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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,

Appellee,

v.

Scott Orate,

Appellant.

OPENING BRIEF

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I. Introduction, Summary and Procedural History.

This case began as a standard issue family law case. It was a dissolution of a marriage and the court made decisions regarding the custody of the children. On April 30, 2108, Petitioner Keri Shrewsberry filed a Notice of Intent to move with Children, CP 1, along with a proposed parenting plan. CP 5. The court record shows that a copy was served on the defendant on that same day and was filed with the court on May 3rd. CP 19. ***On May 10, Attorney for the respondent, Ms. Acosta filed her notice of appearance as attorney for Mr. Orate.*** CP 22.

The ensuing litigation in this case involved the propriety of the entry of the ex parte orders on May 31, CP 23-40, and both sides in this case claiming that the other had acted inappropriately.

Shortly after the orders issued, on June 6, respondent filed responsive pleadings and requested that the orders be vacated. CP 41-87. On June 25, 2018 after hearing, the court issued an order on the motion to vacate. CP 140. Between the June 25, 2018 order and the order issued on September 13, 2018, there was quite a bit of litigation involving which side had acted inappropriately. However, for the legal issues presented by this appeal most of that litigation is irrelevant.

The motion that was decided on September 13, 2018 squarely placed the issue on appeal before the court. The court had issued the May 31, 2018 order by applying RCW 26.09.500(5) which allows a party to obtain an ex parte order on a motion to relocate after 30 days have passed if the other party has not filed an objection to the relocation in that time period. The legal question in this appeal involves the interaction of that statutory provision and CR 55, the court rule governing default judgments and the procedure for obtaining them. The September 13, 2018 order is as far as counsel can discern, the first place in the record that the court made a ruling regarding the applicability of CR 55. The Court also awarded \$300 in attorney fees for the petitioner.

The respondent moved for revision of the commissioner's September 13, order and on November 2, 2018, the court issued an order denying the motion for revision by checkbox. The court did add the language "The notice of intent to relocate is the notice of default." CP 199.

Although it is far from clear from the order itself, the court appears to have ruled that the notice of intent to relocate issued under the statutory procedure is a "notice of default" under CR 55. Respondent appeals from that ruling, and also the ruling granting \$300 in attorney's fees.

II. Issues presented

A. Does an ex parte order issued under RCW 26.09.500(5) also need to comply with CR 55?

B. Does the notice of intent to relocate under chapter 26.09, take the place of the notice of default judgment required by CR 55? If not is the Judgment void?

C. Was the award of \$300 in attorney's fees appropriate?

III. Statement of the case.

As stated in the introduction the issue on appeal is whether the procedure set forth in RCW 26.09.500(5), allows for the issuance of the May 31, 2018 ex parte orders even if CR 55 was not complied with. The ultimate issue is how CR 55 applies to the statutory procedure.

IV. Law and Argument

A. CR 55 applies to the procedure set forth in RCW 26.09.500(5).

In 2006 Division I settled this issue in *In re Marriage of Pennamen*, 135 Wn.App. 790 (2006). In that case one of the parties had gone through the same procedure per RCW 26.09.500. The notice of intent to relocate had been filed on July 1, 2005, but the other party failed to file responsive pleadings with the court until August 10. However in that case the trial court allowed the late filing party to cure the default, and the party that filed the notice of intent to relocate complied with CR 55 by service a notice of default judgment. It was the exact same situation we have here except that the trial court did not grant an ex parte order. The party that had filed the notice of intent to relocate argued that she was entitled to default judgment based upon the failure to file a formal objection within 30 days. The court stated that:

Roberson urges us to ignore CR 55 and hold that RCW 26.09.500(1) imposes a strict requirement that the trial court allow relocation by default, without a hearing on the merits, whenever the objecting party fails to comply with the 30 day filing rule. She argues RCW 26.09.500(1)'s 30 day filing requirement should be treated as analogous to the strict procedural rules in the mandatory arbitration and appeals contexts.

In re Marriage of Pennamen, 135 Wn.App. at 800.

The court did not ignore CR 55. It ruled that RCW 26.09.500 does not entitle a party to a default judgment.

The civil rules apply to all civil superior court matters, including dissolution cases. Default judgments are disfavored as a matter of policy. As this court stated in *Batterman v. Red Lion Hotels, Inc.*, default judgments are normally appropriate only "when the adversary process has been halted because of an essentially unresponsive party." We are particularly reluctant to reverse a trial court's decision not to enter a default judgment in the family law context where many parties are pro se, procedural errors are common, and the welfare of children is at stake. Because CR 55 applies to this case, the trial court was not required to allow relocation by default.

In re Marriage of Pennamen, 135 Wn.App. 790, 799.

It is not just Division I that believes that CR 55 applies to Chapter 26.09 RCW. RCW 26.09.010 makes it clear that the "the practice in civil action shall govern all proceedings under this chapter, except that trial by jury is dispensed with." RCW 26.09.010.

Further, if there is any conflict between the statute and the court rule, longstanding Washington case law makes it clear that on matters of procedure, court rules are the province of the court and

that they control over conflicting statutory provisions regarding procedure.

To the extent that a court rule conflicts with a statute, the court rule prevails whenever the right at issue is procedural. *State v. Smith*, 84 Wash.2d 498, 501-02, 527 P.2d 674 (1974). This reflects the division of power between the two branches issuing the conflicting regulations. *State v. W.W.*, 76 Wash.App. 754, 758, 887 P.2d 914 (1995) (citing *Smith*, 84 Wash.2d at 501, 527 P.2d 674); *Emwright v. King County*, 96 Wash.2d 538, 543, 637 P.2d 656 (1981).

State v. Breazeale, 99 Wn.App. 400, 994 P.2d 254, (Div. 3 2000).

So CR 55 pretty clearly applies, and any conflict between RCW 26.09.500 and CR 55 that is procedural must be resolved in favor of the court rule. Getting a default judgment is clearly procedural. Finally *Pennamen* clearly demonstrates that CR 55 must be complied with.

B. The notice of intent to relocate does not “count” as notice of a default judgment under CR 55. Therefore the May 31 judgment is void because Respondent did not receive notice of default judgment.

The trial court's November 2, 2018 ruling seems to state that the notice of intent to relocate counts as the notice of default under CR 55. A cursory reading of *Pennamen* makes it clear that Division I does not agree. Further the procedure under rule 55 is that at the time the notice of default is served, that a hearing be set and that the other party can cure the default by filing responsive pleadings before the hearing. CR 55(a). CR 55 (a) 2 allows a party to "respond to the pleading or otherwise defend at any time before the hearing on the motion." CR 55 (a) 3 clearly contemplates the setting of a hearing on the motion for default. RCW 26.09.500 does none of this. It purports to allow for an ex parte order, and does not require or contemplate a hearing. To the extent that the trial court ruled in its November 2, 2018 revision that the notice of intent to relocate procedure complies with CR 55 it committed error. In other words, part of the notice required by CR 55 is notice of the *HEARING*, which then becomes the cure by date.

Because the procedure did not comply with CR 55, and all relevant authority indicates that the rule applies in this very situation, the May 31, 2018 judgment is void.

Division III recently reiterated that a default judgment issued without compliance with CR 55 is void in *Servatron, Inc. v. Intelligent Wireless Products, Inc.*, 186 Wn.App. 666, (Div. 3 2015)

Washington courts have repeatedly and consistently held that, if a party otherwise entitled to notice under CR 55 does not receive such notice, the trial court lacks the authority to enter the judgment. An aggrieved party is entitled as a matter of right to have the order of default set aside and any resulting default judgment vacated.

Servatron at 679 citations omitted.

“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 at 679

C. The order granting attorney’s fees should be vacated.

Clearly, if the judgment is in fact void, the court should not have awarded the other party attorney’s fees for responding to the

motion. The September 13, 2018 order granting attorney's fees should be vacated.

V. CONCLUSION

For the reasons stated above Mr. Orate requests that the court vacate the May 31, 2018 orders and remand to the Superior Court for a decision on the merits.

RESPECTFULLY SUBMITTED this 8th day of April, 2019

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