No. 43303-6-II

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

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**In re Marriage of:**

**RICHARD B. FERGUSON,**

**Respondent**

**and**

**PAMELA M. FERGUSON,**

**Appellant**

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**APPEAL FROM THE SUPERIOR COURT**
**FOR PIERCE COUNTY**
**THE HONORABLE STEPHANIE A. AREND**

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# BRIEF OF APPELLANT

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B. The trial court erred in denying Ms. Ferguson's motion for revision. CP 114-15.

C. The trial court erred in denying Ms. Ferguson's motion for reconsideration. CP 117.

D. The trial court erred in denying Ms. Ferguson's request for an award of attorney fees pursuant to RCW 26.09.140. CP 25, 30, 90-91.

## II. STATEMENT OF ISSUES

A. The trial court found that Ms. Ferguson had not filed her CR 60(b)(5) motion to vacate the property division in the decree of dissolution within a reasonable time and denied her motion to vacate on that basis. Did the trial court err in limiting the time within which a CR 60(b)(5) motion to vacate a void judgment may be brought? Yes.

B. The trial court held that its decision whether to vacate a void decree of dissolution pursuant to CR 60(b)(5) was discretionary and declined to exercise that discretion and vacate the property division. Did the trial court err by not finding that it had a nondiscretionary duty to vacate the property award in the decree of dissolution if that decree is void? Yes.

C. The trial court never reached the question as to whether the property division in the decree of dissolution was void because it granted relief "different in kind from or exceed in amount that prayed for in the demand for judgment" in violation of CR 54(c) and the Due Process Clause. Should this Court find that the property division in the decree of dissolution is void and vacate it on that basis? Yes.

D. The trial court 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. Did the trial court abuse its discretion in not awarding attorney fees to Ms. Ferguson? Yes.

E. Should this Court award attorney fees to Ms. Ferguson for prosecuting this appeal pursuant to RCW 26.09.140? Yes.

## III. STATEMENT OF FACTS

Pamela Ferguson and Dr. Richard Ferguson were married on November 23, 1992 and have two children together: William, now 19, and Alex, now 17. 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 Commissioner Pro Tem Donald Powell 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.[3] 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.*

Pro Tem Commissioner Powell 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 1** for the Court's ease of reference).

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[3] Initially, it appeared that Dr. Ferguson did ***not*** appear at the final hearing, because the trial court's clerk's notes indicated that only Dr. Ferguson's counsel was present. CP 6.

The Decree awarded substantially all of the property to Dr. Ferguson, including the waterfront Gig Harbor family residence,[2] five other parcels of real estate, his 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 18, 22.[3] 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.

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.[4] 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.[5] CP 50-59, 87.

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[2] 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.

[3] 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 1.**

[4] Sometime in 2008, Ms. Ferguson discovered that the parties' marriage had in fact been dissolved in 2004.

[5] 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).

The day before she left Gig Harbor to bury her mother in Chicago, Ms. Ferguson was served with Dr. Ferguson's unlawful detainer and was later removed from what she believed was the family home.[6] 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 on three grounds. First, the

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[6] This appeal 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.

trial court held that CR 60(b)'s requirement that "[t]he motion shall be made within a reasonable time" was not met by Ms. Ferguson's three year delay in filing for relief:

> It's always been my understanding, quite frankly, that CR 60(b) motions, other than 1, 2 or 3 had to be brought within a reasonable period of time; and, quite frankly, on its face, this motion was not brought in a reasonable time…So under the plain reading of the court rule, I would deny the motion on that basis. RP 2/24/12 at 16-17.

Second, the trial court found no requirement in RCW 26.09.020 that assets and debts be listed with specificity in the Petition, and found that the trial court was in no position at a hearing on a motion to vacate to make a determination as to whether the property division was fair and equitable. RP 2/24/12 at 18-19.

Finally, the trial court concluded from its reading of *Marriage of Leslie*[7] that vacating a void judgment was discretionary. RP 2/24/12 at 19-20. Because it could not determine whether the property division was fair and equitable, the trial court declined to exercise that discretion:

> The other thing that I would say is that the *Marriage of Leslie* case, the provision that I just read, and Civil Rule 60 as it still exists says that, "The Court may relieve a party from a final judgment for the following reasons: The judgment is void." It doesn't say the Court must or shall relieve a party….So this Court chooses not to exercise its discretion and relieve the parties of the final judgment on

[7] *Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989).

> that basis without making a determination of whether or not the distribution is just and equitable. *Id.*

Ms. Ferguson moved for reconsideration pursuant to CR 59(a)(7) and CR 59(a)(9). CP 92-97. Ms. Ferguson argued that the trial court's characterization of the decision whether to vacate a void judgment pursuant to CR 60(b)(5) as discretionary was contrary to law. CP 94-95. She further renewed her argument that the Decree granted relief beyond that requested in the Petition. CP 95-97. The trial court denied the motion for reconsideration, clarifying that it had not reached the issue of whether the Decree was void because it could not determine whether the property division in the Decree was fair and equitable:

> I never reached the issue that the judgment was void because you asked me to make that ruling on the basis that the petition and the final decree did not match.
>
> The petition requested a fair and equitable distribution of the property. The property was distributed. I said, I believe, I was not in a position to determine if that was fair and equitable or not fair and equitable, absent the taking of testimony from all parties concerned. So I could not, as a matter of law, declare that the judgment was void. And I did not declare that the judgment was void. RP 3/16/12 at 12-13.

The trial court further reiterated its earlier ruling that a court's decision to vacate a void judgment pursuant to CR 60(b)(5) is discretionary under the language of CR 60:

> So you don't need to get to the issue of, is it discretionary or is it not discretionary, but I do believe I went beyond that and said that even if it was void, the rule, itself, makes it discretionary because the rule says, under CR 60(b), "On motion and upon such terms as are just the Court may relieve a party or his legal representative from a final judgment order or proceeding for the following reasons: Reason No. 5, the judgment is void." The rule itself uses the word "may." I have always understood "may" to mean discretion. That was my ruling. That is my ruling. Your motion for reconsideration is denied. RP 3/16/12 at 13.

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

## IV. ARGUMENT

### A. STANDARD OF REVIEW

**1. Vacating the Property Division Set Forth in the Decree.** The trial court has no discretion in considering requests made pursuant to CR 60(b)(5), and appellate review of such decisions is *de novo*. *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131, *rev. denied*, 130 Wn.2d 1004 (1996).

**2. Award of Attorney Fees.** A trial court's consideration of a request for attorney fees made pursuant to RCW 26.09.140 is reviewed for abuse of discretion. *Marriage of Greenlee*, 65 Wn.App. 703, 707, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992).

## B. THE TRIAL COURT ERRED BY NOT VACATING THE PROPERTY DIVISION SET FORTH IN THE DECREE.

### 1. CR 60(b)'s Requirement That Motions to Vacate be Brought Within a "Reasonable Time" Was Satisfied.

The trial court ruled that Ms. Ferguson's CR 60(b)(5) motion to vacate was not made within a reasonable time and therefore should be denied. RP 2/24/12 at 16-17. Ms. Ferguson agrees with the trial court's reading of CR 60(b) in that the rule requires that all motions brought pursuant to that rule be filed within a reasonable time. However, in the case of void judgments, a "reasonable time" means ***any*** time: "[m]otions to vacate under CR 60(b)(5) may be brought at any time after entry of judgment." *Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988) (citations omitted); *see also Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985)(five years elapsed between entry of void decree of dissolution and filing of motion); *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 765 P.2d 1333 (1989)(16 years). This aspect of the *Markowski* court's decision has been cited with approval by the Washington Supreme Court in *Marriage of Leslie*, 112 Wn.2d 612, 619, 772 P.2d 1013 (1989). Accordingly, the trial court's denial of Ms. Ferguson's motion to vacate on the basis that it was untimely was in error and should be reversed.

**2. The Trial Court Did Not Have Discretion to Decline to Vacate The Property Division Set Forth in The Decree if it Was Void.**

The trial court held that, under *Marriage of Leslie* and CR 60(b), the decision whether to vacate a void judgment was discretionary. RP 2/24/12 at 19-20. At the hearing on Ms. Ferguson's motion for reconsideration, the trial court clarified its previous decision to indicate that CR 60(b), not *Leslie*, granted the trial court discretion as to whether to vacate a void judgment. RP 3/16/12 at 13. The trial court declined to exercise its discretion and vacate the Decree. *Id.* Ms. Ferguson respectfully submits that this portion of the trial court's holding was contrary to well-established case law and should be reversed.

In *Scott v. Goldman*, a default judgment was entered by the trial court against a defendant in 1989. *Scott v. Goldman*, 82 Wn. App. 1, 4, 917 P.2d 131, *rev. denied*, 130 Wn.2d 1004 (1996). In 1994, the defendant successfully moved to vacate the judgment as void. *Id.* This Court affirmed the trial court's vacation of the judgment, noting: "Courts have a ***mandatory duty to vacate void judgments***." 82 Wn. App. at 6 (*citing Brenner v. Port of Bellingham*, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989)(emphasis added)).

In *Brenner*, the trial court entered judgment by default against a defendant in 1969. 53 Wn. App. at 184. Sixteen years later, in 1985, the

defendant moved to vacate the judgment as void, and the trial court denied the motion. 53 Wn. App. at 185. Division I of this Court reversed the trial court, holding as follows:

> A default judgment entered without valid service is void and may be vacated when the want of jurisdiction is established, regardless of the passage of time. (citation omitted); *Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988)(motions to vacate under CR 60(b)(5) are not barred by the "reasonable time" or the 1-year requirement of CR 60(b), but may be brought at any time after entry of the judgment). ***Courts have a nondiscretionary duty to vacate void judgments.*** *Markowski*, 50 Wn. App. at 635. Consequently, the judgment of the lower court is reversed, and the cause is remanded with directions to the trial court to vacate the 1969 judgment of condemnation. *Brenner*, 53 Wn. App. at 188 (emphasis added).

Accordingly, the premise underlying the trial court's denial of Ms. Ferguson's motion for revision and the underlying motion to vacate—namely, that the decision to vacate a void judgment is discretionary—is contrary to well-established case law. For this reason, the Court should reverse this aspect of the trial court's decision.

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

Contrary to Dr. Ferguson's arguments and the trial court's holding, the Court ***must*** vacate the property division in 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.

Under Dr. Ferguson's 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.[8] 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 Dr. Ferguson's proposed analytical framework.

In 2001, 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.'" *Marriage of Johnson*, 107 Wn. App. 500, 504, 27 P.3d 654 (2001)(*quoting Conner v. Universal Util.*, 105 Wn.2d 168, 172, 712 P.2d 849 (1986)).

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,

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[8] 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.

including the parties' Gig Harbor waterfront residence, five other parcels of real property, 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.

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 division 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 *Marriage of Johnson.*

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.[9] 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. Alternatively, of course, Dr. Ferguson could simply have amended his

[9] 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.

Petition pursuant to CR 15(a), providing Ms. Ferguson with notice of the actual proposed division of the fruits of this marriage.

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. Here, 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 eight years now, he has succeeded in that effort. Ms. Ferguson respectfully requests that this Court reverse the trial court's errors and restore her due process rights.

### C. 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.[10] 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

[10] On August 6, 2012, Ms. Ferguson filed her Supplemental Designation of Clerk's Papers with the trial court and this Court. References to CP 120-179 herein are to the page numbers set forth as proposed page numbers in that Supplemental Designation of Clerk's Papers.

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 appeal 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

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from that requested in the Petition under the test set forth in *Marriage of Johnson*. Therefore, the Decree is void. Under *Marriage of Leslie*, this Court should reverse the trial court and vacate the property award in the Decree.

Respectfully submitted this 6th day of August, 2012.

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Amy L. Perlman, WSBA 42929

## 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 August 6, 2012, I arranged for service of the foregoing Brief of Appellant, 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 U.S. certified mail, return receipt requested

Mr. Roger Schweinler, Attorney for Respondent
McCarthy & Causseaux, P.S.
902 S. 10th St.
Tacoma, WA 98405-4537
Via email and U.S. mail

Dated at Olympia, Washington this 6th day of August, 2012.

Roger Madison, WSBA 15338

# APPENDIX 1

# APPENDIX 1

**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

**McCarthy Causseaux & Rourke, P.S., Inc.**
902 South Tenth Street
Tacoma, Washington 98402
Telephone: (253) 272-2206
Facsimile: (253) 272-6439

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

III.

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

1. Real property as follows:
   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
   f) 1304 19th Street, parcel number 4000380070
2. Husband's Dental Practice, "Wright Park Dental Clinic" and all debt and assets incident thereto
3. 2002 Ford Pickup
4. 1991 Alpha Romeo
5. Bank accounts in his name:
   a. All Key Bank Accounts
   b. All Wells Fargo Accounts
6. Clothing, jewelry and other personal effects in his possession.
7. Home furnishings in his possession.
8. Any and all pension and retirement benefits in his name.
9. Any and all property acquired by him after date of separation.



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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)
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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