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STATE OF WASHINGTON
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NO. 69805-2-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NICHOLAS KELLERMANN
Appellant/Respondent

v.

HEIDI KELLERMANN
Appellee/Petitioner

BRIEF OF APPELLANT

Counsel for Appellant, Nicholas Kellermann:

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CR 60(b)(11)5

II. ASSIGNMENTS OF ERROR

The trial court erred in denying Mr. Kellermann's Motion to Vacate Child Support Order when Mr. Kellermann demonstrated that the child support obligation was causing a manifest injustice.

III. STATEMENT OF THE CASE

Trial was held in this case on February 15, 2012. CP 4. A child support order was entered on February 22, 2012. CP 10. Mr. Kellermann's income was imputed at \$2,804 per month because his income was unknown. CP 12. Mr. Kellermann's child support was set at \$766 per month for his two children, Galaxy and Jazz. *Id.* Mr. Kellermann has been struggling to make these payments. CP 4.

At the time of trial, it was illegal for Mr. Kellermann to work. CP 5. He had recently moved to Northern Ireland to be with his fiancé, Kate, and their infant son, Odin. *Id.* He had applied for a residence permit in October of 2011, which would allow him to live and work in Northern Ireland. *Id.* When he applied for the permit, he had to submit his passport to the U.K. Home Office agency to get the "Limited Leave to Remain in the U.K." Visa on his passport. *Id.* He did not receive the residence permit along with his passport until April 2, 2012. *Id.* Until that point, it was illegal for Mr. Kellermann to work in Northern Ireland. *Id.* He could not even return to the

U.S. to work there as he did not have his passport. *Id.* There was absolutely no way for him to legally generate any income to pay for child support. *Id.*

Mr. Kellermann's child support and income were set beyond his ability due to several circumstances. For the trial, he could not return to the U.S. to appear in person as he did not have a passport. CP 5. He had to appear at trial by telephone. *Id.* This created logistical problems with his ability to adequately represent himself. *Id.* Because he couldn't afford an attorney, he represented himself. *Id.* He did not know that he could request a deviation for the support of Odin, which would have made child support more manageable. *Id.* Ms. Kellermann on the other hand was able to afford to retain an attorney. *Id.* There was a huge disparity in sophistication regarding the legal system.

The trial court was aware that Mr. Kellermann was unemployed. A transcript of excerpts from the trial are designated at CP 21. Ms. Kellermann's position was that Mr. Kellermann should be imputed at his age. CP 23. The trial court heard evidence however that Mr. Kellermann has never made anything even close to \$2,800 per month. CP 25. The trial court stated to Heidi, "the long and the short of it is, during your time together, there wasn't any point in time when he was actually making \$2800 a month, despite the fact that the table says that's what he should be making." CP 26.

Mr. Kellermann's background is in music. CP 6. He has a certificate in music and audio production and a certificate in Protools (music software). *Id.* This has never been a lucrative or marketable career. *Id.* He has never made much more than minimum wage. *Id.* From February to April of 2011, he worked for Skips Music in Sacramento, CA, earning \$8 an hour. *Id.* From November to December 2010, he worked for BP Productions (a lighting company), earning \$10 per hour. *Id.* From March to October 2010, he worked for Rhino Staging and Events at the Tacoma Dome, and he was earning \$12 per hour. *Id.* Sporadically, he has provided music lessons in piano and guitar, earning about \$125 per month. *Id.*

Based on this, the trial court was very hesitant to impute him at an amount that he had never demonstrated he could make. The trial court stated to Ms. Kellermann's attorney, "it feels odd for me to say to Mr. Kellermann, 'I'm imputing income at a rate higher than you've ever made in your life even when the two of you were together.'" CP 30. The trial court went on to point out the irony that if "Mr. Kellerman went over the Northern Ireland and picked up where he left off here with his employment . . . and was making exactly what he was making here . . . you would sort of be stuck with that." CP 33.

The trial court's hesitations to impute Mr. Kellermann at \$2,800 were correct. He has struggled to make the child support payments. CP 6. He was behind from the get-go because he did not get his residence permit until April. *Id.* To get caught up, he began selling his instruments. *Id.* To continue making the child support payments, he has had to borrow money from family and take loans with over 100% interest from institutions that are essentially loan sharks. *Id.* He has made the following child support payments:

April 12, 2012: \$766
June 1, 2012: \$766
June 26, 2012: \$1,532
September 28, 2012: \$766
TOTAL: \$3,830

Id. As of 10/26/2012, Mr. Kellermann was about \$2,200 in arrears. CP 7. If and when his arrears exceed \$2,500, the state may revoke his passport. *Id.* Passport revocation is a serious threat to Mr. Kellermann as it would mean that he could not return to the U.S. to visit his children. *Id.* His ability to remain in Northern Ireland with Kate and Odin would be jeopardized as well. *Id.* This child support obligation has been a major hardship to him and his family. *Id.*

After receiving his resident permit, Mr. Kellermann has been applying for jobs. *Id.* As of 10/26/13 he was on unemployment (called "job seekers allowance" in Northern Ireland), and actively looking for work. *Id.*

Logs of his job search contacts are designated as CP 39. He is looking for work in all fields, not just music. CP 7. Unfortunately, he has been unable to find employment. *Id.*

Mr. Kellermann and his fiancé barely have enough money to live. *Id.* Mr. Kellermann's financial declaration shows that they are barely making ends meet. CP 48. His only source of income is his job seeker's allowance. *Id.* He lives off of that and the public assistance that his fiancé receives. *Id.* That is hardly enough to cover the care of Odin and Kate's daughter, Kyla. CP 7. He expects his expenses to increase in the near future, as he and Kate are expecting their second child. *Id.*

Due to this financial hardship, Mr. Kellermann filed a motion to vacate the child support order on 10/26/12 pursuant to CR 60(b)(11). CP 3. He requested that the court enter his proposed child support worksheets, with his income imputed at full time minimum wage.¹ *Id.* He requested that the new child support order be effective retroactively, and for any overpayment to be applied to future child support payments. *Id.*

On 11/8/12, the trial court denied Mr. Kellermann's motion without written findings. CP 80. Mr. Kellermann filed a motion for

¹ Minimum wage in the U.K. as of October 2012, is 6.19 pounds, or \$9.93 per hour. With his employment history and lack of training or education in anything marketable, he is limited to a minimum wage position. If he was unable to find anything much more than minimum wage in the U.S., there is no reason why he would be making more in Northern Ireland.

reconsideration on 11/19/12, requesting that the court make written findings of its denial of the motion to vacate. CP 83. On 12/11/12, the trial court denied Mr. Kellermann's motion for reconsideration. CP 85. A notice of appeal was filed on 1/10/13. CP 87.

IV. ARGUMENT

The court reviews denials of motions to vacate under CR 60(b) for abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). CR 60(b)(11) allows for relief from judgment or order for “[a]ny other reason justifying relief from the operation of the judgment.” The court will grant relief under CR 60(b)(11) when extraordinary situations, extraneous to the trial court's action, result in a manifest injustice. *In re the Marriage of Hammack*, 114 Wn.App. 805, 810, 60 P.3d 663 (2003) (emphasis added); *In re Marriage of Jennings*, 138 Wash.2d 612, 625-26, 980 P.2d 1248 (1999); *In re Marriage of Burkey*, 36 Wash.App. 487, 490, 675 P.2d 619 (1984). The courts have been willing to expand “extraordinary circumstances” for equitable reasons. *Hammock*, 114 Wn. App. at 810; *see Knies v. Knies*, 96 Wn. App. 243, 250, 979 P.2d 482 (1999) (the court found that the husband was circumventing the property settlement agreement and was denying the wife's one-half interest in the husband's pension).

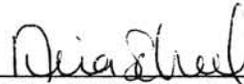
An extraordinary situation exists in this case due to the hardship that the child support order causes on Mr. Kellermann and his family. Mr. Kellermann's child support is set to an amount that is out of his reach and will result in him being constantly in arrears. Mr. Kellermann's income was never as high as the amount to which he was imputed. He did not have the ability to work for months following entry of the order because he did not have his passport or residence permit. Due to his very limited income, Mr. Kellermann struggled to make the payments and has fallen in arrears. He has had to sell instruments to make the payments that he has made. When the instruments ran out, he had to take out loans at over 100% interest. Yet he is still in arrears. Due to these arrears, he faces the threat of being removed from Northern Ireland, where he resides with his pregnant fiancé and their young son. The child support order is causing a manifest injustice to Mr. Kellermann and his family. These effects of this child support order have occurred post-trial, and are thus extraneous to the trial court's actions.

V. CONCLUSION

Mr. Kellermann is determined to fail with the child support order in effect. His income has never been as high as reflected in the child support worksheets. The trial court was aware of this factor. Mr. Kellermann has not been able to keep up with the ordered child support

post-trial. Despite taking measures such as selling belongings and taking loans with extreme interest, he is still behind. With a small child and a baby on the way, this high child support amount has been causing a financial hardship to Mr. Kellermann's family. He risks being removed from his family in Northern Ireland if he falls further into arrears due to passport revocation. Mr. Kellermann is requesting that this court reverse the trial court's decision denying his motion to vacate the child support order.

DATED this 3rd day of May, 2013



NINA SCHEEL, WSBA No. 44775
Attorney for Appellant

**WASHINGTON STATE COURT OF APPEALS
DIVISION I**

In re the Marriage of:

HEIDI KELLERMANN
Appellee,

and

NICHOLAS KELLERMANN
Appellant.

**NO. 69805-2
NO. 11-3-01964-4 SEA**

Declaration of Service

I, Stephanie Baumann, declare that on the 3rd day of May, 2013, I caused the foregoing document: BRIEF OF APPELLANT to be served in the manner described to the following:

VIA:

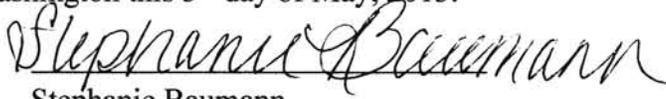
U.S. Mail, Postage Prepaid; and

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TO: HEIDI KELLERMANN
1167 REPUBLICAN STREET, NO#310
SEATTLE, WA 98109

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 3rd day of May, 2013.


Stephanie Baumann