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

In re Marriage of:

RICHARD B. FERGUSON,

Respondent

and

PAMELA M. FERGUSON,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE STEPHANIE A. AREND

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

In his response, Dr. Ferguson does not dispute that the motion to vacate was brought within a reasonable time pursuant to CR 60(b) if the judgment is void. *Brief of Respondent* at 8. Nor does Dr. Ferguson dispute that the trial court does not have discretion when determining whether to vacate a void judgment. *Brief of Respondent* at 9.

Dr. Ferguson claims the trial court should be affirmed because the judgment is not void. Dr. Ferguson bases this claim on his argument that the property award in the decree did not exceed the property division prayed for in his petition. In making this claim he appears to be making four (4) related arguments. First, that the issue of whether the property was fairly and equitably distributed is not properly before the court because it is outside the scope of a proper challenge to the trial court's denial of the CR 60(b)(5) motion and cannot be considered. *Respondent's Brief* at 13. Second, that the petition requested only a division of property and not fair and equitable division of property. *Respondent's Brief* at 10. Third, that the relief requested in the petition was general rather than specific, which distinguishes the present matter from the cases cited in Ms. Ferguson's opening brief. *Respondent's Brief* at 11. And finally, that the property and liability division in the decree was fair and equitable. *Respondent's Brief* at 15.

Ms. Ferguson herein addresses Dr. Ferguson's arguments and respectfully asks the Court to vacate the property division in the decree as void.

II. ARGUMENT

A. EVALUATING WHETHER THE JUDGMENT DIVIDES THE PARTIES' PROPERTY FAIRLY AND EQUITABLY IS WITHIN THE SCOPE OF A CR 60(b)(5) MOTION WHEN THE PETITION REQUESTS A FAIR AND EQUITABLE DIVISION OF PROPERTY AND LIABILITIES.

In order to protect a defaulting party's due process rights, a judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. CR 54(c). "To the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void." *Marriage of Leslie,* 112 Wn.2d 612, 618, 772 P.2d 1013 (1989). It follows that when the petition requests a fair and equitable property division, in order to protect a defaulting party's due process rights, the issue of whether the decree of dissolution fairly and equitably divided property and debts must come before this Court when a trial court's decision to deny a CR 60(b)(5) motion to vacate that decree's property award is appealed.

To determine whether the relief granted in the decree exceeded or was different in kind from the request for a fair and equitable division in

the petition and is thus void, the Court must examine whether the property and liability division in the decree was in fact fair and equitable. To hold such a determination outside the scope of appeal would prevent the opportunity for appeal on all property divisions entered after a default from a petition using the standard "short form" language in the mandatory form for a petition for dissolution of marriage.[1] The petitioning party bears the burden of showing that a default property division is fair and equitable. *See* PCLSPR 94.04(a)(3) (in effect as of December 14, 2004).[2]

Whether the property and liability division in the decree was fair and equitable is properly before this Court on appeal.

B. THE PETITION'S REQUEST FOR THE COURT TO DIVIDE THE PROPERTY AND LIABILITIES OF THE PARTIES NECESSARILY REQUESTS A FAIR AND EQUITABLE PROPERTY DIVISION.

Dr. Ferguson argues that sections 1.8 and 1.9 of his petition, asking the court to make a fair and equitable division of the parties' property and debts and liabilities at a later date should be viewed separately from his request for relief that asks the court to enter a decree of dissolution that divides the property and liabilities. *Respondent's Brief* at 10. He claims that those sections were merely the basis for the petition and the request

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[1] Dr. Ferguson's allegations and requests for relief set forth in paragraphs 1.8 and 1.9 are the "short form" option set forth in Washington State Court mandatory form WPF DR 01.0100.

[2] Current PCLSPR 94.04(a)(1) is substantially equivalent to 2004 PCLSPR 94.04(a)(3), which was in effect at the time the default dissolution was entered.

for fairness in those sections had no bearing on the division of property requested in the relief. *Id.* He argues that because the relief requested was merely for the court to divide the property, and because the decree divided the property, the court need not look into the fairness and equity of the property division in the decree to determine if it exceeded the relief requested in the petition. *Id.* The Court should decline to adopt Dr. Ferguson's reasoning for three (3) reasons.

First, RCW 26.09.080 requires the court to divide property and debt in a way that appears just and equitable. As a result, it is implied that a division of property in a decree of dissolution must be fair and equitable. When the relief requested is for the court to divide the property and liabilities, there is an inherent request for fairness and equity.

Second, by including requests for fair and equitable division of property and debts in the "basis" section for the petition, it is, at least, ambiguous whether the request that the court to divide the property and debt in the "relief requested" section was meant to include conditions of fairness and equity. Where a term is ambiguous, it should be construed against the drafter. *See Restatement (Second) of Contracts* § 206 (1981); *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965). Dr. Ferguson drafted the petition.

Finally, under Dr. Ferguson's reasoning, there is no property division entered upon default, no matter how one-sided, that would not "mirror" the "short form" petition's requested relief for a division of the property. A defaulting Respondent would be at the mercy of the Petitioner, who would be free to claim any and all community and separate property. Surely, Dr. Ferguson does not maintain that this was the legislature's intent behind RCW 26.09.080.

C. THE RELIEF GRANTED IN A JUDGMENT MAY NOT SIGNIFICANTLY VARY FROM OR EXCEED THE RELIEF REQUESTED IN THE PETITION REGARDLESS OF WHETHER THE RELIEF REQUESTED IS STATED GENERALLY OR SPECIFICALLY.

If Ms. Ferguson did not have "sufficient notice to make an intelligent decision to appear or default," the property division in the decree is void. *Marriage of Johnson,* 107 Wn. App. 500, 504, 27 P.3d 654 (2001) (*quoting Conner v. Universal Util.,* 105 Wn.2d 168, 172, 712 P.2d 849 (1986)).

In *Marriage of Johnson* the wife filed a petition for dissolution that valued the family home at $280,000, and requested that each party receive half of the value of the home. *Id.* at 502. Upon the husband's default a decree was entered that awarded the husband the home and awarded the wife a judgment against the husband in the sum of $140,000 with interest

of 12% per annum. *Id.* at 503. The decree also required the husband to sign a deed of trust in favor of the wife in the amount of $140,000. This Court reversed the trial court's denial of the husband's motion to vacate, finding that the relief granted in the decree varied substantially from the relief requested in the petition. *Id.* at 504.

Dr. Ferguson argues that the present matter can be distinguished on its facts from *Marriage of Johnson* because the petition in *Marriage of Johnson* requested a specified division of the property which the decree exceeded, while Dr. Ferguson's requested relief was a general request for a division of property. *Respondent's Brief* at 11. Under Dr. Ferguson's reasoning, there is no default property decree based on a "short form" petition, no matter how one-sided, that could be vacated under *Marriage of Johnson*.

As in *Marriage of Johnson*, Dr. Ferguson gave Ms. Ferguson notice that a property division would be made. CP 2. And, just as in *Marriage of Johnson*, the property division requested in the petition failed to give Ms. Ferguson enough information on which to base her decision whether to fight or acquiesce. The petition requested only a fair and equitable division of property; what the pro tem commissioner actually awarded was neither fair nor equitable. CP 2, 22.

Dr. Ferguson claims that because Ms. Ferguson is a "smart and educated woman with a Master's Degree," the petition requesting a fair and equitable distribution of property and liabilities, along with the order of default, and a restrictive final parenting plan "clearly" provided her with "sufficient notice to make an intelligent decision to appear or default." *Respondent's Brief* at 12. The petition asked the court to make a fair and equitable division of all property and debts and liabilities and the final parenting plan and order of default provided Ms. Ferguson no additional insight into the contents of the decree. CP 2. Ms. Ferguson simply did not have notice of the one-sided property division.

Dr. Ferguson's attempt to distinguish the nature of the petition filed in *Marriage of Johnson* from the petition he filed in the present matter, i.e. specific versus general, is misplaced. The issue is whether the petition gave sufficient notice of the property and liability division ultimately entered in the decree so that Ms. Ferguson could make an intelligent decision to appear or default. It did not.

Notice that the property and debt from the marriage should be fairly and equitably divided did not provide Ms. Ferguson with sufficient information to intelligently decide whether to accept the extremely one-sided property division awarded by default to Dr. Ferguson.

Consequently, this Court should find the decree void and vacate the property division.

D. A DECREE AWARDING DR. FERGUSON SUBSTANTIALLY ALL MARITAL PROPERTY AND MS. FERGUSON A TWELVE YEAR OLD MINI VAN AND $1,392.13 IN CASH IS NOT FAIR AND EQUITABLE.

The decree of dissolution awarded substantially all of the property to Dr. Ferguson, including the waterfront Gig Harbor family residence and all contents and furnishings, five other parcels of real estate, his dental practice, an Alfa Romeo sports car, a Ford pickup, all retirement accounts, and all other property in Dr. Ferguson's possession. CP 18, 22. Ms. Ferguson received the clothes on her back, a 1992 minivan, $1,392.13 in cash, the bank accounts in her name and certain other minor assets. CP 18, 23.

Dr. Ferguson argues that the division of property set out in the decree was fair and equitable. *Respondent's Brief* at 14. In his efforts to show that the property division was fair and equitable, Dr. Ferguson selectively discloses what he claims are the values of certain assets awarded in the property division. *Respondent's Brief* at 14-15. There are three (3) issues with Dr. Ferguson's valuations. First, there is no way to confirm the accuracy of the numbers because Ms. Ferguson had no access to the records and the trial court did not conduct evidentiary proceedings.

Second, these claimed values were not before the trial court at the time it entered the decree. Finally, Dr. Ferguson only disclosed his claimed value of certain assets.

Conspicuously absent in Dr. Ferguson's disclosure is the dollar value of all the financial accounts, including retirement accounts, awarded to Dr. Ferguson. Dr. Ferguson's financial declaration and 2010 tax return show that his income was $12,785 per month. CP 164, 169-79. Dr. Ferguson was a practicing dentist for all twelve (12) years of the marriage. It seems logical that his retirement account could have substantial value, almost certainly more value than a twelve (12) year old minivan and $1,392.13. When listing the values of the assets awarded to each party the value of select assets cannot simply be ignored so that the property division appears fair and equitable. RCW 26.09.080.

Also absent from the record is any evidence supporting Dr. Ferguson's claim that the community had built no equity in Wright Park Dental Clinic. Dr. Ferguson purchased the dental practice in 1988 and the building housing it in 1989 and married Ms. Ferguson in 1992. CP 180-218. It seems unlikely that Dr. Ferguson so completely established his practice in the three (3) years prior to marriage that the following twelve (12) years of marriage provided no benefit or goodwill to the practice.

Goodwill in a professional practice is frequently divided between the separate portion created before the marriage and the community portion created during the marriage. See *Marriage of Sedlock*, 69 Wn. App. 484, 495, 849 P.2d 1243 (1993). Moreover, the trial court's failure to set forth in the record the factors it used in valuing professional goodwill constitutes reversible error. *Marriage of Luckey*, 73 Wn. App. 201, 206, 868 P.2d 189 (1994); *Marriage of Hall*, 103 Wn.2d. 236, 247, 692 P.2d 175 (1984).

RCW 26.09.080 provides that "the court ***shall***...make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable ***after considering all relevant factors."*** (emphasis added). Then-effective PCLSPR 94.04(a)(3) makes clear that a petitioning party must demonstrate that his proposed default decree does not grant relief beyond that "***specifically requested"*** in the petition. Dr. Ferguson appeared personally at the final hearing, but he failed to present the evidence that the trial court needed to make the findings set forth in the Findings or to determine the fairness and equity of the property division in the decree. Where the law sets out a specific requirement, the trial court has an obligation to ensure the requirement is met and all relevant factors are considered. *Sacotte Const. Inc., v. Natl. Fire & Marine Ins. Co.,* 143 Wn.

App. 410, 419, 177 P.3d 1147 (2008). Dr. Ferguson cannot circumvent that requirement by seeking a default judgment. *In re C.R.B.*, 62 Wn. App. 608, 616, 814 P.2d 1197 (1991). It is understandable that the Court would value efficiency in the entry of default judgments, but the defaulting party's due process rights must not fall victim to the quest for efficiency.

V. CONCLUSION

The issue before this Court is whether the property division in the decree exceeded the relief requested in the petition for dissolution of marriage. Ms. Ferguson respectfully contends that it did and that consequently the decree is void. This Court should reverse the trial court and vacate the property award in the decree.

Respectfully submitted this 5th day of October, 2012.

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DECLARATION OF SERVICE

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

That on October 5th, 2012, I arranged for service of the foregoing Brief of Appellant, to the court and counsel for the parties to this action as follows:

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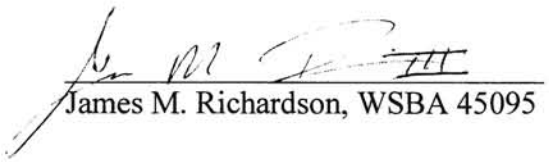
Dated at Olympia, Washington this 5th day of October, 2012.



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