

No. 36657-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
08 APR 21 AM 9:07
STATE OF WASHINGTON
BY DEPUTY

In re the Marriage of
CHRISTA CATHERINE SMITH,

Respondent,

and

CHRISTOPHER ARTHUR SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE JAMES E. RULLI

BRIEF OF RESPONDENT

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& GOODFRIEND, P.S.

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I. INTRODUCTION

The husband was personally served, appeared, and responded to the wife's pleadings, seeking affirmative relief. Yet on appeal he now claims lack of personal jurisdiction. The real question is whether the trial court abused its discretion in striking the husband's pleadings and finding him in default after "giving the husband time and opportunity again and again to bring himself in compliance with the discovery orders before imposing the severe sanction of default." (Finding of Fact 2.20, CP 518) This court should affirm the trial court's orders and award attorney fees to the wife for having to respond to this appeal.

II. RESTATEMENT OF FACTS

While the husband complains about nearly every procedural decision made by the trial court, he fails to substantively challenge any of the trial court's factual findings and the resulting final orders. This restatement of the case provides a fair characterization of the facts presented to the court and the substantial evidence that the trial court relied on in making its decision:

A. The Parties Were Married For Ten Years And Have One Daughter. The Husband Was Successfully Employed In The Entertainment Industry. The Wife Did Not Work Outside The Home During The Marriage.

Respondent Christa Smith, age 49, and appellant Christopher Smith, age 47, were married on October 29, 1997. (CP 705) The wife has two teenage sons from a previous marriage. (RP 191-92) The parties have one child of their marriage, a daughter age 9 (DOB 11/20/98). (CP 704)

The wife was diagnosed with Obsessive Compulsive Disorder when she was 22 years old. (RP 239) The wife also suffers from a panic disorder, agoraphobia, and migraine headaches. (CP 2) The wife is disabled, has not worked outside of the home since 1989, and qualifies for and receives supplemental social security income due to her disability. (RP 201-02) Her disability does not affect her ability to parent, and both parties proposed that the wife be designated as the primary residential parent of their daughter. (See CP 2, 36)

The husband has a history of drug and alcohol abuse and depression. (CP 2-3; RP 198-99) Despite his substance abuse, the husband has had a successful career in the entertainment industry. The husband was general manager at a sound recording

studio in Hollywood, California, and eventually became a twenty-five percent owner and the managing partner of the studio. (RP 206) During the years that the husband was with the recording studio, he earned a base salary of between \$110,000 and \$120,000 and additional disbursements of between \$30,000 and \$75,000 annually. (RP 208)

In August 2004, the husband was bought out of the recording studio for approximately \$400,000. (CP 114; RP 206-07) The husband signed a two-year non-compete agreement, which ended in August 2006. (CP 114; RP 205-07) At the time of trial, on May 16, 2007, it was unclear whether the husband had resumed working in the recording industry, because he had not answered any discovery requests or appeared for a scheduled deposition. (RP 207)

The parties lived together in California until 2003, when they purchased a home in Battleground, Washington. (CP 2, 4) It was the original intent for the entire family to relocate to Washington and for the husband to commute to California for a minimum of one week per month. (CP 4) After the mother and children moved to Washington, the husband remained in the family residence in California, visiting the family infrequently in Washington. (CP 3-4)

The wife described the husband as “totally remov[ing] himself physically and emotionally from our family” in Washington State.

(CP 3)

B. The Parties Filed Cross-Petitions For Dissolution In California And In Washington. California Dismissed The Husband’s Action In Favor Of The Wife’s Action In Washington.

In early 2006, the wife told the husband that she intended to file for divorce. (CP 436) The husband, who was in California at the time, told the wife that he planned to fly to Washington, that “he was going to take [their daughter],” that the wife would never see their daughter again, that “he would kick the [wife’s sons] out on the street,” and that “he would kill [the wife].” (RP 194) The wife believed the husband’s threats. (RP 195) She sought a protection order on February 28, 2006. (CP 434; RP 193-95)

On March 22, 2006, the court entered a one-year order of protection against the husband. (CP 438) The husband was

allowed limited telephone contact with the daughter, (CP 442, 443), which was later expanded to supervised visitation. (CP 110)¹

After the husband was served with the wife's petition for a protection order, he filed a petition for dissolution in California on March 1, 2006. (Supp. CP ____, Sub No. 15) The wife filed a petition for dissolution in Washington on March 7, 2006. (CP 704) On March 13, 2006, the husband was personally served in California with the Washington petition. (CP 712)

On March 29, 2006, the Washington court denied the husband's motion to dismiss the Washington dissolution proceedings, but noted that it "does not intend to usurp any

¹ The protection order entered on March 22, 2006 restrained the husband from contacting the parties' daughter. (CP 438-41) On April 13, 2006, the court modified the protection order to allow telephone contact during established dates and times. (CP 442) On April 19, 2006, the court granted the father supervised visitation with the daughter two days per week for two-hour blocks of time. (CP 110)

The husband did not visit with the daughter until three months after the order allowing supervised visitation was entered. (CP 158) The July 10, 2006 visit occurred a few days before his interview with Family Court Services, which was preparing a recommendation for the court regarding the parenting schedule. (CP 158; RP 194) This was the first and last visit that the husband had with the daughter during the dissolution proceedings. (See RP 194)

During a telephone call on February 14, 2007, the father told the daughter that he was in Washington and was "watching her through her bedroom window." (CP 349) The daughter was distraught over this phone call. (CP 349) The father unilaterally terminated his contact with the daughter after this phone call. (RP 195)

California rights and it will be up to that court to determine how it proceeds.” (Supp. CP ____, Sub No. 21) On May 1, 2006, the California court dismissed the husband's California action in its entirety. (CP 760-61)

On November 27, 2006, in response to the wife's petition for dissolution, the husband admitted that Washington had jurisdiction over the parties' marriage because “the respondent [husband] has resided in and owns property in this state.” (CP 705, 767) The husband also admitted that Washington had jurisdiction over their daughter because Washington was her “home state.” (CP 706, 767) The husband asked the Washington court to dispose of the parties' property and liabilities, establish child support, and approve a parenting plan for their daughter. (CP 767)

C. The Husband Refused To Provide Ordered Financial Support To The Wife And Daughter.

On May 15, 2006, the husband submitted a financial declaration stating that he had “available” assets of \$303,947.86, including \$155,347.85 “on deposit in banks.” (CP 128) On May 17, 2006, the court ordered that the wife receive \$3,600 in monthly support from the husband. (CP 138) The husband was to pay the monthly mortgage of \$2,478.45 on the Washington family residence

directly as part of the monthly support provided to the wife. (CP 128, 138) The husband was also ordered to pay the family's medical insurance. (CP 138)

The husband failed to pay support to the wife and failed to pay the family's medical insurance, causing the wife to file multiple motions for contempt. (See CP 135-37, 168-71, 177-80, 226-31, 284-89) Without any support from the husband, the wife had only her social security income of approximately \$1,700 a month to support her and the children. (RP 203) As a result of the husband's violations, the wife and children were placed in a dire financial situation, forcing her at times to borrow money from her parents. (CP 136, 169-70, 287) On December 15, 2006, the trial court found the husband in contempt and ordered the husband to pay attorney fees. (CP 213-17)

D. The Husband Refused To Answer Discovery Requests And Failed To Appear For A Scheduled Deposition. After Giving The Husband Multiple Opportunities To Produce Discovery, The Trial Court Eventually Found The Husband In Default.

The husband's belabored recitation of dates and motions in his "Statement of the Case" minimizes and loses sight of the reasons the trial court eventually struck his pleadings and held him in default. Nine months passed from the time the husband was first

served with discovery requests until the trial court finally found him in default for his utter refusal to produce discovery. The proceedings eventually led the trial court to order the most "severe" sanction – striking the husband's pleadings:

Date	Action	Notice	Decision-maker
5/17/06	Discovery Requests; Answers due 6/19/06 (CP 743, Exhibit 7)	Served on husband's attorney Alison Greene	
6/26/06	Inquiry regarding status (Exhibit 7)	Email to attorney Greene (unanswered)	
7/21/06	Inquiry regarding status (Exhibit 7)	Email to attorney Greene (unanswered)	
8/10/06	Inquiry regarding status (Exhibit 7)	Email to attorney Greene (unanswered)	
9/13/06	"Order re Motion for CR 37 Relief"; Husband ordered to provide discovery by 9/21/2006 (CP 747-48)	Motion served on counsel by courier. (CP 742) "Service [of order] Accepted" by attorney Greene	Agreed Order, Judge Poyfair
10/02/06	Order finding husband failed to provide discovery pursuant to 9/13/2006 order (CP 164-65)	Unrepresented - No objection to lack of actual notice of this order (See RP 29)	Judge Rulli
<i>"The court will consider further sanctions, including terms and striking [husband's] pleadings, and entering a Decree of Dissolution by default" if husband fails to comply with order." (CP 165)</i>			
10/13/06	Notice of Deposition of Husband (CP 487, 489)	Served on husband by mail	

11/13/06	Husband failed to appear for deposition. (CP 485)		
11/22/06	Hearing on wife's motion for contempt (RP 12-23)	Husband's attorney Marie Tilden acknowledged receipt of motion (CP 200) and present at hearing. (RP 13)	Judge Rulli

"[The court] will consider further sanctions, such as striking [husband's] pleadings if husband fails to comply with orders." (RP 21-22)

12/15/06	Order finding husband in contempt of 9/13/06 and 10/02/06 orders. (CP 213-17)	Attorney Tilden appeared at hearing. (RP 24)	Judge Rulli
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"The [husband] may purge the contempt.. by completely answering the interrogatories propounded to him...by 12/31/06" (CP 215)

1/26/07	Hearing on wife's motion to strike husband's pleadings. (RP 35-53)	Attorney Tilden appeared at hearing. (RP 37)	Judge Rulli
2/16/07	Order striking husband's pleadings. (CP 271-72)	Attorney John Vomaka stands in for husband's attorney Terrance Lee during presentation of written order. (RP 55-59)	Judge Poyfair
3/23/07	Hearing on husband's motion to "void" order striking pleadings. (RP 134-54)	Attorney Lee appeared at hearing	Judge Rulli
4/13/07	Order denying husband's motion for relief (CP 421-23)	Attorney Lee appeared at presentation (RP 156)	Judge Rulli

E. After A Brief Trial, The Trial Court Divided The Parties' Assets Almost Equally, Awarded Spousal Maintenance And Child Support, And Entered A Parenting Plan.

After finding the husband in default, a trial date was set to divide the property and liabilities, award spousal maintenance and child support, and establish a parenting plan. (CP 792) Trial was held before Clark County Superior Court Judge James E. Rulli on May 16, 2007. (RP 177) The husband did not appear at trial. (RP 177) The trial court rejected the husband's attorney's request to participate in the trial by cross-examining witnesses and objecting to exhibits. (RP 185-87)

Based on the financial information that the wife had available to her, and despite her concern that there were in fact more assets that were secreted by the husband, the trial court was able to determine that the parties' marital estate was worth over \$2.6 million, and divided the assets almost equally. (Finding of Fact (FF) 2.21, CP 521-22)

The trial court also awarded maintenance to the wife, who had not worked for nearly twenty years, recognizing that she was disabled and unable to work outside of the home. (FF 2.12, CP 514-16) The trial court determined the husband's ability to pay based on the husband's historic income, since the husband failed

to provide any information regarding his current income. (FF 2.12, CP 515-16) Based on the trial court's findings on the income of the parties, the trial court also ordered the husband to pay monthly child support of \$887 for the parties' daughter. (CP 535-36)

The trial court designated the wife as the primary residential parent for the parties' child. (CP 495) The trial court ordered the father to have no contact with the child based on testimony that the father and child have no bond, as evidenced by his minimal contact with the child during the 14-month dissolution proceeding. (FF 2.18, CP 517) The trial court left its parenting decision open to modification if the father filed a motion. (CP 518) To date, the father has not sought additional residential time with the child.

The trial court's findings, conclusion and decree are attached as an appendix to this brief. The findings are verities on appeal because the husband failed to assign error under RAP 10.3(g). ***Marriage of Possinger***, 105 Wn. App. 326, 338, 19 P.3d 1109, *rev. denied*, 145 Wn.2d 1008 (2001) (unchallenged findings are verities).

After trial, the husband sought to encumber the properties awarded to the wife by filing *lis pendens* against those properties. (See CP 559-69) The court ordered the *lis pendens* cancelled and

revoked. (CP 700) The husband appeals this order, along with several other orders entered by the trial court. (CP 585-86)

III. MOTION TO DISMISS

This motion is made pursuant to RAP 10.4(d) and RAP 17.4(d). This court should dismiss the husband's appeal because he has been found in contempt for failing to comply with the decree. ***Pike v. Pike***, 24 Wn.2d 735, 167 P.2d 401 (1946). The husband did not seek to stay the trial court's orders, and has failed to comply with the court's order, resulting in a contempt citation. (Supp. CP ____, Sub no. 221)

In ***Pike***, the mother appealed a custody decree designating the father as the primary residential parent, removed the children from the jurisdiction, and refused to reveal their location. Our Supreme Court entered an order dismissing the appeal unless the mother complied with the decree, noting that it had "the right to dismiss an appeal in a case where the appellant is guilty of contempt of court." ***Pike***, 24 Wn.2d at 742.

The husband should not be allowed to pursue his appeal despite defying compliance with the court's order without supersedeas or stay. This court should dismiss the appeal because the husband is in contempt.

IV. ARGUMENT

A. The Trial Court Had Jurisdiction To Distribute The Parties' Assets And Liabilities.

1. The Court Had Personal Jurisdiction Over The Husband.

The husband claims that Washington lacked personal jurisdiction over him because there was “no valid service within the 90 days [of filing the petition] provided under RCW 4.16.170.” (App. Br. 21) First, RCW 4.16.170 deals with tolling statutes of limitations and is irrelevant. There is no “statute of limitations” for dissolving a marriage. Second, the husband has waived any defense of insufficient service as he failed to raise this issue prior to this appeal. *Boyd v. Kulczyk*, 115 Wn. App. 411, 415, 63 P.3d 156 (2003).

In *Boyd*, Division One held that the defendant waived the defense of improper service as matter of law when he never raised the defense prior to his appeal. 115 Wn. App. at 415-16. The defendant in *Boyd* had appeared, filed responsive pleadings, and participated in the proceedings without asserting the defense of insufficient service of process. 115 Wn. App. at 415. Likewise in this case, the husband appeared, participated in the proceedings, and responded to the petition, but never alleged that he was not

properly served. (See CP 22-28 (husband's declaration in response to wife's first motion for temporary orders at start of case); CP 766-69 (response to petition)) This court should reject the husband's belated claims of insufficient service and hold that he has waived this defense as a matter of law.

In any event, the husband was properly served with the wife's petition for dissolution. The wife's petition for dissolution was filed on March 7, 2006 in Washington (CP 704), and the husband was personally served on March 13, 2006 in California. (CP 712) Even if RCW 4.16.170 did apply in dissolution actions, service was timely under the statute.

Personal service outside the state requires that an affidavit be filed asserting that service cannot be made on the defendant within the state. RCW 4.28.185(4). The wife filed the required affidavit on August 18, 2006, swearing that it was not possible to serve the husband in Washington State because he was now living in California. (CP 744)

It is of no consequence that the RCW 4.28.185(4) affidavit was filed after the 90-day timeframe established under RCW 4.16.170. (App. Br. 21) The wife substantially complied with RCW 4.28.185(4) by filing her affidavit before judgment was entered.

Barr v. Interbay Citizens Bank of Tampa, 96 Wn.2d 692, 696, 649 P.2d 827 (1982) (“substantial and not strict compliance is sufficient where a proper affidavit is filed, although late” under RCW 4.28.185); ***Barer v. Goldberg***, 20 Wn. App. 472, 482, 582 P.2d 868, *rev. denied*, 90 Wn.2d 1025 (1978) (“No particular time of filing is required [for RCW 4.28.185(4)] as long as it precedes the judgment”); *see also* ***Ryland v. Universal Oil Co.***, 8 Wn. App. 43, 47, 504 P.2d 1171 (1972) (“the plaintiff substantially complied with RCW 4.28.185 even though the affidavit required by subsection (4) thereof was filed after the statute of limitations had run. A holding otherwise would be a sacrifice of substance to form”).

Finally, the husband complaint that the wife’s RCW 4.28.185(4) affidavit is defective because it fails to comply with CR 4(g)(6). (App. Br. 22) Civil Rule 4(g)(6) does not apply to RCW 4.28.185(4) affidavits, but to affidavits of service. The rule requires proof of service to be by “the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or before a clerk of a court of record.” CR 4(g)(6). Here, the wife filed proof of service on the husband consistent with CR 4(g)(6). (CP 712) The wife filed a sworn affidavit by the individual who

personally served the husband, and stating the documents served on the husband. (CP 712)

2. Washington Had Jurisdiction To Dispose Of The Parties' Property And Liabilities In The Dissolution Action.

Washington had personal jurisdiction over the husband and thus jurisdiction to dispose of the parties' property, including their California property, under RCW 26.09.080. Having personal jurisdiction over the parties, the trial court had power to order the performance of acts in a foreign state, including ordering the parties to cooperate in selling the California residence. Tegland, 14 Washington Practice: Civil Procedure, § 2.3, at 10 (First ed. 2003) (*citing* Restatement, (Second) Conflict of Laws § 53); *see also Donaldson v. Greenwood*, 40 Wn.2d 238, 251, 242 P.2d 1038 (1952) (“a court of equity, acting *in personam*, has jurisdiction to decree the conveyance of land situated in another state”); *Rhodes v. D&D Enterprises, Inc.*, 16 Wn. App. 175, 178, 554 P.2d 390 (1976). In fact, the husband specifically requested the court to dispose of the parties' property and liabilities in his response to petition. (CP 767)

The husband claims that the trial court had no discretion to either award spousal maintenance or find the existence of

community property because he alleges that the parties did not have a valid marriage. (App. Br. 29-30) But the husband acknowledged that the wife filed a “nunc pro tunc” decree that voided her earlier marriage. (CP 364) Further, the husband admitted in his response to petition that the parties were married on October 29, 1997. (*Compare* CP 705 and 766) In any event, the court has the same authority to award spousal maintenance and divide community property in a proceeding to declare the invalidity of a marriage as it does in a proceeding to dissolve the marriage. See RCW 26.09.080, 26.09.090.

B. The Husband Had Proper Notice Of All The Court’s Actions.

1. The Wife Properly Served Motions On The Husband.

The husband spends an inordinate amount of space complaining that he was not properly served with motions and orders. (App. Br. 6-12, 23-29) His complaints lack merit because in nearly every instance his attorney was present at the hearing, signed the order, and never complained of “improper service.”

For instance, the husband complains that the court entered an order on November 22, 2006 with “no proof of service of the court’s order on Mr. Smith anywhere in the court file.” (App. Br. 11)

The husband fails to mention that his attorney was present at the hearing when the order was entered. (RP 14-23) Further, in a declaration signed by the husband he stated that he “reviewed and received... the order dated November 22, 2006.” (CP 396)

The husband also complains that there is no “proof of service” of the February 16, 2007 order finding him in default and striking his pleadings. (App. Br. 14) But no rule requires a party to file proof of service of an order when the other party was represented at the hearing when the order was entered. See Civil Rule 5; see also *Davis v. Davis*, 15 Wn.2d 297, 300-01, 130 P.2d 355 (1942) (husband's attorney's appearance at show cause hearing defeated husband's claim of inadequate service of order to show cause).

The husband also complains that the wife served certain motions on his attorney by courier, asserting that “[s]ervice by courier is not provided for in the court rules.” (App. Br. 26) Civil Rule 5(b)(1) allows service to be made upon the attorney for a party “by delivering a copy to him... at his last known address.” Nothing in this rule prevents delivery at that address by courier. The husband's complaint is particularly without merit because his

attorney also served motions “by courier.” (See CP 359, 400, 406, 676)

The husband further complains that the wife served the husband by facsimile without prior written consent as required under CR 5(b)(7). (App. Br. 27-28) However, the husband’s citation to the record to support his claim of “facsimile service” actually shows that the wife served the motion on the husband’s attorney by courier – not facsimile. (See App. Br. 10, *citing* CP 189)²

Finally, the husband complains for the first time on appeal that the affidavit of service by mailing form utilized by the wife’s trial attorney does not “strictly comply” with the form provided by CR 5(b)(2)(B). (App. Br. 28-29) The husband complains that since the affidavit does not include an address, “there is no way to verify if Ms. Smith improperly mailed notice to one of the other addresses.” (App. Br. 29) The rule provides only that the affidavit of service “substantially” follow the form provided in the rule. See CR

² The husband actually cites to CP 21, referring to the document sub number in the index, as opposed to the clerk’s paper designation as required under RAP 10.4(f).

5(b)(2)(B). The wife's affidavit of service "substantially" complies with the form provided in the rule. (CP 198)

2. The Husband's Claim Regarding The Lack Of A Civil Rule 26(i) Conference Lacks Merit, And In Any Event Is Not Preserved.

The husband claims for the first time on appeal that a CR 26(i) conference did not occur prior to the trial court's first order compelling discovery. (App. Br. 6-8, 30-32) Arguments not made to the trial court should not be considered by the appellate court. RAP 2.5(a); ***Marriage of Studebaker***, 36 Wn. App. 815, 818, 677 P.2d 789 (1984) (absent any indication in the record that appellant advanced particular claim in substantive fashion at trial, it would not be considered on appeal). The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. ***Demelash v. Ross Stores, Inc.***, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001).

In any event, this case is distinguishable from ***Rudolph v. Empirical Research Systems, Inc.***, 107 Wn. App. 861, 28 P.3d 813 (2001), relied on by the husband. (App. Br. 30-32) In ***Rudolph***, the plaintiff, whose action was dismissed due to discovery violations, specifically raised the issue of the lack of a CR

26(i) conference in the trial court. 107 Wn. App. at 865. Here, there is no evidence that the husband challenged whether a CR 26(i) conference occurred prior to the wife filing her motion to compel, and the husband did not object to the relief requested by the wife.

In fact, the record shows that husband agreed to the order compelling him to provide full answers to the wife's interrogatories by a date certain or face "additional terms." The order was signed by his counsel, "service accepted, form and content approved and consent to entry granted," nearly a week before it was entered by the court. (CP 748)

While an attorney cannot waive a substantive right of a party, an attorney is authorized to stipulate to, and waive, procedural matters to facilitate a hearing. ***Adoption of Coggins***, 13 Wn. App. 736, 739, 537 P.2d 287 (1975) (attorney authorized to stipulate to, and waive, procedural matters to facilitate hearing or trial). A CR 26(i) conference is a procedural matter and not a substantive right, as the comments by the drafters reflect: "The rationale for the rule is twofold: to encourage professional courtesy between attorneys, and to reduce the number of discovery controversies brought before the courts for adjudication." Tegland,

3A Washington Practice: Rules Practice, CR 26 at 619 (Fifth ed. 2006).

The husband's attorney had authority to bind the husband to the order compelling discovery regardless whether a CR 26(i) conference in fact took place. See **Nguyen v. Sacred Heart Med. Ctr.**, 97 Wn. App. 728, 735-736, 987 P.2d 634 (1999) (stipulation made by counsel binding on client when not the result of fraud or overreaching by attorney); **Graves v. P.J. Taggares Co.**, 94 Wn.2d 298, 305-06, 616 P.2d 1223 (1980) (stipulations that do not involve a substantial right is binding on client). The husband cannot now challenge whether the trial court had authority to "entertain" the wife's motion when he in fact agreed to entry of the order. This court should reject the husband's belated request for review of this issue when he never raised it in the trial court.

The husband's hypertechnical arguments of alleged procedural errors are not only wrong, but they are also largely unpreserved. The husband's scattershot approach to his appeal apparently is intended to obfuscate the fact that it was not his "lack of notice" of the court's rulings that cause the trial court to strike his pleadings, but, as argued below, his utter refusal to comply with any of the court's orders.

C. **The Trial Court Properly Struck The Husband's Pleadings As A Result Of His Refusal To Comply With Multiple Orders Compelling Discovery.**

1. **The Trial Court's Sanction Orders Are Reviewed For Abuse Of Discretion.**

Our discovery rules give trial courts broad discretion to sanction parties for discovery violations. ***Smith v. Behr Process Corp.***, 113 Wn. App. 306, 324, 54 P.3d 665 (2002). A trial court's decision on sanctions is reviewed by this court under an abuse of discretion standard, giving the trial court "wide latitude in determining appropriate sanctions," to reduce trial court reluctance to impose sanctions and recognizing that the trial court is in a better position to determine this issue. ***Smith***, 113 Wn. App. at 324 (*citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-339, 858 P.2d 1054 (1993)). This court will not disturb the use of sanctions absent a clear showing that a trial court's discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. ***Mayer v. Sto Industries., Inc.***, 156 Wn.2d 677, 684, ¶14, 132 P.3d 115 (2006).

2. The Trial Court's Findings Support Its Decision To Strike The Husband's Pleadings And Hold Him In Default.

There are no "due process concerns" raised by the trial court's decision because the record shows that the trial court found that the husband party willfully violated the discovery rules, found the wife's ability to prepare for trial was substantially prejudiced, and explicitly considered whether a lesser sanction probably would have sufficed. (FF 2.20) (CP 518-21); **Smith**, 113 Wn. App. at 324-25. The husband has not substantively challenged any of the trial court's findings, and they are verities on appeal. **Marriage of Possinger**, 105 Wn. App. 326, 338, 19 P.3d 1109, *rev. denied*, 145 Wn.2d 1008 (2001) (unchallenged findings are verities); *see also* **Keever & Associates, Inc. v. Randall**, 129 Wn. App. 733, 741, ¶12, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006) (regardless of an assignment of error, if the issue is not argued or briefed by citation to authority or to the record, the argument is deemed waived).

a. Trial Court Found That The Husband Willfully Violated The Discovery Rules.

The trial court made several findings that the husband willfully violated the discovery rules and the court's orders

compelling discovery. The trial court found that the husband had “intentionally failed to comply” with the order compelling him to answer the interrogatories and requests for production. (FF 2.1, CP 213, unchallenged) The trial court also found that the husband had the past and present ability to comply with the orders but failed to do so. (FF 2.4, 2.5, CP 214)³

The trial court found that the husband provided “no valid reason” for not complying with the order requiring him to answer discovery requests. (CP 271) While the husband claims that he had a valid reason for not answering discovery requests because he had entered a residential mental health facility (App. Br. 33), the trial court rejected this explanation, noting that the husband had not provided any “independent evidence” to support his claim. (CP 422) Credibility determinations of this sort are left to the trial court; the role of the appellate court is not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses. ***Marriage of Rich***, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030 (1996).

³ The husband claims “there is no proof of service on Mr. Smith” of this order. (App. Br. 33, 38) There is no rule that requires a party to file “proof of service” of an order on the party, especially when his attorney was present at the hearing when the order was entered. (See CP 217; RP 24-34)

Finally, the trial court found: “the husband had the ability to answer the interrogatories. In fact, by the time the default order was entered, the husband already had several months to answer the interrogatories.” (FF 2.20, CP 520, unchallenged) The court found that “the husband has failed to provide this court with any reasonable explanation as to why he has not complied with the court’s orders. The husband’s refusal to answer the discovery requests – in violation of several court order – was deliberate and willful.” (FF 2.20, CP 520, unchallenged)

b. The Trial Court Found That The Wife’s Ability To Prepare For Trial Was Prejudiced By The Husband’s Discovery Violations.

The trial court found that the husband’s willful refusal to comply with the court’s orders and refusal to participate in a deposition “severely prejudiced the wife’s ability to prepare her case.” (FF 2.20, CP 521, unchallenged) The court recognized that “[t]he wife had little knowledge about the extent of the parties’ assets. The wife was not allowed to participate in financial decisions. The husband entirely managed the parties’ information regarding the parties’ assets and the husband’s income was entirely in the husband’s control. Without the husband’s cooperation in responding to discovery requests, the wife could not

reasonably be expected to prepare for trial in any meaningful manner.” (FF 2.20, CP 521, unchallenged)

The husband’s reliance on ***Estate of Foster***, 55 Wn. App. 545, 779 P.2d 272 (1989), *rev. denied*, 114 Wn.2d 1004 (1990) (App. Br. 36) is misplaced. In ***Foster***, Division One affirmed an order denying the plaintiff’s motion to exclude expert witness testimony when the defendants disclosed their witnesses late. 55 Wn. App. at 549. Division One held that there was no prejudice to the plaintiff when the defendants eventually provided “extensive disclosure” of their witnesses in compliance with the trial court’s initial order compelling them to do so and the plaintiff did not complain that the defendant’s eventual disclosure was inadequate. ***Foster***, 55 Wn. App. at 549. Here, there was no “eventual disclosure” of discovery by the husband. Unlike the defendants in ***Foster***, the husband never provided any discovery at all.

c. The Trial Court Considered Lesser Sanctions Before Striking The Husband’s Pleadings.

The trial court “considered and in fact imposed lesser sanctions prior to entering its order of default.” (FF 2.20, CP 521, unchallenged) The court noted that it had “imposed lesser sanctions (e.g. attorney fees) to coerce the husband to comply with

discovery orders but he still refused. The court issued multiple orders providing the husband with additional time to comply with the orders but the husband still refused. Four months before it entered its order of default, the trial court warned the husband that the court would consider default as a sanction if he failed to comply with its orders. Despite this warning the husband still refused to comply.” (FF 2.20, CP 521, unchallenged)

The husband argues that the trial court should have imposed “substantial financial sanctions” in order to ensure his compliance. (App. Br. 34) But the trial court *had* already imposed multiple financial sanctions, requiring him to pay the wife’s attorney fees for each of her motions. As the record shows, the husband still failed to comply and failed to pay the sanctions.

3. The Trial Court Properly Rejected The Husband's Attorney's Request To Participate In The Trial When It Found That If Allowed To Do So The Wife Would Be Prejudiced.

The husband complains that his attorney should have been allowed to participate in the trial after he was found in default and his pleadings stricken. (App. Br. 35) The trial court properly recognized that allowing the husband's attorney to participate would essentially "nullify" the court's previous order because "it places [the husband] right back here in the case, speaking through [his attorney], which [was] not the intent of the order." (RP 186)

The trial court recognized that it would prejudice the wife to allow the attorney to participate when the husband failed to appear at trial. The trial court agreed that any cross-examination of the wife by husband's counsel may raise issues that only the husband could answer:

Not only is he – his pleadings struck, but he's in default and he's not here today. What a mockery of the system if you are allowed participate through a lawyer in any case, whether it's a divorce or any case, and not be here. How am I gonna possibly deal with what he might ask or object to when it's – when potentially his client would have information relevant to that?

We're not – we wouldn't know that, of course, until he asks the question, until he gets an answer. But it could be an issue that I would need his client here for,

and we've done everything we can to get his client to participate in this case and he has chosen not to.

(RP 184; see also RP 185 (trial court): "I concur with Mr. Horenstein's analysis")

Smith v. Behr Process Corp., 113 Wn. App. 306, 54 P.3d 665 (2002) (App. Br. 35-36) does not help the husband. In **Smith**, this court upheld trial court's decision to limit the defaulted party's ability to cross-examine witnesses, holding that it "inevitably flowed from the default judgment" and the party's discovery violations. **Smith**, 113 Wn. App. 334. Allowing the defaulted party to cross-examine witnesses would "open the door" to certain defenses, which would require the jury to consider essentially the same evidence that the trial court intended to exclude when it granted the default. **Smith**, 113 Wn. App. at 334. The trial court did not abuse its discretion in denying the husband's attorney's request to participate at the trial.

It was within the husband's power to comply with the trial court's orders throughout these proceedings. The trial court warned the husband that he was at risk of default. The trial court imposed financial sanctions on the husband in an attempt to coerce the husband to comply with its orders but the husband refused. The

husband's failure to do so was willful and deliberate, which prejudiced the wife in the presentation of her own case. The trial court did not abuse its discretion by striking the husband's pleadings and holding him in default.

D. The Trial Court Properly Ordered The Husband To Revoke His *Lis Pendens*.

The trial court did not abuse its discretion by ordering the husband to revoke the *lis pendens* he filed to encumber the properties awarded to the wife. (See CP 559-69, 700) Once the trial court awarded the real property to the wife, the husband did not have any justification to file a *lis pendens*. ***Marriage of Penry***, 119 Wn. App. 799, 82 P.3d 1231 (2004).

The court cancelled a *lis pendens* under similar circumstances in ***Penry***. The intransigent husband, much like the husband in this case, filed a *lis pendens* on property after appealing the trial court's decision awarding the property to the wife. ***Penry***, 119 Wn. App. at 801. The trial court properly cancelled the *lis pendens*, and the court of appeals awarded fees against the husband for his frivolous appeal of an order appointing a commissioner to sign the release of *lis pendens* and quit claim

deed and real estate excess tax affidavit on the husband's behalf.

Penry, 119 Wn.App. at 803-804.

The husband could not effect what amounts to a stay of the trial court's decision by improperly filing a *lis pendens* that will cloud the wife's title to the property awarded to her. His remedy, if any, was to stay enforcement of the property award under RAP 8.1. In ***Hagen v. Messer***, 38 Wn. App. 31, 683 P.2d 1140, *rev. denied* 102 Wn.2d 1021 (1984), for instance, the trial court properly required a supersedeas bond to keep a *lis pendens* in place pending appeal. The trial court properly ordered the husband to revoke his *lis pendens*.

E. This Court Should Award The Wife Attorney Fees.

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; ***Leslie v. Verhey***, 90 Wn. App. 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). This court should award attorney fees to the wife because she has the need for fees and the husband has the ability to pay. RAP 18.1; RCW 26.09.140 (court may award fees considering the financial resources of the parties on any appeal). Further, this court should award attorney fees to the wife because the husband's claims on

appeal are without merit and largely unpreserved. **Marriage of Healy**, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d 1023 (1983) (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees).

V. CONCLUSION

The trial court's order holding the husband in default after he was given "opportunity again and again" to provide discovery was appropriate because the wife was severely prejudiced in presenting her case without discovery. The final orders entered after the default trial were also proper and were supported by unchallenged findings. This court should affirm the trial court's orders and award the wife attorney fees for having to respond to this appeal.

Dated this 18th day of April, 2008.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: _____

Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
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WSBA No. 7864

Attorneys for Respondent

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Sherry W. Parker, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLARK

In re the Marriage of:

CHRISTA CATHERINE SMITH

Petitioner

and

CHRISTOPHER ARTHUR SMITH

Respondent.)

NO. 06-3-00342-7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

(FNFCL)

I. BASIS FOR FINDINGS

The findings are based on a trial that occurred on May 16, 2007 without the participation of the Respondent because an Order Striking Pleadings and Finding Respondent in Default was entered on February 16, 2007. (See Finding of Fact 2.20)

The following people attended the trial:

Petitioner.

Petitioner's Lawyer.

Respondent's Lawyer. The Respondent's lawyer requested permission to participate in the trial by making argument and cross-examining witnesses. The Court denied the attorney's request based on the fact that the Court previously

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1 struck the Respondent's pleadings and found the Respondent in Default. (See
2 Finding of Fact 2.20)

3 II. FINDINGS OF FACT

4 Upon the basis of the Court record, the Court FINDS:

5 2.1 RESIDENCY OF PETITIONER.

6 The Petitioner is a resident of the State of Washington.

7 2.2 NOTICE TO THE RESPONDENT.

8 The Respondent was served in the following manner: By personal service on
9 March 13, 2006 in California. The Respondent subsequently filed an action to
10 dissolve the marriage in California, but that action was dismissed in favor of
11 this action.

12 2.3 BASIS OF PERSONAL JURISDICTION OVER THE RESPONDENT.

13 The facts below establish personal jurisdiction over the Respondent.
14 The parties lived in Washington during their marriage and the Petitioner
15 continues to reside in this state.

16 2.4 DATE AND PLACE OF MARRIAGE.

17 The parties were married on October 29, 1997, at Las Vegas, Nevada.

18 2.5 STATUS OF THE PARTIES.

19 Husband and wife separated on March 3, 2006.

20 2.6 STATUS OF THE MARRIAGE.

21 The marriage is irretrievably broken and at least ninety (90) days have
22 elapsed since the date the Petition was filed and since the date the Summons
was served.

2.7 SEPARATION AGREEMENT OR PRENUPTIAL AGREEMENT.

There is no written Separation Agreement or Prenuptial Agreement.

2.8 COMMUNITY PROPERTY.

The parties have real or personal community property as set forth in
Exhibit "A." This Exhibit is attached or filed and incorporated by reference as

1 part of these Findings. Except as otherwise provided for herein, each party
2 should be awarded all household goods and furnishings and personal effects
3 and belongings currently in his or her possession.

4 2.9 SEPARATE PROPERTY.

5 To the extent each party has acquired personal property not outlined on
6 Exhibit "A" that was acquired after separation, that property is the separate
7 property of the party acquiring the same.

8 2.10 COMMUNITY LIABILITIES.

9 There are no known community liabilities except the mortgage debt on the
10 real property described on Exhibit "A", located at 21711 NE 212th Ave.
11 Battleground, Washington.

12 2.11 SEPARATE LIABILITIES.

13 To the extent the parties have each incurred liabilities after the date of
14 separation, those liabilities are the separate liabilities of the party incurring
15 the same.

16 2.12 MAINTENANCE.

17 The wife is in need of maintenance. Maintenance in the amount of \$4,000.00
18 per month for the remainder of the life of the wife should be ordered. In
19 determining maintenance, the court considered the factors set forth in RCW
20 26.09.090. Based on its consideration of the following factors, the court finds
21 that an award of modifiable lifetime maintenance is just:

22 The wife does not have the financial resources to independently meet her
reasonable needs, which exceed \$6,000 per month. An award of spousal
maintenance of \$4,000 per month plus her \$1,000 Social Security monthly
disability benefit, and monthly child support of \$887 will bring the wife close to
meeting her reasonable needs.

1 While the wife was awarded some liquid assets, she should not be required to
2 expend these assets to meet her reasonable monthly expenses. This is
3 especially true since the husband was also awarded significant liquid assets
4 but is employed, or has the ability to be employed at a level that, based on
5 historical earnings, will allow him to receive significant income which will not
6 require him to use his property distribution to meet his expenses.

7 It is unlikely that any amount of training or education will allow the wife to find
8 appropriate employment so that she could meet her financial needs
9 independently. The wife is age 48. The wife was diagnosed with Obsessive
10 Compulsive Disorder at age 22. This is a lifelong disability and it is not
11 expected to improve. The wife has a minimal work history and did not work at
12 all during the marriage. The wife has a high school education and was last
13 employed at age 23. The wife's lack of employment was due to her
14 Obsessive Compulsive Disorder, which prevents her from working. It was also
15 unnecessary for the wife to work because the husband was able to provide
16 for the needs of the family with his income alone.

17 The length of the marriage (10 years) and the lifestyle established during the
18 marriage justifies an award of spousal maintenance to the wife.

19 The husband has the ability to pay spousal maintenance and meet his own
20 financial needs and obligations. The court finds that the husband earns
21 \$9,335.00 net per month. This income was determined based on his average
22 earning history from 1999 through 2004 as reported in his federal income tax
returns. The court was unable to determine with any accuracy the husband's
income for 2005 and 2006. The wife has had no access to the parties' recent
tax returns and it unclear whether tax returns for these years have been filed.

1 The husband refused to provide these returns to the wife or to the court. The
2 husband failed to answer interrogatories propounded to him and failed to
3 attend a duly noted deposition. The court has no reason to believe that the
4 husband is earning any less than he earned prior to 2005. In fact, the
5 husband is no longer constrained by a covenant not to compete resulting from
6 the sale of his interest in a recording business.

6 2.13 CONTINUING RESTRAINING ORDER.

7 A continuing Restraining Order against the husband is necessary because:
8 The wife is in grave fear for her safety and that of the parties' daughter and
9 her other children from another marriage because of past incidences of
10 domestic violence, physical and mental, against the wife and the children (for
11 which an Order of Protection was entered after the parties' separation and
12 which was renewed in the form of a Restraining Order in this case.) The
13 court finds that the wife's allegations of domestic violence are credible and
14 her fears are reasonable. Further, the husband has violated the restraining
15 order by coming closer to the home and the wife and the child than allowed
16 by the Protection Order and Restraining Order and by threatening to take the
17 parties' minor child.

15 2.14 FEES AND COSTS.

16 The wife has the need for the payment of fees and costs and the husband
17 has the ability to pay these fees and costs. In addition, an award of attorney
18 fees is warranted based on the husband's intransigence in this proceeding,
19 which caused the wife to incur substantial attorney fees and costs. Further,
20 the wife was forced to incur additional attorney fees in the California courts on
21 issues related to this dissolution because of the husband's intransigence.
22 The wife was required to hire counsel in California to successfully defend
against a Dissolution of Marriage case brought in that state after this action

1 was filed and to defend against claims of a tenant in property owned by the
2 parties in California who became a tenant because the husband wrongfully
3 leased the property to her in violation of this court's order. The wife has
4 incurred reasonable attorney fees and costs in the amount of \$32,000.00.

5 2.15 PREGNANCY.

6 The wife is not pregnant.

7 2.16 DEPENDENT CHILDREN.

8 The children listed below are dependent upon either or both spouses.

<u>Name of Child</u>	<u>Age</u>	<u>Mother's Name</u>	<u>Father's Name</u>
CCS	7	Christa C. Smith	Christopher A. Smith

9 2.17 JURISDICTION OVER THE CHILDREN.

10 This Court has jurisdiction of the children for the following reasons:

11 This state is the home state of the children because the child lived in
12 Washington with a parent or a person acting as a parent for at least six
13 consecutive months immediately preceding the commencement of this
14 proceeding.

15 2.18 PARENTING PLAN.

16 The Parenting Plan signed by the Court of even date herewith is approved
17 and incorporated as part of these Findings.

18 The court finds that there has been history of physical and verbal abuse by
19 the husband against the wife. This history of domestic violence warrants the
20 imposition of restrictions on the father's residential time with the child.

21 The father and child have no bond as evidenced by the fact that the father
22 has not asked for contact with the child nor has the father exercised visitation
with the child for several months. At the time of trial, the father's last contact
with the child was on Valentine's Day.

1 At this time, the court orders that there be no contact between the father and
2 child subject to further review by motion by the father.

3 The parenting plan signed by the court is in the child's best interest.

4 2.19 CHILD SUPPORT:

5 There is a child in need of support and child support should be set pursuant to
6 the Washington State Child Support Schedule. The Order of Child Support
7 signed by the Court of even date, including the Worksheet is incorporated by
8 reference in these Findings.

9 2.20 DEFAULT.

10 This court gave the husband time and opportunity again and again to bring
11 himself in compliance with the discovery orders before imposing the severe
12 sanction of default. The following facts detail this court's painstaking and
13 patient approach to have the husband comply with interrogatories and court
14 orders:

15 In August 2006, the wife sought CR 37 relief after the husband failed to
16 answer interrogatories that were propounded to him. On September 13,
17 2006, the court ordered the husband to answer the interrogatories by
18 September 21, 2006. The court also ordered the husband to provide monthly
19 bank statements to the wife for accounts in his name or in his control. The
20 court ordered the husband to provide an accounting of the funds that the
21 husband was previously allowed to manage for the benefit of the parties. The
22 court ordered the husband to provide this information to the wife by
September 21, 2006. In its order, the court warned the husband that in the
event he failed to comply with its order, the husband would be ordered to turn
over control of the accounts to the wife's counsel. The court ordered the
husband to pay attorney fees to the wife for requiring her to bring the motion.

1 The husband failed to comply with the September 13, 2006 order. On
2 October 2, 2006, the court ordered that the accounts controlled by the
3 husband be transmitted to the wife's attorney. The order restrained the
4 husband from making any withdrawals from the accounts. In its order, the
5 court further warned the husband that if he fails to comply with the court's
6 order that the "court will consider further sanctions, including terms and
7 striking his pleadings, and entering a Decree of Dissolution of Marriage by
8 default."

9 In December 2006, the parties appeared before this court for a hearing on the
10 wife's motion for contempt. The husband was found in contempt for
11 intentionally failing to comply with lawful orders of the court dated May 17,
12 2006, September 13, 2006, and October 2, 2006. This court found that the
13 husband "has failed to provide answers to interrogatories, he has failed to
14 timely make support payments, he has failed to properly account for funds
15 entrusted to him per court order, he has called the parties minor child at
16 impermissible times, he has attempted communication with the [wife] in
17 violation of a protection order and he has failed to transmit funds to the
18 [wife]'s counsel, all in violation of court orders on file herein." The husband
19 was given the opportunity to purge his contempt by completely answering the
20 interrogatories propounded to him and by accounting for and sending to wife's
21 counsel all funds he was previously allowed to manage by December 31,
22 2006.

By January 26, 2007, the husband had still failed to comply with the court's
previous orders requiring him to fully answer interrogatories propounded to
him and failed to tender the funds that he was previously allowed to manage
to the wife's counsel. On February 16, 2007, the court found the husband in

1 default and struck the husband's pleadings. This court entertained the
2 husband's motion for relief from the order of default (although it was unclear
3 whether it was intended as an untimely motion for reconsideration or a CR 60
4 motion), which it denied.

5 The court recognizes that an order of default is a harsh sanction. However, in
6 light of the husband's complete refusal to comply with the court orders
7 requiring him to answer interrogatories, default was an appropriate sanction.
8 The husband had the ability to answer the interrogatories. In fact, by the time
9 the default order was entered, the husband already had several months to
10 answer the interrogatories. The husband has failed to provide this court with
11 any reasonable explanation as to why he has not complied with the court's
12 orders. The husband's refusal to answer the discovery requests – in violation
13 of several court orders – was deliberate and willful.

14 ~~While not controlling~~ in the trial court's decision to strike the husband's
15 pleadings, the court did consider the husband's non-compliance with other
16 court orders as evidence of the husband's intentional refusal to comply with
17 court orders. In violation of court orders, the husband failed to properly
18 account for funds entrusted to him by the court, failed to transmit such funds
19 to the Petitioner's attorney when ordered to do so, failed to timely pay direct
20 family support, failed to timely pay the mortgage on the family home, failed to
21 timely pay the insurance premiums on the family health insurance policy,
22 violated the court's restraining order regarding being closer to the family
23 home than allowed by court order, disposed of personal property against
24 court order and leased the home in California in violation of court order.

1 The husband's willful refusal to comply with this court's orders and refusal to
2 participate in a deposition severely prejudiced the wife's ability to prepare her
3 case. The wife has been a stay at home mother and is disabled by
4 Obsessive Compulsive Disorder. The wife had little knowledge about the
5 extent of the parties' assets. The wife was not allowed to participate in
6 financial decisions. The husband entirely managed the parties' finances.
7 Information regarding the parties' assets and the husband's income was
8 entirely in the husband's control. Without the husband's cooperation in
9 responding to discovery requests, the wife could not reasonably be expected
10 to prepare for trial in any meaningful manner.

11 The court considered and in fact imposed lesser sanctions prior to entering its
12 order of default. The court imposed lesser sanctions (e.g. attorney fees) to
13 coerce the husband to comply with discovery orders but he still refused. The
14 court issued multiple orders providing the husband additional time to comply
15 with the orders but the husband still refused. Four months before it entered
16 its order of default, the trial court warned the husband that the court would
17 consider default as a sanction if he failed to comply with its orders. Despite
18 this warning, the husband still refused to comply with the discovery orders.

19 A default order is tantamount to a non-appearance by a party. Therefore, the
20 court precluded the husband's attorney from presenting any legal argument or
21 cross-examining the wife at trial. Further, allowing the husband's attorney to
22 participate at the trial could potentially leave the wife at a disadvantage.

2.21 PROPERTY DISTRIBUTION

The property distribution set forth in Exhibit A to these findings is just and equitable. Based on the evidence presented, which was somewhat limited

1 due to the husband's failure to comply with the discovery orders, the court
2 finds that the parties' net estate is \$2,627,798.15. The distribution of
3 property is approximately equal although slightly in favor of the wife (51%).

4 In reaching its property distribution, the trial court considered the factors set
5 forth in RCW 26.09.080.

6 The trial court considered the character of the property. The trial court heard
7 no evidence that any of the property was separate property. However, the
8 character of the property was not controlling in the trial court's determination
9 of the distribution of the properties as it sought to make an equitable
10 distribution of the property between the parties – including any community or
11 separate property.

12 The trial court considered the length of the marriage (10 years).

13 The trial court considered the economic circumstances of the parties at the
14 time the division of property is to become effective including the spousal
15 maintenance awarded to the wife.

16 The court finds that the property award to each party plus spousal
17 maintenance to the wife provides a just and equitable resolution for the
18 parties in this action.

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III. CONCLUSIONS OF LAW

The Court makes the following Conclusions of Law from the foregoing Findings of Fact:

3.1 JURISDICTION.

The Court has jurisdiction to enter a Decree in this matter.

3.2 GRANTING OF A DECREE.

The parties should be granted a Decree.

3.3 DISPOSITION.

The Court should determine the marital status of the parties, make provision for a Parenting Plan for any minor children of the marriage, make provision for the support of any minor child of the marriage entitled to support, consider or approve provision for the maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing Restraining Orders, and make provision for the change of name of any party. The distribution of property and liabilities as set forth in the Decree is fair and equitable.

3.4 CONTINUING RESTRAINING ORDER.

A continuing Restraining Order should be entered.

3.5 ATTORNEY FEES AND COSTS.

Attorney fees, other professional fees and costs should be paid.

3.6 OTHER:

Each party should execute any and all documents necessary to effectuate the provisions of the Decree of Dissolution of Marriage, including, but not limited to Qualified Domestic Relations Order(s). If a party fails to execute any necessary documents, the Court may, on its motion docket, appoint another in that person's stead to execute such document(s). If a party has taken or

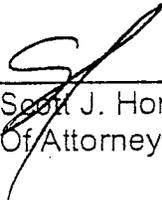
1 does take any action to jeopardize the other party's interest in the property
2 being awarded to that party, the party who takes such adverse action shall
3 assume the responsibility for and forthwith pay the other party any loss or
4 damage incurred by the non-acting party and the acting party may be held in
5 contempt by the court. Relief under this provision may be sought on the
6 court's motion docket.

7 Dated: 6/11/07

18/ JAMES E. RULLI

HONORABLE JAMES E. RULLI

8 Presented by:

9 
10 Scott J. Horenstein, WSBA # 7864
11 Of Attorneys for Petitioner

12 Service accepted, form and content
13 approved and consent to entry granted
14 this day of , 2007.

*objection to Entry
copy received*

15  ~~JAMES E. RULLI~~
16 TERRANCE J. LEE, WSBA #
17 Of Attorneys for Respondent

Wife's Proposal for Division .munity Property/Debts

TAB No.	ASSETS/DEBTS:	Date	FMV:	DEBT	NET VALUE	AWARD TO	
						To Husband	To Wife
1	Real Property						
2	21711 NE 212th aVe, Battle Ground		\$585,000.00	\$ (315,000.00)	\$ 270,000.00	\$ 270,000.00	
3	Lots 5.6,7,8,9 in Spokane, WA		\$ 150,000.00		\$ 150,000.00	\$ 150,000.00	
13	Proceeds from sale of Camarillo St. home (SJH Trust)		\$ 925,191.00		\$ 925,191.00	\$ 925,191.00	
	80 Acres in California City (est at \$3,000/acre)		\$ 240,000.00		\$ 240,000.00	\$ 240,000.00	
	Automobiles/ Misc. Vehicles						
4	1999 Dodge Durango (W's)				\$ -		X
4	1989 Mercedes Benz 300 (Not operable)				\$ -		X
4	2004 Jaguar				\$ -		
4	1989 Dodge Truck				\$ -	X	
4	1989 Dodge Truck				\$ -	X	
	Personal Property:						
	Battle Ground Home contents				\$ -		
	Camarillo Home contents				\$ -		
	Investments/ Stocks						
5	Bank of America CD #21462511	Apr-05	\$ 295,000.00		\$ 295,000.00	\$ 295,000.00	
6	Wachovia Securities Acct#XX2846 (closed)	Feb-06	\$ 147,290.61		\$ 147,290.61	\$ 147,290.61	
7	Bank of America CD #2173703146	May-06	\$ 2,548.06		\$ 2,548.06	\$ 2,548.06	
8	Cal National Bank CD #12138434	Apr-06	\$ 227,250.97		\$ 227,250.97	\$ 227,250.97	
	Business Interests						
12	Funds Rec'd on ElDorado Imports by Husband		\$ 136,566.92		\$ 136,566.92	\$ 136,566.92	
	Pension/Retirement/ Life Insurance						
	Bank Accounts						
10	Cal National Bank Acct#XX7858 (H's)	Apr-06	\$ 126,052.72		\$ 126,052.72	\$ 126,052.72	
11	Cal National Bank Acct#XX1314	Dec-06	\$ 72,897.87		\$ 72,897.87	\$ 72,897.87	
7	Bank of America Acct#XX3313 *	May-06	\$ 35,000.00		\$ 35,000.00	\$ 35,000.00	
	Children's Accounts						
	Debts:						
9	Bank of America Overdraft Protection (W's)				\$ -		XX
	Husband's debts				\$ -	XX	
	TOTALS:		\$ 2,942,798.15	\$ (315,000.00)	\$ 2,627,798.15	\$ 1,282,607.15	\$ 1,345,191.00

Legal Descriptions to Real Property Awarded to the Wife

Clark County, Washington:

Clark County, State of Washington, particularly described as:

Lot 5, ALPINE VIEW ESTATES, according to the plat thereof, recorded in Volume "310" of Plats, at 697, records of Clark County, Washington.

Spokane County, Washington:

Spokane County, State of Washington, particularly described as:

Lots 5, 6, 7, 8 & 9 in Block 4 ALBION HEIGHTS ADDITION as per plat thereof recorded in Volume "C" of Plats, Page 35;

A portion of the above property has been re-platted into Lots 1 and 2 in Block 9, Tract E and dedicated streets of WESTRIDGE ADDITION, a P.U.D., as per plat thereof recorded in Volume 25 of Plats, Pages 36, 37, and 38;

Situate in the City and County of Spokane, State of Washington.

Parcel Nos. 25261.4101, 25261.4102 and 25261.4104

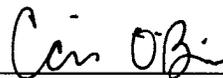
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 18, 2008, I arranged for service of the Brief of Respondent, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Terrance J. Lee Attorney at Law 201 N.E. Park Plaza Drive, Suite 222 Vancouver, WA 98684	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mr. Scott J. Horenstein Attorney at Law 900 Washington St., Suite 1020 Vancouver, WA 98660-3455	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 18th day of April, 2008.


Carrie O'Brien

FILED
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY