002 deals with child support on appeal. It says expressly that it's not suspending...

CASEY: My understanding is that's conferring if you're talking about enforcing of temporary orders on appeal.

OWEN: No. It says on appeal from a final order. Then it goes on to say on appeal from a final order with or without a supersedeas bond, that does not suspend the order unless the CA suspends it.

CASEY: When the time that Bivins was done and the times of the other cases, that statute was not there.

OWEN: But now we have a statute that specifically addresses child support.

PHILLIPS: And it doesn't address spousal maintenance, so aren't we to draw the inference the legislature sees those as being subject to different treatment?

CASEY: I think it was just codifying the Bivins case. My feeling is is that if this court had the power to do it in terms of a Bivins with the others, then it also has the power to do it now. And I don't think it's counter \_\_\_\_ of legislative intent or express desires of the legislature on that issue.

Again when you look at it from a practical side, where J. Hecht pointed out in terms of the hearings and what's involved and the goal of sitting there trying to get a spouse back on her feet, obviously it's been totally defeated in this case by the fact that he's refused to pay a dime.

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#### REBUTTAL

RAMSEY: First of all, I would say that in regards to Mr. Casey's argument that the spousal maintenance issue has not been raised or will not be raised by Mr. Sheshtawy on appeal, I would first of all point out that in what has been listed in Tab 3, which was filed back in November, was a motion to correct. On page 7 of that motion to correct, entry 22 it clearly says incorrect amount and duration of spousal alimony. Now he filed that contesting and arguing the spousal alimony. He filed an amended version of that at the end of Nov. 2002, which was attached to the docketing statement filed with the CA. That docketing statement would be Tab 16, under the supplemental tabs. Under XX of the docketing statements in regard to issues on appeal, he clearly references the amended order to correct. And on page 7 of the amended order to correct, it indicates incorrect amount and duration of spousal alimony.

Now he has not, he is representing himself pro se in regard to this appeal on the merits, filed a brief. He has requested, not five extensions as indicated by counsel in their brief, but two. Both extensions to file a brief filed while he was incarcerated in Harris county jail.

OWEN: Let's suppose we were to agree with you and say you've got to go to the CA. And let's say that tomorrow Mr. Casey goes to the CA and asks for a contempt order. Are you then going to argue that his only remedy was to have asked for temporary orders within the 30 day period, or do you concede that the CA has the authority to enforce the divorce decree by a contempt pending appeal?

RAMSEY: That is a separate issue and I certainly would not make the argument that he has lost his right to enforce something by contempt by not filing asking for temporary orders within that 30 day window. No. I wouldn't argue that.

OWEN: I'm just asking as a practical matter...

RAMSEY: I have doubts whether or not a CA or any court can enforce by a contempt an issue from a final judgment that is pending in their court or is a pending issue on appeal.



OWEN: That gets me to my question. What supersedes the spousal maintenance pending appeal? Do the general rules of supersedeas apply? What supersedes that monetary obligation in a final judgment?

RAMSEY: And I will supersede from the standpoint of enforcing it by a contempt.

OWEN: Let's just suppose this is an ordinary civil judgment. You pay me \$30 a month for X number of months. Normally that's not superseded on appeal unless you follow the supersedeas bond. What applies in these kind of spousal maintenance cases to supersede the obligation to pay money pending appeal?

RAMSEY: I'm not sure that there is any statute - I'm not aware of any statute that says that you can supersede it unless you file a supersedeas bond.

OWEN: And that was not done in this case?

RAMSEY: That was not done in this case. But I would again draw a distinction between that and enforcing at the TC level something by contempt, which is pending.

OWEN: Go back to my other question then. Assuming it's not superseded. It's an outstanding obligation. Can the CA enforce that order pending appeal?

RAMSEY: I would say that under the existing law, I would probably believe that they could, although I would reserve doubts on that whether they can enforce by contempt as opposed to...

OWEN: How else can they enforce it?

RAMSEY: I think that the CA probably only enforce by contempt, but I would also point out that this real party has a right to take a judgment, has the right to try to obtain writs of garnishment and other things to enforce the judgment. The judgment is not enforceable merely by a contempt action. It's enforceable in other ways at the TC level because a supersedeas bond has not been...

OWEN: Well we've got a statute that says it's enforceable by a contempt. The final judgment. So why isn't this a final judgment if it hasn't been superseded?

RAMSEY: I think that it's not a final judgment because the issue is pending on appeal.

OWEN: What's different about spousal maintenance that it's superseded on appeal where other civil judgments aren't?

RAMSEY: I think the argument we have is not whether it's superseded on appeal, or whether the appellate court has jurisdiction, but the question is based on Boniface and other rulings

from this court, it says that the ability to enforce it shifts to the appellate court, not to the TC. There is not a statute - I'm not aware of a statutory provision in the family code that addresses that and says that once the spousal maintenance is appealed it is superseded.

OWEN:                   There is specific statutes that says you can enforce it by a contempt. My only question is, this would be a final judgment I think by supersedeas. Normally you would have to supersede a civil judgment, or you can move forward to collect it. And what makes this different?

RAMSEY:               First of all, the order from this court in Boniface makes it different because it says otherwise. It says that the ability to enforce by a contempt rests with the appellate court, not with the TC, which is the issue in front of this court today.

                              The predecessor statutes were similar and I would disagree with counsel on that. They have been modified. They have been changed. Family Code 109.002 is a very specific thing that addresses this. It says not in regard to temporary orders, but in regard to appeal of child related orders in general, it is not going to be superseded no matter what has happened. So I think the orders even before were present.