

FILED  
COURT OF APPEALS  
DIVISION II

2014 SEP -8 AM 10:07

STATE OF WASHINGTON

BY           
DEPUTY

NO. 46298-2-II

---

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

---

TIMOTHY MARK PUTMAN, Appellant

v.

DEANNE MARIE PUTMAN, Respondent

---

BRIEF OF RESPONDENT

---

MARGARET BROST  
Attorney for Respondent  
1800 Cooper Point Road SW #18  
Olympia, WA 98502  
360.357.0285  
WSBA No. 20188

**TABLE OF CONTENTS**

A.	ASSIGNMENTS OF ERROR .....	1
	Assignments of Error .....	1
	Issues Pertaining to Assignments of Error .....	2
B.	STATEMENT OF THE CASE .....	2
C.	SUMMARY OF ARGUMENT .....	5
D.	ARGUMENT .....	5
E.	CONCLUSION .....	13

**TABLE OF AUTHORITIES**

Table of Cases

*Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) . . . . 5

*Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) . . . . . 5

*First Nat'l Bank v. Stilwell*, 50 Ind.App. 226, 98 N.E. 151 (1912) . 9

*Gutz v. Johnson*, 128 Wn.App. 901, 918-19, 117 P.3d 390 (2005) . . . . . 9

*In re Marriage of Wallace*, 111 Wn.App. 697, 710, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011 (2003) . . . . . 12

*Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007) . . . . . 5

*Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007) . . . . . 9

*Norton v. Brown*, 99 Wn.App. 118, 123, 992 P.2d 1019 (1999) . . 9

*Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wash.App. 829, 834, 14 P.3d 837 (2000), *review denied*, 143 Wash.2d 1021, 25 P.3d 1019 (2001). . . . . 8

*Pybas v. Paolino*, 869 P.2d 427, 73 Wn.App. 393 (1994) . . . . . 9

*TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn.App. 191, 200, 165 P.3d 1271 (2007) . . . . . 5

*White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) . . . . . 6

*Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) . . . . 5

*Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) . . . . . 5

<i>First Nat'l Bank v. Stilwell</i> , 50 Ind.App. 226, 98 N.E. 151 (1912) .....	9
<i>Gutz v. Johnson</i> , 128 Wn.App. 901, 918-19, 117 P.3d 390 (2005) .....	9
<i>In re Marriage of Wallace</i> , 111 Wn.App. 697, 710, 45 P.3d 1131 (2002), <i>review denied</i> , 148 Wn.2d 1011 (2003) .....	12
<i>Little v. King</i> , 160 Wn.2d 696, 702, 161 P.3d 345 (2007) .....	5
<i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007) .....	9
<i>Norton v. Brown</i> , 99 Wn.App. 118, 123, 992 P.2d 1019 (1999) ..	9
<i>Pfaff v. State Farm Mut. Auto. Ins. Co.</i> , 103 Wash.App. 829, 834, 14 P.3d 837 (2000), <i>review denied</i> , 143 Wash.2d 1021, 25 P.3d 1019 (2001). .....	8
<i>Pybas v. Paolino</i> , 869 P.2d 427, 73 Wn.App. 393 (1994) .....	9
<i>TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.</i> , 140 Wn.App. 191, 200, 165 P.3d 1271 (2007) .....	5
<i>White v. Holm</i> , 73 Wn.2d 348, 352, 438 P.2d 581 (1968) .....	6

#### Statutes

RCW 26.09.080. ....	7
RCW 26.09.140 .....	11

#### Regulations and Rules

CR 52 .....	8
CR 60(b) .....	5

Other Authorities

WPF DR 04.030 ..... 8

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE STATUTORY REQUIREMENT TO MAKE A DISPOSITION IN A JUST AND EQUITABLE MANNER MEETS THE "DEFENSE" REQUIREMENT OF THE WHITE FOUR PART TEST. CP 148.
2. THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE WAS EXCUSABLE NEGLIGENCE ON THE PART OF DEANNE. CP 148.
3. THE TRIAL COURT CORRECTLY FOUND THAT THERE HAD BEEN ON-GOING NEGOTIATIONS BETWEEN THE PARTIES. CP 148.
4. THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE WAS NO SUBSTANTIAL HARDSHIP TO TIM. CP 148.
5. THE TRIAL COURT CORRECTLY GRANTED DEANNE'S MOTION TO REVISE. CP 149.
6. THE TRIAL COURT CORRECTLY RESTORED THE PARTIES TO THE STATUS AS A MARRIED COUPLE. CP 149.
7. THE TRIAL COURT CORRECTLY FOUND THAT THERE WERE ASSETS AND DEBTS INCLUDING AN IRS DEBT FOR \$100,000. CP 148.

### Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion when it vacated a decree of dissolution based on CR60(b). (Assignment of Errors 5 & 6)
2. Whether the statutory requirement to make a disposition in a just and equitable manner meets the "defense" requirement of the *White* four part test. (Assignment of Error 1)
3. Whether the trial court abused its discretion when it concluded that Deanne's failure to formally appear and defend was excusable neglect. (Assignments of Errors 2 & 3)
4. Whether Tim will suffer substantial hardship if the default is vacated. (Assignment of Error 4)
5. Whether there was sufficient evidence of a \$100,000 debt owing to the IRS. (Assignment of Error 7)

### B. STATEMENT OF THE CASE

#### **1. Factual History**

Tim and Deanne agreed to amicably dissolve their 21 year marriage in early April 2013 by filing a bare bones petition in which the division of assets and liabilities was to be "determined by the court at a later date". CP 2. Tim was represented by attorney Jennifer Johnson, who drafted the documents. CP 4. Deanne, who was unrepresented, accepted service. CP 7.

Over the course of the 8 months this matter was pending, Tim and Deanne continued to have on-going conversations, many of them amiable and cordial (chatty and uncharacteristic of two people in mid-divorce). CP 41 - 52. They attempted to reach resolution with respect to several businesses, commercial properties and retirement benefits without success, but engaged in no mediation or court action. CP 38. At one point during negotiations, Tim's attorney drafted a proposed "Settlement Agreement", the terms of which were outlandishly unrealistic according to Deanne. CP 38. Based on Tim's comments to her, she did not believe that he was making a serious attempt at reaching resolution. CP 38.

In the interim, however, Tim and Deanne were able to agree (without court orders) on parenting their almost 18 year old son, and began an equal sharing of the financial burden of supporting him in college. CP 41 - 45.

Finally, in late 2013 it became clear that the parties could not reach an agreement and Deanne, who continued to be unrepresented, acknowledged that she needed to obtain representation. CP 48. Upon receiving notice of the entry of final documents by default, she promptly filed a motion to vacate. CP 37.

## **2. Procedural History**

This case arises from Petition for Dissolution filed by Tim on April 9, 2013. CP 1- 4. Deanne accepted service on April 10, 2013. CP 7- 9.

Tim then filed a 1st Amended Petition for Dissolution on November 13, 2013. CP 10 -15. Deanne was personally served on November 14, 2013. On November 27, 2013, Tim presented a Motion and Declaration for Default without notice to Deanne. CP 18 - 22. An Order on Motion for Default was entered the same day. CP 23 - 24. Tim also noted a final dissolution hearing on the court's docket (also without notice to Deanne). CP 25. On December 11, 2013, the court took jurisdictional testimony from Tim (CP 58) and entered Findings of Fact, Final Order of Child Support, and a Decree of Dissolution. CP 26 - 36.

On February 2, 2014, Deanne filed Motion and Declaration for Order to Show Cause re: Vacation of Judgment/Order. CP 37-52. The Order to Show Cause was granted, but the Motion to Vacate subsequently denied. Deanne then filed a Motion to Revise, which was granted on May 2, 2014. CP 146 - 149. This appeal followed.

C. SUMMARY OF ARGUMENT

The court correctly set aside (vacated) Findings of Fact / Conclusions of Law and a Decree of Dissolution obtained without notice on the basis that Respondent, Deanne's, failure to respond was excusable neglect under CR 60(b).

D. ARGUMENT

1. STANDARD OF REVIEW

A trial court's decision vacating a default judgment is reviewed for an abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). "An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court." *Little*, 160 Wn.2d at 710 (citing, *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000)). The primary concern in reviewing a trial court's decision on a motion to vacate is whether that decision is just and equitable. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn.App. 191, 200, 165 P.3d 1271 (2007). "Abuse of discretion is less likely to be found if the default judgment is set aside." *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).

## 2. DEFAULT JUDGMENTS ARE NOT FAVORED.

The courts favor a policy of determining controversies on their merits. Griggs, at 581. In deciding a motion to set aside a default under CR 60(b), courts use a 4 factor test articulated in White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). That test is as follows:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

Id. at 352.

The courts consider the first two factors as the major elements. Id. Thus, when coupled with the last two, it allows the court to determine whether its determination will be fair and equitable. TMT Bear Creek, at 191.

3. THE STATUTORY REQUIREMENT TO MAKE A DISPOSITION IN A JUST AND EQUITABLE MANNER MEETS THE "DEFENSE" REQUIREMENT OF THE WHITE FOUR PART TEST.

RCW 26.09.080 states in pertinent part:

*In a proceeding for dissolution of the marriage . . . 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 including, but not limited to:*

*(1) The nature and extent of the community property;*

*(2) The nature and extent of the separate property;*

*3) The duration of the marriage or domestic partnership; and*

*(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.*

RCW 26.09.080.

Civil Rule 52 states in pertinent part:

*2) Specifically Required. Without in any way limiting the requirements of subsection (1), findings and conclusions are required:*

(A) . . .

*(B) Domestic relations. In connection with all final decisions in adoption, custody, and divorce proceedings, whether heard ex parte or not.*

CR 52.

The trial court does not make factual determinations under CR 60(b); instead it evaluates whether the movant, has established substantial evidence of a prima facie defense. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wash.App. 829, 834, 14 P.3d 837 (2000), *review denied*, 143 Wash.2d 1021, 25 P.3d 1019 (2001). Whether a movant has demonstrated substantial evidence of a prima facie defense is reviewed in the light most favorable to the moving party. *Pfaff*, 103 Wash.App. at 834, 14 P.3d 837.

In this case, there is not a single reference to the extent of either the community or the separate property contained in the “findings” entered by default. CP 27 - 29. Similarly, the findings do not reference any specific obligation of the parties; nor any amount owing thereon. See also, WPF DR 04.030 - paragraph 2.10 (which specifically asks for amounts owing to creditors). CP 27 - 29. The findings failed to identify a \$100,000 debt to the IRS. CP 38; 148. They also fail to describe, in any manner whatsoever, the economic

circumstances of either party, nor any factual basis for awarding post-secondary support to the dependent child of the parties. CP 29.

Since the court lacked a factual basis upon which to make a “just and equitable” disposition of the property and liabilities, the court correctly determined that the first, and most important, prong of the White test was met.

4. DEANNE'S FAILURE TO FORMALLY APPEAR AND DEFEND WAS EXCUSABLE NEGLIGENCE.

Courts determine excusable neglect on a case-by-case basis. Gutz v. Johnson, 128 Wn.App. 901, 918-19, 117 P.3d 390 (2005) (citing, Norton v. Brown, 99 Wn.App. 118, 123, 992 P.2d 1019 (1999)), off dsub nom., Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956 (2007). Each case of excusable neglect must rest on its own facts. See First Nat'l Bank v. Stilwell, 50 Ind.App. 226, 232, 98 N.E. 151 (1912). In cases seeking relief from a default judgment, a more liberal application of the rules is made. Pybas v. Paolino, 869 P.2d 427, 73 Wn.App. 393 (1994).

In this situation, Deanne originally accepted service of the documents with the understanding that the only purpose was to begin the process of a dissolution. CP 37. For 8 months thereafter, Deanne

and Tim were engaged in on-going conversations and settlement negotiations. CP 38 - 39; 41 - 52; CP 103-105. Deanne had no contact with Tim's attorney. CP 38; 104. Deanne remained unrepresented and trusted Tim to negotiate with her in good faith. CP 37 - 39. Deanne would not agree to what she felt was an outrageous settlement suggestion by Tim. CP 39; 104. She clearly expressed to Tim that she intended to seek an attorney to assist her when it became obvious they could not reach an agreement. CP 47 - 48.

Tim admits to telling Deanne to go to Spokane for their son's state tournament baseball game, instead of finding an attorney to represent her. CP 105. He says that there was "no reason to get mean and nasty with each other" and claims "I am just not that kind of person". CP 102. Consequently, Deanne had no reason to think that, just as she was about to obtain legal representation, that Tim would suddenly and without any notice whatsoever authorize his attorney to use a legal technicality to obtain a half-million dollar judgment that will devastate her business. CP 38; 85.

Because of the on-going communication between the parties after the dissolution action was filed and the relationship of trust between them, there was sufficient basis for Deanne to expect notice

of any further court action. Her failure to formally appear and respond is excusable, given the intent of the initial filing, the complexity of the financial circumstances, the on-going discussions between the parties which did not involve attorneys, and their relationship of trust with each other.

5. NO SUBSTANTIAL HARDSHIP WILL OCCUR IF THE DEFAULT IS VACATED.

The prospect of having to go to trial is not, by itself, enough to constitute substantial hardship. Pfaff v. State Farm Mut. Auto. Ins. Co., at 836.

In this case, there are no facts to support Tim's claim of hardship. He indicates in his declaration to the court that he had little or no involvement in the day to day operation of the insurance businesses. CP 103. He asserts no claim that he was dependent on any of the business income and will not be prejudiced by having to wait until a trial can be held to determine any interest he has therein. Any financial cost to him of the loss of tax advantages or cost of litigation can be dealt with by the court in the dissolution trial. See RCW 26.09.140.

6. THE TRIAL COURT CORRECTLY FOUND THAT THERE WAS A \$100,000 DEBT THAT HAD NOT BEEN DEALT WITH IN THE DECREE.

Tim cavalierly dispenses with any obligation on his part for \$100,000 owing to the IRS by suggesting that a catch all provision in the findings is sufficient for a just and equitable division of property and debts. He cites no authority to support his claim of error.

In this case, the findings place no value on any of the businesses and are silent as to any debt owing. The findings place no value on any real property and are similarly silent as to any debt owing. The findings are also silent as to the value of any employment benefits or any retirement assets. At the very least, the debt owing to the IRS is significant when making a "just and equitable" disposition of property and debts.

7. THE COURT SHOULD DENY ATTORNEY FEES

Absent a consideration of the parties' financial resources, attorney fees are only permitted upon a finding of intransigence of a party, demonstrated by litigious behavior, "bringing excessive motions, or discovery abuses." *In re Marriage of Wallace*, 111 Wn.App. 697, 710, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011 (2003).

Here, the mere filing on one motion to revise is insufficient to

demonstrate intransigence. The request for fees should be denied.

E. CONCLUSION

For all the forgoing reasons, the court should affirm the decision of the trial court which revised the court commissioner and vacated the Findings of Fact and Decree of Dissolution that had been obtained by default. The court should deny the request for attorney fees.

Respectfully submitted,

09/07/2014

\_\_\_\_\_  
DATED

  
\_\_\_\_\_  
MARGARET BROST  
Attorney for Respondent  
WSBA No. 20188

<p><i>SUPERIOR COURT STATE OF WASHINGTON COUNTY OF LEWIS</i></p>
--

In re the Marriage of:

TIMOTHY MARK PUTMAN,

Petitioner,

and

DEANNE MARIE PUTMAN,

Respondent.

NO. 46298-2-II

RETURN OF SERVICE  
(OPTIONAL USE)  
**(RTS)**

I DECLARE:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to JENNIFER JOHNSON, ATTORNEY FOR TIMOTHY MARK PUTMAN:

Brief of Respondent

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

Date: September 8, 2014 Time: 4:39 a.m./(p.m.)

Address: JBJ Law Group

366 SW 13<sup>th</sup> Street, Chehalis, WA  
98532

4. Service was made:

5. Service of Notice on Dependent of a Person in Military Service.

Does not apply.

6. Other:

Does not apply.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Chehalis, wa  
City and State

September 8, 2014  
Date

Candace Rigdon  
Print or Type Name

Candace Rigdon  
Signature

(Tape Return Receipt here, if service was by mail)

File the original Return of Service with the clerk. Provide a copy to the law enforcement agency where the protected person resides if the documents served include a restraining order signed by the court.

RECEIVED

SEP 08 2014

JB J LAW GROUP  
4:39 pm

(1) #18 09/08/2014 0801

NO. 46298-2-II

RECEIVED  
SEP - 8 2014  
CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

---

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

---

TIMOTHY MARK PUTMAN, Appellant

v.

DEANNE MARIE PUTMAN, Respondent

---

BRIEF OF RESPONDENT

---

MARGARET BROST  
Attorney for Respondent  
1800 Cooper Point Road SW #18  
Olympia, WA 98502  
360.357.0285  
WSBA No. 20188