

FILED
COURT OF APPEALS
DIVISION II

2013 DEC 18 AM 11:37
COURT OF APPEALS
STATE OF WASHINGTON

No. 89672-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 43303-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re Marriage of:

PAMELA M. FERGUSON,

Respondent

and

RICHARD B. FERGUSON,

Petitioner

FILED

DEC 18 2013

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Pamela M. Ferguson, respondent in the Superior Court and appellant in the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review designated in part II of this petition.

II. COURT OF APPEALS DECISION

Division II of the Court of Appeals filed its unpublished decision on October 1, 2013. *Appendix 1*. A timely motion for reconsideration and for publication was denied on November 7, 2013. *Appendix 2*.

III. ISSUES PRESENTED FOR REVIEW

A. After a twelve year marriage, the husband earning nearly five times as much as the wife filed a “short-form” petition for dissolution, requesting only that the trial court fairly and equitably divide the parties’ substantial assets. Is a property division void when it is entered by default without notice to the respondent and awards nearly all of the assets to the financially advantaged spouse, because the relief granted varies substantially from that requested in the petition? Yes.

B. Does a property division entered by default in such a case violate the respondent’s due process rights when it awards the financially advantaged party five rental homes owned free and clear, a Gig Harbor waterfront residence, a dental practice, all retirement accounts, all contents

of the family residence and two vehicles while awarding the financially disadvantaged party approximately \$1,300, a twelve year old minivan and other minor assets? Yes.

C. Did the Court of Appeals erred in finding that the trial court did not abuse its discretion when it declined to consider the parties' financial circumstances and rule on Ms. Ferguson's motion for an award of attorney fees based on need and ability to pay pursuant to RCW 26.09.140? Yes.

IV. STATEMENT OF THE CASE

Pamela Ferguson and Dr. Richard Ferguson were married on November 23, 1992 and have two children together: William, now 20, and Alex, now 19. CP 31. Dr. Ferguson owns and operates a dental practice, and Ms. Ferguson stayed home for much of the marriage to raise the children, occasionally helping out with the dental practice. CP 31-32.

Unable to continue with the long-standing pattern of abuse she suffered from Dr. Ferguson, in June 2004 Ms. Ferguson left the marital residence. CP 32. On August 10, 2004, Dr. Ferguson filed a petition for dissolution of marriage (the "Petition"). CP 1-5. In his petition, Dr.

Ferguson requested relief as follows:

1.8 **PROPERTY.**

There is community or separate property owned by the parties. The court should make a fair and equitable division of all the property.

The division of the property should be determined by the court at a later date.

1.9 DEBTS AND LIABILITIES

The parties have debts and liabilities. The court should make a fair and equitable division of all debts and liabilities.

The division of debts and liabilities should be determined by the court at a later date. CP 2-3.

The Petition and related initial pleadings were properly served on Ms. Ferguson on August 11, 2004. CP 61. Ms. Ferguson neither appeared nor responded, and an order of default was entered on September 1, 2004 and mailed to her on September 3, 2004. CP 61. On October 1, 2004, a final parenting plan was entered by default and, on October 5, 2004, a copy of that parenting plan was mailed to Ms. Ferguson. CP 61.

On December 14, 2004, Dr. Ferguson and his attorney appeared before a pro tem commissioner of the trial court for presentation and entry of findings of fact/conclusions of law and a decree of dissolution. RP 12/14/04 at 1. Ms. Ferguson received no notice of the hearing and received no notice of the property division other than as set forth in the Petition, quoted above. Dr. Ferguson testified as follows regarding the property and debts of the parties:

Q: And you have presented to the Court a distribution of property and debt. Is the distribution fair and equitable?

A: Yes, it is. RP 12/14/04 at 4.

No further evidence was offered to the trial court regarding the identification of the parties' assets or debts, the separate or community nature of the parties' assets or debts, the value of the parties' assets or debts, or the parties' income and financial circumstances. *Id.*

The pro tem commissioner then entered Dr. Ferguson's proposed Findings of Fact/Conclusions of Law (the "Findings") and Decree of Dissolution (the "Decree"). RP 12/14/04 at 4; CP 7-24. In its Findings, the trial court then set forth a detailed list of assets and debts and found that most of the parties' assets were Dr. Ferguson's separate property. CP 8-9, 12-15. The marital community was found to have no interest in Dr. Ferguson's dental practice. CP 12-15 (a copy of this portion of the Findings is attached hereto as *Appendix 3* for the Court's ease of reference).

The Decree awarded substantially all of the property to Dr. Ferguson, including the waterfront Gig Harbor family residence,¹ five rental homes owned free and clear, a dental practice, an Alfa Romeo sports car, a Ford pickup, all retirement accounts, and all other property in Dr. Ferguson's possession (including all contents of the family home). CP

¹ The Decree does not indicate that the parties' residence was a waterfront home in Gig Harbor. This fact is set forth in the record at CP 33.

18, 22.² Ms. Ferguson received a 1992 minivan, \$1,392.13 in cash, the bank accounts in her name and certain other minor assets. CP 18, 23. Although Dr. Ferguson through counsel had earlier mailed copies of the parenting plan and default order to Ms. Ferguson, there is no evidence in the record to indicate that he ever mailed a copy of the Findings or Decree to Ms. Ferguson.

From the time Ms. Ferguson was served with the Petition until 2011, Dr. Ferguson repeatedly assured Ms. Ferguson that he would not and had not pursued the dissolution.³ CP 32-33, 85-87. In December 2004, Ms. Ferguson moved back into the family residence and resumed her role as wife and mother. CP 32-33, 45-48, 87. The parties continued to hold themselves out as married until, in November 2011, Dr. Ferguson filed an unlawful detainer action against Ms. Ferguson.⁴ CP 50-59, 87. The day before she left Gig Harbor to bury her mother in Chicago, Ms.

² The property listing and division in the Decree was identical to that found in the Findings, set forth for the Court's ease of reference as *Appendix 3*.

³ Sometime in 2008, Ms. Ferguson discovered that the parties' marriage had in fact been dissolved in 2004. However, there is no evidence that she was provided a copy of the property division set forth in the Decree until late 2011.

⁴ Ms. Ferguson provided multiple items of documentary evidence to the trial court supporting her contention that the parties had held themselves out as married after December 2004, including the fact that Dr. Ferguson continued to be covered on Ms. Ferguson's health insurance through her employer (CP 37, 42), utility bills continued to be issued to them jointly (CP 38), their church continued to send mail to them addresses to "Mr. and Mrs. Richard and Pam Ferguson" (CP 39), and they held themselves as married to their friends (CP 40).

Ferguson was served with Dr. Ferguson's unlawful detainer and was later removed from what she believed was the family home.⁵ CP 50-59, 87.

Ms. Ferguson filed her motion to vacate the Decree on December 16, 2011. CP 25. The trial court commissioner initially expressed concern over the fact that the Findings and Decree did not include complete information as to the values of the assets being divided:

...attorneys get all ruffled up when I bring it up to them, but, you know, things I like to see in final decrees are, you know, actual estimated or at least fair market value or approximate estimated value of assets so that I know I can ascertain whether I have got fair and equitable distribution.

It's always troublesome when they say, "Oh, just divide this up." I don't know if I am giving 2 million to one party and 50 cents to another. RP 1/30/12 at 24.

The commissioner then summarily denied the CR 60(b)(5) motion to vacate without further explanation. RP 1/30/12 at 25.

Ms. Ferguson moved to revise the trial court commissioner's order, limiting the scope of her revision motion to the denial of her CR 60(b)(5) motion to vacate the property division in the Decree as a void judgment. CP 90-91. The trial court denied the motion. RP 2/24/12 at 16-20.

⁵ This petition for review relates only to Ms. Ferguson's request that the trial court vacate the Decree as a void judgment pursuant to CR 60(b)(5). Ms. Ferguson originally sought vacation of the final parenting plan and Decree pursuant to CR 60(b)(4) based on her allegation of fraud and pursuant to CR 60(b)(11), but her motion was denied, in part due to the delay of over three years in seeking relief. RP 1/30/12 at 24-25. Ms. Ferguson is not seeking review of this portion of the trial court's order.

Ms. Ferguson moved for reconsideration pursuant to CR 59(a)(7) and CR 59(a)(9). CP 92-97. The trial court denied the motion for reconsideration. RP 3/16/12 at 12-13.

Ms. Ferguson timely filed her Notice of Appeal, requesting the Court of Appeals vacate the property division in the Decree as void and to award her attorney fees pursuant to RCW 26.09.140. CP 107.

In an unpublished opinion, the Court of Appeals affirmed the trial court's decision. *Appendix 1*. Ms. Ferguson timely moved the Court of Appeals for reconsideration and to publish its decision, and those motions were denied. *Appendix 2*.

Ms. Ferguson now petitions this Court for review.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review of the Court of Appeals' decision for three reasons:

A. The Court of Appeals' decision conflicts with this Court's decisions in *Conner v. Universal Util.*, 105 Wn.2d 168, 712 P.2d 849 (1986); *Ermey v. Ermey*, 18 Wn.2d 544, 139 P.2d 1016 (1943); and *Watson v. Washington Preferred Life Ins. Co.*, 81 Wn.2d 403, 502 P.2d 1016 (1972).

B. The Court of Appeals' decision conflicts with its decision in *Marriage of Johnson*, 107 Wn. App. 500, 27 P.3d 654 (2001).

C. The Court of Appeals' decision involves a significant question of constitutional law, namely, whether the due process rights of a defaulting respondent in a marital dissolution are violated when virtually all of the assets from a twelve year marriage are awarded by default to the petitioner when the only notice of the property division provided to the respondent was that it would be a "fair and equitable" division.

A. THE TRIAL COURT AND COURT OF APPEALS ERRED BY NOT VACATING THE PROPERTY DIVISION SET FORTH IN THE DECREE.

1. The Property Division Set Forth in the Decree Was Void and Therefore Should be Vacated.

As the Court of Appeals held, contrary to Dr. Ferguson's arguments and the trial court's holding, the Court *must* vacate the property division if the Decree if it is void. Ms. Ferguson respectfully submits that the property division is indeed void.

Default judgments may not provide relief "different in kind from or exceed in amount that prayed for in the demand for judgment." CR 54(c). "To the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void." *Marriage of Leslie*, 112 Wn.2d at 618 (citations omitted).

Dr. Ferguson has argued that the Decree granted no relief not requested in the Petition, and his position was succinctly stated by his counsel as follows:

First of all, I'd like to point out in the petition, the relief requested from the Court is to divide the properties and liabilities, and it's also to enter a decree of dissolution of marriage. And that's exactly what the decree did. RP 01/20/12 at 12

...

What the respondent is saying is that my client, the petitioner, was required to specifically set forth in his petition his proposed division of debts and division of property before he could go and get a default judgment -- that's the petition here -- and if he didn't, then any litigant can't go forward and get a default judgment unless they specifically set forth their proposed division of property and liabilities, and that's not the law.

The petition in this case doesn't request that the Court fairly and equitably divide property and liabilities. The petition states, as far as relief requested, enter a decree of dissolution and divide properties and liabilities. That's all the demand -- the petition requested in this case, and that's exactly what the Court did. It entered a decree of dissolution and it divided properties and liabilities. RP 2/24/12 at 12-13.

The Court of Appeals adopted Dr. Ferguson's reasoning, stating "a party cannot move to vacate a judgment under CR 60(b)(5) merely because it belatedly seems unfair." Under this approach there is no division of assets in a default decree of dissolution that could be held as void under *Leslie*, as long as the petitioner used the standard "short form" language in the

mandatory form for a petition for dissolution of marriage.⁶ Even the hypothetical \$2 million to one spouse, 50 cents to the other spouse asset distribution referred to by the trial court commissioner could not be vacated as void under the Court of Appeals' analytical framework. The language requesting a "fair and equitable division" becomes meaningless, if not misleading. A respondent that relies on the "fair and equitable" property division requested in the petition leaves herself open to an enforceable decree with a grossly unfair and inequitable division of property.

In 1986, this Court established the standard to be applied by the trial court in determining whether the Decree granted relief different from that requested in the petition: whether the defendant has "sufficient notice to make an intelligent decision to appear or default." *Conner v. Universal Util.*, 105 Wn.2d 168, 172, 712 P.2d 849 (1986); *see also Marriage of Johnson*, 107 Wn. App. 500, 504, 27 P.3d 654 (2001).

In *Watson v. Washington Preferred Life Ins. Co.*, 81 Wn.2d 403, 502 P.2d 1016 (1972), this Court held that a statute setting forth notice requirements for corporate shareholders in a merger vote violated those shareholders' due process rights because the required notice failed to

⁶ Dr. Ferguson's allegations and requests for relief set forth in paragraphs 1.8 and 1.9 are the "short form" option set forth in Washington State Court mandatory form WPF DR 01.0100.

advise the shareholders that, if they failed to appear, a court-appointed representative would exercise their shareholder's rights. *Watson*, 81 Wn.2d at 408-09. The Court reiterated that "[i]t is fundamental that a notice to be meaningful must apprise the party to whom it is directed that his person or property is in jeopardy." 81 Wn.2d at 408 (*quoting Ware v. Phillips*, 77 Wn.2d 879, 882, 468 P.2d 444 (1970)). In *Ermey v. Ermey*, 18 Wn.2d 544, 139 P.2d 1016 (1943), this Court considered a divorce complaint which requested a divorce, the return of the wife's maiden name, and "for such other and different relief as to the court seems meet and just." *Ermey*, 18 Wn.2d at 544. This Court held that the trial court's award of \$40 per month in spousal support to the wife was void:

The [husband] had a right to allow the default to be taken against him, secure in the knowledge that the decree would not exceed the demand of the complaint.

Demand for "other or different relief" adds nothing to the demand of the complaint, ***because of lack of specification***. *Ermey*, 18 Wn.2d at 545 (emphasis added).

Here, the only notice Ms. Ferguson ever received of the requested property and debt division was that it be fairly and equitably divided, as stated in the Petition. CP 2. Dr. Ferguson's Petition made no specific requests with respect to the division of the parties' assets and debts, nor did it characterize any assets as community or separate. CP 2-3. In sharp contrast, the Decree awarded nearly all of the property to Dr. Ferguson,

including the parties' Gig Harbor waterfront residence, five rental homes, owned free and clear, Dr. Ferguson's dental practice, all bank and retirement accounts, an Alfa Romeo sports car and a pickup truck. CP 18, 22-24. Ms. Ferguson was awarded only a 1992 Dodge Caravan, \$1,392.13 cash and certain other minor assets. CP 18, 23. Being notified that the property and debt from the marriage would be fairly and equitably divided did not equip Ms. Ferguson to intelligently decide whether to accept the extremely one-sided property division awarded by default to Dr. Ferguson. In short, due to the "lack of specification" in Dr. Ferguson's petition, Ms. Ferguson did not know and could not have known that her property was in jeopardy.

The trial court made a point of noting that it was not in a position to determine whether the asset division in the Decree was fair and equitable in a motion hearing, as such a determination would require an evidentiary hearing. RP 2/24/12 at 19; RP 3/16/12 at 13. Ms. Ferguson agrees. Similarly, *the Pro Tem Court Commissioner who entered the Decree by default was not in a position to make that same determination*, as the only evidence in the record regarding the property accumulated during the marriage was Dr. Ferguson's three words of testimony quoted above. If the trial court could not determine whether the asset division was fair and equitable, how could Ms. Ferguson have had "sufficient

notice to make an intelligent decision to appear or default” when she received no notice of the actual asset division proposed by Dr. Ferguson? The answer is that she could not, and therefore Dr. Ferguson failed to satisfy the standard set forth by this Court in *Conner, Watson and Ermey*.

Dr. Ferguson argued below that Ms. Ferguson bore the burden of proving that the asset division in the Decree was not fair and equitable. CP 63. Ms. Ferguson respectfully submits that it is the petitioning party who bears the burden of establishing that a proposed asset division awarded by default is fair and equitable when the respondent receives no notice of the actual proposed division. RCW 26.09.080 provides that “the court *shall*...make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable *after considering all relevant factors.*” (emphasis added). Here, the pro tem commissioner could not have considered all factors relevant to the property division because the *only* information in the record before the Court at that time was Dr. Ferguson’s testimony that he believed the asset division was fair and equitable.

At the time the Decree was entered on December 14, 2004, then-effective PCLSPR 94.04(a)(3) required the petitioner to either personally appear for entry of final orders or provide the Court with declarations under penalty of perjury attesting to the truth and accuracy of the proposed

findings and declaring that the petitioner is not seeking relief beyond that “*specifically requested*” in the petition.⁷ Because Dr. Ferguson personally appeared and testified at the December 14, 2004 hearing, he was not required to declare under penalty of perjury regarding the accuracy of the detailed listing of assets and debts in the Findings or to confirm that he was asking for nothing not “specifically requested” in the petition. Dr. Ferguson instead chose to appear personally at the final hearing, but he failed to present the evidence that the trial court needed to make the findings set forth in the Findings or to determine the fairness and equity of the property division in the Decree.

At a minimum, the trial court should have required testimony to establish the community or separate nature of the assets being divided, the approximate value of those assets (including the balances in the retirement and other financial accounts), and the income and financial circumstances of each party. Once the trial court received such information into the record, it could then make a reasoned decision as to whether Dr. Ferguson’s proposed asset division was fair and equitable, or whether an evidentiary hearing pursuant to CR 55(b)(2) would be in order.

⁷ This requirement is substantially the same as set forth in current PCLSPR 94.04(a)(1). Substantially similar provisions have been in the Pierce County local rules since the amendments which became effective September 1, 1995. *Compare* King County LFLR 5, Appendix I, which requires the petitioner seeking entry of a decree by default declare under penalty of perjury that the decree “provides for only that relief requested in the petition.”

Alternatively, of course, Dr. Ferguson could simply have amended his Petition pursuant to CR 15(a), providing Ms. Ferguson with notice of the actual proposed division of the fruits of this marriage.

Ms. Ferguson does not point out the trial court's failure to consider "all relevant factors," as required by RCW 26.09.080, to collaterally attack the sufficiency of the evidence. Ms. Ferguson simply points it out to alleviate the Court of Appeals' concern that adopting Ms. Ferguson's position would give a defaulting party greater rights to challenge a trial court's judgment than a party who appeared. Both appearing and defaulting parties have a right to have "all relevant factors" considered. Had the trial court followed the statutory requirement to consider the nature and extent of all separate and community property, a judgment which varied substantially from the relief requested would not have been entered, and this challenge would not have been necessary. Unfortunately, the nature and extent of the community and separate property was not determined and the result was a property division that vastly exceeded the relief requested in the petition.

Fundamentally, all litigants are entitled to due process, and due process requires reasonable notice of pending proceedings, the relief being requested, and an opportunity to be heard. More than sixty years ago, the United States Supreme Court made this concept clear:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case....This is defined by our holding that “The fundamental requisite of due process of law is the opportunity to be heard.” The right to be heard has little reality or worth unless one is informed that the matter is pending **and can choose for himself whether to appear or default, acquiesce or contest.** *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950)(quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)(emphasis added); see also *State v. Ralph Williams’ North West Chrysler Plymouth, Inc.*, 87 Wn.2d 327, 335, 553 P.2d 442 (1976), *appeal dismissed*, 430 U.S. 952 (1977).

CR 54(c)’s proscription against default judgments granting relief

“different in kind from or exceed[ing] in amount that prayed for in the demand for judgment” is based on the fundamental principle set forth by the *Mullane* Court.

When this Court determines whether Ms. Ferguson’s due process rights were violated it must decide if the requirement of a “fair and equitable” division has any meaning. Ms. Ferguson acknowledges that a trial court has considerable discretion in fashioning a property distribution that is equitable. The Court of Appeals held that when a trial court enters a decree and conclusions of law stating a property division was fair and equitable it is so, regardless of the substance of the division.

Ms. Ferguson respectfully disagrees and contends that a property division can be inequitable. Although “fair and equitable” is difficult to define, that does not mean that unfair and inequitable cannot exist. Perhaps the threshold test Justice Potter Stewart proposed for defining obscenity should apply: the Court “knows it when it sees it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart, J., concurring). A decree which awards the dentist husband earning \$12,785 per month the family home on the Gig Harbor waterfront, five rental properties owned free and clear, his dental practice, an Alfa Romeo sports car, a Ford pickup, all retirement accounts, and all other property in his possession (including all contents of the family home) and the wife earning \$2,619 per month a 1992 minivan, \$1,392.13 in cash, the bank accounts in her name and certain other minor assets is not fair nor equitable.

The Court should find that Ms. Ferguson’s due process rights were violated by Dr. Ferguson’s brazen attempt to claim for himself substantially all of the financial resources generated by this marriage of almost twelve years. For nearly nine years now, he has succeeded in that effort. Ms. Ferguson respectfully requests that this Court accept review, reverse the Court of Appeals and the trial court, and restore her due process rights.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING ATTORNEY FEES TO MS. FERGUSON, AND THIS COURT SHOULD AWARD ATTORNEY FEES TO MS. FERGUSON FOR THIS APPEAL.

The trial court had discretion to award attorney fees on the basis of need and ability to pay in its ruling on Ms. Ferguson's motion to vacate under CR 60(b). RCW 26.09.140; *Marriage of Moody*, 137 Wn.2d 979, 994, 976 P.2d 1240 (1999). The trial court abuses its discretion if it fails to follow statutory standards or uses criteria other than those set forth in the statute. *Custody of Halls*, 126 Wn. App. 599, 606, 109 P.3d 15 (2005). Ms. Ferguson's financial declaration and paystubs showed that her income was \$2,619 per month. CP 121, 161. Dr. Ferguson's financial declaration and 2010 tax return showed that his income was \$12,785 per month, but he did not file any information regarding his current income. CP 164, 169-79. The trial court considered none of the financial circumstances of either party and, indeed, never specifically addressed Ms. Ferguson's request for attorney fees based on the need and ability to pay criteria set forth in RCW 26.09.140. Accordingly, the trial court abused its discretion in not awarding Ms. Ferguson her attorney fees and should be reversed.

Ms. Ferguson also petitions this Court for her attorney fees and costs for bringing this petition for review pursuant to RCW 26.09.140 (on the basis of her need and Dr. Ferguson's ability to pay). This Court has

discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Marriage of Leslie*, 90 Wn. App. at 807. Ms. Ferguson will comply with RAP 18.1(c).

V. CONCLUSION

At the hearing on Ms. Ferguson's motion for revision and again at the hearing on the motion for reconsideration, the trial court made clear that it could not evaluate whether the property division was fair and equitable based on the record before it. At the critical time during which she had to decide whether to respond to the Petition, neither could Ms. Ferguson. Unlike the trial court, Ms. Ferguson did not have notice of the contents of the Decree. Consequently, the Decree granted relief different from that requested in the Petition under the test set forth in *Conner*, *Watson*, *Erney* and *Marriage of Johnson*. Therefore, the Decree is void.

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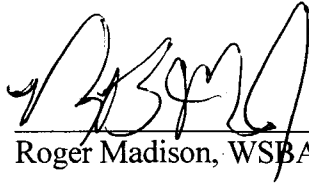
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Under *Marriage of Leslie*, this Court should grant review, reverse the lower courts and vacate the property award in the Decree.

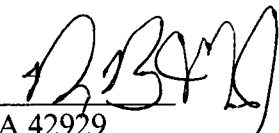
This Court should accept review pursuant to RAP 13.5(b)(1), (2), (3) and (4).

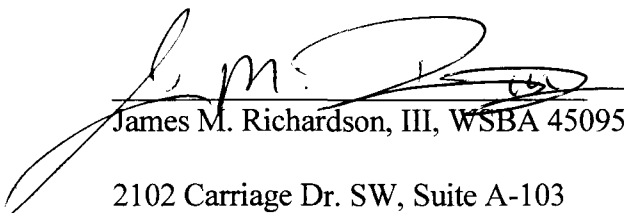
Respectfully submitted this 9th day of December, 2013.

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DECLARATION OF SERVICE

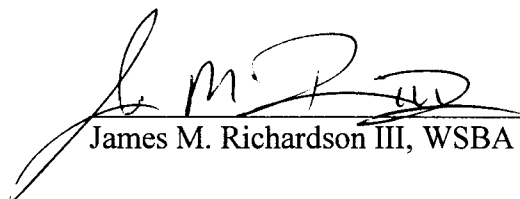
The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on December 7, 2013, I arranged for service of the foregoing Petition for Review by the Supreme Court of Washington, to the court and counsel for the parties to this action as follows:

Office of Clerk
Washington Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
Via Certified Mail, Return Receipt Requested

Mr. Roger Schweinler
McCarthy & Causseaux
902 South 10th Street
Tacoma, WA 98405
Via email and via Certified Mail, Return Receipt Requested

Dated at Olympia, Washington this 9th day of December, 2013.


James M. Richardson III, WSBA 45095

APPENDIX 1

APPENDIX 1

2013 OCT -1 AM 9:10

STATE OF WASHINGTON

BY  _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of:

RICHARD B. FERGUSON,
Respondent,

v.

PAMELA A. FERGUSON,
Appellant.

No. 43303-6-II

UNPUBLISHED OPINION

MAXA, J. — Pamela Ferguson appeals the trial court’s denial of her motion to vacate a dissolution decree entered after her default, claiming that the decree should be vacated as void under CR 60(b)(5) because the property distribution provisions exceeded the relief requested in her former husband’s petition for dissolution. Specifically, she argues that the property division was extremely one-sided and therefore exceeded the petition’s request that the trial court order a “fair and equitable” division. She also argues that the trial court abused its discretion in denying her request for attorney fees. We disagree, and affirm.

FACTS

After 11 years of marriage, Richard and Pamela Ferguson¹ separated in April 2004. Richard filed a petition for dissolution of marriage in August. The petition alleged that the parties owned community or separate property and requested that the trial court make a “fair and

¹ Because the parties have the same last name, we refer to them by their first names for clarity.

equitable" division of all community and separate property and all the debts and liabilities. Clerk's Papers (CP) at 2. The petition's "relief requested" section asked for entry of a decree of dissolution and division of the parties' property and liabilities.² CP at 4. Although Pamela was served personally with the summons and petition for dissolution, she did not appear or answer. The court entered an order of default on September 1, and a copy of the order was mailed to Pamela.

On December 14, 2004, Richard appeared before the court for a formal proof hearing. Because she was in default, Pamela did not receive notice of this hearing and did not appear. Richard presented a proposed division of property and liabilities. Richard's only testimony regarding the parties' property and debts/liabilities was that his proposed division was "fair and equitable". Report of Proceedings (RP) (Dec. 14, 2004) at 4. He presented no other substantive evidence regarding the division.

The trial court adopted Richard's proposed division of property and liabilities and incorporated the division into written findings of fact/conclusions of law and the dissolution decree. The decree awarded the family home and significant other property, as well as most of the community debts, to Richard. The decree awarded Pamela minimal property and debt. In a written conclusion of law the trial court ruled that the division was fair and equitable. Richard did not serve Pamela with a copy of this final decree.

In late December 2004 or early January 2005, Pamela moved back into the family home. The parties dispute the nature of this arrangement and whether Pamela knew the dissolution was final. The relationship eventually deteriorated, and in September 2011 Richard filed an unlawful

² Richard used the "short form" mandatory dissolution form. RCW 26.09.006.

detainer action to remove Pamela from the home. Pamela was evicted from the residence on November 17.

On December 16, 2011, Pamela moved the trial court to vacate the 2004 dissolution decree under CR 60(b) and also requested an award of attorney fees. The commissioner denied the motion to vacate, and the trial court denied Pamela's motion for revision and request for attorney fees. Pamela moved for reconsideration, arguing that the trial court had erred in ruling that vacating a void judgment was within the court's discretion. The trial court denied reconsideration and clarified that its previous ruling did not rely on whether the decision to vacate a void judgment was discretionary.

Pamela appeals, arguing that the dissolution decree is void and should be vacated under CR 60(b)(5).³

ANALYSIS

A. MOTION TO VACATE – CR 60(b)(5)

CR 60(b)(5) provides that a court may relieve a party from a final judgment if the judgment is void. Pamela argues that the dissolution decree is void because the decree's property division was "extremely one-sided", and therefore exceeded the petition's request that the trial court order a fair and equitable property division. Br. of Appellant at 15. We disagree.

1. Standard of Review

Generally, a decision to grant or deny a motion to vacate a judgment under CR 60(b) is within the trial court's sound discretion and will not be disturbed absent an abuse of discretion.

³ Pamela also sought to vacate the decree under CR 60(b)(4) (fraud) and (11) (other). The commissioner denied relief on those grounds, and Pamela does not seek review of those portions of the order.

In re Marriage of Hughes, 128 Wn. App. 650, 657, 116 P.3d 1042 (2005). However, courts have a mandatory, nondiscretionary duty to grant relief from void judgments. *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010). Therefore, we review de novo a trial court's decision to grant or deny a CR 60(b)(5) motion to vacate a void judgment. *Ahten*, 158 Wn. App. at 350.

2. Timeliness of Motion

Pamela filed her motion to vacate under CR 60(b)(5) seven years after the trial court entered the dissolution decree. Notwithstanding the "reasonable time" requirement of CR 60(b), motions to vacate void judgments under CR 60(b)(5) may be brought at any time. *Ahten*, 158 Wn. App. at 350. Accordingly, Pamela's CR 60(b)(5) motion to vacate was timely.⁴

3. Mandatory Duty To Vacate Void Judgments

Pamela argues that we must reverse because the trial court stated that its decision to vacate a void judgment was discretionary. As we noted above, this statement was incorrect. *See Ahten*, 158 Wn. App. at 350 (stating that courts must vacate void judgments). However, on reconsideration the trial court clarified that because it did not declare the judgment void, its denial of Pamela's motion did not depend on whether vacating a void judgment was discretionary or mandatory. In any event, because our review is de novo the trial court's erroneous statement is immaterial.

4. Validity of Decree

The primary issue in this case is whether the trial court erred in not finding the dissolution decree void. CR 54(c) provides that a "judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." In other words, a

⁴ Pamela alleges that the trial court denied her motion to vacate on the basis that it was untimely, but we disagree. In its oral ruling the court discussed timeliness, but ultimately considered the motion on its merits.

court may not enter a default judgment or decree that grants relief in excess of or substantially different from that described in the complaint. *Hughes*, 128 Wn. App. at 658. A default judgment or decree that grants such relief without notice and opportunity to be heard denies the defaulting party procedural due process and is void. *In re Marriage of Johnson*, 107 Wn. App. 500, 503-04, 27 P.3d 654 (2001). The key is that the complaint or petition must provide the defendant “ ‘sufficient notice to make an intelligent decision to appear or default.’ ” *Johnson*, 107 Wn. App. at 504 (quoting *Conner v. Universal Utils.*, 105 Wn.2d 168, 172, 712 P.2d 849 (1986)).

In this case, the dissolution petition gave Pamela notice that Richard was requesting a division of all property and liabilities. The “relief requested” portion of the petition expressly asked for that division. This notice was sufficient to inform Pamela that she needed to appear in order to have any input in that division. Pamela complains that the petition did not specify the property being divided, but the broad petition language – calling for a division of *all* property – should have provided an even greater incentive to appear and defend. Further, the decree of dissolution in fact provided the exact relief requested – a division of all property and debts/liabilities.

Pamela relies on *Johnson*, where the wife filed a dissolution petition alleging that the family home was worth \$280,000 and that each party should receive one-half its value. 107 Wn. App. at 502. She subsequently obtained an order of default and a final decree that awarded the family home to the husband, made the wife a “ ‘judgment creditor’ ” and the husband a “ ‘judgment debtor’ ” in the amount of \$140,000, and provided for interest to accrue on the “judgment” amount. *Johnson*, 107 Wn. App. at 502-03. The decree also ordered the husband to execute a deed of trust securing the wife’s \$140,000 interest in the home. *Johnson*, 107 Wn.

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App. at 503. We held that the decree was void because its terms varied substantially from the relief requested in the petition. *Johnson*, 107 Wn. App. at 504-05.

Johnson is distinguishable. The petition in *Johnson* put the husband on notice that only the specified value of the family home would be divided equally between husband and wife. 107 Wn. App. at 502, 504. The additional provisions that the husband would owe the wife a \$140,000 debt, pay interest on that debt, secure the debt by executing a deed of trust on the home, and bear the entire risk of overvaluation of the home were substantially different than the relief requested. *Johnson*, 107 Wn. App. at 504. In contrast, here the petition generally requested a division of all property and debts/liabilities. The decree provided that division and nothing more.

The fact that Pamela now contends that the division was unfair does not mean that the decree terms were substantially different than the notice she received of Richard's request for a "fair and equitable" division of property. The trial court has considerable discretion in fashioning a property distribution that is equitable. *In re Marriage of Farmer*, 172 Wn.2d 616, 624, 259 P.3d 256 (2011) (citing RCW 26.09.080). The entry of a decree and a conclusion of law stating that the property division was fair and equitable – regardless of Pamela's opinion – are sufficient to satisfy any due process concerns because Pamela was put on notice that the trial court would be dividing the parties' property.

A contrary rule would give the defaulting party greater rights to challenge a trial court's judgment than a party who appeared and answered. A party cannot move to vacate a judgment under CR 60(b)(5) merely because it belatedly seems unfair. However, under the rule Pamela advocates, a defaulting party would be able to challenge a judgment's fairness under CR 60(b)(5)

whenever a plaintiff requested fair relief in a petition or complaint. And there would be no time limit on such a challenge. The law does not require such a result.

5. Trial Court Evidence

Pamela also argues that the trial court should have required more evidence at the formal proof hearing besides Richard's testimony that the property division was fair and equitable. She points out that RCW 26.09.080 requires the trial court to consider "all relevant factors" when making a property disposition, and argues that the trial court did not consider such factors. Br. of Appellant at 16 (emphasis omitted).

However, Pamela is seeking relief from a final judgment, not appealing as a matter of right the trial court's original property division. Insufficiency of the evidence is not grounds for vacating a judgment under CR 60(b). *Burlingame v. Consol. Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986). The proper means for challenging sufficiency of evidence or other alleged errors of law is an immediate appeal of the judgment. *Burlingame*, 106 Wn.2d at 336; *In re Marriage of Tang*, 57 Wn. App. 648, 654-56, 789 P.2d 118 (1990) (applying rule to characterization and valuation of property in dissolution action). We reject this collateral attack on the trial court's conclusion that the property division was fair and equitable.

We hold that the trial court's property division did not substantially deviate from the petition's request for a "fair and equitable" division, and therefore that the default decree is not void under CR 60(b)(5). Accordingly, we affirm the trial court's denial of Pamela's motion to vacate.

B. ATTORNEY FEES

Pamela alleges that the trial court abused its discretion by not awarding her attorney fees under RCW 26.09.140. And both parties request attorney fees and costs on appeal. We hold that

the trial court did not abuse its discretion in denying Pamela's fee request. In addition, we deny the parties' requests for fees and costs on appeal.

1. Trial Court Fees

Under RCW 26.09.140, the trial court may award attorney fees "after considering the financial resources of both parties." The trial court must balance the needs of the requesting party against the other party's ability to pay. *In re Custody of Brown*, 153 Wn.2d 646, 656, 105 P.3d 991 (2005). A challenge to a decree entered under the dissolution statute is a continuation of the original action, and therefore fees may be awarded under RCW 26.09.140 on a motion to vacate. *In re Marriage of Moody*, 137 Wn.2d 979, 993-94, 976 P.2d 1240 (1999).

We review a trial court's decision to grant or deny a statutory attorney fee award for abuse of discretion. *In re Marriage of Coy*, 160 Wn. App. 797, 807, 248 P.3d 1101 (2011). A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. *Farmer*, 172 Wn.2d at 625.

In its oral ruling denying Pamela's motion to revise, the trial court stated that "[e]ach party can pay their own" and declined to order fees. RP (Feb. 24, 2012) at 20. The parties' financial information submitted for the trial court's consideration demonstrated that both parties' monthly expenses exceeded their respective monthly incomes by approximately double. Both parties had regular income and neither appeared well-situated to pay the opposing party's costs and fees. Accordingly, we hold that the trial court did not abuse its discretion in denying Pamela's request for attorney fees.

2. Fees on Appeal

Pamela now requests attorney fees and costs on appeal under RAP 18.1 and RCW 26.09.140. We have discretion to order a party to pay for the cost of maintaining the appeal and

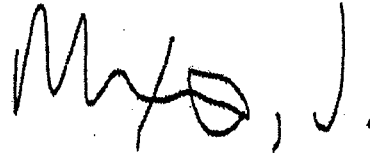
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attorney fees in addition to statutory costs. RCW 26.09.140. When awarding attorney fees, we examine the arguable merit of the issues and the parties' financial resources. *Johnson*, 107 Wn. App. at 505. In order to receive attorney fees on appeal, a party must file a financial affidavit with the court no later than 10 days before oral argument. RAP 18.1(c). Because Pamela failed to file an affidavit of need, she is not entitled to fees under RCW 26.09.140.

Richard also requests fees and costs on appeal based on his allegation that the appeal is meritless and pursued in bad faith. However, Richard has not provided any citation to authority to support his position, and therefore we deny his request for fees on appeal. RAP 18.1(b); *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9, *review denied*, 175 Wn.2d 1016 (2012).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

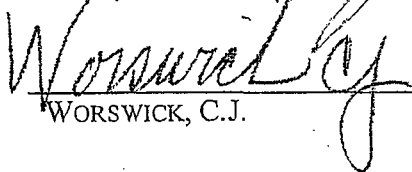


MAXA, J.

We concur:



HUNT, J.



WORSWICK, C.J.

APPENDIX 2

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the matter of the Marriage of:

RICHARD B. FERGUSON,

Respondent,

PAMELA A. FERGUSON,

Appellant.

No. 43303-6-II

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

APPELLANT moves for reconsideration and publication of the Court's October 1, 2013 opinion. Upon consideration, the Court denies the motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Hunt, Maxa

DATED this 7th day of November, 2013.

FOR THE COURT:

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY
[Signature]
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APPENDIX 3

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IN RE THE MARRIAGE OF:
RICHARD B. FERGUSON AND PAMELA M. FERGUSON

PIERCE COUNTY CAUSE NO. 04-3-02649-0

EXHIBIT "A"

I.

The parties have real or personal community property as set forth below:

- 1. Real Property located at 1304 – 19th Street Ct. NW, Gig Harbor, Washington 98335 valued at approximately \$500,000.00. Parcel No. 4000380070
- 2. 2002 Ford Pickup
- 3. 1991 Alpha Romeo
- 4. 1992 Dodge Caravan

II.

Separate property of the Parties

- 1. Husband's Dental Practice "Wright Park Dental Clinic" and all assets and debts incident thereto
- 2. Husband's separate real property:
 - a) 820 6th Ave, parcel number 2006170020
 - b) 1035 South Ferry Street, parcel number 9405000270
 - c) 807 South State Street, parcel number 3075000210
 - d) 2108 South 8th Street, parcel number 3075000200
 - e) 2208 South 8th Street, parcel numbers 5390100020 - 5390100040
- 3. Husband's Key Bank Accounts
- 4. Husband's Wells Fargo Bank Accounts
- 5. Property Husband acquired after date of separation

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- 1 6. Wife's Columbia Bank Accounts
- 2 7. Wife's lease purchase agreement acquired after date of separation

3 III.

4 The following separate community, real and personal property should be
5 awarded to the Petitioner/Husband, RICHARD B. FERGUSON:

- 6 1. Real property as follows:
 - 7 a) 820 6th Ave, parcel number 2006170020
 - 8 b) 1035 South Ferry Street, parcel number 9405000270
 - 9 c) 807 South State Street, parcel number 3075000210
 - 10 d) 2108 South 8th Street, parcel number 3075000200
 - 11 e) 2208 South 8th Street, parcel numbers 5390100020 – 5390100040
 - 12 f) 1304 19th Street, parcel number 4000380070
- 13 2. Husband's Dental Practice, "Wright Park Dental Clinic" and all debt and
14 assets incident thereto
- 15 3. 2002 Ford Pickup
- 16 4. 1991 Alpha Romeo
- 17 5. Bank accounts in his name:
 - 18 a. All Key Bank Accounts
 - 19 b. All Wells Fargo Accounts
- 20 6. Clothing, jewelry and other personal effects in his possession.
- 21 7. Home furnishings in his possession.
- 22 8. Any and all pension and retirement benefits in his name.
- 23 9. Any and all property acquired by him after date of separation.

24
25 **McCarthy Causseaux &**
26 **Rourke, P.S., Inc.**
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IV.

The following separate, community, real and personal property is awarded to the

Respondent/Wife, PAMELA M. FERGUSON:

1. Bank and retirement pension accounts solely in her name:
2. 1992 Dodge Caravan (which husband paid \$1,000.00 to release from storage) *He gave this to someone signed lease.*
3. Home furnishings in her possession.
4. Clothing, jewelry and other personal effects in her possession.
5. Wife's lease purchase agreement acquired *after* date of separation and any interest therein
6. Any and all property acquired by her after the date of separation
7. \$1,392.13 cash taken from children's Key DinoSaver's Accounts

V.

The following debt is awarded to the Petitioner/Husband, RICHARD B. FERGUSON:

1. Husband's attorney's fees;
2. Mortgages
 - a) Wells Fargo \$400,00.00
 - b) Wells Fargo \$185,000.00
3. Debt to husband's mother of approximately \$37,000.00
4. 2002 IRS Taxes of \$4,490.57
5. MBNA Credit Card (Account ending 10971)
6. 2003 IRS Taxes of \$11,000.00
7. Key Bank Credit Card

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IV.

The following separate, community, real and personal property is awarded to the Respondent/Wife, PAMELA M. FERGUSON:

- 1. Bank and retirement pension accounts solely in her name:
- 2. 1992 Dodge Caravan (which husband paid \$1,000.00 to release from storage) *He gave this to someone signed lease.*
- 3. Home furnishings in her possession.
- 4. Clothing, jewelry and other personal effects in her possession.
- 5. Wife's lease purchase agreement acquired after date of separation and any interest therein
- 6. Any and all property acquired by her after the date of separation
- 7. \$1,392.13 cash taken from children's Key DinoSaver's Accounts

V.

The following debt is awarded to the Petitioner/Husband, RICHARD B. FERGUSON:

- 1. Husband's attorney's fees;
- 2. Mortgages *?*
 - a) Wells Fargo \$400,00.00
 - b) Wells Fargo \$185,000.00
- 3. Debt to husband's mother of approximately \$37,000.00
- 4. 2002 IRS Taxes of \$4,490.57
- 5. MBNA Credit Card (Account ending 1091)
- 6. 2003 IRS Taxes of \$11,000.00
- 7. Key Bank Credit Card of approximately \$2,000.00

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8. Any and all liabilities incurred by him after the date of the parties' separation.

VI.

The following debt is awarded to the Respondent/Wife, PAMELA M.

FERGUSON:

1. Citibank Credit Card (Acct. Ending 1558)

2. Any and all liabilities incurred by her after the date of the parties' separation.

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