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COURT OF APPEALS
DIVISION II
2018 MAR 19 PM 2:53
STATE OF WASHINGTON
BY 
DEPUTY

No. 51164-9-II

THE COURT OF APPEALS, DIVISION II

State of Washington

ROSABLANCA BEINHAUER,

Respondent

Vs.

MARK BEINHAUER,

Appellant,

RESPONDENT'S BRIEF

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COUNTER STATEMENT OF THE CASE

IMPORTANT FACTS

This case is a very old divorce case and pertains to collecting child support ordered in November of 2004. CP 44-54.

Mr. Beinhauer began *judicial* collection efforts January 20, 2017, some 13 years after the order was entered directing Ms. Beinhauer to make payments.

In the interim, there were sporadic efforts to collect administratively, which seem to have resulted in a 2015 agreement at CPS by which Ms. Beinhauer pays \$200 beginning January of 2016 and this appeal does not challenge any part of the administrative collection efforts.

To begin judicial collection efforts, Mr. Beinhauer filed a motion for finding of contempt and for entry of a judgment on January 20, 2017. CP 55-63. That motion was denied by a court commissioner on June 6, 2017. CP 80-81.

A revision was timely filed. The motion for revision was denied on July 25, 2017, (CP 84) and accordingly, the decision of the commissioner on the question of what, if any,

judgment for past due support was appropriate became a final, appealable decision.

No appeal was filed.

Instead of filing an appeal, a month later, on August 24, 2017 Mr. Bienhauer filed an affidavit for Writ of Garnishment, asserting that \$13,600 was due for back support along with \$13,355.97 due in back interest. CP 85-88.

A Writ of Garnishment was also filed on August 25, 2017; it was signed only by Mr. Bienhauer's attorney. CP 89-94.

Three days later, on August 28, 2017 copies of the affidavit and Writ were mailed to Ms. Bienhauer.

On September 12, 2017, Ms. Beinhauer's attorney obtain an ex-parte order staying collection via the Writ and setting a further hearing. CP 95-96.

All matters were heard on October 24, 2017 at which time, the Writ of Garnishment was quashed and sanctions imposed. CP 117-18.

A revision was denied on November 9, 2017 and from that order a timely appeal was filed. 121-22.

STANDARD OF REVIEW

What's been appealed in this case is an order dated November 9, 2017. That order denied a motion to revise a Commissioner's ruling dated October 24, 2017.

The Commissioner ruled, in part, that Writs of Garnishment were issued in violation of RCW 6.27.020 because Superior Court Writs must be issued by the Clerk and they were, in this case, issued by Mr. Bienhauer's attorney alone.

The question of whether RCW 6.27.020 authorizes only the Clerk of the Superior Court to issue writs of garnishment is a legal question; legal questions are reviewed de novo. See Kitsap County v. Kitsap Rifle & Revolver Club, 337 P.3d 328, 184 Wn.App. 252 (Wash.App. Div. 2 2014) (“The process of determining the applicable law and applying it to the facts is a question of law that we review de novo. Erwin v. Cotter Health Ctrs., Inc., 161 Wn.2d 676, 687, 167 P.3d 1112 (2007). We also review other questions of law de novo. Recreational Equip., Inc. v. World Wrapps Nw., Inc., 165 Wn.App. 553, 559, 266 P.3d 924 (2011)”).

The Commissioner also ruled that “Father is precluded from pursuing further collection action against the

petitioner until further order of the court.” This is, in substance, a legal determination that prior orders of the court bar Mr. Beinhauer from collecting back child support allegedly due.

Whether prior orders of the court in fact bar further collection of back support is also a legal question reviewed de novo. *Id.*

The orders from which appeal are taken all award sanctions pursuant to CR-11 and award attorney fees and costs. Such rulings are reviewed for abuse of discretion. *See Spice v. Pierce County*, 45476-9-II (Nov. 21, 2017) (“We review both the determination whether CR 11 was violated and the appropriateness of a sanction under it for an abuse of discretion. *In re Guardianship of Lasky*, 54 Wn.App. 841, 852, 854, 776 P.2d 695 (1989). A court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id.* A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported

facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id.*”)

APPLICABLE LAW and ARGUMENT

It is too late to appeal the question of whether back child support is owed or whether equity bars collecting back support.

Generally, child support payments become vested judgments as the installments become due. The accumulated child support judgments generally may not be retrospectively modified. In re Marriage of Stoltzfus, 69 Wash.App. 558, 561-62, 849 P.2d 685, *review denied*, 122 Wash.2d 1011, 863 P.2d 72 (1993).

However, in special circumstances, Washington courts will apply traditional equitable principles to mitigate the harshness of particular claims for retrospective support if it will not work an injustice to the custodian or the child. In re Marriage of Shoemaker, 128 Wash.2d 116, 122-23, 904 P.2d 1150 (1995); In re Marriage of Hunter, 52 Wash.App. 265, 270, 758 P.2d 1019 (1988), *review denied*, 112 Wash.2d 1006 (1989).

Mr. Bienhauer's briefing recognizes that principles of equity can cut off the right to collect child support. See appellant's brief at page 16-17 citing Marriage of Capetillo and Kivett, 85 Wn.App. 311, 319 (1997.)

The question of whether to apply these equitable principles and to deny Mr. Bienhauer a judgment for back support was the subject of the litigation from the date Mr. Bienhauer first filed his motion for contempt and for a judgment on January 20, 2017.

The application of these equitable principles undergirds the Commissioner's denial of Mr. Bienhauer's motion for finding of contempt; the Commissioner refused to enter a judgment as requested back on June 6, 2017 based on these principles of equity.

A timely revision of that Commissioner's order was filed, and – again considering the equities of Ms. Bienhauer's defense – the trial court declined to revise the Commissioner's order denying Mr. Bienhauer's request for back support. The order denying revision was entered back on July 25, 2017. That revision order was a final appealable order.

A party may appeal from "[t]he final judgment entered, in any action or proceeding." RAP 2.2(a)(1). A final

judgment is "a judgment that ends the litigation, leaving nothing for the court to do but execute the judgment."
Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 79 Wn.App. 221, 225, 901 P.2d 1060 (1995), aff'd, 130 Wn.2d 862, 929 P.2d 379 (1996) (citing Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)). (all cited with approval in an unpublished Division II decision: In re Marriage of Badkin, 43900-0-II (Nov. 2014)).

The only thing left in the case following the trial court's July 25, 2017 denial of Mr. Bienhauer's motion for revision was collection or enforcement action, and in fact *after* the trial court declined to enter a judgment for back support, Mr. Bienhauer simply set about trying to collect his judgment *as if* the Commissioner and trial court had granted his motion – rather than denying it.

Because all that was left following the denial of Mr. Bienhauer's motion for revision was enforcement, the July 25, 2017 revision order was a final appealable order.

No appeal was timely filed and the thirty days to appeal passed long before any appeal was filed in this case. Accordingly, those decisions are simply the law of the case, and are beyond challenge in this appeal.

Efforts to collect on a judgment the trial court has declined to enter are improper and a violation of CR-11.

Mr. Bienhauer asked the trial court to enter a judgment for past support. Based on principles of equity, the court declined when the July 25, 2017 revision order was entered.

Mr. Bienhauer cites a number of cases for the proposition that there isn't any requirement that support payments be reduced separately to a consolidated judgment. It's not necessary to decide that question. If true, and if that strategy had been pursued, Ms. Bienhauer could have applied for an order quashing collection actions, by reference to the same equitable principles that the court applied when it denied Mr. Bienhauer's motion for contempt and for entry of a judgment.

Whether Mr. Bienhauer could have proceeded directly to garnish without applying for a consolidated judgment is irrelevant because *he did not pursue that strategy*. Instead, he squarely presented the Superior Court with the question of whether collection could occur, and the trial court – based on Ms. Bienhauer's equitable defenses – ruled that it would be inequitable to allow that.

Thus, the question in this case is whether it's appropriate for any party to mount a concerted collection effort *after* the court has conclusively ruled that back support is *not* collectible.

Mr. Bienhauer's position is not actually that it's *unnecessary* to seek a separate consolidated judgment; rather his position is that having tried and failed to obtain a judgment, and having squarely presented the issue of whether collection is appropriate, and been denied, that he is nonetheless free to set about collecting *as if* the Superior Court had never ruled on the issue of collecting back support.

There is just no authority whatsoever to support the proposition that he's entitled to collect *after* the Superior Court has specifically ruled that it would be inequitable to collect. Accordingly, the sanctions for violation of CR-11 are manifestly within the discretion of the trial court and there was no error in the trial court's decision to quash writs of garnishment and award Ms. Bienhauer her fees or for sanctions imposed.

Writs of Execution from the Superior Court may not issue on an attorney's signature alone.

Because there's no lawful basis to collect back support in light of the trial court's decision denying a request for back support judgment, any writ, however issued would be improper. However, it's worth pointing out that, in this case, Mr. Bienhauer's lawyer circumvented the court clerk and improperly issued writs simply on the attorney's signature alone.

That's almost certainly because no court clerk would have issued the writs given the court orders denying a request to issue a judgment for back support.

Mr. Bienhauer's position that "the statutes on garnishment are ambiguous with regard to attorneys issuing writs in Superior Court" is simply not well-taken.

The applicable statute is this:

RCW 6.27.020

Grounds for issuance of writ—Time of issuance of prejudgment writs.

(1) The clerks of the superior courts and district courts of this state may issue writs of garnishment returnable to their respective courts for the benefit of a judgment creditor who has a judgment wholly or partially unsatisfied in the court from which the garnishment is sought.

(2) Writs of garnishment may be issued in district court with like effect by the attorney of record for the

judgment creditor, and the form of writ shall be substantially the same as when issued by the court except that it shall be subscribed only by the signature of such attorney.

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." It's not surprising that a different rule applies to District Court given the more limited jurisdiction of District Courts and their resulting expedited procedures.

Mr. Beinhauer suggests "an ambiguity" is created by RCW 6.27.100, but that statute says only that a special statement must be placed "conspicuously in the caption" for writs pertaining to child support collection.

The same statute *separately* sets out special changes that must appear in the form for writs of garnishments "issued by an attorney"; i.e. writs of garnishment issuing in district court cases.

Nothing in RCW 6.27.100 authorizes attorneys to issue writs from the Superior Court. Nothing about RCW 6.27.100 creates any ambiguity in RCW 6.27.020.

CONCLUSION

The Notice of Appeal, filed November 21, 2017, is too late to properly appeal the trial court's denial of revision dated July 25, 2017 (or the underlying Commissioner's order). That ruling denying revision resolved with finality the question of whether back support could lawfully be collected.

Instead of appealing the denial of his request for a judgment as to back child support, Mr. Bienhauer simply set about collecting back support as if the court had never denied his request or entertained his motion for contempt and judgment.

Mr. Bienhauer's attorney set about collecting back support by issuing a Superior Court Writ of Garnishment without applying to the clerk, as is required by the statute. Likely that "oversight" was a result of the near certainty that a clerk would never issue such a Writ without a judgment and certainly would not do so in the face of orders by the Superior Court denying a request for judgment.

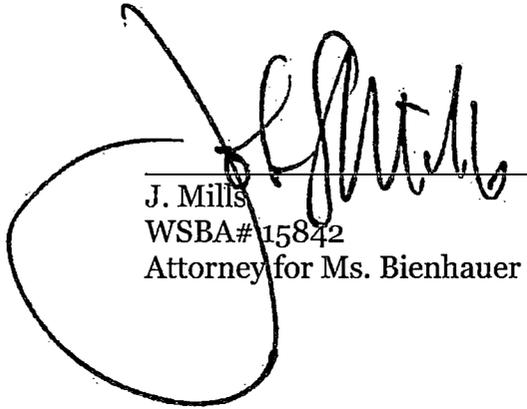
Because the clerk almost certainly would never issue a writ of garnishment, application to the Clerk was ignored and the writ issued under the attorney's signature alone.

There is no good faith basis in law or fact for collecting a judgment the Superior Court has refused to enter. There is no good faith basis for doing so by by-passing the Clerk who is the only person authorized by statute to issue writs of garnishment in the Superior Court.

Accordingly, for all the reasons the Superior Court awarded Ms. Bienhauer her fees and costs, the appellate court should also award Ms. Beinhauer her fees and costs.

The appellate court should deny this appeal and award to Ms. Bienhauer her fees and costs.

DATED this 18th day of March, 2018.

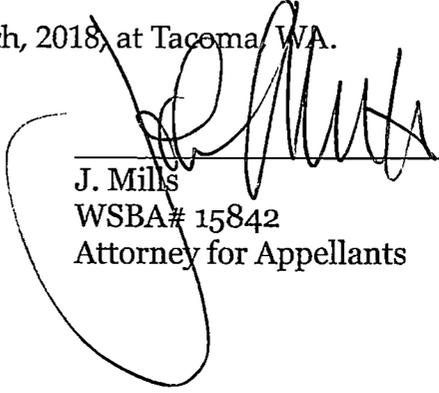


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3 I certify under penalty of perjury under the laws of the state of Washington that
4 the foregoing is true and correct.

5 DATED this 19th day of March, 2018, at Tacoma, WA.

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