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JEFFREY B., APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, V. AMY L., APPELLANT AND CROSS-APPELLEE, AND TODD W., INTERVENOR-APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE.

814 N.W.2d 737

Filed June 1, 2012. No. S-11-561.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.
2. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Interventions.** Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule.
5. **Interventions: Appeal and Error.** An order permitting equitable intervention is reviewed for an abuse of discretion.
6. **Judgments: Interventions: Trial: Time.** A right to intervene should be asserted within a reasonable time. The applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit.
7. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Reversed and remanded with directions.

Anthony W. Liakos, of Govier & Milone, L.L.P., for appellant.

Phillip G. Wright for intervenor-appellee Todd W.

C.G. (Dooley) Jolly and Tyler J. Volkmer, of Jolly Law, P.C., L.L.O., for appellee Jeffrey B.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF CASE

Amy L. is the biological mother of Fianna L. In 2001, the Sarpy County District Court entered a paternity decree finding

Jeffrey B. to be Fianna's father. Several years later, Amy began to suspect that Todd W. was Fianna's father.

In 2009, Amy filed an application to modify the paternity decree. Todd sought to intervene in the action, claiming that he was Fianna's father. The trial court allowed Todd to intervene, and it later set aside the paternity decree. Later still, the court entered an order finding that Todd was Fianna's father and awarding custody of Fianna to Todd. Genetic tests confirmed that Todd was the biological father. Because it was error for the trial court to permit Todd to intervene, we reverse the judgment and remand the cause with directions.

FACTS

Todd was in Omaha, Nebraska, between January and July 1999, working for a company that did wireless construction. Between March and June 1999, Todd and Amy were involved in a sexual relationship. Though Todd testified that he used contraception during his sexual encounters with Amy, he also admitted to being intoxicated during at least one of these encounters, which made it possible that he did not always take such measures. Around that same time, Amy was also in a sexual relationship with Jeffrey. When Todd left Omaha in July 1999, he did not know that Amy was pregnant. He ultimately returned to St. Louis, Missouri.

Amy learned she was pregnant in June 1999. Shortly thereafter, she went to St. Louis to find Todd and "see if there was anything more between [them]." She did not meet with Todd because he was out of town; however, she did locate two of his coworkers, but she did not ask them for Todd's telephone number or tell them she was pregnant.

Later, Todd learned that Amy had met with his coworkers. Todd testified one of them told him that he thought Amy might be pregnant, but that he also thought she was seeing someone other than Todd. Though Todd knew that Amy could be pregnant and did not know that she had another boyfriend during their sexual relationship, Todd testified that he never considered the possibility that he could be the father of Amy's baby.

When Fianna was born in December 1999, both Amy and Jeffrey thought Jeffrey was her biological father. After Fianna was born, Jeffrey lived with Amy and Fianna, and attempted to form a family, an attempt that lasted 6 to 8 months. Jeffrey and Amy were never married.

By 2001, Jeffrey had filed a petition to establish paternity. On October 26, 2001, the Sarpy County District Court entered a paternity decree making a legal finding that Jeffrey was Fianna's father. Under the decree, Amy had custody of Fianna, Jeffrey had visitation rights, and Jeffrey paid child support. At this point, Amy still believed Jeffrey was Fianna's biological father. In July 2002, the paternity decree was modified to adjust Jeffrey's child support payments.

In 2005, Fianna was removed from Amy's home and placed in the temporary custody of the Department of Health and Human Services. The paternity decree was modified again in 2006, and custody was transferred from Amy to Jeffrey, subject to Amy's visitation. When Amy signed the stipulation transferring custody, she still thought Jeffrey was Fianna's biological father. Fianna lived with Jeffrey for approximately 7 years prior to trial.

Amy first realized that Todd could be Fianna's biological father when Fianna was about 6 years old. Fianna had certain physical traits resembling Todd. Amy sought modification of the paternity decree on August 10, 2009, but did not raise her concerns about paternity with the court. At that time, Fianna was in Jeffrey's custody.

After Todd left Omaha in July 1999, he had no contact with Amy for approximately 10 years. On October 12, 2009, Amy sent Todd an e-mail telling him that he could be Fianna's biological father. Amy testified that in an e-mail response to her, Todd mentioned hearing from his coworker that Amy was pregnant but that "he didn't think anything more of it."

When Todd saw a picture of Fianna, he thought she resembled him, and he agreed to a genetic test. The test was performed on DNA samples from Fianna, Amy, and Todd and showed a 99.997-percent probability that Todd could not be excluded as Fianna's biological father. A later genetic test

excluded Jeffrey as Fianna's biological father. Todd first met Fianna in May 2010.

On May 17, 2010, Todd moved to intervene in the pending proceedings to modify the paternity decree, alleging that he was Fianna's biological father. Todd's initial motion to intervene was denied because he had failed to challenge the existing paternity decree, which the trial court determined was res judicata as long as it stood. Within a month of that decision, Todd filed another motion. This motion asked the court to allow him to intervene and to set aside the paternity decree. On August 10, the court entered an order allowing Todd to intervene. He filed a complaint on August 16 asking the court to set aside the paternity decree.

On May 9, 2011, the trial court set aside the paternity decree. It relied on Neb. Rev. Stat. § 25-2001(2) and (4) (Reissue 2008). The court found that Todd had met his burden of showing that he did not have sufficient information or knowledge to participate in the paternity action which resulted in the October 26, 2001, decree. The court determined that the 2-year statute of limitations in Neb. Rev. Stat. § 25-2008 (Reissue 2008) ran from the time Todd discovered he might be Fianna's father and that from this point forward, Todd had 2 years to attempt to set aside a decree under § 25-2001(4). It found that Todd did not know of Amy's pregnancy, despite her visit to St. Louis in 1999. Therefore, the court concluded that Todd met the statute of limitations by instituting legal proceedings within 2 years after he knew of the situation.

At the trial of Todd's petition to set aside the paternity decree, the court found that Todd had shown irregularity in obtaining the decree because a necessary party was not included in the proceedings, newly discovered material evidence that could not have been discovered before the 2001 paternity decree was entered, and unavoidable casualty or misfortune kept Todd from participating in the 2001 paternity action. It determined that Todd had met the requirements of § 25-2001(4)(a), (4)(c), and (4)(f) and that the October 26, 2001, paternity decree and subsequent modifications should be set aside.

The trial court also found that Todd had made the necessary showing for the court to exercise its equity power pursuant to § 25-2001(2). The court concluded that Amy had not told Todd's coworkers she was pregnant, Amy and Todd took measures to prevent pregnancy, and absent speculation from a coworker, Todd had no information to support a belief that he was the father of a child with Amy. As a result, the court concluded that Todd had met his burden to show that the paternity decree and its later modifications should be set aside pursuant to § 25-2001(2).

Given the evidence, including the statistical probability of Todd's paternity, the trial court found that Todd was Fianna's biological father and was a fit parent. Though the court was concerned about Amy's parenting ability, it did not find her to be an unfit parent. It concluded that Jeffrey could not be awarded custody because the rights of Amy and Todd were greater than any rights Jeffrey had under the doctrine of in loco parentis. The court found it would be in Fianna's best interests for Todd to have custody. It granted Jeffrey and Amy visitation and set out a visitation schedule. The court later stayed the change of custody until after the appeal was decided but denied other postjudgment relief requested by the parties.

ASSIGNMENTS OF ERROR

Amy assigns that the trial court erred in (1) granting Todd's amended motion to intervene, (2) determining § 25-2001 governed the complaint the court allowed Todd to file, (3) setting aside the paternity decree and the modifications made to the decree in 2002 and 2006, (4) determining Todd's complaint was timely filed under § 25-2008, (5) awarding custody to Todd, (6) failing to sufficiently consider Fianna's trial testimony, and (7) changing Fianna's surname.

On cross-appeal, Jeffrey assigns that the trial court erred in (1) disestablishing Jeffrey's paternity, (2) granting Todd's amended motion to intervene, (3) failing to appoint a guardian ad litem for Fianna, (4) awarding custody to Todd, (5) failing to give appropriate consideration to Fianna's best interests, (6) failing to sustain Jeffrey's motion for new trial, and (7) failing to grant any of Jeffrey's requested postjudgment relief.

Todd also cross-appeals, claiming that the trial court erred in awarding Jeffrey visitation and arguing that if Jeffrey is to have visitation, he should pay child support.

STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.[1]

[2,3] Whether a party has the right to intervene in a proceeding is a question of law.[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[3]

ANALYSIS

In a paternity decree entered on October 26, 2001, the Sarpy County District Court legally determined that Jeffrey was Fianna's father. Both Amy and Jeffrey claim that the trial court erred in allowing Todd to intervene and in setting aside the paternity decree. Whether a party has the right to intervene in a proceeding is a question of law.[4]

We first examine whether Todd had a right to intervene. Under Neb. Rev. Stat. § 25-328 (Reissue 2008),

> Any person who has or claims an interest in the matter in litigation . . . in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action . . . by joining the plaintiff . . . by uniting with the defendants . . . or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and *before the trial commences*.

(Emphasis supplied.) The plain language of § 25-328 makes clear that intervention as a matter of right is allowed only

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[1] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

[2] *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006).

[3] *Id.*

[4] *Id.*

before trial begins. Intervention after judgment cannot be obtained as a matter of right under § 25-328.[5] Todd did not attempt to intervene until 2010, nearly a decade after the paternity decree was entered. He could not intervene as a matter of right.

[4] Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule.[6] In such a case, the burden of persuasion is a heavy one. One court wrote that "absent extraordinary and unusual circumstances, intervention, by a party who did not participate in the litigation giving rise to the judgment sought to be vacated, should not be permitted."[7] The Washington Supreme Court has stated that "[w]here a person seeks to intervene after judgment, the court should allow intervention only upon a strong showing after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay."[8]

We conclude that the trial court erred in allowing Todd to intervene; in setting aside the October 26, 2001, paternity decree; and in relying upon § 25-2001(2), (4)(a), (4)(c), and (4)(f), which state:

> (2) The power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy is not limited by this section.

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[5] See, *Meister v. Meister*, 274 Neb. 705, 742 N.W.2d 746 (2007); *Lincoln Bonding & Ins. Co. v. Barrett*, 179 Neb. 367, 138 N.W.2d 462 (1965); *Department of Banking v. Stenger*, 132 Neb. 576, 272 N.W. 403 (1937); *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co.*, 126 Neb. 744, 254 N.W. 507 (1934); *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993).

[6] *Meister, supra* note 5; *Lincoln Bonding & Ins. Co., supra* note 5; *Kitchen Bros. Hotel Co., supra* note 5; *Engdahl v. Laverty*, 110 Neb. 672, 194 N.W. 862 (1923).

[7] *Bank of Quitman v. Phillips*, 270 Ark. 53, 56, 603 S.W.2d 450, 452 (Ark. App. 1980), citing 7A Charles Alan Wright et al., Federal Practice and Procedure: Civil § 1916 (1972).

[8] *Kreidler v. Eikenberry*, 111 Wash. 2d 828, 832-33, 766 P.2d 438, 441 (1989).

> . . . .
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> (4) A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made (a) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order . . . (c) for newly discovered material evidence which could neither have been discovered with reasonable diligence before trial nor have been discovered with reasonable diligence in time to move for a new trial . . . (f) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending . . . .

Todd cannot invoke § 25-2001(4) because § 25-328 does not permit intervention after the paternity decree was entered in 2001. Todd has not shown that the 2001 paternity decree was obtained by mistake, neglect, or irregularity. Amy's pregnancy could have been discovered by reasonable diligence before trial or in time to move for a new trial, but Todd did not exercise reasonable diligence to discover that Amy was pregnant with his child. Todd has not shown there was unavoidable casualty or misfortune that prevented him from intervening before the 2001 decree. Thus, it was error to allow Todd to intervene and for the trial court to rely upon § 25-2001(4) as a basis for Todd to intervene and set aside the 2001 decree.

[5] We next examine whether, consistent with § 25-2001(2), the trial court could apply equity jurisdiction and allow Todd to intervene and set aside the 2001 paternity decree. An order permitting equitable intervention is reviewed for an abuse of discretion.[9]

[6] A key factor in the analysis is the length of delay, which in this case is the time between entry of the paternity decree and Todd's attempt to intervene. "A right to intervene should be asserted within a reasonable time. The applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit."[10]

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[9] *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

[10] *Lincoln Bonding & Ins. Co., supra* note 5, 179 Neb. at 371, 138 N.W.2d at 465. See *Merz, supra* note 2.

Several cases demonstrate this principle. In *Engdahl v. Laverty*,[11] we held that a trial court did not err in permitting a landowner to intervene in a mortgage foreclosure action 17 days after the decree of foreclosure had been entered, but before its execution. In *Meister v. Meister*,[12] we held under principles of equity that an attorney should have been permitted to intervene 8 days after his attorney's lien was found to be unenforceable, because he was given notice only 5 business days before the hearing on the validity of the lien. But in *Lincoln Bonding & Ins. Co. v. Barrett*,[13] we held that a party was properly denied leave to intervene several months after a decree dissolving a corporation and ordering its liquidation had been entered. We noted the party was aware of the action prior to trial, but did not seek leave to intervene until after the judgment had been entered, a receiver had been appointed, and the corporation had been partially liquidated.

We have held that laches, or unreasonable delay, is a proper reason to deny intervention even prior to trial or judgment. In *Merz v. Seeba*,[14] an action by a shareholder for an accounting and divestment of stock had been dismissed for lack of prosecution, but no formal order of dismissal was entered. Nearly 10 years later, after the original plaintiff had died, another shareholder sought but was denied leave to intervene. We noted that laches depends on the circumstances of the case and does not result from the mere passage of time, but results when, "during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another."[15] We reasoned that such circumstances existed because the original defendant could have justifiably believed that the action had been finally concluded and the statute of limitations for the filing of a new action had run.

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[11] *Engdahl, supra* note 6.

[12] *Meister, supra* note 5.

[13] *Lincoln Bonding & Ins. Co., supra* note 5.

[14] *Merz, supra* note 2.

[15] *Id.* at 121, 710 N.W.2d at 95.

To be entitled to vacate a judgment after term by an action in equity, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under § 25-2001.[16] Todd has not shown that he was without fault or was prevented from proceeding in a timely manner. His actions show that he is not entitled to equitable relief. Todd did not exercise reasonable diligence to determine if he was Fianna's father. Todd was told in 1999 that Amy could be pregnant. At that point, he could have taken steps to confirm the pregnancy and establish or rule out his own paternity, but he did not do so until after being contacted by Amy in 2009. Instead, "he didn't think anything more of it" or consider whether he could be the father if Amy was pregnant. He took no action for 10 years despite knowing that he had sexual relations with Amy in 1999. He admitted he was intoxicated during at least one of those sexual encounters, so it was possible he had not always used contraception.

While Todd slept on his rights, Jeffrey fulfilled the obligations of a father in justifiable reliance on the 2001 paternity decree. Jeffrey was judicially determined to be Fianna's father, and he developed a parental relationship with her. He exercised his visitation rights when Fianna was in Amy's custody, paid child support, and later took custody of Fianna after she was removed from Amy's care. Todd's failure to exercise any attempt to discover whether he was the biological father of Fianna prevents him from obtaining equitable relief.

Another reason that Todd cannot intervene as a matter of equity is that "equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common law or statute."[17] This maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law.[18] Also, equitable remedies are

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[16] See, *State ex rel. Birdine v. Fuller*, 216 Neb. 86, 341 N.W.2d 613 (1983); *Lindstrom v. Nilsson*, 133 Neb. 184, 274 N.W. 485 (1937).

[17] *Guy Dean's Lake Shore Marina v. Ramey*, 246 Neb. 258, 264, 518 N.W.2d 129, 133 (1994).

[18] *Id.*; *In re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952).

generally not available where there exists an adequate remedy at law.[19]

Todd sought to set aside the paternity decree on the basis of his own unadjudicated claim that he was Fianna's biological father. Nebraska law provides specific statutory remedies to be utilized in establishing paternity and setting aside a paternity decree. Neb. Rev. Stat. § 43-1411(1) (Reissue 2008) authorizes the mother or "alleged father" of a child to bring a civil action to determine paternity "either during pregnancy or within four years after the child's birth," except in circumstances not applicable here. Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) provides a remedy whereby "an individual" may ask a court to set aside a legal determination of paternity based upon the results of a scientifically reliable genetic test performed in accordance with certain statutes. Even where such testing demonstrates that a presumed or adjudicated father is not the biological father, a court has discretion in determining whether to grant disestablishment of paternity, based upon its consideration of the interests of the child and the adjudicated father.[20] Section 43-1412.01 specifically provides that a "court shall not grant relief from determination of paternity" under certain circumstances, including where "the individual named as father . . . completed a notarized acknowledgment of paternity pursuant to section 43-1408.01."

In his amended motion to intervene, Todd asserted that the paternity decree should be set aside pursuant to § 43-1412.01. But in response to a specific question from the court during the hearing on this motion, Todd's counsel argued that § 25-2001(2) and (4) provided the statutory authority for setting aside the decree. The district court's subsequent order granted Todd leave to intervene and to "file a Complaint . . . requesting that the Decree of Paternity be set aside pursuant to Neb.Rev.Stat. § 25-2001(4)." In his complaint, Todd alleged that it had been determined by genetic testing that he "is the

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[19] *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999); *Vaccaro v. City of Omaha*, 254 Neb. 800, 579 N.W.2d 535 (1998).

[20] See *Alisha C. v. Jeremy C., ante* p. 340, 808 N.W.2d 875 (2012).

true biological father" and that the paternity decree should be set aside pursuant to § 25-2001(2) and (4).

[7] To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.[21] Under this well-established rule, the question of whether the paternity decree should be set aside must be determined under § 43-1412.01, applicable to setting aside a judgment of paternity, and not under the provisions of § 25-2001, applicable to vacating judgments in general. And to have standing in the form of a legal or equitable right, title, or interest in the subject matter of the controversy,[22] it was necessary for Todd to establish his own paternity under the procedure set forth in § 43-1411. By permitting Todd to intervene for the purpose of setting aside the 2001 decree pursuant to § 25-2001, the district court effectively negated the specific procedures and limitations which the Legislature imposed in §§ 43-1411 and 43-1412.01. A court's equitable power does not include the power to circumvent statutory requirements and procedures.

Fianna has resided with Jeffrey since 2004, and we can find no reason that would allow Todd to intervene and substitute himself as Fianna's father. An applicant must be diligent and not guilty of unreasonable delay in bringing such claim.[23] Todd made no attempt to assert his claim of paternity for 10 years. Therefore, the trial court abused its discretion in applying its equity jurisdiction to set aside the October 26, 2001, paternity decree.

Because the trial court erred in allowing Todd to intervene and in setting aside the 2001 paternity decree, it also erred in finding that Todd was Fianna's father. Under these circumstances, a genetic test establishing that Todd was Fianna's biological father does not compel a legal determination that Todd should be allowed to intervene or that the 2001 paternity

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[21] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009); *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819.

[22] See *Ferer v. Aaron Ferer & Sons*, 278 Neb. 282, 770 N.W.2d 608 (2009).

[23] See *Lincoln Bonding & Ins. Co., supra* note 5.

decree should be set aside. Todd, who did nothing to investigate whether Amy was pregnant with his child, cannot now seek equitable relief to intervene and set aside the paternity decree in this action, especially when doing so negates the effect of statutes duly enacted by the Legislature.

CONCLUSION

Todd attempted to intervene in the pending action to modify the 2001 paternity decree. The trial court erred in relying upon § 25-2001 in order to permit Todd to intervene and set aside the 2001 decree of paternity that Jeffrey is Fianna's father. For the foregoing reasons, we conclude the trial court abused its discretion in allowing Todd to intervene and in setting aside the paternity decree of 2001.

The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss Todd from the action and to proceed on Amy's request to modify the paternity decree.

REVERSED AND REMANDED WITH DIRECTIONS.

MUTUAL OF OMAHA BANK, APPELLEE, V. PATRICK J. KASSEBAUM AND APRIL M. KASSEBAUM, APPELLANTS, AND TIMOTHY R. ENGLER, APPELLEE.

814 N.W.2d 731

Filed June 1, 2012. No. S-11-749.

1. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
2. **Judgments: Moot Question: Appeal and Error.** When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question.
3. ____: ____: ____. Where the payment of a judgment compelled by law is not voluntary, payment will not render an appeal moot.
4. **Torts: Claims: Assignments: Death: Abatement, Survival, and Revival.** The common-law rule regarding the assignability of tort claims is that such a right of action is not assignable where the tort causes a strictly personal injury and does not survive the death of the person injured.
5. ____: ____: ____: ____: ____. The prohibition against the assignability of a tort claim is grounded on two principles: (1) that prior to more recent statutory