



TABLE OF CONTENTS

- I. ASSIGNMENTS OF ERROR
  - a. Assignments Of Error.....iii
  - b. Issues Pertaining to Assignments of Error.....iii
- II. STATEMENT OF THE CASE.....1-6
  - a. Summary of Argument.....6-8
  - b. Application of Law
    - i. Standard of Review.....8
    - ii. Respondent Did Not Adhere to Due Process..8-9
    - iii. Default Judgment for Modified Child Support Order Does Not Reflect the Historic or Current Evidence of Appellant’s Income.....9-10
    - iv. Appellant is Entitled to Have the Default Order for Child Support Vacated.....10-13
- III. CONCLUSIONS.....13-14

**TABLE OF AUTHORITIES**

**CASES**

*Morin v. Burris*, 106 WA 2d 745, 161 P.3d 956 (2007).....8, 10, 11

*Bevan v. Meyers*, Wn. App. ,334 P.3d 39, 44 (2014) .....10, 13

*In Marriage of McLean*, 132 Wn.2d 301, 937 P.2d 602 (1997).....9, 13

*In re Marriage of McCausland*. 159 Wn.2d 607, 611, 152 P.3d 1013  
(2007).....10

*Tiffin v. Hendricks*, 44 Wash.2d 837, 847, 271 P.2d 683 (1954).....11

*White*, 73 Wash.2d at 352, 438 P.2d 581 .....12

*Hull*, 17 Wash. 352, 49 P. 537) .....12

*Trickel*, 52 Wash. 13, 100 P. 155 .....13

**STATUTES**

RCW 26.19.011(1) .....10

RCW 26.19.071(6).....8, 13

**RULES**

CR 60.....6, 8, 10, 11

CR 55(c) .....10, 11

## A. ASSIGNMENTS OF ERROR

### Assignment of Error No. 1

The court erred in denying the Appellant's motion to vacate the default order.

### Assignment of Error No. 2

The court erred in accepting imputed income of Appellant rather than historical and current data of Appellant's income.

## B. Issues Pertaining to Assignments of Error

1. Did Respondent make a reasonable effort to serve the Appellant in an effort to uphold Due Process laws?
2. Did the court adhere to statutes and case law governing setting and modifying the Child Support Order?
3. Is Appellant entitled to have the default order pertaining to child support vacated pursuant CR60 and ruling case law?

## II. STATEMENT OF CASE

On September 24, 2013, Respondent filed a Summons and Petition for Modification of Child Support (CP 1-6), Proposed Child Support Worksheets (CP 7-11), Sealed Financial Source Documents (CP 12-20), and Declaration of Mailing (CP 21). The Declaration of Mailing listed an address that does not exist (CP 148-153).

The reason the address does not exist but was used by Respondent via her attorney is because the address on the prior Child Support Order drafted by Appellant's attorney at the time listed the address incorrectly. Appellant admits he failed to notice the missing number from the street address. Appellant also admits he moved from the Corbett address approximately three years prior to the service but failed to update the court with his current address/s. However, the Division of Child Support had Appellant's current address at all times and remained in email contact for various communications up until about February 2014 when there was a new case manager assigned to the case. It is also important to note that the Parenting Plan required Appellant to keep Respondent apprised of his address at all times, which he did. In fact, before any visitation with Appellant's daughter, Respondent would ask for the Appellant's current address. Appellant mistakenly believed that keeping the Division of Child

Support apprised of his current address was sufficient and simply didn't think about or remember to notify the court. Appellant was not hiding, and he had to speak or email with Respondent from time to time regarding visitation pickups and drop-offs. Appellant acknowledges he made a mistake by neglecting to keep the court updated as to his current address. However, he did keep Respondent and all of their children apprised as to his current address (CP 76-147).

Although Respondent and Appellant communicated regularly regarding visitations and Appellant always shared his current address with Respondent and their children, Respondent relied solely on an incorrect address for service. In the five month period between the initial service and the Default Judgment hearing, neither Respondent nor her attorney made any effort to obtain the correct address of Appellant. In fact, it appears as if they intentionally relied upon an address they knew did not exist. In all, Respondent through her attorney filed three Declarations of Service; all to an address that did not exist. Both Respondent and her attorney had Appellant's phone number and his email address (CP 76-147) and could have contacted him at anytime.

In addition to Appellant sharing his address with Respondent, Respondent and her attorney simply had to call or email the Division of Child Support for Appellant's current address.

It is also important to note that Appellant, during 2013, tried through the Division of Child Support and through requests to Respondent and her attorney to modify the child support order because he was still paying for two children, one of which turned eighteen and moved out. This fact further indicates that the Respondent's use of the incorrect address may have been intentional. Certainly, Respondent's and her attorney's choice not to look further than one court document for the correct address was intentional. In fact, the Notice of Withdrawal filed by Appellant's attorney in 2011 did have the correct address – a copy of which was served on the court and the Respondent's attorney.

Regardless of the motivations of the Respondent to rely on an address that does not exist, the fact remains a default order was entered against Appellant in February 2014 (CP 53-54) and Appellant was unaware of the default order until September 2014. Unfortunately, it was during this time (February 2014) that the Division of Child Support case worker was changed – without the knowledge of Appellant. It was not until September 2014 that Appellant learned that the child support had

been modified. He learned this when he received a letter from the Oregon Division of Child Support, which threatened to suspend his driver's license (CP 76-147). Since Appellant was working as a United States Postal Worker, he needed his driver's license to keep his job. He called the Oregon Division of Child Support to learn not only that his case had been transferred to Oregon for enforcement but that a default judgment had been entered against him retroactive to September 2013, which resulted in thousands of dollars of unpaid child support, which kept accruing until he learned of the judgment in September 2014 (CP 76-147). Appellant also called and emailed the Washington Division of Child Support to learn the case manager was changed and that the current case manager could not explain why so much back support accrued without notifying him. She did not have an answer. She didn't know. Perhaps it was because the case was transferred to Oregon for enforcement.

As soon as Appellant learned of the default order, he contacted both Respondent and her attorney and offered to do a modification based on his current income, if they agreed to vacate the default order. They refused. Appellant, after speaking to several attorneys, found and hired an attorney to file a motion to vacate the default judgment who accepted credit cards. Appellant's attorney was paid on October 23, 2014. Unfortunately, between Appellant's attorney's schedule and the holidays,

the motion did not get heard until January 2015; however, still before the time period expired to vacate a default judgment.

Although Respondent relied solely on service to an address that did not exist and imputed income for Appellant that was/is drastically higher than his historic income, the court denied the motion to vacate the default judgment (CP 223-224).

Because Appellant is required to maintain a current driver's license in good standing to keep his job this has created a severe hardship for him and his current family of three. The current child support and back support obligation leaves little left over for living expenses, and since Appellant's domestic partner of nine years is having health problems, he is the sole wage earner.

The fact is Appellant welcomed a modification in September 2013 and wants to pay what is fair and just as he loves his children. Respondent could have notified Appellant of the modification proceeding but chose not to.

Since the economy took a downward turn in 2008, Appellant has had a very difficult time finding and keeping full-time work but rarely missed a monthly support payment. Since the economy has been

recovering, he maintains a full-time job that fits his skill set but the financial burden of the default child support order is not sustainable, equitable, nor just.

Appellant filed a timely appeal.

**i. SUMMARY OF ARGUMENT**

There are four basic arguments in this case. One, did Respondent, through her attorney, meet the threshold for Due Process? Two, was it proper to impute an income that is not in line with Appellant's earning potential based on historical and current data? Three, did Respondent have any supporting evidence that allowed them to modify the child support order? Four, is Appellant entitled to have the default order vacated per CR 60?

Due Process is important because it helps to ensure that all parties have a chance to represent their interests in court. While Respondent did serve Appellant using certified mail, they did not make any effort to determine the correct address of Appellant in the five month period since they began the process. Case law does not support the method of service utilized by Respondent.

Imputing income for child support is not the preferred method of setting a child support order. Washington State has a child support

worksheet that ensures the support obligation is fair and just. The fact that Respondent did not have any supporting documentation that Appellant's historic and/or current wage earnings matched the imputed income level should have disqualified Respondent from using an imputed wage. In addition, certain factors need to be taken into consideration such as Appellant's education and age. Appellant only has a High School education, and he is 48 years old, which has a real and true impact on his ability to find high paying jobs.

Child Support Orders may be modified when there is a showing of "substantial changes of circumstances". Child Support Orders may be modified every 24 months when a change in income can be shown without showing drastic changes in circumstances. The Respondent did not show either a substantial change in circumstances or a change in income. Without evidence of Appellant's change in income or a substantial change in circumstances, a modification proceeding should not have even taken place.

Default orders are not looked upon positively by the Washington State Courts for good reason. When a default judgment is entered that means one party does not have representation during a court proceeding. For this reason, the courts liberally vacate default orders. In this case, the default order was obtained by an irregular effort to meet Due Process

requirements. The order does not accurately reflect the historic and current evidence regarding Appellant's wages. The order was obtained without Respondent showing a substantial change in circumstances or a change in income. Due Process, service, was done via certified mail to an incorrect, non-existent, address, which was obtained from the old Child Support Order, which was mistakenly left "incorrect" by Appellant who simply didn't notice that his attorney at the time had put in the wrong address. Appellant also failed to notify the court of his new address/s when he moved – this was not an intentional act, but a mistake and excusable neglect on the part of Appellant. Under CR 60, the facts and/or lack of facts in this case support vacating the Default Child Support Order.

#### **A. APPLICATION OF LAW**

I. *Standard of Review.* A superior court's decision regarding a motion for a default judgment and a motion to vacate a default judgment are reviewed for abuse of discretion. Abuse of discretion is found if the court acted in a manner that exercised on untenable grounds or for untenable reasons. *See Morin v. Burris*, 106 WA 2d 745, 161 P.3d 956 (2007).

#### **II. Respondent Did Not Adhere to Due Process**

The trial court abuses its authority when it enters a default judgment that has not met Due Process requirements. *In Marriage of McLean*, 132 Wn.2d 301, 937 P.2d 602 (1997), the court held that due process only requires notice that is “reasonably calculated under all circumstances to apprise a party of the pendency of the action and provide an opportunity to be heard.”

In this case, Respondent relied solely on an address they knew did not exist. There can be no doubt that the Respondent and her attorney knew Appellant would not and did not receive any of the notices sent to a non-existent address because all of the notices were returned marked “NSN” and “Return to Sender, No Such Number, Unable to Forward, Return to Sender” (CP 148-153). Under these circumstances, it is reasonable for Respondent to inquire further as to Appellant’s current and correct address. *In re Marriage of McLean* further states that with supporting circumstances “that if a petitioning parent mails pleadings in child support modification proceedings to a valid address the nonpetitioning parent will receive them.” In Appellant’s case, circumstances do not support that he will receive the pleadings and more importantly *In re Marriage of McLean* specifically distinguishes between a non-valid address and a “valid address.”

**III. Default Judgment for Modified Child Support Order Does Not Reflect the Historic or Current Evidence of Appellant’s Income**

In Appellant's case, the court used imputed income (CP 28-33). According to RCW 26.19.071(6), imputed income may only be used if the parent is found to be voluntarily underemployed or unemployed. The trial court must evaluate work history, education, health, age, and any other relevant factor when determining whether a parent is voluntarily underemployed or unemployed. This clearly was not done even though the court already had Appellant's historic earnings, age, educational background, etc. as a matter of record associated with the previous child support order. Respondent did not and could not show a change because there was none. If the evidence and/or record do not support voluntary underemployment or unemployment, then income cannot be imputed.

“Chapter 26.19 RCW directs the trial court to set the basic child support obligation based on the parents' combined monthly net income and the number and ages of the children ‘for whom support is owed.’ RCW 26.19.011(1), .020; *In re Marriage of McCausland*. 159 Wn.2d 607, 611, 152 P.3d 1013 (2007).” See *Bevan v. Meyers*, Wn. App. ,334 P.3d 39, 44 (2014).

#### **IV. Appellant is Entitled to Have the Default Order for Child Support**

##### **Vacated**

The Washington Supreme Court in *Morin v. Burris*, 161 P.3d 956 (2007) states, “This court has long favored resolution of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice.

Similarly, if default judgment is rendered against a party who was entitled to, but did not receive, notice, the judgment will be set aside. Tiffin v. Hendricks, 44 Wash.2d 837, 847, 271 P.2d 683 (1954).”

It is clear that the Washington Supreme Court believes that in cases like the Appellant’s that the default judgment should be vacated for both of the reasons stated above. Appellant was not notified of the pending action because service was sent to an address that did not exist, and Respondent made absolutely no effort to serve Appellant properly. In addition, it is reasonable to believe that Respondent would insist on and be given Appellant’s current address for visitation purposes. Respondent and her attorney had Appellant’s phone number and email address. The three children, two adults now, all had Appellant’s current address. It is reasonable and logical to conclude that Respondent and her attorney did not want to serve Appellant properly, but instead relied solely on an address they knew did not exist (CP 21).

In addition to a lack of proper service, the Supreme Court makes it abundantly clear that “This court has long favored resolution of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice.” See *Morin v. Burris*, 161 P.3d 956 (2007). The default order grossly lacks fairness and justice.

Appellant also meets the requirements of the four part test for setting aside default judgments as set forth in White, 73 Wash.2d at 352, 438 P.2d 581 (citing Hull, 17 Wash. 352, 49 P. 537):

“(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.”

Appellant produced tax returns and check stubs to verify his income at the time of the motion to vacate and his income at the time Respondent began the proceeding dating back two years (CP 154-160). This satisfies the first part of the four part test.

Appellant mistakenly, through excusable neglect, forgot to update his address with the court. However, he did keep Respondent and the Division of Child Support updated with his current address at all times. This satisfies the second part of the test.

The third part was satisfied by Appellant because as soon as he knew about the default order he began taking steps to deal with it, which led to a motion to vacate. This was accomplished within one year and as soon as his attorney was able to set the motion for hearing (CP 76-147). Appellant

certainly wanted this addressed as quickly as possible as it is an extreme hardship.

The fourth and final part of the test is satisfied because Respondent is being overpaid what the support should be. Additionally, Appellant only seeks a credit against future support obligations not a lump sum pay back (CP 148-153).

Finally, the courts support vacating a default judgment if the Respondent (in this case) has done something creating an inequity. See *Trickel*, 52 Wash. 13, 100 P. 155. By imputing an income that grossly exaggerates Appellant's true income and earning potential, Respondent has created an extremely inequitable situation.

#### **IV. CONCLUSION**

Respondent violated Due Process because her action did not "reasonably calculated under all circumstances to apprise a party of the pendency of the action and provide an opportunity to be heard." See *In Marriage of McLean*, 132 Wn.2d 301, 937 P.2d 602 (1997).

Respondent imputed income without satisfying the statutory requirements of RCW 26.19.071(6) and the court's ruling in *Bevan v. Meyers*, Wn. App. ,334 P.3d 39, 44 (2014). An income was imputed that conflicts with the court records

before this proceeding and with the current court records that are part of this proceeding.

Appellant asks this court to overturn the trial court's decision and vacate the Default Child Modification Order of February 2014 and order the overpayment of support since the Default Order was entered to be credited to Appellant toward future child support obligations.

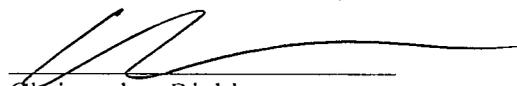
Appellant requests attorney's fees just for the trial court portion (CP 195-197)

I, Christopher Riehle, Declare Under Penalty of Perjury that and the information contained within this document are true and correct to the best of my knowledge. 

Christopher Riehle

Dated July 24, 2015

Respectfully Submitted by,



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Division II

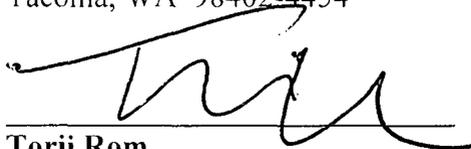
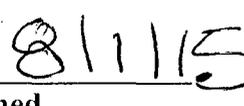
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Christopher Riehle ) Kitsap County No. 07-3-00730-5  
Petitioner ) Court of Appeals No. 47230-9-II  
v. ) **Declaration of Service (U.S. Mail)**  
Paula Murphy )  
Respondent )

I, Torii Rom, declare that I am over 18, and placed the following documents, including this Declaration of Service regarding the above-stated case, in the United States Mail, to the following addressee's listed below:

Appellant's Brief – Resubmitted with numbering

Washington State Court of Appeals - - Todd Buskirk  
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