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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK CAVENER

APPELLANT

v.

ANDREA JOLLES

RESPONDENT

RESPONDENT'S BRIEF ON APPEAL

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III. INTRODUCTION

COMES NOW, the Respondent/Mother, ANDREA JOLLES, and submits this brief in opposition to the Appellant/Father's appeal of the final order entered by King County Superior Court Judge Deborah Fleck on 6/25/13.

The Mother initiated a Petition for Modification of the parties' parenting plan in January, 2012. Instead of participating in the case schedule and following mandatory court procedures, the Father refused to cooperate, choosing instead to create conflicts and diversions. The Father repeatedly abused the legal process, manipulated evidence, and fabricated complicated and unnecessary court actions. Despite all of these transgressions and instances of intransigence, the trial court gave the Father ample opportunities to be heard, to respond, and to exercise his due process rights. It was not until June, 2012, a full six months after the initiation of the modification action, and after several hearings in which the father personally appeared, that the trial court entered an order of default against the Father due to his intentional failure to respond to the Mother's petition and his unwillingness to cooperate in allowing the case to procedurally move forward. The Father waited almost a full year after this entry of the default order to bring his motion to vacate this order of

default and the subsequent final orders entered on June 14, 2013.

Based on these considerations, and under a thoughtful and sound analysis of the Father's arguments under the four *Gutz* factors, the Honorable Judge Deborah Fleck denied the Father's motion to vacate on June 25, 2013. Judge Fleck's ruling was not an abuse of discretion; therefore, the Mother respectfully requests that this Court uphold the trial court's decision, and deny the Father's request for a new trial on the Mother's motion to modify the parties' parenting plan.

IV. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERRORS

The only assignment of error identified by the Father on appeal is a faulty analysis of the *Gutz* factors. Thus, the only issue for purposes of this appeal is as follows: Based on the evidence presented by the parties, did Judge Fleck engage in a proper analysis of the *Gutz* factors, and thus properly deny the father's motion to vacate the final orders of 06/14/12? Answer: Yes.

V. STATEMENT OF THE CASE

The parties' dissolution was finalized and a final parenting plan regarding their only child, Lucy Cavener, was entered on April 11, 2003. CP 42, Docket sub 52. Due to the Father's history of domestic violence,

particularly his abusive use of conflict directed at the parties' daughter, this case has continued to be plagued by litigation for many years. CP 300.

In August, 2010, the Mother filed a Petition for an Order of Protection. CP 43, Docket sub 103; CP 93-107. A Temporary Order for Protection was entered on August 4, 2010. CP 43, Docket sub 105; CP 109-11. The Father filed a Declaration in response, challenging the Mother's allegations. CP 43, Docket sub 116; CP 120-126. Another Temporary Order of Protection was entered on August 30, 2010, CP 43, Docket sub 122; CP 137-139, and reissued on November 15, 2010. CP 44, Docket sub 148; CP 155. On November 22, 2010, the Father filed an additional Declaration in response, CP 168-77, and his attorney filed a Legal Memorandum opposing entry of the DV protection order. CP 157-60. However, the Temporary Order of Protection was again reissued on November 29, 2010. CP 44, Docket sub 156; CP 179.

After a contested hearing on the merits, at which the father was represented by counsel, a full Order for Protection was entered on December 20, 2010. CP 44, Docket sub 163; CP 181-85. The Father's Motion for Revision of the 12/10/10 order was denied. CP 44, Docket sub 181. This order was not appealed and became the law of the case.

The December 20, 2010 Order of Protection was modified in June

and October of 2011 by agreement. CP 44, Docket sub 185B, 190.

The Mother filed a petition to renew the Order of Protection on November 29, 2011, CP 44, Docket sub 195; CP 208-18, and on January 17, 2012, the court granted the renewal for one year. CP 45, Docket sub 234; CP 235-40. In March 27, 2012, the Father filed a Notice of Appeal to the Washington Court of Appeals regarding the Order of Protection. CP 46, Docket sub 254; CP 351. His appeal was dismissed. CP 351. The Father did not appeal said dismissal. CP 41-46, 351.

On January 13, 2012, the Mother filed a modification of the parties' parenting plan and order of child support. CP 45, Docket sub 223-32; CP 220-33. The Father was served on January 17, 2012 by the Mother's attorney. CP 45, Docket sub 237A; CP 305-07. A hearing was scheduled for February 9, 2012 for Temporary Orders. CP 228.

The Mother sent the Father many notices about the Parenting Plan Modification Case schedule, a Declaration of Mailing, and the February 9, 2012 Hearing on the Motion for Temporary Orders. CP 308-325.

On February 9, 2012, the Father appeared at the hearing, but denied service of process. CP 246, 301. The court continued the hearing to March 14 to allow an evidentiary hearing regarding the January 17 service. CP 245-46, 301. On February 15, the Mother moved for default

without notice due to the Father's continued failure to file a response, CP 269-49; however, default was denied because the Father had appeared at the February 9 hearing. CP 250. Therefore, rather than incur expenses for a full evidentiary hearing regarding service, the Mother hired a second process server who effectuated service on March 21, 2012. CP 46, Docket sub 253; CP 301, 327-29. This service was not contested.

After the Father had been served a second time with the summons, petition, case schedule and proposed orders, the Mother waited again for a response; still, none came. CP 46, 301.

On April 12, 2012, The Mother sent a letter to the Father requesting that he file a response to her petition and cooperate in the filing of a Confirmation of Issues and/or stipulate to adequate cause; the Father did not respond. CP 301, 331-35.

On May 11, 2012, the Mother scheduled a hearing for adequate cause to occur May 31, 2013. CP 46, Docket sub 258; CP 261, 267, 302. She mailed the documents to the Father and included the three day waiting period for mailing when calculating the date of the hearing. CP 302. The Mother received confirmation that the documents were delivered to the Father. CP 46, Docket sub 267; CP 343. On May 11, 2012, the Mother also filed a second Motion/Declaration for an Order of Default due to the

Father's continued failure to respond to the petition and his ongoing lack of cooperation in allowing the case to move forward. CP 46, Docket sub 265; CP 269-71. These documents were delivered to the Father along with the documents regarding the adequate cause hearing. CP 343.

The Father then filed an objection to adequate cause, but did not serve the Mother. CP 46, Docket sub 269; CP 242-43, 273-76, 302. At the May 31, 2012 hearing on adequate cause, the Father objected to service of the motion documents for the adequate cause hearing. CP 273-76, 278-79. The court continued the Adequate Cause/Temporary Orders hearing to June 14 to give the Father one last opportunity to file a Response to the petition. CP 46, Docket sub 273; CP 279, 302, 345-46. The minute entry for the hearing specifically states, "Court continues the hearing to allow Resp. to respond." CP 279.

At the hearing, the court spent substantial time in determining whether the Father was contesting service of process or service of the underlying motion. CP 302. The Father clarified that he was contesting service of the adequate cause motion, not service of process. CP 302. As such, the court wrote in paragraph 7 of the continuance order, "The court finds that service of process is required for original process only. Therefore, service is not a legal issue. Respondent was served..." CP 346.

On June 1, 2012, the Mother appeared at the status conference hearing. CP 302, 348. Judge Doerty extended the adequate cause deadline to August 13, 2012, but noted that “Respondent has not answered or appeared at this hearing.” CP 302, 348-49.

Despite the many chances he was given, by the date of the June 14, 2012 hearing, at which the parties both appeared, the Father had still failed to provide a response to the petition. CP 288. As a result, the court entered an order of default against the Father. CP 288-89. Based on this order of default, the court entered the Mother’s proposed parenting plan and order of child support. CP 290-97.

Almost a year after the order of default, on May 13, 2013, the Father filed a motion and order to show cause requiring the Mother to appear and defend against his motion to vacate the order of default and final orders of 6/14/12. CP 298-99. The order to show cause set a hearing for June 7, 2013 before Judge Deborah Fleck. CP 299. Both parties appeared at the hearing, represented by counsel (the mother personally and the father by phone). CP 354.

The Father dedicated a substantial portion of his motion collaterally attacking proceedings surrounding the DV protection orders entered back in 2010 and 2011, by asserting a “pattern of errors,” by the

court. CP 1-297. When the Father's attorney began to make these assertions at the hearing, the Mother's attorney objected to the scope of the argument exceeding the orders that were before the court. RP 6-7. The court sustained the objection, noting that only the events and orders of 2012 were relevant for the purposes of the father's motion to vacate. RP 7-8. At no time during his argument did the Father's attorney address the *Gutz* factors, nor did he present evidence to the court that the Father was entitled to relief based on these considerations. RP 1-74.

After being further prompted by the court to focus his argument on which sections of CR 60 he was basing his motion, the Father's attorney argued that the orders of 6/14/12 should be vacated on the basis of CR 60(b)(1), (4) and (11). RP 22-23. The Father essentially argues that the multiple chances he was provided should be ignored. RP 18, 29. The court recognized that procedural requirements must be met in order for the court to reach the merits of a matter by asking, "What is a [party] supposed to do in order to get the response filed so that the case can continue on its path? The motion for default is – is the tool that the rules provide for us." RP 24. Every step was taken to try to keep [the Father] informed and involved in the process.

Based on these considerations, along with the rest of the parties'

oral argument and written submissions, the Father's motion to vacate was denied. CP 354, 375-80. In making her ruling, Judge Fleck explained that she acknowledged that default judgments are disfavored in the law, that motions to set aside default judgments are proceedings that are equitable in nature, and that determinations regarding the best interests of the child involve rights that are constitutional in nature. RP 65-69. It is in keeping all of these considerations in mind that she analyzed the four *Gutz* factors, and determined that the Father's motion should be denied. RP 65-70.

The order denying the Father's motion was to be presented on June 25, 2013. CP 354. Both parties filed a Notice of Presentation, including proposed orders. CP 357-73. The parties' attorneys appeared via phone on June 25 to present arguments to the court regarding their proposed orders. CP 374. After hearing the arguments presented by counsel, Judge Fleck determined that she would take the matter under further advisement and issue a written decision which would later be provided to the respective parties. CP 374. Judge Fleck's final order denying the Father's motion to vacate was signed and entered later that day. CP 375-80. In July, 2013, the Father filed notice of this appeal.

VI. ARGUMENT

A trial court's ruling under CR 60(b) is reviewed for an abuse of discretion. Gutz v. Johnson, 128 Wn.App. 901, 916, 117 P.3d 390 (2005) (citing Showalter v. Wild Oats, 124 Wn.App. 506, 510, 101 P.3d 867 (2004)). A trial court abuses its discretion by issuing a manifestly unreasonable or untenable decision. Wild Oats, 124 Wn.App. at 510. Accordingly, if a trial court's ruling is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. *Id.*

Though a decision by the trial court that does not set aside a default judgment is more likely to be reversed, the court must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits. *See Id.* at 510-11 (citing Johnson v. Cash Store, 116 Wn.App. 833, 841, 68 P.3d 1099, *review denied*, 150 Wash.2d 1020, 81 P.3d 120 (2003) ("Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted.") (Emphasis added). Consequently, the court evaluates the trial court's decision by considering the unique facts and circumstances of the case before it. Wild Oats, 124 Wn.App at 511.

The Father carries the burden of proof with regard to the *Gutz* factors. *See Gutz*, 128 Wn.App at 916. *Gutz* provides in pertinent part,

“The party seeking to vacate a default judgment under CR 60 must demonstrate four factors...” *Id.* Not only did the Father fail to address any of these factors, directly or indirectly, at the time of the hearing, but the Father’s argument on appeal still only addresses the first two factors, providing no basis as to why Judge Fleck’s decision with regard to the secondary factors was in error. The Father’s only defense to the modification action amounts to an impermissible collateral attack on the 2010 and 2011 DV orders in this matter, and the Father brazenly refused to comply with procedural rules despite being given many chances to do so. Thus, Judge Fleck properly determined that the Father did not demonstrate the primary *Gutz* factors. Furthermore, both at the trial court level, and even on appeal, the Father does not provide any evidence that he acted with due diligence in seeking to vacate the default order and the parenting plan. The Father fails to address or provide any evidence the Mother would not sustain substantial hardship if the default judgment is vacated.

Therefore, based on the unique facts and circumstances before the court, Judge Fleck’s analysis of the *Gutz* factors was reasonable and based on tenable grounds, and thus was not an abuse of discretion.

A. The trial court did not abuse its discretion in determining that the Father did not demonstrate a prima facie defense.

The Father's only basis for his defense to modification is an extensive collateral attack on previous DV orders, and thus, he has failed to provide evidence that he could have presented a prima facie defense against modification at trial.

The Father dedicates a substantial portion of his brief, some 17 pages, to discussing these DV orders and the proceedings under which they were entered. No domestic violence Order for Protection was before the court either during the parenting modification or motion to vacate. The Father then asserts in his argument that Judge Fleck "failed to analyze, at any significant level," the first *Gutz* factor because she "missed the big picture" by analyzing the procedural aspects of the case over concerns regarding the Father's relationship with his daughter. In his Argument, however, the Father merely repeatedly asserts that he could have "easily presented a credible defense" at trial, even suggesting that he had a "strong or virtually conclusive defense," without ever stating a single fact upon which he would rely at trial. The Father failed to disclose efforts to comply with prior orders, nor did he disclose that he had failed to exercise visitation for more than a year.

Res judicata and collateral estoppel preclude the relitigation of issues after a final judgment has been entered in a prior proceeding. *See Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). Res judicata applies to dissolution proceedings. *In re Marriage of Timmons*, 94 Wn.2d 594, 597, 617 P.2d 1032 (1980). The DV orders in this case were fully and fairly litigated. The Father was given proper notice of all proceedings, he responded to the Mother's petitions. He was present at the proceedings, and taking into account all of the evidence presented by the parties, the court issued a final judgment. The Father's motion for revision of the Order of Protection was denied, and the Father failed to follow through on his appeal of any of these orders. Therefore, based on the principles of res judicata, the Father is barred from attempting to undermine these orders or argue that they were the result of factual misrepresentation or entered based on error by the court. Therefore, his alleged defense relies completely on issues that he is barred from relitigating.

The trial court correctly focused its analysis of the Father's motion to vacate on any arguments regarding the modification proceedings, and upon hearing no credible defense offered by the Father to support vacating the modified parenting plan and support order, the Father failed to meet

his burden under the first *Gutz* factor.

The trial court also addressed the Father's contentions regarding the DV proceedings in her order by stating, in pertinent part, "the law of the case is that domestic violence occurred and that the child was affected by domestic violence, based on inferences that can be drawn from the factual statements in the orders, including the Amended Parenting Plan which contains factual bases to have included the child as well as bases for the terms of the Parenting Plan itself." CP 379. Therefore, Judge Fleck acknowledged that the court record reflects that prior courts have considered the child's best interests and entered orders accordingly. The orders, including orders which limit the Father's residential time and require that he obtain domestic violence batterer's treatment, provide ample factual bases to include the restrictions contained in the Amended Parenting Plan.

Moreover, the Father asserts in his Introduction that Judge Fleck "mischaracterized and/or left out critical case law findings" which were supportive of the Father's motion to vacate. However, this is false. The court noted in the order that "default judgments are disfavored," (*See Lee v. Western Processing Co. Inc.*, 35 Wn.App. 466, 667 P.2d 638 (1983)), and that a court "considers CR 60(b) motions and factors more rigidly

when parenting plans are at issue.” The court clearly appreciated the “magnitude of parental rights as a constitutional issue,” but the factors did not weigh in favor of vacating the judgment. The court also directly stated in her order that “motions to set aside orders are equitable in nature,” (*See Cahloun v. Merritt*, 46 Wn.App. 616, 731 P.2d 1094 (1986)) and therefore she analyzed the factors in this case under that basis. CP 375-80. The Father has failed to show how exactly it is that she mischaracterized or failed to address important case law in making her decision.

B. The trial court did not abuse its discretion in determining that there was no mistake, inadvertence, surprise, or excusable neglect on the Father’s part and that none was asserted.

Notably, out of the Father’s 47 page brief, he dedicates only two pages to argument regarding the remaining three *Gutz* factors. RAP 10.3(5) requires that a Statement of the Case include, “A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement,” (emphasis added). The Father’s brief fails to comply with this rule by including uncited and unsupported statements which amount to nothing more than argument rather than “facts” in the case. The Father’s references to various rules of law and argument in his Statement of the Case, combined with his vague and conclusory Argument section, further

demonstrate the Father's continued pattern of abusing the legal process, manipulating evidence, and fabricating complicated and unnecessary court actions. The Father's brief utterly fails to provide any sound basis for his appeal, and his continued flagrant disregard for following court rules has further burdened the Mother in forcing her to attempt to thoroughly respond to the Father's disorganized, rambling, and baseless argument on appeal.

The Father's argument regarding the second *Gutz* factor also fails. The Father has asserted that he did, in fact, appear in the modification action through his attendance at three hearings on February 9, May 31, and June 14, 2012, and therefore the order of default for failure to respond or cooperate in allowing the case to move forward was unwarranted. However, this is not responsive to the second *Gutz* factor being incorrectly analyzed by the court. The Father also fails to provide any evidence to support that there was mistake, inadvertence, surprise, or excusable neglect on the part of the Father. The order of default was entered due to the Father's failure to respond, and therefore the Father must demonstrate, under this factor, that his *failure to respond* was due to mistake, inadvertence, surprise, or excusable neglect. See Boss Logger, Inc. v. Aetna Cas. & Sur. Co., 93 Wn.App. 682, 689, 970 P.2d 755 (1998). The

Father has made no attempt to meet his burden under this factor, either at the trial court level or on appeal.

CR 55(a)(1) provides, “When a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made,” (emphasis added). Not only is the Father’s failure to respond to the Mother’s modification petition thus proper grounds for default under CR 55, the Father’s failure to respond after appearing at multiple hearings, after being repeatedly told he needed to respond, and after being granted multiple continuances in order to do so, his failure to provide a response is even more egregious; therefore, rather than being the result of mistake or excusable neglect, the Father’s failure to respond was due to an intentional unwillingness to comply with court rules or cooperate in following the case schedule.

Upon receiving no argument from the Father at the trial court level regarding this factor, the court determined that that there was no mistake, inadvertence, surprise, or excusable neglect on the Father’s part, and “none has been asserted.” CP 379. The court based its decision on the following considerations: (1) the Father was present in court multiple times, (2) the court granted several continuances to allow the Father time

to respond, (3) the Father was very familiar with the court system, as there are pleadings approaching 300 sub numbers that have been filed in this case, and (4) the Father was served with the motion for default. CP 379. These considerations provide a tenable and reasonable basis upon which to determine that this factor weighed against vacating the motion for default, and thus the court did not abuse its discretion.

C. The trial court did not abuse its discretion in determining that the Father did not act with due diligence in waiting almost a full year after notice of default to seek to vacate the order.

At the trial court level, the Father failed to provide any evidence or make any argument that he did, in fact, use due diligence in seeking to vacate the 6/14/12 orders. Even now, at the appellate level, the Father fails to assert in his argument that he acted with due diligence. Other than a vague, one sentence statement in his Statement of the Case regarding the Father's lack of funding, the Father has failed to present any evidence as to how waiting almost a full year to seek to vacate the default order constitutes due diligence on his part. Without any further explanation of his circumstances, the court was presented with nothing other than the Father's timing by which to analyze this factor.

Therefore, the court analyzed the Father's timing based on well-established case law in Washington regarding due diligence. Under

Calhoun, a party who receives notice of a judgment and does nothing for three months failed to demonstrate due diligence. *Calhoun*, 46 Wn.App. at 619. However, a party that moves to vacate a default judgment within one month satisfies CR 60(b)'s diligence prong. *In re Estate of Stevens*, 94 Wn.App. 20, 35, 971 P.2d 58 (1999). Comparing the Father's choice to wait almost a full year to the decisions regarding timing in these cases, it was logical and reasonable for the court to conclude that waiting so long does not constitute due diligence on the Father's part.

D. The trial court did not abuse its discretion in addressing the fourth *Gutz* factor by simply asserting that, "It is difficult for the party who has obtained the order of default and default judgment including parenting plans to oppose vacation of such orders on this basis."

The fourth factor requires an analysis of the effect of vacating the judgment on the opposing party. This is generally demonstrated by the party seeking to vacate the order by asserting that the non-moving party will not sustain substantial hardship if the default judgment is vacated. *See Gutz*, 128 Wn.App. at 920. *Gutz* goes on to state that, "The possibility of trial is an insufficient basis for the court to find substantial hardship on the non-moving party." *Id.* (citing *Pflaff v. State Farm Mut. Auto Ins. Co.*, 103 Wn.App. 829, 834, 14 P.3d 837 (2000)). The case also notes that, "This reasoning is consistent with Washington's policy that

prefers parties resolve disputes on the merits, as opposed to default proceedings. *Id.* at 920-21 (citing Wild Oats, 124 Wash.App. at 511).

Not only did the Father fail to present any evidence addressing this factor, but the court, weighing the evidence in a light most favorable to the Father, actually weighed this factor in the Father's favor. Taking into account the above considerations, simply noting that it would be difficult for the non-moving party to object to vacating the order on the basis of the fourth factor, is sufficient to address the issue and to use as a basis to determine that the factor weighs in the moving party's favor. However, because all three of the other factors weighed against vacating the order, the Court properly determined that the Father's motion to vacate should be denied, and the orders entered on 6/14/12 should be affirmed.

VII. ATTORNEY'S FEES

RAP 18.1, RCW 26.09.140 and RCW 26.50.060(g) allow for the award of fees on appeal on the basis of need versus ability. Additionally, the court has the ability to award fees based on one party's intransigence. In re Marriage of Mattson, 95 Wn.App. 592, 164, 976 P.2d 157 (1999).

The Father has engaged in conduct that resulted in a substantial and unnecessary increase in the cost and difficulty of the underlying motion by improperly attempting to relitigate the prior domestic matter in a motion to

vacate. The court was repeatedly forced to address at the hearing issues that flowed from the Father's failures to comply with court rules. The Court should find that intransigence has permeated the case and as a result, award the Mother is not required to segregate attorney's fees. In re Marriage of Sievers, 78 Wn.App. 287, 312, 897 P.2d 388 (1995).

VIII. CONCLUSION

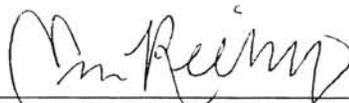
The trial court's analysis of the *Gutz* factors was reasonable and based on tenable grounds, and thus was not an abuse of discretion. The Mother respectfully requests that this Court uphold the trial court's decision, any deny the Father's request for a new trial on the Mother's motion to modify the parties' parenting plan.

Dated this 27th day of February, 2014.

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CERTIFICATE OF SERVICE

I certify that I a copy was of the Brief of Respondent was delivered to Stuart E. Brown, Attorney for Appellant, 12535 15th Ave. NE, #201, Seattle, WA 98125 on February 28th, 2014, by ABC messenger.


KERRY BOWERS