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NO. 71525-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROBERT HENSLEY

Appellant,

v.

GLORIA HENSLEY (BRINKLEY)

Respondent.

BRIEF ON APPEAL

Prepared by:

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INTRODUCTION

This case arises out of a late post-dissolution motion for an award of child support arrearages following the closing of the case. The child support order, however, when it was originally entered, was defective as a direct and proximate result of a fraud on the court, perpetrated by Respondent and Respondent's counsel, having crafted a Child Support Order that did not comport with the trial verdict in this case.

Because the Child Support Order was defective due to a fraud on the court, the court is required to set aside the order and proceed pursuant to its jurisdiction thereafter. However, because the court no longer has jurisdiction, the order must be set aside.

ASSIGNMENTS OF ERROR

The court, when presented with evidence of fraud on the court, erred by failing to set aside the Child Support Order, and thereafter erred in failing to dismiss the action with prejudice.

ISSUES

This Court is being asked to consider:

Whether an order presented by the Respondent which does not comport with the verdict found at trial is defective;

Whether an order presented by the Respondent which intentionally distorts and misstates the verdict found at trial constitutes fraud on the court;

Whether the trial court has an obligation to set aside an order that does not comport with the verdict of the court as found at trial;

Whether fraud on the court may be raised at such a late date;

Whether the fraud on the court requires the court to set aside the defective order;

Whether, if the defective order is set aside, the court has any further jurisdiction, or must dismiss the case.

STATEMENT OF THE CASE

Mr. Hensley (Appellant) appeals the Order of November 6, 2013 awarding interest on past due child support, and the subsequent Order of January 6, 2014, denying Mr. Hensley's motion for reconsideration pursuant to CR 59(1), CR 60(b)(4), and CR 60(b)(5). Mr. Hensley brought his motion to make a collateral challenge on the initial Order of Child Support pursuant to CR 59(1) on the basis of an irregularity in the proceedings of the court (fraud on the court), pursuant to CR 60(b)(4) (fraud in the procurement of judgment), and CR 60(b)(5), (original judgment entering the Order of Child Support is void). The Order of November 6, 2013 was predicated on claims made by the mother based upon the Order of Child Support from January 31, 2003. (CP 44-50)

The Order of Child Support, however, does not match the verdict of the court at trial on the issues. (C 43).

The verdict of the trial court provided as follows:

The Court will adopt the Child Support Order, and finds the maintenance intended as temporary was appropriate and finds no fraud or extortion re the internet issue. The Court strikes the retroactive maintenance to the Mother since she is fully employed. The Father shall make a transfer payment of $591.71 in child support to the Mother, from March 1, 2001 through December 12, 2002, which includes medical expenses. The Father shall be responsible for 65% of all outstanding daycare expenses through January 1, 2003. There shall be a judgment for back child support of $8,555.95 against the Father, to include $350.00 in civil penalty and attorney fees. (CP 43).

The amount of day care claimed by the mother at trial was set forth on the Child Support Worksheet entered by the Court on the same date as the verdict at trial was entered (Jan. 31, 2003) and sets forth the Total Extraordinary Health Care, Day Care, and Special Expenses in line 11 of the Child Support Worksheet prepared by the mother, as being the sum of $67.90, of which Respondent's portion was $35.31. (CP 51-55). Yet, the mother presented a Child Support Order to the Court that included a charge of back support set at $10,285.13, and a charge of back due day care at $8,555.95. The day care sum was confused with the back child support sum.

This obfuscation is sufficient indication to warrant one of two conclusions: 1) that the court entered a directed verdict (formerly,

judgment *non obstante veredicto*, or JNOV); or 2) that the falseness of this order was not understood by the court at the time of its presentment.

The order as presented did not comport with the verdict, and at no time was there a motion brought to alter the verdict, or to obtain a directed verdict; nor was there a finding that there was no substantial evidence or reasonable inference to sustain the judge's own verdict for the nonmoving party.

Because the judgment is contradictory to the verdict of the court, and fraudulently sets forth a judgment sum $10,249.82 above the actual finding of the court, the Order of Child Support was at all times fraudulent to the court, and therefore must be set aside.

Appellant declared his belief that the trial court judge did not read the Order of Child Support, and in particular, the judgment summary part, when he signed the order, but instead, that he relied on the integrity of Terry Forbes, an officer of the court at that time, to present an order that agreed with the Judge's verdict at trial. (CP 36). The judgment summary, however, had obvious errors in it, and were such that any judge upon reading it would have discovered these errors. For instance, the court awarded back child support in the amount of $8,555.95, yet the Order of Child Support presented to the judge claims $10,285.13. That alone demonstrates that the judge didn't read the judgment summary. The judge never ordered $8,555.95 in back day care; the judge order $8,555.95 in back support, which again demonstrates that the judge did not read the

judgment summary. The judge ordered that the civil penalty and attorney's fee amount be included in the $8,555.95, and they were set out separately without adjustment to the total sum awarded, which again demonstrates that the judge didn't read the judgment summary. Finally, the judge awarded 65% of outstanding day care, which Respondent had articulated as a sworn statement on the Child Support Worksheet was a total of $67.90, (CP 52) and further articulated that Appellant's share was $35.31, yet on the Order of Child Support, Respondent placed the sum of $8,555.95, which the judge never found at trial.

Appellant asserts that the mother knew these numbers were false, but claimed them anyway. (CP 36). More importantly, Appellant asserts that attorney Terry Forbes knew that the judge had not ordered this amount, but went ahead and put it in the order hoping the judge wouldn't catch it, and the judge didn't catch it. (CP 36).

Following the entry of the final orders in this dissolution action, Terry Forbes was disbarred by the Washington State Bar Association. Appellant has declared his understanding to be that is that Mr. Forbes was disbarred for fraud. (CP 36).

The obfuscation of these sums and the additions placed in the Order of Child Support were fraudulent to the court, and for these reasons, the court was required to set aside the fraudulent judgment, and has therefore erred in entering judgment in favor of Respondent in awarding interest on this sum.

ARGUMENT

An abuse of discretion occurs when a trial court bases its decision on untenable grounds or untenable reasons. *Noble v. Safe Harbor Family Preservation Trust,* 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State ex. Rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court abuses discretion if its decision is manifestly unreasonable. A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. A decision is based on untenable grounds if factual finds are unsupported by the record. Abuse occurs when the decision is based on an incorrect standard or facts do not meet the requirement of the correct standard. *Marriage of Littlefield,* 133 Wn.2d 39, 47 (1997)(court had no authority under facts presented to require a residential schedule requiring geographic restriction on mother).

A trial court abuses its discretion by misapplying the law. *State v. Olivera-Avila,* 89 Wn. App. 313 (1997) (reversing withdrawal of plea of guilty after three years based on failure to inform of community placement requirement and in light of RCW 10.73); see also, *State v. McCarty,* 90 Wn. App. 195 (1998) (trial court's grant of new trial predicated on

erroneous interpretation of law, here money laundering); *State v. Smith,* 106 Wn.2d 772, 725 P.2d 951 (1986)(ER 404(b) requiring reversal).

The range of discretionary choices is a question of law and the judge abused his or her discretion if the discretionary decision is contrary to law. *State v. Neal,* 144 Wn.2d 600 (2001) (admission of a document not strictly compliant with CrR 6.13(b) which was, finally, hearsay, was an abuse of discretion).

Civil Rule 59(1) provides that "[o]n the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial."

Civil Rules 60(b) provides that "[o]n 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:

> (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

In *Marriage of Lint,* 135 Wn. 2d at 533, the court described a void marriage due to the lack of solemnization. The *Lint* case outlines the elements of fraud, 135 Wn. 2d at 533, fn.l: The elements of fraud are: (1) representation of an existing fact; (2) materiality of representation; (3) falsity of the representation; (4) knowledge of the falsity or reckless disregard as to its truth; (5) intent to induce reliance on the representation; (6) ignorance of the falsity; (7) reliance on the truth of the representation; (8) justifiable reliance; and (9) damages."

The Order of Child Support upon which the Court relied in entering it Order of November 6, 2013, was solely predicated upon the Order of Child Support Order entered in this action on January 31, 2003. (CP 44-55). This Order of Child Support is anomalous to the verdict reached by the trial judge. Appellant states that this Order as presented by the wife's attorney, was intentionally false, presented with reckless disregard for the truth, not disclosed to the court, and which deceived the court into entering a judgment against Respondent which was inconsistent with the final verdict of the court. (CP 44). Such a presentation constitutes a fraud upon the court.

The party attacking a judgment under CR 60(b)(4) must establish by clear and convincing evidence the existence of fraud that prevented it from fully and fairly presenting its case, *Lindgren v Lindgren,* 58 Wn.App. 588, 596, 794 P.2d 526 (1990). Review is limited to determining whether the evidence shows that fraud, misrepresentation or misconduct was

"highly probable." *Dalton v State,* 130 Wn. App. 653, 666, 124 P.3d 305 (2005).

"The elements of a 'fraud upon the court' are numerous. Fraud on the court is conduct: 1) on the part of an officer of the court; 2) that is directed to the judicial machinery itself; 3) that is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4) that is a positive averment or a concealment when one is under a duty to disclose; 5) that deceives the court." *Workman v. Bell,* 245 F.3d 849, 852 (6th Cir. 2001). "[F]raud upon the court is limited to that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Salsberg v. Trico Marine Servs. (In re Trico Marine Servs.),* 360 B.R. 53 (S.D.N.Y. 2006) (Citing *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir.), cert. denied, 409 U.S. 883, 93 S. Ct. 173, 34 L. Ed. 2d 139 (1972).

Establishing fraud on the court does not require that the court officer responsible "attempt" to defraud the court when the positive averment in question does, in fact, defraud the court. "The petitioner must show that an officer of the court 'whose judgment is under attack' acted in a manner that is 'intentionally false, willfully blind to the truth, or is in reckless disregard for the truth.'" *James v. United States*, 603 F. Supp. 2d 472 (E.D.N.Y. 2009) (Citing *Alley v. Bell*, 392 F.3d 822, 831 (6th Cir.

2004)). The Court is reminded that the lawyer who prepared and presented this Order of Child Support for the court's signature was subsequently disbarred. (CP 36).

By encouraging dishonesty on the mother's part, and by exploiting that dishonesty to gain unfair advantage in the litigation, the mother engaged in misrepresentation to the Court of the relevant law and engaged in misconduct as the opposing party. CR 60 (b) (4) provides for the Court to vacate the order of Judge Wynne which had been originally filed on January 31, 2003.

The child support order and the child support worksheet which were presented to the court by the mother and her now disbarred attorney deliberately fabricated the verdict of the court 1) by creating a judgment amount of $10,285.13 for a principal amount of back child support, when the court specifically found that $8,555.95 was due in back child support, 2) by entering the sum of $8,555.95 as the amount due in back day care, when the court specifically found that back day care was to be 65% of all back day care due at that time, which the mother had declared as being the sum of $67.90 on her CS Worksheet, and 3) by assessing $250 in attorney's fees and a $100 civil assessment that the court specifically held was to be included in the back child support amount of $8,555.95. The mother knowingly permitted the false and fraudulent Order of Child Support to be entered in the court record without informing the court of that fact that the order was disparate and in fact contrary to the verdict of

the court. The mother has therefore perpetuated a fraud in obtaining the judgment.

A representation of fact believed to be true but which proves to be false is actionable, and our law as of right ought to and does afford a remedy for the damage sustained. *Bank v. Tschabold Equipment,* 51 Wn. App. 749, 757, 754 P.2d 1290 (1988). *Brown v. Underwriters at Lloyd's,* 53 Wn.2d 142, 146, 332 P.2d 228 (1958). RCW 6.40.040(2)(b) provides for non-recognition of a judgment obtained by fraud.

Pursuant to CR 60(b)(5), "a void judgment, order or decree may be attacked at any time or in any court, either directly or collaterally." The law is well-settled that a void order or judgment is void even before reversal. *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 41 S.Ct. 116 (1920). "It is clear and well established law that a void order can be challenged in any court." *Old Wayne Mut. L. Assoc. v McDonough*, 204 U.S. 8, 27 S.Ct. 236 (1907).

A challenge to a void judgment can be brought at any time. *Matter of Marriage of Leslie*, 112 Wash. 2d 612, 618-19, 772 P.2d 1013 (1989) (citing *John Hancock Mut. Life Ins. Co. v. Gooley,* 196 Wash. 357, 370, 83 P.2d 221 (1938) (additional citation omitted); CR 60(b)(5).

"A court has a nondiscretionary duty to vacate a void judgment." *Leen v. Demopolis,* 62 Wash.App. 473, 478, 815 P.2d 269 (1991), *review denied,* 118 Wash.2d 1022, 827 P.2d 1393 (1992); *In re Marriage of*

Markowski, 50 Wash. App. 633, 635, 749 P.2d 754 (1988); *Brickum Inv. Co. v. Vernham Corp.*, 46 Wash. App. 517, 520, 731 P.2d 533 (1987).

Following the Court vacating the Order of Child Support which was entered based on the fraud of the mother, the Court was without discretion to then dismiss this action entirely, because the Court no longer has jurisdiction to hear the matter.

The right to challenge jurisdiction cannot be waived and may be raised at any time. *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County.,* 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

RCW 26.09.170(3) provides: "Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child." For purposes of this statute, "emancipation" refers to the age of majority — 18. *In re Marriage of Gimlett,* 95 Wn.2d 699, 702 -04, 629 P.2d 450 (1981). If a decree does not provide for post-majority support, a party must file a motion to modify to add such support before the child turns 18. *Balch v. Balch,* 75 Wn. App. 776, 779, 880 P.2d 78 (1994). Conversely, if a decree expressly provides for post- majority support, a court may modify such support as long as the movant files a motion to modify before the "termination of support." *Balch,* 75 Wn. App. at 779.

In this case, no such motion was made by the mother. The children that are the subject of this Order of Child Support are now both over the age of 18. Alex was born August 19, 1993, and Brian was born July 14,

1995. Termination of support for Alex occurred on August 20, 2011, and Child Support was adjusted accordingly. Termination of support for Brian occurred on July 15, 2013.

The mother brought a motion for interest on child support arrears on September 6, 2013, more than 30 days after the termination of support, and she did not seek ongoing support for continuing education pursuant to paragraph 3.14 of the Order of Child Support, the Court has no jurisdiction to modify, amend, or re-enter an Order of Child Support in this matter.

Because the court no longer has jurisdiction to hear this matter, the court must dismiss this action with prejudice.

Respectfully submitted this 29th day of April, 2014.

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CERTIFICATE OF SERVICE

The undersigned now certifies that a true copy of this BRIEF OF APPELLANT was served on the following:

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by first class, U.S. Mail, this 29th day of April, 2014.

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