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DIVISION II
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STATE OF WASHINGTON
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No. 39346-8-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SUSAN E. MAMMEN, Respondent

V

KAY E. LEWIS, Appellant

Appeal from Pierce County Superior Court
Honorable Stephanie A. Arend

RESPONDENT'S BRIEF

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ORIGINAL

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A. Response to Assignments of Error

1. The trial court did not err in finding that Mammen is the real party in interest under CR 17(a) and denying Lewis's motion to vacate the orders related to contempt and dismiss the action.
2. The trial court did not err nor abuse its discretion in awarding attorney's fees to Mammen.

Response to Issues Pertaining to Assignments of Error

1. Mammen, the custodial parent, is owed past due child support, petitions in her own name to collect same, and obtains judgments in her own name for same. Mammen's entry into an agency/client and limited attorney-in-fact relationship with Amerikids, a non-party, does not cause Amerikids to gain standing, or Mammen to lose standing, as the real party in interest under CR 17(a). Error #1.
2. CR 17(a) does not require dismissal of this action. Error #1.
3. Regardless of whether the relationship between Amerikids and Mammen in this case is a fiduciary relationship or an assignment for collection, neither relationship should cause a change in the character of the support obligation or prevent Mammen from utilizing equitable

remedies under the Uniform Interstate Family Support Act (“UIFSA”) for collection of past due child support. Error #1.

4. Petitioner’s due diligence, which regards the unchallenged finding of contempt, is not before the court upon appeal. The sole issue is the amount of fees awarded. The trial court properly exercised its discretion in awarding attorney’s fees based upon the unchallenged findings in the order of contempt. Error #2.

B. Statement of the Case

Mammen and Lewis were divorced October 12, 1988 in Cascade County, Montana. CP 6. Lewis was ordered to pay child support to Mammen. CP 6. He did not do so. CP 14. A subsequent order was entered in the same court on September 4, 1996, in which the court found *inter alia*, that Lewis: (1) was in contempt of court; (2) had never paid any amount to support his children; and (3) owed Mammen \$20,440 in past due support owing through July 14, 1995. CP 18. Mammen subsequently obtained judgment in the same court on November 17, 2006 for the original principal amount, interest, and costs in a total amount of \$43,844.60. CP 14.

Mammen properly registered the Montana judgment in Pierce County, Washington under the Uniform Interstate Family Support Act. CP 1. Mammen signed the petition to register the judgment. CP 4. Mammen obtained an order to show cause why Lewis should not be held in contempt for failing to pay child support under the Montana judgment, for failing to pay support from September 4, 1996 to present. CP 34-36.

The matter proceeded through multiple hearings during which Lewis was represented by counsel. On May 28, 2008, Lewis was found in contempt of court. CP 153. Judgment was entered in favor of Mammen and against Lewis in the amount of \$81,153.38, inclusive of the Montana judgment. CP 153. Attorney's fees were reserved. CP 153. On revision, heard July 18, 2008, the trial court found that the judgment was properly registered, that jurisdiction was proper, that contempt was properly found, and denied revision. CP 195. This order was not appealed.

Mammen moved for attorney's fees. CP 198. In support of her request, Mammen supplied an attorney's fee affidavit. CP 198. Lewis discovered from the affidavit that Mammen had involved a third-party, Amerikids Child Support Specialists, Inc. ("Amerikids") in her endeavor to collect support. CP 361. Lewis filed an objection under CR 17(a). CP 225. Lewis was granted a continuance of the hearing on attorney's fees. CP 226. Lewis propounded post-judgment discovery. Mammen provided

the Limited Power of Attorney and Release of Information Authorization (“LPOA”) and Exclusive Agency/Client Agreement (“EACA”). CP 244.

Lewis then moved to dismiss the action under CR 17(a) claiming that Amerikids was the real party in interest. CP 235. The trial court found that Mammen was the real party in interest under CR 17(a), that Mammen court use UIFSA equitable remedies to collect support, and denied Lewis’s motion to dismiss. CP 334. This appeal followed.

Mammen then renewed her motion for attorney’s fees. CP 337. The commissioner entered an award of attorney’s fees but reduced the award. CP 369. Mammen moved for revision, and the trial court restored some of the attorney’s fees originally requested by Mammen, and entered judgment in favor of Mammen and against Lewis accordingly. CP 411. The judgment for attorney’s fees is also the subject of this appeal.

C. Summary of Argument

Susan Mammen raised Kay Lewis’s children from 1988 until their emancipation without any financial support from Lewis despite a valid and unchallenged support order.

Mammen entered into an agreement with Amerikids, a third party, to provide assistance in collecting past-due child support. Amerikids

would provide financial and logistical assistance to Mammen in collecting her past due support in exchange for a portion of the recovery. Such an agreement does not make Amerikids a real party in interest.

Lewis suggests that the agreement with Amerikids makes them the real party in interest, or if it does not make them the real party in interest, it somehow “taints” the proceeding such that Mammen should not be able to utilize equitable remedies under UIFSA. This argument fails because the agreement was not an assignment, but rather a fiduciary relationship. At most, other jurisdictions may consider it a limited “assignment for collection”. Mammen is the real party in interest and Amerikids’ involvement in this proceeding should have no effect on the outcome.

Lewis also argues that the imposition of sanctions in this matter for failing to pay child support is somehow “unconstitutional” because the legislature has not provided a specific definition of “due diligence”. Lewis was found in contempt and the contempt was not appealed. Lewis’s arguments regarding due diligence relate to contempt and are not properly before this court. An award of attorney’s fees in this matter was within the trial court’s discretion and based upon the findings of fact in the order of contempt.

D. Argument

Mammen is the Real Party in Interest

1. The Agreements

Mammen and Amerikids entered into two agreements, a Limited Power of Attorney and Release of Information Authorization (“LPOA”) and Exclusive Agency/Client Agreement (“EACA”). CP 303-307

THE EACA

Agency is “the fiduciary relation which results from the manifestation of consent by one person to another than the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Black’s Law Dictionary* 62, (6th ed., 1990).

Client is defined as: “An individual...that employs a professional to advise or assist it in the professional's line of work.” *Black’s Law Dictionary* 254, (6th ed., 1990).

Neither definition states or implies assignment or the relinquishing of any portion of a cause of action to the agent.

The EACA between Amerikids and Susan Mammen is more properly compared to a contingency fee agreement entered into between a lawyer and a personal injury client, where the lawyer will receive a

percentage of the recovery if the client prevails.¹ However, a lawyer working on a contingent fee basis, for example, does not become the “assignee” of the Plaintiff’s personal injury cause of action, even though the lawyer may advance costs on behalf of Plaintiff. The lawyer may work without compensation unless or until the client recovers money in his cause of action. In both a contingency fee case, and the EACA, the client remains responsible for payment of certain costs. In both cases, the ability of the parties to sever the relationship, and the responsibilities and entitlements to each upon such severance is dictated by the contract between the parties. Although the Rules of Professional Conduct do not allow the client to bargain away the ability to discharge the lawyer at any time, the lawyer may have the ability to lien the cause of action or recover costs from the client.

The terms of the EACA are not relevant to this matter. While the EACA may contain provisions that appear to favor Amerikids, the EACA may well be tailored to meet the unique risk to Amerikids that is associated with forwarding costs of clients’ litigation where recovery may meet a staunch defense or an “empty pocket.”

In essence, Amerikids’ relationship to Mammen is akin to a personal injury lawyer. Both are third parties assisting with litigation of

¹ Washington RPC 1.5 would not preclude a lawyer from charging a contingent fee for recovery of post-judgment balances due under support orders.

the case while acting as a fiduciary to the client. It would be absurd to suggest that the lawyer obtained a distinct and separate cause of action against the defendant due to the fiduciary relationship. Or that the personal injury plaintiff loses his standing as a real party in interest solely by contracting with a lawyer where the client benefits by the lawyer's services and the lawyer benefits by receiving a portion of recovery. It would be absurd to suggest that the lawyer becomes the "real party in interest". But yet that is what Lewis is asking this court to find.

To take Lewis's argument to the next level, in his brief, Lewis concedes that his legal fees are being paid by his family. Lewis's best outcome in this matter would be to recover his attorney's fees. If Lewis has to pay his family back all or part of those fees, does that make his family the "assignee" of his cause of action or the real party in interest? The answer is no. Lewis's argument that the EACA makes Amerikids a real party in interest should fail.

THE LPOA

Power of attorney is defined as "[a]n instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of the principal. *Black's Law Dictionary* 1171, (6th ed., 1990). Limited means restricted; bounded; prescribed. *Id.*, at 927. The definition

does not include any reference to assignment or the relinquishing of any portion of a cause of action to the attorney-in-fact.

Under the LPOA, Ms. Mammen has given authorization to Amerikids as her attorney-in-fact for purposes including “pledging, negotiating, obtaining legal counsel, appearing in court, and any other action deemed necessary by agent in its discretion in the pursuit of child support payments **due me**”. Notably, the LPOA regards the child support payments as due and owing to Mammen, not Amerikids. And most importantly, the LPOA does not allow Amerikids to discharge or compromise the debt owing to Mammen.

A principal of a power of attorney does not assign his cause of action to his attorney-in-fact. He creates an agency or fiduciary relationship. Lewis’s argument in his brief completely misapprehends and mischaracterizes the relationship between Amerikids and Mammen and ignores the fact that Mammen is the Petitioner in the underlying action and is suing on her own behalf. The judgments obtained are in Mammen’s name alone as judgment creditor. Neither the LPOA or the EACA act as an assignment, nor implicate CR 17(a).

CR 17(a)

Civil Rule 17(a) states in its entirety:

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The important language is that “a party with whom or in whose name a contract has been made for the benefit of another...may sue in his own name without joining with him the party for whose benefit the action is brought.” Regardless of who Lewis believes the benefit of the contract inures to, the rule states that a party in whose name a contract has been made may sue in his own name. Suing in her own name is exactly what Mammen has done.

Notwithstanding the plain language of the statute, the Washington Supreme Court recently analyzed CR 17(a) in *Kommavongsa v. Haskell*, 149 Wn.2d. 288, 67 P.3d 1068 (2003) in its analysis of the public policy concerns surrounding the assignability of legal malpractice claims.

The *Kommavongsa* court stated “[t]he purpose of CR 17(a) is to protect the defendant against a subsequent action by the party actually entitled to recover and to expedite litigation by not permitting technical or

narrow constructions to interfere with the merits of legitimate controversy.” *Kommavongsa*, 149 Wn.2d at 315 (citing *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998)).

While another case was originally brought in Amerikids’ name as Petitioner, that case was not allowed to proceed and no action was taken on that case after Mammen’s case was initiated. There is simply no colorable argument that Lewis will face a later action regarding this child support obligation in the name. Lewis’ use of CR 17(a) as a defense in this matter interferes with the merits of Mammen’s legitimate controversy by trying to create and then exploit a technicality as a magic bullet. Mammen is entitled to past due support. Equity and public policy are not served in this case by a complete dismissal and vacation of a judgment for 18 years of unpaid child support where a mother has struggled to raise two children without any assistance from father? Mammen is the real party in interest and should be allowed to proceed as same.

Even if Amerikids were a real party in interest, CR 17(a) would require remand to the trial court to substitute Amerikids as plaintiff.

The *Kommavongsa* court allowed the Plaintiff to request the opportunity to file a motion to substitute the plaintiff under CR 17(a) if the

court sustained the Defendant's objection to the assignment of a claim. *Kommavongsa*, 149 Wn.2d at 317. Under CR 15(c) this substitution would relate back to the filing of the claim. *Id.*, at 317-18.

Should this court be inclined to reverse the trial court's holding that Mammen is the real party in interest, it should remand with direction to allow Amerikids the opportunity to substitute or intervene in the matter and for such intervention or substitution to relate back to the filing of the complaint.

Regardless of the relationship between Amerikids and Mammen, the character of the debt does not change nor does the relationship preclude Mammen's use of the UIFSA for collection of support.

Lewis's assignment of error regarding Amerikids' entitlement to proceed is founded on the improper assumption that Amerikids is the real party in interest. It is not. Mammen has not assigned her debt to Amerikids. Mammen remains the real party in interest. However, even relationships involving third parties are supported by other jurisdictions and public policy.

Lewis continues his improper assumption by stating that the Uniform Interstate Family Support Act (UIFSA) does not allow for

collection of past-due child support when assigned to, or even assisted by, a third party. In either event, it ignores the cumulative provisions of RCW 26.21A.020:

(1) Remedies provided by this chapter are cumulative and do not affect the availability of remedies under other law, including the recognition of a support order of a foreign country or political subdivision on the basis of comity. (2) This chapter does not: (a) Provide the exclusive method of establishing or enforcing a support order under the law of this state....

It also ignores the Washington courts' longstanding and broad equitable power in enforcing a parent's support obligation, even a foreign judgment:

It is our view that, on account of the character of a judgment for alimony, which rests, to some extent, upon public policy, in requiring a husband to support his wife and children, due to the sacred human relationship, and that they may not become public charges and derelicts, the decree for alimony, with the extraordinary power of enforcement by attachment and contempt proceedings, should be established and enforced by our equity court, which has full and sole jurisdiction of all matters of divorce and alimony; because to hold that a foreign judgment for alimony can be enforced in this state only by execution, the same as judgments at law, would be to impair or to deprive a foreign judgment for alimony of its inherent power of enforcement by attachment and contempt proceedings.

Shibley v. Shibley, 181 Wash. 166, 171, 42 P.2d 446 (1935).

Even under the misguided application of the law that Lewis suggests, with the judgment in the hands of a true third party assignee, courts have retained the equitable nature of these debts.

In *Smith v. Child Support Enforcement*, 180 B.R. 648 (1995) the United States District Court for Utah held that, in a Chapter 13 bankruptcy proceeding, a past due child support obligation assigned to a third party private collection agency was not dischargeable under the theory of a “true” assignment, but was rather an assignment for collection purposes. 180 B.R. at 652. In reasoning as such, the Smith court highlighted that (1) there was a direct benefit to the former spouse from the collected funds (as opposed to the assignment operating to pay off another of the former spouse’s creditors); (2) the former spouse was not indebted to the third party prior to executing the agreement for collection with the third party, (3) the former spouse did not receive anything from the third party in exchange for executing the agreement (4) the third party did not have the power to discharge or compromise the debt, and (5) the third party agency would not profit if the debt was not collectible. Id., at 653.

Under the terms of Mammen’s agreement with Amerikids, all of these factors against a “true” assignment are present: (1) Minus the contingency fee to Amerikids, Mammen will receive the collected funds directly. (2) Mammen was not indebted to Amerikids prior to the agreement. (3) Mammen received nothing from Amerikids for executing the agreement. (4) Amerikids’ power of attorney does not allow it to discharge or compromise the debt owed to Ms. Mammen. (5) Amerikids

is entitled to reimbursement of legal fees, but will not profit if no money is collected from Lewis. Lewis states that the characterization of these debts by a bankruptcy court is not relevant. It is relevant in its showing the protection that is afforded past due support obligations in other jurisdictions.

True assignments of past due support have been approved by other jurisdictions. For example, in *State v. Sucec*, the Utah Supreme Court held that “a debt for past-due child support is assignable by the person who provided the support to a private collection agency.” 924 P.2d 882, 886 (Utah 1996). In *Sucec*, the custodial parents received Aid to Families with Dependent Children (AFDC) benefits from the Office of Recovery Services (ORS) of the Department of Human Services of the State of Utah. In order to do so, under Title IV-D of the Social Security Act, the custodial parents assigned their rights to support to the State of Utah. During the times they were not receiving AFDC benefits, the custodial parents assigned their past-due child support claims to a private support collection agency, CSE. CSE later moved to intervene in the paternity actions against the non-custodial parents in order to enforce the assignments from the custodial parents. ORS objected to the intervention. The *Sucec* court held, *inter alia*, that custodial parents could assign their past due child support claims to a private collection agency and that CSE

was properly allowed to intervene to enforce the assignment. *Sucec*, 924 P.2d at 885. “Because the right to reimbursement belongs to the person who provided the support, that person is free to assign the debt, just as she is free to discharge, settle, or negotiate the debt.” *Id.*, at 886.

Similarly, in *Marriage of Paul*, 978 P.2d 136 (Colo. App. 1998), the Colorado Court of Appeals ruled, *inter alia* that an assignment by mother of past-due child support to child’s step-father was valid, specifically agreeing with the analysis in *Sucec*, *supra*.

These cases demonstrate that, from a public policy standpoint, other jurisdictions allow assigned support to retain its character and thus allow the obligee flexibility in meaningfully collecting the debt. Like the other cases, Mammen is being paid back for the expenditure of her own funds which she used in lieu of support from Lewis. The debt should be Mammen’s to do with as she pleases, even to truly assign it to another.

Moreover, even the use of the court’s contempt powers to enforce assigned judgments has been approved by other jurisdictions and is not barred by UIFSA. In *Hamilton v. Regan*, a case with very similar facts to this case, the Utah Supreme Court stated:

[T]his court has permitted the assignment of judgments for past-due child support to both governmental and private entities for collection purposes. *State v. Sucec*, 924 P.2d 882, 886 (Utah 1996). We have never held, however, and now **explicitly decline to hold, that such judgments lose their fundamental character as instruments of family support subject**

to the statutory and equitable enforcement powers of the courts. The policies favoring enhancement of the enforceability of such judgments through assignment for collection likewise favor retention of broad judicial enforcement powers.

938 P.2d 282, 284 (Utah 1997) (emphasis added).

In *Marriage of Paul, supra*, the Colorado Court of Appeals cited Sucec and “reject[ed] father’s related contention that stepfather could not use wage assignments and invoke the court’s contempt powers in his attempt to enforce collection of the past due amounts owed.” 978 P.2d at 140.

Lewis’s arguments regarding the involvement of an “unregistered foreign corporation” fail for two reasons. First, Amerikids is not the real party in interest in this matter. Second, Lewis shows no actual prejudice to him by the involvement of Amerikids in this case. This is simply a red herring argument that the court should ignore.

From a policy standpoint, support debts like Mammen’s simply must retain their family support character and the creditor must have the corresponding ability to use the power of contempt. Otherwise, Mammen and others in her situation would be placed into a “Catch-22”. Mammen would have huge arrears which she would lack the ability to collect without the assistance of an entity like Amerikids. If she “assigned” the debt for collection purposes, or even enlisted the mere assistance of an

entity like Amerikids, she would risk the debt losing its fundamental character as support. This would allow debtors like Lewis the ability to rest upon the defense rejected by the court in the contempt proceeding below —“I can’t pay”—or discharge the debt in bankruptcy, both outcomes the legislature tries to prevent by characterizing support debts in a certain way.

If Mammen’s support judgment becomes unenforceable under UIFSA by the involvement of a third party in this case, the effect will be to reward those who avoid their support obligations, and punish those who lack the means on their own to enforce their support obligations. It is not Mammen’s fault that Lewis’s failure to pay placed her in the position of entering the agreement with Amerikids. Nor has Lewis identified any prejudice or damage to him by Amerikids’ assistance to Mammen.

The trial court acted within its discretion in awarding attorney’s fees to Mammen.

Lewis’s brief concedes that he is not seeking review of the merits of the order of contempt but rather the awards of attorney’s fees on the basis of means and ability to pay. Brief of Petitioner, p. 12, n. 7. He then proceeds to attack the constitutionality of the statute regarding due

diligence. The issue of Lewis's compliance with the court's orders is not the subject of this appeal and should not be considered by this court.

An award of attorney's fees under RCW 26.18.160 does not require an analysis of need and ability to pay. The decision to award attorney's fees is within the trial court's discretion. *Crosetto v. Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). The party challenging the trial court's decision bears the burden of proving the trial court exercised its discretion in a way that was "clearly untenable or manifestly unreasonable." *Id.*, 82 Wn. App. at 563. Lewis cannot maintain his burden of proving that the trial court's award of attorney's fees was clearly untenable or manifestly unreasonable.

The commissioner's order awarding attorney's fees and the order on revision contained sufficient findings of fact for this court to uphold the trial court's exercise of discretion in awarding fees to Mammen. This court should not disturb the trial court's decision.

Mammen should be awarded attorney's fees for this appeal.

Mammen requests attorney's fees on appeal under RAP 18.1 and RCW 26.18.160, which states:

In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

Mammen is thus entitled to her attorney's fees on appeal as the prevailing party. Under RCW 26.18.160, no finding of need or ability to pay need be made for the court to award attorney's fees.

Lewis is the obligor under the support order. Even if Lewis prevails on appeal, he cannot recover his attorney's fees unless the court finds that Mammen has acted in bad faith in connection with the proceeding.

Lewis has utterly failed his obligation to financially support his children. Mammen did so without his financial support and now seeks to claim what has been rightfully hers under process of law. It can hardly be said that she has proceeded in bad faith.

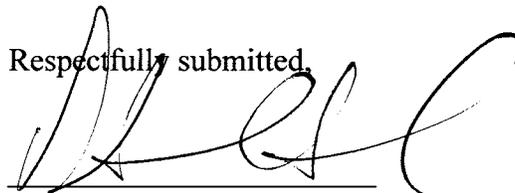
Lewis cites RCW 4.84.185 to support an award of his attorney's fees. However, an action must be "wholly frivolous" to support an award of attorney's fees under RCW 4.84.185. *In re MacGibbon*, 139 Wn.App. 496, 505, 161 P.3d 441 (2007). An action by Mammen to recover child support unpaid for decades is not wholly frivolous.

E. Conclusion

This court should affirm the decision of the superior court denying Lewis's motion to vacate and dismiss and award Mammen her attorney's fees upon appeal.

Dated this 8th day of February, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter D. Haroldson', written over a horizontal line.

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