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

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ROSABLANCA BEINHAUER, Respondent

v.

MARK BEINHAUER, Appellant

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# AMENDED BRIEF OF APPELLANT

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## I. INTRODUCTION

The issues in this case relate to the attempt by appellant Mark Beinhauer (hereinafter referred to as "Mark") to collect child support from respondent Rosablanca Beinhauer, his former wife, now known as Rosablanca Abardo (hereinafter referred to as "Rosablanca").

## II. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The trial court erred in entering the order of October 9, 2019 denying the request of appellant Mark Beinhauer for leave to collect unpaid child support without a judgment establishing the amount of unpaid child support due.

2. The trial court erred in entering the order of November 8, 2019 denying the appellant leave to collect unpaid child support.

3. The trial court erred in entering the order of November 8, 2019 awarding. the respondent attorney's fees.

4. The trial court erred in entering the order of November 8, 2019 by failing to award attorney's fees to appellant.

### Issues Pertaining to Assignment of Error

1. Does an order of child support create an automatic judgment each month that child support becomes due and unpaid? (Assignment of error 1.)

2. Must the court determine the amount of child support due in order to allow the obligee to take action to collect it when it is undisputed that child support is owed? (Assignment of error 1.)

3. Does the failure of the court to find a support obligor in contempt bar collection of unpaid child support? (Assignment of error 2.)

4. Does the failure of the court to declare the amount of child support owed bar a child support obligee from initiating garnishments to collect child support, when it is undisputed that child support is owed? (Assignment of error 2.)

5. Does a court order precluding a support obligee from pursing collection action without further order of the court bar a motion for leave to collect unpaid child support? (Assignment of error 2.)

6. May a support obligor be awarded attorney's fees in a proceeding to prevent the collection of child support due, without a showing of bad faith by the support obligee? (Assignment of error 3.)

7. Is a child support obligee entitled to an award of attorney's fees with respect to proceeding initiated by the support obligor challenging his right to collect unpaid child support? (Assignment of error 4.)

## III. STATEMENT OF THE CASE

The marriage of the parties was dissolved on February 18, 2000. As part of the division of property, the court entered two qualified domestic relations orders awarding Rosablanca one-half the community interest in Mark's two retirement plans. The parties have one son, Karl Beinhauer, who was born on January 18, 1992. At the time of the divorce, Rosablanca was named the primary residential parent. However, Mark later sought a modification of the parenting plan. This resulted in a new parenting plan on November 12, 2004 designating Mark as the primary residential parent. Karl was 12 years and 10 months of age at that time. A child support order entered that same day required Rosablanca to pay $200.00 per month child support beginning June 1, 2004. The order declared that there was no back child support owed. (The history of the case was reviewed in the prior Court of Appeals opinion in cause no: 51164-9-II).

In January 20, 2017 Mark filed an amended motion for contempt. (It corrected the original motion, which had been filed but not served on Rosablanca.) Besides requesting a finding of contempt for failure to pay child support, the amended motion asked the court to declare that Rosablanca owed Mark $13,600.00 in unpaid support from July 1,

2004 through January 17, 2017. An additional $13,647.87 was requested in interest. The motion also asked for an award of attorney's fees and costs. CP 1-9.

Rosablanca responded by stating that Mark's request for unpaid child support demonstrated a pattern of abusive, manipulative and vindictive behavior towards her and their son. She claimed that she had been supporting Karl since he moved in with her in June 2015 when he was 23 years old. She claimed that she did not hear from Mark about child support for 10 years until he was getting ready to retire from Boeing. She claimed that the only reason he reopened the child support collection case was to manipulate her into giving up her court-ordered right to part of his retirement. Rosablanca also claimed that Karl lived with her for 6 months when he was 16 and had been severely injured. Rosablanca went on to state that Mark kicked Karl out of the home in June 2015 when Karl was 23. Rosablanca alleged that after Karl moved in with her, she was able to get him to turn his life around and become a productive citizen. No findings were made by the court with respect to any of these claims. Rosablanca also claimed that she had given Mark $15,000.00 in cash to pay all child support due. There were no receipts or bank statements submitted to support this claim. No evidence was produced of this or any other payment. CP 10-15.

The motion was heard by Commissioner Sabrina Ahrens on June 6, 2017. She denied a finding of contempt. She also denied Mark's request for a judgment for back child support with interest and denied Mark's request for attorney's fees. CP 16-17. This decision was sustained by Judge Edmund Murphy on a motion to revise on July 25, 2017. CP 18.

On August 25, 2017 petitioner's attorney issued writs of garnishments directed to the Boeing Company Employee Retirement Plan and to Boeing Company Voluntary Investment Plan. This prompted a motion by Rosablanca to quash the writs. In her motion, Rosablanca again stated that Mark had not contacted her about child support for over 10 years until he was ready to retire. She stated that in the support enforcement proceedings the Division of Child Support had determined she owed $13,856.72 in September 2015 and that she had worked out a payment plan to pay $200.00 per month until the debt was paid in full. She stated she had been making the agreed payment of $200.00 per month from January 2016 and was current on those payments to D.C.S. She noted that Commissioner Ahrens had denied respondent's prior request for a consolidated judgment. She acknowledged that there was a valid D.C.S. case for back support. She also claimed that a writ of garnishment may not be issued by an attorney in this case, but had to be done by the clerk of the court. CP 21-24.

On October 24, 2017 Commissioner Diana Kiesel heard Rosablanca's motion to quash the writs of garnishment. The court ruled that the writs had to be issued by the clerk of the court. The court stayed all further action to collect unpaid child support "until further order of the court." CP 25-26. Mark then moved to revise the decision of Commissioner Keisel. The motion was heard by Judge Edmund Murphy on November 9, 2017. Judge Murphy sustained the commissioner's decision and awarded an additional $720.00 attorney's fees to Rosablanca's attorney. CP 30-31.

Mark appealed to the Court of Appeals from the order on revision. He asked the court to vacate the prior order restraining him from collecting child support due to him. He also requested that the court sustain the validity of writs of garnishment issued by an

attorney. On March 26, 2019 the Court of Appeals issued its unpublished opinion. It ruled that the Superior Court did not abuse its discretion in denying the motion for contempt. It also ruled that the writs of garnishment to collect child support had to be issued by the clerk of the court. It did not address the issue relating to the court precluding Mark from pursuing further collection action against Rosablanca without further order of the court. CP 32-47.

On September 11, 2019, Mark filed a motion for leave to collect unpaid child support. Since the October 24, 2017 order required Mark to "cease further collection action until further order of the court," the motion requested court permission to have the clerk of the court issue writs of garnishment. Mark submitted calculations showing Rosablanca owed $13,600.00 in unpaid child support, plus an additional $10,343.82 in accrued interest, for a total debt of $23,943.82. CP 48-66. In response Rosablanca stated that she had consistently paid her back child support obligation through the Division of Child Support. She did not dispute Mark's calculation of the child support arrears. CP 67-97.

The motion was heard on October 9, 2019, Commissioner Mark Gelman denied leave to collect unpaid child support without a judgment establishing the total amount due. The respondent was given leave to move for a judgment establishing the amount due. CP 101-102. Rosablanca then moved to revise. On November 8, 2019 her motion was heard by Judge Edmund Murphy. He ruled that the issue was decided by the order of Commissioner Arends on June 6, 2017, which had denied Mark's motion for contempt and request for judgment and interest in back child support. He did, however, allow the Division of Child Support to continue to collect unpaid child support. CP 30-31.

## IV ARGUMENT

**1. An oblige may collect back child support without a judgment for the total amount owed.**

RCW Chapter 26.18 on enforcement of child support begins with legislative findings in section 26.18.010, stating "there is an urgent need for vigorous enforcement of child support . . . and that stronger and more efficient statutory remedies need to be established to supplement and complement the remedies [otherwise available]. RCW 26.18.030(3) goes on to state "This chapter shall be liberally construed to assure that all dependent children are adequately supported." This shows that RCW 26.18 should be interpreted in favor of vigorous enforcement.

An order of child support creates an automatic judgment each month that child support becomes due and is unpaid. Washington State courts have repeatedly held that an order of child support alone provides sufficient basis for enforcement, Each installment becomes a separate and final judgment as it became due and will support normal collection efforts. See, *Starkey v. Starkey,*40 Wn.2d 307, 242 P.2d 1048 (1952); *Pace v. Pace,* 67 Wn.2d 640, 409 P. 2d 172 (1965); *Marriage of Glass,* 67 Wn.App. 378, 835 P.2d 1054 (1992). Although a court may appropriately combine them into one judgment to provide a sum certain, this is not required when the obligee is seeking enforcement. As the court held in *Marriage of Capetillo*, 85 Wn. App 311, 316, 932 P.2d 691 (1997). ". . . child support payments become vested judgments as the installments become due.

The failure of the court to declare the amount of child support owed cannot bar a child support obligee from initiating garnishment to collect child support. Our courts

have held that. payments which have accrued before modification become vested judgments. *Marriage of Glass,* 67 Wn.App. 378, 835 P.2d 1054 (1992).

**2. A court may not limit an obligee's right to collect child support.**

The cases of *Pace* and *Starkey v. Starkey,* supra, share many similarities to the case at bar and show in no uncertain terms that Mark is entitled to enforce the child support order regardless of any order or agreement appearing to set payment plans or otherwise retroactively modify the child support order. In *Pace* a child support obligor obtained an order limiting his payments on the arrears at $50.00 per month. He argued this order, which was never appealed, should prevent the obligee from enforcing her right to the arrearage because the order set a payment plan. His motion was denied, and the Supreme Court of Washington affirmed. The court found that the order "could not and did not purport to provide the exclusive method by which respondent could collect her judgment." *Pace,* supra at 641. As quoted above, the Supreme Court of Washington ruled courts may not interfere with the obligee's right to enforce collection by the usual means. The court went on to say that holding as the obligor requested would "defeat a reasonable solution to a support problem" and "would deny the obligee's statutory rights to enforce the judgment." *Pace*, supra, at 641.

In *Starkey v. Starkey,* 40 Wn.2d 307 (1952), Mr. Starkey obtained an order which, among other things, purported to enjoin his ex-wife from collecting on the child support arrears. On appeal, however, the Washington State Supreme Court held that, despite the good intentions of the lower court, it was without power to enter such an order. The court goes on to state:

> The unpaid installments did, however, provide the basis for writs of garnishment, writs of attachment, and general executions. The provision if the

> instant decree which purports to deny the plaintiff the right to pursue those remedies, which deprive her of interest on the arrearage, and which permit payment thereof on a monthly basis, are therefore, in effect, attempted modifications of the interlocutory order with respect to accrued and unpaid support money. This, as indicated above, may not be done." *Starkey, s*upra, at 314.

There is an exception to this rule against retroactive modifications of child support orders. Child support orders may sometimes be retroactively modified based on traditional forms of equitable relief such as equitable estopped or laches. These defenses were not raised at the trial level and should not be considered on appeal. However, for the sake of completeness, this brief will address equitable defenses.

Equitable relief is not appropriate in the current case. To begin with, our courts have carved this exception very narrowly with due regard for the legislature's express preference for enforcement. ". . . equitable relief from past-due support obligations should be limited to those cases where enforcement would create a severe hardship on the obligor-parent and where the facts support traditional equitable remedies. "*In re The Marriage of Capetillo and Kivett,* 85 Wn.App. 311,319, 932 P.2d 691 (1997).

Equitable estoppel and laches are similar and the fact patterns sometimes overlap. Equitable estoppel requires the obligor to show 1) the oblige states something, or acts in a way that is inconsistent with a later claim, 2) the obligor relies in good faith on this statement or action, and 3) the obligor would be injured if the obligee is allowed to contradict their act or statement and proceed with the claim. *Capetillo* supra, at 320. Furthermore, as the court in *Capetillo* points out, equitable estoppel is not favored and the party who claims it must prove it by clear, cogent, and convincing evidence.

Laches is a similar defense that requires the party who claims it to show 1) the other party had knowledge of fact constituting a cause of action, 2) he or she

unreasonably delayed commencing the action, and 3) the party is damaged as a result to the delay. *Capetillo* supra, at 317. As in equitable estopped, *Capetillo* supra, points out an additional hurdle for laches. "Absent unusual circumstances, the doctrine of laches should not be invoked to bar an action short of the applicable statute of limitations." Quoting *In re Marriage of Hunter*, 52 Wash.App. 265, 758 P.2d 1019 (1988)

Successfully employing laches in a child support case requires a strong showing of damage resulting from an unreasonable delay. This requires more than the obligor "showing he is having to do now what he had been legally obligated to do for years" *Capetillo* supra, at 318. A finding that laches applies was overturned in *Capetillo,* where the trial court found the obligor altered his work hours, dissipated his settlement funds, married, and never sought a support modification. The appellate court found there was insufficient showing those acts were taken in reliance of the obligee's failure to enforce support.

For all these reasons, the commissioner's order denying contempt on June 6, 2017, and the judge's order denying revision on July 25, 2017 cannot be interpreted to deny Mark's right to enforce his order of child support by usual means, namely by writs of garnishment. As in *Pace, Starkey* and the case at bar, the court may not keep the obligee of a child support order from enforcing arrearages because to do so would effectively be a prohibited retroactive modification of the earlier order, and would defeat a reasonable solution to a support problem.

**3. Res judicate does not apply**

The court below ruled on November 9, 2019 that the commissioner's order of

June 6, 2017 prohibited collection of child support arrears. This argument has two fundamental flaws. First, the order of June 6, 2017 does not prohibit enforcement of the child support arrears. Second, if the order did make such a prohibition, than the June 6, 2017 order would fall under the scope of the present review.

The June 6, 2017 order denied Mark's motion for contempt and his request for a consolidated judgment for attorney's fee. There is no indication anywhere in that order or findings that was meant to foreclose Mark's further efforts to enforce his right to the arrears, and Rosablanca cites no authority which would lead us to make such an assumption. In fact, consolidated judgments for back child support are more a matter of convenience rather than a full blown determination of rights. For instance, in *Valley v. Selfridge,* 30 Wn.App. 908, 912, 639 P.2d 225 (1982), the court says: "Although a series of past-due support installments may be reduced to a judgment, it does not follow that this judgment is in lieu of the original judgment that vested on the date the support was due. Rather, the lump-sum judgment is an ancillary proceeding to clarify the amount where there is a question as to the amount of arrearages."

It would he both absurd and unjust if a moving party risked their ability to collect back child support simply by requesting a consolidated judgment when they could just choose to enforce the underlying judgments instead. Another reason we should not read such a drastic meaning into the commissioner's refusal to grant a consolidated judgment is because such an order would violate the law against retroactive modifications of child support.

As was stated in Mark's initial brief on the prior appeal of this matter, courts generally may not retroactively modify child support orders, and therefore may not

reduce accrued child support arrears. See, *Marriage of Glass,* 67 Wn.App. 378, 835 P.2d 1054 (1992); *Pace v Pace,* 67 Wn.2d 640, 409 P.2d 172 (1965). These cases make it clear that earlier orders, even final orders that have not been appealed, may not be construed to bar enforcement of past child support. Allowing such an interpretation would effectively sanction retroactive modification of child support.

In *Pace v Pace*, supra, Albert Pace was ordered to pay Betty Pace child support in their divorce decree issued August 8, 1960. On June 25, 1964, Betty obtained a judgment for past child support in the amount of $1,497.20. Albert then secured a modification, on October 20, 1964. The modification reduced his future obligation and also ordered that arrears to be paid back at $50.00 per month. No appeal was taken from the order. When Betty obtained a writ of garnishment based on her June 26, 1960 judgment, Albert moved to dismiss. He claimed the October order, which was never appealed, provided the sole means for Betty to recover the arrears, namely at $50.00 per month. The court held otherwise, stating:

> Appellant misconstrues the effect of the order of October 20, 1964. That order could not and did not purport to provide the exclusive method by which respondent could collect her judgment. The effect of the order was rather to provide a means whereby the appellant could pay the judgment for accumulated support payments on an installment basis without being subject to contempt proceedings. The failure to appeal from the order of October did not deprive respondent of the usual means of enforcing her judgment. (Internal citation omitted.) *Pace*, at 641.

In the present case, Mark is relying on each child support payment becoming a "final judgment as it became due and unpaid." *Casa del Rey v. Hart,* 110 Wn.2d 65, 750 P. 2d 261. (1988). Mark should be allowed to collect on his judgments regardless of the order of June 6, 2017 denying contempt, just as Betty Pace was allowed to collect on her judgment from June 26, 1960 regardless of the modification on October 1964.

An exception to the law against retroactive modification of child support is equitable relief. As discussed in Mark's initial brief, there is an extremely narrow exception that requires a significant showing on the part of the debtor. There is no indication in the June 6, 2017 order or findings that the commissioner granted or even considered such relief. Rosablanca never requested equitable relief in her pleadings and the evidence she supplied would have failed to establish it. CR 8 (c) requires that a party specifically set forth affirmative defenses in responsive pleadings including requests for equitable relief such as laches or estoppel. No such defenses were thus pled in this case.

Other exceptions to the rule against retroactive modification of child support are laches and equitable credit. Laches requires 1) the obligee had knowledge of facts constituting a cause of action, 2) he or she unreasonably delayed commencing the action, and 3) the obligor is damaged as a result of the delay. *In re the Marriage of Capetillo and Kivett,* 85 Wn. App. 311, 317, 932 P.2d 691 (1997). Equitable estoppel requires the obligor to show 1) the obligee states something, or acts in a way that is inconsistent with a later claim, 2) the obligor acts in bad faith on this statement of action, and 3) the obligor would be injured if the oblige is allowed to contradict their act or statement and proceed with their claim. *Capetillo* at 320. Equitable credit requires that the obligor show he or she provided for the child for an extended period of time and asks that those costs be credited against their back support.

The case record would not support any of these defense. "Absent unusual circumstances, the doctrine of laches should not be invoked to bar an action short of the applicate statute of limitation." *In re Marriage of Hunter,* 52 Wash.App. 265, 758 P.2d 1019 (1988). Mark filed his case within the statute of limitations for child support

enforcement. In the case of equitable estoppel, equitable estoppel is not favored and requires the party who claims it to prove it by clear, cogent, and convincing evidence. *Capetillo,* supra, at 320. ". . . [E]quitable relief from past-due support obligations should be limited to those cases where enforcement would create a severe hardship on the obligor-parent and where the facts support traditional equitable remedies." *Capetillo,* supra, at 319. There is nothing in the record to show Rosablanca would suffer a severe hardship.

Rather than clearly alleging any equitable defenses, Rosablanca responses to Mark's motions consist of wild and irrelevant allegations. Rosablanca alleges Mark threatened to burn her house down. CP 11. What equitable defense does this support? Rosablanca claims Mark offered to settle his claim for back child support if she dropped her claim for his retirement. CP 12. In addition to violating the rules of evidence, what equitable defense does this support? Rosablanca claims Mark refused to bail their adult son from jail. CP 13. How does this establish equitable relief is necessary? Rosablanca says Mark had a sexual relationship with their son's ex-girlfriend. CP 13. How is that a claim for equitable relief? It's clear Rosablanca threw in every allegation she could in response to Mark's motion. None of them support equitable relief. The court made no findings that it accepted any of these allegations or that they would justify Mark from being precluded from collecting support due.

**4. If the order of June 2017 were understood to prohibit Mark's collection of child support arrears, then it is within the scope of review for this appeal**

Even if the underlying order of June 6, 2017 were understood to grant Rosablanca

equitable relief, or in some other way to preclude Mark from collection the child support arrears, it is not the case that such an order is beyond review. Such an order would preclude Mark's efforts to enforce the child support order and would therefore be within the scope of this appeal according to RAP 2.4(b).

The pertinent portion of this rule reads:

> Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

If the order denying Mark's request for a consolidated judgment prevents collection of the support due, then it clearly falls within the above rule. It would be prejudicially affect the decision designated in the notice, and the order was entered before the appellate court accepted review.

In the event this court deems it necessary to review the order of June 6, 2017, we repeat our argument that the only legal way for Rosablanca to avoid her child support debt would be equitable relief, and we again point out the record does not support such a claim as a matter of law. If the order of June 6, 2017 does not prohibit Mark's attempts at enforcement, then the court should not have enjoined Mark's attempts to collect by garnishment.

**5. A child support oblige is entitled to attorney's fee in a proceeding to collect unpaid child support.**

The right to collect attorney's fees in a proceeding to collect child support is covered by RCW 26.18.160 as follows:

> In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a

prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

Since Mark should have prevailed in enforcing the back child support he is owed, he should have also recovered attorney fees for responding to Rosablanca's objection to enforcement. Similarly, Mark had to file this appeal to be able to enforce his right to collect. He is also entitled to attorney fees incurred in this appeal.

**6. A support obligor should not be awarded attorney fees and sanctions in a proceeding to prevent the collections of child support due without a showing of bad faith.**

As noted above, such a proceeding is governed by RCW 26.18.160, requiring an obligor to show bad faith by the obligee to recover attorney fees. Because Rosablanca should have failed to prevent enforcement and failed to show bad faith on Mark's part, she should not have been awarded attorney fees or sanctions.

## V. FEES AND COSTS FOR APPEAL

In addition to the fees and costs Mark is entitled to from his efforts at the trial court level, Mark also requests Rosablanca be assessed the attorney fees and costs associated with this appeal. As stated above, RCW 26.18.160 calls for attorney fees and costs to be awarded to the prevailing party in an action to enforce child support. When fees and costs are authorized at the trial level, they may also be had on appeal. See, e.g., *Puget Sound Plywood, Inc. v. Mester,* 86. Wn.2d 135, 542 P.2d 756 (1975)

## VI. CONCLUSION

Because Rosablanca owes child support to Mark, and because equitable relief for her was neither argued nor appropriate, Mark is entitled to recover unpaid support by the usual methods of enforcement, including garnishment. As a prevailing obligee, Mark is also entitled to attorney fees and costs associated with these enforcement actions, and

Rosablanca is not entitled to any fees or costs for her defense. Therefore, this court should reverse the Superior Court order enjoining enforcement of child support, allow Mark to collect the support he is owed, and award him the fees and costs he is entitled to,

Dated this 16th day of July, 2020.

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## ROBERT TAUB & ASSOCIATES

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## Transmittal Information

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