

NOTICE

Decision filed 04/22/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 120274-U
NO. 5-12-0274
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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| <i>In re</i> MARRIAGE OF |) | Appeal from the |
| LINDA SUE SHELTON, |) | Circuit Court of |
| |) | Franklin County |
| Petitioner-Appellee, |) | |
| and |) | No. 05-D-30 |
| DANNY LEE SHELTON, |) | Honorable |
| |) | Robert W. Lewis, |
| Respondent-Appellant. |) | Judge, presiding. |

PRESIDING JUSTICE SPOMER delivered the judgment of the court.
Justices Wexstten and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* Because answering question certified by trial court would lead to hypothetical answer with no practical effect, this court declines to answer the question. Certified question not answered; appeal dismissed.

¶ 2 In this appeal, we are asked to answer the following question, as certified by the circuit court of Franklin County pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010).

¶ 3 "In an Illinois dissolution of marriage proceeding, can a Court divide as marital property the royalties received after the date of dissolution by an author-spouse pursuant to a publication contract executed after the date of dissolution where the underlying literary work was not in final form and had not been published as of the date of dissolution?"

¶ 4 **FACTS**

¶ 5 The facts necessary to our disposition of this appeal are taken from deposition

testimony and other relevant documents provided in the supporting record on appeal provided by the respondent, Danny Lee Shelton (Danny), and in the supplemental supporting record on appeal provided by the petitioner, Linda Sue Shelton (Linda), and are as follows. Danny and Linda were married in 1984. During the course of their marriage, Danny and Linda cofounded Three Angels Broadcasting Network (3ABN), a Christian broadcasting network located in Thompsonville that disseminates its programming throughout the world. By his own admission, and as corroborated by the testimony of others, Danny has become one of the most well-known Seventh Day Adventist televangelists in the world. During their marriage, both Danny and Linda appeared in many programs televised by 3ABN, and each created intellectual property—Linda in the form of musical CDs, Danny in the form of printed and published pamphlets—that is not the subject of this appeal. However, in August 2003, Danny told Linda that he intended to write a book. According to Linda, Danny stated that he believed sales revenues from the book would be "incredible," based upon the commercial success of his earlier writings. In the months that followed, Danny produced two versions of a draft manuscript of the book: the first dated September 23, 2003, and the second—which was an edited and slightly modified version of the first—dated November 10, 2003. Each manuscript was approximately 40 pages long. Because of the similarities between the manuscripts—and because it is undisputed that each was created by Danny during the course of the marriage—we shall hereinafter collectively refer to these two documents as "the manuscript."

¶6 After November 2003, Danny stopped working on the manuscript until May 2004, due to the strain of marital discord. According to Linda, in January 2004, Danny showed her a copy of the manuscript. On May 24, 2004, Danny showed the manuscript to Shelley Quinn (Shelley), an author whose book *Exalting His Word* had been published by 3ABN in 2003 and who had done a number of live and taped programs on 3ABN prior to 2004. He asked

Shelley if she would like to read the manuscript, and she said that she would. Danny asked Shelley to review it and told her that if she had any suggestions, or noticed any corrections that needed to be made, to note them. As she began to review the manuscript, Shelley found it to be "a little difficult to follow and bogged down." Accordingly, Shelley "determined to sit down and rewrite." She did so because, as she later opined, she did "not think it could have been published" in its present form. She completed a rewrite of what she considered to be the first chapter of a book (the manuscript contained no chapters) on May 26, 2004, and on or around May 30, 2004, Danny told her that he loved what she had done and asked her if she would "like to just rewrite the whole book." She answered that she would, although she and Danny did not discuss terms of compensation or any other arrangements regarding this "rewriting." Shelley did not find this unusual, as she had donated *Exalting His Word* to 3ABN at Linda's request and had not received any of the proceeds generated by sales of the book. She assumed she was donating her services on the new book as well and stated that she wanted to write it not for monetary gain, but because God had laid the writing of the book "very definitely on [her] heart."

¶ 7 Shelley described in detail the writing process she undertook, as well as the struggles it entailed. She stated that when she read Danny's manuscript, she noted similarities between its subject matter—which, put very succinctly, involves the change of the Sabbath—and the subject matter she had recently decided to include in a book she planned to write. Nevertheless, when Danny asked her to rewrite his manuscript, she concluded that her book "would be substantially different" and that she could "still write his and then write [her] own." However, as she began to write, she "felt very selfish" and wondered if she would ever get around to writing her own book. Accordingly, she decided to expand on Danny's manuscript and include her own "teachings" about the Sabbath. Shelley described "teachings" to be things she "had studied out" from the Bible. She and her husband prayed

about what to do, and ultimately Shelley decided that she would add her teachings but put them "in under Danny's name." Her husband supported her decision, because the book would "be around a lot longer than either [Shelley] or Danny." She described the "teachings" that she added as "substantially different" than the contents of the manuscript. She also noted that because she was adding her own ideas as well as expanding on the manuscript, what she referred to as the "rewrite" was actually "the writing of the book." She later posited, as tactfully as she could, that Danny's writings about the Sabbath were "not deep enough" and that without the additions of her detailed Bible studies, she did not think the finished work would make a very convincing argument that a "Sunday-keeper" should become a "Sabbath-keeper." Nonetheless, she noted that she believed Danny's name should remain on the work because if the book contained only Shelley's name, it "would not have been marketed the way it was marketed because Danny was able to have people who came forward with large sums of money" to purchase large quantities of the book that 3ABN could then give away to viewers. She agreed that Danny's contribution to the book was "in a large part" the use of his name.

¶ 8 With regard to her actual writing process, Shelley stated that after she and her husband returned from Thompsonville to their Texas home with the manuscript and Danny's permission to "rewrite" it, she cut the manuscript up and "made little piles." Sometimes she would "cut out just a sentence," as she organized the manuscript, and other times she would discard parts of Danny's manuscript entirely. Then she "sat down and wrote." She completed a rewrite of her earlier-crafted chapter 1 on June 7, 2004, then began to work on what she later designated chapter 2. As she completed a draft of a chapter—referring, as she did so, to her own "Bible study" and to "the Seventh Day Adventist commentary" on her book—she would return to the appropriate "pile" from Danny's manuscript and would "pull out Danny's thoughts or what would be—you know, trying to keep it in a voice, because I said

I would write it in his voice." Shelley stated that as a result of this process, "there may be a sentence or two that were actually transferred in there verbatim, but very little of that would be verbatim." She noted that her inclusion of verbatim statements was intentional, so that the book would "sound like Danny."

¶ 9 Meanwhile, on June 14, 2004, as Shelley continued her work, Danny and Linda prepared divorce papers that were subsequently filed in Guam. On June 25, 2004, the Superior Court of Guam entered an order dissolving their marriage, but reserving issues of division of property. In the division of property proceedings directly relevant to this appeal, the circuit court of Franklin County recognized the termination of the marriage by the Guam decree and entered an order, unopposed by the parties, in which it concluded that the date of dissolution of the marriage was June 25, 2004.

¶ 10 On June 26, 2004, Shelley, Danny, and a number of other 3ABN employees returned on the 3ABN company jet from a 3ABN event in St. Joseph, Missouri. As Shelley rode with Danny in his pickup truck from the Marion airport to Thompsonville, she described for him what she was "including in the book." She had not, at that point, shown him any of her work. However, after hearing what was included in the book, Danny told Shelley that he felt she deserved to be a coauthor, with him, of the evolving book. As of June 26, 2004, Shelley had completed chapters 1-4 of her first draft of the book. Danny and Shelley did not discuss compensation for Shelley as a coauthor, nor did Danny say anything at that time to lead Shelley to believe that she would be compensated for her work. In deposition testimony, Shelley stated that prior to June 26, 2004, she considered herself a "ghost writer" for Danny and that after June 26, 2004, she considered herself a coauthor with him. Subsequent to June 26, 2004, Shelley continued to work on the book, and as her work continued she "massaged" the content of chapters 1-4. Nevertheless, chapters 1-4 as completed on June 25, 2004, are virtually identical to chapters 1-4 in the finished books. Shelley also began, for the first time,

to send e-mail drafts of the book to Danny and to other 3ABN employees and colleagues, for comments, suggestions, and other feedback. It is undisputed, however, that after completing the manuscript in late 2003, Danny did not contribute any additional writing to the evolving work.

¶ 11 In August 2004, Danny approached Dwight Hall, who at the time was the president of Remnant Publications, Inc. (Remnant). Hall expressed an interest in seeing the completed work, once it was ready. On September 14, 2004, Shelley e-mailed what she characterized as her "comprehensive manuscript"—now tentatively entitled *The Antichrist Agenda: Ten Commandments Twice Removed (Antichrist Agenda)*—to Remnant. Additional corrections to the manuscript were made later in September and in October, with the final manuscript, which was approximately 200 pages long, being delivered to Remnant on November 24, 2004. In December 2004, Remnant issued the first printing of the book, which was published by Danny's company DLS Publishing, Inc. (DLS). In May 2005, Remnant took over publishing as well as printing the book. In deposition testimony, Hall stated that the switch to Remnant as both publisher and printer was done to simplify matters with regard to order fulfillment and fund consolidation. A written publication agreement between Danny Shelton d/b/a DLS and Remnant was executed on May 23, 2005, which provided for royalties to be paid to Danny for copies of the book sold. Shelley is not a party to the agreement, although she is listed on the cover of the book and within it as a coauthor with Danny, and the copyright notice affixed to the book states that the copyright belongs to "Danny Shelton and Shelley J. Quinn." With regard to the amount of material from the manuscript that is included verbatim in *Antichrist Agenda*, Shelley reiterated in deposition testimony that her "rewrite" of the manuscript encompassed both form and substance, that the finished book is "substantially different" from the manuscript, and that if anything at all were verbatim it would be "very little." Danny noted in deposition testimony that the parts of the manuscript

that were included verbatim in the finished book were quotes he had taken from other "uncopyrighted" sources, such as the Bible, rather than Danny's original words.

¶ 12 In a 3ABN broadcast with Shelley, Danny described to viewers Shelley's contribution to *Antichrist Agenda* as follows: "She kept what I was, you know, putting in but she expounded on it." In deposition testimony, Danny opined that Shelley was not serving as a ghost writer for him, because "the finished result is—her name was on it." When asked if Danny considered Shelley a coauthor at the time he asked her to "rewrite" the manuscript, Danny responded that he "didn't really figure anything on it," because Shelley "came and she had all of these ideas," and he considered it "a thing that you just kind of take it day by day and see what happens." He did not want to make any commitments to Shelley, for fear that he might not like the work as a whole. Accordingly, he told her to "go ahead and work on it." He later decided "that she should have not only credit with the title, but she should have a portion of the income," and despite the fact that the two never had a contract, he voluntarily paid her some of his royalties from sales of the books. Danny stated: "It was actually her book. The reason my name stayed on it is because I had the name. People didn't know her as well."

¶ 13 In early 2005, Hall approached Danny and told him that if *Antichrist Agenda* could be condensed from 200 pages down to approximately 100 or 120 pages, Remnant might be able to get it into major retail outlets such as Walmart. Danny subsequently asked Shelley to condense *Antichrist Agenda*, and Shelley complied. It is undisputed that Danny took no part in the condensation process. The condensed work, which includes, *inter alia*, chapters 1-4 of *Antichrist Agenda*, was published in late 2005 as *Ten Commandments Twice Removed*. A written publication agreement between Remnant and DLS was executed on October 3, 2005, with Danny signing on behalf of DLS. Shelley is not a party to the agreement, although once again she is listed on the book as a coauthor with Danny. As per the

agreement, Remnant would own the copyright to *Ten Commandments Twice Removed* and would pay royalties to DLS. As of 2007, over five million copies of *Ten Commandments Twice Removed* were in print. A third book was produced as well, entitled *Ten Commandments—Never Forget God's Word*. The parties agree that this book differed from *Ten Commandments Twice Removed* only in title and in terms of the cover of the book. Otherwise, it was identical to *Ten Commandments Twice Removed*. For purposes of simplicity, when we hereinafter refer to *Antichrist Agenda*, *Ten Commandments Twice Removed*, and *Ten Commandments—Never Forget God's Word* collectively, we will refer to them as "the books."

¶ 14 Meanwhile, Danny and Linda continued to litigate, in the circuit court of Franklin County, the distribution of their marital property. On June 14, 2011, the court entered an order in which it bifurcated the proceedings and held that the issue of whether any royalties received by Danny from sales of the books were divisible as marital property would be tried separately. The order allowed discovery to move forward, but prevented Linda from inquiring "as to the amount of proceeds arising from" sales of the books. As a result of the order, the amount of royalties received by Danny to date, as well as the amount he has paid to Shelley to date, is as yet undiscovered.

¶ 15 On October 20, 2011, Danny filed a motion for a summary determination of major issues regarding the nonmarital status of certain property, in which he asked for a finding from the court that the books were nonmarital property, as were any royalties generated therefrom. On November 30, 2011, Linda filed a countermotion for a summary determination of major issues, in which she advanced several theories under which she believed she was entitled to a share of Danny's royalties. On February 16, 2012, Judge Lewis entered an order in which he found, *inter alia*, that: (1) the manuscript "was an artistic or literary work created during the marriage through the skill and effort" of Danny and was

accordingly marital property, and (2) because Danny's entire contribution to the endeavor from which he was earning royalties had taken place during the marriage, the royalties in question were marital property as well.

¶ 16 On March 14, 2012, Danny filed a motion to reconsider or, in the alternative, to certify questions for appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). On June 12, 2012, Judge Lewis denied Danny's motion to reconsider, but granted Danny's request to certify a question pursuant to Rule 308. Accordingly, he certified the following question:

¶ 17 "In an Illinois dissolution of marriage proceeding, can a Court divide as marital property the royalties received after the date of dissolution by an author-spouse pursuant to a publication contract executed after the date of dissolution where the underlying literary work was not in final form and had not been published as of the date of dissolution?"

¶ 18 On June 22, 2012, Danny filed in this court an application for leave to appeal pursuant to Rule 308,¹ which we granted on August 22, 2012.

¶ 19 ANALYSIS

¶ 20 When a reviewing court grants an application for leave to appeal pursuant to Rule 308, that court limits its review to the certified question or questions, which, as questions of law, are reviewed *de novo*. *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550 (2009). If the reviewing court determines, during the course of the appeal, that "the question certified by the trial court calls for a hypothetical answer with no practical effect," the reviewing court

¹We note that Danny also attempted to appeal the trial court's order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). However, on August 22, 2012, we dismissed that appeal, which was docketed in this court as No. 5-12-0302, because we concluded we did not have jurisdiction to entertain a Rule 304(a) appeal, pursuant to the reasoning of the Illinois Supreme Court in *In re Marriage of Leopando*, 96 Ill. 2d 114 (1983).

"should refrain from answering it." *Lawndale Restoration Ltd. Partnership v. Acordia of Illinois, Inc.*, 367 Ill. App. 3d 24, 27 (2006). That is because Rule 308 requires that the answer to the question "may materially advance the ultimate termination of the litigation" (Ill. S. Ct. R. 308 (eff. Feb. 26, 2010)), and if the question is general and overly broad to the extent that the answer will not do so, it is not provident for the reviewing court to answer it. *Lawndale*, 367 Ill. App. 3d at 27, 33.

¶ 21 In the case at bar, at oral argument that followed the thorough briefing of the case by the parties, Justice Cates repeatedly raised concerns about presumptions within the certified question and the concomitant applicability of the certified question to the issues actually being argued by the parties. The parties conceded that the wording of the certified question was the product of "a lot of wrangling" between the parties and that it might be of limited utility to deciding the issues actually raised on appeal, because, as Danny's counsel put it, the "question doesn't reflect the facts of the case." Accordingly, although we recognize that it was this court that originally granted Danny's petition for leave to appeal pursuant to Rule 308, before we answer the certified question we are now compelled to consider, in light of the issues actually argued by the parties on appeal, whether it is provident for us to do so.

¶ 22 Implicit in the arguments advanced by the parties on appeal is their agreement that the pivotal issue with regard to Linda's interest in Danny's royalties is the relationship between the manuscript Danny created during the course of the marriage and Shelley's subsequent creation of the books. Linda contends that regardless of when the copyrights to the books came into existence as a matter of law, and regardless of when the books were contracted for and published, every bit of personal skill, effort, and energy Danny put into the writing of the books—as embodied in his fashioning of the manuscript—took place during the marriage, and therefore any royalties he is receiving must be the fruits of the writing he did during the marriage, the intricacies of federal copyright law notwithstanding. Danny, on the other hand,

claims that under federal copyright law, the books did not come into existence until after the dissolution of the marriage and that, accordingly, pursuant to *In re Marriage of Heinze*, 257 Ill. App. 3d 782, 784 (1994), royalties from the books are not marital property. Danny contends that the manuscript and the books are each separate and distinct copyrighted literary works and that because only the manuscript was written during the marriage (and only it was written by Danny), only it may be classified as marital property.

¶ 23 In his brief on appeal, Danny has provided a detailed, thorough, and well-reasoned analysis of federal copyright law as it pertains to the question of Danny's creation of the manuscript and Shelley's subsequent creation of the books. His argument underscores the infirmities of the trial court's conclusion that the royalties may be classified as marital property without an analysis of relevant federal copyright law and leads us to the pivotal question that must be answered by the trial court in this case: what is the legal relationship between the manuscript and the books?

¶ 24 Danny posits that "at most" the books are derivative works of the manuscript. Under federal copyright law, a derivative work is "a work based upon one or more preexisting works, such as *** [an] abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (2010). When a work consists of "editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship," that work is a derivative work. *Id.* However, "[a] work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a prior work had been taken without the consent of a copyright proprietor of such prior work." *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976). The right to prepare a derivative work is one of the exclusive rights enjoyed by a copyright holder (17 U.S.C. § 106 (2002)), although a copyright holder may transfer that right to another. 17 U.S.C. § 107 (2012).

¶ 25 The parties agree that the manuscript was created by Danny during the course of the marriage and, as the trial court correctly ruled in its February 16, 2012, order, is marital property. As the owner of the copyright to the manuscript, one of Danny's rights was the right to transfer to Shelley Quinn the right to create one or more derivative works based upon the manuscript. Although Linda does not own the copyright to the manuscript, the manuscript is marital property, and Linda therefore is entitled to an economic interest in the copyright that is attached to the manuscript. See, e.g., *Berry v. Berry*, 277 P.3d 968, 987 (Haw. 2012) (in a marriage dissolution action, equitable division and distribution of ownership interests in a copyright "must result in the authoring-spouse retaining the exclusive rights set forth under 17 U.S.C. § 106, but *** the non-authoring spouse is entitled to an economic interest in the copyrights").

¶ 26 Accordingly, whether the books are, or are not, derivative works of the manuscript is of no small significance. If they are, then when Danny gave Shelley permission to create the books as derivative works, he conveyed to Shelley a right to which Linda held an economic interest; Linda, therefore, would have the right to ask the trial court to place a monetary value on her economic interest in the right that Danny conveyed to Shelley. The determination, however, of whether the books are derivative works of the manuscript (and, if so, the determination of the value of Linda's economic interest in the right Danny conveyed to Shelley by giving her permission to create them) is best left to the trier of fact, after: (1) full briefing of this issue, (2) the presentation of evidence (including the facts set forth in detail at the beginning of this order, as well as additional evidence and, to the extent the parties deem it desirable, expert testimony), and (3) argument. Indeed, although we take no position with regard to whether the royalties Danny has been paid pursuant to the sales of the books would be *determinative* of the value of Linda's interest, there is no doubt that if the books are derivatives of the manuscript, they could not legally exist without Danny having conveyed

the right to create them to Shelley, and therefore the amount of royalties Danny has been paid might very well be *probative* of the value of Linda's interest, and the trial court might need to revisit, to some extent, its June 14, 2011, ruling that prevented Linda from inquiring "as to the amount of proceeds arising from" sales of the books. The question, after all, would not necessarily be how much money Danny actually received immediately upon transferring to Shelley the right to create the derivative works, but how much that right, as an item of marital property, was in fact worth at the time of its transfer, regardless of what Danny received immediately for it.

¶ 27 We conclude that it is the question of the legal relationship between the manuscript and the books, not the question certified below, that is the pivotal question that must be answered by the trial court for this case to move forward. Accordingly, after entertaining the arguments of the parties as fully briefed on appeal, we conclude that the certified question before us is general, overly broad, and the answer to it has little to do with the pivotal question remaining in this case. We do not see how answering it would materially advance the ultimate termination of this litigation, as required by Rule 308. Indeed, "the question certified by the trial court calls for a hypothetical answer with no practical effect." *Lawndale Restoration Ltd. Partnership v. Acordia of Illinois, Inc.*, 367 Ill. App. 3d 24, 27 (2006). Therefore, we decline to answer the certified question and hereby dismiss this appeal.

¶ 28 Certified question not answered; appeal dismissed.