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COURT OF APPEALS

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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

SAM BOYSEN,
fka SYLVIA CRAIG,
Petitioner/Appellee

and

ROY B. CRAIG III,
Respondent/Appellant

NO: 34551-0-II

(Trial Court No. 96-3-02330-1
Pierce County Superior Court)

APPELLANT'S OPENING
BRIEF (*corrected*)

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ORIGINAL

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I. STANDARD OF REVIEW

When a court lacks a personam jurisdiction over a party, any judgment entered against that party is void. Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed de novo. *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131 (1906); *Allstate Ins. Co. v Khani*, 75 Wn. App. 317, 877 P.2d 724 (1994); *Brickum Inv. Co. v. Vernham Corp*, 46 Wn. App. 517, 520, 731 P.2d 533 (1987).

II. ASSIGNMENT OF ERROR

1. The trial court erred in finding that "*The court finds it has jurisdiction to amend the decree.*" (CP 257-258).
2. The trial court erred in finding that "*Mr. Craig received notice of the July 1999 hearing to Amend the Decree.*" (CP 257-258)
3. The trial court erred in finding that "*Failure to add the Exhibit E is a clerical mistake.*" (CP 257-258)
4. The trial court erred in not awarding Skip his attorney's fees (CP 257-258).

Issues Pertaining to Assignment of Error

1. Can the trial court amend a Decree of Dissolution when it lacked personal jurisdiction over Skip? (Assignment of Error 1 and 2.)
2. When the court rules require personal service and Ms. Boysen merely mailed the notice of the hearing to amend the Decree of Dissolution to Skip's wrong address, and only one month before Ms. Boysen had served Skip at his correct address in connection with a garnishment action, does Ms. Boysen's unsupported allegation in her declaration that she believed Skip got notice provide sufficient evidence for the court to find that Skip had notice of the July 1999 hearing? (Assignment of Error 2.)
3. Where there is no reference to an Exhibit E in the Decree of Dissolution and the amendment adding Exhibit E changes the fundamental rights of the parties, can the court without personal jurisdiction or even notice to Skip add Exhibit E to the Decree of Dissolution on the basis of a mere clerical mistake or error? (Assignment of Error 3.)
4. Where Ms. Boysen did not properly serve Skip so as to allow the court personal jurisdiction of him and the fact of the deficiencies have been noted to Ms. Boysen by Skip, is her intransigence in failing to vacate the amendment to the Decree of Dissolution

sufficient to allow Skip reasonable attorney's fees under RCW 26.09.140 and/or CR 60(b)? (Assignment of Error 4.)

III. STATEMENT OF FACTS

Roy B. Craig III, ("Skip") appeals from the Order that denied his Motion to Vacate the Amended Decree of Dissolution due to the court's lack of jurisdiction.

Skip and the Petitioner, Sam Boysen ("Ms. Boysen"), were divorced on December 21, 1999. Decree of Dissolution and Findings of Facts and Conclusions of Law was signed by commissioner pro tem Mark Gelman (CP 15-25). The parties have two (2) children, TC and HC, currently seventeen (17) and fourteen (14) years old (CP 1-9). After entry of this Decree of Dissolution an Amended Decree of Dissolution was entered by default and signed on July 30, 1999 by Judge Tollefson (CP 51-61).

The process to amend the Decree of Dissolution chosen by Ms. Boysen was by a CR 7 Motion. A Note for Motion Docket dated July 14, 1999 by attorney for Petitioner, Diana Lynn Kiesel, set a Hearing/Motion for July 30, 1999 (CP 35). Ms. Boysen's method to provide Skip notice of this hearing was by mail (CP 36). Skip never had any notice of the Hearing set by Ms. Boysen's attorney nor was he personally served. Skip stated "I never had notice of the hearing that amended the Decree of

Dissolution on July 30, 1999” (CP 222 Ln. 15). Skip was unrepresented as his attorney had withdrawn as of February 8, 1999 (CP 28). Counsel for both parties withdrew and the parties were representing themselves shortly after the divorce (CP 190 Ln. 15).

In support of Ms. Boysen’s Motion to Amend the Decree of Dissolution, Ms. Boysen stated:

When final papers were submitted for formal proof in my dissolution on December 21, 1998, an Exhibit “E” relating to retirement was inadvertently omitted from the Decree of Dissolution. I have signed an identical Decree with the proper exhibits attached. Attempts to have Mr. Craig sign the Decree have been unsuccessful and I would ask the court to approve the Amended Decree. (Motion to Amend Decree (CP 37-38).

There never was any reference in the December 21, 1999 Decree to an Exhibit E. Neither is there a reference in the Findings of Fact and Conclusions of Law to an Exhibit E (CP 10-15). There is no evidence in the record of any Exhibit E. For Ms. Boysen to claim that Exhibit E was inadvertently omitted is improper as it suggests that Exhibit E was simply not attached to the Decree of Dissolution. Skip was not aware of any communication alleged to have occurred between Ms. Boysen’s attorney and his attorney’s office after entry of the original Decree of Dissolution (CP 223).

The Note for Motion Docket, Special Notice of Appearance, and Motion to Amend Decree were all mailed to Skip at 407 Valley Avenue East, Apartment Y105, Puyallup, Washington 98372 (CP 37). Skip did not live at that address where the documents were mailed nor had he lived there since August 1998. Ms. Boysen, who signed the Declaration in Support of the Motion to Amend, (CP 37-38), knew as a matter of fact and law that Skip was not living at the 407 Valley Avenue East, Apartment Y105, Puyallup, Washington 98372 address or even in the city of Puyallup.

Ms. Boysen garnished Skip's wages on May 14, 1999, only one month prior to sending out the notice for the July 30, 1999 hearing to amend the 1999 Decree. When she wanted Skip's money, she knew where to find him, but when she noted the hearing to amend and benefited by Skip not appearing, she could not remember where he lived all within one (1) month's time. In the garnishment action, Ms. Boysen stated Skip's address as 3724 – 116th Avenue Court East, Edgewood, Washington 98372 (CP 29-31). That was the address where Ms. Boysen served Skip with a Writ of Garnishment (CP 32-34). This is the address where Skip still resides. Skip never received anything from Ms. Boysen or her attorney in regards to their Motion to Amend the Decree in July 1999 by mail or otherwise (CP 67). This is not surprising since the address they chose to serve Skip with the motion had not been his address for almost a year.

Even assuming alternative service was ordered, and it was not, Ms. Boysen would have been required to send the notice to Skip's current residence and she did not.

The Amended Decree of Dissolution substantially changed the Decree of Dissolution.

In the original decree Exhibit B, No. 5 stated:

The wife is to receive all benefits in the Burlington Northern - Santa Fe Railroad Company Tier II Account upon **husband's retirement**. Benefits should be awarded to wife consistent with the requirements of the Plan (**emphasis added**) (CP 23)

The Amended Decree of Dissolution Exhibit B now states:

The wife is to receive all benefits in the Burlington Northern - Santa Fe Railroad Company Tier II Account upon husband's retirement. Benefits should be awarded to wife consistent with the requirements of the Plan. **See Exhibit E** attached (**emphasis added**) (CP 57).

In January 2005, Skip was determined to be disabled by the Railroad Retirement Board (CP 167). The Railroad Retirement Board noted that Skip's disability was retroactive to October 1, 2003 (CP 167). As a result of this disability award, Skip's case is periodically reviewed to determine whether the conditions remain so severe as to prevent Skip from working and to allow annuity payments to continue (CP 167). Skip is unable to work (CP 167). Skip received, pursuant to the Railroad

Retirement Award Notice, his Tier I Benefits which are computed under the social security formula. These benefits are not assignable in a Dissolution of Marriage action (45 U.S.C. § 231m). Tier II Benefits are computed under the Railroad Retirement Formula and are assignable (CP 167). Skip is fifty-nine (59) years old and is not eligible for railroad retirement until 2012 when he reaches age sixty six (66) (CP 69). Should he now work, all of his benefits are at risk (CP 69).

Skip stated “It was never negotiated that my disability benefits, whether it be Tier I or Tier II would ever belong to the Petitioner.” (CP 69 Ln. 11). The addition of Exhibit E to the Amended Decree of Dissolution has allowed Ms. Boysen to receive Skip’s Tier II Disability Benefits years before Skip’s retirement. Skip’s Tier II benefits have been accelerated as a result of his disability. It is only through the mere fortuity of Skip’s career ending disability that Ms. Boysen is receiving benefits. Were Skip not disabled and still working for the railroad, Ms. Boysen would not be receiving any benefit and would only receive the Tier II benefits when Skip retired. Without the addition of Exhibit E to the Amended Decree of dissolution, the Railroad Retirement Board would not distribute disability benefits to Ms. Boysen (CP 188 Ln. 5).

Exhibit E to the Amended Decree of Dissolution states:

Railroad Retirement Benefits - Sylvia Craig is awarded, and the Railroad Retirement Board is directed to pay, an interest in the portion of Roy B. Craig's benefits under the Railroad Retirement Act (45 U.S.C. § 231 et seq) which may be divided as provided by section 14 of that Act (45 U.S.C. § 231m). Sylvia Craig's share shall be the entire divisible portion of Roy B. Craig's monthly benefit as defined in the above referenced sections. This decree may be modified if additional language is required to award Sylvia Craig her interest in the above mentioned benefits (CP 61).

**IV. ARGUMENT AND AUTHORITIES
(APPLICABLE TO ALL ASSIGNMENTS OF ERROR)**

The trial court erred in finding "The Court finds it has jurisdiction to amend the Decree of Dissolution".

The court did not have jurisdiction in July of 1999 to amend the Decree of Dissolution. Ms. Boysen's Motion to Amend the Decree of Dissolution in July of 1999 by a CR 7 Motion and service by mail on Skip did not confer jurisdiction to the Court.

CR 60 *Relief from Judgment or Order* sets forth the proper procedure to vacate a judgment or order. In the instance case "the Motion to Amend" was mailed to Mr. Craig more than six (6) months after the Decree of Dissolution was entered and after his attorney had withdrawn and in a manner consistent with a CR 7 Motion not CR 60. The way to

seek relief from a judgment or order is through CR 60. CR 60(e) sets forth the procedure for vacation of judgment.

(e) Procedures on vacation of judgment.

(1) *Motion.* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) *Notice.* Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) *Service.* The motion, affidavit, and the order to show cause shall be served upon all parties affected **in the same manner as in the case of summons in a civil action** at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct (**emphasis added**).

(4) *Statutes.* Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect. (Adopted May 5, 1967, effective July 1, 1967; amended Sept. 26, 1972, effective Sept. 26, 1972; amended, effective Jan. 1, 1977.)

The procedure under CR 60 requires that the court first enter an order fixing the time and place and that the Order to Show Cause be issued and personal service be had upon all parties in the same manner as in the case of summons in a civil action. CR 4(d) *Service*. This rule sets forth the service requirements and RCW 4.28.080(15) requires Skip be served personally. Statutes and court rules provide alternative ways to serve. Statutes such as RCW 4.28.100 and .110, 13.34.080 and 26.33.310 among others provide for service by publication but requires court order. There are alternatives to serving by publication and CR 4(d)(4) provides for service by mail. Service by mail also requires a court order. There was no court order allowing service by mail in Ms. Boysen's motion to amend the Decree.

Skip's Motion to Vacate the Agreed Decree of Dissolution was made pursuant to CR 60 (b)(5). *The judgment is void*. Motions to vacate under CR 60 (b)(5) are not required to be "made within a reasonable time" as required by other CR 60(b) Motions. Motion to vacate because the judgment is void may be brought at anytime after entry of judgment. *In re Marriage of Maxfield*, 47 Wn. App. 699, 702, 737, P.2d 671 (1987). *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985). The court in July of 1999 never had personal jurisdiction of Skip to allow the

court to amend the Decree because Skip was never personally served and no alternative service was ever ordered.

First and basic to any litigation is personal jurisdiction, and first and basic to jurisdiction is service of process. *Dobbins v. Mendoza* 88 Wn. App. 862, 947 P.2d 1229 (1997). When a trial court lacks in personam jurisdiction over a party, any judgment entered by the court against the party is void. *Scott v. Goldman* 82 Wn. App. 1, 6, 917 P.2d 131 (1996). Courts have a mandatory duty to vacate void judgments. *Scott v. Goldman*, *ibid*.

The trial court erred in finding “*Mr. Craig received notice of the July 1999 hearing to amend the Decree*”.

There is no testimony of anybody that indicates that Skip was personally served with the Motion to Amend the Decree of Dissolution. Further, there was no court order allowing for any substitute service upon Skip. Since Skip’s attorney filed his Notice of Intent to Withdraw on January 28, 1999 effective February 8, 2000 (CP 28) any service therefore would have had to have been on Skip. Ms. Boysen’s only argument for Skip having received notice is contained in her declaration upon Page 6 of that declaration.

Mr. Craig attached a copy of my attorney’s affidavit of mailing regarding the motion to amend the Decree of Dissolution. The affidavit of mailing states that it was

mailed both certified, return receipt and 1st class mail. Attached is a copy of the original envelope and receipt for mailing the motion and note for motion calendar to Mr. Craig which is dated July 14, 1999, two weeks prior to the motion. (Attachment #9). The certified mail indicates that Mr. Craig received several notices of the certified mail, but he did not claim it and it was returned to sender. It should be pointed out the envelope is not stamped with, "addressee unknown, return to sender" "moved left no forwarding address" "unable to forward, return to sender" or "not deliverable as addressed" which would be stamped on the envelope if the post office was unable to give proper notice of the certified mail to Mr. Craig. According to my attorney, the first class copy was never returned to her office which is why she proceeded with the hearing. It should also be pointed out that Mr. Craig moved within the same zip code. **I believe** that he received notice of the hearing, but as with everything else, he refused to cooperate (**emphasis added**) (CP 189-190).

Skip unequivocally has stated that he did not receive any notice of the hearing (CP 222). The best that Ms. Boysen states is "I believe that he received notice of the hearing, but as with everything else that he refused to cooperate" (CP 189-190). Ms. Boysen never has offered any explanation why she attempted service on Skip by mailing a notice of the motion and hearing to Skip at an address she knew he did not live. Providing proof of service is Ms. Boysen obligation and simply believing that Skip received notice of the hearing is not sufficient.

The trial court erred in finding "*that failure to add Exhibit E is a clerical mistake*".

CR Rule 60 RELIEF FROM JUDGMENT OR ORDER

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

The court erred in believing that the addition of Exhibit E was simply a clerical mistake. For the purposes of subdivision (a) of CR 60, a clerical mistake is one involving a mere mechanical error rather than a matter of substance, i.e., one which prevents the judgment from embodying the court's intention. *Marchel v. Bunger*, 13 Wn. App. 81, 533 P.2d 406 (1975). The addition of Exhibit E to the Decree is a substantial change to the rights of the parties and was not agreed to by the parties. Ms. Boysen was to receive Skip's benefits upon retirement not upon disability (CP 23). The effect is to deprive Skip of nine (9) years of income that he did not agree to and that neither party agreed to.

The test for distinguishing between judicial error and clerical error, for the purpose of applying this rule is that clerical mistakes in judgments and errors therein arising from oversight or omission may be corrected any time, is whether, based on the record, the judgment

embodies the trial court's intention. In re *Getz* 57 Wn. App. 602, 789 P.2d 331 (1990).

Ms. Boysen attempted to give Skip notice of her Motion to Amend the Decree of Dissolution. That notice did not comply with CR 60(e) requirements for service on Skip. There was no court order allowing substitute service to relieve Ms. Boysen from the normal requirement of personal service on Skip of the motion to amend the Decree of Dissolution. Skip's disability benefits are income replacement not retirement. The addition of Exhibit E has resulted in Skip being denied nine (9) years of income and it has resulted in Skip's disability payment, which is income replacement and not a retirement benefit, improperly being paid to Ms. Boysen years before Skip can retire. Railroad disability pay is not retirement pay.

The post disability benefits of Mr. Craig's employment is his separate property. Mr. Craig's disability occurred in October 2003, almost four (4) years after the Decree of Dissolution was entered. Skip's disability was an occurrence that affected his future earning ability. This disability award through his railroad employment is logically distinguishable from a retirement benefit which is earned and thus acquired over a number of years by virtue of Skip's labor. *In re Marriage of Hutson*, 27 Wn. App. 579, 619 P.2d 981 (1980). Where there is no

substantial element of deferred compensation or retirement, a post separation disability award is a separate property of the disabled person.

Under *Marriage of Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984) monthly payments under disability insurance policy intended to compensate the insured for future income for pain and suffering should be characterized as separate property. Monthly payments under the policy which compensate for expenses incurred during the marriage, earnings lost during the marriage or payments which in fact are deferred compensation should be characterized community property proportionate to the community's contributions and its expenses or to the deferred compensation. *Marriage of Brewer*, 137 Wn.2d. 756, 770, 976 P.2d 102 (1999)

There is no provision in the Decree or elsewhere making Skip's separate property disability benefits for an incident occurring after the Decree of Dissolution Ms. Boysen's property. How could Skip or the court allow Skip to give to Ms. Boysen his separate property disability when he is still responsible for child support?

ATTORNEY'S FEES

The trial court erred in not awarding Skip his attorney's fees. Skip should be awarded his attorney's fees for having brought the Motion to Vacate and the subsequent Appeal of its denial due to Ms. Boysen's refusal to agree to vacate the Amended Decree of Dissolution. CR 60(b) provides:

b. *Mistakes; Inadvertent; Excusement; 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 final judgment, order, or proceedings for the following reasons:

In Housing Auth. v Newbiggings, 105 Wn. App. 178, 19 P.3d 1081 (2001), the court ordered terms to the party requesting that a court set aside a default judgment. CR 60(b) is equitable in nature and gives the court equal discretion to preserve substantial rights and due justice to the parties. *Pamelin Industries Inc. v Sheen – USA*, 95 Wn.2d 398, 622 P.2d 1270 (1981). Ms. Boysen knew that there was no personal service on Skip and that she had not even mailed the notice to Skip’s correct address. By not agreeing to vacate the Amended Dissolution is tantamount to intransigence and has resulted in Skip incurring attorney’s fees unnecessarily.

RCW 26.09.140 also gives this court discretion to order fees to be paid to Skip. A challenge to a decree entered under the dissolution statute is a continuation of the original action, and thus, a fee may be awarded under this statute on a motion to vacate. *In re Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999).

V. CONCLUSION

Skip respectfully asks the court to vacate the amended Decree of Dissolution, award Skip his separate property disability benefits and award Skip his attorney's fees and costs on Appeal.

Dated June 9, 2006

A handwritten signature in black ink, appearing to read 'C. Nelson', written over a horizontal line.

Christopher S. Nelson, WSBA #6347
Attorney for Appellant

CERTIFICATION OF SERVICE

Christopher S. Nelson, attorney for Appellant, certifies that:

I served this document on June 9, 2006, upon Petitioner through her counsel, by depositing a true and complete copy thereof, in the U.S. Mail, enclosed in a sealed envelope, with first class postage, prepaid, addressed as follows, and also by faxing a copy to the fax number shown below.

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DATED this 9th day of June, 2006.



Christopher S. Nelson, WSBA #6347
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