No. 73651-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of

DAVID PATTEN,

Appellant,

and

LESLIE PATTEN,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

SMITH GOODFRIEND, P.S.

By: Valerie A. Villacin
WSBA No. 34515
Victoria E. Ainsworth
WSBA No. 49677

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

V. FREITAS LAW, PLLC

By: Veronica A. Freitas
WSBA No. 19405

210 Summit Avenue East
Seattle, WA 98102
(206) 328-7362

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

I. INTRODUCTION

The husband appeals the trial court's order denying his motion to vacate a dissolution decree entered by default. Although the husband appeared at two preliminary hearings, he thereafter failed to appear in any capacity, and did not respond to the petition for dissolution at any time during these proceedings. After the trial court granted the wife's motion for default, it entered a default judgment against the husband in February 2014. A year later, in February 2015, the husband filed a motion to vacate the default judgment, but neither filed the order to show cause nor served the wife until March – thirteen months after the judgment had been entered. The trial court denied the husband's motion to vacate, finding that the motion had been untimely and that he could not satisfy the four factors set forth in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968) justifying vacation of the judgment.

The husband appeals the court's denial of his motion to vacate and motion for reconsideration, arguing that the default orders were void for lack of jurisdiction, that his motion under CR 60 was timely, and that circumstances warranted setting aside the default judgment. However, the trial court had personal jurisdiction over the husband and subject matter jurisdiction over

the dissolution proceeding, and thus the orders it entered are not void for lack of jurisdiction. Further, it was well within the trial court's discretion to deny the motion to vacate after finding that the motion was untimely because it was not made within a reasonable time after entry of judgment. Finally, the trial court properly held that setting aside the judgment was not warranted when the husband did not act diligently, there was no excusable neglect, and the wife would suffer substantial hardship. This Court should affirm.

II. RESTATEMENT OF FACTS

A. The trial court entered the wife's requested temporary orders after the husband failed to respond to the wife's motion.

Respondent Leslie Patten and appellant David Patten were married for seventeen years and have three children, aged 7, 12, and 18, at the commencement of these proceedings. (CP 1-2) The parties separated on April 1, 2013, and Leslie filed a summons, petition for dissolution, and motion for temporary orders on August 8, 2013. (CP 1-4, 20-21, 253-54) David was served the following day, on August 9, 2013. (CP 255-56) The petition asked for a fair and equitable division of all property and liabilities to be determined by the court at a later date, child support and daycare expenses, approval of the proposed parenting plan, award of tax

exemptions for the dependent children, change of the wife's name, and attorney fees. (CP 4) David appeared by telephone at the August 23, 2013 hearing for temporary orders, asking for a continuance in order to retain a lawyer. (CP 86, 90; 2/18 RP 5) The commissioner granted a continuance to September 20, 2013, and entered a temporary restraining order against David effective until that date. (CP 86-90)

The September 20 hearing was again continued to October 17, 2013 because David still had not responded to the pleadings, even though he had already been aware of the requested relief for more than one month. (CP 91; 2/18 RP 6) The temporary restraining order against David remained in effect pending the new hearing date. (CP 92) After David failed to appear at the October 17 hearing, the commissioner entered temporary orders, including a restraining order, parenting plan, and order of child support. (CP 95-100, 257-73; 4/30 RP 22)

B. The wife moved for default after the husband failed to answer the petition. The trial court entered final orders by default in February 2014.

David failed to provide any financial support for the children, in violation of the temporary orders. (4/30 RP 25; CP 190-91) He likewise failed to comply with the case schedule and did

not appear at the status conference on December 27, 2013. (CP 108-09; 2/18 RP 6) At the status conference, the court acknowledged that Leslie planned to file a motion for default due to David's failure to respond to the petition, and rescheduled the conference to April 4, 2014, unless final orders were entered by March 28, 2014. (CP 108-09)

David "started drinking excessively during 2008" after the parties' business went under. (CP 152) He accrued large amounts of debt by spending marital funds and leveraging community assets without Leslie's knowledge. (4/30 RP 25-26; CP 24-25) David was subsequently incarcerated beginning in January 2014 for a hit and run accident. (4/30 RP 23; CP 150)

On January 17, 2014, Leslie served David with an amended petition for dissolution. (CP 110-15) In the amended petition, Leslie requested that she be awarded the family home, two vehicles, and the ongoing royalty check from the parties' former business. (CP 111-12) She requested that the parties' three other real estate properties be sold, with the profits from one being used to pay for the daughter's college tuition and the parties' credit card debts. (CP 111) She recommended that the profits from the sale of the other two properties be divided equally between the parties, with David's

share being used to bring his child support obligations current and to pay down the lines of credit on the family home. (CP 111) Leslie also requested that both parties be awarded any and all property currently in their possession. (CP 112) Regarding their liabilities, Leslie recommended that she be responsible for the auto loan associated with the car that was awarded to her, as well as the mortgage and lines of credit on the family home. (CP 112) She requested that David be responsible for any and all unpaid or unfiled tax returns. (CP 112)

The following day, on January 18, 2014, Leslie also served David with the motion and declaration for default, the proposed orders for the motion for default, decree of dissolution, final parenting plan, child support, final restraining order, and findings of facts and conclusions of law. (CP 116, 119, 141; App. Br. 6) David was also served with notice that the motion for default would be heard on February 18, 2014. (CP 116, 119, 141; App. Br. 6)

Leslie filed the amended petition with the court on January 21, 2014, four days after serving David. (CP 110-14) Nearly three weeks passed after David was served with the amended petition for dissolution and motion for default, yet he made no effort to answer the amended petition for dissolution or to respond to the motion for

default. As a result, Leslie filed the notice of hearing, motion for default, and supporting declaration on February 6, 2014, setting the hearing for February 18, 2014. (CP 117-20)

By the time of the hearing on February 18, David had not responded to any of Leslie's pleadings, and did not appear at the hearing for her motion for default. (CP 140-41) After the trial court found David in default, Leslie's counsel filed a certificate of compliance and the court entered final orders that were consistent with the relief she sought in her amended petition for dissolution on February 18, 2014. (CP 121-31, 133-46) The final orders included a restraining order against David effective until January 30, 2019. (CP 142-44)

C. The husband made an untimely motion to vacate the default judgment in March 2015, over a year after the trial orders were entered against him.

David was released from jail on April 22, 2014, just two months after the final default orders were entered. (CP 150; 4/30 RP 24) Nevertheless, he did not file a motion to vacate the default decree, order of child support, and parenting plan until February 18, 2015 – exactly one year after the final orders were entered. (CP 148-52) He did not file an order to show cause until March 4, 2015, and did not serve Leslie with any paperwork until March 19, 2015,

thirteen months after the final orders were entered. (App. Br. 3; CP 153; 4/30 RP 14, 34-36) The basis for his motion to vacate under CR 60(b)(1) was for "an irregularity in obtaining this judgment or order given that they did not wait 90 days after the service of the amended summons and petition."[1] (4/30 RP 15)

David stated that when the original petition for dissolution was filed, he "understood that the court was to make a fair and equitable division of property at a later date." (CP 150) He "took that to mean that [he] would receive something from [the] marriage," maybe even "one-half." (CP 150) He listed the parties' assets that had been awarded to Leslie, stating that the personal property he had been awarded was merely his clothing and a vehicle

[1] Appellant has abandoned this argument on appeal. Regardless, the allegation that the marriage is irretrievably broken is what triggers the clock for the 90-day period under RCW 26.09.030. In *Marriage of Buecking*, 179 Wn.2d 438, 316 P.3d 999 (2013), the decree of dissolution was entered more than 90 days from the original petition for legal separation, but less than 90 days from the amended petition for dissolution. The Court reasoned that the purpose of the 90 days is to act as a "cooling off" period to avoid "a hasty end to the marriage without time for considering whether dissolution is truly what the parties want." *Buecking*, 179 Wn.2d at 445, ¶ 16. In the case of an amended petition for dissolution, the allegation was made in the original petition, and thus the parties have both had a chance to "allow time for reflection and to act as a buffer against 'spur of the moment' arbitrary action." *Buecking*, 179 Wn.2d at 445, ¶ 16 (citations omitted). Therefore, given the purpose of the cooling off period, there is no reason that the 90 days would be triggered again by an amended petition for dissolution. The period began with the filing and service of the original petition, and was thus satisfied in this case.

worth only $500. (CP 150-52) In addition, he stated that he had "debts not disclosed in the final papers," as well as tax liabilities. (CP 151)

D. The trial court denied the husband's motion to vacate because it was untimely and he could not satisfy the four *Holm* factors.

King County Superior Court Judge Lori K. Smith (the "trial court") denied David's motion to set aside the final orders, finding that the motion to vacate under CR 60 was untimely because Leslie had not been served with the order to show cause until March 2015, thirteen months after entry of judgment. (4/30 RP 34, 36; CP 175-76)(Appendix) In addition, the trial court held that "Mr. Patten did not demonstrate a legal basis to set aside the orders" under *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). (CP 175; 4/30 RP 37-40)

The court found that although "Mr. Patten had notice of the action and appeared," he "did not bring this action within 12 months of entry of the final orders on February 18, 2014." (CP 175) In addition, he "did not demonstrate excusable neglect" and "did not act with due diligence after he became aware of entry of the default orders." (CP 175) The trial court also found that "Mr. Patten did not provide substantial evidence to support a conclusion that the trial court would make a different distribution of assets." (CP 175)

Finally, the court determined that "Ms. Patten would suffer a hardship if the orders were set aside at this point." (CP 175) With Leslie's agreement, the child support order was vacated and a zero transfer payment was entered. (CP 175-76; 4/30 RP 40) David moved for reconsideration, which the trial court denied. (CP 179-83, 240)

David appeals. (CP 243-44)

III. ARGUMENT

A. The trial court had full jurisdiction over the proceedings and properly entered the final dissolution decree and restraining order by default.

The trial court had both personal and subject matter jurisdiction over the parties and the dissolution proceedings. Under RCW 26.09.030, a party who is, or is married to, a resident of this state may petition for dissolution of marriage, alleging that the marriage is irretrievably broken. When 90 days have elapsed since the petition was filed and from the date when the respondent was served with the summons, the court "shall" enter a decree of dissolution "[i]f the other party . . . does not deny that the marriage . . . is irretrievably broken." RCW 26.09.030(a). In entering the decree, the court may enter an order of child support, maintenance, property division, and a restraining order. RCW 26.09.050(1).

In *Marriage of Buecking*, 179 Wn.2d 438, 316 P.3d 999 (2013), *cert. denied*, 135 S.Ct. 181 (2014), our Supreme Court clarified that jurisdiction is comprised of two elements: personal jurisdiction and subject matter jurisdiction. 179 Wn.2d at 447, ¶ 23. Subject matter jurisdiction "refers to a court's ability to entertain a type of case, *not to its authority to enter an order in a particular case.*" *Buecking*, 179 Wn.2d at 448, ¶ 23 (emphasis added). Thus, "if a court can hear a particular class of case, then it has subject matter jurisdiction." *Buecking*, 179 Wn.2d at 448, ¶ 24. The Court held that if the residency requirement under RCW 26.09.030 is met, the trial court has full jurisdiction over the proceedings. *Buecking*, 179 Wn.2d at 452, ¶ 34. That jurisdiction is limited "to granting the relief contemplated by the statute." *Buecking*, 179 Wn.2d at 452, ¶ 34.

Despite appellant's contention otherwise, the trial court indeed had jurisdiction over him personally and over the subject matter. The residency requirement was met as both the husband and the wife have at all times during these proceedings been residents of Washington. (CP 2, 111) Because residency is the prerequisite to the trial court's exercise of jurisdiction under RCW 26.09.030, it had the authority to preside over the parties'

dissolution case. In addition, the dissolution decree, including the final restraining order, was the type of relief "contemplated by the statute." Accordingly, the trial court exercised full and proper personal and subject matter jurisdiction over the final orders entered by default.

1. The court's subject matter jurisdiction was not affected by the dates on which the amended petition and motion for default were filed, noted, or served.

The husband contends that the default judgment against him is void under CR 60(b)(5) because the trial court lacked jurisdiction to proceed with the motion for default based on when he was served with the amended petition and when the motion for default was filed. (App. Br. 8-9) However, it is undisputed that by the time the motion was filed with the court and noted for hearing, the husband was in default. In any event, the husband's arguments fail because neither affects the court's subject matter jurisdiction over the case.

a. The husband was in default when the motion was noted and filed because he failed to respond to the amended petition within ten days.

Under CR 12(a)(1), a defendant has twenty days after service of the summons and complaint to serve an answer. A party may amend their pleading once at any time before a responsive pleading

is served. CR 15(a). The other party then has the longer of either the remaining time to respond to the original pleading or within ten days after service of the amended pleading to respond. CR 15(a). A party may move for an entry of default against an opposing party that has failed to respond within that time. CR 55(a)(1).

Here, the husband was served with the amended petition for dissolution on January 17, 2014, well after the time to respond to the original petition (served on August 9, 2013) had elapsed. (CP 115, 255-56) Further, the ten-day period to respond to an amended pleading under CR 15(a) had passed on January 28, 2014, well before the motion for the default judgment was noted and filed with the court on February 6, 2014. The wife thus properly moved for entry of default.

b. The default decree is not void for lack of subject matter jurisdiction because the husband had more than fourteen days notice before the hearing.

If a party has appeared in the proceeding, but not filed a response to the petition for dissolution, any other party may move for an order of default, provided that notice is given in accordance with King County Local Family Law Rule (KCLFLR) 6. KCLFLR 5(c)(8). Under KCLFLR 6, the motion and all supporting documents must be filed with the clerk and served on all parties "at

least fourteen (14) calendar days before the date of the hearing." KCLFLR 6(b)(2). Upon entry of the order of default, a default judgment, including an order setting support, may be entered. KCLFLR 5(c)(8)(B). Uncontested final decrees of dissolution must be noted on at least fourteen days notice, "provided that, the matter need not be noted for hearing when presented by an attorney of record . . . [who] has signed and filed a certificate of compliance in the form prescribed by the court." KCLFLR 5(c)(1).

Here, it is undisputed that the husband was served with the motion for default and notice of hearing more than fourteen days in advance of the hearing. Nevertheless, the husband contends that because the court only had twelve days notice, "the court lacked jurisdiction to even schedule a hearing." (App. Br. 8) As a threshold matter, the final orders are not void for lack of subject matter jurisdiction because the trial court had the authority to hear the case. *Buecking*, 179 Wn.2d at 448, ¶23. Therefore, the trial court retained full jurisdiction over the proceedings, and was able to schedule the hearing and enter the default orders. The husband's contention that the order was void is thus without merit.

The husband cites RPC 3.4 and 3.5, insinuating that the wife's trial counsel acted improperly because "[t]here is nothing in

the record showing that this scheduling [for a hearing on a motion for default] was done pursuant to any rule, and there is nothing in the record that shows that the husband was notified of this act." (App. Br. 9) This argument is entirely inaccurate. The scheduling for the motion for default was done pursuant to KCLFLR 5(c)(8) and KCLFLR 6(b)(2). Although the motion for default was filed only twelve, rather than fourteen, days prior to the hearing, there was no prejudice to the husband because he had been served with the motion on January 18, 2014, a month prior to the February 18 hearing – well in advance of the timeframe set forth by KCLFLR 6(b)(2). (CP 116, 119, 141; App. Br. 6) He thus knew that the wife was seeking default, had adequate notice of the hearing, and had adequate opportunity to respond.

Regardless, the trial court has "inherent power to waive its rules." *Raymond v. Ingram*, 47 Wn. App. 781, 784, 737 P.2d 314, *rev. denied*, 108 Wn.2d 1031 (1987), *superseded by statute on other grounds*. "Unless the record shows that an injustice has been done, this court will presume" that the trial court disregarded the local rules for a good reason. *Raymond*, 47 Wn. App. at 784. Here, given that no injustice had been done because the husband had notice of the hearing, it was well within the trial court's discretion to

waive its local rules and allow the wife to note the motion on twelve days notice.

Once the order for default was entered by the trial court on February 18, 2014, the wife was able to seek entry of a default judgment without further notice to the husband. KCLFLR 5(c)(8). Under KCLFLR 5(c)(1), uncontested final decrees of dissolution do not need to be noted for a hearing at all when presented by an attorney of record who has signed and filed a certificate of compliance, as the wife's counsel did here. (CP 137-39) Thus, the wife complied with the local family law rules when seeking entry of the final decree by default.

2. The final restraining order is not void for lack of jurisdiction because it arose out of this dissolution action.

The husband argues that the final restraining order entered against him on February 18, 2014 is void for lack of jurisdiction because "the default decree had an injunction when the amended complaint did not ask for one." (App. Br. 9) Because the final restraining order arose out of this dissolution action, over which the trial court had full personal and subject matter jurisdiction, the restraining order is not void for lack of jurisdiction. *Buecking*, 179 Wn.2d at 448, ¶ 23; *see also* RCW 26.09.020, 26.09.050.

In addition, although the amended petition for dissolution stated that a continuing restraining order did not apply, (CP 112), the husband was served a copy of the final proposed restraining order on January 18, 2014, at the same time he was served with the note for the motion for the February 18 hearing, as well as the motion and declaration for default and the proposed orders on the motion for default. (CP 116, 119, 141; App. Br. 6) Therefore, he was on notice that the wife was seeking a final restraining order against him that the court ultimately adopted.

B. The husband's motion to vacate the default judgment under CR 60 was untimely.

1. The husband's motion to vacate under CR 60(b)(1) was untimely because it was not filed and served within a reasonable time and over a year after the entry of judgment.

The husband argues that if the decree is not void for lack of jurisdiction under CR 60(b)(5), then it was timely filed within one year and should be set aside under CR 60(b)(1). (App. Br. 9-11) He contends that "CR 60 only requires that a motion be 'made' within one year, not served." (*See* App. Br. 10) Thus, he argues that although he did not serve the wife until more than a year had passed, the motion was still timely because it was filed on February 18, 2015, exactly one year after judgment was entered. (App. Br.

10) This argument is inaccurate, however, because the adverse party must be served within one year of the entry of the decree if the motion to vacate is based on irregularities in the proceedings.

Under CR 60(b)(1), the court may relieve a party from a final judgment or order for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." A motion under CR 60(b)(1) "shall be made within a reasonable time" and "not more than 1 year after the judgment, order, or proceeding was entered or taken." CR 60(b). RCW 4.72.020, which "remain[s] in full force and effect" except as modified by CR 60, further specifies:

> The proceedings to vacate or modify a judgment or order for . . . irregularity in obtaining the judgment or order, shall be by motion *served on the adverse party* or on his or her attorney in the action, and *within one year*.

(emphasis added)

Here, the husband brought his motion to vacate the default decree under CR 60(b)(1) for an irregularity in obtaining the judgment. (CP 149; 4/30 RP 15) He filed a notice of appearance and a motion to vacate on February 18, 2015, exactly one year after the final orders were entered by default. (CP 148-52) However, he did not serve the wife with the motion or order to show cause until

March 19, 2015, thirteen months after the final orders were entered. (4/30 RP 14, 34-36) Under CR 60(b) and RCW 4.72.020, the proceedings to vacate for an irregularity must be made *and served* on the adverse party within one year. Therefore, the trial court properly found that the motion to vacate was untimely.

2. Even if the motion was made within a year, the trial court did not abuse its discretion in finding that the motion was untimely because it was not made within a reasonable time.

This Court has held that "a motion brought under CR 60(b)(1) may be untimely if it is not made within a reasonable time *even if it is filed within one year from the date of the judgment*, order, or proceeding from which relief is sought." *Luckett v. Boeing Co.*, 98 Wn. App. 307, 308, 989 P.2d 1144 (1999), *rev. denied*, 140 Wn.2d 1026 (2000) (emphasis added). In *Luckett*, this Court noted that the "critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion." 98 Wn. App. at 312. Two major considerations in determining a motion's timeliness are (1) prejudice to the nonmoving party due to the delay, and (2) whether the moving party has good reasons for failing to take appropriate action sooner.

Luckett, 98 Wn. App. at 312. This Court will not disturb a trial court's determination that a motion to vacate is untimely unless the trial court abused its discretion. *Luckett*, 98 Wn. App. at 309-10.

Here, the husband admits that he was aware of the entry of the default judgment in February 2014. (4/30 RP 16) In considering the timeliness of the motion, the trial court properly found that "Ms. Patten would suffer a hardship if the orders were set aside at this point," (CP 175), given the costs of the hearing to vacate the judgment and "having lived with and worked under this order for this period of time." (4/30 RP 39) In addition, the trial court did not find that the husband had good reasons for failing to take appropriate action sooner, as he was released from prison in April 2014, "just a couple of months after the orders were entered," and yet it took him "past that year mark of the entry of the orders to come into court." (4/30 RP 37)

To compare, in *Luckett*, the party's counsel became aware in August 1996 that the action had been dismissed, but waited until December 31, 1996 to file the motion to vacate. 98 Wn. App. at 313. This Court found that the trial court was well within its discretion in finding that waiting four months without "any good reason" was not within a reasonable time. *Luckett*, 98 Wn. App. at 313. Here, the

husband waited three times as long as the party in *Luckett* to file his motion to vacate without any good reason for doing so. The trial court did not abuse its discretion in finding that the motion was untimely.

C. Even if the motion to vacate was timely, the trial court properly refused to vacate the default judgment because the husband could not satisfy the four *Holm* factors.

This Court reviews a denial of a motion to vacate a default judgment for an abuse of discretion. *Little v. King*, 160 Wn.2d 696, 703, ¶ 16, 161 P.3d 345 (2007). The trial court's "exercise of that discretion will not be disturbed unless abuse thereof is clearly shown." *Carmichael v. Carmichael*, 5 Wn. App. 715, 718, 490 P.2d 442 (1971). "A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds." *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 403, ¶ 20, 196 P.3d 711 (2008); *Marriage of Thompson*, 32 Wn. App. 179, 183, 646 P.2d 163 (1982).

In determining whether to set aside a default judgment, the trial court must consider four factors: (1) whether there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party; (2) the moving party's failure to timely appear and answer the opponent's claim was the result of

mistake, inadvertence, surprise, or excusable neglect; (3) the moving party acted with due diligence after notice of entry of the default judgment; and (4) no substantial hardship will result to the opposing party. *Rosander,* 147 Wn. App. at 404, ¶ 21 (citing *Holm,* 73 Wn.2d at 352). The first two factors are primary, and the burden is on the moving party to demonstrate that all of these factors are satisfied. *Rosander*, 147 Wn. App. at 404, ¶ 22; *Holm,* 73 Wn.2d at 352. Here, the trial court properly found that the husband failed to satisfy these four factors. Thus, the trial court was well within its discretion in denying the husband's motion to vacate the judgment.

The trial court properly found that there was not substantial evidence to support a defense. The husband merely listed the assets that had been awarded to the wife, and complained that he had only been left with little personal property, tax liability, and debts he had not previously disclosed. (CP 150-52) However, he did not make any recommendations for how the trial court should have divided the property aside from saying that he "thought it would be one-half." (CP 150) Nor did he demonstrate that the court would have made a different distribution of the assets and liabilities than what was set forth in the default orders, especially in light of the debts he incurred on behalf of the marital property without the wife's

knowledge. *Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002) ("In making its property distribution, the trial court may properly consider a spouse's waste or concealment of assets."), *rev. denied*, 148 Wn.2d 1011 (2003). A property division is not subject to vacation merely because it is undesirable to one or both parties. *See, e.g., Marriage of Tang*, 57 Wn. App. 648, 789 P.2d 118 (1990) (relief from dissolution decree and property division not justified even where decree failed to list the parties' property and left the parties as tenants in common of most of their property); *Marriage of Thompson*, 32 Wn. App. at 185 (trial court did not abuse its discretion in division of property despite wife's contention that the distribution was "not fair"). In any event, a disparate property division favoring the parent with whom the children primarily reside is appropriate when the other parent is relieved of their child support obligations, as is the case here. *See Holaday v. Merceri*, 49 Wn. App. 321, 326-27, 742 P.2d 127 (trial court correctly concluded that wife's child support obligation was satisfied by disparate division of property), *rev. denied*, 108 Wn.2d 1035 (1987).

As the court noted, this was merely "evidence pre[s]ented as to why Mr. Patten doesn't believe that the distribution of the assets

was just and equitable, but that isn't a defense. That's dissatisfaction." (4/30 RP 38) The court concluded that "[a] defense would be articulating the evidence that the Court would look at and make a determination that the assets should be distributed differently," but it could not in this position "substitut[e] [its] own decision based on very limited information as to how . . . some property should be distributed." (4/30 RP 38) Therefore, the trial court properly found that the husband had not met the requisite showing of a defense merely by presenting evidence of his dissatisfaction with the property distribution.

The trial court similarly found that the second factor was not satisfied because there was no justification as to why the husband had failed to timely appear. The trial court did not "believe that there was a mistake or inadvertence," (4/30 RP 38), and similarly found that the husband "did not demonstrate excusable neglect." (CP 175) The court noted that "addiction is not a reason that the Court would look beyond the one year in determining when you can come back," especially because "despite being in the position of being actively involved in [his] addiction," the husband was "aware of the case," "came to court," and "there was some participation by" him. (4/30 RP 36-37) Nevertheless, he "never filed a response that

would have prevented the entry of the default." (4/30 RP 37) Although the trial court looked at the husband's incarceration at the time the amended petition was filed "as certainly a hardship to [him] being able to participate in the hearing," it could not find there to be excusable neglect when the husband was "released in April, so just a couple of months after the orders were entered," and yet it took him "past that year mark of the entry of the orders to come into court." (4/30 RP 37)

For this same reason, the husband also failed to meet the third factor of acting with due diligence after notice of entry of the default judgment. In line with this Court's holding in *Luckett*, the trial court recognized that the case law requires the moving party to do "something within just a few months in order for the Court to find that in fact due diligence is being acted upon," because "if someone lives with an order for a year . . . there should be some certainty and some resolution with regard to that." (4/30 RP 39) Accordingly, the trial court properly found that "Mr. Patten did not act with due diligence after he became aware of entry of the default orders." (CP 175)

Finally, the trial court found that the fourth factor was not satisfied because the wife would suffer a substantial hardship if the

motion were granted. The trial court was well within its discretion in finding that "Ms. Patten would suffer a hardship if the orders were set aside at this point." (CP 175)

Therefore, the trial court did not abuse its discretion in denying the husband's untimely motion to vacate the judgment after considering and deciding that he did not satisfy the four *Holm* factors.

IV. CONCLUSION

This Court should affirm the trial court's decision denying appellant's motion to vacate.

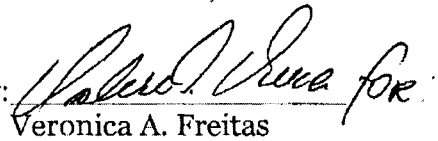
Dated this 30th day of March, 2016.

SMITH GOODFRIEND, P.S.

By: 

Valerie A. Villacin
WSBA No. 34515
Victoria E. Ainsworth
WSBA No. 49677

V. FREITAS LAW, PLLC

By: 

Veronica A. Freitas
WSBA No. 19405

Attorneys for Respondent

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 March 30, 2016, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Veronica A. Freitas V. Freitas Law, PLLC 544 29th Ave. Seattle, WA 98122	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
David Patten 700 NW Gilman Blvd #235 Issaquah WA 98027	___ Facsimile ___ Messenger ✓ U.S. Mail ___ E-Mail

DATED at Seattle, Washington this 30th day of March, 2016.

Jenna L. Sanders

COPY

Superior Court of Washington
County of King

In re: Leslie Patten Petitioner, and David Patten Respondent.	**No. 13-3-10392-7 SEA** **Order on Show Cause** ~~**(PROPOSED)**~~ **Clerk's Action Required**

This matter being before the court upon the motion to vacate and order to show cause of the respondent and the court having considered the records and files herein and the testimony of the parties does make the following:

ORDER

The orders of default, findings and decree (except for the order decreeing that the marriage is dissolved), order of child support and parenting plan entered February 18, 2015 are NOT vacated ~~and the matter shall be set for trial June 15, 2015 before the honorable _____, Judge of the Superior court. The clerk of the court shall issue a new case schedule in compliance herewith.~~

The court denies the motion to set aside. Mr. Patten did not demonstrate ~~that he can meet~~ a legal basis to set aside the orders under the 4 factors of White v. Holm. Mr. Patten had notice of the action and appeared - He did not bring the action within 12 months of entry of the final orders on February 18, 2014. He did not demonstrate excusable neglect.

Mr. Patten did not ~~demonstrate~~ provide substantial evidence to support a conclusion that the trial court would ~~not~~ make a different distribution of assets. Mr. Patten did not act with due diligence after he became aware of ~~copies of~~ the default orders. Mrs. Patten would suffer a hardship if the orders were set aside at this point.

Lloyd Coble
WSBA No. 7324
22500 SE 286th St.
Maple Valley, WA 98038
(206) 930-9118
(360) 886-2351 FAX
lloydcoble@comcast.net

The following conditions shall apply:

Child support will be modified to provide no arrears and zero payments. Petitioner shall be responsible for 94% of post secondary expenses of children.

Dated: April 30, 2015

Judge/Commissioner
Lori K. Smith

Presented by:

Signature of Moving Party or Lawyer/
Lloyd Coble, WSBA No. 7324

Approved as to form:

Veronica Freitas, WSBA No. 19405
Attorney for Petitioner

94% of extraordinary expenses of children. BV will enter new order of child support upon presentation of request within 30 days of entry of this order.

Lloyd Coble
WSBA No. 7324
22500 SE 286th St.
Maple Valley, WA 98038
(206) 930-9118
(360) 886-2351 FAX
lloydcoble@comcast.net