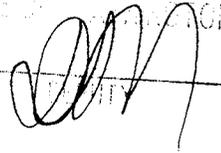


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STATE OF WASHINGTON

BY 

No. 35109-9-II

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

JANELL KAY HENDERSON,

Cross-Appellant,

v.

RANDY GENE HENDERSON,

Appellant.

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APPELLANT'S BRIEF

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**I. Assignment of Errors**

- A. The burden of proof imposed by the Court on Appellant/Husband in Finding of Fact number 2.2 was in error. Once the Court decided to set aside the property division in the Decree of Dissolution entered by default, the Court should have determined the rights of the parties as if the Decree had never been entered, rather than requiring Husband to prove that no reasonable judge would have made the division of property and debts set forth in the default Decree. Finding of Fact 2.2 also erroneously states that the Court was required to value the parties' property as of the date of the Decree when determining whether the default Decree equitably divided the parties' assets.
- B. The Court erred in entering the legal conclusion set forth in Finding of Fact 2.4 that David Goggin's appraisal of the property as of March 15, 2006 was irrelevant. The Court erred in finding that it was required to consider only the value of the property as of the date of the default Decree.
- C. The Conclusions of Law set forth by the Court are also in error in that the Court fails to specifically vacate the division of property set forth in the default Decree.
- D. Conclusion of Law 3.1 and paragraphs 1 and 2 of the Order Modifying Judgment entered on June 16, 2006 are in error because the Court refused to consider Husband's evidence of the value of the marital home when calculating the Husband's marital lien against the equity in the marital home.

**II. Issues Related to Assignment of Errors**

- A. WHETHER THE COURT ABUSED ITS DISCRETION IN FAILING TO VACATE THE PROVISIONS OF THE DECREE OF DISSOLUTION ENTERED BY DEFAULT WHICH WERE INCONSISTENT WITH

THE REQUESTS IN WIFE'S PETITION?

- B. WHETHER THE TRIAL COURT ERRED IN FAILING TO DIVIDE THE PARTIES' PROPERTY AS IF THE DEFAULT DECREE HAD NEVER BEEN ENTERED?
- C. WHETHER THE TRIAL COURT ERRED IN VALUING THE MARITAL HOME AS OF FEBRUARY 2004, WHEN THE PARTIES SEPARATED?

**III. Statement of the Case**

Janell Henderson (hereinafter referred to as "Wife") filed a Petition for Dissolution in the Superior Court of Washington for Clark County on February 18, 2004. In paragraphs 1.8 and 1.9 of the petition, she requested that the Court divide the parties' assets and liabilities at a later date. The petition failed to list the parties' assets or liabilities or to set forth any proposal on division of assets or liabilities. (C.P. 1-7).

Wife filed a Motion for Default against Randy Henderson (hereinafter referred to as "Husband") on March 18, 2004 and obtained an Order of Default from the Court on the same date. Husband had been served with the Summons and Petition for Dissolution on February 20, 2004 and had failed to respond. (C.P. 14-18).

Husband believed that he and Wife would work out an agreement on splitting the equity in the home during the ninety day waiting period

before the dissolution could be finalized. (R.P. 70-71). In the time period after the petition for dissolution was filed, but before the final orders were entered, Husband continued to perform maintenance work at the marital home when Wife requested help, even though he no longer resided in the home. (R.P. 73).

On May 28, 2004, Wife's attorney presented final orders to the Court. In the declaration in support of entry of Decree of Dissolution, Wife stated that she believed that the division of property set forth in the Decree was fair and equitable. In the same declaration, Wife's attorney verified that the relief granted in the Decree was the same as that requested in the petition or had been stipulated to by both parties. (C.P. 19-20). The Decree granted the family home to Wife without providing for an award of any of the equity in the home to Husband. (C.P. 30-34).

In June 2004, Husband learned that the Decree awarded the marital home to Wife and he hired Attorney Mark Baum to vacate the Decree. Wife then threatened Husband that if he did not fire Mr. Baum, she would stop making the mortgage payments on the home and neither would receive anything from the equity in the home. Husband then fired Mr. Baum. (R.P. 74-75).

In December 2004, Wife told Husband that he would need to start helping with repairs to the marital home if he wanted to receive money from the sale of the home. While Husband was at the home to repair the furnace, he discovered that Wife was trying to refinance the home and was lying to him about selling the home. (R.P. 98-99).

Husband filed a Motion to Vacate the Distribution of Assets, Attorney Fees and Child Support Provisions in the Final Orders on January 19, 2005 because the specific division of property granted in the Decree of Dissolution was inconsistent with the requests in Wife's Petition for Dissolution. (C.P. 50-56). In its initial ruling on Husband's motion, the Court ruled that the Decree of Dissolution was not inconsistent with the prayer for relief in Wife's Petition for Dissolution, but found that Respondent had made a sufficient showing for fraud to allow for an evidentiary hearing on that basis. In its reconsideration of its ruling, the Court wrote:

I grant reconsideration, but on grounds slightly different from those urged by Respondent. Rather than holding that a general prayer cannot result in a specific decree, I hold that under the particular facts of this case, Respondent has made a showing that the award of the entire equity in the home to Petitioner was not a "fair and equitable division" of the assets of the marriage, and that therefore the decree deviated from the prayer. By holding that Respondent has "made a showing," the court does not conclude that the

division was not fair, but rather finds that Respondent should be entitled to litigate this issue, and will bear the burden of proof to disprove the fairness of the distribution. In other words, Respondent must prove that no reasonable judge would have made such a distribution. (C.P. 117-119).

The Court held an evidentiary hearing on Husband's motion in April 2006. At the trial, each party presented expert testimony from appraisers concerning the value of the marital home. David Goggin, testifying on Husband's behalf, testified that the property was worth \$350,000 in March 2006. (R.P. 33). Mr. Goggin noted that there had been rapid appreciation in property values in Clark County, Washington from 2004 to 2006. (R.P. 34). Michael Metcalf testified on Wife's behalf. According to Mr. Metcalf, the property was worth \$219,000 in February 2004 (R.P. 34), was worth \$244,500 in February 2005 (R.P. 47) and was worth \$324,000 on March 24, 2006. (R.P. 113). Mr. Goggin testified that he believed that Mr. Metcalf's appraisals for 2004 and 2005 were low because of the age of the comparable sales used and the failure to adequately adjust for the smaller lot sizes of some of the comparable sales. (R.P. 35-47).

At trial, Husband requested to be awarded \$75,000 to \$77,000 from the equity in the house. (R.P. 101). Wife's position was that it was fair and equitable for her to receive all of the equity in the home and to

receive her stock options from employment and her pension. (R.P. 232-256). The stock options and pension had not been addressed in the Decree of Dissolution. (C.P. 139).

Husband's proposal that he receive at least \$75,000 from the equity in the home was based on Mr. Goggin's appraisal of the family home as having a value of \$350,000. In rejecting Husband's evidence concerning the value of the family home, the Court wrote:

If this were a trial on the dissolution petition, which Respondent waived by defaulting, the court would attempt to determine a fair market value of the home by considering all the evidence. Where, however, the issue is whether or not the award fits the wide borders of reasonableness, the court's chore is to decide whether Petitioner's valuation is one which could be found; that is, is it supported by credible evidence?

The answer to that question is clearly, yes. Mr. Metcalf is an accredited, experienced, professional appraiser, who utilized an accepted professional method for making his evaluation. A reasonable judge could have accepted his opinion on value. (C.P. 129-130).

Based on Mr. Metcalf's appraisal, the Court determined that the division of property in the decree was not fair and equitable:

In short, a reasonable judge could have considered, at the time of the default, that the equity was \$24,000, and that each party's share, to be equal, would be \$12,000.00. That hypothetical reasonable judge could also have concluded that Respondent owed Petitioner one-half of the property taxes plus one-half the loan from parents (\$650.00 + \$2,000.00) plus \$946.00 for child support. Therefore, a judge could have concluded that Petitioner's award

was not \$12,000.00 more than she was entitled to, but rather \$9,004.00 (\$12,000 - \$2,986.00).

These numbers, of course, are hypothetical – they assume in all instances that a judge, if presented with the issue, in a default setting, would have drawn all reasonable inferences in favor of Petitioner. That is the burden I placed on Respondent in my prior ruling. (C.P. 130 - 131).

The Court determined that the disproportionate award of property to Wife in the default decree was not fair and equitable and granted Husband a marital lien against the family home in the amount of \$9,000.00. (C.P. 131). The Court also divided Wife's pension and stock options account, which were omitted from the default Decree. (C.P. 131-132).

Husband filed a motion for clarification/reconsideration, asking the Court to clarify whether the Court had vacated the divorce decree in regards to the property distribution. Husband also asked for clarification of the use of a "hypothetical reasonable judge" standard in determining the amount of property to be awarded to Husband. (C.P. 134).

The Court indicated that its ruling "should not be characterized as vacating the decree and starting over ... obviously it isn't what I did." (R.P. 295). The Court stated that because Husband chose to default, he had no right to have input into the proposed distribution of property, other than the fact that he was promised a fair and equitable distribution. (R.P.

294-295). By defaulting, the Court found that Husband had waived his right to contest a reasonable value of the marital property, as established by Mr. Metcalf's appraisal. (R.P. 296).

**IV. Summary of Arguments**

The Court abused its discretion in failing to vacate the provisions of the Decree of Dissolution entered by default which were inconsistent with the requests in Wife's Petition for Dissolution. When a Decree entered by default exceeds the relief requested in the Petition, the Court must vacate the provisions which are inconsistent with the Petition.

Once a Court vacates a Decree, the Court should decide the case as if the Decree had never been entered. The Court erred in refusing to consider evidence of the value of the marital home presented by Husband based upon the reasoning that Husband had waived his right to present such evidence by failing to respond to the Petition. The Court also erred in failing to make a fresh determination concerning the division of property, but instead, making a division based on what the Court believed a "hypothetical reasonable judge" would have done at the time that the default Decree was entered.

The Court should have valued the marital home as of the date of the evidentiary hearing in April 2006, instead of the date of the parties'

separation in February 2004. The evidence demonstrated that the home's value increased considerably during that time as a result of rapid appreciation in home prices in Clark County, rather than due to any separate contributions from Wife.

**V. Argument**

- A. THE COURT ABUSED ITS DISCRETION IN FAILING TO VACATE THE PROVISIONS OF THE DECREE OF DISSOLUTION ENTERED BY DEFAULT WHICH WERE INCONSISTENT WITH THE REQUESTS IN WIFE'S PETITION.

When entering a judgment by default, the law is well-settled that a court may not grant relief in excess of or substantially different from that described in the complaint. *Sceva Steel Bldgs. Inc. v. Weitz*, 66 Wn.2d 260, 262, 401 P.2d 980 (1965); *Stablein v. Stablein*, 59 Wn.2d 465, 466, 369 P.2d 174 (1962); *In re Marriage of Campbell*, 37 Wn.App. 840, 845, 683 P.2d 604 (1984); *In re Marriage of Thompson*, 32 Wn.App. 179, 183-184, 646 P.2d 163 (1982); *Columbia Vly. Credit Exch., Inc. v. Lampson*, 12 Wn.App. 952, 954, 533 P.2d 152 (1975). Relief granted in excess or substantially different from that requested in the complaint without notice and an opportunity to be heard denies procedural due process. *Conner v. Universal Utils.*, 105 Wn.2d 168, 172-173, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins. Co.*, 81 Wn.2d 403, 408, 502 P.2d 1016

(1972); *Ware v. Phillips*, 77 Wn.2d 879, 884, 468 P.2d 444 (1970); *State ex rel. Adams v. Superior Court*, 36 Wn.2d 868, 220 P.2d 1081 (1950).

To the extent that a default judgment exceeds relief requested in the complaint, that portion of the judgment is void. *Stablein, supra*, at 466. Void judgments have long been recognized as the type of irregularity justifying a motion to vacate. *In re Marriage of Hardt*, 39 Wn.App. 493, 495, 693 P.2d 1386 (1985).

In *In re Marriage of Johnson*, 107 Wn.App. 500, 27 P.3d 1203 (2001), the wife filed a petition for dissolution proposing that each party would receive half of the \$280,000 value of the marital home without indicating how the division of equity would be accomplished. She obtained an Order of Default against Husband and the Decree of Dissolution entered by the Court made Wife a judgment creditor against Husband, with a judgment of \$140,000 accruing 12% per annum interest. The Decree also required Husband to sign a deed of trust in Wife's favor in the amount of \$140,000.

In *Johnson*, in a Division II opinion authored by Dean Morgan, the Court of Appeals reversed the trial court's denial of Husband's motion to vacate, finding that the relief granted in the default Decree varied substantially from the relief requested in Wife's Petition for Dissolution.

The Petition did not allege that Husband would owe a \$140,000 debt, that judgment would be entered on that debt with interest at 12% per annum or that Husband would be required to secure the debt with a deed of trust. Because the Petition provided inadequate notice to Husband of the relief sought, Husband's procedural due process rights were violated, the Decree was void with regard to division of the marital home and it should have been vacated by the trial court.

This case presents even stronger reasons to vacate the Decree than those found in *Johnson*. Wife's Petition for Dissolution in this case stated only that "the division of property should be determined by the court at a later date." (C.P. 4). The prayer for relief in Wife's petition requested a Decree of Dissolution to "divide the property and liabilities." Wife's petition did not list the community property to be divided by the Court, the values of the property or how the property would be divided. (C.P. 7). The trial court found that Wife requested a "fair and equitable" division of property in her petition and that the disproportionate award of the equity in the marital home to Wife in the default decree exceeded that request. However, the Court did not vacate the Decree, but granted a marital lien against the family home to Husband in the amount of \$9,000 based on

what it determined a “reasonable” judge would have ordered at the time the default Decree was entered.

The Court abused its discretion in failing to vacate the division of property in the default Decree. The relief granted was substantially different from that requested in the generic petition for dissolution. As a result, Husband was denied procedural due process when the default Decree was entered against him. The provisions of the default Decree which differed from the relief requested in the Petition were void and should have been vacated by the Court under CR 60(b)(5).

B. THE TRIAL COURT ERRED IN FAILING  
TO DIVIDE THE PARTIES' PROPERTY  
AS IF THE DEFAULT DECREE HAD  
NEVER BEEN ENTERED.

The trial court should have vacated the provisions of the default Decree which were different from Wife's requests in the Petition for Dissolution. Once the judgment was vacated, the vacated judgment should have been given no effect and the rights of the parties should have been left as though the judgment had never been entered. *In re Marriage of Leslie*, 112 Wn.2d 612, 618, 112 Wn.2d 612 (1989).

In this case, the trial court failed to treat the default Decree as if it had never existed. Instead, the Court based its division of property on

what it determined a “hypothetical reasonable judge” could have considered at the time of the default. Based on this standard, the trial court refused to consider all of the evidence concerning the value of the family home. The Court noted that it would have considered such evidence in a trial on the petition for dissolution, but that its ruling was based on what a hypothetical judge would have decided in a default setting, drawing all reasonable inferences in favor of Petitioner/Wife. (C.P. 129-131). The trial court reasoned that because Husband chose to default, he had no right to have input into the proposed distribution of property, other than the fact that he was promised a fair and equitable distribution. (R.P. 294-295). By defaulting, the Court found that Husband had waived his right to contest a the value of the marital property, and the Court adopted Mr. Metcalf’s appraisal of \$219,000 in February 2004 as a reasonable value. (R.P. 296).

Because a vacated decree should be treated as if it had never existed, the Court should have allowed a new trial on the issue of valuation and distribution of the marital home. The Court erred in refusing to consider Husband’s evidence concerning the value of the marital home.

C. THE TRIAL COURT ERRED IN VALUING THE MARITAL HOME AS OF FEBRUARY 2004, WHEN THE PARTIES SEPARATED.

The trial court determined the amount of Husband's marital lien against the family home based on a determination that the value of the home was \$219,000. This was the value established through the testimony of Mr. Metcalf as of February 2004, when the parties separated. As set forth above, the Court found that Husband had waived his right to present evidence of the home's value by failing to respond to Wife's petition. In fact, the Decree should have been vacated and treated as if it had never existed. The Court should then have considered all evidence concerning the value of the home and determined that the marital home had a value of \$350,000 when calculating Husband's marital lien.

In Washington, courts have discretion in determining whether to value the property as of the date of separation, date of trial, date of distribution of property or some other date in between those dates. *WSBA Family Law Deskbook*, §31.2(4). In some situations,

...the only equitable approach is to value an asset as of the date of settlement or trial. For example, if a community property account contains \$50,000 as of the date of separation and the account accrues \$10,000 in interest between the date of separation and the date of trial, the account should be valued at \$60,000, not \$50,000. *Id.*

In this case, as in the above example of the interest bearing account, the increase in the home's value was not due to Wife's separate

contributions but due to rapid appreciation in home prices in Clark County from 2004 to 2006. Also, there was evidence that Husband continued to help with maintenance of the home after separation. Under these circumstances, the Court erred in valuing the home in the amount of \$219,000 as of the date of separation, instead of at \$350,000 as of the date of trial.

**VI. Request for Attorney Fees**

On appeal, this Court has discretion to award attorney fees and costs based on Husband's need for attorney fees and Wife's ability to pay. RCW 26.09.140.

Husband's testimony at trial indicated that he had no income in 2003 and earned \$13,475 in 2004. (R.P. 151-152). He testified that he was earning \$14/hour at a new job in April 2006. (R.P. 101). Husband indicated that Wife's income is twice as much as his income. (R.P. 161).

Based on Husband's financial need for fees, the Court should award fees under RCW 26.09.140. Husband will comply with RAP 18.1(c) by filing an updated affidavit of financial need ten days before oral argument.

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**VII. Conclusion**

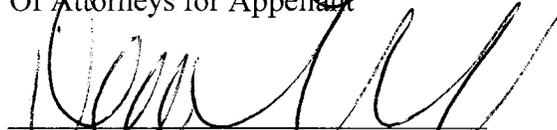
For the reasons stated above, the decision of the trial court should be reversed because the trial court abused its discretion in refusing to vacate the award of the marital home in the Decree of Dissolution and improperly limited the evidence that it considered in determining a fair and equitable division of the marital home. The Court should have valued the marital home as of the date of trial on Husband's motion to vacate and granted Husband's request for a marital lien in the amount of \$75,000 to \$77,000.

Dated this 16 day of October, 2006.

GREGERSON & LANGSDORF, P.S.



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Of Attorneys for Appellant



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CERTIFICATE OF SERVICE

On the 16 day of October, 2006, I certify that I served the foregoing Appellant's Brief on the attorney of record for Respondent by sending a copy by first-class mail to:

John M. Clark, Attorney for Cross-Appellant  
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Place: Vancouver, WA

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