

FILED

JAN 14 2016

No. 338614

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By.....

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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In re: Receivership of:

WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP,

Respondent,

and

DEONNE MOE,

Appellant.

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APPELLANT'S OPENING BRIEF

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## I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Denying Wife's Motion to Vacate Judgment Against Marital Community Where Judgment Was Based Solely on Finding of Contempt Committed by Husband and Wife Was Not Provided Adequate Notice and Opportunity to be Heard Prior to Entry of Judgment.

ISSUE: Whether due process requires that a spouse who not found to be in contempt be given notice and opportunity to be heard before judgment is entered against the marital community based solely on finding of contempt by the other spouse.

## II. STATEMENT OF THE CASE

This appeal arises out of a finding of contempt and the imposition of a monetary sanctions against Appellant's husband, Orville Moe, for failure to comply with orders to compel discovery. Those sanctions resulted in a judgment being entered in favor of Respondent Washington Motorsports Limited Partnership against the marital community of Orville and Deonne Moe. Neither Mr. nor Mrs. Moe is a party to the underlying action. However, Mr. Moe was a defendant in the original action brought against Spokane Raceway Park, Inc., and others by several individuals

who held ownership units in WML. The action was later converted into the present receivership action. Mr. Moe is now deceased.

On September 19, 2008, the trial court entered a "Final Judgment against Orville Moe" in the amount of \$373,626.10 in favor of WML after finding Mr. Moe in contempt. A second "Final Judgment Against Orville and Deonne Moe for Sanctions" was entered on June 21, 2011. CP 22-28. That judgment included \$730,000.00 payable to WML as "remedial sanctions" pursuant to an order entered on June 11, 2010, finding Orville Moe in contempt for failure to comply with orders on supplemental proceedings. CP 25. The \$730,000 represented sanctions of \$2,000.00 per day imposed on Mr. Moe from June 11, 2010 to June 10, 2011. CP 25.

The Final Judgment recites that the sanctions imposed against Mr. Moe were "remedial in nature" and were imposed to "attempt to gain his compliance with this Court's Orders." CP 26. The Final Judgment also recites that Mr. Moe had previously been found in contempt for failure to comply with court orders and states "[t]his portion of this Judgment relating to the remedial sanction incurred by Mr. Moe is \$730,000.00 (representing \$2,000.00/day for the time period of June 11, 2010 to June 10, 2011 (365 days))." CP 24.

Paragraph 14 of the Final Judgment states as follows:

At all relevant time, Orville Moe and Deonne Moe were husband and wife. For the benefit of Orville and Deonne Moe's marital community, Orville Moe has refused to comply with this Court's Orders for supplemental proceedings to avoid WML's efforts to collect its \$373,626.10 (plus interest) judgment. A debt incurred during marriage is presumed to be a community obligation; the burden of proving that a debt is not a community obligation rests on the community. *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d 341, 343 (1980). Neither Orville Moe nor Deonne Moe has rebutted that presumption. As such, the \$730,000.00 in remedial sanctions entered herein are against Orville Moe and the community property of Orville Moe and Deonne Moe.

CP 26-27.

No hearing was held and no ruling was made by the trial court regarding whether the remedial sanctions imposed solely against Mr. Moe should be characterized as his separate debt or as an obligation of the marital community. No motion was brought by WML seeking relief against the marital community based solely on Mr. Moe's conduct. Instead, WML simply included the above paragraph in its proposed Final Judgment after obtaining a ruling from the trial court that Mr. Moe was in contempt.

On August 19, 2015, Deonne Moe moved to vacate that portion of the Final Judgment awarding \$730,000.00 to WML as against the marital community, thus making her share of community assets subject to

execution. CP 29-34. Mrs. Moe claimed that the entry of judgment against the marital community violated her due process rights because she was not put on notice that her share of community property would be at risk in the event her husband was found in contempt.

In response to the motion, WML argued that due process was satisfied because Mrs. Moe was given notice sanctions for contempt would be entered against her and her husband "jointly and severally" if they did not comply with the court's orders. CP 39. WML also argued that Mrs. Moe was put on notice that judgment would be entered against the marital community because a Notice of Presentment was mailed to the Moe's attorney, who appeared at the presentment and objected to entry of the judgment. CP 40. WML further argued that judgment against the marital community was proper, Mrs. Moe's argument was foreclosed by the law of the case doctrine, and the trial court lacked jurisdiction to consider the motion. CP 40-41.

The trial court denied the motion the motion to vacate. Mrs. Moe now appeals.

### III. STANDARD OF REVIEW

Because courts have a non-discretionary duty to vacate void judgments, a trial court's decision to grant or deny a motion to vacate under CR 60 (b)(5) is reviewed de novo. *See, Ahten v. Barnes*, 158 Wn.App. 343, 349-50, 242 P.3d 35 (2010). There is no time limit on when a motion to vacate a judgment under CR 60(b)(5) can be brought. *Id.*, at 350. On review of an order denying a motion to vacate, only the propriety of the denial is before the reviewing court, not the propriety of the underlying judgment. *State v. Gaut*, 111 Wn.App. 449, 450-51, 618 P.2d 533 (1980).

### IV. ARGUMENT

1. The Judgment Entered on June 21, 2011 is Void for Lack of Due Process as Against Appellant's Interest in Community Property Because Mrs. Moe Was Never Given Notice and Opportunity to be Heard as to Whether Sanctions for a Contempt Committed Only by her Husband Could be Imposed on the Marital Community.

Civil Rule 60(b)(5) provides that a court may order relief from a judgment at any time if the judgment is void. In general, the trial court exercises its discretion when ruling on a motion to vacate under CR 60. However, a motion to vacate a judgment made pursuant to CR 60(b)(5)

must be granted if it is shown that the judgment is void. *Summers v. Dept. of Revenue*, 104 Wn.App. 87, 90, 14 P.3d 902 (2001), *citing*, *In Re Marriage of Leslie*, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989). A judgment entered in a proceeding that does not comport with the requirements of due process is void. *Id.*, *citing*, *Sheldon v. Sheldon*, 47 Wn.2d 699, 702, 289 P.2d 335 (1955). It is a fundamental tenet of due process that until adequate notice, either actual or constructive, is given, a court has no jurisdiction to proceed to judgment. *Northern Commercial Co., v. E. J. Hermann, Co., Inc.*, 22 Wn.App. 963, 970, 593 P.2d 1332 (1979) *citing*, *Staley v. Staley*, 15 Wn.App. 254, 257, 548 P.2d 1097 (1976).

Art. 1, § 3 of the Washington State Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The Fourth and Fourteenth Amendments to the United States Constitution also require that due process be followed before any person can be deprived of their liberty or property. Due process requires notice and the opportunity to be heard and to defend. *Esmieu v. Schrag*, 15 Wn. App. 260, 265, 548 P.2d 581 (1976).

The interest of one spouse in the property of the marital community constitutes a property interest protected by procedural due

process. *See, Arnold v. Dept. of Ret. Systems*, 128 Wn.2d 765, 772-73, 912 P.2d 463 (1996). In addition, a court must comply with the requirements of due process prior to entering an order of contempt or imposing sanctions for contempt. *See, Lasar v. Ford Motor Company*, 399 F.3d 1101, 1109-10 (9th Cir. 2005)(notice and opportunity to be heard are indispensable prerequisites for imposing sanctions for contempt) Notice must inform the person against whom sanctions are sought both the grounds for any finding of contempt and the possible sanctions to be imposed. Such minimal requirements are necessary to satisfy historic notions of elementary fairness. *Id.* Absent adequate notice and opportunity to be heard, a contempt order is a nullity. *See, In re Acceptance Insurance Co.*, 33 S.W. 443, 448-49 (CA Tex. 2000)

Due process also requires that any civil contemnor be given certain basic procedural protections prior to imposition of any sanction, including adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *SEC v. Hyatt*, 621 F.3d 687, 694 (7th Cir. 2010) *citing*, CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2465 (3d ed. 2008). Due process notice is satisfied by service and filing of a motion stating the grounds for

relief and specifying the actual relief sought along with notice of a hearing on the motion. *See. Id.*, at 695.

Here, Mrs. Moe was never given notice that her share of community property could be taken based solely on an act of contempt committed by her husband. Both Mr. and Mrs. Moe were informed that they would be subject to sanctions in the event they did not comply with the trial court's orders, and as pointed out by WML, the trial court told both Mr. and Mrs. Moe that they would be held "jointly and severally" liable for any sanctions. But in this context, the phrase "jointly and severally" means only that both Mr. and Mrs. Moe would be equally responsible to pay any sanctions imposed by the trial court in the event both were found to be in contempt, since joint and several liability arises only when more than one party is found to be at fault. *See, Anderson v. Seattle*, 123 Wn.2d 847, 851, 873 P.2d 489 (1994). Mrs. Moe was not told that she would be held responsible and that her share of community assets would be used to pay any sanction that resulted solely from a finding of contempt against Mr. Moe.

The trial court did not find Mrs. Moe to be in contempt prior imposing sanctions. The sanction of \$730,000, based on a statutory maximum forfeiture of \$2,000 for each day Mr. Moe was found to be in

contempt, was imposed solely on Mr. Moe. Nevertheless, when WML prepared and presented the Final Judgment, it included a finding that Mr. Moe's refusal to comply with the court's orders was done for the benefit of the marital community. That finding was included in the Final Judgment even though WML had never filed or served a motion requesting any relief against the marital community and never notified Mrs. Moe that it would be requesting such relief.

The procedure employed by WML clearly fails to satisfy the basic requirements of due process. Mrs. Moe was not given adequate notice that WML was seeking relief against the marital community that would put her share of community assets at risk. She was only told, along with her husband, that either or both of them could be sanctioned if they failed to comply with the trial court's orders. Mrs. Moe was never told that she could be personally sanctioned even if she fully complied with the trial court's orders or that her property could be taken to satisfy sanctions imposed only on her husband.

In addition, Mrs. Moe was never given an opportunity to be heard as to whether her share of community assets should be subject to judgment and execution based solely on the conduct of her husband. Although the proposed Final Judgment was served on the Moe's attorney prior to

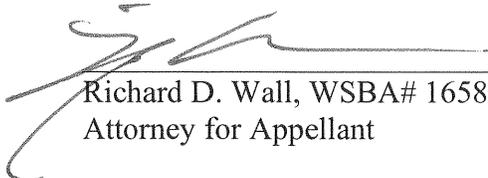
presentment, no motion was filed and no hearing was noted at which either Mr. or Mrs. Moe were given the opportunity to contest WML's claim that the sanctions imposed on Mr. Moe should be characterized as a community liability, thereby making Mrs. Moe's share of community assets subject to judgment and execution.

The inclusion of that additional relief in WML's proposed Final Judgment did not provide Mrs. Moe adequate notice of the full extent of the relief sought by WML. Nor did it provide Mrs. Moe an opportunity to be heard at a meaningful time and in a meaningful manner. Therefore, the procedure employed by WML violated Mrs. Moe's right to due process. Because that portion of the Final Judgment imposing liability on the marital community violated due process, it is void and must be vacated.

#### CONCLUSION

For the foregoing reasons, trial court's order denying Appellant's motion to vacate Judgment as against the marital community should be reversed. This Court should enter an order vacating that portion of the Judgment and remanding to the Superior Court for further proceedings.

Respectfully submitted this 14<sup>th</sup> day of January, 2016.



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Richard D. Wall, WSBA# 16581  
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14<sup>th</sup> day of January, 2016, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was sent via legal messenger to the following:

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