NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

August 17, 2021

Heather A. Cooper
COOPER GINSBERG GRAY, PLLC
9302 Lee Highway, Suite 1200
Fairfax, VA 22031

Robert L. Vaughn, Jr.
Vaughn Law Firm PLC
1433 New Monrovia Road
Colonial Beach, VA 22443

Re: *Susan W. Frazier* v. *John W. Frazier*, CL 2008-12548

Dear Ms. Cooper and Mr. Vaughn:

This matter came before the court on June 11, 2021 on Defendant's Motion to Set Aside a provision of an order of December 17, 2010 barring him from seeking modification of child support. The court heard argument on the motion on June 11, 2021, took the matter under advisement, and ordered supplemental briefing by the parties on the issue of *res judicata*.[1]

The two issues before the Court are (1) whether a court order barring a father from seeking affirmative relief, including child support modification, until he becomes current on his court-ordered monetary obligations, is void *ab initio*, and (2) whether Defendant's Motion to Set Aside is barred by *res judicata*.

BACKGROUND

Plaintiff Mother and Defendant Father were divorced pursuant to a

[1] The supplemental memoranda were timely filed on June 25, 2021 and July 9, 2021.

OPINION LETTER

Final Decree of Divorce A Vinculo Matrimonii entered on November 25, 2008. Mother and Father executed a *Property, Custody and Support Settlement Agreement* on September 5, 2008, which was incorporated into the *Final Decree of Divorce*, and in which Father agreed to pay monthly child support.

Mother subsequently filed multiple petitions for rules to show cause based on Father's nonpayment of: his child support obligation, HELOC payments, and Mother's attorney's fees. At a review hearing on December 17, 2010 arising from one of these petitions, the court entered an Order (hereinafter referred to as the 2010 Order) with the following provision:

> [Father] agrees that he shall be barred from seeking any affirmative relief, including modification of child support, until such time as he becomes current on his court-ordered monetary obligations, including HELOC payments.

On January 12, 2011, Father filed an Emergency Motion to Adjust Child Support and Spousal Support. On March 9, 2011, the court entered an order denying this motion, finding that Father was "barred from seeking a modification of his court-ordered child support and monetary obligations . . . because of unclean hands and by the terms of this Court's Order of December 17, 2010." This will hereinafter be referred to as the March 2011 proceeding.

After Father was incarcerated at a March 18, 2011 review hearing arising out of one of Mother's petitions for a rule to show cause, Father filed a Motion to Review Case on May 13, 2011 based on the parties' inability to reach an agreement on a payment plan for Father's arrearage of his court-ordered monetary obligations. On May 27, 2011, the court entered an order outlining Father's arrearage amount, entering judgment against him for that amount, and releasing Father from incarceration, finding that it would not cause him to pay the sums due. This will hereinafter be referred to as the May 2011 proceeding.

On April 17, 2020, the Department of Child Support Enforcement ("DCSE") filed a Motion to Reopen, Intervene and Transfer based on the emancipation of one of the parties' minor children. On August 7, 2020, the court entered an order denying this motion. Although Father was present at this hearing by video, he did not present any argument. This will hereinafter be referred to as the August 2020 proceeding.

On March 31, 2021, Father filed his Motion to Set Aside as void the provision of the 2010 Order barring him from seeking child support modification.

ANALYSIS

A. Voidness

Father argues that the provision of the 2010 Order barring him from

seeking child support modification is void, and was void *ab initio*, because it interferes with the court's continuing jurisdiction to modify its decrees concerning child support. Def.'s Supp. Br. ¶¶ 13-22. Mother argues that Father should be denied relief under the doctrine of unclean hands. Pl.'s Opp'n Br. at 8-10.

It is well-established that a court "retains continuing jurisdiction to change or modify its decree relating to the maintenance and support of minor children." *Kelley v. Kelley*, 248 Va. 295, 298 (1994) (citations omitted).[2] "[T]he rights of children to support and maintenance . . . cannot be impinged by contract, and any contract purporting to do so is facially illegal and void." *Id.* at 299. "[P]arents cannot contract away their children's rights to support *nor can a court be precluded by agreement from exercising its power to decree child support*." *Id.* at 298 (emphasis added) (citations omitted). *Kelley* thus held that a provision in a property settlement agreement that "Husband shall never be responsible for payment of child support" was void because "the court's power to decree support was diminished." *Id.*[3]

"An order is void *ab initio* . . . if the character of the order is such that the court had no power to render it." *Singh v. Mooney*, 261 Va. 48, 51-52 (2001) (citation omitted). "[A]n order which is void *ab initio* is a 'nullity,' and is without effect from the moment it comes into existence." *Amin v. Cty. of Henrico*, 286 Va. 231, 235-36 (2013) (citation omitted). An order which is void *ab initio* "may be attacked in any proceeding by any person whose rights are affected." *Harris v. Deal*, 189 Va. 675, 687 (1949).

The challenged provision of the 2010 Order runs afoul of *Kelley*. By specifically barring Father from seeking child support modification, the provision diminishes the court's power to decree support similar to the provision at issue in *Kelley*, even if specific facts and circumstances have changed. Moreover, the challenged provision of the 2010 Order was void *ab initio*.

Mother attempts to justify the provision at issue by arguing that Father comes to the court with unclean hands. Equitable defenses, such as unclean hands, do not, however, apply to divorce cases as such cases

---

[2] *See* Code § 20-108 ("The court may, from time to time after decreeing as provided in § 20-107.2, on petition of either of the parents, or on its own motion or upon petition of any probation officer or the Department of Social Services, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require.").

[3] More recently, the Virginia Court of Appeals held to be void a provision in a property settlement agreement stating that, "regardless of circumstances, the agreed amount of child support 'may not be reduced'" because it "prevent[ed] a circuit court from decreeing child support based on the specific facts and circumstances." *Host v. Host*, Record No. 2134-14-4, 2016 WL 486519, at *6 (Va. App. Ct. Feb. 9, 2016).

are creatures of statute. *See Bajgain v. Bajgain*, 64 Va. App. 439, 458 (2015) (citing *Westbrook v. Westbrook*, 5 Va. App. 446, 455-57 (1988)) ("[A]lthough divorce cases appear on the chancery side of the docket, the many statutory limitations placed on divorces differentiate those cases from ordinary suits in equity. Consequently, in adjudicating these cases, we look to the terms of the statute rather than equitable maxims.").

In sum, the Court holds that the provision in the 2010 Order barring Father from seeking affirmative relief in the form of child support modification until he becomes current on his court-ordered monetary obligations was null and void *ab initio*.

B. Res Judicata

Mother argues that Father's Motion to Set Aside is barred by *res judicata*. Pl.'s Opp'n Br. at 7-8; Pl.'s Suppl. Br. Specifically, Mother argues that Father's Motion is barred by Sup. Ct. Rule 1:6(a) -- claim preclusion -- because Father could have presented his motion regarding the 2010 Order's validity during the March 2011, May 2011, or August 2020 proceedings. *Id.* Additionally, Mother argues that Father's motion is barred by issue preclusion, or collateral estoppel, because the issue of the 2010 Order's validity was actually litigated and decided by the court at each of the March 2011, May 2011, and August 2020 proceedings. *Id.*

i. Claim Preclusion v. Issue Preclusion

Although the broad term "[r]*es judicata* involves both issue and claim preclusion," *The Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 142 (2017) (citing *Lee v. Spoden*, 290 Va. 235, 245-46 (2015)), issue and claim preclusion are distinct concepts with different applications and requirements. The Virginia Supreme Court succinctly stated the main difference between claim preclusion and issue preclusion that is determinative in this matter: "While *claim preclusion* bars relitigation of *a cause of action*, *issue preclusion* bars relitigation of *a factual issue*." *Lane v. Bayview Loan Servicing*, LLC, 297 Va. 645, 653 (2019) (emphasis added) (citing *D'Ambrosio v. Wolf*, 295 Va. 48, 56 (2018)).[4]

ii. Claim Preclusion

"In Virginia, claim preclusion is encompassed by Rule 1:6." *Lee*, 290 Va. at 245. Rule 1:6(a) provides, in relevant part:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, is forever barred from prosecuting *any second*

---

[4] The Virginia Supreme Court has indicated that issue preclusion also applies to issues of law. *See Bates v. Devers*, 214 Va. 667, 671 n. 6 (1974) ("Collateral estoppel is applied with less rigor to issues of law.") (citing Restatement of Judgments § 70 (1942) & Restatement Supp. (Judgments § 70) (1948)).

> *or subsequent civil action* against the same opposing party or parties on *any claim or cause of action* that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in *the second or subsequent action* were raised in *the prior lawsuit*, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought. (Emphasis added).

Rule 1:6(a) makes clear that claim preclusion applies to "*any* second or subsequent civil action . . . on *any* claim or cause of action that arises from that same conduct, transaction or occurrence . . . ." (Emphasis added). Thus, where a second or subsequent civil lawsuit with a *different* claim or cause of action is filed, but is based on the *same* conduct, transaction, or occurrence as a prior civil lawsuit, that second or subsequent civil lawsuit is barred by Rule 1:6(a). This interpretation is reinforced by the Virginia Supreme Court's discussion of the link between Rule 1:6 and the claim joinder statute and the development of the same conduct, transaction, or occurrence test in *The Funny Guy, LLC*, 293 Va. at 144-150.[5]

Father's Motion to Set Aside actually arose out of the parties' divorce lawsuit and could not possibly have been joined with the initial claim or cause of action pursuant to the joinder statute. Father's motion thus is not a claim or cause of action within the meaning of Rule 1:6(a) claim preclusion.[6]

Moreover, Father's motion is not a second and separate civil lawsuit with a claim or cause of action that could have been joined with the parties' divorce lawsuit at its outset. What Father's motion is seeking is essentially a declaratory judgment that the 2010 Order is void, and Virginia courts do not consider a declaratory judgment action to be a cause of action.[7] *See D'Ambrosio*, 295 Va. at 55-56 (citing Restatement (Second) of Judgments § 33, cmt. c (1982)) ("When a party seeks declaratory relief, 'the weight of authority does not view him as seeking to enforce a claim. Instead, he is seen as merely requesting a judicial declaration as the existence and nature of a relation between himself and the [opposing party].'").

---

[5] "Rule 1:6 parallels the 'same transaction or occurrence' scope of Code §§ 8.01-272 and 8.01-281. Thus, if the underlying dispute produces different legal claims that can be joined in a single suit under the joinder statutes, Rule 1:6 provides that they should be joined unless a judicially-recognized exception to res judicata exists." *The Funny Guy, LLC,* 293 Va. at 150.

[6] "A 'cause of action', for purposes of *res judicata*, may be broadly characterized as an assertion of particular legal rights which have arisen out of a definable factual transaction." *Bates*, 214 Va. at 672 n. 8 (1974) (citations omitted).

[7] Although declaratory judgments have preclusive effect, it is through issue preclusion, not claim preclusion. *See D'Ambrosio*, 295 Va. at 53-58.

Further, acceptance of Mother's argument that Father could have raised the issue of the 2010 Order's validity at prior proceedings within the divorce lawsuit would effectively mean that *any and every* motion filed in a civil lawsuit is a claim or cause of action subject to the preclusive effects of Rule 1:6(a) claim preclusion. This, of course, is not the case. Mother's argument would also essentially mean that there is no difference between claim preclusion and issue preclusion, which is clearly not the case under Virginia law. *See, e.g., Lane*, 297 Va. at 653. Most motions made in civil lawsuits (like Father's Motion to Set Aside) raise factual or legal issues for determination by the court and may be subject to issue preclusion, provided all of the other elements of issue preclusion doctrine are met. *See, infra*.

Additionally, the prior proceedings Mother points to as having a preclusive effect on Father's motion (the March 2011, May 2011, and August 2020 proceedings) are also not claims or causes of action as intended by the Rule 1:6 claim preclusion doctrine. So, even if the court concluded that Father's Motion to Set Aside was a claim or cause of action, there would be no claim or cause of action to compare it to for purposes of the Rule 1:6 claim preclusion doctrine.

And, even if the court were to conclude that Father's motion is a claim or cause of action subject to the Rule 1:6 claim preclusion doctrine, the motion is still not barred by Rule 1:6 because there was no final judgment on the merits.

The elements of Rule 1:6(a) claim preclusion are:

> (1) there has been a final judgment *on the merits*, (2) the parties or privies are the same, and (3) the later lawsuit arises from the same conduct, transaction, or occurrence as the earlier lawsuit.

Alexander v. *Cobb*, 298 Va. 380, 388 (2020) (citations omitted) (emphasis added).

The party asserting *res judicata* "must show by a preponderance of the evidence that the claim or issue should be precluded by the prior judgment." *Kellogg v. Green*, 295 Va. 39, 44 (2018) (quoting *Caperton v. A.T. Massey Coal Co.*, 285 Va. 537, 548 (2013)).

None of the orders from the March 2011, May 2011, or August 2020 proceedings indicates that they were final judgments decided "on the merits" of the issue of the 2010 Order's validity, and Mother has not otherwise carried her burden to prove the contrary by a preponderance of the evidence. Additionally, in the August 2020 proceeding, the parties were not the same. The DCSE, rather than Father, filed the Motion to Reopen, Intervene and Transfer. At the hearing on the DCSE's Motion, only counsel for the DCSE and Mother's counsel presented arguments; although Father was present via video, he did not, and was not given an opportunity to, present argument, so he cannot be considered to have been

a party to that proceeding.

Moreover, the March 2011, May 2011, and August 2020 proceedings did not arise from the same conduct, transaction, or occurrence as Father's Motion to Set Aside. The March 2011 proceeding arose out of Father's alleged changed circumstances regarding his ability to pay child and spousal support. The May 2011 proceeding arose out of one of Mother's petitions for a rule to show cause against Father for his failure to pay his court-ordered obligations, Father's incarceration, and Father's Motion to Review Case after his incarceration. The August 2020 proceeding arose as a procedural necessity when Father attempted to modify his child support obligation with the DCSE based on the changed circumstances of one of the parties' minor children emancipating. Father's Motion to Set Aside, on the other hand, arose out of the court's entry of an order with a void provision, which has no bearing on, or relation to, the facts or circumstances of Father's requests for child support modification or the contempt proceedings for his failure to pay his court-ordered monetary obligations.

Further evidence that Rule 1:6(a) claim preclusion does not apply to Father's Motion to Set Aside is the treatment of the issue of an order's validity or voidness in the *res judicata* context. The Virginia Court of Appeals stated unequivocally that:

> [o]nce a court of competent jurisdiction declares a prior order to be either void or valid, that declaration – if it becomes final and subject to no further appeals – is itself entitled to the protection of *res judicata*.

Carrithers v. *Harrah*, 63 Va. App. 641, 649-50 (2014).

This requires that the issue of whether a court order is valid be "declared" by a court to have preclusive effect on a litigant, which is one of the elements of issue preclusion. *See Lane*, 297 Va. at 654-55 (citation omitted). None of the orders resulting from the March 2011, May 2011, and August 2020 proceedings "declared" that the challenged provision of the 2010 Order was valid or void.

The March 2011, May 2011, and August 2020 proceedings thus do not bar Father's Motion to Set Aside under the doctrine of claim preclusion; Rule 1:6 thus does not bar Father's motion.

iii. Issue Preclusion

The elements of issue preclusion are:

> (1) parties [or their privies] to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must have resulted in a valid,

> final judgment against the party against whom the doctrine is sought to be applied.

Lane, 297 Va. at 654-55 (alteration in original) (quoting *Glasco v. Ballard*, 249 Va. 61, 64 (1995)).

Mother has the burden of showing, by a preponderance of the evidence, that a challenge to the validity of the 2010 Order is precluded by the March 2011, May 2011, and August 2020 proceedings. *See Kellogg*, 295 Va. at 44 (citation omitted).

In considering issue preclusion, the court's inquiry "must always be as to the point or question actually litigated and determined in the original action; not what *might* have been thus litigated and determined." *D'Ambrosio*, 295 Va. at 56 (emphasis in original) (quoting *Eason v. Eason*, 204 Va. 347, 351 (1963)). "Estoppel . . . must be certain to every intent and its scope should not be extended by argument or inference." *Id.* at 58 (quoting *Gilmer v. Brown*, 186 Va. 630, 636 (1947)).

None of the filings or orders from the March 2011, May 2011, or August 2020 proceedings indicates that the issue of the 2010 Order's validity was actually litigated, and Mother has not otherwise carried her burden to prove the contrary by a preponderance of the evidence. Although the *existence* of the 2010 Order was essential to the March 2011 proceeding explicitly and to the August 2020 proceeding inferentially, the specific issue of the *validity* of the 2010 Order was not actually litigated or decided in either of these proceedings and, therefore, was not essential to their judgments. The issue of the validity of the 2010 Order was also not essential to the judgment in the May 2011 proceeding; the provision of the 2010 Order at issue here is not even referenced in the May 2011 judgment. Finally, the same parties were not involved in the August 2020 proceeding as Father's Motion to Set Aside. The DCSE, rather than Father, filed the Motion to Reopen, Intervene and Transfer. At the hearing on the DCSE's Motion, only counsel for the DCSE and Mother's counsel presented arguments; although Father was present via video, he did not, and was not given an opportunity to, present argument, so he cannot be considered to be a party to that proceeding.

Because the March 2011, May 2011, and April 2020 proceedings do not satisfy all the elements of the doctrine of issue preclusion, they do not bar Father's Motion to Set Aside.

CONCLUSION

For the reasons set forth, Defendant's Motion to Set Aside is **GRANTED.**

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SUSAN W. FRAZIER	)	
	)	
Plaintiff	)	
	)	
v.	)	CL 2008-12548
	)	
JOHN W. FRAZIER	)	
	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Defendant's Motion to Set Aside a provision of an order of December 17, 2010 barring him from seeking modification of child support.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, hereby GRANTS Defendant's motion, and it is hereby

ORDERED that the provision of the order of December 17, 2010 barring Defendant from seeking modification of child support is SET ASIDE.

ENTERED this 17th day of August, 2021.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Robert L. Vaughn, Jr.
Counsel for Plaintiff

Heather A. Cooper
Counsel for Defendant