

No. 45657-5-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

LUCINDA B. CARPENTER,
Respondent,

v.

BRADLEY A. CARPENTER,
Appellant.

REPLY BRIEF OF APPELLANT

Barbara McInville
Attorney for Appellants

Helland Law Group PLLC
960 Market St.
Tacoma, WA 98402
(253) 572-2684

TABLE OF CONTENTS

I.	ARGUMENT	1
	A. THIS COURT CAN AND SHOULD CONSIDER EACH OF THE ISSUES RAISED BY BRADLEY	1
	B. BRADLEY'S ACCEPTANCE OF SERVICE ENTITLED HIM TO NOTICE.....	2
	C. NOTHING IN THE RECORD SUPPORTS THE VALUES ASSIGNED TO THE MARITAL ASSETS IN THE FINDINGS OF FACT AND DECREE	4
	1. Lucinda's self-serving affidavit does not constitute substantial evidence	4
	2. This Court can consider the issue of the trial court's improper valuation of some of the marital assets based on insufficient evidence.....	6
	D. THE RELIEF GRANTED BY THE TRIAL COURT FAR EXCEEDED THE RELIEF REQUESTED IN THE PETITION	8
	1. The Findings of Fact and Decree do not value all of the marital property.....	8
	E. LUCINDA DID NOT ADDRESS BRADLEY'S ARGUMENT THAT THE ATTORNEY'S FEES AWARD TO LUCINDA ON THE MOTION TO VACATE SHOULD BE VACATED	9
	F. LUCINDA'S REQUEST FOR ATTORNEY'S FEES SHOULD BE DENIED.....	9
	1. This appeal is not frivolous	9
II.	CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<i>Baldwin v. Silver</i> , 165 Wn. App. 463, 269 P.3d 284 (2011)	5
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 917-918, 784 P.2d 1258 (1990).....	1, 2
<i>Dlouhy v. Dlouhy</i> , 55 Wn.2d 718, 721, 349 P.2d 1073 (1960).....	10
<i>Draper Machine Works, Inc. v. The Dep't of Nat. Resources</i> , 117 Wn.2d 306, 815 P.2d 770 (1991)	5
<i>East Gig Harbor Imp. Ass'n v. Pierce Cy.</i> , 106 Wn.2d 707, 709 n.1, 724 P.2d 1009 (1986).....	2
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)	10
<i>Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.</i> , 151 Wn. App. 195, 211 P.3d 430 (2009).....	6
<i>Mahoney v. Shinpoch</i> , 107 Wn.2d 679, 691, 732 P.2d 510 (1987).....	10
<i>Marriage of Rideout</i> , 150 Wn.2d 337, 351, 77 P.3d 1174 (2003)	7
<i>Maynard Inv. Co. v. McCann</i> , 77 Wn.2d 616, 621, 465 P.2d 657 (1970)	2
<i>New Meadows Holding Co. v. Washington Water Power Co.</i> , 102 Wn.2d 495, 498, 687 P.2d 212 (1984).....	2
<i>Obert v. Environmental Research & Dev. Corp.</i> , 112 Wn.2d 323, 333, 771 P.2d 340 (1989).....	1
<i>Osborn v. Public Hosp. Dist. 1</i> , 80 Wn.2d 201, 492 P.2d 1025 (1972)	2
<i>Shaffer v. Shaffer</i> , 43 Wn.2d 629, 631, 262 P.2d 763 (1953)	8
<i>State v. Fagalde</i> , 85 Wn.2d 730, 732, 539 P.2d 86 (1975).....	2
<i>State v. Ward</i> , 125 Wn. App. 138, 104 P.3d 61 (2005)	9
<i>Thun v. City of Bonney Lake</i> , 164 Wn. App. 755, 265 P.3d 207 (2011).....	5
<i>Wold v. Wold</i> , 7 Wn. App. 872, 878, 503 P.2d 118 (1972).....	8

STATUTES

RCW 26.09.080	8
---------------------	---

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 1222 (6 th ed. 1999)	5
--	---

RULES

RAP 2.5(a)	1
------------------	---

I. ARGUMENT

A. THIS COURT CAN AND SHOULD CONSIDER EACH OF THE ISSUES RAISED BY BRADLEY.

Application of RAP 2.5(a) is within the discretion of the reviewing Court. *Obert v. Environmental Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989). The general rule that a reviewing court will not consider any issue not raised below is not without exception. RAP 2.5(a). There are several.

The first exceptions are contained within the language of the rule itself. A party to an appeal may raise the following claimed errors for the first time in the appellate court, among others:

- (1) lack of trial court jurisdiction,
- (2) failure to establish facts upon which relief can be granted, and
- (3) manifest error affecting a constitutional right.

RAP 2.5(a).

Washington courts have applied other exceptions to RAP 2.5(a). If an issue is perhaps “framed more clearly” on appeal than it was below, as long as the trial court had an opportunity to consider the issue and rule on the relevant authority, the issue is deemed to be properly before a reviewing court. *Bennett v. Hardy*, 113 Wn.2d 912, 917-918, 784 P.2d 1258 (1990) (citing *East Gig Harbor Imp. Ass'n v.*

Pierce Cy., 106 Wn.2d 707, 709 n.1, 724 P.2d 1009 (1986); *Osborn v. Public Hosp. Dist. 1*, 80 Wn.2d 201, 492 P.2d 1025 (1972)).

A statute not addressed below but pertinent to the substantive issues that were raised below may be considered for the first time on appeal. *Id.* at 918 (citing *State v. Fagalde*, 85 Wn.2d 730, 732, 539 P.2d 86 (1975)).

Important here, when an issue not raised below affects a party's right to maintain an action, a reviewing court will consider that issue on appeal. *Id.* (citing *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970); *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). As in *Bennett*, the central issue on appeal is Bradley's right to maintain this action for legal separation, and ultimately for an equitable division of the marital estate. This Court should consider all issues raised by Bradley in this appeal.

B. BRADLEY'S ACCEPTANCE OF SERVICE ENTITLED HIM TO NOTICE.

Even though she now claims this was a mere scrivener's error, the Motion for Default, signed by Lucinda under penalty of perjury states: "The other party [Bradley] **has appeared by signing the Acceptance of Service**, but has failed to respond."

CP 27, at para. 2.5; CP 28.

Lucinda argues that she told Bradley exactly what signing an Acceptance of Service meant when he signed it. Br. of Respondent at 13; CP 72. But this statement (that she so advised Bradley) appears in a declaration prepared by Lucinda with nothing else in the record to substantiate this claim. CP 72.

Lucinda also argues that because Bradley has been involved in prior litigations he should have known how this process works. Br. of Resp. at 13; CP 72. It is improper to assume that Bradley understood any distinction between an Acceptance of Service and a Notice of Appearance. In the prior litigations referred to by Lucinda (CP 72-73), attorneys were involved in every instance, and Bradley no doubt relied on those attorneys to handle matters such as service and appearances, as virtually all clients do.

We do not know for a fact that Bradley was “expressly told [by Lucinda] that signing an acceptance of service had the same effect as would have occurred had he been served by a process server.” Br. of Respondent at 13; CP 72; RP (Nov. 15, 2013) at 10. Nothing in the record supports this assertion. This argument is only “supported” by Lucinda’s declaration, filed in opposition to Bradley’s motion to

vacate. CP 72. This is also completely contradicted by Lucinda's sworn statement that Bradley had, in fact, appeared in the action but not responded to the Petition. CP 27. Lucinda changed her position after Bradley sought to vacate the default orders.

Lucinda argues that Bradley did not evidence any intent to defend, and he did not acknowledge the jurisdiction of the court in the Acceptance of Service. However, the Acceptance of Service was prepared by Lucinda's attorney. CP 25. On that form, Bradley was not even given the option of consenting to jurisdiction. CP 25.

Had Bradley not signed the Acceptance of Service *and* not entered an appearance in the case, he would not have been entitled to notice of Lucinda's motion for default. However, because Bradley did sign an Acceptance of Service, he was entitled to notice of the ex parte presentation of Lucinda's motion for default. CR 55(a)(3). It was error for the trial court to deny his motion to vacate the default orders.

C. NOTHING IN THE RECORD SUPPORTS THE VALUES ASSIGNED TO THE MARITAL ASSETS IN THE FINDINGS OF FACT AND DECREE.

1. Lucinda's self-serving affidavit does not constitute substantial evidence.

Lucinda argues that her own "testimony" provided the trial court with a sufficient basis to value some of the properties that were

awarded in the Decree. Br. of Respondent at 14. Specifically, she argues in her brief

The findings of fact and conclusions of law listed the community assets. Every one of those assets except the time share was valued by the declaration of Lucinda Carpenter supporting the decree of legal separation.

Br. of Respondent at 15 (referring to CP 34-35). None of the values shown on the Findings of Fact appeared anywhere in the record prior to the default entry of the Findings of Fact. Lucinda's declaration was filed contemporaneously with the Findings of Fact. CP 34, 37. There is nothing in the record to support the values as set forth in Lucinda's declaration.

Summary judgment and default are both summary proceedings. BLACK'S LAW DICTIONARY 1222 (6th ed. 1999) ("a nonjury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner").

In summary judgment proceedings, sworn affidavits containing unsupported conclusory statements are not deemed sufficient to raise genuine issues of material fact. *See, e.g., Draper Machine Works, Inc. v. The Dep't of Nat. Resources*, 117 Wn.2d 306, 815 P.2d 770 (1991); *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 265 P.3d 207 (2011); *Baldwin v. Silver*, 165 Wn. App. 463, 269 P.3d 284 (2011); *Loc Thien*

Truong v. Allstate Prop. & Cas. Ins. Co., 151 Wn. App. 195, 211 P.3d 430 (2009).

This Court should similarly deem Lucinda's unsupported affidavit in this case insufficient to conclusively establish the values of the assets as shown in the findings of fact. This Court should find that it was error to accept the findings of fact as presented and deny Bradley's motion to vacate.

2. This Court can consider the issue of the trial court's improper valuation of some of the marital assets based on insufficient evidence.

Lucinda argues that Bradley "admits in his brief at page 17 that there is evidence from Ms. Carpenter as to the value of the assets and the amount of the debts." Br. of Resp. at 18. That is simply not true. In his opening brief, Bradley argued, "there is nothing in the record that substantiates those values other than the parties' declarations. CP 38 - 39 (Finding of Fact 2.10), CP 34 - 35, CP 53 - 66. This is an insufficient quantum of evidence." Br. of Appellant at 17.

Lucinda also argues that Bradley's argument that those of the Court's findings of fact that do assign values to some of the marital assets are not supported by substantial evidence was impermissibly

raised for the first time on appeal. Br. of Resp. at 14. Our Supreme Court has held:

The application of the substantial evidence standard in cases such as this is a narrow exception to the general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases de novo because that court is in the same position as trial courts to review written submissions.

In re Marriage of Rideout, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003) (citation omitted).

Lucinda's declaration (attributing values to the properties as shown in the findings of fact) was submitted to the Court *with* the findings of fact . CP 37 (Findings of Fact – filed Sept. 30, 2013); CP 34-35 (Declaration of Lucinda Carpenter – filed Sept. 30, 2013). Lucinda's self-serving declaration was the sole basis for the values of the properties as shown in the Findings of Fact. As stated above, those assertions were not supported by any evidence. This Court should consider this issue and find that the findings of fact were not supported by substantial evidence.

D. THE RELIEF GRANTED BY THE TRIAL COURT FAR EXCEEDED THE RELIEF REQUESTED IN THE PETITION.

There were no specific items of property, debts or liabilities enumerated in the Petition for Legal Separation. CP 21. No specific values whatsoever were pleaded. CP 21. The Findings of Fact and Decree list specific assets, debts and liabilities, and attributed specific values to most, but not all, of them. CP 37-41. Therefore, the relief granted by the trial court far exceeded the relief sought in Lucinda's petition. The trial court erred by denying Bradley's motion to vacate the Findings of Fact and Decree.

1. The Findings of Fact and Decree do not value all of the marital property.

In the Findings of Fact and Decree, there are properties that have no value attributed thereto. CP 37-41, 42-45. It is impossible for a reviewing Court to determine the propriety of a trial court's property division absent values for all of the property it is distributing between the parties. *Shaffer v. Shaffer*, 43 Wn.2d 629, 631, 262 P.2d 763 (1953); *Wold v. Wold*, 7 Wn. App. 872, 878, 503 P.2d 118 (1972). As such, the division of property in this case included items of property that were not valued as required by RCW 26.09.080. CP 38 (Finding of Fact 2.8); CP 43.

E. LUCINDA DID NOT ADDRESS BRADLEY'S ARGUMENT THAT THE ATTORNEY'S FEES AWARD TO LUCINDA ON THE MOTION TO VACATE SHOULD BE VACATED.

In her responsive brief, Lucinda failed to respond to Bradley's claim that the trial court erred by awarding Lucinda attorney's fees at the motion to vacate the default orders. Br. of Respondent. Therefore, this Court should find that Lucinda concedes this argument. *See, e.g., State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005) (State's failure to respond to appellant's argument deemed by Court as concession of that point). This award should be vacated.

F. LUCINDA'S REQUEST FOR ATTORNEY'S FEES SHOULD BE DENIED.

Lucinda first argues that she "should be awarded all of her fees for processing this appeal," apparently based on a theory of intransigence. Lucinda has not demonstrated intransigence, and her request should be denied.

1. THIS APPEAL IS NOT FRIVOLOUS.

In the alternative, Lucinda requests an award of attorney's fees arguing that this appeal is frivolous. This is not a frivolous appeal. When there are no "debatable issues upon which reasonable minds could differ" and if an appeal is so "devoid of merit" that there is "no

possibility of reversal,” an appeal may be deemed frivolous. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). That is absolutely not the case here. There are highly debatable issues about the valuation of the marital estate, and about the propriety of the division of the marital estate. “Any doubts should be resolved in favor of the appellant.” *Id.* at 692.

Applicable case law strongly supports reversal of the trial court in this case. Equity strongly supports reversal of the trial court in this case. Therefore, there should be no award of attorney fees to the Lucinda on either basis she claims.


II. CONCLUSION

It is well settled that our courts have long maintained the policy that controversies, especially such as this, be determined on their merits, rather than by default. *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960). Proceedings to vacate default judgments are regarded as equitable; therefore, relief is to be granted according to equitable principles. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). The default orders entered in this case are not remotely equitable.

Bradley was entitled to notice of Lucinda's motion for default. The property valuations as reflected in the Findings of Fact and Decree are not supported by substantial evidence, nor was all of the marital estate valued. The trial court erred by denying Bradley's motion to vacate the default orders. This matter should be remanded to the trial court for proceeding necessary to effect an equitable result. Both parties are entitled to equity.

DATED this 17th day of July, 2014.

RESPECTFULLY SUBMITTED,


Barbara McInville, WSBA #32386
Attorney for Appellant

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by personal service, and delivered a copy of this document via ABC Legal Messengers and e-mail to:

Barton Adams
Adams & Adams Law PS
2626 N. Pearl St.
Tacoma, WA 98407-2499
bartonladams1@msn.com

Signed at Tacoma, Washington on this 17th day of July, 2014.


Barbara McInville

HELLAND LAW OFFICE

July 17, 2014 - 2:04 PM

Transmittal Letter

Document Uploaded: 456575-Reply Brief.pdf

Case Name: Marriage of Carpenter

Court of Appeals Case Number: 45657-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Barbara Mcinville - Email: barb@hellandlawgroup.com

A copy of this document has been emailed to the following addresses:

bartonladams@msn.com