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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DAVID M. FERNANDEZ	)	
	)	
And	)	
CYNTHIA L. FERNANDEZ	)	3AN-86-9323 CI
Husband and Wife	)	
	)	

MOTION FOR RULE 60B MOTION TO SET ASIDE THE JUDGMENT

Comes now Ms. Fernandez, by and through undersigned counsel and respectfully moves the court for an order to set aside the judgment under Civil Rule 60(b) as per the court's directive on September 26, 2011. The court signed the order on September 26, 2011, which had formalized the agreement put on the record by the parties. The order that was signed on September 26, 2011 is the formalization of the settlement conference from May 10, 2011. As the motion is filed less than a year from the ruling, the motion is timely filed.

History of the Case

The nature of the relationship between Mr. Fernandez and Ms. Fernandez evolved during the relationship. This evolution must be taken into account in terms of the distribution. The couple had a complex relationship: from 1979 until 1986, the couple was divorced. Then the couple was in a domestic partnership from 1986 until 1997. Then there was the co-habitation of the couple from 2001-until 2007, but the relationship did not end until 2008. However, during the 2001-2008 period, the financial arrangement was different than one that was typical of a co-habitating couple. For years, Mr. Fernandez co-habitated, but did not contribute to the household expenses. This changes the calculations. The financial position of the parties must be taken into consideration.

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ARGUMENT

Procedurally, the Court Should Have Recused Itself Due to Conflict of Interest

At the first hearing in January, 2011, the court indicated that the court was willing to entertain ideas as to how to resolve the case, as long as the parties agreed.

At the status hearing on March 7, 2011, Ms. Erwin suggested that the court have the settlement conference before the judge in May, 2011, and to have the trial in June 2011 (Status hearing 3/7/11 at 2:30:30). Mr. Wheeles agreed (Status hearing 3/7/11 at 2:30:36). The court gave the option at a later point in the hearing as well to determine who would conduct the settlement conference and suggested Judge Joannides (Status hearing 3/7/11 at 2:32:10). Ms. Erwin continued to push on this issue and inquired from the court as to whether the court conducted this hearing for a settlement conference. Mr. Wheeles again agreed. While this was a creative solution by the attorneys as a means to resolve the issues in the case, undersigned counsel respectfully submits that it was not a viable one.

Ms. Erwin then reassured the court that the settlement conference should be a shorter one as it was all forensics, the hearing was about valuations and offsets so the hearing should not take more than a couple of hours (Status hearing 3/7/11 at 2:31:35). Ms. Erwin stated that it was valuation and offsets (2:31:51)

Undersigned counsel is, admittedly, new to the case. Undersigned was not present at the status hearing. Undersigned counsel appreciates the seniority of the court, and the experience of Ms. Erwin, as well as the fact that by virtue of Mr. Wheeles agreeing to having the court conduct the settlement conference, Ms. Fernandez is bound.

However, undersigned would respectfully submit to the court and the parties that this poses a conflict of interest. Cannon 4 section F of the Judicial Conduct. As per the commentary

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section, section 4F "does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties." This is undisputed . But conducting a settlement conference for a case where the court is presiding over the case, puts the court in the uncomfortable position of knowing too much. As per the scope defined by Administrative Rule 23, subsection 1, under the Service as an Arbitrator or Mediator, (the private practice rules) a judge shall

(1) The judge shall refrain from soliciting or accepting employment as an arbitrator or mediator from a lawyer or party who is currently appearing in a case assigned to the judge.

(2) The judge shall disqualify himself or herself from sitting as a pro tem judge in a case if the judge has previously served as an arbitrator or mediator in the same matter. This disqualification may be waived under Section 3F of the Code of Judicial Conduct.

(3) The judge shall disqualify himself or herself from sitting as a pro tem judge in a case if the judge is currently serving or scheduled to serve as an arbitrator or mediator for a lawyer or party in the case. This disqualification may be waived under Section 3F of the Code of Judicial Conduct.

The conflict identified in the judicial cannons has occurred here, and an issue has now arisen that the Cannons were meant to avoid. The court has seen all of the positions of the parties, and conducted the negotiation. As this is the same judge presiding over the settlement conference and over the case, the briefs were made public as part of the file, and the result is that the court is over informed as to what resources the parties have, what evidence would be used at trial, and what realistic settlement options are. The net effect is that the impartiality of the trier of fact is regrettably called into question. Even though the court entered into the settlement conference in good faith, there is now a question of impartiality, despite all best intentions.

What should have occurred was that given that the court was assigned to the case, and that the court had offered up Judge Hopwood or Judge Joannides as settlement judges, they should have been utilized to preserve judicial impartiality. As that did not occur, undersigned would respectfully submit to the court that the cure to this problem is to re-assign the case and/or re-conduct the settlement conference.

The Agreement in its Totality Fails to Set the Parties in Compliance with AS 25.24.160

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As per AS 25.24.160 (a)(4) an award of maintenance must fairly allocate the economic effect of divorce by being based on a consideration of the following factors:

(A) the length of the marriage and station in life of the parties during the marriage;

(B) the age and health of the parties;

(C) the earning capacity of the parties, including their educational backgrounds, training, employment skills, work experiences, length of absence from the job market, and custodial responsibilities for children during the marriage;

(D) the financial condition of the parties, including the availability and cost of health insurance;

(E) the conduct of the parties, including whether there has been unreasonable depletion of marital assets;

(F) the desirability of awarding the family home, or the right to live in it for a reasonable period of time, to the party who has primary physical custody of children;

(G) the circumstances and necessities of each party;

(H) the time and manner of acquisition of the property in question; and

(I) the income-producing capacity of the property and the value of the property at the time of division.

The purpose of this statute is to comparatively put the parties into a comparable position as before they were married, and to take into consideration all of the factors that contribute to the economic earning capacity of both parties.

As per the recording that was put on the record on May 11, 2011, the court found that Mr. Fernandez was a PTSD veteran on disability. The court found that Ms. Fernandez was a 55 year old woman with no savings and no retirement. The court listed only Ms. Fernandez's assets in the matrix: the Thunderbird Falls house, and Ms. Fernandez's Mercedes. The court did not look at the Mountain View triplex that Mr. Fernandez purchased when the couple was separated from 1997-2001, the cabin Mr. Fernandez purchased when living with Ms. Fernandez from 2001-2005, the bank account assets that Mr. Fernandez had, the retirements of Mr. Fernandez, or the

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debts that Ms. Fernandez paid after Mr. Fernandez left the relationship in 1997, which resulted in her assuming $100,000 of debts.

The agreement that has been finalized, as per the court's instructions on September 26, 2011 is that Ms. Fernandez, per the advice of her previous attorney, waived her right to an equitable division of the couples $74,000 in debts (that Ms. Fernandez paid), her right to her child support award of over $128,000, gives up any rights that she has to Mr. Fernandez's assets that were accrued during the relationship, and Ms. Fernandez must pay Mr. Fernandez $33,000 plus give up her car.

Thus, in chart form, the parties assets and debts are divided as follows

Mr. Fernandez	Savings Accounts	$100,000 Estimated
	Mountain view triplex	$285,000
	Retirement accounts	$200,000 Estimated
	Mercedes	$27,700
	Trailer/vehicles	$14,000 Estimated
Apt #1 01-07	Mt View Revenue	$54,000

(this was the apartment that Mr. Fernandez had occupied prior to moving back in with Ms. Fernandez)

	4x4, Raft, Motors, Tools	$12,000 Estimated
	Land Rover	$2,500

Relief from debts

	Couple's debts	-$50,000
	Child support	-$128,000

Total Assets for Mr. Fernandez	$695,000
Total Debts Relieved by the court for Mr. Fernandez in the settlement	$178,000
Total benefit to Mr. Fernandez	$873,200

In contrast, Ms. Fernandez's assets/debts are as follows

Ms. Fernandez	Thunderbird house	$212,000
	The debts	-$100,000 removed by ruling
	Child support	-$128,000 removed by ruling
	Mortgage to house	-$140,000
	Offset payment	-$33,000
	02 Benz	- $12,000

Total Debts	-201.000

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As this was a functional domestic partnership, as per the definitions under *Gurney v. Gurney* 80 P3d 223 (Alaska 2003) that "the standard for division of property accumulated during the period of the parties' cohabitation was based on the parties' intent, either express or implied."

Mr. and Ms. Fernandez lived as a couple post divorce from 1986-1997. They accrued debt together. They built assets together. As such, this portion of their relationship, they should both be responsible for an equal division of the assets and the debts from the 1997 breakup. Unfortunately, the calculations do not appear to take this into consideration.

When looking at the totality of the circumstances after the 1997 breakup, the relationship had evolved. They kept their finances separate from 2001-2007; the intentions of the parties were different than in their original relationship that went from 1979-1997. However, the court has treated the relationship from the critical period (2001-2007) as a domestic partnership where the parties lived as a married couple. As such, Ms. Fernandez should be entitled to half of Mr. Fernandez's bank accounts, his equity in his triplex, and the other assets.

It defies logic that a woman who has dutifully spent years of her life paying off debts that were incurred when they were a couple would not only waive her right to her child support judgment, as only she can do under the Bradley Amendment, but she would also ask the court to ignore her payment of all of the debts, and to put aside Mr. Fernandez's assets, so that she could pay Mr. Fernandez $33,000 plus give him her only means of transportation.

The Child Support Judgment Should Not Have Been Removed Out of the Settlement Equation

Standard of Review

The Supreme Court applies " *de novo* review when interpreting statutes and rules, adopting the rule of law most persuasive in light of precedent, reason, and policy. But we generally will not disturb a trial court's decision on a motion to modify a child support award unless the trial court

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abused its discretion "[9] Issues of statutory interpretation are questions of law which we review *de novo.*[10]

Undersigned counsel would respectfully point out the Bradley Amendment. Specifically, as per Civil Rule 90.3

"The Omnibus Budget Reconciliation Act of 1986, P.L. 99-509, Section 9103(a) (the Bradley Amendment), prohibits retroactive modification of child support arrearages. Rule 90.3(h)(2) is intended to restate this prohibition, including the exception allowed by federal law for modification during the pendency of a modification motion. Pursuant to this rule, the notice of petition for modification sent by the Child Support Services Division triggers the legal process for modification of child support awards and thus an increase or decrease of support back to the date of this notice does not constitute retroactive modification."[11]

The prohibition against retroactive modification limits both requested decreases and increases in child support. See Prohibition of Retroactive Modification of Child Support Arrearages, 54 Fed. Reg. 15,763 (1989). Thus, either the custodial or the obligor parent should promptly apply for a modification of child support when a material change in circumstances occurs.

The statutes in Alaska are similarly clear. As per AS 25.27.225, "A support order ordering a noncustodial parent obligor to make periodic support payments to the custodian of a child is a judgment that becomes vested when each payment becomes due and unpaid. The custodian of the child, or the agency on behalf of that person, may take legal action under AS 25.27.226 to establish a judgment for support payments ordered by a court of this state that are delinquent.

The Relevant Case Law that Applies to the Current Fact Pattern

[9] *State, Dept. of Revenue, Child Support Enforcement Div., ex rel. Husa v. Schofield* 3 P.2d 405 (Alaska 1999)
[10] *State, Dept. of Revenue, Child Support Enforcement Div. ex rel. Wallace v. Delaney 962 P.2d 187 (Alaska* 1998)
[11] Civil Rule 90.3 (h)(2) Commentary – Section X MODIFICATION section (B)

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The case law is similarly supportive. In *Brown v. Brown*, 983 P.2d 1264 (Alaska 1999) the court affirmed the duty of the father to pay for the arrearages in the child support, and to pay the statutory interest rate.

Similarly, in *State, Dept. of Revenue, Child Support Enforcement Div., ex rel. Husa v. Schofield* 3 P.2d 405 (Alaska 1999), the court affirmed that the superior court was prohibited from making a retroactive judgment on child support arrearages.

Applying the case law to the facts in the case, Mr. Fernandez cannot set this aside, not matter what his wish to do so. Mr. Fernandez acknowledged his responsibility to the debt, as per the attached letter (Exhibit A) to child support.

The Judgment for Child Support Cannot Be Set Aside Due to the Length of Time.

As per *Koss v. Koss* 981 P.2d 106 (Alaska 1999) the superior court found that judgments, even more than ten years old were still valid as to child support arrearages, because CSED does not commence a new "action" when it enforces an outstanding judgment for unpaid support.[12] Further, the court specifically found in *State of Alaska, Dept. of Revenue, Child Support Enforcement Div ex rel. Gause v. Gause*[13] "Because statutes based on a mistaken premise do not change the legal rules in effect prior to their enactment, we conclude that[§AS 9.10.] 040(b) does not apply to AS 25.27.226 motions…..We hold that new subsection (b) does not apply to AS 25.27.226 motions to collect arrears because such motions are not "actions" as that term is understood in the common law."[14] In *Koss*, the court further emphasized that "We hold that AS 09.10.040 does not apply to CSED's collection of child support judgments. The agency's administrative collections are not "actions upon a judgment."[15]

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[12] *Koss v. Koss*, 981 P.2d 106, 106 (Alaska 1999)

[13] 967 P.2d 599, 600 (Alaska 1998)
[14] *Gause*, at 603
[15] *Koss* at 109

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The most recent case, *Huestess v. Kelly Huestess,* No. S–13375 (Alaska 2011),[16] appears to address some of the issues that plague this case (i.e. the marriage, and the domestic partnership relationship where the parties lived together). Specfically *Huestess* states that prejudgment interest for a couple that co-habitated (and later married) accrued while the parties lived together. [17] Mr. Huestess endeavored to have the child support set aside and the court found that "We hold that under AS 09.10.140 the statute of limitations for child support actions is tolled during the child's minority. Other states have reached the same conclusion- Bonnie's claim for child support is not barred by the statute of limitations, and it was not error for the superior court to deny Allen's motion to dismiss."[18]

Procedurally, this case should never have come before the court. Mr. Fernandez did not timely access his remedies. Instead, he petitions the court more than ten years after some of the judgments for judicial relief. Mr. Fernandez let all of his remedies through Child Support lapse. He cannot now come in and ask for a do over on judgment already rendered. He is obligated to pay the back child support and CSED is obligated to collect the child support. Mr. Fernandez cannot waive the interest on the back child support arrearages.[19]

As per the case law on this issue, only Ms. Fernandez has the means to provide this waiver. Undersigned counsel would respectfully argue that Ms. Fernandez has not waived that child support, particularly given the agreement that was put on the record where Mr. and Mrs. Fernandez were sworn into and agreed to contingent terms on May 10, 2011 were only about the offset payment that Ms. Fernandez was to pay to Mr. Fernandez.

It is anticipated that Mr. Fernandez will say that Mr. Wheeles, the attorney for Ms. Fernandez, had the authority and did bind the Ms. Fernandez to dismiss her claim for the child

[16] 2011 WL 3802663
[17] *Id.*
[18] *Id.* at page 3
[19] *State, Dept. of Revenue, Child Support Enforcement Div. ex rel. Wallace v. Delaney* August 7, 1998 962 P.2d 187

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support arrearages as per the end of the settlement conference on May 10, 2011. (May 10 hearing 8:55:42) However the agreement that was sworn to by the parties was only focused on the ability of Ms. Fernandez to pay; the child support component did not enter the terms that either Mr. Fernandez or Ms. Fernandez agreed to until Ms. Erwin slipped in the comment about the child support, and in the heat of the moment, Mr. Wheeles agreed to it. Again, undersigned counsel was not there, and not privy to the negotiation, and does not wish to disparage any of the parties, but in listening to the tape, it appears that this was a last minute addition. This is a last minute provision that completely changed the deal terms and skewed the purpose of AS 25.24.160.

The situation appears to be further compounded by the conflict between Ms. Fernandez and Mr. Wheeles. There appears to be heated whispering between Ms. Fernandez and her counsel prior to Mr. Wheeles swearing in Ms. Fernandez to ratify the deal terms (8:59: 12- 8:59-32), where the words "going to trial" and other phrases were placed on the record whispered between Ms. Fernandez and her attorney which is indicative of the disagreements that Ms. Fernandez was having with her counsel. Based on the totality of the circumstances (as stated above with regards to the assets and debts of the respective parties) it appears that there was a material conflict between the client and the attorney that bound the negotiation. While it is understandable that the court would say that this is a client problem, and not the court's problem, as it so globally affected the agreement, this is something that must be looked at in the scope of the agreement that was made.

The Lack of Research Regarding Valuation Adversely Affected the Negotiation at the Settlement Conference

There are other compounding factors which the court should take into attention. At the March 7, 2011 status hearing, Ms. Erwin referred on the records "to hiring Daphne Corrup to do the appraisals of the properties (Time: 2:30:11)… to do the forensic appraisals on the Mountain View and marital residence. " This has never occurred. Ms. Erwin clearly put the Mountain View property into the calculation, as it should have been; but the fundamental work of assessing the values of the respective properties was never accomplished. Instead, assumptions were made that

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the Mountain View triplex had no equity and that the Thunderbird property had significant equity. At the beginning of the settlement conference findings of fact that the court put on record (May 10, 2011 at 8:48:20), where there was a complex fact pattern, but that the parties got back together, in 2001 and there was a disagreement among you as to what the implicit deal was (8:48:48). The court acknowledges the complexity of the facts.

Undersigned wishes to respectfully point out to the court and parties that this lack of a baseline has clearly adversely affected Ms. Fernandez's ability to in good faith obtain the loan that the court wished to have Ms. Fernandez accomplish, using the Thunderbird house as collateral. As was filed in the cross motion on August 10, 2011, the Thunderbird property was inspected after the settlement conference and requires considerable renovations and repairs. The home inspection was filed with the court, identifying significant structural and cosmetic issues, including the need for a new roof, mold issues, flooring problems, and the need for structural repairs that went into the tens of thousands. Copies of the quotes for the home repairs were previously filed with the court, documenting that the repairs done by Mr. Fernandez served to decrease the value of the property, that the flooring alone would cost at least $18,000, and that this was just one of many tasks that would need to be accomplished for a bank to give serious consideration to Ms. Fernandez's ability to obtain a loan using the house as collateral, combined with her credit history that was marred by her paying all of the domestic partnership debts.

At the court hearing on May 10, 2011, the court indicated that there was quite a bit of equity in the Thunderbird Falls house (May 10 hearing 8:50:50). The court acknowledges that the parties disagree as to what the right appraisal is, how much equity there is, but they have agreed to wrap that into their final settlement (8:51: 05) it was doubtful that Ms. Fernandez could obtain loan funding; the court acknowledged her difficulty in obtaining a second mortage due to her credit worthiness and income (May 10, 2011 tape 8:52:00). Ms. Fernandez has agreed to make best efforts to get that accomplished (May 10, 2011 tape 8:52: 12) If she can't get the $33,000 she is going to negotiate for the highest amount in good faith that she can get (8:52:22). (8:52:29) Let's imagine that' s $20,000, then there's a $13,000 deficiency. (8:52:37) At that point the parties are going to negotiate on terms in good faith". (8:53:02) "If they can make that

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deal at that time, in the light of the circumstances, they have a settlement. If they can't then all bets are off and they are back to square one". The court then made the determination that " no child support is due" (8:55:24). Even at the time of the hearing, the court exhibited skepticism that Ms. Fernandez could obtain the loan, (8:56:41), and that there would need to be further discussion on terms.

As per the pleadings, Ms. Fernandez has diligently attempted to obtain loans against the house. To date she is unable to obtain any funding. The court ordered the parties to negotiate in good faith at the September 19th hearing, as there would be no grounds for a do over per the settlement conference until a payment plan had been proposed in good faith. The parties endeavored in good faith to negotiate the settlement. At the hearing on September 26, 2011, the court wanted the parties to continue with the negotiation, and if necessary, there would be a hearing on the matter set at the November 2011 date.

The order that is being challenged by this rule 60 motion has additional errors, such as the amount of the settlement. For example, at the September 26, 2011 hearing Ms. Fernandez clearly articulated on the record that the loan as to the Mercedes was paid off, so the amount in question that the court is referring to ($33,000 + the $7000 for the loan against the Mercedes) at the May settlement hearing should truly only reflect the $33,000 as per the September 26, 2011. However, given the facts above, having Ms. Fernandez pay Mr. Fernandez does not appear to restore the parties back to their comparable economic positions.

Relief Requested

Given the circumstances of the case, undersigned counsel respectfully requests that the court overturn the decision and to set aside the agreement as per Civil Rule 60 (b), and to provide the "do over" as the court had indicated at the settlement conference on May 10, 2011.

Dated: October 6, 2011

Alicia Porter ABA #0011100
Attorney for Ms. Fernandez