

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*.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A. Statement of the Case

The parties, husband and wife, separated on August 3, 2006, the day after the husband was arrested on a domestic violence charge involving the wife and charged in Spokane County District Court. CP 4; 44 – 45. The parties both resided in Spokane County at the time with their one and only child. At that time, the parties were involved in a dependency proceeding in the Spokane County Juvenile Court. CP 45. On September 21, 2006, the husband filed for legal separation in Clark County, which was the day after his criminal charge was resolved and the no contact order against him was recalled by the Spokane County District Court. CP 45. After the husband served the wife with the separation action, the parties attempted reconciliation which was unsuccessful. CP 46 and 59. On November 8, 2006, the Trial Court granted the husband's motion for a default judgment. CP 18. On November 28, 2006, the Decree for Legal Separation was entered with Findings of Fact and Conclusions of Law. On December 23, 2006, the child began to reside with the husband in Clark County pursuant to simultaneous court proceedings in the Juvenile Court in Spokane County on the dependency case. CP 77. On January 29, 2007, that court ordered the child to return to the father residing in Clark County. CP 79. On February 7, 2007, the husband moved for an Order to Show Cause re Contempt against the wife

to establish a judgment against her in the amount of \$18,410 for failing to abide to his proposed property distribution which was granted through the default Decree. CP 34-39. On March 9, 2007, the wife moved for a motion to vacate the default judgment under CR 60(b). CP 41-43. Specifically, the wife sought relief under the rule's subsections (1), (4), or (11). Her declaration stated errors in the Findings of Fact and Conclusions of Law regarding significant dates, such as the marriage date, and the mischaracterization of property, which purported an untrue assessment for equitable distribution of property. CP 44-49. Her declaration also outlined the events since the parties' separation as she perceived them; she stated that she had made attempts to secure legal representation on the legal separation case; and she explained her mind set at the time she was served the petition through the time after the subsequent default was taken against her while also dealing with ongoing hearings on the dependency case in Spokane. On March 22, 2007, the matter was heard before the assigned family court commissioner. CP 87. The hearing on the husband's motion for contempt was combined with the wife's motion to vacate the default legal separation. On April 19, 2007, the Court entered an Order Vacating Legal Separation Decree, finding that the motion was timely made and that there was evidence to support good cause to vacate the default judgment. CP 88. Also, the Court awarded the husband

\$350.00 in attorney fees. On April 19, 2007, the husband made a motion for an order of revision before the family court judge. That judge ruled there was insufficient evidence to support excusable delay or neglect on the part of the wife. However, he agreed that the legal separation decree should not have been granted because the husband had attempted to bifurcate the issues. The Order on Revision was entered on September 21, 2007. CP, pg. 92-95. The vacation of the Decree of Legal Separation was conditioned upon the wife paying \$1,000 to the husband for attorney fees within thirty days. This amount was despite evidence that the husband's attorney fees were only \$620 for securing the legal separation. VRP 10-11. The wife paid this amount to the husband's attorney within the prescribed time and the decree of legal separation was thereby vacated by the Final Order on Revision entered on November 2, 2007. CP 96-98.

B. Summary of Argument

The trial court acted within its discretion. The trial court had multiple bases upon which to vacate the default judgment in this case, any number of which may be relied upon by this Court. First, the default judgment is void for lack of subject matter jurisdiction over all the issues, namely that it lacked jurisdiction over the custody and parenting issues. Second, a motion to vacate a default judgment is within the trial court's discretion under CR 60(b). Alternatively, this matter should be remanded

to the trial court for specific findings and conclusions as to granting the vacation of the default decree and issuing the Order to Vacate.

C. Argument

1. THE TRIAL COURT DID NOT ERR IN VACATING THE DEFAULT LEGAL SEPARATION DECREE

The trial court had authority to issue a legal separation decree pursuant to RCW 26.09.050(1) and grant relief as it would in a martial dissolution decree except for the act of dissolving the marriage. Whether the trial court erred in granting a legal separation decree is reviewed de novo. It is within the trial court's sound discretion to resolve a motion to vacate a default judgment. *Hwang v. McMahon*, 103 Wn. App. 945, 950, 15 P.3d 172 (Div. 1, 2000), *rev denied*, 144 Wn.2d 1011, 31 P.3d 1185 (2001).

The trial court found that it did not have jurisdiction over all the issues, in that custody and parenting issues remained outstanding while the court in Spokane County remained jurisdiction over the pending dependency case involving the parties' child. Therefore, a discussion of *Little v. Little*, 96 W.2d 183, 634 P.2d 498 (1981) is relevant to an analysis of the trial court's ruling.

That case involved consolidated appeals in which the Court examined legislative intent and Chapter 26.09 RCW. It held that ancillary

matters may be postponed but the basis is that the trial court has jurisdiction over those ancillary matters.

It is true that RCW 26.09.030 sets forth certain conditions precedent to the entry of a decree of dissolution, and that resolution of property, custody, maintenance and support matters is not among them. However, the act must be read as a whole, and its parts harmonized. RCW 26.09.050 requires the court "(i)n entering a decree of dissolution" to "consider, approve, or make provision for" ancillary matters.

96 Wn.2d at 191; 503. The Court held that "RCW 26.09.050 is explicit in requiring the court to take action on ancillary provisions at the time that it enters a decree of divorce." *Id.* The Court found that it is the duty of the Superior Court to make a ruling on ancillary matters at the time it enters a decree. *Id.* at 194; 504. Therefore, bifurcation of issues in entering a legal separation decree is not allowed. Some provision for all issues must be made.

Here, the Superior Court could not make a provision regarding all the issues because it did not have jurisdiction over all the issues. The husband had attempted to bifurcate the issues with the trial court having the authority to resolve property issues but not have the authority to resolve, *or even address or make a provision for*, issues related child custody and parenting. As the husband's brief also cites, "A judgment is void only if the court lacks jurisdiction." *Id.* at 195; 505. The husband focuses on what

the court can do when it has jurisdiction over all the issues and fails to recognize that the trial court did not have jurisdiction over all the issues in his attempt to secure a legal separation from his wife in a different county from that county which had an ongoing and pending dependency proceeding involving their child. The trial court had the authority to vacate the Decree under CR 60(b)(5).

2. THE TRIAL COURT'S DECISION TO VACATE THE DEFAULT LEGAL SEPARATION DECREE WAS WITHIN ITS DISCRETION UNDER CR 60(B)

The trial court had discretion to vacate the Decree and did not abuse its discretion. The hearing on revision did not provide a clear basis for the reasons for vacating the Decree other than there was a lack of jurisdiction. Although the judge disagreed with the commissioner by finding a lack of excusable neglect, the Order does not state whether the judge excluded other reasons for granting the motion to vacate such as misconduct or other reason under CR 60(b) which may constitute good cause to vacate the Decree. The trial court could have also been considering the overall fairness in having both the separation and dependency cases heard before the Spokane County Superior Court. This position is supported by the judge's statement:

Thirty days from today, if she does not pay it, the legal separation continues and it is done and we move on. If she pays it, then the Commissioner's ruling is there. I reflect that if you bring it to me and you have the dependency in Spokane, I will tell you that I want everything in Spokane.
VRP 11.

3. EQUITY REQUIRES VACATING THE DEFAULT DECREE

The trial court had multiple bases in CR 60(b) upon which to base its decision. In considering a motion to vacate a default judgment the Court's principle inquiry should be whether or not justice is being done. *Hwang v. McMahon*, 103 Wn. App. 945, 950, 15 P.3d 172 (Div. 1, 2000), *rev denied*, 144 Wn.2d 1011, 31 P.3d 1185 (2001). The proceeding is equitable in character, and relief should be granted or denied in accordance with equitable principles. *Griggs v. Averbeck Realty, Inc.*, 92 W.2d 576, 581-82, 599 P.2d 1289 (1979). The trial court has liberal discretion to preserve substantial rights and do justice between the parties. *Id.* In considering a motion to vacate a default judgment, what is just and proper must be determined by the facts of each case, and not by a hard and fast rule applicable to all situations regardless of the outcome. *Id.* at 582; *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019, *as amended*, 3 P.3d 207, *rev denied*, 142 Wn.2d 1004, 11 P.3d 826 (1999).

The granting of the vacation of the decree, even on other grounds than on the motion to vacate, rendered the wife's need to appeal

meaningless except to argue that the Court erred in granting attorney fees to the husband, especially beyond those actually incurred. The judge failed to let the wife's counsel speak in order to discuss the facts regarding the commissioner's ruling that there were reasons under CR 60 for granting the wife's motion to vacate. The judge did not make specific findings under the different subsections of CR 60. He only stated that the wife waited too long to respond. Despite stating, "My concern and *I'll ask counsel* is why does the court vacate something . . ." RP 4, line 8 (emphasis added), the judge failed to allow the wife's counsel to address the explanations for the delay, review the findings of the commissioner regarding her findings that there were reasons for finding excusable neglect. The judge did not discuss the issues revolving around the domestic violence incident and timing of the recall of the No Contact Order with the filing of the legal separation action. The judge did mention the husband's apparent "forum shopping". VRP 7. when he filed the action in Clark County when the child, the wife, the community property, and another action involving the child were located in Spokane County. Yet, the judge then didn't discuss, as the commissioner did, that this may have caused the delay by the wife to travel across the state to appear in this case in Clark County as well find another attorney to represent her in the legal separation case while also appearing in the ongoing hearings in

the dependency case in Spokane County. Instead, the judge based his ruling on the basis that he did not want the matter to be adjudicated by through a default decree which "bifurcated" the issues.

Whether the terms of a separation decree are unfair is a legal issue which must be raised on appeal, not in a motion to vacate the decree. *In re Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999). Admittedly, the wife did raise that issue in the motion to vacate the decree while she argued other proper issues under CR 60(b). However, should the Court reverse the trial court and hold the Decree valid, the wife raises that issue briefly in her response to the husband's appeal of the Order of Vacation as it was not necessary for the wife to appeal when the wife's motion for vacation was upheld by the trial court.

As discussed further below herein, the wife alleges that the judge erred in finding that the wife did not have excusable neglect for responding prior to the entry of the default judgment despite the commissioner's findings otherwise. However, the trial court did vacate the default legal separation decree by finding that it did not have jurisdiction over all the issues in the decree, namely subject matter jurisdiction over custody and parenting issues and was thereby void for lack of authority to issue such decree. Therefore, the wife did not need to appeal the judge's findings as its eventual outcome was favorable towards

her. The wife did not appeal that ruling as the judge allowed the vacation of the legal separation to remain although the judge had conditioned the vacation of the decree on the wife's payment of \$1,000 in attorney fees to the husband within thirty days. This was despite that the husband's attorney had declared that only \$650 had been charged to the husband in legal services previously completed on the case. CP 96.

The judge, upon hearing the matter on a Motion for Order of Revision, found that there was a lack of jurisdiction over the child and that the default judgment granting the Legal Separation Decree was in error, in that the husband had bifurcated the issues and left the custody and parenting issues unresolved in the Decree because another court had jurisdiction over that subject matter. The judge did not agree with the commissioner's previous finding that the wife acted timely and that good cause existed to grant the wife's motion under excusable neglect. The judge's thinking, in granting the vacation of the default legal separation in the Order of Revision, must be what it appears to be on the face of the Verbatim Report of Proceedings of March 6, 2007. He states that:

You'll pardon me. 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. VRP 6.

He later continued:

And I ... 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. VRP 7.

Once the trial court has exercised its discretion in accordance with equitable principles, it is not the appellate court's role to substitute its judgment for that of the trial court. However, if the appellate court finds that the trial court failed to address the equitable issues and the underlying facts supporting the wife's CR 60(b) motion, but rather granted the vacation solely on a legal conclusion regarding lack of subject matter jurisdiction, then this matter should be remanded for the trial court to make such a determination as to the findings of fact. The appellate court reviews such factual findings for clear error. However, the trial court failed to make substantial factual findings in order to make a full review of the facts.

The trial court failed to discuss the reasons under CR 60(b) or those supporting facts alleged by the wife under her motion to vacate pursuant to CR 60(b). Here, the wife mentioned the inequitable distribution of property between the parties, the issues surrounding the timing of the default motion with ongoing dependency hearings in Spokane, her attempts to secure legal representation in Clark County, and the remaining emotional issues with dealing with her husband's domestic

abuse and manipulation regarding truthfulness regarding his attempts at reconciliation with her. The wife filed her motion to vacate within approximately four months of his motion for default legal separation. The judge did not discuss those facts but made a conclusive determination that she "sat on her laurels". VRP 7. Anytime the wife's counsel began to speak of the issue of excusable neglect, the judge cut counsel off from speaking. The trial court focused on the lack of jurisdiction and did not allow argument on issue of excusable neglect.

The court's principle inquiry in considering a motion to vacate a default judgment is whether or not justice is being done, and relief is granted or denied in accordance with equitable principles. *Hwang*, 103 Wn. App. at 950, *citing Griggs*, 92 W.2d 576, 581-82. The trial court has liberal discretion to preserve substantial rights and do justice between the parties. *Griggs*, at 582. Even these principles, the trial court was well within its discretion to restore the controversies between the parties on the merits relating to all issues of the marriage rather than the granting a default decree using the husband's proposed property distribution. It also was within the trial court's discretion to vacate the default order and judgment based upon CR 60(b)(11) if the trial court determined the circumstances did not clearly fit another subsection of CR 60(b). This Court must consider the public policy of the trial court's granting default

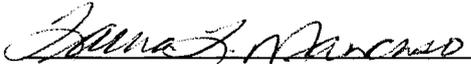
legal separation in which not all the issues are adjudicated especially in a default setting. The only consequence of vacating the default is that the parties will be able resolve all the issues involving their marriage for entry of a valid separation decree or dissolution decree.

In the alternative to affirming the trial court, the wife requests the matter be remanded. Since the record does not include specific findings as to the judge's determination of the facts under CR 60(b), this Court should remand the matter for the trial court to clearly state all the facts upon which it made a decision to vacate the default legal separation decree. Alternatively, this matter should be remanded to the trial court for specific findings and conclusions as to granting the vacation of the default decree and issuing the Order to Vacate. The trial court should review whether the property distribution was fair and equitable as listed in the Decree in light of the wife's assertions that the distribution was not accurate, whether property was mischaracterized by the husband in the default and whether the property distribution between the parties was equitable. The trial court did not discuss its authority to revoke or modify the property distribution under RCW 26.09.170. With a record with more stated findings and conclusions, any future appellate court would then have the ability to review for clear error upon factual determinations by the trial court and review de novo the trial court's conclusions of law.

D. CONCLUSION

The motion to vacate the default order and judgment in this case is firmly committed to the trial court's discretion, and there is no basis for finding any abuse of that discretion. For the reasons described above, this court should affirm the trial court's order vacating the default order and judgment, and allow the case to go forward as dissolution on all the issues. Respondent respectfully requests that the Order of Revision, vacating the legal separation decree, should be summarily affirmed. Alternatively, Respondent requests the matter be remanded to the trial court for additionally findings. Additionally, Respondent requests attorney fees and costs in this matter.

Respectfully Submitted this 25th day of April, 2008.


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