

FILED
COURT OF APPEALS
DIVISION II
10 FEB 11 PM 2:18
STATE OF WASHINGTON
BY Ca
DEPUTY

No. 39808-7

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

**IN RE THE MARRIAGE OF
PHILIP A. BROWN, APPELLANT,
AND
JANET R. BROWN, RESPONDENT.**

BRIEF OF APPELLANT

W. LINCOLN HARVEY
ATTORNEY FOR APPELLANT
WSBA No. 31116

2418 MAIN STREET
VANCOUVER, WA 98660
(360)696-8575

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....v

Table of Cases.....v

Statutes.....vi

Rules.....vi

Other Authorities.....vii

I. ASSIGNMENTS OF ERROR.....1

Assignment of Error One.....1

Issue One.....1

II. STATEMENT OF THE CASE.....2

**A. Philip’s Pleadings And Janet’s Default; Entry Of Decree Of
 Legal Separation.....2**

**B. Philip’s Motion To Compel And Janet’s Motion To Vacate
 The Decree Of Legal Separation Under CR 60(b).....3**

**1. Janet Argued That Her Failure To Respond Had Been
 Excusable Neglect.....4**

**2. Janet Argued That Factual Errors Supported The
 Vacation Of The Decree.....5**

**3. Janet Argued That The Decree Should Be Vacated To
 Ensure A Fair And Equitable Distribution Of Assets
 And Liabilities.....5**

**C. Initial Hearings, Orders, And Appeal Of Janet’s Motion To
 Vacate.....7**

**1. The Commissioner Granted Janet’s Motion To
 Vacate.....7**

2.	Order To Vacate By The Trial Court.....	7
3.	Philip’s Appeal Of The Final Order On Revision Granting Janet’s Motion To Vacate.....	7
D.	Trial Court Hearing On July 7, 2009 To Hear Oral Argument On Grounds Other Than Excusable Neglect To Support Janet’s Motion To Vacate	8
1.	Trial Court Clarified The Purpose Of The Hearing Was To Consider Grounds Other Than Excusable Neglect As Support For Motion To Vacate	8
2.	Janet’s Arguments In Support Of Her Motion To Vacate: Misrepresentation In The Pleadings And Inequitable Division Of Property	9
3.	Philip’s Argument In Opposition To Motion To Vacate	10
4.	Janet’s Rebuttal To Philip’s Argument	10
5.	Trial Court’s Oral Decision And Order	11
E.	The Trial Court Vacated The Decree Of Legal Separation At A Hearing On August 7, 2009.....	12
1.	The Trial Court’s Findings Of Fact.....	12
2.	The Trial Court’s Conclusion Of Law.....	13
3.	The Trial Court’s Order Vacating The Decree Of Legal Separation.....	13
III.	SUMMARY OF ARGUMENT.....	13
IV.	ARGUMENT	15
A.	The Trial Court Abused Its Discretion In Vacating The Decree Of Legal Separation In Order To Determine Whether An Equitable Division Of Assets And Liabilities	

Had Been Made In The Decree Following The Default Of The Respondent Without Excusable Neglect And In The Absence Of Any Finding Of Fraud, Misrepresentation, Or Other Misconduct Of An Adverse Party.....15

- 1. The Standard Of Review For A Trial Court’s Decision To Vacate A Decree Of Legal Separation Under CR 60 (b) Is That Of A Manifest Abuse Of Discretion15**
- 2. The Trial Court Committed Error In Vacating The Decree Of Legal Separation Because A Decree Disposing Of Property May Not Be Modified Unless The Court Finds The Existence Of Conditions That Justify The Reopening Of A Judgment Under The Laws Of This State And The Trial Court Made No Such Findings16**
- 3. The Decree Of Legal Separation Entered Upon The Default Of The Wife Should Be Sustained Because The Wife Had Proper Notice Of The Petition, Had No Excusable Neglect In Failing To Appear, And The Decree Ordered Did Not Exceed Or Substantially Differ From That Sought In The Complaint20**
- 4. A Trial Court May Not Reopen A Final Order In Order To Readjust Or Correct Errors Of Law.....21**
- 5. Characterization And Valuation Of Property Are Legal Decisions Of A Trial Court, Errors In Determination Of Which Must Be Appealed.....26**
- 6. The Trial Court Committed A Manifest Abuse Of Discretion When It Vacated The Final Decree For The Purpose Of Reviewing Or Adjusting Alleged Or Actual Disparities In Property Distributions.....32**

V. PHILIP’S REQUEST FOR ATTORNEY FEES37

- A. The Appellate Court Has Discretion To Order A Party To Pay Attorney Fees And Costs To The Other Party.....37**

**B. Costs Are To Be Awarded To The Substantially Prevailing
Party On Review Unless Otherwise Ordered By The
Appellate Court.....39**

VI. CONCLUSION40

TABLE OF AUTHORITIES

TABLE OF CASES

Martin v. Pickering, 85 Wn.2d 241 (1975).....15

Griggs v. Averbeck Realty, Inc., 92 Wn. 2d 576 (1979).....15, 16

Marriage of Thompson, 32 Wn. App. 179 (1982).....15, 16, 20, 21

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)16

Marriage of Brown, 98 Wn.2d 46, 49 (1982)16, 17

Thompson v. Thompson, 82 Wn.2d 352 (1973)16

Smith v. Smith, 56 Wn.2d 1 (1960).....16

Kinne v. Kinne, 82 Wn.2d 360 (1973).....16

Lindgren v. Lindgren, 58 Wn. App. 588, 596 (1990).....17, 18

Momah v. Bharti, 144 Wn. App. 731, 182 P.3d 455 (2008).....17

In re Adamec, 100 Wn.2d 166, 178 (1983).....18

Dow v. Dow, 135 Wash. 188 (1925).....18, 19

Kern v. Kern, 28 Wn.2d 617 (1947).....18, 22, 23, 24

Old Republic Nat. Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC,
142 Wn. App. 71 (2007).....18

Morin v. Burris, 160 Wn.2d 745, 755 (2007).....18

In re Marriage of Himes, 136 Wn.2d 707 (1998).....18

Lawrence v. Rawson, 126 Wash. 158 (1923).....18

Marriage of Griffin, 114 Wn.2d 772, 777 (1990).....19, 37

Smith v. Behr Process Corp., 113 Wn. App. 306 (2002).....20

<i>Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.</i> , 68 Wn. 2d 756 (1966).....	22, 23
<i>State ex rel. Seattle v. Superior Court</i> , 1 Wn.2d 630 (1939).....	24
<i>Green v. Normand Park</i> , 137 Wn. App. 665, amended on reconsideration, rev. den. 163 Wn.2d 1003.....	25
<i>Marriage of Tang</i> , 57 Wn. App. 648 (1990)	26, 27
<i>Marriage of Burkey</i> , 36 Wn. App. 487 (1984).....	27, 29, 31
<i>Peste v. Peste</i> , 1 Wn. App. 19 (1969).....	27, 31, 33, 35, 39
<i>Marriage of Maddix</i> , 41 Wn. App. 248 (1985).....	28, 29, 31
<i>Marriage of Cohn</i> , 18 Wn. App. 502	29
<i>In re Marriage of Curtis</i> , 106 Wn App. 191, rev. denied, 145 Wn.2d 1008	30
<i>Garrett v. Garrett</i> , 67 Wn.2d 646, 648 (1965).....	35
<i>In re Marriage of Fernau</i> , 39 Wn. App. 695, 708 (1984).....	37-38
<i>Marriage of King</i> , 66 Wn. App. 134, 139 (1992)	38

STATUTES

RCW 26.09.170.....	16
RCW 26.09.080.....	30
RCW 26.09.140.....	37

RULES

CR 60	25
CR 60(b).....	9, 10, 11, 13, 22, 26, 32
CR 60(b)(1).....	4
CR 60(b)(4).....	4, 12, 13, 14, 17, 18, 22, 27, 28
CR 60(b)(11).....	4, 27
RAP 14.2.....	39
RAP 14.3.....	39

OTHER AUTHORITIES

1 BLACK ON JUDGMENTS (2d ed.) 506, §329	23
---	----

I. ASSIGNMENTS OF ERROR

Assignments Of Error

1. Assignment of Error One

The trial court erred in entering the order of September 18, 2009 granting the respondent's motion to vacate the decree of legal separation entered on November 28, 2006.

Issues Pertaining To Assignments Of Error

1. Issue One

Did the trial court abuse its discretion by vacating a decree of legal separation to review and adjust the equities of the property distribution upon motion by the wife, who alleged that the property distribution was unfair and inequitable, that certain items of property had been incorrectly mischaracterized and mis-valued, and that the husband had failed to list or value a business as an item for distribution, when the wife had received personal service of the summons and petition, the petition had contained a detailed listing of the parties' assets and liabilities with proposed characterizations, valuations, and distributions, the wife presented no excusable neglect for failing to respond, the findings of fact and conclusions of law incorporated the asset and liability findings as

presented in the petition, the final decree contained an identical asset and liability list as that contained in the petition, the wife knew of the business prior to the petition and believed the business was a “sham,” and the wife failed to allege any misconduct by the husband other than his act of proposing the property distribution itself and presenting the same to the court for entry upon the default of the wife.

II. STATEMENT OF THE CASE

A. Philip’s Pleadings And Janet’s Default: Entry Of Decree Of Legal Separation

Philip Brown, the appellant here and petitioner below, filed a summons and petition for legal separation from Janet Brown, the respondent, in Clark County Superior Court on September 21, 2006 (CP at 1 & 3). Philip had Janet personally served with the summons and petition on September 28, 2006 within the State of Washington (CP at 12). Janet acknowledged in her declaration filed on March 9, 2007 that she had received the summons and petition, and had failed to respond. Consequently, Philip filed a motion and declaration for order of default on October 27, 2006 (CP at 11), and obtained an order of default on November 8, 2006 (CP at 13). Philip presented his findings of fact and conclusions of law and decree of legal separation to the court on

November 28, 2006, at which time the court signed them and they were entered (CP at 15).

The petition for legal separation contained an exhibit with a detailed listing of both community and separate property and debts, their proposed values, and their proposed characterizations, along with Philip's proposed award of the same to both him and Janet, with the values summed (CP at 7). Philip's findings of fact referenced the exhibit contained in the petition as findings of the court as to the parties' community and separate property and debts (CP at 16). Philip's decree of legal separation distributed the parties' property and debts by means of an attached exhibit that was in substance exactly equal to the exhibit contained in the petition.¹ Janet did not appeal the entry of the final documents.

B. Philip's Motion To Compel And Janet's Motion To Vacate The Decree Of Legal Separation Under CR 60(b)

More than two months later on February 8, 2007 Philip filed a motion and declaration for an order to show cause re contempt seeking to compel Janet to obey the terms of the decree of legal separation (CP at 27). A month later, on March 9, 2007, Janet filed a motion to vacate the

¹ Philip had interlineated some corrections in the exhibit contained in the petition; the exhibit attached to the decree incorporated these interlineations.

decree of legal separation(CP at 45). She filed both a memorandum of authorities (CP at 45) and a declaration in support of the motion (CP at 48). In her motion to vacate, she argued that the decree of legal separation should be vacated under CR 60(b)(1), CR 60(b)(4), and CR 60(b)(11) (CP at 45).

Janet argued that her failure to respond was excusable neglect (CP at 48). She also argued that Philip had misrepresented items of property in the distribution (CP at 51). And finally, she argued that the alleged incidents of domestic violence that occurred prior to the filing of the petition constituted “other misconduct of an adverse party” or “other reason” justifying relief from the default judgment (CP at 48). She also indicated that the court should not allow Philip to distribute to Janet what she alleged was a debt associated with his “criminal conduct” (CP at 51).

1. Janet Argued That Her Failure To Respond Had Been Excusable Neglect

In her supporting declaration, Janet’s first statement was that her failure to respond to the petition was excusable neglect and the court should grant her motion to vacate upon that ground (CP at 48). She related numerous incidents that occurred between August 2, 2006 and September 28, 2006, the day she was served, in support of this request

(CP at 48). At the hearing on revision on May 4, 2007, the trial court found that Janet had no excusable neglect for her failure to respond, and this finding was entered into an order on September 21, 2007 (CP at 67). Janet did not contest this finding. In the hearing on July 7, 2009, the trial court reiterated this finding as well (RP at 14).

2. Janet Argued That Factual Errors Supported The Vacation Of The Decree

In addition to her argument about excusable neglect, Janet also argued that Philip had “made factual errors in the Findings and Conclusions of Law” (CP at 51). She alleged that he had erred in the correct date of their marriage, and he had failed to indicate that the parties had allegedly met and began living together in 1992 (CP at 51).

3. Janet Argued That The Decree Should Be Vacated To Ensure A Fair And Equitable Distribution Of Assets And Liabilities

Thirdly, Janet argued that the decree of legal separation did not provide a fair and equitable distribution of assets and liabilities (CP at 51). She then listed her “disputes” with the property distribution as ordered in the decree: (a) the jewelry items, although distributed to Janet in their entirety, were mis-characterized as community, rather than separate, property (CP at 51); (b) some of the property items were characterized as

separate property, although Janet alleged they had been purchased during the marriage and should have been characterized as community property (CP at 51); (c) Janet alleged that the account receivable from her father, Dan Coe, was not an asset of the community because “he had not signed anything regarding repayment nor was he expected to repay this amount to us” (CP at 51); (d) Janet alleged that Philip’s business was not listed as an asset but yet a portion of its debt had been distributed to her, and she stated, “If he keeps the business, then he should keep the debts related to that business” (CP at 51); Janet argued that the award of business debt to her was equivalent to an award of maintenance to Philip even though maintenance had not been requested nor ordered (CP at 51); finally, she argued that Philip “is fully capable of being employed full-time but chooses not to do so” (CP at 52). In this regard, Janet also declared in her declaration that Philip “first started this business in 2001 but it was really a sham” (CP at 48); (e) Janet stated that Philip had “included his criminal and civil attorney fees as community debt” (CP at 52), but should have been characterized as separate; further she argued that these debts should not have been awarded to her and the court had not awarded attorney fees (CP at 52).

C. Initial Hearings, Orders, And Appeal Of Janet's Motion To Vacate

1. The Commissioner Granted Janet's Motion To Vacate

Janet's motion to vacate the decree of legal separation was first heard by a commissioner on March 22, 2007 (CP at 62). The commissioner granted the motion to vacate (CP at 62), and Philip moved to revise.

2. Order To Vacate By The Trial Court

The trial court heard the motion on May 4, 2007, and granted Janet's motion to vacate for reasons other than those presented by Janet in her motion and declaration. The trial court's initial order was entered on September 21, 2007, and its final order on revision was entered on November 2, 2007. Philip appealed this decision.

3. Philip's Appeal Of The Final Order On Revision Granting Janet's Motion To Vacate

Division II of the Court of Appeal reversed the trial court's decision to vacate the decree of legal separation, but remanded the case back to the trial court to consider and rule upon Janet's motion to vacate, which had not been considered at the May 4, 2007, September 21, 2007, or November 2, 2007 hearings (CP at 84).

D. Trial Court Hearing On July 7, 2009 To Hear Oral Argument On Grounds Other Than Excusable Neglect To Support Janet's Motion To Vacate

1. Trial Court Clarified The Purpose Of The Hearing Was To Consider Grounds Other Than Excusable Neglect As Support For Motion To Vacate

Upon remand, the trial court conducted a hearing on July 7, 2009, in which it heard oral argument on Janet's motion to vacate (RP at 1). The focus of the hearing was to determine if any ground other than excusable neglect would support Janet's motion to vacate (RP at 1, 3). The court clarified, "I set this [hearing] at this particular time to ... determine if there were other grounds ... to base the CR 60 motion to vacate filed by [Janet] regarding specifically property that had been defaulted" (RP at 1). A few moments later the court confirmed that excusable neglect had not been found and was not at issue: "Again I note that this court in looking over all of it made a determination that it would not revise excusable neglect.... So having said that, ... the only reason we're here is to see if, in fact, the court should consider anything else or ... should it, in fact, deny [sic] [grant] the motion for revision and sustain the default that was previously entered (RP at 3).

2. Janet's Arguments In Support Of Her Motion To Vacate: Misrepresentation In The Pleadings And Inequitable Division Of Property

Janet first argued that “there has been misrepresentation in the actual pleadings that were filed by [Philip] in reference to characterization of property as well as the fact that it’s a fair and equitable division of property” (RP at 6).

Janet next argued that “she did not feel the decree of legal separation which has an attached Exhibit ‘A’ provided a fair and equitable division of the assets” (RP at 6).

Janet summarized her argument, “So I believe there are grounds under 60(b) that there has been either a misrepresentation to a certain extent by [Philip] as to the actual categorization of property as well as the values and the division between the parties (RP at 6).

In further argument, Janet stated, “... the division of the property between the parties both mischaracterized the separate-community aspects and further basically doesn’t list his business, but then wants [Janet] to take the debts of that so-called business. And apparently that had quite a bit to do with some credit card debt division also. And apparently ... in his proposed fair and equitable division of the ... debts is his criminal and civil attorney fees as community debts. (RP at 7).

Janet again argued, “So I would ask the court that in this particular case, given the enormity of the types of division of property and debts that occurred here, which weighted pretty heavily against [Janet], certainly is not a fair and equitable division and full litigation on all issues should be allowed and proceeded with” (RP at 8).

In conclusion, Janet submitted that “...we are here to seek justice, we are here to get a fair and equitable relief...” (RP at 8).

3. Philip’s Argument In Opposition To Motion To Vacate

Philip argued that CR 60(b) “goes to misrepresentation that leads to the entry of an order. In other words, it’s the process of getting to the order. And we don’t have that here” (RP at 9). Philip also argued that Janet received notice and “she had an opportunity to object to the characterization and the distribution and the division of the property. And she did not do so” (RP at 9-10). Further, Philip argued that the fact that property may have been mischaracterized “is not something that would support a vacation under CR 60(b)” (RP at 10).

4. Janet’s Rebuttal To Philip’s Argument

Upon rebuttal Janet reiterated that “the main issue here is obviously is justice ... being done in this particular case, given the process that’s been followed here. And I think the court has the jurisdiction and

the ability to make sure that justice does happen and there is a fair and equitable division of the assets and debt properly by this court versus misrepresentation by any other party” (RP at 11).

5. Trial Court’s Oral Decision And Order

The trial court reviewed the issue of misrepresentation and found that a misrepresentation is something that is hidden from the court, but that “if you say a ball is a ball and it ought to be awarded, that’s no misrepresentation” (RP at 13). Further, the court found that “[a] court doesn’t get into valuations in default judgments. A court doesn’t get into characterizations in default judgments. ... Well ... whoever entered the default did not rely upon whether it was separate or community property” (RP at 13). The trial court then reviewed all of the bases for setting aside a final order, from CR 60(b)(1) through 60(b)(11) (RP at 14-15).

In conclusion the court asked, “Do you have any ... authority that supports [Janet’s] theory that a request to set aside because ... an asset ... was mislabeled - certainly if an asset was left then it’s tenants in common and we treat it and we move forward. That’s what happens at [sic] anything that’s not included in the divorce or the legal separation” (RP at 16). Again, the court asked, “Do you have anything, counsel - any case

law - and I'm sure there is quite a bit out there - any case law that can tell me that ... the statutory period of time or the civil rule period of time has run, default was entered, it should be set aside because ... the property was mischaracterized? Do you have anything? Any case laws that support it?" (RP at 16-17).

In conclusion, the trial court allowed Janet to brief the sole issue of CR 60(b)(4) "because that's what you ... hung your hat on" (RP at 18). The court said, "So I want to know if the contents of that default are such ... that the court can take into consideration the characterization and valuations" (RP at 18).

E. The Trial Court Vacated The Decree Of Legal Separation At A Hearing On August 7, 2009

Following the submission of briefs by both parties, at a hearing held on August 7, 2009, the trial court expressed its oral findings and conclusions and order (RP at 19).

1. The Trial Court's Findings Of Fact

The court found that the parties had been together substantially before the marriage, and it was not certain that that fact had been taken into consideration (RP at 20). Further, the court found that the characterization of the property "is also suspect as relates to was it all included? Was there something left out?" (RP at 20). And finally the

court found in relation to the debt and business that “it was divided and yet father ended up with the business but the debt was divided amongst the parties. That may be appropriate, it may be inappropriate. But it is something that needs to be reviewed” (RP at 20-21).

2. The Trial Court’s Conclusion Of Law

The trial court concluded that “[t]his court must ... determine whether an equitable division has been made...” (RP at 21).

3. The Trial Court’s Order Vacating The Decree Of Legal Separation

The court ordered that “[a]t the present time, without a hearing in the matter, the court will vacate the default.” The order vacating the decree was entered on September 18, 2009. Philip appealed.

III. SUMMARY OF ARGUMENT

Dispositions of property by final decree in a dissolution matter are final, subject to conditions that would justify vacating them under CR 60 (b). Under CR 60(b)(4), misrepresentation, fraud, or other misconduct of an adverse party may allow for the vacation of a final order. Janet alleged that Philip’s act of pleading a property distribution in a petition for legal separation, serving Janet with a summons and the petition containing the proposed property distribution, and then presenting the same to the trial court for entry upon Janet’s default, amounted to misrepresentation or

fraud under CR 60(b)(4) supporting the vacation of the decree because she disagreed with his characterization and valuation placed on some items, and because she alleged he had failed to list or value his business, which she acknowledged in her motion to vacate was nothing more than a “sham.” Alternatively, Janet argued that the actual distribution of assets and liabilities was unfair and inequitable, which fact alone supported her right to vacate the decree and relitigate the matters.

Because the misrepresentation, fraud, or other misconduct of an adverse party must relate to the procurement of the decree by unfair or deceptive means, and not to the merits of the case, Janet’s argument is totally devoid of any merit whatsoever, as she did not allege that Philip did anything wrong that prevented her from litigating the issues she is now complaining of. She had full notice of his proposed asset and debt distribution, of his proposed characterization of property and debt items, and of his proposed values, yet did nothing to assert or protect her own interests in these matters; further, she admitted in her declaration in support of her motion to vacate that she had prior knowledge of his business, and believed it was a “sham.”

And finally, Washington case law is clear that in the absence of wrongful conduct leading to the entry of a property distribution, alleged or

actual inequities of property distributions is legal error for which the remedy is appeal, not motion to vacate. Since Janet did not appeal the decree, her motion to vacate to correct alleged inequities must be denied as contrary to law.

IV. ARGUMENT

A. The Trial Court Abused Its Discretion In Vacating The Decree Of Legal Separation In Order To Determine Whether An Equitable Division Of Assets And Liabilities Had Been Made In The Decree Following The Default Of The Respondent Without Excusable Neglect And In The Absence Of Any Finding Of Fraud, Misrepresentation, Or Other Misconduct Of An Adverse Party.

1. The Standard Of Review For A Trial Court's Decision To Vacate A Decree Of Legal Separation Under CR 60 (b) Is That Of A Manifest Abuse Of Discretion

A trial court's decision to vacate a final judgment, decree, or order rests within the sound discretion of the court and is reviewed for a manifest abuse of that discretion. *Martin v. Pickering*, 85 Wn.2d 241 (1975); *Griggs v. Averbek Realty, Inc.*, 92 Wn. 2d 576 (1979). A reviewing court will not disturb a trial court's decision on a motion to vacate a final order unless that decision is manifestly unreasonable or is based upon untenable grounds or untenable reasons. *Marriage of Thompson*, 32 Wn. App. 179 (1982).

A motion to vacate a default judgment is addressed to the discretion of the trial court, and its decision will not be

disturbed absent abuse of that discretion. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979). An abuse of discretion is “discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P.2d 775 (1971). We must determine if the trial court abused its discretion in refusing to set aside the default judgment.

Marriage of Thompson, 32 Wn. App. at 183.

2. The Trial Court Committed Error In Vacating The Decree Of Legal Separation Because A Decree Disposing Of Property May Not Be Modified Unless The Court Finds The Existence Of Conditions That Justify The Reopening Of A Judgment Under The Laws Of This State And The Trial Court Made No Such Findings

RCW 26.09.170 holds 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. Washington case law unequivocally holds the same. See *Marriage of Brown*, 98 Wn.2d 46, 49 (1982); *Thompson v. Thompson*, 82 Wn.2d 352 (1973); *Smith v. Smith*, 56 Wn.2d 1 (1960); *Kinne v. Kinne*, 82 Wn.2d 360 (1973). In *Kinne v. Kinne*, the Supreme Court stated, “It is the rule in this jurisdiction that provisions of a divorce decree relative to alimony may be modified on a proper showing, even if the payments were provided for in an agreement between the parties; however, the disposition of property made either by a divorce decree or by agreement between the

parties and approved by the court cannot be so modified.” *Id.* at 362. In *Marriage of Brown*, the court stated, “In the conflict between the principles of finality in judgments and the validity of judgments, modern judicial development has been to favor finality rather than validity.” *Marriage of Brown*, 98 Wn.2d at 49.

On the other hand, CR 60(b)(4) holds that “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: ... (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.”

In a CR 60(b)(4) proceeding to vacate or reopen a final order, the essential question is whether the “misconduct of an adverse party” caused the entry of the order complained of. Under this rule allowing the vacation of a judgment on the ground of fraud, the fraudulent conduct or misrepresentation must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 596 (1990); *Momah v. Bharti*, 182 P.3d 455 (2008). A corollary to this expression of the rule is that CR 60(b)(4) “does not permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment.”

Lindgren, 58 Wn. App. at 596 (1990); *In re Adamec*, 100 Wn.2d 166, 178 (1983). Finally, the party attacking a judgment under CR 60(b)(4) must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence. *Lindgren*, at 596.

Defaults are not not favored, especially in dissolutions. *Dow v. Dow*, 135 Wash. 188 (1925). Nevertheless, a party must demonstrate some wrong extraneous to the proceeding that will support setting aside of the judgment. *Kern v. Kern*, 28 Wn.2d 617 (1947). In other words, because a proceeding to vacate a default judgment is equitable in character, “a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable.” *Old Republic Nat. Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC*, 142 Wn. App. 71 (2007) (quoting *Morin v. Burris*, 160 Wn.2d 745, 755 (2007)); *In re Marriage of Himes*, 136 Wn.2d 707 (1998). Therefore, motions to vacate default judgments taken on personal service are properly denied where no sufficient excuse is shown for failure to answer. *Lawrence v. Rawson*, 126 Wash. 158 (1923).

In *Dow v. Dow*, 135 Wash. 188 (1925), the court denied a wife’s motion to vacate a default decree of divorce because the excuse for the nonappearance of the wife was so weak. *Dow v. Dow*, 135 Wash. at 189.

The court said that while the trial court has great discretion to vacate default decrees, especially in dissolution actions, even “upon what sometimes are rather vague showings, in order that the defaulted party may fully exhibit his case, yet to secure the opening of such defaults there must be some evidence showing that an injustice has been perpetrated, and in determining the effect of such evidence the trial court exercises a discretion.” *Id.* 188-189.

In this case, the trial court did not make any findings of conditions relating to the wrongful conduct of Philip or that he had perpetrated an injustice that would justify the reopening of a judgment under the laws of this state. The trial court made no findings at all except in its oral opinions. “In the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court’s resolution of the issue.” *Marriage of Griffin*, 114 Wn.2d 772, 777 (1990). Looking to the transcript of the hearings, then, the trial court intimated that certain items of property may have been mischaracterized and the ultimate division of assets and liabilities may have been other than fair and equitable, although it made no such determination. It found that Janet had proper notice and had no excusable neglect in failing to respond. It found no other reasons to justify vacating

the decree. Because these reasons do not implicate wrongful conduct, they are not conditions that would justify the reopening of a judgment in Washington. Therefore, the decree should be affirmed and the trial court order vacating the decree reversed.

3. The Decree Of Legal Separation Entered Upon The Default Of The Wife Should Be Sustained Because The Wife Had Proper Notice Of The Petition, Had No Excusable Neglect In Failing To Appear, And The Decree Ordered Did Not Exceed Or Substantially Differ From That Sought In The Complaint

In Washington, a party to a lawsuit may voluntarily default and in so doing rely on the relief requested in the pleadings. “A defaulting party should expect that the relief granted will not exceed or substantially differ from that sought in the complaint.” *Marriage of Thompson*, 32 Wn. App. 179, 183. The legal consequences of a default is that the defaulting party is deemed to have admitted all factual allegations necessary to establish the petitioning party’s claim for relief. *Smith v. Behr Process Corp.*, 113 Wn. App. 306 (2002). A default decree is valid if it conforms to the pleadings and the defaulted party had proper notice and opportunity. In *Marriage of Thompson*, the wife had received proper notice of the pleadings, which, as to the parties’ property, “should be divided equitably.” *Marriage of Thompson*, 32 Wn. App. 179, 181. At a motion

for default, and upon a finding that the wife had proper notice by personal service, the trial court divided the property, *id.* at 182-3, even though there had been no prior notice as to the proposed division. The wife moved to vacate the default and property division, arguing in part that the property division was “not fair.” *Id.* at 185. The court of appeal dismissed the argument summarily because she had had proper notice and no excuse for failing to appear. *Id.*

The instant case is factually identical in these respects, except that here Janet not only had proper notice of the petition, but she also had advance notice of the proposed property distribution in the nature of a detailed exhibit listing the parties’ asset and debts, their proposed characterizations, and their proposed distribution. The final distribution in the decree was identical to the proposed distribution. Therefore, Janet’s motion to vacate should be denied and the original decree of legal separation reinstated.

4. A Trial Court May Not Reopen A Final Order In Order To Readjust Or Correct Errors Of Law.

Janet argued that Philip had misled the court into making findings of fact and conclusions of law that were factually incorrect, and this misrepresentation is wrongdoing that supports her motion to vacate under

CR 60(b)(4) in order to correct these errors. She did not appeal the court's determination however, but instead sought to correct these errors by means of a motion to vacate under CR 60(b). Janet presented no case law to support her assertion, and yet it is the foundation of her motion to vacate.

As related above, the fraud or misrepresentation required to support a CR 60(b)(4) motion must be something that is extraneous to the trial court's action. *Kern v. Kern*, 28 Wn.2d 617 (1947). Actions by the court upon the merits are not extraneous, but rather implicit, to a trial court's actions. Even if a trial court should make a mistake upon the merits, a trial court may never reopen a final judgment to correct its own mistakes. *Id.*; *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756 (1966).

In *Kern v. Kern*, 28 Wn.2d 617 (1947), incident to a decree of divorce, the trial court had vested title to community property in the minor children of the parties. In other words, the court had divested title to community property from its owners to individuals other than its owners, surely a gross inequity. The mother petitioned the court to set aside this decree on the ground that the court had no jurisdiction to vest title to community property in the children and that its order had been an error.

The court of appeal denied the petition because the error had not been appealed. It stated:

‘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.’ 1 BLACK ON JUDGMENTS (2d ed.) 506, §329. This court adheres to that rule.

Kern v. Kern, 28 Wn.2d at 619.

In *Marie’s Blue Cheese Dressing*, 68 Wn.2d 756, the court of appeals addressed what it saw as confusion between errors of law, which do not support the setting aside of a final order, and fraud or misrepresentation, which do support such action. In the case the trial court admitted upon a motion to vacate after the time for appeal had passed that it had “overlooked” certain testimony when it granted a final order; the trial court therefore granted the motion to vacate for the purpose of “correcting” its mistake and entering a new order based upon its reliance on the overlooked testimony. *Id.* at 757. The moving party in support of its motion to vacate argued that the trial court was not correcting an error of law, but rather was correcting “a mistake of fact,”

which it had the inherent power to do. *Id.* at 758. In denying this right, the court of appeal stated that there was “some confusion concerning the lines of distinction which have been drawn in this area.” *Id.*

The distinction is not between mistakes of fact and mistakes of law, but between errors of law and irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings. In *Kern v. Kern*, 28 Wn.2d 617, 619 ... (1947), we said: ... ‘It is not intended to be used as a means for a court to review or revise its own judgments, . . .’ ... The court adheres to that rule. ... It is clear that the error the trial court sought to correct was not ‘something extraneous to the action of the court or [going] only to the question of the irregularity of its proceedings.’

Id. The court of appeal held that the trial court had committed error by vacating the order in order to correct the consequences of overlooking the testimony. In sum, “The trial court could not correct its own error after the time for appeal from the entry of the order had expired.” *Id.* at 759.

In the instant case, the trial court ruled that it had the right to review the equities and make its own determination. However, a trial court may never reopen a final judgment in order to admit further testimony for the purpose of modifying it or rethinking it. In *State ex rel. Seattle v. Superior Court*, 1 Wn.2d 630 (1939), the Supreme Court said, in response to a motion to admit further evidence in the trial court upon

remand by the Supreme Court, that “a judgment of the superior court appealed to this court and determined upon its merits, becomes, in effect, a judgment of this court, and the trial court is without power, after its remand, to vacate or otherwise modify it on motion or petition, except in such manner as may be necessary to carry out the court’s mandate. The trial court, therefore, properly dismissed the ... application, because it had no jurisdiction to reopen the case for taking further evidence for the purpose of modifying a judgment affirmed by this court.” *Id.* at 633. Further, CR 60 does not allow a trial court to “rethink” the case and enter an amended judgment different than that originally intended. *Green v. Normand Park*, 137 Wn. App. 665, amended on reconsideration, rev. den. 163 Wn.2d 1003.

In the instant case the trial judge held that it had the right to reconsider the evidence and to make a determination as to the fair and equitable distribution of property and debts. In light of the above precedent, however, this determination is error, and the trial court’s order vacating the decree of legal separation should be reversed and the original decree reinstated.

5. Characterization And Valuation Of Property Are Legal Decisions Of A Trial Court, Errors In Determination Of Which Must Be Appealed

Janet's argument that either or both mischaracterization or misvaluation of property in pleading allegations or presentation of final documents constitutes fraud or misrepresentation is fallacious for the simple reason that these determinations are legal in nature. *Marriage of Tang*, 57 Wn. App. 648 (1990). Janet argued that Philip had committed misrepresentation when he, first, proposed that certain property was either separate or community, and then, second, submitted this proposal to the court as findings of fact and conclusions of law upon Janet's default. However, Janet does not appreciate that each party has the legal prerogative to set its own value upon property and the court does not commit error by relying upon such values in the absence of contrary evidence.

In *Marriage of Tang*, 57 Wn. App. 648, the wife argued that the trial court had to have before it a list identifying and stating the value of the relevant properties in order to determine whether a separation contract was equitable. She argued in part that because the trial court had not had such a list, it had discretion to vacate the decree under CR 60(b). The court of appeal ruled that this basis is an alleged error of law that must be

raised on appeal, and further there was “nothing to suggest that a list of the parties’ assets would have impacted the decision of the judge who ordered the dissolution. Indeed, this decree was entered on an agreed basis.” *Id.* at 655. While a decree entered upon the default of a party is not “agreed” in the sense of a settlement, nevertheless, as discussed above, a party who defaults with full knowledge of the pleadings admits the factual underpinnings that allow the petitioner to proceed to final judgment. While in *Tang* no property had been presented at all to the court, in the present case Janet argued that Philip had merely failed to list his business, which, by her declaration of March 9, 2006, she had full knowledge of. Such failure, if it is a failure, is an error of law only.

In *Marriage of Burkey*, 36 Wn. App. 487 (1984), the wife moved to vacate a decree of dissolution within two months if its entry under CR 60(b)(4) and 60(b)(11). The trial court vacated the decree because it found that the husband had “breached his fiduciary duty to make known to his wife the value of all of the property before the dissolution.” *Id.* at 488. The court of appeal reversed, finding that the trial court had erred in vacating the decree, even upon a finding that there was a disparity in the property disposition, grounding this reversal upon policy reasons favoring the finality of divorce decrees as expressed in *Peste v. Peste*, 1 Wn. App.

19 (1969), and because there had been no finding of fraud, overreaching, or collusion in the process leading up to the entry of the decree. The trial court had found that the parties were aware of their property, both real and personal, prior to the entry of the decree, and there was no showing either had information regarding valuation which they kept from the other.

Rather than securing expert appraisals of their property, they proceeded to estimate values themselves. The trial court found that the wife did not have sufficient knowledge to value the family business, but the court did not find that the husband had any knowledge exceeding his wife's. The husband had not concealed information, and "the parties exercised their right to set their own value on that property without the benefit of appraisals." *Id.* at 491, n. 3. It is significant that, although the wife argued that the husband had failed to make known the value of the business, the court of appeal had instead found that the wife knew of the business and had set her own value on it, which was her right, even if it was inaccurate. She had no basis to vacate the decree to correct her error.

In *Marriage of Maddix*, 41 Wn. App. 248 (1985), the wife moved to vacate the decree of dissolution under CR 60(b)(4) on the ground that the husband had "fraudulently withheld from her the value of his business." *Id.* at 249. The wife alleged that she had asked about the value

of the company prior to agreeing to the property settlement, and had been told “it had no value.” *Id.* After entering into the settlement agreement, the wife alleged that she discovered evidence that the value of the business was between \$25,000 and \$93,296. *Id.* The trial court found that, indeed, the husband had “failed to disclose the value of his business,” *id.* at 250, and vacated the decree “for the sole purpose of establishing that value.” *Id.* at 252.

In *Maddix*, the issue before the court of appeal was “whether failure to disclose the true value of an asset disposed of in a dissolution proceeding constitutes the fraud necessary to vacate the decree.” *Id.* at 252-3. Referring to *In re Marriage of Burkey*, 36 Wn. App. 487 and *Marriage of Cohn*, 18 Wn. App. 502, the court of appeal stated that the “rule of full disclosure” mandated by the fiduciary relationship of husband and wife *assumes that one party has information which the other needs to know to protect his interests.* *Id.* at 253. Therefore, the failure to disclose an asset’s value is not per se wrongful, because the one party may not have any information unknown to the other, or the other may have possession of sufficient information to protect her interests:

[If a spouse] had knowledge of the true value of the business, *or at least sufficient notice to protect her interests prior to the entry of the final decree*, it was incumbent upon

her at that time to examine more closely that value before proceeding with the dissolution. If she voluntarily chose not to do so, she should not be allowed to return to court to do what should have been done prior to entry of the final decree.

Id. at 253.

Janet's own declaration indicates that she knew of Philip's business, handled the financial affairs of the family, believed Philip's business was a "sham," declared that these facts caused strain in the marital relationship, and she wanted a divorce. Philip's failure to list the "sham" business or give a value to it in his pleading gave Janet sufficient information to protect her interest in that property item if she had so chosen. She chose not to. She should not be allowed to return to court to do what she should have done prior to entry of the final decree.

In *In re Marriage of Curtis*, 106 Wn App. 191, *rev. denied*, 145 Wn.2d 1008, faced with similar facts, the wife took a different legal tack and argued that a trial court is mandated to affirmatively ensure that property settlements are fair and equitable by applying the factors set forth in RCW 26.09.080 in the context of an agreed settlement prior to approving the property settlement. *Id.* at 195-6. The wife argued that the settlement was unfair because (1) the business had not been valued, and (2) the business had been awarded solely to the husband. *Id.* at 197. The

court of appeals held that these allegations, even if true, did not support vacating the property settlement. *Id.* Regarding the issue of valuation, the court referred to the *Maddix* decision and stated:

The duty to value an asset is on the parties when they know of the asset's existence. [*Maddix*, 41 Wn. App. 248, 253.] A party who voluntarily chooses not to value an asset before settlement "should not be allowed to return to court to do what should have been done prior to entry of the final decree." [*Maddix* at 253.]

[The wife] does not claim that she was unaware of [the husband's] medical practice, only that it was not properly valued. She could, however, have had her own expert value the practice.... She cannot now reopen the proceedings to do something that could have been done prior to entering the property settlement.” *Id.*

[The wife] also argues that awarding the medical practice to [the husband] creates a financial disparity between the parties. But “ ‘[t]o permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora’s Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses.’” *Burkey*, 36 Wn. App. at 489 (quoting *Peste v. Peste*, 1 Wn. App. 19, 25 (1969)).

Id. Therefore, Janet is wrong in claiming that Philip’s presentation of characterization and valuation of assets and liabilities in the petition and subsequently in the findings, conclusions, and decree were “misrepresentations.” He had the right to present his own characterizations and valuations to the court, as did Janet. He did not

conceal anything from her that she needed to know to protect her interests. Her own assessment of his business was that it was a “sham.” It was her right to place her own value upon his business, and choosing to rely upon Philip’s pleadings does not grant her the right to reopen the decree to relitigate these issues.

6. The Trial Court Committed A Manifest Abuse Of Discretion When It Vacated The Final Decree For The Purpose Of Reviewing Or Adjusting Alleged Or Actual Disparities In Property Distributions

Janet’s fundamental argument in support of her motion to vacate the decree of legal separation is that the property distribution is inequitable and the trial court has discretion to reopen the decree to rectify the inequities, to bring justice to the parties. Significantly, she argued this position as a legal right independent of any showing of wrongful conduct by the adverse party. In this case, Janet specifically argued that the award to her of half of the business debt with no award of the business, plus the award of half of the criminal and civil attorney fees, amounted to an inequitable distribution of property which would support a motion to vacate under CR 60(b). She did not allege that Philip had acted wrongfully, except for making the proposal in the first place. Again, Janet has provided no case law to support her argument. Nevertheless, the trial

court agreed with Janet when it stated, “[t]his court must ... determine whether an equitable division has been made..” and then ordered the decree vacated. This is plain error and the trial court’s order vacating the decree should be reversed.

A disparate property distribution, without wrongdoing in its procurement, amounts to nothing more than a voluntary waiver of one’s community property interests. *Peste v. Peste*, 1 Wn. App. 19 (1969). In *Peste*, the wife moved to set aside a property settlement agreement and that part of a default divorce decree that confirmed the settlement. *Id.* at 20. It was undisputed, even stipulated by the husband, that the property disposition was grossly unfair to the wife. The wife argued that her husband had (1) fraudulently misrepresented the value of the community assets, (2) that he had exercised undue influence over her, and (3) that “the court was defrauded by the failure of [the husband] to introduce testimony as to the value of the community assets.” *Id.* Alternatively, she argued that if no actual fraud was proven, nevertheless the “wrong” against her, arising from the disproportionate division of property, gave rise to a constructive trust in her favor. *Id.* The trial court found that, although there was a large disparity between the assets received by the husband as compared to that which the wife received, there had been no fraud or

undue influence, and the wife had entered into the agreement at a time when all of the material facts were known to her. *Id.*

The wife disagreed with the trial court's findings of fact, but argued as a matter of law that "a property settlement agreement *must* be set aside where the award to the wife is substantially less than the award to the husband, even though no element of wrongdoing has entered into its execution." *Id.* at 21 (emphasis in original). The property settlement agreement had contained a detailed description of the parties' community assets, but without values. *Id.* At a hearing on the motion to vacate, the husband stipulated that the community business was valued at between \$100,000 and \$105,000, while the remaining community assets amounted to little more than \$30,000 - \$35,000. Under the agreement, the wife received her personal effects, some household furnishings, and cash of \$6,600, payable in installments over three years. The husband received the business along with all other assets. *Id.*

The trial court found that because the wife had worked in the management of the business and handled the parties' personal finances, she was "fully knowledgeable of the values of the assets of the marital community." *Id.* at 22. "She got what she wanted out of the settlement and her failure to further exercise her rights was a matter of her own

choosing. It did not result from any wrongful conduct on the part of either [husband] or [his attorney].” *Id.*

The court of appeal addressed the perplexing question of “whether or not a wife may waive substantially all of her community interest upon the dissolution of the marriage where no wrongdoing has occurred to induce such waiver.” *Id.* It determined she could. *Id.* at 24. The *Peste* court quoted Supreme Court dictum to support this proposition:

“We have consistently held that the court, in a divorce proceeding, must make a just and equitable distribution of the community property of the parties, where there has been no waiver of this right.”

Id. at 24, citing to *Garrett v. Garrett*, 67 Wn.2d 646, 648 (1965).

As its holding, the *Peste* court ruled:

We hold that the doctrine of waiver is applicable to transactions between spouses generally and in the divorce situation specifically, where, as here, the choice to waive is made freely and voluntarily, without fraud, undue influence, duress, concealments, or without the taking advantage of one’s weakness or necessities by the other.” *Id.* at 24-5.

As further support of this proposition, the court of appeal relied upon the policy of finality as well as precedent:

We also believe that persuasive reasons exist for the application of the rule of waiver to the type of case here presented. When the divorce decree is entered, the deeds of properties exchanged and recorded, and the parties go their

separate ways to engage in business, there must be some finality to the divorce settlement upon which both can reasonably rely. To permit collateral attacks upon divorce proceedings without any more than a showing of disparity in the award would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses. The uncertainties which would result would be devastating.

Id. at 25. Additionally, the court of appeal upheld the decree because the wife had not discovered any new facts after the entry of the decree that she had not already known. *Id.* In other words, she truly got what she expected.

By defaulting after receiving full notice of Philip's proposed distribution of property, Janet waived her interest in receiving an equitable distribution of that business and the listed property. She knew of the business prior to the default. Other than the business, Janet has not alleged that Philip left any items of property off of the list. Other than \$675 of attorney fees Janet has not alleged that the property distribution was other than fair and equitable. Even if the assets and debts might have been distributed other than equitably, in the absence of any finding of wrongdoing by Philip, this fact amounts to no more nor no less than Janet's voluntary relinquishment of that right.

By arguing no more than that the distribution was inequitable Janet has invoked no right to vacate the decree. The trial court's order vacating the decree of legal separation for the purpose of equitably adjusting the distribution is manifest error and should be reversed, with the original decree being reinstated.

V. PHILIP'S REQUEST FOR ATTORNEY FEES

A. The Appellate Court Has Discretion To Order A Party To Pay Attorney Fees And Costs To The Other Party

RCW 26.09.140 states that “[u]pon 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 enforce the order in his name.”

Philip requests that this Court of Appeal order Janet to pay his attorney’s fees and statutory costs, and that Janet be ordered to pay the attorney’s fees directly to his attorney in his name.

That Supreme Court has stated that, in awarding attorney fees on appeal, the court should examine “the arguable merit of the issues on appeal and the financial resources of the respective parties.” *In re Marriage of Griffin*, 114 Wn.2d 772, 779-80 (1990) (citing *In re Marriage*

of Fernau, 39 Wn. App. 695, 708 (1984); *Marriage of King*, 66 Wn. App. 134, 139 (1992).

Janet's motion to vacate was frivolous; it was brought for the purpose of delay; and it was brought and maintained without reference to any case law, and was clearly in violation of long-standing legal precedent in Washington. Case law existed as to each issue raised by Janet, case law which refuted each of Janet's arguments as to equitable distribution, characterization, valuation, and procedure. In addition, Janet had not only the opportunity, but also the mandate, to find and present case law to the trial court answering the trial court's questions when it granted her the opportunity to research the issues submitted by the court: "Do you have anything, counsel - any case law - and I'm sure there is quite a bit out there - any case law that can tell me that ... the statutory period of time or the civil rule period of time has run, default was entered, it should be set aside because ... the property was mischaracterized? Do you have anything? Any case laws that support it?" (RP at 16-17). Janet not only failed to find the numerous cases, but failed to find anything that even remotely supported her position.

Janet's claim that the decree should be vacated because Philip characterized the jewelry as community, when in fact it was all distributed

to her is manifestly unreasonable. Janet's claim that the decree should be vacated because Philip failed to include a, in her words, "sham" business is also frivolous. It was obvious that she had placed no value on this business preceding Philip's motion to compel compliance with the order, and she was seeking to find any pretext to avoid complying with the decree. Janet completely ignored the fact that she needed to find misrepresentation extraneous to the court's action. And Janet maintained each argument without any reference to legal authority.

The policy reasons expressed in *Peste v. Peste* for the finality of property dispositions support an award of attorney's fees to Philip in this case. He has been deprived of his property for years, deprived of opportunity to devote his finances and energy into his work and family. He should not have to face the difficult choice of moving forward at the expense of forfeiting his rights to a fair judicial proceeding.

B. Costs Are To Be Awarded To The Substantially Prevailing Party On Review Unless Otherwise Ordered By The Appellate Court

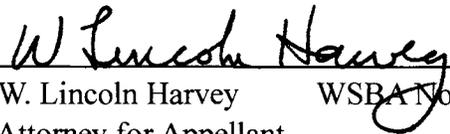
Under RAP 14.2, an award of costs will be made to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision. Under RAP 14.3, statutory attorney fees and the reasonable expenses actually incurred by a party for certain enumerated

items which were reasonably necessary for review may be awarded to a party as costs. Philip requests an award of costs should he be determined to have substantially prevailed.

VI. CONCLUSION

In conclusion, Philip Brown requests the Court of Appeals to find that the trial court abused its discretion in vacating the decree of legal separation to adjust the equities of the property distribution, reverse this decision, and reinstate the decree. Philip also requests an award of reasonable attorney fees and costs, in an amount to be determined.

Respectfully submitted this February 11, 2010 by


W. Lincoln Harvey WSBA No. 31116
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

10 FEB 11 PM 2:18

STATE OF WASHINGTON

BY 
DEPUTY

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

In re the Marriage of:

PHILIP A. BROWN,
Appellant,

and

JANET R. BROWN,
Respondent.

NO. 39808-7-II

DECLARATION OF SERVICE

1. Declaration of Service

I declare that I served: JANET BROWN, RESPONDENT with the BRIEF OF APPELLANT on February 11, 2010 by delivering a copy to the party's attorney-of-record, SUSAN A. STAUFFER, at her regular business address of 904 Esther Street, Vancouver, Washington.

2. Signature

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

DATED: 2/11/10


PHILIP A. BROWN
APPELLANT