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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 287360
Kittitas County Cause No. 00-3-00017-7

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Nuthavadee Slane, Respondent
v.
Stephen Slane, Appellant

APPELLANT'S BRIEF

Stephen Slane
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I. ASSIGNMENTS OF ERROR

1. THE COURT HAD NO JURISDICTION/AUTHORITY TO ENTER THE ORDER OF CHILD SUPPORT, MR. SLANE SOUGHT TO VACATE. THE TRIAL COURT ERRED BY DENYING MR. SLANE'S MOTION TO VACATE. CP 525-528 @ 2.1.
2. THE TRIAL COURT ERRED BY SANCTIONING MR. SLANE UNDER CR 11 AND AWARDING ATTORNEY'S FEES TO MRS. KUKES FOR THE MOTION TO VACATE. CP 525-528 @ 2.5.
3. THE COURT ERRED BY FINDING THAT MRS. KUKES DID NOT COMMIT FRAUD BY HER SIGNING AND ENTRY OF THE CHILD SUPPORT WORKSHEET AND ORDER FOR CHILD SUPPORT. THE ORDER OF CHILD SUPPORT IS OTHERWISE VOID DUE TO FRAUD ON THE PART OF MRS. KUKES. CP 525-528 @ 2.2.
4. THE TRIAL COURT ERRED BY FINDING THAT MR. SLANE'S MOTION FOR CONTEMPT WAS BROUGHT WITHOUT REASONABLE BASIS AND AWARDING MRS. KUKES ATTORNEY'S FEES. CP 525-528 @ 2.6.
5. SAME ERROR AS # 2. CP 525-528 @ 2.4.
6. SAME ERROR AS #1. CP 525-528 @ 2.3

II. ISSUES

1. DID THE COURT HAVE THE AUTHORITY TO ENTER A DEFAULT JUDGMENT APPROXIMATELY TWO YEARS AFTER MR. SLANE WAS SERVED WITH THE SUMMONS/PETITION AND SUBSEQUENTLY FOUND IN DEFAULT, WHILE IGNORING THE REQUIREMENTS OF CR 55?
[ASSIGNMENT OF ERROR NUMBER 1 & 6]

2. DID MR. SLANE NEED TO DEMONSTRATE A MERITORIOUS DEFENSE OR PROFFER AN ANY EXCUSE FOR SEEKING TO VACATE A VOID JUDGMENT? [ASSIGNMENT OF ERROR NUMBER 2 & 5]
3. DOES AN OMISSION OF FACTS SIGNED UNDER THE PENALTY OF PERJURY CONSTITUTE FRAUD AND IS A JUDGMENT PROCURED BY FRAUD OR A JUDGMENT CONTRARY TO PUBLIC POLICY, VOID? [ASSIGNMENT OF ERROR NUMBER 3]
4. WAS MR. SLANE'S MOTION FOR CONTEMPT BROUGHT WITHOUT REASONABLE BASIS? [ASSIGNMENT OF ERROR NUMBER 4]

III. SHORT ANSWERS

1. THE TRIAL COURT ACTED WITHOUT JURISDICTION/AUTHORITY WHEN IT SIGNED THE ORDER OF CHILD SUPPORT ON 28 JANUARY 2002 BECAUSE THE REQUIREMENTS OF CR 55(f)(1) WERE NOT MET BY MRS. KUKES PRIOR TO PRESENTATION. THE LANGUAGE OF CR 55(f)(1) IS CLEAR AND UNAMBIGUOUS AND THE ORDER OF CHILD SUPPORT IS A VOID ORDER. THE TRIAL COURT HAD A DUTY TO VACATE THE ORDER. BROOKS V. UNIV. CITY, INC. 154 Wn. App. 474 (2010). [ASSIGNMENT OF ERROR 1 & 6, ISSUE NUMBER 1]
2. MR. SLANE DID NOT NEED TO DEMONSTRATE A MERITORIOUS DEFENSE FOR SEEKING TO VACATE A VOID ORDER AND LACHES COULD NOT APPLY. Colacurcio v. Burger, 110 Wn. App. 488, 497-98,41 P.3d 506 (2002), review denied, 148 Wn.2d 1003 (2003). Marriage of Johnston 33 Wn. App. 178,653 P.2d 1329 (1982) .[ASSIGNMENT OF ERROR 2 & 5 AND ISSUE NUMBER 2]

3. **THE ORDER OF CHILD SUPPORT IS VOID DUE TO FRAUD. FRAUD IS PROVEN BY PROVING THE NINE (9) ELEMENTS OF FRAUD (Baddley v. Seek, 138 Wn. App. 333, 338-39,156 P.3d 959 (2007)) OR “By showing that the party breached the affirmative duty to disclose a material fact.” Crisman v. Crisman, 85 Wn. App. 15,21,931 P.2d 163 (1997) . [ASSIGNMENT OF ERROR AND ISSUE NUMBER 3]**
4. **EVERY POINT MR. SLANE RAISED IN THE MOTION FOR CONTEMPT WAS PROVEN. THEREFORE, IT CANNOT BE INTELLIGENTLY ARGUED THAT THE MOTION WAS RAISED WITHOUT REASONABLE BASIS. IT WAS AN ABUSE OF DISCRETION TO SAY THE MOTION HAD NO REASONABLE BASIS AND ALSO TO AWARD MRS. KUKES ATTORNEY’S FEES ON THOSE GROUNDS. [ASSIGNMENT OF ERROR AND ISSUE NUMBER 4]**

IV. STATEMENT OF THE CASE

On 27 January 2000, Mrs. Kukes filed a petition for dissolution (CP 1-6) and Mr. Slane was served with the petition and summons (CP 7-8) with a return of service being filed on 09 February 2000 (CP 21-22). On 12 April 2000, the court signed an Order of Default (CP 37-38). In November 2000, Mr. Slane signed a joinder (CP 39-44). In December 2000, Mr. Slane moved to St. Louis, MO. On 23 January 2002, Mrs. Kukes filed a notice with the clerk to present the dissolution orders (CP 45-46). On 28 January 2002, five days after noting the hearing, the Mrs. Kukes presented, and the court signed, the Order for Child Support (CP 52-58), The Child Support Worksheet (CP 47-51), The Findings of Fact and Conclusions of Law (CP 66-70), the Final Parenting Plan (CP 59-65), and the Dissolution Decree (CP 71-74). The findings of fact and conclusions of law, which have a date of sometime in 2001, presumably when they were printed, state that the order of dissolution was entered upon default. They were signed by me,

waiving their entry and state that there is no continuing restraining order and that child support will be entered pursuant to the Washington State Child Support Schedule. All the documents, except for the child support order and child support worksheet, were printed in May, while the documents for child support were printed the day Mrs. Kukes noted the presentment hearing with the court. No affidavit of service or return of service exists on file for the notice of entry of the default order of child support entered on 23 January 2002 and signed by the court on 28 January 2002, in compliance with, and as required by CR 55 (f) for default judgments entered after more than one year has elapsed since the summons was issued and default was ordered nor was the order ever served on Mr. Slane in any other manner.

In September 2008, Mr. Slane was found in contempt by the Grant County Superior Court for violating the Parenting plan signed by the Kittitas Court. Mr. Slane's defense was that the parties never followed the Parenting Plan signed by the court because they had signed an out of court agreement covering custody. In April 2009, Mr. Slane was then found in contempt of the Order for Child Support entered by the Kittitas Court.

Mr. Slane raised a Motion for Contempt and a Motion to Vacate in Kittitas County and both were simultaneously served on Mrs. Kukes on 2 Oct 2009 (CP 132). Mrs. Kukes' defense was that no good reason existed to set the default judgment aside per CR 55 or CR 60, Laches applied and that CR11 sanctions should be imposed after suggesting to the court that the motions were raised for improper purposes and were not well grounded (CP 246-258). After a hearing on 4 December 2009, on 9 December 2009, the court agreed with Mrs. Kukes' position and awarded her attorney's fees per CR 11. **CP 525-528.**

V. ARGUMENT

1. Assignment of error number 1 & 6

The court lacked jurisdiction or authority to enter the default judgment for child support, or any other default order or judgment, because more than one (1) year had lapsed between the issuance of the summons and petition (CP 1-8, CP 21-22) in January 2000 and the note up to the court for, and presentment of, the orders and judgments to the court in January 2002 (CP 45 – 74) as Mr. Slane was found in default in April 2000 (CP 37-38). Mrs. Kukes did not follow the provisions of CR 55, and it is a question of law as to whether or not the court erred by not vacating the orders and interpretation is subject to review, *de novo*. *Gourley v. Gourley* 158 Wn. 2d. 460, Oct. 2006; *Arborwood Idaho, L.L.C. v. City of Kennewick* , 151 Wn.2d 359 , 367, 89 P.3d 217 (2004) .

CR 55 (f):

“ (1) Notice. When more than 1 year has elapsed after service of summons with no appearance being made, *the court shall not sign an order of default or enter a judgment until a notice of the time and place of the application for the order or judgment is served on the party in default, not less than 10 days prior to the entry. Proof by affidavit of the service of the notice shall be filed before entry of the judgment.*

(2) Service. Service of notice of the time and place on the application for the order of default or default judgment shall be made as follows:

(A) by service upon the attorney of record;

(B) if there is no attorney of record, then by service upon the defendant by certified mail with return receipt of said service to be attached to the affidavit in support of the application; or

(C) by a personal service upon the defendant in the same manner

provided for service of process.

(D) If service of notice cannot be made under subsections (A) and (C), the notice may be given by publication in a newspaper of general circulation in the county in which the action is pending for one publication, and by mailing a copy to the last known address of each defendant. Both the publication and mailing shall be done 10 days prior to the hearing.” (emphasis added)

Last year, Division III of the Washington State Court of Appeals examined this very subject and found that “The language is clear. A plaintiff must notify a nonappearing defendant when the plaintiff seeks a default judgment more than one year after service of the summons..... *The trial judge did not, then, have authority to enter the default judgment. And we must vacate the judgment.*” BROOKS V. UNIV. CITY, INC. 154 Wn. App. 474 (2010). (emphasis added)

This means that the court, in order to even have had the authority to enter any order or judgment by default in this case, would first have to verify that Mrs. Kukes had notified Mr. Slane of the time and place of entry of any default judgment, by 18 January 2002. The child support order and worksheet were printed and signed by Mrs. Kukes on 23 January 2002 (CP 47-58), and no affidavit of service or return of service exists showing the notice of entry for the child support order as prescribed by CR 55 (f). Also, no affidavit or return of service exists for that specific order of support in any form, whatsoever. Also, Mr. Slane’s signature does **not** appear on the order, waiving notice of its entry. The court did not have authority to enter the child support order. The court, therefore, had a nondiscretionary duty to vacate the order, because it was always, and remains, void.

“A void judgment, which includes judgment entered by a court which lacks jurisdiction over the parties or the subject matter, *or lacks inherent power to enter the particular judgment*, or an order procured by fraud, can be attacked at any time, in any court, either directly or collaterally” Long v. Shorebank Development Corp., 182 F.3d 548 (C.A.7 III. 1999). [emphasis added]

Mr. Slane raised this issue in filings (CP 325-341) and on oral argument (RP 3-4, RP 7-8, RP 10). Any argument Mrs. Kukes may make claiming to have served the child support order to me in accordance with CR 55(f), seven or more years later, is irrelevant and unsupported by the record. As pointed out, the court had a duty to verify that service of the notice of entry was made before or by 18 January 2002, and that requirement was not met. The court did not have the authority to enter the default order of child support and no other authority existed for which the court could have entered the order of child support.

2. Assignment of error number 2 & 5

Given that the Assignment of error in number 1 renders the order of child support void, the court's findings that Mr. Slane's motion to vacate was nothing more than an attempt to raise Mrs. Kukes' cost of litigation, that it had no basis in fact or law, or that it was ill-motivated, is clearly in error, because, as previously cited: "A void judgment, which includes judgment entered by a court which lacks jurisdiction over the parties or the subject matter, *or lacks inherent power to enter the particular judgment*, or an order procured by fraud, can be attacked at any time, in any court, either directly or collaterally" Long v. Shorebank Development Corp., 182 F.3d 548 (C.A.7 III. 1999). [emphasis added]. Also, see In re Adoption of E.L., 733 N.E.2d 846 (2000)

Also, "A default judgment entered without notice to an appearing party is void, and we need not consider the passage of time or whether a meritorious defense exists. Colacurcio v. Burger, 110 Wn. App. 488, 497-98, 41 P.3d 506 (2002), review denied, 148 Wn.2d 1003 (2003); Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323-25, 877 P.2d 724 (1994)." This also defeats any laches defense. Therefore, there was reasonable basis to vacate the child support order per CR 60 (b) as the order was void. CR 11 sanctions are unwarranted.

3. Assignment of error number 3

Generally, fraud is proven by proving the nine (9) elements of fraud. Baddley v. Seek, 138 Wn. App. 333, 338-39, 156 P.3d 959 (2007). Also, fraud is proven by "breaching an affirmative duty to disclose information". Crisman v. Crisman, 85 Wn. App. 15, 21, 931 P.2d 163 (1997).

First, it was ridiculous, even fraudulent for Mrs. Kukes to enter a final parenting plan giving Mr. Slane custody every other week while Mrs. Kukes lived in Washington State and Mr. Slane lived in Missouri. No judge would have signed such an order. It cannot be intelligently argued that Mrs. Kukes didn't fail to disclose a material fact to the court, a fact which she was required to disclose.

Then, Mrs. Kukes claiming that she "did not aver Respondent had no other children, dependent on him for support" (CP 246-258) is completely contradicted by the fact that *she* signed the child support worksheet stating that I had no additional dependents living with me that relied upon me for support. She failed to disclose this fact. Not only was she aware that I had a stepson whom our children had lived with, she knew I had an infant son at the time the child support worksheet was signed. I even submitted a picture of her holding my infant son in exhibit G of "Reply Affidavit of Stephen Slane re Vacate and Contempt" (CP 353-403).

Also, the nine elements of fraud are shown in the motion for an order on contempt. (CP 82-86). Mrs. Kukes was receiving unemployment benefits, and also working part time, yet claimed on the child support worksheet that she had no income. The Evidence obtained from the Washington State Employment Security Department showed that not only was she receiving unemployment benefits, she had other income right before and right after the child support worksheet and child support order was entered and signed, it also showed that the state ruled that she was voluntarily unemployed under RCW 50.20.050 (CP 435-452).

Also, under RCW 26.19.071, the court had a nondiscretionary duty to impute income to her because she was voluntarily unemployed. There are no additional conditions around someone who is voluntarily unemployed. The law states that the court will impute income. Yet, Mrs. Kukes failed to disclose that she was receiving unemployment benefits or that she was unemployed, let alone, voluntarily unemployed. This constitutes a failure to disclose a material fact. Interestingly enough, as a result, the court allowed her to permanently waive any and all financial liability where child support was concerned, which is contrary to public policy. In re

Marriage of Goodell 130 Wn. App. 381 (2005). Mrs. Kukes' proportionate share of support was zero percent, zero dollars. Exhibit A in the "Reply Affidavit of Stephen Slane re Vacate and Contempt" (CP 353-403) contains a Division of Child Services child support worksheet, completed by DCS prior to the worksheet Mrs. Kukes filed in court. This shows she also knew she was to have income imputed to her. It cannot be said that the points raised concerning fraud, whether for contempt, or to vacate the order of child support, were not well grounded in fact as the trial court found.

The order of child support would be void due to fraud, if it were not already void on its face, because orders were procured by the use of perjury, render the judgment void and it must be vacated. Pettet v. Wonders, 23 Wn.App. 795, 800, 599 P.2d 1297 (1979). This is all completely moot because the order of child support is already shown to be a void judgment. CR 11 sanctions against Mr. Slane by the trial court, however, was an abuse of discretion.

4. Assignment of error number 4

It was an abuse of discretion to award attorney's fees based on RCW 26.09.160. Aside from the fraud that was proven to support contempt, contempt of the parenting plan and contempt of the child support order were also proven, on all points, though the child support order, at a minimum, is void. The court erred by finding that "Mr. Slane's motion for contempt of court was brought without reasonable basis. Mr. Slane violated RCW 26.09.160 and attorney's fees and costs are warranted."

In the motion for contempt Mr. Slane raised the issue that Mrs. Kukes claimed ES on tax returns, which caused him financial harm, and which was contrary to the order of child support. Mrs. Kukes admitted to claiming ES as a tax exemption, but claimed it was inadvertence (CP 246-258) which isn't really plausible since she had never claimed her prior, but the fact that she admitted to claiming her proves that the claim was well founded in fact and with reasonable basis.

Mrs. Kukes' claimed that Mr. Slane never once tried to exercise Christmas visitation or visitation for birthday's (CP 259-280), then when I proved that I did try to by flying out between the birthday of PS and the Christmas holiday, her argument was not that she had lied about me not trying to exercise visitation, but rather that I had lied by making that trip. (RP 12). However, the trip was not on the birthday of PS, nor was it on Christmas. It was in between both, and it was the only time she would let me have with PS during that month. So, the claim raised in the motion to show cause was well based in fact. (CP 75-80).

VI. CONCLUSION

The order of child support is void because it was a default order not entered under the guidelines of CR 55(f) The court had a nondiscretionary duty to vacate the order of child support and the denial of the motion with prejudice should be reversed and the order vacated. **CP 525-528 @ 3.1.** The award for attorney fees to Mrs. Kukes should also be reversed. **CP 525-528 @ 3.3.**

Respectfully submitted this 15th day of September, 2011.



Stephen James Slane; Petitioner, *Pro Se*