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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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No. 47230-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CHRISTOPHER RIEHLE,

Appellant,

vs.

PAULA MURPHY,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF KITSAP COUNTY, WASHINGTON

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THE HONORABLE LEILA MILLS, JUDGE

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BRIEF OF RESPONDENT

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TODD A. BUSKIRK, WSBA #30517  
Attorney for Respondent  
3256 Chico Way NW  
Bremerton, WA98312  
(360) 792-8638

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## II. STATEMENT OF THE CASE

The April 15, 2011 Order of Child Support that was modified was not drafted by appellant's attorney as alleged. It was drafted by appellant. (CP 85 – 92).

The Amended Summons and Petition for Modification of Child Support were mailed to the address appellant provided in the April 15, 2011 Order of Child Support. (CP 44-45).

Appellant provided no evidence to the trial court that Division of Child Support had been provided his current address.

Appellant provided no evidence to the trial court that he kept respondent or her attorney apprised of his address and/or phone number at all times or that respondent would ask for appellant's current address before any visitation.

The only evidence of communication between the parties that appellant provided to the trial court confirms that he wanted to "keep our current 'no speaking to each other' status, except in emergency situations." (CP 116 – 118).

Appellant admits that he moved twice since entry of the April 15, 2011 Order of Child Support. (CP 78).

Appellant provided no evidence to the trial court that he had ever requested that the United States Postal Service forward his mail from his previous addresses.

The trial court found that appellant failed to establish a basis for any relief under Civil Rule 60 and therefore made no finding or ruling as to the issue of appellant's income. (CP 221- 224)

### III. ISSUE PRESENTED

The issue that this court must address is:

Did the trial court abuse its discretion by refusing to allow appellant to avail himself to CR 60 relief when (1) he failed to comply with the statutes that compelled him to keep his address updated with the court and registry, (2) notice of subsequent proceedings, in accordance with statute, were sent to the last address appellant provided to the court, and (3) appellant subsequently moved twice more without notifying respondent of his new address(es) or the court? The answer should be "no."

### IV. ARGUMENT

#### A. STANDARD OF REVIEW.

The decision on a motion to vacate an order of default or a default judgment is within the sound discretion of the trial court. In Re Estate of Stevens, 94 Wash. App. 20, 29, 971 P.2d 58 (1999) citing Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc., 63 Wash. App. 266, 271, 818 P.2d 618 (1991); Lindgren v. Lindgren, 58 Wash. App. 588, 595, 794 P.2d 526 (1990), review denied, 116 Wash.2d 1009, 805 P.2d 813 (1991). That decision will not be reversed on appeal unless it plainly appears that

the trial court abused its discretion. Lindgren, 58 Wash. App. at 595.

Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. Lindgren, 58 Wash. App. at 595.

"[T]he discretionary judgment of a trial court of whether to vacate [an order] is a decision upon which reasonable minds can sometimes differ." In Re Estate of Stevens, 94 Wash. App. at 30 citing Lindgren, 58 Wash. App. at 595. Thus, if the decision "is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." In Re Estate of Stevens, 94 Wash. App. at 30 citing Lindgren, 58 Wash. App. at 59.

**B. APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED.**

Appellant relies heavily on In re Marriage of McLean, 132 Wn. 2d 301, 937 P.2d 602 (June 5, 1997). However, this case can be distinguished from McLean because appellant failed to comply with his affirmative duty to keep his information current pursuant to RCW 26.23.050(m)(1) and RCW 26.23.050(5)(m)(ii).

In McLean, the notice was provided to a presumably valid address provided by the obligor. The issue the McLean court took up was whether actual receipt of the documents was required when mailed to a valid address. The answer was "no." In this case appellant admits that he never

provided his new addresses to the court.

This case is more analogous to notice requirements required by RCW 46.20.205 (Change of address or name). Both this court and the Court of Appeals have held that due process is not violated where notice of a driver's license revocation is mailed to the licensee's address of record pursuant to RCW 46.20.205, even though that statute expressly states that notice is effective notwithstanding the licensee's failure to receive the notice. McLean, 132 Wn.2d. at 311; State v. Rogers, 127 Wash.2d 270, 898 P.2d 294 (1995); State v. Whitney, 78 Wash. App. 506, 897 P.2d 374, review denied, 128 Wash.2d 1003, 907 P.2d 297 (1995). The Court of Appeals in Whitney, 78 Wash. App. at 513, 897 P.2d 374, stated: "The mailing of a notice, certified mail, return receipt requested to the address on a driver's current license under circumstances where the driver has not advised the Department of any address change is a procedure which, if followed, creates a reasonable probability that the driver will receive actual notice." McLean, 132 Wn. 2d at 311.

Appellant in the instant case moved twice after the April 15, 2011 Order of Child Support and neglected to advise the appropriate entities.<sup>1</sup> Allowing him relief under Civil Rule 60 would have given a judicial

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<sup>1</sup> Interestingly, appellant's 2013 1040EZ (CP 167) shows yet another address for him in addition to the other three – 909 Washington Street, Oregon City, OR 97045.

blessing to what amounts to appellant's frustration of service. See McLean, 132 Wn.2d at 312 citing State v. Vahl, 56 Wash. App. 603, 607, 784 P.2d 1280 (1990) (citing United Pac. Ins. Co. v. Discount Co., 15 Wash. App. 559, 550 P.2d 699 (1976) and Nielsen v. Braland, 264 Minn. 481, 119 N.W.2d 737 (1963)).

Further, as recently as December 6, 2013 appellant confirmed with respondent that he wanted the parties "to keep our current 'no speaking to each other' status, except in emergency situations." (CP 116 – 118). Given those words and appellant's multiple relocations without notice to the court and respondent, the trial court's finding that "petitioner had an affirmative duty to update his address pursuant to RCW 26.23.050(m)(1) and RCW 26.23.050(5)(m)(ii)" is manifestly reasonable and consistent with statute. (CP 223 -224).

Indeed, the April 15, 2011 Order of Child Support (CP 85 – 92) states in larger font (12 point vs. 11 point), italicized, and **bold** at Section 3.2:

***The Obligor Parent Must Immediately File With the Court and the Washington State Child Support Registry, and Update as Necessary, the Confidential Information Form Required by RCW 26.23.050.***

***The Obligor Parent Shall Update the Information Required by Paragraph 3.2 Promptly After any Change in the Information. The Duty to Update the Information Continues as long as any Support Debt Remains due Under This Order.***

And in larger font, italicized, and **bold** at Section 3.4 **Service of Process** (CP 85 – 92):

***Service of Process on the Obligor at the Address Required by Paragraph 3.2 or any Updated Address, or on the Oblige at the Address Required by Paragraph 3.3 or any Updated Address, may Be Allowed or Accepted as Adequate in any Proceeding to Establish, Enforce or Modify a Child Support Order Between the Parties by Delivery of Written Notice to the Obligor or Oblige at the Last Address Provided.***

Appellant knew, or should have known, that he had to keep the court apprised of his address.

The McLean court found that “due process does not require actual receipt of mailed notice of the modification proceedings even though a significant individual interest is at stake where modification of child support is sought.” McLean, 132 Wn.2d at 312.

Failure on appellant’s part to comply with statutory requirements should not be manipulated to lead to the conclusion that respondent (or any other litigant in her position) cannot rely on the methods by which service is authorized by statute.

Appellant cannot be allowed to claim that he received no notice when his actions (the moves) and inactions (failure to update his address) amount to frustration of the service process allowed by the plain language of the statute.

**C. THE COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO VACATE PURSUANT TO CIVIL RULE 60.**

The requirements for setting aside a default judgment are (1) excusable neglect, (2) due diligence, plus (3) a meritorious defense, and (4) no substantial hardship to opposing party. CR 60(b); White v. Holm, 73 Wash.2d 348, 352, 438 P.2d 581 (1968); Canam Hambro Sys., Inc. v. Horbach, 33 Wash. App. 452, 453, 655 P.2d 1182 (1982).

The plain language of those requirements clearly shows that not only must there be excusable neglect, due diligence but also, a meritorious defense, and no substantial hardship to the opposing party. The test is conjunctive, i.e. all four parts of the test must be met.

**1. The court did not abuse its discretion by declining to vacate the default judgment based on Civil Rule 60(b)(1).**

Civil Rule (b)(1) provides in pertinent part that “on motion and upon such terms as are just, the court may relieve a party ... from a final judgment ... for the following reasons: mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order.” Civil Rule 60(b)(1).

(a) The trial court rejected appellant’s argument that it was respondent’s mistake that the Summons and Petition to Modify Child Support were sent to the address appellant had provided to the court. (CP 223-224). There was no mistake on respondent’s part.

(b) The trial court rejected appellant's argument that he acted with due diligence and specifically found that "as a past pro se litigant, has sufficient familiarity with the court file and legal process to have acted more promptly to seek relief from the February 11, 2014 Order of Child Support." (CP 223-224)

(c) While there is no specific finding with regard to a meritorious defense, the trial court did review all of the pleadings submitted by appellant. Among those pleadings were his tax returns from 2013 and 2014 along with pay information from the United States Postal Service. (CP 161 – 194). Appellant's tax returns (CP 167 – 180) show someone who is unemployed. Appellant presented no evidence demonstrating why he was unemployed and/or underemployed thereby he failed to present any evidence why income should not have been imputed to him as someone who was voluntarily unemployed or underemployed. Appellant's pay stubs (CP 181 – 193) show that as of the end of 2014 he was working but he presented no evidence that he was employed when the Order of Default was entered on February 11, 2014. Thus he presented no evidence that rose to a meritorious defense that his income was wrongfully imputed.

(d) While argued both for and against, there was no specific finding as to whether vacating the Order of Default would cause a

significant hardship to respondent.

**2. The court did not abuse its discretion by declining to vacate the default judgment based on Civil Rule 60(b)(4).**

CR 60(b)(4) authorizes a trial court to vacate a judgment for "[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." However, vacation of a judgment is an extraordinary remedy. See Dalton v. State, 130 Wn. App. 653, 665, 124 P.3d 305 (2005). Therefore, there must be clear and convincing evidence of fraud, misrepresentation, or misconduct in order to vacate a judgment. Id.

Appellant presented no evidence that rose to the standard set forth above. Appellant presented no evidence that either respondent or her attorney knew his address when the Amended Summons and Petition for Modification of Child Support were mailed. Nor did he present any evidence that respondent or her attorney knew his address when the Order of Default was entered. Instead appellant made unsubstantiated allegations.

**3. The court did not abuse its discretion by declining to vacate the default judgment based on Civil Rule 60(b)(11).**

CR 60(b)(11) is a "catchall" provision granting the trial court discretion to vacate an order or judgment for "[a]ny other reason justifying relief from the operation of the judgment." However, application of this provision is confined to situations involving extraordinary circumstances

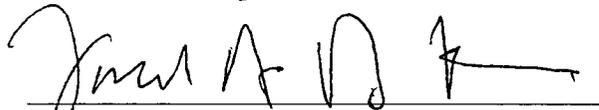
not covered by other sections of CR 60(b). In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (quoting State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). The claimed circumstances must relate to irregularities that are extraneous to the trial court's action or go to the question of the regularity of its proceedings. In re Marriage of Flannagan, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) citing Keller, 32 at 140.

While no specific findings were made with regard to Civil Rule 60(b)(11) the court did find that "it was reasonable for respondent to rely on the address listed by petitioner in the April 15, 2011 Order of Child Support for purposes of notice and service pursuant to RCW 26.09.175(2)(a)." (CP 223- 224). The clear implication from this finding is that there were no claimed circumstances related to irregularities that were extraneous to the trial court's action or that went to the question of the regularity of its proceedings.

#### V. CONCLUSION

Respondent respectfully requests that appellant's appeal be denied and the trial's court's decision affirmed.

RESPECTFULLY SUBMITTED this <sup>5<sup>th</sup></sup>~~2~~ day of October, 2015.



TODD A. BUSKIRK, WSBA #30517  
Attorney for Respondent

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BY [Signature]  
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No. ~~40234-3-II~~

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

Christopher Riehle, )  
 )  
 Appellant, ) DECLARATION OF SERVICE  
 )  
 )  
 vs. )  
 )  
 Paula Murphy, )  
 )  
 Respondent. )

I, TODD A. BUSKIRK, attorney for Respondent, hereby declare under penalty of perjury the following: On Tuesday, October 6, 2015, a true and correct copy of the Brief of Respondent was e-mailed to the Appellant at criehle67@gmail.com and also mailed first class mail, postage prepaid to Appellant at 65382 E. Timberline Drive, Rhododendron, Oregon, 97049.

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

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of October, 2015.

[Signature]  
TODD A. BUSKIRK, WSBA #30517  
Attorney for Respondent