

NO. 36826-9-II

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

In re the Marriage of

PHILLIP A. BROWN, APPELLANT

and

JANET R. BROWN, RESPONDENT

FILED
COURT OF APPEALS
DIVISION II
08 FEB 22 AM 11:58
STATE OF WASHINGTON
BY  DEPUTY

BRIEF OF APPELLANT

W. LINCOLN HARVEY
ATTORNEY FOR APPELLANT
2418 MAIN STREET
VANCOUVER, WA 98660
360-696-8575
WSBA NO. 31116

TABLE OF CONTENTS

A. Assignments of Error	1
Assignments of Error	1
Issues Pertaining to Assignments of Error.....	1
B. Statement of the Case.....	2
C. Summary of Argument.....	7
D. Argument	10

Point One: The Decree of Legal Separation reserving on ancillary issues is valid and final when entered because the trial court had jurisdiction over the subject matter, over the parties, and possessed the power to make the order. 10

- a. The Scope of Review regarding the validity of a decree is de novo..... 10
- b. A decree of legal separation is valid if the issuing court possesses the three elements of jurisdiction: Subject Matter Jurisdiction, Personal Jurisdiction, and Authority to Enter the Judgment..... 10
- c. The Trial Court had both Subject Jurisdiction and Personal Jurisdiction..... 12
- d. The Trial Court has Power and Authority to Enter a Decree Affecting Marital Status When the Jurisdictional Elements of RCW 26.09.030 are Present..... 12
- e. The Decree of Legal Separation was final and unappealed and should be reinstated..... 18

Point Two: The Trial Court abused its discretion in vacating the decree of legal separation under CR 60(b) because it grounded its reasons on unappealed errors of law..... 18

- a. The Scope of Review for an Order Vacating a Decree under CR 60(b) is that of Abuse of Discretion..... 18
- b. The Trial Court abused its discretion by vacating the Decree of Legal Separation on grounds that errors had been made relating to bifurcation of ancillary matters and improper venue because these are errors of law correctable by appeal..... 19

c. In cases of egregious error in which rights of children are irreversibly terminated, an otherwise valid decree may be vacated under CR 60(b)(11) because of extraordinary circumstances for which an appeal is not a viable solution. 22

d. Proper venue includes the petitioning party's county of residence, and a defense of improper venue must be raised by pleading or motion or is waived..... 25

E. Conclusion..... 30

TABLE OF AUTHORITIES

CASES

<i>Bresolin v. Morris</i> , 86 Wn.2d 241, 245, 543 P.2d 325 (1975).....	16
<i>Dike v. Dike</i> , 74 Wn.2d 1, 448 P.2d 490 (1968).....	16
<i>Fairley v. Department of Labor & Indus.</i> , 29 Wn. App.477, 627 P.2d 961, <i>rev. denied</i> , 95 Wn.2d 1032 (1981).....	15
<i>In re Marriage of Brown</i> , 98 Wn.2d 46, 48, 653 P.2d 602 (1982).....	20
<i>In re Marriage of Flannagan</i> , 42 Wn. App. 214, 709 P.2d 1247 (1985).....	22
<i>In re Marriage of Furrow</i> , 115 Wn. App. 661, 63 P.3d 821 (2003) ...	13, 14, 15, 22, 23, 24
<i>In re Marriage of Hughes</i> , 128 Wn. App. 650, 658, 116 P.3d 1042 (2005).....	21
<i>In re Marriage of Little</i> , 96 Wn.2d 183, 186 (1981), 634 P.2d 498.....	11, 13, 14, 21
<i>In re Marriage of Moody</i> , 137 Wn.2d 979, 988, 976 P.2d 1240 (1999).....	19
<i>In re Marriage of Possinger</i> , 105 Wn. App. 326, 332 (2001), 19 P.3d 1109	11, 13, 21
<i>In re Marriage of Tang</i> , 57 Wn. App. 648, 655, 789 P.2d 118 (1990).....	18, 19, 20
<i>In re Marriage of Thurston</i> , 92 Wn. App. 494, 499, 963 P.2d 947 (1998).....	20
<i>In re Marriage of True</i> , 104 Wn. App. 291, 16 P.3d 646 (2000).....	13
<i>In re Marriage of Wilson</i> , 117 Wn. App. 40, 45 (2003), 68 P.3d 1121	10, 11
<i>In re Marriage of Yearout</i> , 41 Wn. App. 897, 902, 707 P.2d 1367 (1985).....	22
<i>Kahclamat v. Yakima County</i> , 31 Wn. App. 464, 643 P.2d 453 (1982).....	26
<i>Kern v. Kern</i> , 28 Wn.2d 617, 619, 183 P.2d 811 (1947).....	19, 20
<i>Marley v. Labor and Industries</i> , 125 Wn.2d 533, 886 P.2d 189 (1994) ...	11, 15, 16, 17, 27
<i>Marriage of Strohmaier</i> , 34 Wn. App. 14, 659 P.2d 534 (1983).....	26, 28
<i>Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.</i> , 95 Wn.2d 398, 403, 622 P.2d 1270 (1981) ...	19
<i>Sanders v. Sanders</i> , 63 Wn.2d 709, 714, 388 P.2d 942 (1964).....	26
<i>Schroeder v. Schroeder</i> , 74 Wn.2d 853, 855 56, 447 P.2d 604 (1968).....	26, 28
<i>Shoop v. Kittitas County</i> , 149 Wn.2d 29, 33, 65 P.2d 189 (2002).....	10, 11, 27, 28

STATUTES

Ch. 26.09 RCW.....	8, 11, 15
RCW 26.09.010	9, 11, 25, 26, 28
RCW 26.09.030	11
RCW 26.09.050	11, 12
RCW 26.09.140	29
RCW 26.09.150	18, 19
RCW 26.09.170	18

OTHER AUTHORITIES

1 <i>Black on Judgments</i> (2d ed.) 506, §329	20
<i>Restatement (Second) of Judgments</i> § 12.....	17
Robert J. Martineau, <i>Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse</i> , 1988 B.Y.U. L. Rev. 1, 28	16, 27

RULES

CR 12.....	12
CR 60(b)	7, 18, 22, 29
CR 60(b)(1).....	2, 7, 8, 10, 22
CR 60(b)(4).....	2, 7, 8, 10
CR 60(b)(5).....	10
CR 60(b)(11).....	2, 7, 8, 10, 22, 23, 24, 25
RAP 14.2	30
RAP 14.3	30

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the order on revision, dated September 21, 2007, and the final order on revision, dated November 2, 2007, together vacating the decree of legal separation of November 28, 2006 upon the satisfaction of conditions.

Issues Pertaining to Assignments of Error

1. The parties, husband and wife, have one child, and were involved in dependency proceedings in the Juvenile Division of the Superior Court of Spokane County. The husband petitioned for legal separation in the Superior Court of Clark County, his county of residence. The wife defaulted with notice, and a decree of legal separation was entered finalizing property issues while leaving ancillary parenting issues reserved pending the Juvenile Division granting leave to proceed. The wife filed a motion to vacate the decree after the period for appeal had expired on the ground that the property distribution was inequitable. The trial court granted the motion to vacate the decree on the ground that the court had erred in entering a property distribution while leaving the parenting issues unresolved in Spokane County. Did the Clark County Superior Court have jurisdiction to issue a valid and enforceable decree of legal separation in Clark County while reserving on the ancillary child

issues of a parenting plan and order of child support? (Assignment of Error 1).

2. Under the above circumstances, did the trial court abuse its discretion by vacating the decree of legal separation on the ground that the decree had improperly bifurcated ancillary issues because the child was then in dependency proceedings in a different county? (Assignment of Error 1).

B. STATEMENT OF THE CASE

1. Procedural History

Phillip Brown filed a petition for legal separation from Janet Brown in Clark County Superior Court on 9/21/2006 (CP at 3). Janet was served with the summons and petition on 9/29/2006 (CP at 12). An order of default was entered against Janet on 11/8/2006 (CP at 18) and a final decree was entered on 11/28/2006 (CP at 26). Janet moved for vacation of the default decree under CR 60(b)(1), (4) and (11) on 3/9/2007 (CP at 41), a commissioner granted the motion on 4/19/2007 (CP at 88), Phillip moved for revision the same day (CP at 84), and the trial court granted the motion on 9/21/2007 and 11/2/2007 in two related orders (CP at 92-98). Phillip appealed the orders granting the vacation of decree of legal separation.

2. Factual History

Phillip Brown and Janet Brown married on May 5, 2000 (CP at 54, line 21; CP at 89, line 22) and one child, BB, was born in 2001 (CP at 3).

Their child was placed in dependency proceedings in Snohomish County on February 24, 2005 (CP at 6), and Child Protective Services supervision was transferred to Spokane County in March 2006 (CP at 70). The dependency case was transferred to Spokane County Juvenile Court in August 2006 (CP at 6) following the breakup of the marital community (CP at 44; CP at 57, lines 24-25). A no-contact order was entered against Phillip in early August 2006, and he moved to Clark County, Washington to live near relatives (CP at 45, lines 4-5).

Phillip filed a petition for legal separation in Clark County Superior Court on September 21, 2006 (CP at 3). Janet was served with a summons, the petition, and a motion and declaration for temporary orders in Spokane County on September 28, 2006 (CP at 11-13; CP at 46, lines 6-7). On October 27, 2006 Phillip filed a motion and declaration for default (CP at 14-15) and citation for hearing for November 8, 2006 (CP at 16). These documents were sent by mail to Janet's home address (CP at 17). Janet received but did not respond to the motion for default (CP at 19; CP at 46, line 14). An order of default was entered on November 8, 2006 (CP at 18-19). Phillip entered findings of fact and conclusions of law, and a decree of legal separation on November 28, 2006 (CP at 22-33). The findings established that the child was in dependency proceedings in Spokane County Juvenile Court (CP at 24, ¶2.18) and the issue of a parenting plan should be reserved (CP at 24, ¶2.19). The decree of legal separation stated that the child was under the jurisdiction of the Spokane

County Juvenile Court in dependency proceedings, and that at such time as the child was no longer under their jurisdiction, and the Clark County Superior Court attained jurisdiction, the issues of a parenting plan and child support could be addressed by means of a petition to modify the decree (CP at 28, ¶¶ 3.10-12). Janet acknowledged receiving notice of the decree in December 2006 (CP at 46, line 16).

On February 7, 2007 Phillip filed a motion and declaration for order to show cause re contempt requesting Janet to appear and show cause why she should not be held in contempt for failing to comply with the property provisions of the decree (CP at 34-39). An order to show cause was issued directing Janet to appear on February 21, 2007 in Clark County Superior Court (CP at 40). Janet filed a motion to vacate the order of default for legal separation and supporting memorandum of authorities on March 9, 2007 (CP at 41-43) and a declaration of Janet Brown supporting motion to vacate (CP at 44-49). Phillip filed a response to motion to vacate order of default for legal separation (CP at 50-53) and a supporting declaration on March 20, 2007 (CP at 54-83). A commissioner of the Superior Court heard the motion on March 22, 2007 and issued an order vacating the decree of legal separation on April 19, 2007 (CP at 88). Phillip moved to revise on the same day (CP at 84-88). Janet then filed a response to the petition on May 7, 2007 (CP at 89-91). She acknowledged that the Clark County Superior Court had not previously made a child custody, parenting plan, residential schedule, or visitation determination,

she asserted that a dependency action was pending in Spokane County Juvenile Court, and that Clark County Superior Court would have jurisdiction when Juvenile Court terminated its jurisdiction (CP at 90, lines 13 -17).

The motion for revision was heard on May 4, 2007 by Judge Poyfair of the Clark County Superior Court (CP at 92). A conditional order to vacate the decree of legal separation was entered on September 21, 2007 (CP at 92-95) and a final order vacating the decree of legal separation was entered on November 2, 2007 (CP at 96-98).

3. Hearing on Revision

At the hearing on the motion for revision, the trial court made several statements regarding Janet's lack of response prior to and after the entry of the decree, as follows: "My concern and I'll ask counsel is why does the court vacate something that one had complete and full knowledge of, acknowledging that she received it, acknowledging that she didn't take any ... any steps to ... to correct it and then whoops! It's already done ... I ... I really don't want to go on." (RP at 4, lines 8-13). He then stated in response to Janet's attorney's argument that Janet felt threatened, that: "Was ... was anyone being threatened...? She was able to get you there. And she was able to secure an attorney, but she didn't take any action prior to the time." (RP at 4, lines 23-25, & at 5, line 1). The order on revision found that Janet had no excusable neglect for failing to respond (RP at 93, lines 3-4).

The trial court then addressed the unresolved ancillary parenting issues. Janet's attorney said, "And so that there is all these other court actions on the different case involving ..." and the trial court said, "There is ... one of the concerns that I have is with the child ... simply having heard ... having it heard such that a court can make a determination with regards to what is the proper parenting plan." (RP at 5, line 25 & at 6, lines 1-5). The court then stated "We have jurisdiction" (RP at 6, line 9), and "And it shouldn't have gone ... it shouldn't have gone through." (RP at 6, lines 12-13). "If ... if there was not a coordinated co-existing jurisdiction, then I have a real problem with that. The Superior Court ... then what you're simply doing is bifurcating and you're having property determinations and you're leaving the parenting plan on the other side." (RP at 6, lines 16-21). "And I don't proceed to finalize if there is a child until I know the juvenile court gives me that co-existing top jurisdiction. I'm not at all thrilled to say that it's being handled in Spokane on the parenting plan but yet we take care of the other side ... you'll pardon me, that's ... that's forum shopping." (RP at 7, lines 5-10). Finally, the trial court ordered Janet to pay attorney fees for her "culpability" (RP at 10, line 24) as a condition to the decree of legal separation being vacated, but indicated that if she did not meet that condition, the decree would not be vacated: "...[I]f she does not pay it, the legal separation continues and it is done and we move on." (RP at 11, lines 13-19). The order on revision entered on 9/21/2007 stated, "It was error for Clark County Superior Court

to enter a final decree of legal separation when it did not also have jurisdiction over the parenting issues.” (CP at93, lines 7 – 8).

C. SUMMARY OF ARGUMENT

A final decree is valid and final when entered after the period for appeal has expired if the issuing court had jurisdiction to enter the order. A decree entered by a court without jurisdiction will be void when entered and will be subject to vacation at any time. Jurisdiction has three elements: (i) subject matter jurisdiction; (2) personal jurisdiction; (3) and authority or power to enter the decree. In this case, the court possessed all three elements of proper jurisdiction, and therefore the resulting decree was valid and enforceable when entered, subject to an appeal. Because no appeal was taken within the allowable timer period after its entry, it can only be vacated pursuant to the law relating to motions to vacate under CR 60(b).

Final decrees may be vacated under CR 60(b) for a number of different reasons, including: (i) mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order under CR 60(b)(1); (ii) fraud, misrepresentation, or other misconduct of an adverse party under CR 60(b)(4); or (iii) any other reason justifying relief from the operation of the judgment under CR 60(b)(11). Motions to vacate final decrees are submitted to the trial court’s sound discretion. A trial court’s decision to vacate a decree will be overturned only for an abuse of that discretion. An abuse of discretion occurs when no tenable grounds or

reasons exist for the decision. Motions to vacate under CR 60(b)(1), (4) and (11) should be granted only to correct irregularities occurring beyond the trial court's direct actions; they should not be used to correct errors committed by the trial court or for errors of law that may have occurred. For these grounds, an appeal will lie. A party waives these errors by not appealing them within the allowable time.

A trial court has a statutory duty to decide all ancillary matters at the time it enters a decree affecting the marital status of parties, such as a decree of dissolution or legal separation under Ch. 26.09 RCW. However, a trial court does not thereby lose jurisdiction to enter a final decree of legal separation when it leaves ancillary issues unresolved. The parties may either voluntarily stipulate to unresolved parenting issues such as parenting plans and child support; or the parties may waive the right to have all ancillary matters settled at the same time by not appealing a trial court's decision to enter a final decree while leaving ancillary matters unresolved. In either case, the trial court's decision to enter a final decree is valid and final subject to appeal, and a failure to either object or appeal is a waiver of that right. Because the issue involves an error of law or procedure only, it is not an irregularity beyond the direct province of the trial court and therefore cannot support a motion to vacate under CR 60(b)(1), (4), or (11).

Venue is proper in a domestic case in the petitioner's county of residence. Venue may be moved at the request of a party if proper

grounds are presented and a trial court agrees. Failure to request a change of venue waives any argument that may have existed upon which a motion to change venue may have rested. So long as a court otherwise had jurisdiction in the matter, a decree will be final and enforceable in any venue.

In this case, the child and the parties were involved in a dependency proceeding in the Juvenile Division of the Spokane County Superior Court. One party was domiciled in Spokane County, while the other party was domiciled in Clark County. A proceeding for legal separation was started in Clark County, a proper venue under RCW 26.09.010 as being the county of residence of the petitioner, the responding party received notice and an opportunity to appear, but voluntarily chose not to, and was found not to have any excusable neglect for such failure. A decree of legal separation was entered in which the ancillary issues of a parenting plan and child support were reserved for a time when the Juvenile Division release jurisdiction over the child. The responding mother did not object, and in fact later on agreed to that procedure. Nevertheless, the trial court vacated the decree because of the bifurcation of ancillary issues and improper "forum shopping"; it therefore erred by vacating the decree of legal separation based upon alleged unappealed errors only, and not upon a finding that the decree was either void or was the result of extrinsic irregularities. It therefore abused its discretion, and the decree of legal separation should be reinstated.

D. ARGUMENT

Point One: The Decree of Legal Separation reserving on ancillary issues is valid and final when entered because the trial court had jurisdiction over the subject matter, over the parties, and possessed the power to make the order.

a. The Scope of Review regarding the validity of a decree is de novo.

Janet moved the trial court to vacate the decree of legal separation under CR 60(b)(1), (4), and (11). The trial court vacated the decree for reasons other than those that had been raised by Janet as the moving party; the specific grounds for the vacation were not identified other than that the court had erred in bifurcating the issues and the venue may have been improper. If a court does not have jurisdiction, the resulting order will be void. Whether a particular court has jurisdiction is a question of law reviewed de novo. *Shoop v. Kittitas County*, 149 Wn.2d 29, 33, 65 P.2d 189 (2002). A motion to vacate a final order for lack of jurisdiction as void is also reviewed de novo. *In re Marriage of Wilson*, 117 Wn. App. 40, 45 (2003), 68 P.3d 1121.

b. A decree of legal separation is valid if the issuing court possesses the three elements of jurisdiction: Subject Matter Jurisdiction, Personal Jurisdiction, and Authority to Enter the Judgment

One possible ground for the vacation of the decree of legal separation is that the decree is void because the trial court lacked jurisdiction to enter the order. CR 60(b)(5). The argument is that because the Parenting Act of 1987 is a statutory proceeding, a failure to follow the mandates of the Act deprives the court of jurisdiction to enter a valid

order. *See, e.g., In re Marriage of Little*, 96 Wn.2d 183, 186 (1981), 634 P.2d 498; *In re Marriage of Possinger*, 105 Wn. App. 326, 332 (2001), 19 P.3d 1109; *In re Marriage of Wilson*, 117 Wn. App. 40, 47 (2003), 68 P.3d 1121. Since an order entered by a court without jurisdiction is void for all purposes and all times, some discussion is therefore addressed to this issue.

There are in general three jurisdictional elements in every valid judgment: jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment. *See Marley v. Labor and Industries*, 125 Wn.2d 533, 886 P.2d 189 (1994); *Little*, 96 Wn.2d at 197. "Subject matter jurisdiction is a tribunal's authority to adjudicate the type of controversy involved in the action." *Shoop v. Kittitas County*, 108 Wn. App. 388, 393, 30 P.3d 529 (2001). Subject jurisdiction as well as power and authority to render a decree of legal separation are governed by the Parenting Act, Ch. 26.09 RCW. If at least one party is domiciled in Washington, and the petitioning party requests a decree of a legal separation in lieu of dissolution, and the responding party does not object, the Superior Court gains subject jurisdiction and the power and authority to enter a decree of legal separation. RCW 26.09.030; RCW 26.09.050.

The second element, jurisdiction over the person, is governed by the rules of a civil action under the laws of Washington. RCW 26.09.010(1). In general, the responding party must be served with

process according to the statutes and rules in Washington, receive notice of the claims and relief requested, and be given an opportunity to respond. An objection to personal jurisdiction is waived if not timely raised. CR 12.

c. The Trial Court had both Subject Jurisdiction and Personal Jurisdiction

The first two elements were present in this case. Phillip filed a petition requesting a decree of legal separation in lieu of dissolution, alleged both he and Janet were Washington residents, and Janet did not object. CP at 3 – 6. An affidavit of service was filed testifying that Janet was served. CP at 11 – 13. Further, Janet acknowledged that she received the summons, petition, notice of default, and decree of legal separation, and did not respond, object, or appeal. CP at 46.

d. The Trial Court has Power and Authority to Enter a Decree Affecting Marital Status When the Jurisdictional Elements of RCW 26.09.030 are Present

The argument commonly arises that a court lacks the power and authority to enter a particular judgment if it does not follow the statutory mandates set out for it by the legislature, in particular that the court enter final ancillary orders regarding parenting issues under RCW 26.09.050. However, the appellate courts have consistently ruled that trial courts have jurisdiction to enter valid decrees while leaving ancillary issues unresolved. “Failure to settle ancillary matters at the time the decree of dissolution is rendered does not deprive the court of jurisdiction over the parties, or the subject matter, or of the power to render a decree of

dissolution.” *Little*, 96 Wn.2d 183, 197; *see also Possinger*, 105 Wn. App. 326; *In re Marriage of True*, 104 Wn. App. 291, 16 P.3d 646 (2000). If a decree is entered against the wishes of a party, the resulting decree is valid and final, but may be subject to reversal on appeal.

Three cases clearly establish the above proposition. The cases of *Little*, 96 Wn.2d 183 and *Possinger*, 105 Wn. App. 326, establish that a trial court has jurisdiction to enter a final decree while leaving ancillary issues pending, that the only proper remedy is by appeal, and that the failure of an a party to appeal results in a waiver. The case of *In re Marriage of Furrow*, 115 Wn. App. 661, 63 P.3d 821 (2003), establishes that a court has jurisdiction even if egregious mistakes occur because the court is one of general jurisdiction. *Furrow* involved a trial court decision issued pursuant to a petition to modify the parenting plan. Despite grievous errors in procedure occasioned by the trial court, including the fact that the Parenting Act did not authorize a trial court to terminate parental rights at all, the trial court’s decision terminating a mother’s parental rights as part of the action to modify the parenting plan was nevertheless valid and enforceable because the trial court had jurisdiction to make such an order under other statutory authority.

In the Supreme Court decision of *Little*, the court stated, “Some of the briefs before this court proceed upon the apparent assumption that the failure of a lower court to decide the custody and property issues at the time it enters the decree of dissolution renders the judgment void.

However, no authority is offered for that proposition, and we do not perceive a valid basis for it. A judgment is void only if the court lacks jurisdiction.” *Little*, 92 Wn.2d at 195. Quoting from an out-of-state decision discussing the issue of jurisdiction, the *Little* court concluded, “Although the provisions of section 401(3) are mandatory, they do not present a jurisdictional requirement in the sense they cannot be waived . . .” *Little*, 92 Wn. 2d at 196. Finally, the court held,

Failure to settle ancillary matters at the time the decree of dissolution is rendered does not deprive the court of jurisdiction over the parties, or the subject matter, or of the power to render a decree of dissolution.

It follows that our holding with respect to the court's duty to rule upon all ancillary questions at the time it enters a decree of divorce does not affect the validity of decrees which have previously been entered and from which no appeal has been taken. In such cases, the right to have all the issues decided at once has been waived, the failure to rule upon such issues having been but a procedural error and not a jurisdictional defect.

Little, 96 Wn.2d at 197 - 198.

In *Furrow*, 115 Wn. App. 661, 63 P.3d 821 (2003), the court considered an egregious case in which the trial court had accepted one parent's relinquishment of parental rights as part of a parenting plan modification petition. Amici argued that the trial court should be held to have issued a void decree because it had overstepped its authority under the Parenting Act. For example, they “urge[d] this court to declare that the modification court lacked subject matter jurisdiction to enter the order terminating Ms. Taylor's parental rights, and that the order is, accordingly, void and subject to vacation....” *Furrow*, 115 Wn. App. at 667. The court

of appeal held that even though the trial court had no authority under the Parenting Act to issue such an order, since “[n]o provision in chapter 26.09 RCW permits a court to terminate parental rights in the course of a marital dissolution or a postdecree modification action,” *Furrow* at 667, it nevertheless did have the authority under the adoption statute, and therefore had jurisdiction to make a valid order. The court held, “The modification court did not lack subject matter jurisdiction; thus, the order terminating Ms. Taylor's parental rights was not void,” even when numerous procedures had been violated. *Furrow* at 664.

The Supreme Court, in the case of *Marley v. Labor and Industries*, 125 Wn.2d 533, 886 P.2d 189 (1994), was faced with a situation that presented confusion of the concepts of subject matter jurisdiction, errors of law, and void judgments. It attempted to clear the confusion by emphasizing that so long as a court has subject matter jurisdiction, errors of law it may have committed have no effect on the validity of the resulting orders. It further overruled a Court of Appeal case, *Fairley v. Department of Labor & Indus.*, 29 Wn. App.477, 627 P.2d 961, *rev. denied*, 95 Wn.2d 1032 (1981) because it had erroneously held that an error of law was a jurisdictional flaw rendering an order void. The Supreme Court explained:

A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. The term "subject matter jurisdiction" is often confused with a court's "authority" to rule in a particular manner. This has led to improvident and inconsistent use of the term.

...

...Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously. If the phrase is to maintain its rightfully sweeping definition, it must not be reduced to signifying that a court has acted without error. (Footnote omitted.) *In re Major*, 71 Wn. App. 531, 534-35, 859 P.2d 1262 (1993).

A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. [T]he focus must be on the words "type of controversy." If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction. Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 B.Y.U. L. Rev. 1, 28. A lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief.

Marley, 125 Wn.2d at 538-39.

The Supreme Court in *Marley* then looked to a prior Supreme Court ruling in *Dike v. Dike*, 74 Wn.2d 1, 448 P.2d 490 (1968) for a slightly different expression of the above principles: "[W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt." *Marley*, 125 Wn.2d at 540; see also *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975) ("[a] judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved"). In explaining the third element expressed by the *Dike* court, the Supreme Court said, "The third element - the inherent power to enter the order - is a subset of subject matter jurisdiction, adopted by this court to account for the unique qualities of contempt orders." *Marley*, 125 Wn.2d at 540. However, the Supreme Court adopted the Restatement

definition of a valid order: "Because the test in *Dike* does not differ in substance from that in the Restatement, we adopt the definition of a valid order set forth in the Restatement (Second) of Judgments § 1 (1982). We also conclude that a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim." *Id.* at 541. Because the Court of Appeal in the *Fairley* case had held that the trial court's award had been "outside the statutory mandate," it "was therefore void Being a void order, no appeal from the initial decision was necessary....," was an incorrect statement of the law, they overruled that opinion. *See Marley*, 125 Wn.2d at 541. The policy behind this decision was one based upon *res judicata* and finality. "...[C]lassifying an error of law as a 'jurisdictional' issue:

transforms it into one that may be raised belatedly, and thus permits its assertion by a litigant who failed to raise it at an earlier stage in the litigation. The classification of a matter as one of jurisdiction is thus a pathway of escape from the rigors of the rules of *res judicata*. By the same token it opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment. *Restatement (Second) of Judgments* § 12, cmt. b (1982).

Marley, 125 Wn.2d at 541.

In this case, personal jurisdiction was never contested. Further, subject matter jurisdiction was never openly contested, although power or authority to enter the particular order may have been when the trial court found that it had been error for the trial court to bifurcate the issues in Clark County and enter a final decree while reserving on the parenting issues. However, if the trial court had felt that the resulting order was void

because of this error, it clearly made a mistake, confusing void judgments with erroneous judgments; the proper remedy for the latter is an appeal, not a belated motion to vacate.

e. The Decree of Legal Separation was final and unappealed and should be reinstated.

RCW 26.09.150 states that a decree of legal separation is final when entered, subject to the right of appeal. RCW 26.09.170(1) states that the provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state. An order vacating a decree based upon no grounds other than alleged errors of law is an abuse of discretion. *In re Marriage of Tang*, 57 Wn. App. 648, 655, 789 P.2d 118 (1990).

In this case, a decree of legal separation had been entered by a court with jurisdiction and final provisions relating to property and debt distribution were entered. The decree should have been assailable, if at all, only by appeal unless grounds existed under CR 60(b).

Point Two: The Trial Court abused its discretion in vacating the decree of legal separation under CR 60(b) because it grounded its reasons on unappealed errors of law.

a. The Scope of Review for an Order Vacating a Decree under CR 60(b) is that of Abuse of Discretion

A final judgment may be vacated for certain enumerated grounds listed in CR 60(b). An order vacating a final judgment or order is submitted to the sound discretion of the trial court. *Tang*, 57 Wn. App. at

654. Such an order will only be overturned on appeal if the trial court manifestly abused its discretion. *Id.* A trial court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. *Id.* Final orders may not be vacated for errors of law; an order overturned to correct errors of law is an abuse of discretion. "The court will not vacate a decree that is erroneous as a matter of law." *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 403, 622 P.2d 1270 (1981); *Kern v. Kern*, 28 Wn.2d 617, 619, 183 P.2d 811 (1947).

b. The Trial Court abused its discretion by vacating the Decree of Legal Separation on grounds that errors had been made relating to bifurcation of ancillary matters and improper venue because these are errors of law correctable by appeal.

A decree of legal separation is final when entered, subject to the right of appeal. RCW 26.09.150; *In re Marriage of Moody*, 137 Wn.2d 979, 988, 976 P.2d 1240 (1999). If the decree is valid and final, the question then becomes, did the trial court find the existence of conditions that justified the reopening of the decree when it stated that the court had erred in bifurcating the ancillary parenting issues or that venue had been improper? The answer is no because each of these issues is an error of law, appealable as a matter of right, and waived if not appealed. Since Janet did not appeal the decree of legal separation, she waived these errors. Therefore, based upon the rule that errors of law are not subject to vacation, the trial court abused its discretion and the decree should be reinstated.

The basic principle is that a ground for vacation of a final order must be based upon an extrinsic irregularity to the process or decision-making of the trial court; an error committed by the trial must be appealed or is waived.

In general, grounds sufficient to vacate a final judgment must be based upon some irregularity beyond the action of the trial court. "The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari according to the case, but it is no ground for setting aside the judgment on motion." ... This court adheres to that rule.

Kern, 28 Wn.2d at 619 (quoting from 1 *Black on Judgments* (2d ed.) 506, §329).

Janet primarily argued that the decree of legal separation should have been vacated because the resulting property and liability distribution was inequitable. CP at 47, line 6. She intimated in her motion that misrepresentation may have occurred, but did not argue that point in her declaration. CP at 42, lines 21 – 24. However, the equity of a disposition of property is a legal issue that must be appealed, not vacated. "[W]hether the terms of a separation agreement are unfair is a legal issue which must be raised on appeal-not in a motion to vacate the decree. *In re Marriage of Tang*, 57 Wn. App. 648, 654, 789 P.2d 118 (1990). *See also In re Marriage of Brown*, 98 Wn.2d 46, 48, 653 P.2d 602 (1982) (errors of law may not be corrected by a motion to vacate); *In re Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947 (1998)." *Moody*, 137 Wn.2d at 991.

In fact, however, the trial court did not vacate the decree upon any argument raised by Janet. The trial court found sua sponte that error had occurred when the decree was entered without final resolution of the parenting plan or child support. It is true that both statutory and case law grant to both parties the right to have all ancillary issues resolved at one time, and it would therefore be error for a court to decide otherwise in the face of an objection by a party. *Little*, 96 Wn.2d at 194; *Possinger*, 105 Wn. App. at 335; *In re Marriage of Hughes*, 128 Wn. App. 650, 658, 116 P.3d 1042 (2005). However, the cases also agree that a violation of this rule is an error of the trial court correctable by appeal only, and is otherwise waiveable. “In such cases, the right to have all the issues decided at once has been waived, the failure to rule upon such issues having been but a procedural error and not a jurisdictional defect. ... Furthermore, any objection to that procedure was waived by a failure to object or to raise the question on appeal.” *Little*, 96 Wn.2d at 197.

In effect the trial court agreed with this result when it stated that Janet had to be punished for her culpability in voluntarily declining to appear until she was subjected to a possibility of contempt if she did not comply with the provisions of the decree, and placing upon her the condition of paying a sanction for the right to have her case heard on the merits despite her inexcusable neglect. If she did not pay the sanction within the 30 days, then the decree would not be vacated and the parties

would have to proceed with a motion to modify in order to take care of the unresolved ancillary child issues.

- c. In cases of egregious error in which rights of children are irreversibly terminated, an otherwise valid decree may be vacated under CR 60(b)(11) because of extraordinary circumstances for which an appeal is not a viable solution.**

The case of *Furrow*, 115 Wn. App. 661, 63 P.3d 821 (2003) presents a situation in which CR 60(b)(11) is used to justify the vacation of a valid order terminating a mother's parental rights even though the underlying order involved an error of law. The court makes clear that the case presented extraordinary circumstances justifying such a result. The extraordinary circumstances were basically that the children were irreparably harmed by the order and had not had proper representation, thus negating their ability to appeal. The court stated that if only the mother's interests were involved, it would not vacate the decree, but because the children's interests were inextricably interwoven, the decree should be vacated despite the error having been one of law only.

The court stated:

CR 60(b)(11) grants the court discretion to vacate an order for "[a]ny other reason justifying relief from the operation of the judgment." Despite its broad language, the use of CR 60(b)(11) should be reserved for situations involving extraordinary circumstances not covered by any other section of CR 60(b). *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). Furthermore, those circumstances, just as with CR 60(b)(1), must relate to "irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." *Id. See, e.g., In re Marriage of Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985) (passage of Uniformed Services Former Spouses Protection Act constituted extraordinary

circumstance and thus relief under the Act was properly granted retroactively pursuant to CR 60(b)(11)).

[I]rregularities justify vacation [under CR 60(b)(11)] whereas errors of law do not. For the latter the only remedy is by appeal from the judgment. The power to vacate for irregularity is not to be used by a court as a means to review or revise its judgments or to correct mere errors of law into which it may have fallen. . . .

...

Viewing the problem more generally it appears that an irregularity is regarded as a more fundamental wrong, a more substantial deviation from procedure than an error of law. An irregularity is deemed to be of such character as to justify the special remedies provided by vacation proceedings, whereas errors of law are deemed to be adequately protected against by the availability of the appellate process. Other than that, the most that can be said is that it must be left for the court in each instance to classify.

Furrow, 115 Wn. App. at 6730-674 (quoting from Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. 505, 515 (1960)).

The court in *Furrow* agreed that the mother had voluntarily relinquished her parental rights and it was not therefore vacating that decree upon any alleged lack of jurisdiction in the issuing court or violated right of the mother; rather, the court vacated the decree because of the permanent harm occasioned to the children by the order. In fact, the court had little sympathy for the mother:

Although we deal here with an irregularity of egregious proportions, we would not be inclined to grant relief if only the interests of Ms. Taylor were at stake. Although Ms. Taylor may have had altruistic motives, she nevertheless invited the irregularity by voluntarily consenting to relinquishment of her parental rights and providing the court with documents that did not meet the requirements of the adoption statutes. Moreover, she

benefited from her bargain by being freed of her child support obligations, as well as her other parental obligations.

Id. at 674. In other words, the mother was found to have waived her rights and her remedy was by appeal.

The appellate court nevertheless vacated the order. In fully justifying its decision to vacate the order of relinquishment, the court grounded its decision on the irreparable harm to the children, and not on account of the errors committed at the instance of the parents: “Our concern is not the predicament in which Ms. Taylor finds herself, but rather, the predicament in which the modification court's irregular action placed the children of the parties.” *Id.* at 676. The children were not protected by a guardian ad litem, they lost a parent whom they loved and wanted to be with, and they were left without a substitute being appointed to take responsibility for them. “An order terminating parental rights does far more than merely terminate the rights of a relinquishing parent. It deprives the children of their right to financial support from that parent, their right to the companionship and guidance of that parent, their right of inheritance from that parent, and their right to social security benefits in the event of that parent's death or disability.” *Id.* at 664. In sum, the court vacated the order under CR 60(b)(11) because “...it is the only remedy that will protect the rights of the children in this case, who have not been adopted by a stepparent in the interim.” *Id.* at 664.

The court argued in *Furrow* that if a parent has an adequate remedy to an error of law by appeal, reliance upon CR 60(b)(11) is not

justified. Because the children were permanently and substantially harmed by the trial court irregularity, the court had no alternative option but to resort to CR 60(b)(11).

The instant case does not present a situation in which the child has been irreparably injured; rather, the child was under the direct supervision of a court charged with providing for its best interests, the parties and the state were actively involved in that process, had full access to the court at all time, a guardian ad litem was involved, and the parents both had full authority by means of a modification action to bring the matter to the court in the future when the child was no longer under the Juvenile Division's oversight. When the mother moved to vacate, she objected only to the propriety of the property and liability division. She had an adequate remedy in an appeal, and the vacation of the decree had no direct or indirect bearing on harm, alleged or actual, to the children. No rights involving the children were permanently lost or even temporarily affected. Egregious violations in court procedure did not occur.

d. Proper venue includes the petitioning party's county of residence, and a defense of improper venue must be raised by pleading or motion or is waived.

A second ground given by the trial court for vacating the decree was that the petitioning party had engaged in improper forum shopping by filing a petition for legal separation in Clark County. CP at 93. Proper venue in a domestic case includes the petitioner's county of residence. RCW 26.09.010(1). Phillip alleged in his petition that he was a resident of

Clark County. Therefore, he had standing to file for a legal separation in Clark County Superior Court, and Janet did not object or move to change venue. Because Janet did not object to venue in Clark County by filing a response or defensive motion, and because she did not allege that venue was improper in her motion to vacate, she effectively agreed that Clark County was a proper venue and waived any opportunity to argue that issue.

A defense of improper venue must be presented in the responsive pleading or by motion. CR 12(b) & (h). Failure to raise the matter by responsive pleading or by motion at the earliest opportunity results in a waiver of that defense. *See Kahclamat v. Yakima County*, 31 Wn. App. 464, 643 P.2d 453 (1982); *Sanders v. Sanders*, 63 Wn.2d 709, 714, 388 P.2d 942 (1964).

In any case improper venue is not jurisdictional. *See Marriage of Strohmaier*, 34 Wn. App. 14, 659 P.2d 534 (1983), which quoted from *Schroeder v. Schroeder*, 74 Wn.2d 853, 855 56, 447 P.2d 604 (1968): “If an action is brought in the wrong county, the action may nevertheless be tried therein unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits and demands that the trial be had in the proper county. The wording of the predecessor statute is substantially the same as RCW 26.09.010(2), ..., and therefore the rationale of *Schroeder* applies.” *Strohmaier*, 34 Wn. App. at 18.

The court of appeal in *Shoop v. Kittitas County*, 108 Wn. App. 388, 395, 30 P.3d 529 (2001) discussed the interrelationship between venue and jurisdiction, and held that venue is not jurisdictional because the superior court has the authority to decide the questions at issue at any location unless such location is objected to.

The concept that subject matter jurisdiction of the superior court varies from county to county is at odds with the concept of the superior court as a single bench whose subject matter jurisdiction 'flows from constitutional mandate.' See *State v. Werner*, 129 Wn.2d 485, 492, 918 P.2d 916 (1996). The constitutional article defining the types of controversy the superior court may adjudicate does not make any distinctions between one county and another[.]

Shoop, 108 Wn. App. at 395.

A little later, the *Shoop* court explained that failure to raise an objection results in a waiver. "If it is a defense that can be waived, then failure to file a claim does not deprive the superior court of subject matter jurisdiction, notwithstanding the use of "jurisdictional language" in the claim filing statute." *Shoop*, 108 Wn. App. at 401.

In summary, it is simpler to view the subject matter jurisdiction of the superior court as constant, uniform across the state, and centered in the constitution, than to assume subject matter jurisdiction varies from county to county and from year to year depending on how the legislature writes the venue statutes. "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." Martineau, *supra*, at 28, cited in Marley, 125 Wn.2d at 539.

...

The simpler model produces results that are more predictable, more consistent, and more practical. If all superior courts have the same general, constitutional subject matter jurisdiction over the same types of controversies, then the King

County Superior Court would have the authority to adjudicate an action against Kittitas County for damages for personal injury arising out of a motor vehicle accident, even though King County is not the proper venue for such an action. Proceeding to adjudicate the case in King County would be error, but the error would go to something other than subject matter jurisdiction. Having subject matter jurisdiction in the case, the King County Superior Court necessarily also would have the authority to grant a motion to transfer venue to a proper county without dismissing the case.

Shoop, 108 Wn. App. at 402.

Although the court in *Shoop* strongly criticized earlier cases in which the court had held that the Legislature could cause the subject matter jurisdiction of each superior court to vary depending on who was named as a defendant, its discussion above clearly establishes that the general rule is just the opposite and should be followed unless a contrary rule has been established by case law. *Strohmaier* and *Schroeder* indicate that such is not the case. In domestic cases, venue is established by statute, RCW 26.09.010(1), and a respondent has the right to have venue transferred to a county specified in the statute, but failure to do so results merely in a waiver, not lack of jurisdiction leading to a void order.

Janet did not appear and object to venue; nor did she object later when she did appear. She therefore waived improper venue as a defense in both the original case and upon motion to vacate, and the trial court erred by relying upon that issue as a ground for vacating the decree.

4. Summary

In sum, the interests of the child were fully protected by Janet's right to appeal and by the Juvenile Division of the dependency court exercising its jurisdiction over the child. Janet voluntarily allowed the

decree to be entered secure in the knowledge that her child's best interests were being addressed by the Juvenile Court and happy, at least for the time being, in obtaining resolution of her domestic dispute. Vacation of the decree for errors of law relating to bifurcation or venue will not further protect the rights of the child in this case, but would simply allow an aggrieved party to avoid the finality of a fully valid order for reasons unrelated to any interests of the child. The trial court having had jurisdiction to enter the decree, and no valid ground having been presented under CR 60(b) for the vacation of the decree, the decree of legal separation should be final and nonmodifiable and the court's decision vacating the decree should be found to have been an abuse of discretion justifying its reversal.

5. Phillip requests attorney fees pursuant to RCW 26.09.140 and RAP 14.2 and .3.

a. RCW 26.09.140

RCW 26.09.140 states, "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs. The court may order that the attorney's fees be paid directly to the attorney who may order that the attorney's fees be paid directly to the attorney" Phillip requests that the court of appeals order Janet to pay his costs and attorney fees in an amount to be proven at the conclusion of the appeal.

b. Title 14 RAP

Under RAP 14.2, costs will be awarded to the party that substantially prevails on review, unless the appellate court orders otherwise. Under RAP 14.3, statutory attorney fees and reasonable expenses actually incurred by a party for certain enumerated items may be awarded to a party. Phillip requests an award of costs as authorized by RAP 14.2 if he is determined to have substantially prevailed.

E. CONCLUSION

b. Title 14 RAP

Under RAP 14.2, costs will be awarded to the party that substantially prevails on review, unless the appellate court orders otherwise. Under RAP 14.3, statutory attorney fees and reasonable expenses actually incurred by a party for certain enumerated items may be awarded to a party. Phillip requests an award of costs as authorized by RAP 14.2 if he is determined to have substantially prevailed.

E. CONCLUSION

In conclusion, Phillip Brown requests that the Court of Appeals find that the trial court had proper jurisdiction to enter the decree of legal separation, abused its discretion in vacating it, reverse the vacation, and reinstate the decree of legal separation. Phillip Brown also requests an award of reasonable attorney fees and costs in an amount to be determined.

Dated: February 21, 2008

Respectfully submitted,

W. Lincoln Harvey
W. Lincoln Harvey WSBA No. 31116
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

08 FEB 22 AM 11:58

STATE OF WASHINGTON

BY
DEPUTY

No. 36826-9-11

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF:

PHILLIP A. BROWN

APPELLANT,

AND

JANET R. BROWN

RESPONDENT.

PROOF OF SERVICE

I, ASAYO IIDA, declare under penalty of perjury:

1. I am over the age of 18, not a party to these proceedings, and competent to testify as a witness.

2. I served Janet R. Brown, respondent, the following document: BRIEF OF APPELLANT

on the 21st day of February, 2008 at 4:30 p.m.

at 201 NE Park Plaza Dr. Suite 248

Vancouver, Wa 98684

in the following manner: leaving it at the respondent's attorney-of-record's business office with a person in charge thereof.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct to the best of my knowledge, information and belief.

DATED: _____
Signed at Vancouver, Washington

Asayo Iida

PROOF OF SERVICE

PAGE 1 OF 1

LAW OFFICE OF LINCOLN HARVEY
W. LINCOLN HARVEY, ATTORNEY
2418 MAIN STREET
VANCOUVER, WA 98660
360.696.8575

Facsimile Cover Sheet

PRIVILEGED AND CONFIDENTIAL

DATE: Friday, February 22, 2008

TO:

WA COURT OF APPEALS - II

Attn: VICTORIA

950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454
253-593-2970 (TEL)
253-593-2806 (FAX)

RECEIVED
FEB 22 2008
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

FROM:

LAW OFFICE OF LINCOLN HARVEY
W. Lincoln Harvey, Attorney
2418 Main St.
Vancouver, WA 98660
(360)696-8575 (tel)
(360)694-1655 (fax)

RE: **APPEALS CASE NO. 36826-9-II**
IN RE MARRIAGE OF PHILLIP & JANET BROWN
DECLARATION OF SERVICE

CONTENTS: 2 PAGES INCLUDING COVER

WARNING/CONFIDENTIAL

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS. THANK YOU!

FILED
COURT OF APPEALS
DIVISION II

08 FEB 22 PM 1:17

STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 36826-9-11

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF:

PHILLIP A. BROWN
APPELLANT,

AND

JANET R. BROWN
RESPONDENT.

PROOF OF SERVICE

I, ASAYO IIDA, declare under penalty of perjury:

1. I am over the age of 18, not a party to these proceedings, and competent to testify as a witness.

2. I served Janet R. Brown, respondent, the following document: BRIEF OF APPELLANT

on the 21st day of February, 2008 at 4:30 p.m. ^{4:53 pm} _{AI}

at 201 NE Park Plaza Dr. Suite 248

Vancouver, Wa 98684

in the following manner: leaving it at the respondent's attorney-of-record's business office with a person in charge thereof.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct to the best of my knowledge, information and belief.

DATED: 2/21/08
Signed at Vancouver, Washington

[Signature]
Asayo Iida