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Division III
State of Washington
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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON
CASE # 364798**

In re the marriage of
Keri Orate n.k.a. Shrewsberry,
Respondent,
v.
Scott Orate,
Appellant.

REPLY BRIEF

Kraig Gardner Attorney at Law.
P.O. Box 777
Ellensburg, WA 98926
Office: (509) 406-3849
kraiggardner@yahoo.com

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A. SUMMARY OF ISSUES FOR REPLY.

In their response brief, the petitioner/appellee attempts to raise issues for the first time on appeal. Even if this were allowed, there is no relevant reference to the record for the factual support that these new issues would require. The petitioner/appellee also attempts to distinguish the *Pennamen* case. Mr. Orate submits that there is no reasonable argument, certainly not one presented by the other party, that distinguishes the clear ruling in *Pennamen*, that CR 55 applies to situations in which a party has filed a notice of relocation pursuant to RCW 26.09.500. Finally, appellee claims that the appeal is untimely.

B. ISSUES FOR REPLY.

- I. The appellee raises issues for the first time on appeal and their arguments for these issues are not properly supported in the record.
- II. The other party's argument that *Pennamen* is distinguishable is innapropriate. They do not present a reasonable argument that *Pennamen*'s clear application of CR 55 to the operation of RCW 26.09.500 should not also apply in the instant case.
- III. Appellee's argument that the appeal is untimely is not correct. A motion to vacate an order that did not comply with CR 55 may be brought at any time.

C. LAW AND ARGUMENT

- I. This court may decline to consider issues raised for the first time on appeal.

The appellee attempts to skirt the central issue in this appeal by making an argument that Ms. Shrewsberry was entitled by the March 26, 2015 parenting plan to relocate without any process at all. Brief of Respondent at 1. This issue was not raised in the court below, opposing counsel can point to nothing in the record to establish that this issue was raised, and there was no cross appeal preserving this issue. RAP 2.5 allows this court to decline to address such issues and we are request the court do so. Raising these issues at this time would require factual determinations. For example, the referred to parenting plan was not part of the designated record on appeal. Further even if it were, if the child had already been enrolled in Sunnyside then the provision would arguably not apply, (*see CP 72, where Mr. Orate's statement implies that the child is of school age already*), and an argument that by filing a notice of relocation, that the other party waived reliance on that provision could be made. These arguments should have been made to the trial court, there is nothing indicating that they were, and this court should not consider them here.

Similarly, the argument that the other party did not receive a copy of counsel's notice of appearance was not made below. Considering the very liberal definition of appearance that is set forth in the *Pennamen* decision, counsel doubts that it would have been successful. *Pennamen* 135 Wn. App 798. Regardless, the appropriate time to bring it up would have been during the litigation of the motion to revise commissioner's ruling, where the CR 55 argument was fully developed. Counsel for petitioner/appellee did not submit any briefing or argument during that phase. We ask that this court also not consider this argument not raised below, or find that the filing of the NOA in court, would count as an appearance under CR 55 without any other action, see *Tiffin v. Hendricks*, 44 Wn.2d 837, 271 P.2d 683, 686-687 (1954).

These issues were not raised below, and therefore no factual support for them were adduced and this court should decline to consider them.

II. Appellee fails to distinguish *Pennamen*, and fails to address important portions of our argument.

Appellee apparently argues that the language of RCW 26.09.010(1), which makes the civil rules applicable to chapter 26.09, does not control, arguing that RCW 26.09.500 is a specific

exemption to CR 55. Brief of Respondent at 3. They then go on to make the argument that requiring compliance with CR 55 if a party had made an “appearance” would nullify this provision, seemingly invoking the rule of statutory construction that courts should avoid interpretations of a statute that render certain provisions superfluous without citation to caselaw or other authority. See *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

It is here that I would point out that appellee does not address our argument that the longstanding rule in Washington is that when there is a conflict between statutes and court rules on matters of procedure, that the court rules prevail. Opening Brief at 6, citing *State v. Breazeale*, 99 Wn.App. 400, 994 P.2d 254, (Div. 3 2000). This alone would defeat their argument that 26.09.500 has procedural supremacy over CR 55 if these provisions were in conflict.

But these provisions are not necessarily in conflict. RCW 26.09 is a family law chapter. Family law cases may lie dormant for a considerable period of time when there are no current issues regarding the parenting plan that need to be brought before the

court. RCW 26.09.500, should be seen as requiring an “appearance” after the notice of relocation has been filed, because in most (all?) parenting plan cases the other party will have at some point in the past have made an appearance. The interplay between RCW 26.09.500 and CR 55 is that some kind of an appearance must be made by the non moving party **after** the notice of relocation is filed to trigger the requirements of CR 55. This is consistent with the purpose of CR 55 as stated in *Pennamen*. The *Pennamen* case explains some of the policy considerations behind its interpretation of CR 55 and RCW 26.09.500. The court notes that default judgements are appropriate "when the adversary process has been halted because of an essentially unresponsive party," and that default judgments are generally disfavored. *Pennamen*, 135 Wn.App. at 799. The court further noted that these considerations disfavoring default are especially strong because these cases involve the welfare of children, and that both parents should have their input heard. *Id.*

Read to seek a harmonious integration of these provisions, RCW 26.09.500 can be seen as allowing a court to grant ex parte relief without CR 55 compliance when a party may have previously “appeared” in the case, but has not “appeared” in the specific

litigation over relocation, and therefore has “halted the adversarial process.” When, as in both *Pennamen* and this case, the non moving party has “appeared” after the notice of relocation, they have expressed an intent to address the current matter on the merits. They have not brought the adversarial process to a halt.

Other portions of the *Pennamen* opinion support this, when the court reinforces and reiterates some of its policy reasoning. The court analogizes this process to answering a complaint within 20 days under CR 12(a), even though that would be the start of a case and in our situation there is already a case in progress, though dormant which is returned to pending status when the notice of relocation is given. *Pennamen* at 800. The court then goes on to re-emphasize that these cases are about children, and default judgments are therefore especially disfavored. *Id.*, at 801.

A holistic interpretation of RCW 26.09.500 and CR 55 does not make the statute superfluous, it still has effect, just not the effect that appellee desires.

Appellee also attempts to distinguish the situation in *Penneman* from this case by procedural status.

In both cases, the notice of relocation was filed, and the non moving party (hereinafter NMP) failed to respond within 30 days. In *Pennamen*, at 795-796, the moving party (hereinafter MP) complied with CR 55 and set a hearing and the NMP substantively responded before the hearing for default judgment. In this case the MP did not comply with CR 55 and simply sought out a ex parte order, which was granted. In *Pennamen*, at the hearing, the court found that “nothing warranted allowing Roberson to relocate with the children Before a trial on the issue. The commissioner did not cite CR 55, but he stated in his order that “the objection to relocation although late does not automatically allow a move because the objection was filed within a reasonable time.” Id at 796.

This also squares with the language that the court used to describe its holding at the head of the opinion. “We hold Roberson was not entitled to relocate by default because the trial court properly considered Pennamen's objection under Civil Rule (CR) 55.” Id, at 794-95.

It is hard to understand how CR 55 could apply to that case and not this one. The sole difference is that CR 55 was followed in that case and not in this. Is appellee arguing that because she did not follow CR 55 and set a hearing for a default judgement, that this excuses her from complying with CR 55? Because if she had, in this case, set a hearing for default judgement there would be no procedural distinction to be had.

In fact, it is clear that the court specifically rejected the argument that appellee makes here.

Roberson contends the trial court should have allowed her to relocate by default because Pennamen did not file a timely objection as required by RCW 26.09.440(1). Roberson claims that RCW 26.09.500(1) mandates a default order permitting relocation when a person with notice fails to timely object. This is not entirely correct. RCW 26.09.500(1) states: Except for good cause shown, if a person entitled to object to the relocation of the child does not file an objection with the court within thirty days after receipt of the relocation notice, then the relocation of the child shall be permitted.

Pennamen, 135 Wn.App. 789-790.

The MP claimed that failure to object required that the court grant a default, the court rejected that, pointing out that 26.09.500 allowed for curing if the NMP showed good cause for late filing. But, the court explicitly states that the NMP did

not establish good cause for late filing. “Although Pennamen failed to demonstrate good cause for his untimely filing, the commissioner appears to have allowed Pennamen to proceed because he complied with CR 55. Id at 790.

The NMP did not establish good cause under RCW 26.09.500, but the court still rejected the MP’s argument that they were entitled to a default judgment. There is no reading of this language that does not lead to the conclusion that CR 55 is mandatory when a NMP makes an appearance. Otherwise, Division I’s reasoning is without support. In *Pennamen*, the NMP was not entitled to cure by RCW 26.09.500, the NMP did not even establish a basis for relief (good cause for late filing). The only basis for the *Pennamen* decision is that the NMP was entitled to the cure period of CR 55, because if an “appearance” is made CR 55 becomes mandatory.

III. Timeliness of appeal

Appellee claims the appeal is untimely because a motion to vacate and object to the relocation was denied on June 25, 2018. Brief of Respondent at 3. However, appellee makes

an argument without reference to any authority or the record that the June 25 ruling and the September 13 ruling were “essentially duplicate motions to vacate” *Id.*

Even if this were true it wouldn’t matter as this court has made clear “Where a court lacks jurisdiction over the parties or the subject matter, or lacks the inherent power to make or enter the particular order, its judgment is void. A motion to vacate a void judgment may be brought at any time, and the court must vacate the judgment as soon as the defect comes to light.” *Servatron, Inc. v. Intelligent Wireless Products, Inc.*, 186 Wn.App. 666, 679 (Div. 3 2015).

If CR 55 applies and wasn’t followed, the judgment is void, the motion that led to the Sept 13 order under CR 55 could have been brought “at any time”

D. CONCLUSION

This case is important beyond the issues of the parties in this case. Mandatory court form FL relocate 707, CR 28-9, purports to be a form order for granting a motion to relocate ex parte under RCW 26.09.500, and it does not

mention CR 55 anywhere. Of course, mandatory forms are not the law, but the mandatory forms should reflect the correct legal standards. When I became involved in this case I did a search for RCW 26.09.500, and it brought up *Pennamen*. Even if I were wrong on what *Pennamen* ultimately means, my conclusion that it has something to do with how RCW 26.09.500 should be applied doesn't seem farfetched. Other lawyers will do a search of 26.09.500 in the future and *Pennamen* will pop up. If its wrong or if its right, it needs clarification.

Respectfully submitted this 1st day of July, 2019



Kraig Gardner WSBA #31935

KRAIG GARDNER ATTORNEY AT LAW

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