

No. 35109-9-II

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

JANELL K. HENDERSON,

Cross-Appellant,

v.

RANDY GENE HENDERSON,

Appellant.

FILED IN  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY 

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APPELLANT'S REPLY BRIEF

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**I. Argument in Response to Brief of Cross-Appellant**

- A. CR 60(b)(5) GIVES THE COURT AUTHORITY TO VACATE THE PORTIONS OF THE DECREE OF DISSOLUTION WHICH WERE INCONSISTENT WITH THE REQUESTS SET FORTH IN THE PETITION FOR DISSOLUTION.

Cross-Appellant, Janell K. Henderson (hereinafter referred to as “Wife”) argues that the trial court abused its discretion in partially vacating the Decree of Dissolution entered by default. Wife argues that the trial court should not have been granted any relief from the Decree of Dissolution because the trial court did not find the existence of “mistake, inadvertence, surprise or excusable neglect” on the part of Husband or misrepresentation on the part of Wife.

Mistake, inadvertence, surprise or excusable neglect would be a basis for relief from the Decree under CR 60(b)(1) and misrepresentation would be a basis for relief under CR 60(b)(4). However, the trial court did not rely on these sections of CR 60. Instead, the trial court granted relief from the Decree based on the fact that the relief granted in the Decree differed from the relief sought in the petition. Wife’s petition sought a fair and equitable division of property. The Court found that the award of all of the equity in the marital home to Wife was not fair and equitable.

To the extent that a default judgment exceeds relief requested in the complaint, that portion of the judgment is void. *Stablein v. Stablein*, 59 Wn.2d 465, 369 P.2d 174 (1962). If a judgment is void, it may be vacated under CR 60(b)(5).

B. AWARDING ALL OF THE EQUITY IN THE MARITAL HOME TO WIFE WAS NOT A FAIR AND EQUITABLE DIVISION OF PROPERTY.

Wife argues that the award of the marital home to her was fair and equitable because she earned more than Husband in the latter years of the marriage. However, the cases cited by Wife do not support this argument. In *Clark v. Clark*, 13 Wn.App. 14 (1973), a disparate award of property to the wife was found to be fair and equitable because of Husband's dissipation of community assets due to his alcohol consumption and "profligate lifestyle." There is no allegation in this case that Husband dissipated community assets. In *Baker v. Baker*, 80 Wn.2d 736 (1972), another case cited by Wife in support of her argument, the Court considered the economic circumstances of the parties at the time of their divorce and awarded more property to Wife because her prospects for future earnings were more limited than those of her Husband. A disparate award of property to a lower earning spouse has been found to be fair and equitable in other cases. See *In re Marriage of Crosetto*, 82 Wn.App. 545,

918 P.2d 954 (1996); *Marriage of Donovan*, 25 Wn.App. 691, 612 P.2d 387 (1980); *Marriage of Rink*, 18 Wn.App. 549, 571 P.2d 210 (1977).

However, since Husband earned less than Wife at the time of the divorce, these cases would support an award of more than half of the community property to Husband, rather than an award of substantially all of the property to Wife. Wife's argument that the higher earning spouse who contributes more to the acquisition of community property should be awarded a larger share of that property was rejected in *Marriage of DeHollander*, 53 Wn.App. 695, 770 P.2d 638 (1989).

Wife asks the Court to consider that Husband's inability to pay his child support after the Decree as a reason to deny his motion to vacate. However, the events occurring after entry of the Decree are irrelevant to the determination of whether the default Decree granted relief consistent with the requests in Wife's petition. Also, this is not a case in which the custodial parent received a disparate award of property in lieu of child support. *See In re Marriage of Babbitt*, 50 Wn.App. 190, 747 P.2d 507 (1987).

C. VOID PORTIONS OF A DECREE OF DISSOLUTION  
MAY BE CHALLENGED AT ANY TIME.

Wife also argues that Husband should have been denied relief because of the seven month length of time between when the default Decree was granted and when Husband filed his motion. However, a provision of a default Decree that is void because it is not consistent with the relief requested in the petition may be vacated irrespective of the lapse of time between the entry of the judgment and the filing of the motion to vacate. See *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wn. 357, 83 P.2d 221 (1938). Thus, in *Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989), the Supreme Court reversed a Court of Appeals decision which had denied relief on a motion to vacate filed eight years after entry of the default decree. Because the default Decree had included relief not requested in the petition for dissolution, the Supreme Court found that the void portion of the Decree could be attacked at any time. Similarly, in *Marriage of Hardt*, 39 Wn.App. 493, 693 P.2d 1386 (1985), a five year old dissolution decree which included a child support provision not requested in the petition for dissolution was properly vacated.

In *Marriage of Markowski*, 50 Wn.App. 633, 749 P.2d 754 (1988), the Court held that a motion to vacate a void judgment may be brought at

any time and granted relief when the motion had been filed a year after entry of the judgment. The Court also rejected the argument that relief from the judgment should have been denied on the grounds of estoppel because the husband paid child support pursuant to the decree and had attempted to exercise visitation allowed under the decree. Similarly, in this case, the Court should reject Wife's argument that Husband's motion to vacate should be denied because he sold a tractor awarded to him in the Decree.

D. IN GRANTING SOME RELIEF FROM THE DECREE OF DISSOLUTION ENTERED BY DEFAULT, THE TRIAL COURT ERRED IN LIMITING ITS ANALYSIS TO WHAT A HYPOTHETICAL REASONABLE JUDGE WOULD HAVE ORDERED AT THE TIME OF THE DEFAULT DECREE.

Wife argues that the Court correctly limited its determination of a fair and equitable division of property based upon evidence that a "hypothetical reasonable judge" could have considered at the time of the default, drawing all reasonable inferences in favor of Wife. Based upon this reasoning, the Court found that Husband had waived his right to contest the value of the marital home.

As set forth in *Marriage of Leslie, supra*, a vacated decree should be treated as if it had never existed. Therefore, 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.

The Court's decision that it was constrained to consider only the value of the home at the time of separation was also in error. Once the Decree was vacated, the Court could have fixed the value of the home 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.

**II. 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 23<sup>rd</sup> day of February, 2007.

GREGERSON & LANGSDORF, P.S.

  
LORI A. FERGUSON, WSB #29018  
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

On the 22 day of February, 2007, I certify that I served the foregoing Reply Brief on the attorney of record for Respondent by sending a copy by first-class mail to:

John M. Clark, Attorney for Cross-Appellant  
222 East 4<sup>th</sup> Plain Blvd.  
Vancouver, WA 98663

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Place: Vancouver, WA

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