

No. 43530-6-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

DAWN BAUER,

Respondent,

vs.

NYLES BAUER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY
Cause No. 09-3-00087-6

OPENING BRIEF OF APPELLANT

WAYNE C. FRICKE
WSB #16550

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Rules

CR 5	6, 7
CR 60	7, 8
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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to vacate the order impacting his parental rights.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a judgment is void when it is entered without notice to the opposing party? (Assignments of Error #1)

2. Whether a motion to vacate a judgment should be granted when the underlying order was entered without notice to the opposing party? (Assignments of Error #1)

III. STATEMENT OF THE CASE

A. Procedural History

In August 2010, an order in a child custody case was entered against the appellant herein, which limited his parental rights. RP 10 at 3-19; CP 29-62. The order was entered after his prior attorney withdrew from the case. CP 8. However, even then, the attorney represented that Mr. Bauer wanted a hearing on the matter. RP 5:16-25. In addition to naming his ex wife as primary guardian, the oral order allowed professionally supervised visits upon certain conditions. RP 13. See Attachment “A”.

Upon learning of the entry of the order, Mr. Bauer filed a motion to vacate on May 3, 2012. CP 2-3. The basis for the motion was that the attorney had withdrawn and was not representing him at the hearing. CP 4-9; 25-27. As he stated in his motion, the reason for it not being made within one year was because he was incarcerated for approximately 200 days and then placed in a psychiatric unit. CP 26. The trial court indicated it would hear the motion without oral argument. CP 65-66. The court then summarily denied the motion, finding it was without merit. See Attachment “A”. Mr. Bauer now appeals.

IV. ARGUMENT

A decision on a motion to vacate a judgment is within the court’s discretion and will not be disturbed on appeal unless the trial court abused its

discretion. In re Dependency of A.G., 93 Wn.App. 268, 276, 968 P. 2d 424 (1998). A court abuses its discretion when its decision is based on untenable grounds, for untenable reasons, or its decision is manifestly unreasonable. Lindgren v. Lindgren, 58 Wn.App. 588, 595, 794 P.2d 526 (1990). In this instance, all of these factors are present.¹

A. THE COURT SHOULD REVERSE THE TRIAL COURT AND VACATE THE ORDER ESTABLISHING PARENTAL CUSTODY BECAUSE THE ORDER WAS ENTERED WITHOUT PROPER NOTICE.

1. The Order Was Void.

CR 5(a) provides as follows:

Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served

¹ As such, this court should accept review pursuant to RAP 2.3(b). It provides in pertinent part:

(b) Considerations Governing Acceptance of Review. Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

While interlocutory review is disfavored, it is available in those instances where the error is reasonably certain and its impact on the trial manifest. Minehart v. Morning Star Boys Ranch, 156 Wn.App. 457, 232 P.3d 591 (2010). As stated in Minehart, under the above criteria,

...there is an inverse relationship between the certainty of error and its impact on the trial. Where there is a weaker argument for error, there must be a stronger showing of harm.

156 Wn.App. at 462-63. Utilizing these principles, it is apparent that discretionary review is appropriate in this case due both to the certainty of error and the potential for harm in Mr. Bauer's child custody litigation.

upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties....

And a violation of CR 5(b)(2):

Service by Mail. (A) How made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the third day. (B) Proof of service by mail. Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney.

In this case, Mr. Bauer was never given notice of the hearing because his attorney had withdrawn from the case and he was not present for the hearing, not having been given notice. As the court is aware, before a court may issue an order against an individual, it must have jurisdiction over the parties. If it does not, then a judgment is void. See Bresoloin v. Morris, 86 Wn.2d 241, 245, 543 P.2d 325 (1975). Under this scenario, a judgment is void and pursuant to CR 60(b)(5) it should be vacated regardless of the time between the original order and the motion to vacate. State ex rel. Campbell v. Cook, 86 Wn.App. 761, 767, 938 P.2d 345 (1997). Additionally, there is no need to even demonstrate a meritorious

defense under this scenario. Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces, 36 Wn.App. 480, 486, 674 P.2d 1271 (1984).

The trial court, having denied the motion without hearing or articulated reasons, committed obvious and probable error. As such, based on the authorities set forth above, the court should reverse the trial court and remand for a new hearing.

2. The Order Is Voidable and Mr. Bauer Filed His Motion to Vacate Within a Reasonable Time.

If the court determines that the order is not void, but merely voidable, the trial court, nevertheless, abused its discretion in denying the motion without any analysis. Pursuant to CR 60(b)(1),(2), or (3) a motion to vacate must be made within a reasonable time. It provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).

In this instance, the order was entered by surprise, excusable neglect and irregularity in the proceedings. Mr. Bauer's former attorney had withdrawn, only

to reappear, unbeknownst to Mr. Bauer. Additionally, he was out of the country and unavailable to be at the hearing. The order was entered without his knowledge or consent. In State ex rel. Turner v. Briggs, 94 Wn.App. 299, 305, 971 P.2d 581(1999), the court acknowledged that orders entered without client authority are voidable and may be vacated.

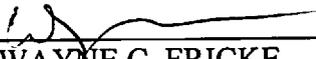
The only issue is whether Mr. Bauer brought his motion within a reasonable time. As he noted in his pleadings he was incarcerated and then later placed in a psychiatric unit and unavailable. Thus, he has demonstrated that he acted within a reasonable time. Therefore, the court should hold that he acted within a reasonable time and find that the trial court committed obvious/probable error and so far departed from the usual course of proceedings which would require reversal of the trial court and remand for further proceedings.

V. **CONCLUSION**

The Appellant respectfully requests that the court reverse the trial court and remand for further proceedings.

DATED this 6th day of March, 2013.

HESTER LAW GROUP, INC. P.S.
Attorneys for Appellant

By: 
WAYNE C. FRICKE
WSB #16550

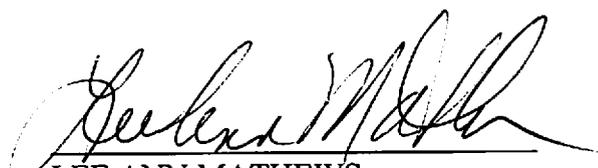
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Dawn Bauer
PMB 5360
P. O. Box 257
Olympia, WA 98507-0257

Nyles Bauer
1242-B Willow Street NE
Lacey, WA 98503

Signed at Tacoma, Washington, this 6th day of March, 2013.


LEE ANN MATHEWS

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SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY
FAMILY & JUVENILE COURT

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
12 MAY 23 AM 10:04
SETTY J. GOULD, CLERK
BY _____
DEPUTY

DAWN BAUER
Petitioner,

NO. 09-3-00087-6

and

ORDER

NYLES BAUER
Respondent.

I. BASIS

This matter came before the Court on Respondent's Motion to Vacate the Order Modifying the Parenting Plan entered in October 2010 following an August 2010 trial.

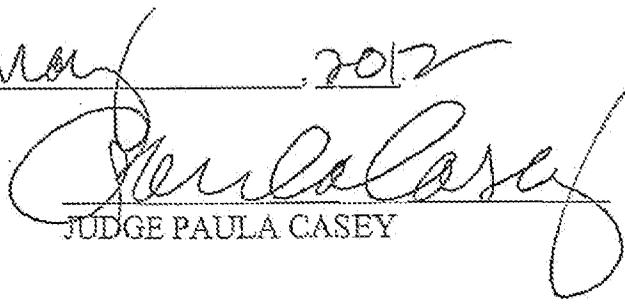
II. FINDINGS

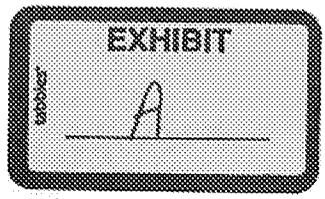
After reviewing the case record to date, and the basis for the motion, the court finds that: This matter would be heard without oral argument. I have reviewed the materials filed by the parties and find no reason justifying vacation of the Order entered in this matter.

III. ORDER

IT IS ORDERED that the Motion to Vacate be and is denied.

DATED this 23rd day of May, 2012


JUDGE PAULA CASEY



HESTER LAW OFFICES

March 06, 2013 - 2:19 PM

Transmittal Letter

Document Uploaded: 435306-Appellant's Brief.pdf

Case Name: Bauer v. Bauer

Court of Appeals Case Number: 43530-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
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- Motion: _____
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- Statement of Additional Authorities
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- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Leeann Mathews - Email: leeann@hesterlawgroup.com