Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-464

MAY TERM, 2003

Rosemarie Ann Jeleniewski	}	APPEALED FROM:
v.	}	Franklin Family Court
John Joseph Jeleniewski, Jr.	}	DOCKET No. 403-11-95 Frdm
	}	Trial Judge: Jane G. Dimotsis

In the above-entitled cause, the Clerk will enter:

Husband appeals from a decision of the Franklin Family Court denying his motion for relief from judgment. He contends the court erred in denying the motion because: (1) the underlying divorce judgment and child support order were void and subject to challenge at any time; and (2) he did not unreasonably delay in filing the motion. We affirm.

The facts may be briefly summarized. In 1993, a California superior court appointed wife as conservator of husband' s estate for the purpose of managing his business and financial affairs, on account of husband' s prolonged drug addiction and abuse. In November 1995, with the conservatorship still apparently in effect, wife filed a complaint for divorce in the Franklin Family Court. Although husband was aware of the divorce proceeding, having contacted the court on two occasions, he failed to appear for any of the hearings, resulting in the entry of a default child support order in March and a default divorce judgment in July 1996. In December 1996, the California court issued an order discharging the conservatorship. In 1998, wife moved to enforce the child support order, seeking arrearages in excess of $50,000. Husband appeared by telephone at a hearing on the motion in December. He acknowledged that he had a copy of the child support order, and agreed to pay $10,000 toward the arrearages by the end of the month. At one point during the hearing, he complained that wife had denied him funds for representation at the divorce hearing, and indicated that he was considering hiring an attorney to challenge the divorce.

In January 2002, husband moved for relief from judgment, claiming that the child support order and divorce judgment were void because he was under a conservatorship when they were entered and the trial court had failed to appoint a guardian to defend his interests. Following a hearing, the court denied the motion, ruling that husband had failed to raise the issue within a reasonable time. This appeal followed.

Under V.R.C.P. 60(b), a court may relieve a party from a final judgment on the basis that the " judgment is void." A motion for relief from judgment on this ground must be brought " within a reasonable time." Id. Husband asserts that a judgment entered against a person under a conservatorship is void unless the conservator has been joined, and argues that the conservatee may thereafter challenge the judgment at any time, unconstrained by the statutory requirement that the motion be made within a reasonable time. Our rules do provide that " no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian, conservator, or other such representative who has appeared therein." V.R.C.P. 55(b)(1). Nevertheless, the premise of husband' s argument is unpersuasive. Any number of courts have examined the question and have " ruled that an entry of judgment against an incompetent, even in the absence of a guardian, does not render the judgment void" ab initio, but merely voidable. S. Idaho Prod. Credit Ass' n v. Ruiz, 666 P.2d 1151, 1153 (Idaho 1983); see also Nesbitt v. Nesbitt, 402 P.2d 228, 230 (Ariz. Ct. App. 1965) (where the court otherwise has jurisdiction, judgment or decree entered without appointment of guardian, as required by statute, " while it may be erroneous, at most is only voidable, and not absolutely void");

Hackley Union Nat' l Bank & Trust Co. v.Sheneman, 186 N.W.2d 344, 350 (Mich. Ct. App. 1971) (default judgment of divorce against incompetent person unrepresented by guardian " voidable upon proper proceedings"); Pigg v. Commonwealth, 441 S.E.2d 216, 219-220 (Va. Ct. App. 1994) (despite failure to appoint guardian for person under disability, prior judgment is not void ab initio, but merely voidable).

Although husband cites an 1881 Vermont decision setting aside as void an earlier judgment for a debt against an insane person under guardianship, that decision was based upon a former statute expressly prohibiting writs of execution against a ward for a debt while the guardianship continues. See Miller v. Potter, 54 Vt. 267, 269 (1881). The court ruled that the trial court lacked subject matter jurisdiction to issue the writ, and as such the judgment was " wholly void." Id. at 270. The present case, however, is not one in which the family court lacked subject matter jurisdiction. See In re B.C., 169 Vt. 1, 7 (1999) (where court otherwise has general subject matter jurisdiction, the fact that it errs in exercising jurisdiction in a particular case does not render judgment void). Accordingly, we reject the assertion that the underlying child support order and divorce judgment were void ab initio and subject to challenge at any time. Husband was required to bring his motion within a reasonable time.

The trial court' s finding that the motion was not brought within a reasonable time was well within its discretion. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 149 Vt. 365, 368-69 (1988) (test for determining whether trial court could find that motion for relief from judgment was filed within reasonable time is " whether the trial court exercised sound discretion," and court' s ruling will not be set aside absent an abuse of discretion). Husband was clearly on notice of the original divorce and child support proceedings in 1996, and even suggested at the enforcement hearing in 1998 that he was considering hiring an attorney to challenge the divorce judgment. Yet, he delayed an additional three years before filing the instant motion, for reasons nowhere explained or excused in any of his pleadings. We thus discern no basis to conclude that the court abused its discretion in ruling that the motion was untimely. See Riehle v.Tudhope, 171 Vt. 626, 629-30 (2000) (mem.) (court did not abuse discretion in determining that five-year delay in bringing V.R.C.P. 60(b) motion was not reasonable); Martin v. Martin, 154 Vt. 651, 651 (1990) (mem.) (court was within its discretion in determining that two-year delay in moving to set aside divorce judgment was not reasonable).

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned