COA No. 31297-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

DREW C. OLSEN,

Appellant,

v.

MEGAN M. OLSEN,

Respondent.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Respondent
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENT OF ERROR

A. The trial court erred by denying Drew Olsen's CR 60(b) motion to vacate default and final orders.

Issue Pertaining to Assignment of Error

1. Did the trial court abuse its discretion by denying Mr. Olsen's CR 60(b) motion to vacate when his attorney's repeated failure to appear for court proceedings, the failure to advise the client, and deliberate misrepresentations to the court and client were the result of his medical condition and/or disability that effectively deprived Mr. Olsen of representation, thus constituting an irregularity in the proceedings sufficient to vacate the default and final orders?

II. STATEMENT OF THE CASE

The facts that are undisputed were set forth in the trial court's order on dissolution issues:

> The trial in this matter was held on May 16, 2012 in Spokane County Superior Court. The matter was originally commenced by a Petition for Dissolution of Marriage by Petitioner, Drew C. Olsen on May 20, 2011. The Petition requested that the Court determine support for the minor child, divide the property and liabilities, award tax exemptions, and award attorney's fees. The Respondent, Megan Olsen, appeared by counsel and requested the Court to: divide the property and liabilities; order each party to pay his or her own debts incurred since separation; require

Petitioner to pay a portion of all expenses relating to the child, including medical expenses; award tax exemptions; and that the Court determine payment of attorney's fees. This matter was originally set for trial on January 23, 2012, and was continued by agreement of the parties. The matter was then set to commence on April 16, 2012. The Respondent, Megan Olsen, through counsel, timely provided Respondent's portion of the Domestic Trial Management Report, together with Respondent's Exhibits to Judge Michael Price's Court on April 12, 2012, and also provided all of said documents to counsel for Petitioner. Neither Petitioner nor his counsel submitted a Joint Trial Management Report or Exhibits.

The Respondent, Megan Olsen through her counsel, Terence R. Whitten of Lukins & Annis, P.S. appeared for trial in Judge Michael Price's court on April 16, 2012. Neither the Petitioner nor his counsel appeared at that time. Respondent's counsel waited the entire morning on April 16, 2012 through the docket call, and then was heard in open Court by Judge Michael Price. Although the failure of the Petitioner and/or his counsel to appear at that time was a default, the Court nevertheless continued the matter for trial to Monday, May 14, 2012. Counsel for the Respondent, and counsel for the Petitioner appeared in Court at that time. Petitioner's counsel advised the Court's representative that Petitioner was not available on that date. The Court instructed both counsel for Petitioner and Respondent that the trial would commence at 9:00 a.m. on Wednesday, May 16, 2012.

On May 16, 2012, counsel for Respondent appeared for trial. Neither Petitioner nor Petitioner's counsel appeared for trial at that time. The Court made attempts to contact the

> Petitioner's counsel to verify his whereabouts and advise counsel regarding the trial scheduling, which the Court reset to commence at 1:30 p.m. on May 16, 2012. When neither Petitioner nor his counsel appeared in the afternoon on May 16, 2012, the Court instructed Respondent's counsel to present evidence from the Respondent which was done in the afternoon on May 12, 2012.
>
> The court thereafter issued a written Memorandum Decision which is dated June 13, 2012 and is incorporated in this Order. (CP 143-44).

This procedural history was also reflected in the Findings of Fact and Conclusions of Law entered on June 29, 2012. (CP 135).

The court entered an order of default on May 16, 2012, in which it found Mr. Olsen and his counsel failed to appear for trial:

> IT IS ORDERED that: A default trial occurred and an Order of Default is entered by this Order. The court will issue a memorandum decision. (CP 91).

The court issued its memorandum decision on June 13, 2012. (CP 104-13). On June 29, 2012, Findings of Fact and Conclusions of Law, an Order of Child Support, and Washington State Child Support Schedule Worksheets were filed. (CP 117-142).

Mr. Olsen's new counsel, Jason Nelson, substituted for former counsel, Kevin Mickey, on June 29, 2012. (CP 116; *see also* CP 114-15). On June Mr. Nelson filed a motion to vacate default and final orders on August 10, 2012. (CP 150). The

supporting declaration of Mr. Olsen in which he stated (1) he provided Mr. Mickey with financial information, proposed child support worksheets, a valuation of assets; (2) he regularly called Mr. Mickey's office and various cell phone numbers asking about the status of his case; (3) he regularly e-mailed Mr. Mickey asking questions and providing information; (4) he was assured by Mr. Mickey he was working on his case; (5) he followed up with any issues raised by Mr. Mickey or Mr. Whitten, including responses to settlement offers; (6) he went to mediation, but Mr. Mickey failed to attend; (7) he asked Mr. Mickey why he did not appear for mediation and was told he had health issues; (8) he was unaware Mr. Mickey failed to provide information to Mr. Whitten and the court for the joint trial management report; (9) he was unaware trial was scheduled for April 16, 2012, as Mr. Mickey failed to advise him of the trial date; (10) he was advised by Mr. Mickey that trial was set for May 16, 2012; (11) he planned to meet with Mr. Mickey on May 16, 2012, to go over information for that day's trial; (12) he could not reach Mr. Mickey by phone on May 16, 2012, so he went directly to the courthouse; (13) he waited in the hallway outside courtroom 307 and saw Mr. Whitten, although he did not attempt to speak to him directly; (14) he was still waiting when Mr. Mickey

called and told him he was having heart issues and cold sweats; (15) he was told by Mr. Mickey that Judge Price's judicial assistant told him to go to the hospital and to send medical verification to the judge; (16) he was told by Mr. Mickey the case was going to be continued and not to enter the courtroom; (17) he heard nothing more from Mr. Mickey until after the default had been entered; (18) he was unaware Mr. Mickey had personal issues distracting him from his practice and this case in particular; (19) he would have hired another attorney if he knew about Mr. Mickey's personal problems. (CP 151-55). In his declaration, Mr. Olsen provided financial information rebutting the court's findings as to income, amount of child support ordered, back child support paid, income tax exemptions, travel expenses, property distribution, and attorney fees. (CP 155-58). He also pointed out the lack of verification supporting payment for out-of-pocket birth expenses and health insurance premiums. (*Id.*).

Mr. Olsen declared the default and final orders were "extremely prejudicial to [him] and [he did] believe the court would have made the same findings and orders if it had all of the information." (CP 155). He also stated: "Had the matter proceeded to trial, the outcome would have been significantly,

materially different." (CP 158). In the meantime, the court entered judgment on October 11, 2012, against Mr. Olsen for past due child support, attorney fees and costs, medical costs, and interest. (CP 196).

After hearing oral argument, the court denied the CR 60(b) motion to vacate because Mr. Olsen "failed to satisfy any of the necessary requirements mandated by CR 60 for vacation of a judgment in that the points of contention raised by the Petitioner are matters which should have been properly raised on appeal and/or reconsideration, but not in a CR 60 motion to vacate." (CP 221).

This appeal follows. (CP 223).

III. ARGUMENT

A. The court erred by denying Mr. Olsen's CR 60(b) motion to vacate default and final orders.

CR 60 provides in relevant part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly discovered evidence; Fraud; etc. On motion and on 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:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

. . .

> The motion shall be made within a reasonable time and for reasons (1), (2), or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

Mr. Olsen's motion to vacate was based on an irregularity in obtaining the judgment under CR 60(b)(1). The final orders were entered on June 29, 2012, and the motion to vacate was filed on August 10, 2012, within the 1-year time limit. Although the trial court determined the appropriate remedy was an appeal or a motion for reconsideration, the trial court's decision on the CR 60(b) motion to vacate is certainly appealable and will be reviewed for an abuse of discretion. *C. Rhyne & Assocs. v. Swanson*, 41 Wn. App. 323, 325, 704 P.2d 164 (1985). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 619, 224 P.3d 795 (2009).

It is true that an appeal from the denial of a CR 60(b) motion is not a substitute for appeal from the judgment, but the denial of that motion is properly before this Court. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 452, 618 P.2d 533 (1980). More importantly here, resolution of the issue as to whether the trial court's order of

default, which led to the final orders being entered without any evidence from the defaulted party, Mr. Olsen, controls the propriety of those final orders. *Swanson*, 41 Wn. App. at 327-28. If the order of default should be vacated under CR 60(b) for an irregularity in the proceedings, the subsequent judgment must also be vacated and the case remanded for further proceedings. *Id.*

It cannot be disputed that the court entered an order of default. (CP 91). The fact that testimony was taken does not change the character of the default judgment to a hearing on the merits. *Stanley v. Cole*, 157 Wn. App. 873, 239 P.3d 611 (2010), is instructive, but not controlling as claimed by Ms. Olsen. (10/26/12 RP 89-90). Courts apply CR 60(b) more liberally to judgments by default than those on the merits. *Pybas v. Paolino*, 73 Wn. App. 393, 399, 869 P.2d 427 (1994). The *Stanley* court determined an arbitration hearing was a hearing on the merits even when one party was absent. 157 Wn. App. at 880. The critical difference in Mr. Olsen's case, however, is that the court entered an order of default against him, unlike in *Stanley*, where there was no such order. Indeed, CR 55(b)(2) contemplates the taking of evidence when a default is entered and default judgment is sought for an amount uncertain. That is this case. The final orders were

not entered after a hearing on the merits and instead constituted a default judgment against Mr. Olsen.

Errors of law may not be corrected by a CR 60(b) motion to vacate, but must be raised on appeal. *In re Marriage of Tang*, 57 Wn. App. 648, 654, 789 P.2d 118 (1990). Mr. Olsen, however, does not seek to correct any errors of law. Rather, he argues there was an irregularity under CR 60(b)(1). Irregularities that can be considered under that rule are "those relating to want of adherence to some prescribed rule or mode of proceeding." *Id.* Cases relying on an irregularity typically involve procedural defects unrelated to the merits. *Id.* (citing 4 L. Orland, Wash. Prac., Rules Practice § 5713 at 543 (3d ed. 1983)). This is precisely the category of irregularity claimed by Mr. Olsen. The defect here was procedural, involving his attorney's disability and gross negligence, which had nothing to do with the merits of the case.

An attorney's negligence or incompetence is not a sufficient ground to vacate a judgment or decree. *Stanley*, 157 Wn. App. at 886-87. But this is not a case involving mere negligence or incompetence of Mr. Olsen's counsel. Action or inaction of an attorney that is not based solely on incompetence or deliberate inattention can provide grounds for vacating a final order. *Barr v.*

MacGugan, 119 Wn. App. 43, 47-48, 78 P.3d 660 (2003) (addressing CR 60(b)(11) irregularities extraneous to the court's action or that go to the question of the regularity of the proceedings).

Here, as in *MacGugan*, the sins of the lawyer were visited on the client. In *MacGugan*, the lawyer failed to comply with a discovery order because he suffered from a disability – not incompetence, neglect, or deliberate inattention. 43 Wn. App. at 47. Although the law favors resolution of cases on their merits, the merits of Mr. Olsen's case were never addressed in the hearing where only Ms. Olsen presented evidence. *See Lane v. Brown & Haley*, 81 Wn, App. 102, 107, 912 P.2d 1040, *review denied*, 129 Wn.2d 1028 (1996).

The *MacGugan* court turned to the federal courts for guidance in addressing the circumstances in which a lawyer's mental illness or disability could be grounds for vacating a judgment under CR 60(b). 43 Wn. App. at 47. It cited *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002), in which the court held that an attorney's gross negligence may be grounds to set aside a judgment under F. R. Civ. Pro. 60(b)(6), the federal "catch-all" counterpart to CR 60(b)(11). Under *Tani*, relief could be granted

where the attorney's conduct essentially "vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of the attorney." 282 F.3d at 1171. The *MacGugan* court noted:

> This decision is in accord with the majority of federal courts, including those that have considered an attorney's mental illness or other disability as grounds for granting relief to an unaware client. [cite omitted]. 43 Wn. App. at 47.

It stated CR 60(b)(11) applied only in extraordinary circumstances relating to irregularities which are extraneous to the action of the court or go to the question of the regularity of the proceedings. *Id.* The application and consideration of what constitutes an irregularity under CR 60(b)(11) are in essence the same as in CR 60(b)(1). *In re Marriage of Tang*, 57 Wn. App. at 654. Thus, the holding in *MacGugan* applies as well to this case involving CR 60(b)(1).

Although finding it not necessary to consider whether gross negligence could constitute valid grounds to vacate a judgment, the *MacGugan* court held:

> The point discussed in *Tani* that is most pertinent here is that there is no basis for attributing the attorney's "acts" to the client when the agency relationship has disintegrated to the point where as a practical matter there is no representation. Accordingly, in recognizing this exception, we limit

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> it to situations where an attorney's condition effectively deprives a diligent but unknowing client of representation. 43 Wn. App. at 48.

Mr. Olsen was that diligent but unknowing client of a lawyer whose medical condition and/or disability effectively deprived him of representation. The record is replete with evidence of the attorney's health issues and his misrepresentations to the court and his client. As a practical matter, Mr. Olson's lawyer provided no representation to the client.

Circumstances arise where finality must give way to the even more important value that justice be done between the parties. *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 313, 863 P.2d 1377 (1993), *review denied*, 124 Wn.2d 1006 (1994). "CR 60 is the mechanism to guide the balancing between finality and fairness." *Id.* As in *Suburban Janitorial*, it would be a perversion of the salutary purposes of the rule to uphold the finality of a default and final orders when Mr. Olsen has prima facie established he had no representation from counsel and suffered great prejudice in not being able to present evidence of viable defenses on the merits due to the action and inaction of his erstwhile lawyer. *Id.* at 305, 313. So viewed, the trial court abused its discretion by denying the motion to vacate because its decision

was manifestly unreasonable and not based on tenable grounds. *Boguch*, 153 Wn. App. at 619.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Olsen respectfully urges this Court to reverse the denial of his CR 60(b) motion to vacate default and final orders and remand for further proceedings.

DATED this 21st day of August, 2013.

Respectfully submitted,

Kenneth H. Kato

Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on August 21, 2013, I served by first class mail, postage prepaid, a copy of the brief of appellant on Michael D. Franklin, Kelly Konkright, and Terence R. Whitten, Lukins & Annis, 717 W. Sprague, Suite 1600, Spokane, WA 99201.

Kenneth H. Kato