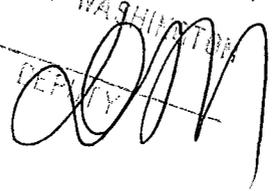


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COURT OF APPEALS
DIVISION II
2013 OCT -3 PM 1:14
STATE OF WASHINGTON
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NO. 44552-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE ADOPTION OF
HMG, a minor child

REPLY BRIEF OF APPELLANT, PP

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

The material facts in this case remain undisputed. In February, 2011 the KNG and CNG (collectively referred to as KNG or Respondents) filed petitions to terminate the parent child relationship between HMG and his natural mother, PP. The petitions were assigned Pierce County Superior Court no. 11-5-00474-7. PP appeared and vigorously defended the lawsuit, answering the petitions and denying the factual basis for termination of her relationship with Hunter. The case was set for trial. In October, 2011, KNG tried to get summary judgment on their petitions. PP opposed the motion, and Judge Elizabeth Martin denied it. In December, 2011, KNG withdrew their petitions citing the fact that PP was taking steps to comply with the parenting plan. An order of dismissal was entered. In March and April, 2012, KNG purported to reopen the case. Using the same cause number as the previous action, and without paying a filing fee, they served then filed what they called "amended" summons and petitions. Then, ignoring the fact that PP had appeared in and actively defended the case, and that in the dissolution proceeding she was actively engaged in getting more visitation rights with HMG, Respondents decided PP needed to reappear or she was not entitled to notice of any further proceedings. On that premise, they proceeded to obtain default without notice to her, and then enter a host of other orders that ultimately took away her rights ever to see her son. To this day, they

have not cited a single statute, rule or court decision that authorizes the procedure they followed.

In their Statement of the Case, Respondents imply that PP had lost all visitation with HMG by court order in the paternity action. Brief of Respondents at 2-5. The implication is inaccurate. In the parenting plan entered in the paternity proceeding, the court ordered as follows:

The mother shall have no contact with the child until after she is released from Prison. At such time she may seek to resume limited supervised contact with the child. Any contact shall be supervised at all times in the presence of a PhD level therapist who is fully familiar with the circumstances of the case; has had contact with Mr. [KNG]; has had contact with the Guardian ad Litem, and who has either been agreed to by Mr. [KNG] or appointed by the court. All costs associated with the therapist or visitation shall be paid in advance by the mother. The therapist, with knowledge of the situation may come up with a plan to restore some relationship between the child and [PP]. (CP 596, 600-01.)

In the termination proceeding, Judge Martin recognized that this order gave PP some visitation rights. (CP 543, lns. 18-22) At the time of the order of default, PP was actively engaged in meeting the conditions necessary to resume her visitation with HMG. On February 10, 2012, in the paternity action, PP asked the court to appoint a counselor who would recommend a visitation plan for PP and HMG. (CP 389-93) For months, KNG would not act to agree on a counselor. (CP 70-72, 73-83) PP's motion forced the issue.

The court granted the motion, ordering the counselor to provide KNG's

attorney with “a proposed plan for reunification between PP and child.” (CP 635)

In their Statement of the Case at 6, Respondents say: “The earlier petitions had been dismissed so an amended summons and amended petition had to be filed.” They cite to CR 4 and 5. Neither rule supports let alone requires filing of amended pleadings after an action is dismissed. The only mention of amended pleadings in either rule is found in CR 4(h), which provides: “At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.” This calls for court intervention and implies that the party against whom the process is issued must have notice. The applicable rule for commencing an action is CR 3. It provides that “a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in Rule 4 or by filing a complaint.” It does not allow a party to commence an action with amended pleadings.

At page 6 of their brief, Respondents state: “Approximately two months after the default order was entered, PP filed a Motion for an Order to Vacate the Default Order.” It took two months because Respondents had not given PP notice of the motion for default or the order until nearly a month

after they were filed. (CP 189) PP moved to vacate the order of default within a month of getting notice.

At page 6-7 of their brief, Respondents state: “PP failed to file a motion for revision or motion for reconsideration within the ten days of entry of the order as required by RCW 2.24.050 and CR 59 so the Court’s order became the final Order of the Court.” She was not required to. Commissioner Kiesel had concluded that PP had not noted her motion in compliance with CR 60. (CR 154-55; 564.) PP would seek revision or appeal of that decision only if she disagreed with it. In the absence of disagreement, her remedy was to re-file the motion following the correct procedure. That is what she did. She did not seek revision or reconsideration.

REPLY ARGUMENT

This case presents three general issues: First, was PP in default because she did not answer the amended petitions or enter a new notice of appearance even though she had appeared and answered the original petitions? Second, if she was in default, was PP entitled to notice of the motion for default before an order of default could be entered against her? Third, even if Respondents properly obtained default, should the trial court have vacated it?

A. PP was not in default

On the first issue, KNG cites two authorities. One is *Skidmore v. Pacific Creditors, Inc.*, 18 Wn. 2d 157, 138 P.2d 66 (1943). Brief of Respondent at 11. In *Skidmore*, the defendant appeared, demurred and filed a motion to make the complaint more definite and certain, but never answered the original complaint and never noted the motion for more definite statement for hearing. Plaintiff filed an amended complaint, to which defendant failed to respond in any way. Plaintiff brought a motion for default and gave notice to defense counsel. Shortly before the court was to hear the motion, the defendant answered. Nevertheless, the trial court entered default. The Supreme Court affirmed, applying the rule that “it is not an abuse of discretion for the trial court to refuse to set aside a default against a defendant who has failed to file his answer until after notice of default, where no showing is made which would justify or excuse the failure of the defendant to answer within the time prescribed by statute, although the answer, as filed, may set up a meritorious defense.” 18 Wn.2d at 160-61.

Skidmore is inapposite. First, in *Skidmore*, the defendant did not answer the first complaint. Here, PP did. Second, in *Skidmore*, Plaintiff gave notice of the motion for default to the Defendant. Here they did not. Third, *Skidmore* applied a rule no longer recognized in Washington: that a Plaintiff may obtain default even if the defendant answers before the trial court hears

the motion for default. Now, under CR 55(a)(2), a party may answer at any time prior to the hearing.

Ultimately, *Skidmore* undermines rather than supports Respondents' case. At the very least, *Skidmore* stands for the proposition that a party who appears in response to an original complaint is entitled to notice of a motion for default on an amended complaint. That did not occur here.

The other case Respondents cite is *Cork Insulation Sales Co. v. Torgeson*, 54 Wn. App. 702, 775 P.2d 970 (1989). They cite this for the proposition that the order of dismissal caused the trial court to lose jurisdiction. However, Respondents fail to explain why the proposition is significant in this case. Indeed, it cuts against them. Since the order of default was entered in the proceeding that had been dismissed, if the trial court lost jurisdiction by the order of dismissal it had no jurisdiction to enter the order of default. Respondents had not reopened the case before presenting the order of default. They did not even pay a new filing fee. Therefore, if the dismissal order eliminated the court's jurisdiction and respondents did nothing to reestablish the court's jurisdiction, none of what Respondents did can stand.

Respondent's efforts to distinguish the authorities that PP cites are unpersuasive. Respondents agree the cases stand for the proposition that a party cannot be in default for failing to answer an amended complaint. They

distinguish the cases because “none of [the] cases cited by Appellant involved the case being dismissed or the subsequent service of a new summons.” Brief of Respondent at 9. None of the cases rested on such facts. More importantly, the argument misses the point. Despite the fact that the case had been dismissed, KNG elected to file “amended” petitions, thus bringing it within the rule regardless of the dismissal.

KNG want the benefit of inconsistent positions. On one hand they want to rely on the dismissal to argue that their filing was like they started an entirely new lawsuit that imposed entirely new appearance and answering requirements on PP. On the other they want to ignore the dismissal so they did not actually have to start a new lawsuit or pay a new filing fee, and so they could deceptively operate under the previous cause number with pleadings they called “amended.” They cite no authority that suggests either position is correct. Neither is correct. Either the case was a continuation of the previous suit, in which case PP appeared and answered, or KNG had to start a new lawsuit, with new pleadings and a new cause number, which they did not.

B. PP had appeared and was entitled to notice of KNG’s motion for default.

Respondents fail to address the second issue: whether PP had appeared and was entitled to notice of KNG’s motion for default. They

simply say PP “failed to appear.” Brief of Respondent at 12.

Generally, a party’s failure to respond to an argument constitutes a concession that the other party’s challenge is well-taken. *State v. Lundy*, 162 Wn. App. 865, ¶57, 256 P.3d 466 (2011); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005). Even if it did not, the result is the same. PP had answered KNGs’ first petitions, and denied the factual basis for their claims. She also responded to and argued in court against motions brought by KNG to summarily terminate her rights and allow adoption. In addition, she was actively engaged in restoring her visitation rights in the paternity action. Through these acts PP clearly indicated she would defend the “new” action that constituted an appearance in that action. *Gage v. Boeing Co.*, 55 Wn. App. 157, 162, 776 P.2d 991 (1989). Because she appeared, she was entitled to notice of the proceedings that followed. Because Respondents did not give her notice, the orders that followed are void. *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 399, 196 P.3d 711 (2008); *Sacotte Const., Inc. v. National Fire & Marine Ins. Co.*, 143 Wn. App. 410, 419, 177 P.3d 1147 (2008).

C. If KNG improperly obtained default, subsequent orders based on the default are void.

Respondents argue that since the order of default was valid in the first instance, all subsequent orders are also. Brief of Respondent at 12. But, as

shown above, the order of default is void. PP was entitled to notice that Respondents did not give. Respondents do not dispute that if the order of default is void, all the subsequent orders are void as well. *Colacurcio v. Burger*, 110 Wn. App. 488, 497-98, 41 P.3d 506 (2002).

D. Justice has not been done

Respondents' quote *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007): "[W]e . . . value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." Brief of Respondents at 13. The quotation is ironic because Respondents strayed far from complying with the rules. They filed amended pleadings without leave of court in an action that was previously dismissed, without paying a filing fee. They obtained default without notice to a party who had appeared and defended in the cause under which Respondents proceeded, and whom they knew would actively resist their efforts. Only then did they seek leave of court to reopen the previous lawsuit. Even then they failed to give notice to PP that they were doing so.

Out of this, Respondents argue that "justice has been done and done twice." Brief of Respondent at 13. Admittedly, something has been done, but it is not justice. Commissioner Kiesel dismissed PP's first motion because it was procedurally incorrect. Then she purported to apply an incorrect standard of review even if it was procedurally correct by requiring

PP to show a meritorious defense despite having no notice of any of the proceedings she was challenging. When PP corrected the procedural defects, Judge Felnagle rubber-stamped the Commissioner's actions, again requiring PP to show a meritorious defense and adding a duty to appeal or seek revision on top of it. The result is that no court has yet determined the merits of PP's challenge: that she was entitled to notice of the default proceedings before her parental rights could be terminated and did not get it. As a result, she has lost all right to her child without notice or an opportunity to defend. That is not justice.

E. PP was not required to prove a viable defense.

Respondents argue that PP "was required to present evidence of the merits of her claim" citing *Johnson v. Asotin County*, 3 Wn. App. 659, 477 P.2d 207 (1970). Brief of Respondent at 15. That is neither the rule nor the holding in *Johnson*. Under CR 60(b)(5), judgment may be set aside if it is void. As discussed in Appellant's opening brief, a judgment entered without notice and an opportunity to be heard is void. *Sheldon v. Sheldon*, 47 Wn.2d 699, 702, 289 P.2d 335 (1955); *State ex rel. Adams v. Superior Court*, 36 Wn.2d 868, 220 P.2d 1081 (1950); *State ex rel. First Nat. Bank of Central City, Colo. v. Hastings*, 120 Wash. 283, 207 P. 23, 31 (1922); *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 399, 196 P.3d 711 (2008)(citations omitted); *Sacotte Const., Inc. v. National Fire & Marine Ins.*

Co., 143 Wn. App. 410, 419, 177 P.3d 1147 (2008). Proof of a meritorius defense is needed only if the judgment was proper in the first instance. *Hardesty v. Stenchever*, 82 Wn. App. 253, 263, 917 P.2d 577 (1996).

F. If the judgment was proper, PP showed that clear, cogent and convincing evidence did not support the order terminating her parental rights.

Finally, Respondents argue that PP could not show a meritorius defense because (1) she had not had visitation with HMG and the restrictions against her getting visitation were “substantial and numerous” (Brief of Respondent at 16); (2) her efforts to modify the parenting plan had been denied; (3) the adoption investigator concluded adoption was in the best interests of HMG; and (4) she was behind in child support payments. Brief of Respondent at 15-20. The evidence falls far short of what Respondents needed to terminate PP’s parental rights.

Involuntary termination of the parent/child relationship is governed by RCW 26.33.120(1). It states:

Except in the case of an Indian child and his or her parent, the parent-child relationship of a parent may be terminated upon a showing by *clear, cogent, and convincing evidence* that it is in the best interest of the child to terminate the relationship *and* that the parent has failed to perform parental duties under *circumstances showing a substantial lack of regard for his or her parental obligations* and is withholding consent to adoption contrary to the best interest of the child. (Emphasis added.)

This statute continued previous standards applied by Washington courts

before the statute was enacted. *Matter of H.J.P.*, 114 Wn.2d 522, 531, 789 P.2d 96 (1990). Under this statute, termination of a parent child relationship requires “clear, cogent and convincing evidence of abandonment.” *In re Adoption of Webb*, 14 Wn. App. 651, 656, 544 P.2d 130 (1975). Abandonment requires a finding of an intention, either expressed or implied, on the part of the parent to permanently relinquish all claims to his children. *In re Tryon*, 27 Wn. App. 842, 845, 621 P.2d 775 (1980). “For purposes of an adoption, . . . the natural parent will only be deemed to have deserted or abandoned his children when he has intentionally pursued a course of conduct ‘showing a wilful substantial lack of regard for parental obligations.’” *Id.* at 848.

None of Respondents’ evidence shows abandonment, let alone abandonment by clear, cogent and convincing evidence. PP had not had visitation with HMG not because she lacked regard for her parental obligations, but because a court order placed conditions on her visitation that she could only meet after she was released from prison. She wrote to HMG expressing her love and concern for him. (CP 308-326.) Once released from prison, she made efforts to see HMG from 2010 up to the time she learned her rights had been terminated. (See, e.g., CP 71 (November, 2010), 72 (June, 2011), 80-81 (September, 2011), 66 & 83 (October, 2011), 257 (December, 2011). On March 9, 2012, the same day Respondents served PP

with the amended petitions for termination and adoption, PP had obtained a court order in the paternity action appointing a counselor and directing him to provide KNG's attorney with "a proposed plan for reunification between [PP] and child." (CP 635.) Indeed, apparently not knowing default had been ordered, on April 10, 2012, five days after the order of default was entered, Respondents' attorney in the paternity action, Britta Long, wrote a lengthy letter to the counselor offering to arrange meetings in fulfillment of the court's orders. (CP 306-07.) Even Ms. Long did not believe PP had abandoned her efforts. Under these circumstances, there is no reasonable basis for concluding that PP had not attempted to obtain visitation with her son. PP's efforts to amend the parenting plan were denied until the reunification plan was provided. (CP 635.)

The conclusion of the adoption investigator should carry no weight. First, it is unclear how she was appointed. Though Respondents contend the investigator was appointed pursuant to PCLSPR 93.04(c), Brief of Respondent at 13, the court file contains no record of her appointment. Likewise, there is no evidence PP was notified of the appointment.

Moreover, her opinions lack legitimacy. Under PCLSPR 93.04(c), the investigator was appointed at the soonest on April 3, 2012, when Respondents filed their amended petitions. Her report is dated three weeks later. (CP 116) In that short time, she concluded that adoption by

Respondents, with the necessary termination of PP's parental rights, was "in [HMG's] best interests." (Id.) But her opinions are based solely on her interviews with Respondents, two unidentified "positive references" and review of unspecified court documents. She had no contact with PP whatsoever and received no information from PP or on her behalf. (CP 114-16.) It is not surprising, therefore, that the investigator's report recites "facts" that are simply wrong. Under the circumstances, her investigation was insufficient as a matter of law, and her opinion is unsupportable.

Nor do the restrictions in the parenting plan support termination. The parenting plan itself indicates the court that imposed the plan believed that reunification was possible under appropriate conditions. (CP 596, 600-01.) PP was actively engaged in fulfilling those conditions. Unless this court can presume the court that set the parenting plan engaged in an act of futility when it imposed the conditions, until PP is allowed to try to meet the conditions it is premature to deem the conditions so onerous she cannot possibly meet them. Had Respondents believed the findings in the parenting plan justified termination, the time was then to ask for it.

Finally, there is no evidence that PP failed in her financial support obligations. Respondents now note she was \$3,800 behind in support at the time the decree of adoption was entered in April, 2012. Brief of Respondents at 16. They did not raise that fact in support of termination, (CP 97-101) and

the trial court did not cite that fact as a basis for terminating PP's parental rights. (CP 135-37.) Respondents did not raise the issue until their response to PP's motion for reconsideration, by which time PP had brought her obligations current. (CP 597.) Importantly, the amount does not reflect abandonment, especially in the absence of evidence that PP was able to pay. Compare *In re Adoption of Lybbert*, 75 Wn.2d 671, 673, 453 P.2d 650 (1969)(father totally failed to support the children from the entry of the divorce decree on March 21, 1958, until the commencement of the instant action on February 7, 1967, at which time he paid the sum of \$150).

If proof of a meritorius defense was needed, PP provided it. The evidence was not sufficient to show that the conditions RCW 26.33.120(1) require were met. In fact, the record is replete with evidence that PP had not abandoned HMG. The order of default should have been vacated and the trial court should not have terminated PP's parental rights.

CONCLUSION

Respondents' arguments notwithstanding, it is clear they tried and succeeded in using the termination and adoption proceedings to make an end run around the parenting plan which established conditions for PP's reunification with HMG. Judge Martin recognized that fact when KNG asked for, and the court denied, summary judgment to terminate PP's parental rights:

THE COURT: Ms. Long, with all due respect, you're seeking to terminate her rights.

MS. LONG: I am.

THE COURT: You understand that.

MS. LONG: I absolutely do.

THE COURT: The gravity of it is huge. In the meantime, there is a parenting plan that gives her some visitation rights. She has not been able to complete those or exercise any visitation, but there's only two months remaining. I'm not going to suspend visitation. I'm going to deny the motion because I think you're really asking me, in essence, really to prejudge the case, and I'm not willing to do that.

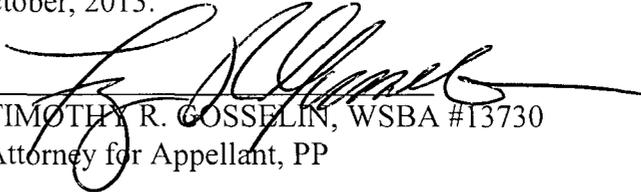
There's an existing parenting plan in effect. I have no authority to modify that. I'm not modifying that. All of the steps are laid out in that parenting plan. If PP feels that something is not being complied with, she has remedy by way of motion to compel.

(CP 543-44) In the end, through the default proceedings and a different judge, KNG got the very result that Judge Martin had refused to give them. By terminating her parental rights and allowing HMG to be adopted, KNG cut off PP's ability to meet the conditions of the parenting plan and thereby reestablish her connection with HMG.

PP had a fundamental right to the parenthood of her child. Even though she had appeared and answered the charges Respondents made against her, her right was taken from her without notice or an opportunity to be heard. This process violated basic notions of due process, Washington statutes, court rules and court decisions. The trial court affirmed those violations when it denied her motion to vacate. Because that ruling is contrary to the law and the evidence, PP again asks this court to reverse the

“Order on Motion for Default” entered on April 5, 2012. Because default was improperly ordered, PP also asks the court to vacate the “Findings of Fact, Conclusions of Law and Order of Relinquishment/Termination of Parent/Child Relationship” entered April 27, 2012; the “Findings of Fact and Conclusions of Law” entered April 27, 2012; “Decree of Adoption” entered April 27, 2012; “Order on Motion to Vacate Default Order” entered June 12, 2012; “Order on Motion to Vacate Default Judgment” entered January 25, 2013, and “Order Denying Motion for Reconsideration” entered March 22, 2013. She also asks the court to reverse the award of attorney fees to made in the January 25th order. PP should be restored to the position she was in before the Order of Default and allowed to defend against the termination of her parental rights.

Dated this 2nd day of October, 2013.

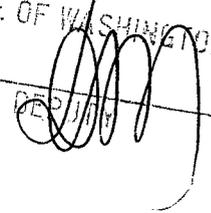

TIMOTHY R. GOSSELIN, WSBA #13730
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Signed this 2nd day of October, 2013, at Tacoma, Washington.

By : 
TIMOTHY R. GOSSELIN

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STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS
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DIVISION TWO

IN RE THE ADOPTION
OF HMG, a minor child

NO.44552-2-II

CERTIFICATE
OF SERVICE

CERTIFICATE OF SERVICE

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 2nd day of October, I did place with the United States Postal Service, first class postage paid, the Reply Brief of Appellant, PP, and this Certificate addressed to the following:

Daniel W. Smith
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Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

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

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CERTIFICATE OF SERVICE
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