

Advanced Legal Writing Project 2
Critical Thinking, Legal Analysis and Application of Law in Motion Practice
INTRODUCTION
In this lesson, we will examine a motion to vacate orders and prepare an opposition. You will be provided with the facts of the case, law and documentary evidence. You will draft an opposition using the appropriate law and evidence to defeat the motion. This lesson focuses on critical thinking (what issue(s), facts, law, evidence is relevant), legal analysis (what law supports your position or defeats opponent's claims) and application of the law (using the law to support your position).
OBJECTIVES
After completing this lesson, the student can <ol style="list-style-type: none"> 1. Identify relevant issues from a motion to address in an opposition 2. Identify facts and evidence relevant to the issues 3. Analyze the law applicable to the issues 4. Synthesize the law and apply to the facts and issues to support an opposition. 5. Draft an opposition in the correct style utilizing appropriate law and evidence as support. 6. Practice feedback and revising process through peer review.
READING ASSIGNMENTS
Read Motion to Vacate, Memo in Support, Joe Hill Affidavit Read facts Read/research law provided Read documentary evidence (Hill's Washington motion to change jurisdiction, Hart declaration)
ASSIGNMENT
Draft an opposition and proposed order granting opposition. An affidavit is optional. Opposition should present 1 main issue and at least 3 collateral issues. Opposition should clearly and concisely state your client's position and accurately apply the law to the facts and issues in this case.
LECTURE NOTES OR NARRATIVE
<ol style="list-style-type: none"> 1. Discuss facts and motion to vacate. What law is movant using to support his position? 2. Identify the issues presented in the motion. Improper Service? Lack of notice? Type of hearing? Others? 3. Brainstorm and outline how to address issues in opposition. <ul style="list-style-type: none"> -What is the main issue for the opposition? (whether a motion to modify a new claim) -What are the collateral issues? (proper service of motion to modify, no basis to set aside under CR 60(b), unopposed motion is not a default) 4. Discuss how these issues should be presented in opposition 5. Discuss how to deal with movant's contradictory statements 6. Discuss the law that supports issues for opposition 7. Peer review draft oppositions.

FACTS

Date	Event
Five years ago	Parties divorced. Father has primary custody of child; mother has summer visitation under the custody order.
9/20/xx (last year)	Mother's files Motion to Modify Child Custody, Visitation and Support, copies were served by mail on father's attorney in divorce action.
9/25/xx	Mother's attorney mailed Motion to Modify Custody and Notice of Right to Respond to Father at last known mailing address in Othello, WA.
10/7/xx	Father received Motion to Modify Custody and Notice of Right to Respond at his PO Box in Othello [source: Father's Declaration].
10/10/xx	Mother's attorney received telephone call from judicial assistant about scheduling a hearing on the Motion to Modify for October 17, 20xx, but needed father's contact information so she could discuss scheduling the hearing with him. Father's last known contact information was provided.
10/17/xx	Custody modification hearing held. Mother appeared. Father did not appear. Court granted mother's Motion to Modify and noted the motion was unopposed by father. The court issued an order awarding Mother primary custody of child.
10/18/xx	Paul Hart of Acme Services personally served Father with a certified copy of order modifying custody and travel arrangements for child to return to Alaska at his Quincy, Washington residence. Proof of Service was filed with the court on October 29, 2013. [source, Hart's Declaration].
10/22/xx	Father filed Motion to Change Jurisdiction in Grant County, Washington to establish jurisdiction over the child in that state [source: father's Washington motion and declaration served on Mother].
11/15/xx	Motion to Set Aside 10/17/xx Order filed by Edison. Denied by court (procedural defect in motion).
2/20/xx	Elliott files Rule 60(b) Motion to Vacate October 17, 20xx order.

LAW FOR OPPOSITION

Case Law

Allen v. Bussell, 558 P.2d 496 (Alaska 1976)

Balchen v. Balchen, 566 P.2d 1324 (Alaska 1977)

Burrell v. Burrell, 696 P.2d 157 (Alaska 1984)

Case v. Municipality of Anchorage, 128 P.3d 193 (Alaska Ct. App. 2006)

Childs v. Childs, 310 P.3d 955 (Alaska 2013)

Cook v. Rowland, 49 P.3d 262 (Alaska 2002)

Jacko v. State, 981 P.2d 1075, (Alaska Ct. App. 1999)

O'Link v. O'Link, 632 P.2d 225 (Alaska 1981)

Richard v. Boggs, 162 P.3d 629 (Alaska 2007)

Rowland v. Monsen, 135 P.3d 1036 (Alaska 2006)

Court Rules

Civil Rule 4

Civil Rule 5

Civil Rule 55

Civil Rule 60(b)

Statutes

AS 25.24.150. Judgments for custody; supervised visitation.

AS 25.30.300. Initial child custody jurisdiction.

AS 25.30.310. Exclusive, continuing jurisdiction.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

LINDA J. HILL,)
Plaintiff,)
)
v.)
)
JOE J. HILL,)
Defendant.)
_____)

Case No. 4FA-xx-1234CI

RULE 60(b) MOTION TO VACATE OCTOBER 17, 20XX ORDERS

COMES NOW the defendant, Joe Hill, by and through undersigned counsel, and hereby moves the court pursuant to Civil Rule 60(b)(1), (b)(4), (b)(6) or Civil Rule 55(e) to vacate the October 17, 20xx order modifying custody and temporary orders in this case.

This motion is more fully supported by the attached memorandum of counsel and affidavit of Defendant.

DATE this ____ day of February 20xx at Fairbanks, Alaska.

The Law Office of
Steve Edison, Inc.

By: Steve Edison
Steve Edison, #9922334

Certificate of Service

I hereby certify that a true and correct
Copy of the foregoing was provided via
__ mail __ courier __ hand delivery to:

Mary Squires, attorney for plaintiff

Dated: 2/14/xx By: SE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

LINDA J. HILL,)
 Plaintiff,)
)
 v.)
)
JOE J. HILL,)
 Defendant.)
_____)
Case No. 4FA-xx-1234CI

MEMORANDUM IN SUPPORT OF
RULE 60(b) MOTION TO VACATE OCTOBER 17, 20XX ORDERS

COMES NOW the defendant, Joe Hill, by and through undersigned counsel, and hereby moves pursuant to Civil Rule 60(b)(1), (b)(4), (b)(6) or Civil Rule 55(e) to vacate the October 17, 20xx order modifying custody and temporary orders in this case.

Joe respectfully submits that the orders entered on October 17, 20xx must be set aside for the following reasons: 1) he did not receive adequate notice of the October 17, 20xx; 2) the October 17, 20xx hearing was a “scheduling/status conference” not an evidentiary hearing; and, 3) Linda Hill (“Linda”) failed to properly serve Joe with her motion to modify custody and motion for temporary orders.

I. Applicable Law

A. Civil Rule 60(b):

Civil Rule 60(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise or excusable neglect;
- (4) the judgment is void;
- (6) any other reason justifying relief from the operation of the judgment.

“In order to prevail on a 60(b) motion, a movant must generally show the existence of a meritorious claim as well as one of the grounds stated in the rule, such as excusable neglect or mistake.”¹

Civil Rule 60(b) requires claims for relief under subsections (b)(1) to be brought within “one year after the date of notice of the judgment or orders as defined in Civil Rule 58.1(c).” A claim for relief under subsection (b)(6) need only be brought “within a reasonable time” after entry of the final judgment or order.

In deciding Rule 60(b)(6) motions, courts consider: (1) the prejudice, if any, to the nonmoving party if relief from judgment is granted; (2) whether any intervening equities make the granting of relief inappropriate; and, (3) any other circumstances relevant to the consideration of the equities of the case.² Courts must balance “the interest in the finality of judgments against the interest in granting relief from judgment when justice so requires.”³ In doing so, courts should liberally construe Rule 60(b)(6) “to do justice where extraordinary circumstances demand it.”⁴

B. Civil Rule 55(e):

Civil Rule 55(e) states:

For good cause shown the court may set aside an entry of default and, if a default judgment has been entered, may likewise set it aside in accordance with rule 60(b).

¹ Clearv Diving Serv. v. Thomas Head & Greison, 688 P.2d 940, 943 (Alaska 1984).

² Richard v. Boggs, 162 P.3d 629, 635 (Alaska 2007).

³ *Id.* at 635.

⁴ *Id.*

“Good cause” is a question of equity left to the discretion of the trial court upon showing of a meritorious defense.⁵ The “meritorious defense” requirement demands a showing that if relief is granted the outcome of the suit may be different than if the entry of default or the default judgment is allowed to stand. “Different outcome” does not necessarily mean a different prevailing party, but could mean a reduction in the amount of Plaintiffs award.⁶

II. DISCUSSION

a. Improper Service

Joe was not properly served with Linda’s motion to modify custody and did not receive notice of the hearing on October 17, 2013 until after the hearing had been held.

The motion to modify custody was mailed via first class to Joe’s address in Othello, Washington. At the time, Joe was residing in Quincy, Washington, more than 50 miles away. When the decree of divorce entered in this case five years ago, Joe was represented by undersigned counsel. According to Courtview, Linda filed her pending motions on September 20, 20xx. Prior to that, the last filing or action of any kind in this case was on October 1, 20xx.

Alaska Civil Rule 81(e)(2) states in pertinent part:

(2) An attorney shall be considered to have properly withdrawn as counsel for a party in an action or proceeding to which a period of one year has elapsed since the filing of any paper or the issuance of any process in the action or proceeding, and

(A) The final judgment or decree has been entered and the time for filing an appeal has expired;

⁵ Hicks v. Pleasants, 158 P.3d 817 (2007).

⁶ Hertz v. Berznske, 704 P.2d 767 (Alaska 1985).

Because more than one year had passed since any action had occurred in this case, undersigned counsel was not Joe's attorney of record. Accordingly, Linda was required to serve Joe in compliance with Alaska Civil Rule 4.

Civil Rule 4 required Linda to serve Joe by peace officer, process server or by registered or certified mail,⁷ return receipt requested.⁸ Linda did not comply with the service requirements of Civil Rule 4. Accordingly, her motions were not properly before the court on October 17 and any substantive action concerning them should have been stayed until service was perfected.

Linda asserts that Civil Rule 5 governs and that service was perfected by mailing the motion to modify custody by first class mail.

However, Civil Rule 5(a) states:

Service - When Required. Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties but no service need be made on parties in default for failure to appear **except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.**⁹

Joe had been exercising primary physical custody of the parties son Justin for the last five years pursuant to their custody agreement. Linda's motion to modify constituted a new claim since it sought to award her primary physical custody.

⁷ See Civil Rule 4(c)(1).

⁸ See Civil Rule 4(h).

⁹ Emphasis added.

b. Notice of Hearing

According to the Notice of Hearing, the clerk's certificate of service indicates that Joe was notified of the October 17th hearing by mail and by phone. The certificate of service states that the notice of hearing was mailed on October 11, 20xx. It does not clarify when telephonic notice of the hearing was provided or whether it was communicated to directly to Joe or via voicemail.

Joe would have attended the hearing if he had received notice of it. He did not. Accordingly, any orders or substantive rulings that entered subsequent to the hearing on October 17 should be set-aside.

c. Type of hearing:

Even had Joe received timely notice of the hearing, he would have prepared for a scheduling or status conference, not an evidentiary hearing."¹⁰ Joe was not afforded appropriate notice that the hearing on October 17 would be an evidentiary hearing or that any action other than scheduling matters would be taken. Concomitantly, any orders that entered at the hearing on October 17 should be set-aside on due process grounds.

Joe first became aware of the motion to modify custody when he was served with the order modifying custody on October 18, 20xx in Quincy, Washington.¹¹ On October 22, 20xx he contacted undersigned counsel. On October 23, 20xx, undersigned counsel went to the courthouse and discovered that a motion to modify custody had been filed

¹⁰ The Notice of Hearing identified the hearing as a "Scheduling/Status Conference".

¹¹ It is unclear why the motion to modify custody was mailed to Othello, Washington, yet Linda knew to serve him with the order modifying custody in Quincy, Washington the day after the October 17, 20xx hearing.

on September 20, 20xx.¹² Undersigned counsel made copies of the pertinent documents and forwarded them to Joe. On November 15, 20xx, Joe filed a motion to vacate the October 17, 20xx orders.

As noted in Joe's opposition to Linda's motion for contempt, undersigned counsel was out of the office from November 20, 20xx to December 10, 20xx. Upon returning, undersigned counsel first learned that a writ of assistance (and subsequent felony criminal charge for custodial interference) had been initiated.¹³ The following day, Joe and his attorney discussed sending Justin to Fairbanks to comply with the writ of assistance. Joe agreed. However, before travel arrangements could be coordinated, Joe was compelled to turn himself over to law enforcement.

Joe endeavored to comply with the writ of assistance in a timely manner after he learned of it. Had the writ of assistance not been applied for ex parte, and a copy mailed to him, he would have learned of its existence in November.

For the reasons stated, Joe respectfully submits that any orders that issued on October 17, 20xx should be vacated, primarily on the grounds that the orders should not have entered and are therefore void.

Had Joe been properly served with the motion to modify custody, then the matter may have been ripe for the court to make a substantive ruling on October 17, 20xx. He was not. Even if he had been properly served, Joe did not receive notice of the hearing until after it was held. Even if he had received timely notice of the hearing, he would only have been on notice that it was Scheduling/Status Conference.

¹² See Exhibit 2.

¹³ According to Courtview, Linda had filed an ex parte motion for writ of assistance on October 29, 2013 and the writ of assistance entered on October 31, 2013.

Good cause exists to vacate the October 17, 2013 orders pursuant to Civil Rule 60(b)(4). Alternatively, Joe respectfully requests that the court vacate the orders pursuant to Civil Rule 60(b)(1), (b)(6) or Civil Rule 55(e).

Joe has already notified the court and Linda of his intent to move back to Fairbanks and has filed a motion to modify custody.

DATE this ____ day of February 20xx at Fairbanks, Alaska.

The Law Office of
Steve Edison, Inc.

By: *Steve Edison*

Steve Edison, #9922334

Certificate of Service

I hereby certify that a true and correct
Copy of the foregoing was provided via
__ mail __ courier __ hand delivery to:

Mary Squires, attorney for plaintiff

Dated: 2/14/xx By: SE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

LINDA J. HILL,)
Plaintiff,)
)
v.)
)
JOE J. HILL,)
Defendant.)
)
_____)
Case No. 4FA-xx-1234CI

AFFIDAVIT OF JOE HILL

I, Joe Hill, being duly first sworn upon oath, depose and state I am over the age of 18 years of age and fully competent to testify in every way and, if called to do so in every way and, if called to do so in court, would testify as follows:

1. I have reviewed my Rule 60(b) Motion to Vacate October 17, 20xx Orders. I swear and affirm that the statements and representations set forth therein, are true and accurate to the best of my knowledge and belief.
2. I first became aware that Linda had filed a motion to modify custody on October 18, 20xx when I was served with an order modifying custody by local law enforcement. Prior to then I had no knowledge of a custody modification proceeding had commenced or that a scheduling/status conference had been scheduled for October 17, 20xx. Had I known about either proceeding, I would have entered and appearance and answered them.
3. At the time I was served with the order modifying custody, I was living in Quincy, Washington. Apparently, Linda had mailed the motion to modify custody to

Othello, Washington where I had lived previously. Quincy is approximately 50 miles from Othello.

4. It is unclear to me how Linda knew to serve me personally with the order modifying custody in Quincy, Washington one day after the order had entered, yet chose to mail her motion to modify custody and motion for temporary orders to my former address in Othello, Washington.

5. On or about October 22, 20xx, contacted Steve Edison to assist me in determining what the order meant. It is my understanding that the next day, Mr. Elliott went to the courthouse and made copies of Linda's pleadings. I received copies of Linda's pleadings a day or two later.

6. On or about November 15, 20xx, I filed a motion to vacate the October 17, 20xx orders. Unbeknownst to me (or Mr. Edison), Linda had filed an ex parte motion for writ of assistance on October 29, 20xx and a writ of assistance had issued on October 31, 2013.

7. I first became aware that a writ of assistance had been issued, and a subsequent felony charge for custodial interference, on or about December 11, 20xx. Mr. Edison recommended that I send Justin to Fairbanks that weekend so that I would be in compliance with the writ of assistance, and that we could address the custodial interference charge after that. Because I had no knowledge of the writ of assistance and was not intentionally defying the court's order, I'd hoped that the custodial interference charge would eventually be dismissed. It was. However, approximately one month later, the DA's office reinstated the charge. That case is currently pending.

8. Before I could arrange to send Joshua to Fairbanks, I learned that law enforcement was looking for me. I voluntarily turned myself over to them on or about October 17, 20xx. Justin has been with Linda since that time.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this ___ day of February 20xx at Fairbanks, Alaska.

Joe Hill
Joe Hill

SUBSCRIBED and SWORN to before me this ___ day of February 20xx at Fairbanks, Alaska.

Mary Notary
Notary Public in and for Alaska
My commission expires: 12/12/20xx

Certificate of Service

I hereby certify that a true and correct
Copy of the foregoing was provided via
___ mail ___ courier ___ hand delivery to:

Mary Squires, attorney for plaintiff

Dated: 2/14/xx By: SE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

LINDA J. HILL,)
 Plaintiff,)
)
 v.)
)
JOE J. HILL,)
 Defendant.)

Case No. 4FA-xx-1234CI

Declaration of Service

STATE OF WASHINGTON)
)
County of Grant)

The undersigned does hereby certify that all times mentioned herein, your affiant was over the age of eighteen (18) years, not a party to the above action, not interested therein, and competent to be a witness in such matter.

The undersigned does hereby further certify that on October 18, 20xx, I received the following documents:

1. Letter to Joe Hill dated October 18, 20xx regarding court order;
2. Order Modifying Child Custody, Visitation and Support;
3. Guardian Contact form; and
4. Alaska Airline's Reservation Confirmation

And that I served the same at 76811 State Highway 82, Quincy, at approximately 12:15 p.m. on the 18th day of October 20xx, within the County of Grant, State of Washington, as follows:

PERSONAL: by delivering to and leaving with Joe J. Hill, personally, a copy of said documents.

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

DATE this 21st day of October, 20xx.

Paul Hart

ACME Process Servers, Lic. No. 98-461
Grant County, WA

Service Fees:

Service:	\$90.00
Rush Service:	\$____
Photo:	\$____
Travel:	\$____
Other:	\$____
Return:	\$____
Total:	\$90.00

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

IN RE THE MARRIAGE OF:)	
)	No. XX-3-00321-1
JOE J. HILL,)	
Petitioner,)	
)	MOTION TO CHANGE JURISDICTION
and)	
)	
LINDA J. HILL,)	
Respondent.)	
_____)	

COMES NOW the petitioner, Joe J. Hill, by and through his attorney, Betsy Boxer, and moves this court for an order transferring jurisdiction in this matter from the Fourth Judicial District in the Superior Court in the State of Alaska to Grant County, Washington.

This motion is based upon the UCCJA, the Declaration of Joe J. Hill and the files and records therein.

Attorney for Petitioner

DATED: 10/22/xx

Betsy Black Esq.
Betsy Black, WSBA #23458

DECLARATION

JOE J. HILL hereby declares:

I am the petitioner herein, am over the age of eighteen (18) and am competent to testify in this matter.

The respondent and I were divorced five years ago in the State of Alaska by Decree entered September 17, 20xx. We entered into a final parenting plan which provided that our son, Justin Hill, would reside primarily with me and our daughter, Stacy Hill, would reside primarily with her mother, Linda. Stacy is now an adult and no longer subject to the parenting agreement.

One year after the divorce, I relocated from Fairbanks, Alaska, to the State of Washington. Justin has resided with me in the State of Washington since then. The final parenting plan contemplated my relocation to Washington and set forth a visitation schedule based on Justin residing in Washington with me and spending residential time with Linda in Alaska. Pursuant to the visitation provisions in the final parenting plan, Linda was to have residential time with Justin during the summer break from school beginning 2 weeks after school was released and ending 2 weeks prior to school resuming.

Justin's last day of school in Quincy, Washington was June 7, 20xx. Linda asked if she could get Justin early for her summer residential time. I agreed and flew Justin to Alaska on June 14, 20xx. School was scheduled to resume in Quincy on August 28, 20xx, so based upon the parenting plan, Justin should have been returned to me on August 14, 20xx.

I work in the field of construction and was unemployed when I sent Justin to Alaska. In late June 20xx, I drove to Alaska and took a job at a construction site in the area near Linda in Fairbanks. I did not move back to Alaska and Justin was only there visiting. I was scheduled to return to

Washington in early September 20xx, and planned to bring Justin back to Washington with me at that time.

Then while I was still in Alaska, before returning home to Washington, Linda filed a petition for domestic violence protective order alleging domestic abuse by me against Justin. That ex parte order gave Linda temporary custody of Justin. At the hearing on September 9, 20xx, the petition was dismissed and Justin was restored to my custody. I immediately put Justin on a plane to return him to Washington so he could start school in Quincy. I left Alaska a few days later to drive back to Washington.

On Monday, October 7, 20xx, I received a Motion and Memorandum to Modify Custody, Visitation and Support, a Motion for Temporary Orders and a Notice of Right to Respond mailed to me at my post office box. The documents were not mailed by certified mail and I was not required to sign for the documents at the post office. Based on these documents, it appeared Linda was trying again to change primary custody of Justin to her home in Alaska. Although there was no file stamp on the documents indicating they had been filed in the State of Alaska and it is my understanding that service has not been properly effected on me, I believe it is important that I take action to have jurisdiction for this action transferred to our home state in Grant County, Washington, where Justin has resided with me for more than 3 years. I have filed a copy of those documents in this action for the court's review.

Justin and I have resided in Washington since August 20xx, and I am asking that jurisdiction for this action be transferred to Grant County,

Washington, where all of the information regarding Justin's current school, health and other records are located, as it is clearly his home state.

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

SIGNED at Moses Lake, Washington on October 22, 20xx.

Joe Hill

Joe Hill