73651-5

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No. 73651-5-I

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**COURT OF APPEALS**
**OF THE STATE OF WASHINGTON, DIVISION ONE**

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**DAVID PATTEN**, *Appellant*

v.

**LESLIE PATTE** , *Respondent,*

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**OPENING BRIEF**

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David Patten
700 NW Gilman Blvd, #235
Issaquah, Wa., 98027

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## I. ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW

### A. Assignments of error

1. The trial court erred in granting a default dissolution on February 18, 2014. 2. The Trial court erred in refusing to set aside the dissolution on 4-30-2015

3. The trial court erred in denying the Motion for Reconsideration on 5-28-2015

### B. Issues relating to the Assignment of error

1. Is a default court order on dissolution void for lack of jurisdiction when it was improperly noted and scheduled in violation of the court rules?

2. Was the Motion to set aside under CR 60 timely filed and served?

3. Should this order be set aside under CR 60?

## II. STATEMENT OF THE CASE

### A. Procedural Facts

1.On June 18, 2013, the petitioner-wife, Leslie Patten filed for dissolution..(CP 1-5)

2.On August 8, 2013, the court set a case schedule with a trial date of 7-7-2014. (CP 6) . Judge Robinson Palmer was assigned as judge. (CP 6)

3. On August 8, 2013, the wife filed for a temporary order requesting temporary custody, child support, restraining respondent from moving children, making each party responsible for future debts, orders respondent to immediately sign authorization form to change the mailing address of the royalty checks are mailed to the family home and dividing responsibility for the debts of parties. (CP 20-80) She also filed a financial declaration on that date. (CP 81-85).

4. On August 23, 2013, the wife obtained a temporary restraining order (CP 88-90) .

5. On October 17, 2013, the wife obtained a temporary child support order. (CP 101-102). On that date she filed a proposed parenting plan. (CP 95-100)

6. On January 21, 2013, wife filed an amended petition along with a declaration indicating that the respondent-husband had been served in jail with the amended petition on January 17, 2013. (CP 110-115)

7. On January 23, the wife filed a certification stating that the husband had been served with a motion for default and a note for motion for defaulted on January 18, 2013).(CP 116)

8. On February 8, 2013, the wife filed a motion for default, and a note for motion for default, noting it for February 18, 2013 (CP 117-120)

9. On February 18, 2013, the court entered a Order on Motion for Default, Findings of Facts and Conclusions of Law, Parenting Plan Final Order, Decree of Dissolution, Certificate of Compliance, and Restraining Order. (CP 121-145))

10. On February 18, 2014, the husband filed a notice of appearance, a motion to set aside the decree and the order of default. (CP148-152 )

11. On March 4, 2014, an order to show cause was signed as to whether the order of default and the accompanying orders should be set aside. A hearing was scheduled for April 10, 2014. (CP 153)

12. On March 23, 2015, an affidavit of service was filed showing wife was served with motion to vacate. (CP 154-155)

13. On March 26, 2015, wife appeared through counsel. (CP 156).

14. On April 6, 2015, the hearing was re-noted for April 30, 2014.(CP 157-158)

15. On April 7, 2015, a show cause order was signed, calling on the wife to respond to the order at a hearing on April 30. (CP 159-160).

16. Wife responded to the show cause order on April 24, 2015 and April 28, 2015. (CP 161-169)

17. Husband replied on April 29, 2015 (CP 170-173).

18. Court denied Motion to set aside on April 30th, 2015. (CP 174-176)

19. On May 7, husband filed a Motion for Reconsideration noting it for May 18, 2014. (CP 177-186)

20. On May 13, Court Orders Response. Within 10 days with response due two days after service of Resonse. (CP 187).

21. On May 22, 2015, wife files a Response. (CP 190-198)

22. On May 27, 2015, husband filed a Reply to the Response (CP 199-233)

23. On May 28, 2015, Court issues order on Reconsideration. (CP 240)

24. On June 25, 2015, Patten files a notice of appeal. (CP 243-44)

**B. Substantive Facts.**

1. This is a long term marriage, with the parties having been married 17 years at the time the dissolution was filed. (CP 22).

2. Just before the bottom fell out of the housing market in 2008, DHL, a corporation run by the husband, basically lost its business because its shipping carrier picked up and left the country. (CP (24).

3. Even though he was suffering from alcoholism, as evidenced by a DUI he received in October 2008, in the summer of 2010, he was able to negotiate a sale of the business for $800,000 and royalties of 8% of

monthly profits. (CP 24). The wife admits that the payments went from $2000 to $8000 per month averaging $4000 per month. She does not deny the husbands allegation that the royalties were at $8000 per month at the time of the default. (CP 150). This was an extraordinary good deal that no other franchise during that period of time had been able to negotiate. (CP 201) This royalty payment is expected to grow to at least $16,000 per month and possible as much as $20,000 to $30,000 month (CP 201). According to calculations done by the husband, at the time of the motion for reconsideration, payments had grown to almost $3000 per week. (CP 202)

4. The husband was primarily responsible for the business during the marriage, putting in 12-13 hour days. He oversaw the business which started a profits of $1000 per week, which eventually grew to over $40,000 per week. During this time, the couple was able to have the mother stay at home and take care of the children instead of sending them to a day care center. (CP 203). The husband does not deny that the wife was an excellent mother but does say she was unwilling to help out by getting a job when the business failed. (CP 152).

5. In her motion for temporary orders, the petitioner never requested the right to sign for company checks, only that they be delivered to her. (CP 21). She does not allege that she was an officer of the

company or in any other way have a right to sign for checks nor have exclusive right to the money. (CP 22-80)

6. After the petitioner appeared at a preliminary hearing concerning temporary custody (See Tr. February 18, 2004, p. 5, l. 20 to p. 6 l. 3), he later was charged on an unrelated matter. He was served with an amended petition that drastically changed the petition on January 17th, 2014. (CP 1-5, 110-115). Although he was served with the motion for default the next day along with a noting date, at the time he was served, he was not in default because the 10 days for responding to an amended summons had not elapsed. There was no allegation in the motion for default that the petitioner was in default at the time it was drafted. (CP 117-120). The motion and default were not filed until February 6, 2014, which was a mere twelve days before the noting date. King County local rules require that the motion be filed 14 days before the noting date. King County LFLR 6. It is not known how the petitioner was able to get her motion heard, but it is highly unlikely it was done through legal means. According to page 5 of the transcript of February 18, 2014, counsel for the petitioner admitted she participated in some kind of illegal ex parte contact when she stated, "We've scheduled a motion this morning." (Tr. 2-18-2014, p.. 5, l. 12-13.). King County rules do not allow for scheduling a motion on just 12 days notice, let alone less than one day.

7. The husband was in jail at the time he was served with the amended petition of January 17. (CP 110-115). According to his declaration, he could not make outgoing calls without calling collect and therefore could not communicate with any attorneys. (CP 185). The jailers would not give him transport so there was no way for him to get to the hearing. (CP 185). The only way he could think of to communicate with the court was to send his nephew, who the court did not recognize (CP 185).

8. Following his release, the petitioner declared under oath that he could not afford to put up a retainer for an attorney (CP 151) which typically required a $5000 (CP 217)

9. The petitioner filed his motion within one year of the Dissolution order on February 18, 2014. (CP 148-152). It was served approximately a month later. (CP 154-155).

## III. ARGUMENT

### A. THE COURT LACKED PERSONAL AND SUBJECT MATTER JURISDICTION OVER THE HUSBAND IN THE ORIGINAL DECREE SO THE ORDER OF DISSOLUTION BASED UPON DEFAULT IS VOID.

Under RAP 2.5(a) a party may raise trial court jurisdiction at any time, including for first time on appeal.

The Wife served the husband with the amended petition on February 17, 2015. She served him with a motion for default the very next day on February 18, 2015. He was not in default because CR 15(a) gives the petitioner 10 days to respond to an amended petition. There was no allegation in the motion for default that he was actually in default, only that he had been served. Thus he was improperly served with a motion for default without being in default under CR 55 (a)(1), which requires that a motion for default may be made only when "when a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules. The husband had appeared in previous temporary motion hearings so he cannot be accused of failing to appear. Therefore, he is only in default when he has failed to plead or defend as required by the rules. As stated earlier, he had no obligation to defend unless 10 days had elapsed after serving the amended complaint. The service of the amended complaint was therefore premature and the court lacked jurisdiction to proceed under CR 55.

Then, because he had appeared, King County Local Rule required that the court be given 14 days notice before a motion for default could be heard. The court only had 12 days notice, so the court lacked jurisdiction to even schedule a hearing, let alone hear it. Apparently the trial court correctly refused to schedule a hearing because counsel admitted that the

hearing had only been scheduled that morning. There is nothing in the record showing that this scheduling was done pursuant to any rule, and there is nothing in the record that shows that the husband was notified of this act. RPC 3.4 states

> A lawyer shall not:... (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

RPC 3.5 states:

> A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

Here there is no provision in the rules that allows an attorney to schedule a hearing without giving 14 days notice to the court. The court therefore lacked jurisdiction to hear the motion. Under CR 60(5), the court can set such a void order aside at any time

In addition, the court never addressed the issue that the default decree had an injunction when the amended complaint did not ask for one. That injunction is likewise void for lack of jurisdiction and can be brought at any time

**B. EVEN IF THE ORDER IS NOT VOID FOR LACK OF JURISDICTION, THEN IT WAS TIMELY FILED WITHIN ONE YEAR.**

CR 60 only requires that a motion be "made" within one year, not served. The respondent has not cited to any authority as to why the motion must be served within one year. CR 60(e)(3) states that service should be accomplished in the same manner as that of a summons and complaint, and RCW 4.16.170 gives the plaintiff 90 days to serve a complaint after it is filed. By analogy, the husband's motion should be considered timely served because it was served within 90 days of filing.

**C. THE COURT SHOULD SET THE JUDGMENT ASIDE FOR THE REASONS GIVEN IN THE HUSBANDS MOTION TO SET ASIDE.**

Application of CR 60(b)(1) turns on the following four factors: (1) that there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action and answer the opponent's claim was occasioned by mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 832, 14 P.3d 837 (2000), review denied, 143 Wn.2d 1021 (2001); *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

Here the plaintiff has met all four factors. He has a valid defense because the wife was awarded all the assets and the trial court never even

addressed the issue whether it was fair and equitable. For the wife to come to the court and demand a judgment in equity, she is required to come with clean hands. This principle is expressed by the old equity maxims: "He who seeks equity must do equity", and "he who comes into equity must come with clean hands." *In re Estate of Novolich*, 7 Wash. App. 495, 502, 500 P.2d 1297 (1972). It appears to the husband that the wife and her counsel come before the court with "unclean hands" because of the unethical manner in which the motion was served noted and heard..

He could not appear because he was in jail and had no reasonable method to appear in the court. He could not find an attorney he could afford with a retainer until the year was about to expire. There is no substantial hardship because the defendant can still raise all the defenses she was entitled to.

Dated this 16th day of February, 2016

David Patten

I certify that on this date I caused a copy of this document to be mailed to

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Dated this 16th day of February , 2016

David Patten