Defining the Field Makes for Easy Work

By CHARLES D. RAY and MATTHEW A. WEINER

We're taking a look at two cases in this column. Both arise from dissolution actions and involve circumstances that we don't see every day. The Supreme Court decided both cases unanimously, albeit not without a few twists and turns that are worth discussing.

The first case, *Hall v. Hall*, 335 Conn. 377 (2020), involves a challenge to a post-judgment finding of contempt, as well as the trial court's refusal to open the judgment and vacate the contempt ruling. The parties were married in 1996 and Mr. Hall commenced the dissolution action in 2014. During the proceedings, the parties entered into a pendente lite stipulation that provided for the deposit of $533,588 into a joint bank account that required "the signature of both parties prior to any withdrawals.…" The trial court approved the stipulation and entered an order to that effect. The parties then opened a joint account and deposited the money to it. As it turns out, the account provided online access to both parties and did not require both signatures prior to any withdrawals.

About a year later, Ms. Hall filed a motion for contempt, alleging that Mr. Hall had violated the court's order by withdrawing, without her permission, the remaining balance ($70,219.99) from the joint account. The trial court granted the motion following an evidentiary hearing. Mr. Hall followed with a motion for reconsideration, which the trial court denied without opinion. Mr. Hall filed a timely appeal from both the judgment of contempt and from the court's denial of his motion for reconsideration.

In the meantime, the parties had filed another joint stipulation, in which they informed the trial court that they had agreed to file a joint motion to open and vacate the findings of contempt because they believed "such findings could interfere with the parties' future employment.…" The parties filed the motion to open and vacate, but the trial court denied it, once again without opinion. Mr. Hall amended his appeal to challenge this ruling and then asked the trial court to articulate the basis on which it had denied both his motion for reconsideration and the joint motion to open and vacate the contempt judgment. In its articulation of the contempt judgment, the trial court made clear that it had based its ruling on three events: 1) failure to comply with the order that any withdrawals from the joint account would require the signatures of both parties; 2) Mr. Hall's unilateral withdrawal of the remaining balance in the account; and 3) Mr. Hall's prior unilateral withdrawal of $237,643.11 from the account.

The Appellate Court affirmed the judgment and the Supreme Court granted certification. Justice Kahn wrote the opinion for a full and unanimous Court. In the end, this became a case of the missing evidence.

Some additional facts would be helpful. First, it was undisputed that both parties knew that the account they had set up did not comport with either their stipulation or the court's order. Indeed, Mr. Hall testified that banks no longer require dual signatures on accounts. Second, Mr. Hall testified that he had moved money from the joint account out of fear that Ms. Hall had suffered a relapse of her substance abuse issues and would squander the money in the joint account. On appeal, he relied, for the most part, on a theory that his actions were not contemptuous because they had been undertaken with the advice of counsel.

Before addressing the merits of that claim, however, the Court first looked at the "threshold" issue of whether it had been raised in the trial court. In this regard, the Court noted that at the time the trial court issued its memorandum of decision, it "was unaware of any intent by [Mr. Hall] to raise the claim that his violations of the order were not wilful because he reasonably relied on the advice of counsel." That seemed to have changed by the time Mr. Hall, now representing himself, filed his motion for reconsideration. In con-

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junction with that motion, he put before the trial court some emails between him and his former counsel and argued that his former counsel had failed to raise the issue of his reliance on counsel's advice. The trial court concluded that the performance of Mr. Hall's former counsel was not a proper basis on which to grant reconsideration and held that Mr. Hall's actions were "intended to circumvent" Ms. Hall's access to the account. The trial court also considered it significant that Mr. Hall was an attorney, licensed in both New York and Massachusetts. On this record, the Supreme Court concluded that Mr. Hall had "adequately" raised the advice of counsel argument in the trial court, notwithstanding that Mr. Hall's motion for reconsideration "was the first time that he had argued that his actions were not wilful because he undertook them in reasonable reliance on the advice of counsel to withdraw funds from the joint account."

Let's stop here for just a moment and ask how long do you suppose it will be before some enterprising lawyer relies on *Hall* for the proposition that claims raised for the first time in a motion for reconsideration are properly preserved for appellate review because they were "adequately" raised in the trial court? Our guess: not very long. We also have another guess: we're going to see a number of invocations of the default rule of "arguments raised for the first time in a motion to reargue are not entitled to appellate review" before we ever see the *Hall* "rule" carry the day again. So why did it carry the day here? We can only speculate that it was because Ms. Hall did not file a brief in the appeal and there was, therefore, no one pounding the preservation drum in the Supreme Court. But if there was no appellee making a preservation/improper record claim, why go down this "adequately raised" rabbit hole to begin with?

An explanation may also reside in the fact that Mr. Hall was challenging both the ruling of contempt and the denial of his motion for reconsideration. And in this section of its opinion, the Court begins by mentioning the former and ends by resolving the latter. It's as if the Court viewed the arguments as two unrelated and separate issues, without considering that the reconsideration denial could (and maybe should) have been denied on the alternate ground that new arguments and theories are not proper fodder for a motion for reconsideration. Given the outcome on the merits, it might have been more prudent to leave this particular rabbit hole unexplored, so that future confusion could have been avoided.

Once it got to the merits, the Court's resolution was straightforward and simple. The trial court had found three violations of its order—two unilateral withdrawals and the improper initial opening of the account. The trial court had before it evidence that Mr. Hall did not consult with counsel about setting up the account and that while there was evidence that Mr. Hall had consulted with counsel after the account was opened, it was also "reasonable to conclude that the exchanges do not establish that he acted on the advice of counsel." If anything, the exchanges between Mr. Hall and his counsel appear to support the view that counsel advocated moving the money to an account that comported with the trial court's order for joint control.

A similar fate befell the motion to open. Once again, the Court affirmed on the basis of missing evidence; namely, any evidence that supported counsel's argument that the contempt finding would have a "deleterious" effect on Mr. Hall's career as an attorney with licenses in the securities field. The trial court concluded that there was no evidence to support this claim and the Supreme Court reached the same conclusion, holding also that the trial court was not obligated to grant the motion to open merely because the parties agreed in that result. So if Hall serves any long-term purpose, it would be to reinforce for counsel the fact that arguments that have no evidentiary support have little chance of prevailing on appeal.

■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

Our second case, *Foisie v. Foisie*, ___ Conn. ___ (2020), answers the question of whether the executor or administrator of a party's estate can be substituted for the deceased party in a dissolution action, when the pending proceeding seeks to open the dissolution judgment on the basis of fraud. In the end, the Supreme Court, Justice D'Auria, writing for a unanimous court, answered "yes." The trip to get there was just a bit convoluted.

The parties' marriage was dissolved in 2011. About four years later, Ms. Foisie filed a motion to open the judgment, claiming that Mr. Foisie had failed to disclose several million dollars that he had on deposit in Swiss bank accounts. The parties stipulated that the judgment could be opened for the limited purpose of conducting discovery, but it appears that Mr. Foisie was less than forthcoming with discovery responses and, in fact, died prior to complying with the trial court's discovery orders.

Ms. Foisie moved to substitute the co-executors of Mr. Foisie's estate as parties in the ongoing dissolution action, which remained open for the purpose of discovery. The trial court denied the motion, concluding that: 1) if the motion to open was granted, the parties' marriage would be reinstated; 2) if the marriage was reinstated, it would have been automatically dis-

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President's Message

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6. Justice Gorsuch is the first to have served as a member of the Supreme Court alongside a justice for whom he clerked.
7. www.archives.gov/founding-docs/constitution-transcript
8. William H. Rehnquist, 2004 Year-End Report on the Federal Judiciary, January 1, 2005, available at www.supremecourtus.gov/publicinfo/ year-end/2004year-endreport.pdf.
9. www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf
10. www.ctbar.org/about/diversity-equity-inclusion/pathways-to-legal-careers

Technology and Ethics

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Connecticut Appellate Courts and the Second Circuit Court of Appeals. Along with his appellate work, he represents attorneys before grievance panels and in public hearings before the Statewide Grievance Committee and also represents candidates for bar admission before the Bar Examining Committee.

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DE&I

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womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf; "First Phase Findings From a National Study of Lawyers With Disabilities and Lawyers Who Identify as LGBTQ+" (2020), www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/bbi-survey-accessible.pdf; International Bar Association,"Us Too? Bullying and Sexual Harassment in the Legal Profession" (May 2019) www.ibanet.org/bullying-and-sexual-harassment.aspx

10. Lauren A. Rivera, András Tilcsik, "Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals in an Elite Labor Market," *American Sociological Review*, Vol. 81, No. 6 (2016)
11. Dr. Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (2014) nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf
12. *You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* (ABA, MCCA 2018) (Executive Summary) www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf
13. *See e.g.*, Destiny Peery, Paulette Brown, and Eileen Letts, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color* (2020), www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf; Chung, et al. *A Portrait of Asian Americans in the Law*, Yale Law School/National Asian Pacific American Bar Association (2017) A Portrait of Asian Americans in the Law (apaportraitproject.org)

Lincoln

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"My best friend is the man who will get me a book I have not read."

2. *See* Michael Burlingame, *Abraham Lincoln: A Life*, Volume 1, p. 36 (2008).
3. "The judgments of the Lord are true and righteous altogether."
4. *See* Robert Bray's comprehensive study, "What Abraham Lincoln Read," Journal of the Abraham Lincoln Association, Volume 28, No. 2 (2007), and Bray's *Reading with Lincoln* (2010).
5. Harkness, supra note 1.
6. Harold Holzer, *Lincoln at Cooper Union: The Speech that Made Abraham Lincoln President* (2006).
7. Professor Masur points out that Lincoln had little military experience, but, as president, he read several treatises on warfare to improve his knowledge of tactics.
8. Bray, p. 56.
9. Poe had published "The Murders in the Rue Morgue" in 1841, and this story and subsequent Poe works appealed to Lincoln.
10. He would recite "A Man's a Man for A'That" and "Auld Lang Syne."
11. *See* Burlingame, Vol. 2, p. 47, who assumes that Lincoln relied on Dickens for the phrase.
12. Bray is not sure of how much Lincoln read of *The Pickwick Papers*, but Harkness states that Lincoln read the book.
13. This was a "heart balm" suit that Connecticut abolished in 1967. *See* General Statutes Sec. 52-572b. England followed the American trend by ending such suits in 1970. Gilbert and Sullivan's *Trial By Jury* also satirized a breach of promise action.
14. See Mark E. Steiner, *An Honest Calling* (2006).
15. Mr. Pickwick became the central figure in the Broadway play *Pickwick*, with its hit song, "If I Ruled the World."

Supreme Deliberations

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solved because of Mr. Foisie's death and by operation of Conn. Gen. Stat. § 46b-40 (a marriage is dissolved by "the death of one of the parties"); and 3) if the marriage was automatically dissolved based on the death of Mr. Foisie, the court could not then re-dissolve it based on the motion to open. "That's some catch.…"

The flaw in the trial court's analysis was, according to the Court, in step number one, because a motion to open a dissolution judgment only for the limited purpose of reconsidering the financial orders does not reinstate the parties' marriage. The motion to substitute was controlled by Conn. Gen. Stat. § 52-599, which states, with three exceptions, that a civil action will not abate upon the death of one of the parties. The exception at issue in *Foisie* applied to any proceeding, "the purpose or object of which is defeated or rendered useless by the death of any party.…" Getting to the meat of the matter, the Court noted that it has permitted substitution where the death of a party would have "no effect on the continuing vitality of the proceeding because the estate could fill the shoes of the decedent, such as when the pending civil case sought monetary damages.…" Contrast this to cases where the action "sought specific relief that was unique to the parties, such as seeking an injunction for specific performance" and, in which case, substitution would not be appropriate.

Within these contours, the Court had little trouble concluding that Ms. Foisie's motion to open sought only reconsideration of the financial orders and not reinstitution of the marriage. And because the end result would involve only money, the action would not be "defeated" or "rendered useless" by the death of Mr. Foisie. Thus, once the map became clear, the end result became obvious. ■