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I. INTRODUCTION

In this action, Appellant seeks the vacation of a decree of legal separation and a decree of dissolution, based upon a fraudulent joinder which was submitted to support both. In the alternative, Appellant seeks a remand for an oral hearing to determine the validity of said joinder.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred in entering order of February 7, 2008, denying Appellant's motion to vacate the decrees of legal separation and dissolution of marriage.

Issues Pertaining to Assignments of Error

No. 1: Did the trial court err in refusing the vacate the decrees of legal separation and dissolution which were sustained only by a contested joinder? (Assignment of Error 1.)

No. 2: Did the trial court err in refusing to hold an oral hearing on the issue of the validity of the contested joinder? (Assignment of Error 1.)

III. STATEMENT OF THE CASE

On November 21, 2005, Respondent (hereinafter referred to as the "wife"), filed a summons and petition for legal separation. CP 1 - 2, 3 - 11. No affidavit of service appears in the court record. Rather, the wife claimed that she "provided" a copy of the summons, petition and a joinder to the Appellant (hereinafter referred to as the "husband"). CP 71.

On December 2, 2005, a pro tempore court commissioner entered a decree of legal separation, findings of fact and conclusions of law, a final parenting plan and a final order of child support with worksheets, CP 55 -61, 46 54, 35 - 45, and 18 - 34. The final pleadings were entered based on a joinder purportedly executed by the husband. CP 72, 116, EX A-1.

Two months after the wife had the final pleadings entered, she advised the husband that they were "legally separated", without explaining what that meant. CP 180.

The Popkovs had previously experienced marital problems. The wife was living in the
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main house on the property and the husband was living in the guest house which he had built on their property. The husband was woken up by police in the middle of the night and told that he had to leave the property, since his wife had obtained an ex parte no-contact order against him. The police then drove the husband to Purdy, approximately 15 miles away from their home, let him out of the police car and told him that he could not return home. CP 181.

The husband was homeless for about two months. During that time, the wife obtained a year-long no-contact order against him. CP 181. He then went to Florida and rented an apartment from his brother, where he remained for about ten months. CP 181.

It was while the husband resided in Florida, that the wife told him by telephone that they were "legally separated". She did not explain what that meant, nor did she tell him that she had filed a joinder to support entry of a decree of legal separation, nor that she had been awarded all interest in their house and

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real property. CP 181.

Three weeks before the no-contact order was to expire, the wife called the husband and invited him to return home. She told him that she had taken care of the no-contact order. The wife picked the husband up at Sea-Tac Airport and drove him back to the family property, where he moved back into the guest house. CP 182.

Once again, the husband was asleep when the police arrived. They then arrested him for breaking the no-contact order. The wife had made no claims of any violence or threats against the husband, she simply advised the police that he had broken the no-contact order. CP 182.

The husband learned that a decree of legal separation had been entered 21 months previously when he was served with a motion to convert the decree of legal separation into a decree of dissolution. CP 62, 65 - 66. The record demonstrates that the wife took no action to enforce any of the final pleadings, including the order of child support, for more than 2 years following entry of the final pleadings. CP
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189 -195. Certified Declaration of Ily Popkov, dtd March 2, 2008.

The husband moved unsuccessfully to vacate the decree of dissolution and the decree of dissolution, CP 67 - 68. Motions for reconsideration of the denial of vacation and for revision were unsuccessful, CP 232 - 233, 237 - 238.

The husband has stated, under penalty of perjury, that he never signed the purported joinder. CP 180. The wife has never claimed that she saw the husband sign the joinder, nor has she ever produced any witness claiming to have witnessed the husband sign the joinder. cf. CP 71 - 72, where the wife claims that the husband must have signed the joinder as he was being evicted from the guest house by the police.

During the initial hearing on the motion to vacate, the court commissioner commented that the husband's failure to provide child support in the interim period hurt his credibility, based on the argument of the wife's attorney. The husband had, in fact, provided child support during the interim period, however, the wife did

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nothing to correct the court commissioner's misapprehension concerning this fact. Rather, she took full advantage of the misapprehension. CP 196 -197. (In obtaining the final order of child support, the wife knowingly exaggerated the husband's income for 2005. CP 198.)

This appeal timely followed the denial of the motion for revision. CP 243 - 260.

IV. ARGUMENT

- (1) The trial court should have vacated the decrees of legal separation and dissolution of marriage and allowed this matter to proceed to trial.

This matter was heard in the court below solely upon declarations and written documents. No oral testimony was taken.

The husband alleges that he never signed the joinder submitted by the wife in support of her decrees and that its submission by the wife constitutes a fraud upon the court. CP 180.

The standard of review in this action is de novo. "Decisions based on declarations, affidavits, and written documents are reviewed de novo." Estate of Bowers, 132 Wn.App. 334,

339, 132 P.2d 916 (2006). The Bowers court summarized the earlier decision in Estate of Nelson, 85 Wn.2d 602, 605-06, 537 P.2d 765 (1975) as follows: "Where the trial court did not have the opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony, appellate review of factual findings and legal conclusions is de novo." Id.

Similarly, in a different context, the courts have reiterated that: "The appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." Spokane Police Guild v. Liquor Control Board, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989); O'Connor v. DSHS, 143 Wn.App. 895, 904, 25 P.3d 426 (2001).

A review of the evidence of this action tilts decidedly toward the husband's request for vacation of the underlying decrees. (a) The wife only claims that she "provided" the summons and petition; she makes no claim of service. CP 71.

(b) The husband stated under penalty of perjury that he never signed the joinder nor even had any notion that an action might exist until two months after the decree of legal separation was entered. CP 180. (c) His only notice was a telephone call from his wife telling him that they were legally separated, but without providing any explanation of what that might mean and certainly not telling him that a property distribution had taken place. CP 180 - 181. (d) Even that notice occurred while the husband was residing in Florida. CP 181. (e) After ten months of separation, the wife indicated that she had taken care of the restraining order, invited him back to the family property, and even picked him up at Sea-Tac airport, hardly the actions of a spouse who had validly obtained a decree of legal separation. CP 182. There is no witness evidence of the husband executing the joinder. On the contrary, the wife claims that he must have executed the joinder on the night when he was being evicted from the house by the police. CP

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71 - 72.

Thus, the wife's theory is that, after being awakened in the middle of the night, and while the husband was evicted from his home, he decided to sign over nearly the totality of the parties' earthly assets to her. To state the proposition is to demonstrate how ludicrous it is.

However, there are further aspects of the wife's conduct which strongly indicate a willingness to deceive the court about this matter. When the court commissioner indicated that the husband's credibility was hurt by his failure to provide interim child support, the wife stood silent even though she was fully aware that the husband had in fact provided child support to her. She thus she took full advantage of the commissioner's misapprehension. CP 196 -197.

Additionally, in obtaining the order of child support, the wife knowingly exaggerated the husband's income for 2005. CP 198.

Moreover, the wife took no action to

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enforce the order of child support for a period of over two years. CP 62, 65 - 66. Since the wife throughout her Responsive Declaration claimed financial hardship, CP 69 - 116, (and see the Petition for Legal Separation, CP 14 at Paragraph 1.10), it is inconceivable that she would not have sought enforcement of the child support order unless she wanted a delay in time in order to claim that the husband was untimely in contesting the validity of the final pleadings.

CR 4.1 allows a summons and proof of service to be dispensed with upon a valid execution of a joinder by the responding party. The underlying decrees in this action can only stand if the joinder is deemed to be valid. The foregoing discussion, however, demonstrates that there is no basis for sustaining the validity of the joinder in this action.

Speaking in the context of a vacation of a default judgment, the Court of Appeals in Lee v. Western Processing Company, 35 Wn.App. 466, 468, 667 P.2d 638 (1983), stated, "The law favors

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determination of controversies on their merits and, consequently, default judgments are disfavored." In that case, affidavits denying that service had occurred were deemed sufficient to require vacation of the underlying default judgment. Similarly, in Haberman v. WPPSS, 109 Wn.2d 107, 176, 750 P.2d 254 (1987), the Court noted that the normal presumption of correctness accorded to an affidavit of service may be attacked and discredited by competent evidence, including controverting affidavits.

In this action, there is no affidavit of service whatsoever, nor any documentary evidence to sustain either service of pleadings or execution of the joinder. (Service of pleadings would avail the wife nothing, of course, since she failed to bring any motion for default judgment. CR 55.) Additionally, "...the mere receipt of process and actual notice alone do not establish valid service of process." Haberman, at 177.

Even if an abuse of discretion standard were applied to this action, the trial court

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should be found to be in error for refusing to vacate the underlying decrees.

A trial court abuses its discretion when it exercises "its discretion on untenable grounds or for untenable reasons, or [its] discretionary act was manifestly unreasonable"...A trial court must exercise its authority "liberally, as well as equitably, to the end that substantial rights [are] preserved and justice between the parties [is] fairly and judiciously done". White v. Holm, 73 Wn.2d 348, 351, 438 581 (1868). "[W]here the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues." 73 Wn.2d at 351-52.

Hardesty v. Stenchever, 82 Wn.App. 253, 262, 917 P.2d 577 (1996).

The foregoing discussion demonstrates that no rational person, and certainly no person in financial need, would wait for over two years to enforce a child support order unless the underlying basis for the child support order, i.e. the joinder, could not face the light of day until a long and prejudicial period of time had elapsed. Certainly, no rational person would execute a joinder which would result in his

penury, after being woken up in the middle of the night and while he was being evicted from his home.

The trial court should have granted the requested vacation of the underlying decrees.

(2) The trial court should have held an oral hearing on the issue of the validity of the contested joinder.

The same standard of review applies under this section as under the foregoing section for the same reasons and analysis therein presented.

The record in this action is entirely upon written materials. Just as a default judgment may reasonably be set aside with greater confidence in order to allow a trial on the merits, Hardesty at 262, so this matter should be remanded for either a full trial or, at the minimum, an oral hearing on the merits. The rationale and analysis of the foregoing section is adopted for this discussion.

The credibility of both parties, who alone possess relevant knowledge concerning the validity of the joinder herein, should be

weighed with each on the witness stand, where their demeanor can be observed and any inconsistencies in explanations can readily be detected. This is all the more so (i) where the wife has been caught being deceitful concerning whether the husband paid interim child support, (ii) where she exaggerated his level of income in 2005, and (iii) where she took no action to enforce her child support order for over two years, while claiming financial hardship. This surely rises to the same level of concern noted in Haberman and Lee.

This action should, at a minimum, be remanded for an oral hearing on the validity of the joinder.

V. CONCLUSION

This action presents numerous factors which undermine the validity of the joinder, upon which both decrees herein depend. The action was heard solely upon written materials and the court should apply a de novo standard of review.

The actions of the Wife are not consistent with the actions of a person who obtained a Brief of Appellant - 14

decree of legal separation upon a valid joinder. Her failure to seek enforcement of the order of child support for over two years is simply incredible for a person with financial hardship and a valid judgment.

The husband's alleged conduct, in supposedly signing away his life's earnings at the same time that he was awakened in the middle of the night and evicted by police is even more incredible.

This court should reverse the trial court and remand for either a full trial on the merits or an oral hearing on the validity of the underlying joinder.

Dated this 17th day of July, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was served on:

Belinda Armijo
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Tacoma, Washington

by serving the same on July 17, 2008 at the
foregoing address, which is the law office of
the said Belinda Armijo, Esq.

Signed at University Place, Washington on July
17, 2008.


ANDREW F. HIBLAR

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