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MATTHEW JOHN BOCK, APPELLEE, V. JENNIFER LYNN DALBEY, APPELLANT.

815 N.W.2d 530

Filed June 15, 2012. No. S-10-973.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Divorce: Property Division: Taxes.** Ordinarily, a trial court in Nebraska should not consider the speculative tax consequences of its distribution orders unless it has ordered the immediate liquidation or sale of an asset or a party must sell an asset to satisfy a monetary judgment.
3. **Injunction: Equity.** A mandatory injunction is an equitable remedy that commands the subject of the order to perform an affirmative act to undo a wrongful act or injury. It is considered an extreme or harsh remedy that should be exercised sparingly and cautiously.
4. **Injunction: Damages.** An injunction, in general, is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is actual and substantial injury; a court should not grant an injunction unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
5. **Statutes: Equity: Jurisdiction.** When a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and a party must exhaust the statutory remedy before it may resort to equity.
6. **Divorce: Property Division: Equity.** Neb. Rev. Stat. § 42-365 (Reissue 2008) authorizes a trial court to equitably distribute the marital estate according to what is fair and reasonable under the circumstances.
7. **Divorce: Property Division: Equity: Taxes.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), if a party seeking an equitable adjustment presents the court with the tax disadvantages of filing separate returns, a trial court may consider a party's unreasonable refusal to file a joint return. Evidence of a tax disadvantage would normally include the parties' calculated joint and separate returns for comparison.
8. **Divorce: Taxes.** A trial court does not have discretion to compel parties seeking marital dissolution to file a joint income tax return.

Petition for further review from the Court of Appeals, IRWIN, CASSEL, and PIRTLE, Judges, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Amy Sherman, of Sherman & Gilner, P.C., L.L.O., for appellant.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellee.

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

CONNOLLY, J.

SUMMARY

The district court dissolved the marriage of Jennifer Lynn Dalbey, the appellant, and Matthew John Bock. We granted Dalbey's petition for further review on one question: Does a trial court in a marital dissolution action have the discretion to order the parties to file a joint income tax return? We conclude it does not. The Nebraska Court of Appeals affirmed the trial court's order requiring the parties to file a joint tax return.[1] It cited cases showing that courts have conflicting views and agreed with those courts holding that trial courts do have this discretion. Because a trial court can equitably adjust its division of the marital estate to account for a spouse's unreasonable refusal to file a joint return, we reverse, and remand the cause to the Court of Appeals with directions for further disposition.

BACKGROUND

The parties married in 2006. The district court entered its dissolution decree in August 2010. Many of the facts of this case deal with the district court's division of the marital assets. But the issue here is the court's order requiring that the parties file a joint tax return for 2008 and 2009. The parties filed a joint return for the 2007 tax year. But they had not filed any tax return for 2008 or 2009. The district court, without citing authority, ordered the parties to file a joint return. It allocated the unspecified refunds or assessments to be shared by the parties in a ratio that equaled each party's contribution of adjusted gross income to their total adjusted gross income. The record does not show what their individual income contributions were for the 2008 and 2009 tax years, but it does show that Bock earned substantially more income than Dalbey.

In affirming, the Court of Appeals framed the issue as whether the Supremacy Clause of the U.S. Constitution barred the district court from ordering the parties to file a joint

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[1] *Bock v. Dalbey*, 19 Neb. App. 210, 809 N.W.2d 785 (2011).

return. The federal tax code allows married individuals to elect whether to file joint or separate returns. But the Court of Appeals determined that this election did not conflict with a state court's order to file jointly. It stated that domestic relations law is generally a state law matter outside of federal jurisdiction.

ASSIGNMENT OF ERROR

In her petition for further review, Dalbey assigns that the Court of Appeals erred in affirming the district court's order that the parties file a joint income tax return.

STANDARD OF REVIEW

[1] We independently review questions of law decided by a lower court.[2]

ANALYSIS

[2] Ordinarily, a trial court in Nebraska should not consider the speculative tax consequences of its distribution orders unless it has ordered the immediate liquidation or sale of an asset or a party must sell an asset to satisfy a monetary judgment.[3] But the questions here are (1) whether a district court can consider the tax consequences of one party's refusal to file a joint return in dividing the marital estate and (2) whether it has discretion to order the parties to file a joint return to preserve assets for the marital estate or to equalize its division of the estate.

Married individuals can elect whether to file a joint or separate return.[4] For joint returns, the federal government taxes the income of a married couple in the aggregate.[5] Filing jointly generally, but not always, produces substantial tax savings.[6]

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[2] *Spitz v. T.O. Haas Tire Co., ante* p. 811, 815 N.W.2d 524 (2012).

[3] See *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). But see *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988). See, also, 2 Brett R. Turner, Equitable Distribution of Property § 8:28 (3d ed. 2005).

[4] I.R.C. § 6013 (2006).

[5] See I.R.C. § 6013(d)(3).

[6] See Leon Gabinet, Tax Aspects of Marital Dissolution § 3:3 (rev. 2d ed. 2005).

But a "[h]usband and wife filing a joint return are jointly and severally liable for all tax for the taxable year (not merely the amount shown on the return), including interest, additions for negligence, and fraud penalties if applicable."[7] The right of election under the federal tax code and the possible exposure to liability have prompted several courts to hold that a trial court cannot order a party to file a joint return.

Few courts, however, have decided this question. This may partially be because marital tax experts advise divorcing couples to privately negotiate an agreement to file a joint return.[8] Generally, if the parties have agreed to file a joint return, the trial court can incorporate or rely on the agreement in equitably dividing the marital estate and enforce the agreement if necessary.[9] But other appellate courts have disagreed on whether a trial court, outside of a party's agreement, can compel a party to a divorce proceeding to file a joint return.

Of the courts that have held that a trial court cannot compel a party to file a joint return, *Leftwich v. Leftwich*[10] is the most cited case. There, unless the wife agreed to file joint tax returns for 2 years of the marriage, the husband would owe about $40,000 in additional taxes. So the trial court conditioned the wife's receipt of her share of marital property upon her filing the joint returns, with the understanding that the husband would pay any additional taxes. The District of

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[7] Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts § 111.3A.1 at 1 (2012) (emphasis omitted). See I.R.C. § 6013(d)(3).

[8] See, e.g., Gabinet, *supra* note 6.

[9] See, *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986); *Kane v. Parry*, 24 Conn. App. 307, 588 A.2d 227 (1991); *Johansen v. Johansen*, 365 N.W.2d 859 (S.D. 1985); *Ahmad v. Ahmad*, No. 23740, 2010 WL 4703072 (Ohio App. Nov. 19, 2010) (unpublished opinion).

[10] *Leftwich v. Leftwich*, 442 A.2d 139 (D.C. 1982). Accord, *Kane, supra* note 9; *Sweeney v. Sweeney*, 583 So. 2d 398 (Fla. App. 1991); *In re Marriage of Butler*, 346 N.W.2d 45 (Iowa App. 1984), *overruled on other grounds, In re Marriage of Wertz*, 492 N.W.2d 711 (Iowa App. 1992); *Teich v. Teich*, 240 A.D.2d 258, 658 N.Y.S.2d 599 (1997); *Matlock v. Matlock*, 750 P.2d 1145 (Okla. App. 1988); *Lewis and Lewis*, 81 Or. App. 22, 723 P.2d 1079 (1986).

Columbia appellate court, concerned with the wife's liability exposure, reversed:

> The propriety of considering tax matters in divorce proceedings, however, does not serve as a license for the trial court to compel a party to execute a joint return. The trial court is not at liberty to alter basic precepts of federal or of state tax law. . . .
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> . . . A married individual possesses complete discretion to file a separate return, or, with the concurrence of his or her spouse, a joint return. . . .
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> To sanction the trial court's effectively ordering a spouse to cooperate in filing a joint return would nullify the right of election conferred upon married taxpayers by the Internal Revenue Code. Such a right is not inconsequential; its exercise affects potential criminal and/or civil liabilities of taxpayers. . . . Married individuals filing a joint return expose themselves to joint and several liability for any fraudulent or erroneous aspect of the return.[11]

The wife's exposure to liability was the critical factor in the court's holding:

> Given the wife's substantial interest in the choice of a filing status, with its concomitant consequences, we find that it was error for the trial court to impose a coercive construction of [I.R.C.] § 6013 [the federal statute permitting a husband and wife to elect to file jointly or separately] on appellant.[12]

Furthermore, the *Leftwich* court reasoned that even if the trial court could override the wife's election to file a separate return, under equity principles, it should not have resorted to a coercive remedy when a less intrusive one existed: "[T]he trial court well could have remedied any perceived tax disadvantage to the husband by altering the disposition of the marital property."[13] Other courts that hold a trial court cannot compel

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[11] *Leftwich, supra* note 10, 442 A.2d at 144-45.

[12] *Id.* at 145.

[13] *Id.* at 146.

the filing of a joint return have also held the trial court may nonetheless consider the tax disadvantages of filing separate returns in its equitable division of the marital estate.[14]

But other appellate courts have held that a trial court can compel a party to file a joint tax return.[15] Of these cases, *Bursztyn v. Bursztyn*[16] is a recent, prominent decision on which the Nebraska Court of Appeals relied. The *Bursztyn* court conceded that good arguments exist on both sides of the issue. It noted, however, that in New Jersey, a trial court is statutorily required to consider the tax consequences of its alimony and equitable distribution rulings. The *Bursztyn* court considered an abridgment of an individual's choice whether to file joint or separate tax returns to be a minor intrusion of the parties' individual rights. Finally, the court concluded that because a trial court has discretion to allocate federal tax exemptions for dependent children, it could, when appropriate, compel the parties to file joint tax returns to preserve the marital estate.

Yet the *Bursztyn* court was nonetheless persuaded by the *Leftwich* court's reasoning that altering the equitable distribution of marital property was a less intrusive option to remedy a tax disadvantage that a spouse incurs because of the other spouse's election to file a separate return. So the *Bursztyn* court tempered its decision that a trial court has discretion to order joint tax returns as follows: "In general, we believe trial courts should avoid compelling parties to execute joint tax returns because of the potential liability to which the parties would be exposed, and because there generally exists a means by which to compensate the parties for the adverse

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[14] See, *Sweeney, supra* note 10; *In re Marriage of Butler, supra* note 10; *Teich, supra* note 10; *Matlock, supra* note 10. Compare *Hardebeck v. Hardebeck*, 917 N.E.2d 694 (Ind. App. 2009).

[15] See, *In re Marriage of Zummo*, 167 Ill. App. 3d 566, 521 N.E.2d 621, 118 Ill. Dec. 339 (1988); *Theroux v. Boehmler*, 410 N.W.2d 354 (Minn. App. 1987); *Bursztyn v. Bursztyn*, 379 N.J. Super. 385, 879 A.2d 129 (2005); *Fraase v. Fraase*, 315 N.W.2d 271 (N.D. 1982); *Ahmad, supra* note 9. See, also, *In re Marriage of LaFaye*, 89 P.3d 455 (Colo. App. 2003).

[16] *Bursztyn, supra* note 15.

tax consequences of filing separately."[17] In short, the *Bursztyn* court required a trial court to consider the equitable adjustment remedy before resorting to a coercive order to file a joint return.

But in other appellate decisions—including the Nebraska Court of Appeals' decision in this appeal—courts holding that trial courts have discretion to compel the parties to file joint tax returns have not required a coercive order to be the remedy of last resort. That is, they have not considered whether adjusting the equitable distribution of marital property is a less intrusive way to remedy a spouse's unprincipled refusal to file a joint tax return. But we believe that it is the preferable remedy for four reasons.

First, the U.S. Tax Court is not bound by orders compelling the parties to sign a joint return. It will look to the husband and wife's intent, and if one of them signed only because a state court ordered him or her to do so, the return may or may not be treated as a joint return.[18] This means that a trial court cannot know with certainty whether its equitable division of the marital estate based on consideration of a joint tax return will be given effect by federal authorities or courts.

[3-5] Second, an order compelling the parties to file joint tax returns is a mandatory injunction. A mandatory injunction is an equitable remedy that commands the subject of the order to perform an affirmative act to undo a wrongful act or injury.[19] It is considered an extreme or harsh remedy that should be exercised sparingly and cautiously.[20] Further, an injunction, in general, is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is actual and substantial injury. And a court should not grant an injunction unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure

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[17] *Id.* at 398, 879 A.2d at 137.

[18] Compare *Price v. Commissioner*, 86 T.C.M. (CCH) 203 (2003), with *Anderson v. Commissioner*, 47 T.C.M. (CCH) 1123 (1984).

[19] See, *Barthel v. Liermann*, 2 Neb. App. 347, 509 N.W.2d 660 (1993); 42 Am. Jur. 2d *Injunctions* § 6 (2010).

[20] *Barthel, supra* note 19.

of justice.[21] Finally, when a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and a party must exhaust the statutory remedy before it may resort to equity.[22]

[6] Here, the statutory remedy is found in Neb. Rev. Stat. § 42-365 (Reissue 2008). This statute authorizes a trial court to equitably distribute the marital estate according to what is fair and reasonable under the circumstances.[23] Because § 42-365 is broad in its scope, we agree with the decisions of courts that hold a trial court may adjust its equitable division of the marital estate to account for the tax consequences of filing separate returns.

[7] Therefore, under § 42-365, we hold that if a party seeking an equitable adjustment presents the court with the tax disadvantages of filing separate returns, a trial court may consider a party's unreasonable refusal to file a joint return. Evidence of a tax disadvantage would normally include the parties' calculated joint and separate returns for comparison.[24] But because we conclude that § 42-365 permits a court to adjust its division of the marital estate to fit the equities of the case, we agree with the *Leftwich* court that equity principles weigh against permitting a trial court to resort to the coercive remedy of compelling a party to file a joint tax return.

Third, a resisting spouse's exposure to liability under the federal tax code is too difficult to predict if compelled to file a joint return. We agree with the Court of Appeals that trial courts in marital dissolution proceedings can order the parties to take actions with tax consequences, such as allocating the dependency exemptions.[25] But allocating dependency exemptions is not analogous to compelling a spouse to file a joint

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[21] See *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[22] *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010).

[23] See, *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004); *Shuck v. Shuck*, 18 Neb. App. 867, 806 N.W.2d 580 (2011).

[24] See, Gabinet, *supra* note 6; 2 Turner, *supra* note 3, § 8:30.

[25] See *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991), citing *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990).

tax return because of the potential liability. And we doubt that a trial court could be certain that the spouse resisting a joint return would not be exposed to joint and several liability for the tax consequences of the return.

In its decision, the Court of Appeals noted that the tax code provides relief from joint and several liability for an "innocent spouse."[26] Obtaining relief under the innocent spouse statute, however, is far from certain. The regulations are complicated,[27] and predicting liability would frequently require considerable tax expertise.

A divorcing spouse compelled to sign a joint return faces potential liability on two fronts. First of all, I.R.C. § 6015(b) and (c) can provide relief from an under*statement* of tax or a divorced spouse's portion of an assessed deficiency, but these provisions do not provide relief from an under*payment* of reported tax. Because subsections (b) and (c) do not apply to underpayments of tax, a claimant can seek equitable relief from an underpayment of tax only under § 6015(f).[28] Among the multiple factors that federal tax regulators will consider are whether the claimant had reason to know that the tax would not be paid and whether the claimant significantly benefited from the unpaid liability.[29] Summed up, for a divorcing spouse with little or no taxable income for the tax year, signing a joint tax return may pose considerable liability risk with no appreciable benefit.

Next, to seek relief from understatements of tax or assessed deficiencies under I.R.C. § 6015(b) and (c), an innocent spouse must *not* have had knowledge of the other spouse's "item" on the joint tax return that resulted in the understatement or deficiency assessment.[30] "A spouse knowing of the facts giving rise to a deficiency has actual knowledge, even if he or she does not understand the tax consequences of the

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[26] See I.R.C. § 6015(b) and (c) (2006).

[27] See Bittker & Lokken, *supra* note 7, §§ 111.3A.2 and 111.3A.3.

[28] See *Washington v. Commissioner*, 120 T.C. 137 (2003).

[29] See *id.*

[30] See I.R.C. § 6015(b)(1)(B) and (c)(3)(C).

facts or the error in the return's treatment of the item."[31] The knowledge component applies to both omissions of income and erroneous deductions, although the test can differ depending on whether omitted income or an erroneous deduction is at issue.[32] In general, however, federal courts review these issues for whether a reasonably prudent person, under the circumstances, would have known that the return contained a substantial understatement of tax or that further investigation was required.[33] If so, and the claimant did not take reasonable steps to investigate, relief will be denied.[34]

These rules show that a coerced filing of a joint tax return can be fraught with unanticipated liability. Because the risks frequently outweigh the benefits, in private negotiations a spouse will often not agree to a joint return without the other spouse's agreement to share in the tax savings and to promise indemnity.[35] We believe that these decisions are best left to the parties to negotiate after considering the risks and benefits of a joint return. If a spouse unreasonably refuses to file a joint return, the other spouse can take the matter up with the court.

Fourth, the rules related to filing deadlines under the federal tax code create practical hurdles to allowing a trial court to compel the parties to file joint returns. Under § 6013(b) of the tax code, a husband and wife can only elect to file a joint return for up to 3 years after they filed separate returns. But the opposite is not true. If the husband and wife filed a joint return, they cannot revoke that decision after the filing time limits for the taxable year have expired.[36]

So if a trial court orders a party to file a joint return, he or she will usually have to comply quickly or risk being held

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[31] See Bittker & Lokken, *supra* note 7, § 111.3A.3 at 4 (citing regulations and case examples).

[32] See, e.g., *Cheshire v. C.I.R.*, 282 F.3d 326 (5th Cir. 2002); *Resser v. C.I.R.*, 74 F.3d 1528, 1536 n.9 (7th Cir. 1996).

[33] See *id.*

[34] See *id.*

[35] See Gabinet, *supra* note 6.

[36] See I.R.C. § 6013(f)(4); 26 C.F.R. § 1.6013-1(a)(1) (2011).

in contempt.[37] Yet even if the party appeals the order, the party cannot revoke the joint return. The party's only avenue for relief from federal tax liability is the tax code's innocent spouse statute. As discussed, that option is a precarious road at best. Thus, the tax code's time limitations also weigh against permitting trial courts to order the parties to file a joint return.

[8] For all of these reasons, we hold that a trial court does not have discretion to compel parties seeking marital dissolution to file a joint income tax return.

CONCLUSION

We conclude that the Court of Appeals erred in holding that a district court has discretion to compel the parties to a marital dissolution proceeding to file a joint income tax return. Because a trial court can equitably adjust its division of the marital estate to account for a spouse's unreasonable refusal to file a joint return, resort to a coercive remedy that carries potential liability is unnecessary. We therefore reverse that portion of the Court of Appeals' decision affirming the district court's order requiring the parties to file a joint tax return. We remand the cause to the Court of Appeals with directions to remand the cause to the district court with directions to vacate that portion of its order that we have reversed.

REVERSED AND REMANDED WITH DIRECTIONS.

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[37] See *Ahmad, supra* note 9.

CARLOS H., APPELLANT, V.
LINDSAY M., APPELLEE.
815 N.W.2d 168

Filed June 15, 2012. No. S-11-548.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law,