

FILED
Court of Appeals
Division II
State of Washington
4/3/2018 1:12 PM

No: 51164-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROSABLANCA BEINHAUER, Respondent

v.

MARK BEINHAUER, Appellant

REPLY BRIEF OF APPELLANT

Robert B. Taub
Attorney for Appellant

4002 Tacoma Mall Blvd., #203
Tacoma, WA 98409
253.475.3000
WSBA#900

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

I. INTRODUCTION.....1

II. ARGUMENT.....1

 1. The order of June 6th, 2017 denying contempt does not prohibit Mark’s collection of child support arrears.....1

 2. If the order of June 6th, 2017 were understood to prohibit Mark’s collection of child support arrears, then it is within the scope of review for this appeal.....8

 3. Mark’s writs of garnishment should not have been quashed and he should not have been enjoined from further attempts to enforce his right to child support arrears.....9

 4. The attorney fees and CR 11 sanctions imposed against Mark should be overturned.....12

 5. Attorney fees and CR 11 sanctions should be imposed against Rosablanca in favor of Mark.....14

III. CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

<i>Casa del Rey v. Hart</i> , 31 Wn.App. 532. (1982).....	4
<i>In re The Marriage of Capetillo and Kivett</i> , 85 Wn.App. 311 (1997).....	5,6,7
<i>Marriage of Glass</i> , 67 Wn.App. 378, at 389 (1992).....	3
<i>In re Marriage of Hunter</i> , 52 Wash.App. 265 (1988).....	6
<i>Pace v Pace</i> , 67 Wn.2d 640 (1965).....	3,4
<i>Puget Sound Plywood, Inc. v. Master</i> , 86 Wn.2d 135 (1975).....	15
<i>Schafer v. Schafer</i> , 95 Wn.2d 78 (1980).....	6
<i>Valley v. Selfridge</i> , 30 Wn.App 908 (1982).....	2

Statutes

RCW 3.66.020.....	10
RCW 6.27.020.....	9
RCW 6.27.060.....	11
RCW 6.27.070.....	11
RCW 6.27.100.....	10
RCW 26.18.160.....	13,15

Court Rules

RAP 2.4 (b).....8
CR 8 (c).....5
CR 1112,13,14

I. INTRODUCTION

The issues in this case relate to the attempt by appellant Mark Beinhauer (hereinafter referred to as “Mark”) to collect child support from respondent Rosablanca Beinhauer, his former wife, now known as Rosablanca Abardo (hereinafter referred to as “Rosablanca”). After considering the response brief of Rosablanca, Mark offers the following reply.

II. ARGUMENT

1) **The order of June 6th, 2017 denying contempt does not prohibit Mark’s collection of child support arrears.**

The main argument in Rosablanca’s response brief is that the commissioner’s order of June 6th, 2017, CP 80-81, prohibits collection of the child support arrears and the order can no longer be reviewed on appeal, therefore Mark’s subsequent attempts at collection had no basis. This argument has two fundamental flaws. First, the order of June 6th, 2017 does not prohibit enforcement of the child support arrears. Second, if the order did make such a prohibition, then the June 6th, 2017 order would fall under the scope of the present review.

The June 6th, 2017 order denied Mark’s motion for contempt and his request for a consolidated judgment and attorney fees. There is no

indication anywhere in that order or findings that it was meant to foreclose Mark's further efforts to enforce his right to the arrears, and Rosablanca cites no authority which would lead us to make such an assumption.

In fact, consolidated judgments for back child support are more a matter of convenience rather than a full blown determination of rights. For instance, in *Valley v. Selfridge*, 30 Wn.App 908 (1982) the court says:

Although a series of past-due support installments may be reduced to a judgment, it does not follow that this judgment is in lieu of the original judgment that vested on the date the support was due. Rather, the lump-sum judgment is an ancillary proceeding to clarify the amount where there is a question as to the amount of arrearage.

It would be both absurd and unjust if a moving party risked their ability to collect back child support simply by requesting a consolidated judgment when they could just choose to enforce the underlying judgments instead. Another reason we should not read such a drastic meaning into the commissioner's refusal to grant a consolidated judgment is because such an order would violate the law against retroactive modifications of child support.

As was stated in Mark's initial brief on this matter, supported by a long history of case law, and acknowledged by Rosablanca in her response, courts generally may not retroactively modify child support

orders, and therefore may not reduce accrued child support arrears. See *Marriage of Glass*, 67 Wn.App. 378, at 389 (1992), or *Pace v Pace*, 67 Wn.2d 640 (1965). To hold that the commissioner's order impliedly did just that by denying Mark a consolidated judgment and that we are somehow now stuck with that result as "the law of the case" is absurd.

One of the cases cited in Mark's earlier brief is very similar to this case. See *Pace v. Pace*. The courts have made it clear that earlier orders, even final orders that have not been appealed, may not be construed to bar enforcement of past due child support. This is because allowing such an interpretation would effectively sanction retroactive modification of child support.

In *Pace v. Pace*, Albert Pace was ordered to pay Betty Pace child support in their divorce decree issued August 8th, 1960. On June 26, 1964, Betty obtained a judgment for past due child support in the amount of \$1,497.20. Albert then secured a modification on October 20, 1964. The modification reduced his future obligations and also ordered that arrears are to be paid back at \$50.00 per month. No appeal was taken from the October 1964 order.

When Betty obtained a writ of garnishment based on her June 26th, 1964 judgment, Albert moved to dismiss. He claimed the October order,

which was never appealed, provided the sole means for Betty to recover the arrears, namely at \$50.00 per month. The court held otherwise, stating:

Appellant misconstrues the effect of the order of October 20, 1964. That order could not and did not purport to provide the exclusive method by which respondent could collect her judgment. The effect of the order was rather to provide a means whereby the appellant could pay the judgment for accumulated support payments on an installment basis without being subject to contempt proceedings. The failure to appeal from the order of October 20 did not deprive respondent of the usual means of enforcing her judgment.

Internal citations omitted

In the present case, Mark is relying on each child support payment becoming a “final judgment as it became due and unpaid” *Casa del Rey v. Hart*, 31 Wn.App. 532. (1982) Mark should be allowed to collect on his judgments regardless of the order of June 6th, 2017 denying contempt, just as Betty Pace was allowed to collect on her judgment from June 26th 1960 regardless of the payment plan ordered in October 1964.

The one exception to the law against retroactive modification of child support is the doctrine equitable relief. As discussed in Mark’s initial brief, this is an extremely narrow exception that requires a significant showing on the part of the debtor. There is no indication in the June 6th, 2017 order or findings that the commissioner granted or even considered

such relief, nor is there any such indication in the order or findings on revision. CP 84. Rosablanca never requested equitable relief in her pleadings and the evidence she supplied would have failed to establish it. CP 64-65, CP 66-71. Washington Court Rule CR 8 (c) requires that a party specifically set forth affirmative defenses in responsive pleadings including requests for equitable relief such as laches or estoppel. No such defenses were pled in this case.

In fact, Rosablanca refers to equitable defenses for the first time in her response brief on this appeal. She states equitable defenses were the subject of litigation during the June 6th contempt hearing, but she cites nothing in the record to support this statement. Even in her response brief she fails to identify what equitable relief she was seeking.

There are three equitable defenses that have been recognized in child support cases. Laches requires the obligor show 1) the obligee had knowledge of facts constituting a cause of action, 2) he or she unreasonably delayed commencing the action, and 3) the obligor is damaged as a result of the delay. *In re The Marriage of Capetillo and Kivett*, 85 Wn.App. 311, 319 (1997).

Equitable estoppel requires the obligor to show 1) the obligee states something, or acts in a way that is inconsistent with a later claim, 2) the obligor acts in good faith on this statement or action, and 3) the obligor

would be injured if the obligee is allowed to contradict their act or statement and proceed with their claim. *Capetillo* at 320.

Equitable credit requires that the obligor show he or she provided for the child for an extended period of time and asks that those costs be credited against their back support. The obligor must also show special circumstances of an equitable nature, and that the result does no injustice on the obligee. *Schafer v. Schafer*, 95 Wn.2d 78 (1980).

The case record would not support any of these defenses, but it's actually more difficult yet. In the case of laches "Absent unusual circumstances, the doctrine of laches should not be invoked to bar an action short of the applicable statute of limitation." *In re Marriage of Hunter*, 52 Wash.App. 265 (1988). Mark filed his case within the statute of limitations for child support enforcement. Equitable estoppel is not favored and requires the party who claims it to prove it by clear, cogent, and convincing evidence. *Capetello* 320. The evidence in the record doesn't establish equitable estoppel by any standard, let alone by clear, cogent and convincing evidence.

For any equitable defense to the payment of back child support, "Equitable relief from past-due support obligations should be limited to those cases where enforcement would create a severe hardship on the obligor-parent and where the facts support traditional equitable remedies."

Capetillo, 319. There is nothing in the record to show Rosablanca would suffer a severe hardship, or that the facts support equitable remedies.

Rather than clearly alleging the equitable defenses Rosablanca now claims were adjudicated in the hearing for contempt, her responsive pleading to Mark's motion for contempt consists of one poorly supported wild and irrelevant allegation after another. Rosablanca alleges Mark threatened to burn their house down. CP 67. Since Mark was awarded the house in the dissolution, this alleged threat was presumably made at that time, long before Mark was awarded custody of their son. What equitable defense does this support? Rosablanca claims Mark offered to settle his claim for back child support if she dropped her claim for his retirement. CP 68. In addition to violating the rules of evidence, what equitable defense does this support? Rosablanca claims Mark refused to help their adult son while he was in jail. CP 69. How does this establish equitable relief is necessary? Rosablanca says Mark had a relationship with their son's ex-girlfriend. CP 69. How is that a claim for equitable relief? It's clear Rosablanca threw every allegation she could in response to Mark's motion. None of them support equitable relief.

Mark's initial brief addresses equitable relief for the sake of a thorough analysis of the issue. It was certainly not included because the

order, findings, or pleadings associated with Mark's motion for contempt had anything what-so-ever to do with equitable relief.

2. If the order of June 6th, 2017 were understood to prohibit Mark's collection of child support arrears, then it is within the scope of review for this appeal.

Even if the underlying order of June 6, 2017 were understood to grant Rosablanca equitable relief, or in some other way to preclude Mark from collecting on the child support arrears, it is not the case that such an order is beyond review. Such an order would prejudice Mark's efforts to enforce the child support order and would therefore be within the scope of this appeal according to RAP 2.4 (b).

The pertinent portion of this rule reads:

Order or Ruling Not Designated in Notice.
The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review...

If the order denying Mark's request for a consolidated judgment acts as Rosablanca claims it does in her response brief, then it clearly falls within the above rule. It would prejudicially affect the decision designated

in the notice, and the order was entered before the appellate court accepted review.

In the event this court does deem it necessary to review the order of June 6, 2017, Mark simply repeats his argument that the only legal way for Rosablanca to avoid her child support debt would be equitable relief, and he again points out the record before you does not support such a claim as a matter of law.

3. Mark's writs of garnishment should not have been quashed and he should not have been enjoined from further attempts to enforce his right to child support arrears.

Despite Rosablanca's argument to the contrary, the statutes are indeed ambiguous with regard to an attorney's authority to issue a writ of garnishment for child support arrears in Superior Court. In her response brief, pages 10-11, Rosablanca quotes RCW 6.27.020, one of the statutes at issue and claims:

There is no way to more clearly indicate that it's *only* in District Court that writs of garnishment can be issued under an attorney's signature "with like effect."
[emphasis hers]

Actually there is a clearer way. The legislator could have used the word "only" or any similar word. Instead the attorney's power to issue

writs in district court is well defined and the statute is silent regarding an attorney's power in Superior Court.

RCW 6.27.100 adds to the confusion stating changes that must be made for writs to collect child support and additional changes if an attorney issues the writ.

All other writs of garnishment shall be substantially in the following form, but if the writ is issued under an order or judgment for child support, the following statement shall appear conspicuously in the caption: "This garnishment is based on a judgment or order for child support"; and if the writ is issued by an attorney, the writ shall be revised as indicated in subsection (2) of this section

Rosablanca argues that this doesn't contribute to any ambiguity because the child support language is addressed separately from the "issued by an attorney" language, but it's clear both adjustments are addressed in the very same sentence. Also, note the "and." This certainly makes it sound like one can have a garnishment which is both based on an order for child support *and* issued by an attorney, but of course, child support orders are under the exclusive jurisdiction of Superior Court. See RCW 3.66.020 which lists the civil jurisdiction of District Court. Child support is not included.

Taken together, these statutes make it appear that an attorney may issue a writ of garnishment to collect child support in Superior Court. They certainly do not make it clear that an attorney may not issue such a writ.

Even if the garnishments should have been issued by the Clerk of the Court, it's difficult to tell what prejudice is supposed to have befallen Rosablanca. She claims in her response, with no statute or case law to back it up, that the Clerk of the Court would not have issued the writ at Mark's request. In fact, RCW 6.27.070 requires the clerk to issue a writ once an applicant satisfies the requirements of RCW 6.27.060, namely providing an affidavit of necessary facts and an administrative fee (in Pierce County it's \$20.00).

Affidavits identical to that required by RCW 6.27.060 were submitted by Mark's attorney of record in this case and filed on August 25th, 2017. CP 85-86, CP 87-88. All the same procedural tools were available to Rosablanca regardless of who issued the writ. The only difference was that Mark saved \$20.00. There is no procedural value to Rosablanca of Mark paying a \$20.00 fee.

Even if this court determines the garnishments should have been quashed on account of not being issued by the Clerk of the Court, Mark should still not be enjoined from future attempts to enforce his right to

back child support. As has been repeatedly explained in Mark's prior brief and now this reply brief, the court may not interfere with Mark's efforts to enforce his right to back child support as this would essentially be a retroactive modification of the child support order. Mark had a judgment against Rosablanca the moment each of those child support payments were due and unpaid.

The only way the court could have legally relieved Rosablanca of her duty to pay Mark is through the narrow exception of equitable relief, such as laches or equitable estoppel. These defenses are simply not supported in the record. Rosablanca fails to specifically claim she requested such defenses as required by the Civil Rules. Her pleadings fail to support such claims and the orders and findings issued by the court make no mention of equitable relief.

4. The attorney fees and CR 11 sanctions imposed against Mark should be overturned.

The statute on collection of attorney fees in child support cases requires that an obligor show the obligee acted in bad faith before they're considered the prevailing party for the purposes of being awarded attorney fees.

RCW 26.18.160 provides:

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.

There is no finding in any of the orders that Mark brought his enforcement actions in bad faith. Therefore, there should be no assessment of attorney fees against Mark. Likewise, there are no grounds for CR 11 sanctions to be imposed against Mark or his counsel.

CR 11 requires that every pleading, motion or legal memorandum be signed by an attorney of record, and the attorney thereby certifies that he or she has read the document and to the best of his or her knowledge, information and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is well grounded in fact;
- (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief...

Every pleading, motion, and legal memorandum filed by Mark in this case has been properly signed and follows each of these rules. They have been well grounded in fact, they are warranted by existing law, they are not interposed for any improper purpose and any denials of factual contentions are warranted on the evidence.

Rosablanca argues that Mark has somehow egregiously ignored the June 6th order denying contempt when he filed for writs of garnishment. As addressed in Mark's briefs, neither that order nor the order on revision said Mark could not enforce his child support arrears. Existing law clearly supports Mark's attempts at collection.

5. Attorney fees and CR 11 sanctions should be imposed against Rosablanca in favor of Mark.

If anyone should have CR 11 sanctions imposed against them, it's Rosablanca. Her declarations were full of salacious, false and irrelevant accusations against Mark. These allegations had no legal bearing on the case and were clearly included just to embarrass Mark and poison the

decision maker against him. She also submitted evidence of Mark's offer to compromise in direct opposition to the rules of evidence.

Mark is also entitled to attorney fees. Unlike an obligor, an obligee need not establish bad faith in order to get attorney fees and costs under the child support enforcement statute, only that he or she prevails. See RCW 26.18.160. As we have argued, Mark should have prevailed at each step of the way. Mark should also be entitled to attorney fees for this appeal. When fees and costs are authorized at the trial court level, they may also be had on appeal. See, e.g., *Puget Sound Plywood, Inc. v. Master*, 86 Wn.2d 135 (1975).

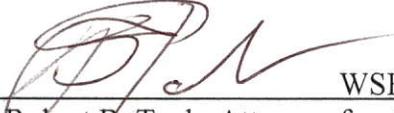
III. CONCLUSION

Rosablanca's arguments in her response brief are without merit because no claim for equitable relief was argued or appropriate and she fails to submit any supporting case law. Mark is entitled to recover the unpaid child support obligations by the usual methods of enforcement, including garnishment. As a prevailing obligee, Mark is also entitled to attorney fees and costs associated with his enforcement actions, and Rosablanca is not entitled to any for her defense.

Therefore, this court should reverse the Superior Court orders quashing the writs of garnishment and enjoining enforcement of child

support, allow Mark to collect the support he is owed, and award him the fees and costs he is entitled to.

Dated this 3rd day of April, 2018



WSBA # 900
Robert B. Taub, Attorney for Appellant



WSBA # 46344
Tobin Standley, Co-counsel for Appellant

FILED
Court of Appeals
Division II
State of Washington
4/3/2018 1:24 PM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 2

ROSABLANCA BEINHAUER,)
Respondent,)
and)
MARK BEINHAUER,)
Appellant)
_____)

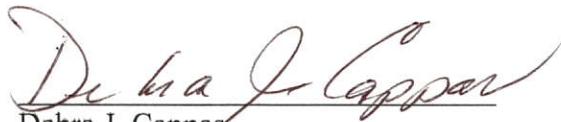
No: 51164-9-II

AFFIDAVIT OF
SERVICE

STATE OF WASHINGTON)
)ss:
COUNTY OF PIERCE)

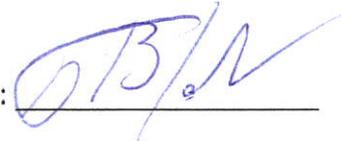
I, Debra J. Cappas, being first duly sworn, state that on March 3, 2018 I
emailed conformed copy of reply brief of appellant as follows:

John Mills
jmills@jmills.pro


Debra J. Cappas

SUBSCRIBED AND SWORN to before me this 3rd day of March,
2018.

Signature of
Notary Public:



Title: Notary Public, State of Washington

My appointment expires: March 1, 2021

Beinhauer appeal

Robert B. Taub

Tue 4/3/2018 1:08 PM

To: John Mills <jmills@jmills.pro>;

 1 attachments (4 MB)

Reply brief of appellant.PDF;

Attached is the reply brief of appellant.

Regards,

Debbie Cappas
Legal Assistant
Robert Taub & Associates
4002 Tacoma Mall Blvd., #203
Tacoma, WA 98409
253.475.3000

CONFIDENTIALITY NOTICE: This email message may be protected by the attorney/client privilege, work product doctrine or other confidentiality protection. **If you believe that it has been sent to you in error, do not read it. Destroy all copies of the original message.** It is intended only for the use of the person(s) named above. If you are not the intended recipient, you are hereby notified that any review, dissemination, distribution or duplication of this communication is strictly prohibited. The receipt by anyone other than the designated recipient does not waive the attorney-client privilege, nor will it constitute a waiver of the work-product doctrine. If you are not the intended recipient, please contact the sender by reply e-mail or by calling (253) 475-3000. Thank you.

ROBERT TAUB & ASSOCIATES

April 03, 2018 - 1:24 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51164-9
Appellate Court Case Title: In re the Marriage of: Rosablanca Beinhauer, Respondent v. Mark Beinhauer, Appellant
Superior Court Case Number: 97-3-02328-8

The following documents have been uploaded:

- 511649_Affidavit_Declaration_20180403132348D2217588_5183.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Affidavit of service.PDF

A copy of the uploaded files will be sent to:

- jmills@jmills.pro
- johnsmills@gmail.com

Comments:

Sender Name: Debra Capas - Email: taubfamilylawyers@msn.com

Filing on Behalf of: Robert B. Taub - Email: taubfamilylawyers@msn.com (Alternate Email:)

Address:
4002 Tacoma Mall Blvd., #203
Tacoma, WA, 98409
Phone: (253) 475-3000

Note: The Filing Id is 20180403132348D2217588

ROBERT TAUB & ASSOCIATES

April 03, 2018 - 1:12 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51164-9
Appellate Court Case Title: In re the Marriage of: Rosablanca Beinhauer, Respondent v. Mark Beinhauer, Appellant
Superior Court Case Number: 97-3-02328-8

The following documents have been uploaded:

- 511649_Briefs_20180403131144D2438224_2621.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply brief of appellant.PDF

A copy of the uploaded files will be sent to:

- jmills@jmills.pro
- johnsmills@gmail.com

Comments:

Sender Name: Debra Capas - Email: taubfamilylawyers@msn.com

Filing on Behalf of: Robert B. Taub - Email: taubfamilylawyers@msn.com (Alternate Email:)

Address:
4002 Tacoma Mall Blvd., #203
Tacoma, WA, 98409
Phone: (253) 475-3000

Note: The Filing Id is 20180403131144D2438224