

No. 67550-8-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

In re the Marriage of

MICHAEL LEVITZ  
Appellant

and

INESA LEVITZ  
Respondent

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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## I. INTRODUCTION

Michael Levitz appeals from an order vacating final orders entered by default in a marital dissolution. These orders included a parenting plan, despite that Michael had never proposed a parenting plan. Thus, the final orders exceeded the relief Michael had requested in his petition for dissolution. Moreover, the orders were entered without the requisite notice for orders of default, given Inesa's active participation in the case. Thus, for both these reasons, the final orders were void. Finally, the imposition of default as a sanction was radically too severe a sanction for any purported discovery violations, particularly in light of the fact that Inesa's attorney had withdrawn and Inesa was changing jobs, changing residences, and undergoing chemotherapy. The court properly vacated the void and erroneously entered orders and remanded the case for trial, where the child's best interests, and other matters, may be determined on their actual merits. Indeed, because the final orders were void, the court had a nondiscretionary duty to vacate them. For the same reason, this appeal is frivolous and Inesa should be awarded fees.

## II. RESTATEMENT OF ISSUES

1. Did the trial court properly vacate the judgment because it granted greater relief than requested in the petition for dissolution?
2. Where a judgment grants greater relief than requested in a petition, is the judgment void and must it be vacated?
3. Did the trial court also properly vacate a default judgment where a party who had appeared in the case and actively litigated did not receive proper notice?
4. Does this court defer to the trial court's finding that there was inadequate notice when it is supported by substantial evidence?
5. Is judgment by default a permissible sanction where there has been only a minor violation, if any, of a discovery order and where, in any case, both parties have violated discovery and other rules?
6. In family law cases, where a parenting plan is contested and a child's best interests are at stake, is a default judgment particularly disfavored and a trial on the merits particularly crucial?

7. Did the “successor judge” properly hear the CR 60 motion when the judge who entered the default orders declined to do so and where, in any case, the identity of the judicial officer is not material?

### III. MOTION FOR ATTORNEY FEES

Inesa respectfully moves the court for an award of attorney fees for the reasons stated below at § V.I.

### IV. STATEMENT OF THE CASE

#### A. INTRODUCTION.

The facts necessary to decide this appeal are largely procedural. Accordingly, Inesa focuses on those, though she offers some additional references to the larger context of conflict in which this appeal takes place to make clear she has participated actively in this litigation from the start and to correct the false impressions Michael seeks to make (see, e.g., Br. Appellant, at 16, that her concerns are monetary). Inesa’s principal concern is the welfare of her child.

#### B. MICHAEL FILED A GENERIC PETITION FOR DISSOLUTION.

On August 20, 2009, Michael filed a petition for dissolution of his marriage to his wife of 16 years, Inesa. CP 1-4. Michael’s petition was “generic” (i.e., boilerplate), lacking specific requests of

any kind. CP 925 (¶ 1), 929 (¶ 8). He asked merely that the court divide the parties' property and liabilities "at a later date"; award him spousal maintenance, without specifying an amount or duration; enter a parenting plan and a child support order for their child, who was two years old at the time, without listing any provisions or attaching any proposed orders; and award him "reasonable attorney's fees and costs." CP 2. In particular, Michael did not include a proposed parenting plan; instead, he swore under penalty of perjury that his "proposed parenting plan for the child listed above will be filed and served at a later date pursuant to RCW 26.09.181." CP 3. More than a year later, as of October 27, 2010, the date Michael's final orders were entered by default, he had not filed his own proposed parenting plan, despite the statutory requirement to do so, despite his prior averment, and despite being ordered to do so at a status conference on January 8, 2009. CP 249-253.

**C. INESA RESPONDED AND THE PARTIES ENGAGED IN SIGNIFICANT MOTIONS PRACTICE.**

In the subsequent months, the parties vigorously litigated in family court over the parenting of and child support for their young son, the division of their property and liabilities, and spousal maintenance, among other things. CP 925 (¶ 1) (court finding

“significant amount of litigation” indicating “active involvement of both parties”). On August 27, 2009, Michael, represented by counsel, and Inesa, pro se, agreed to the entry of a temporary order ex parte. CP \_ (Sub 7). The order required Inesa to pay \$5500 a month in undifferentiated spousal and child support. CP \_ (Sub 7 at 2). Michael was allowed to remain in the family home, with Inesa able to enter only with his permission. Id. Their son was to reside primarily with Michael with “reasonable residential time” with Inesa as agreed on by the parties or as established by the court. CP \_ (Sub 7 at 2-3).

Inesa retained counsel, James Burnett, and filed her response to the petition. CP 5-7. She admitted they had property and debts to be divided. CP 6. However, she denied that spousal maintenance should be awarded, asserting that Michael “is fully capable of earning a substantial living based on his Ph.D. in mathematics and that spousal maintenance should be temporary.” CP 6. She also requested continuing restraining orders and possibly a protection order based on Michael’s “past violent and assaultive behavior” toward her. CP 6.

Further, now assisted by counsel, Inesa took action to undo the temporary orders, which she had agreed to under duress. CP

240-241. On December 9, she alleged, in her motion and declaration for an ex parte restraining order and for an order to show cause, that Michael repeatedly “has physically beaten and harmed” her, has deprived her of financial means, and threatened her with physical harm if she challenged him in the dissolution proceedings. CP 240; (Sub 11 at 1). According to Inesa, when Michael filed his petition for dissolution, he “physically threatened me in order to have me sign the documents. This included the temporary order which gives him \$5500 a month in maintenance and child support, and custody of my son.” CP \_ (Sub 11 at 2). The court granted her request, issuing an ex parte restraining order that prevented Michael from molesting, assaulting, harassing or stalking her, as well as from coming within 500 feet of her home or workplace. CP (Sub 12 at 3).

Michael, in his responsive declaration, denied that he abused Inesa and, instead, accused her of being the abuser in the relationship. CP (Sub 22 at 1).

At the hearing on January 19, 2010, the court imposed a temporary restraining order on Michael, preventing him from “molesting or disturbing the peace of” Inesa and from coming within 500 feet of her home or workplace. CP \_ (Sub 47A).

On January 19, Inesa also filed a motion and declaration for temporary orders and filed her first proposed parenting plan. CP 255-260. She asked the court to adopt her parenting plan, appoint a guardian ad litem, award maintenance and child support, and retain the distance restraints on Michael, among other things. CP \_ (Sub 32). She also requested a finding that Michael engaged in “abusive use of conflict,” which creates the danger of serious damage to the child’s psychological development, but sought no restrictions on his residential time with their son as she believed that by “removing herself from the abusive relationship, the petitioner’s behavior will abate.” CP 257. She proposed a “shared placement” for their son, who was three years old by then, in a “two week pattern” where the boy would spend four nights with her and three with Michael in the first week, with this pattern reversing the second week. CP 256. She also proposed that she and Michael make major decisions for their son jointly. CP 259.

At the hearing on February 24, 2010, the court removed the restraints on Michael, reduced Inesa’s maintenance obligation to \$2650 a month with the proviso that if Michael, who is highly educated, “becomes employed maintenance will decrease one dollar for each two dollars” he earns, and directed that a parenting

evaluator be appointed. CP 657-660. In addition, the court, in a temporary order of child support, required Inesa to make a monthly transfer payment of \$1050, determining her monthly net income to be \$8833, based on her earnings, and Michael's to be \$2390, based solely on the spousal maintenance. CP 184-195, 663, 666, 670-672. The court adopted Inesa's proposed parenting plan, making significant revisions and reserving the majority of the residential schedule and the restrictions for trial. CP 8-13. Inesa received "visitation on alternating weekends" from 9:00 a.m. on Saturdays to 6:30 p.m. on Mondays; however, the parties were permitted to "vary this by mutual agreement." CP 9. The parents were to make major decisions regarding the child jointly. CP 11. Neither parent was to use physical discipline on their son or to have access to his passport without a court order. CP 13.

Contemporaneously, the parties agreed the entire family would move to Hawai'i, in part because the environment helped Inesa contend with her medical conditions (e.g., rheumatoid arthritis). CP 146.<sup>1</sup> Inesa obtained a job in Hilo, quit her job in Seattle, and moved. CP 222. However, Michael did not move to

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<sup>1</sup> In this distressed letter to the court, dated September 27, 2010, Inesa misstates the year as 2009, but the context and other evidence makes clear the move occurred in 2010. CP 140-148, 222, 224.

Hawai'i, as agreed, but remained in Seattle and in control of the parties' assets and their son. CP 144, 147, 222.

D. TRIAL WAS DELAYED AND INESA'S ATTORNEY WITHDREW AFTER HE UNDERWENT SURGERY, AFTER WHICH THE PARTIES LITIGATED DISCOVERY ISSUES.

On May 19, 2010, Michael served Inesa's attorney with interrogatories and requests for production of documents. CP 210, 223. At the time, both parties were represented by counsel, although Inesa was now in Hawai'i. CP 210. Shortly thereafter, Inesa's attorney filed a motion to continue the trial date, originally set for July 26, 2010, due to surgery on his knee. CP 223, 355-357. Michael's attorney agreed to the continuance, which was granted by the court, thereby setting the new trial date at November 8, 2010. CP 29-30, 223, 359, 360.

A month later, on June 23, 2010, counsel for the parties held a discovery conference regarding Inesa's responses to Michael's discovery requests. CP 210, 223. Four days later, Inesa's attorney withdrew, effective on June 27, leaving her to represent herself with her last known address in Hilo, Hawai'i. CP 210, 365.

Three months later, on September 23, Michael's attorney filed a motion to compel Inesa to more completely respond to the discovery requests. CP 33-90, 223, 367-435. After she sent her

answers, counsel struck the motion. CP 210, 224, 637. Judge Fleck found the only evidence regarding Inesa's delay in responding to the discovery requests was that Inesa "believed based on a conversation she had with her attorney prior to his withdrawal, that he had taken care of the discovery requests." CP 223, 927.

On September 28, Inesa informed Michael's attorney by facsimile that she was moving from Hilo to Oahu and provided him with her new address. CP 210-211, 224.

On September 30, Inesa, still representing herself, filed her second proposed parenting plan, with a long distance residential schedule whereby their son would be with her primarily and with Michael on alternating weekends during the school year and for two months during summer. CP 510. She asked Michael be required to pay the transportation expense. CP 513. She and Michael would make education and religious decisions jointly, while she alone would make non-emergency medical decisions. CP 515. She also made clear that she was forced by Michael to agree to the prior temporary order. CP 514.

On that date, Inesa also moved to Oahu. CP 224. The change of address form she submitted to the United States Postal

Service was not processed and she did not receive mail forwarded from her Hilo address until November. CP 224-225. (Inesa speaks English as a second language and has some difficulties with the language. CP \_ (sub 139).) Also during October 2010, in addition to her new job and her change of residence, Inesa underwent chemotherapy for rheumatoid arthritis, which makes it difficult for her to type, among other things. CP (sub 139). The chemotherapy made her ill. Id.; (sub 128). Also, during part of October, Inesa was without her computer, which was being repaired. CP \_(sub 139).

Michael's attorney, dissatisfied with Inesa's interrogatory answers, again filed a motion to compel on October 7, 2010, without first conducting a discovery conference. CP 224, 542-644. (Though titled "Motion to Compel," the motion included a request for entry of a default order. CP 32.) Given that three months had elapsed since the discovery conference between the attorneys on the first (and stricken) motion to compel and since Inesa submitted her answers, pro se, Judge Fleck held that a conference "to identify in which respect's [Inesa's] responses were insufficient," was

required “to be consistent with the purpose of these rules [i.e., CR 26 and LR 37].” CP 927.

Instead, Michael’s attorney sent Inesa a copy of the motion to compel by email on October 11. CP 774. There is no evidence the parties had agreed to service by email. See GR 30(b)(4) (“Parties may electronically serve documents on other parties of record only by agreement.”). While demanding discovery responses from Inesa, Michael’s attorney denied her repeated requests for a copy of Michael’s interrogatory answers, which her former attorney did not have. CP 831. He also filed a motion for an adjudication of child support and maintenance, an award of attorney fees and costs, and an order authorizing the distribution of funds held in his attorney’s trust account. CP 650-679. In addition to his emails, he mailed Inesa the motions and supporting papers to her prior address in Hilo, where she no longer resided. CP 210-211, 225, 791, 878. Indeed, she lived on another island entirely.

The hearing on the motion to compel was set for October 19, 2010, before King County Superior Court Judge Marianne Spearman. CP 225, 678-679, 869. However, Judge Spearman ruled before the hearing, on October 18, ordering Inesa to submit complete responses to the discovery requests in three days, by

5:00 p.m. on October 21, otherwise the court would strike her pleadings and Michael would be entitled to obtain an order of default ex parte. CP 134-136, 225, 845, 927. Judge Spearman's bailiff sent both Inesa and Michael's attorney a copy of the order by email. CP 834. Michael's attorney did not mail a copy of the order to Inesa. CP 211, 774, 791.

Unaware of the motions and the order, Inesa did not provide additional responses to the discovery requests by October 21 or appear at the pre-trial conference before Judge Spearman on October 22. CP 225-226. However, on October 22, she filed a letter imploring Judge Spearman to intervene to "stop the madness" as she was in dire straits with her finances, her health, and the custody orders limiting her ability to see her son. CP 140-148.

**E. WHEN INESA DID NOT COMPLY WITH THE COURT'S ORDER TO COMPLETE HER INTERROGATORY ANSWERS IN THREE DAYS, MICHAEL MOVED FOR ORDERS OF DEFAULT.**

On October 22, Michael filed a motion for an order striking Inesa's pleadings and adjudicating her in default. On the same day, Judge Spearman granted the motion, ruling that her

willful refusal to obey the order of this Court entered October 18, 2010, and her failure to provide complete Interrogatory Answers, Responses to Requests for Production and availability of said documents impacts each and every issue in the case and substantially

prejudices Petitioner's ability to prepare for trial and to present this case at trial.

CP 138. The court further ruled that it

considered lesser sanctions, but Respondent's failure to make even the most minimal effort to comply with the order of this Court, the scope of Respondent's failure to provide requested information and documents, which impacts every contested issue in this case, the fact that there are only eleven (11) court days until the trial date is scheduled to commence, and the fact that trial was previously continued at the request of Respondent, make it clear that no lesser sanction would suffice.

CP 138. Accordingly, the court struck Inesa's pleadings, adjudicated her in default, allowed Michael to present final orders ex parte, and struck the trial date. CP 138-139.

Three days later, on October 25, Commissioner Meg Sassaman granted Michael's second motion (regarding child support, etc.) and entered a judgment against her for \$12,900 in unpaid child and spousal support, \$247 in interest, and \$3,000 in attorney fees. CP 226, 707-709. The court also authorized Michael's attorney to distribute \$16,147 to each party from funds held in his trust account, with Inesa's portion to satisfy the judgments against her. CP 226, 709.

On October 25, Michael's attorney informed Inesa by email that "Judge Spearman has stricken the trial date in your case on my

ex parte motion” and that he “will send you a copy of the order entered today on my family law motion.” CP 847. He did not specify that final orders had been entered, nor did Inesa understand that this had occurred. Believing the case was still active, she replied to Michael’s attorney’s email with an offer to settle issues over the parenting plan and spousal maintenance. CP 847. She had no idea that she could be defaulted. CP 226. She also made it clear that she no longer resided at her address in Hilo, but she told him to mail documents to her there nonetheless and that her friend would bring them to her a few days later. CP 847.

F. MICHAEL SOUGHT AND RECEIVED JUDGMENT BY DEFAULT.

With over \$32,000 just released to him from the trust account, Michael prepared final orders, granting him relief that exceeded his requests in his generic petition, and proceeded to ex parte on October 27 to have them entered. CP 212. There, his attorney swore, in the certificate of compliance with CR 54(c), that, in this default case, the “petition has been verified by the petitioner” and that “the Findings and Decree do not exceed the prayer of the petition.” CP 226, 758-759. His attorney told the court the orders he was presenting “are within the prayer for relief”:

THE COURT: First of all, it's being done by default, so the question is whether or not these orders are within the prayer for relief.

MR. ORDELL: And they are, Your Honor. Again we represent that. I asked for reasonable maintenance for a reasonable period of time, fair and equitable division of property. And, further, we requested attorney's fees be awarded based on the disparity in the income of the parties.

CP 854-855. The attorney also elicited the following testimony from his client:

MR. ORDELL: And you have proposed a parenting plan in this case? Is that parenting plan significantly more than the amount of time your wife has been spending with the child? In other words, is she going to have a lot more residential time in the future than she has actually been exercising in the past?

Mr. Levitz: Yes. A lot more.

CP 853. In fact, Michael had not filed a proposed parenting plan and the plan entered as a final plan gave Inesa significantly less time than she requested in her proposed plan.

The final orders were entered by Commissioner Eric Watness on October 27, 2010. CP 166-173, 184-196.

Michael prepared exhibits, purporting to list the parties' property and liabilities, which he attached to the findings of fact and conclusions of law and the decree of dissolution. CP 156-184. The decree incorporated the exhibits by reference and allocated the

property and liabilities between the parties, except for liabilities incurred since the date of separation, which were assigned to each party respectively. CP 176-177. Inesa was ordered to pay \$2,650 a month in maintenance to Michael for three years, ending on October 1, 2012. Id. She also was ordered to pay \$30,000 in attorney fees and costs to Michael, based on his need and her ability to pay, including \$5,000 “as a result of her intransigence and failure to comply with the court rules and the order of October 18, 2010.” CP 158, 177.

The parenting plan contained a residential schedule placing the child primarily with Michael except “during certain periods of time during summer, holiday, and long weekends” (approximately 60 days) when he would be with Inesa, subject to burdensome travel requirements and one additional condition: As long as Inesa resided outside of Washington state, she was required to post \$5,000 with Michael’s attorney before she could spend residential time with her son, to ensure that she would return him at the end of the visit. CP 167-169, 172. Inesa was stripped of her decision-making authority; Michael alone was to make educational and non-emergency health care decisions for their child. CP 171. Among other provisions, Michael was “authorized to obtain a passport for

the child without first obtaining” Inesa’s approval or signature. CP 172-173.

The order of child support required Inesa to pay a monthly transfer payment of \$1,238 to Michael, based on her alleged monthly net income of \$8,833 and on his spousal maintenance of \$2,390 (no imputed income), combined with 79% of all expenses for day care, educational and extracurricular activities, long distance transportation, and uninsured medical expenses for the child. CP 185-188, 192-195.

**G. INESA MOVED TO VACATE THE DEFAULT JUDGMENT.**

In early November 2010, Inesa received a package from her former landlord in Hilo, containing Michael’s motions to compel, to adjudicate child support and maintenance, and to order her in default, along with all of the orders related to these motions. CP 212, 862.

Inesa retained counsel and on May 11, 2011, filed a motion to vacate: the order striking her pleadings and adjudicating her in default; the order for adjudication of unpaid child support and maintenance; and all of the final orders. CP 209-220. By this date, the litigation had cost her \$135,000 in attorney fees. CP \_ (Sub 139 at 58-59).

On July 14, Judge Deborah Fleck granted Inesa's motion, after entering extensive findings of fact and conclusions of law. CP 925-935. The judge found Michael filed a "generic" petition for dissolution and did not file an amended petition "identifying what specific relief he sought as a basis upon which final pleadings could be entered following entry of the Order of Default" and failed ever to file a proposed parenting plan. CP 929 (¶¶ 8); 930, 933. By these acts, including by this failure of notice, Michael violated RCW 26.09.181, CR 54(c), and due process (U.S. Const., Amend. 14). *Id.* The court noted that there "was no basis to make a specific award of assets and liabilities, spousal maintenance or attorneys' fees" or upon which "to enter a parenting plan by default." CP 929-930. The orders were void and the court vacated them under CR 60(b)(5). CP 933.

The court also found Michael failed to give notice of the default motion itself, that is, the court found that Inesa "was not provided the proper notice required by CR 55 of the Petitioner taking an Order of Default, *ex parte*, following the entry of the October 18, 2010, Order to compel", noting that "King County LFLR 5(c)(9) sets forth a fourteen day notice requirement prior to a hearing on default if the other party has appeared." CP 930-931.

The court found further lack of compliance with court rule. For example, in vacating the order on Michael's motion to compel, entered on October 18, 2010, the court found that before Michael's attorney filed the motion, a discovery conference "was not conducted to identify in which respects the Respondent's responses were insufficient," as required by CR 29 and KCLCR 37. CP 927, 933. The court also found that the order "essentially provid[ed] the Respondent with no time to respond or comply," as it gave Inesa just three days to comply despite that she "would have been properly served three days [only] after the date of mailing" of the order; that is, the order could not have been served any sooner than the date required for compliance. CP 927-928.

The additional orders were vacated on multiple bases under CR 60(b). Judge Fleck concluded that there were "irregularities in obtaining the judgment or order" under CR 60(b)(1), due to the severity of the discovery sanctions and the failure to provide proper notice. CP 931, 933. Specifically, the court found that there "is no evidence in the record" that the court, in imposing the severe discovery sanction of striking Inesa's pleadings and allowing Michael to obtain final orders by default, "explicitly considered whether a lesser sanction would have sufficed and whether it found

the due process factors of willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial," as required. CP 928-929.

Judge Fleck further concluded that "it is no longer equitable that the judgment should have prospective application" under CR 60(b)(6) and for "any other reason justifying relief from the operation of the judgment" under CR 60(b)(11), noting the court's requirement to exercise its authority liberally under CR 60, as well as its "responsibility to create a parenting plan in the best interest of the parties' young child," and "the law's disfavor of defaults generally." CP 932-933.

The court entered an order setting a new trial date for May 14, 2012, amended the case schedule, and assigned the matter to Judge Jeffery Ramsdell. CP 935.

On Inesa's motion, the court adopted her third proposed temporary parenting plan in large part, giving her about one week of visitation with her now five year old son each month from October 2011 to April 2012, in either Washington or Hawai'i. CP \_ (Sub 200 at 1-9). The court also appointed a parenting evaluator, Pam Edgar, to aid in determining the child's best interests. CP \_ (Sub 199 at 1-5).

Michael appealed and sought a stay in the trial court, which the court denied, ruling the dissolution would proceed “consistent with the authority conferred by RAP 7.2, or as otherwise provided by a ruling of the Court of Appeals.” CP 936-948, 1088-1089. The court expressly denied Michael’s request that he receive the benefit of the vacated orders pending appeal. CP 1089. After numerous delays perfecting his appeal, which commenced with filing of the Notice of Appeal on August 5, 2011, Michael again sought a stay in this Court. The parties stipulated that trial should not go forward. However, the commissioner ordered that “the trial court retains authority to address through temporary orders all issues related to the child’s best interests.”

#### V. ARGUMENT IN RESPONSE TO APPEAL.

##### A. THE DEFAULT DECREE GRANTS MORE RELIEF THAN REQUESTED IN THE PETITION AND IS, THEREFORE, VOID AND WAS PROPERLY VACATED UNDER CR 60(B)(5).

The trial court had a nondiscretionary duty to vacate the judgment because it was void, a decision this Court reviews de novo. *Ahten v. Barnes*, 158 Wn. App. 343, 350, 252 P.3d 35 (2010).

Michael argues a judgment is void only when the court lacks subject matter jurisdiction and, therefore, complains Judge Fleck

was wrong to vacate the judgment on the basis that it was void. Br. Appellant, at 17. This argument is misplaced and evades the main problem here, which is that the final orders granted more relief than Michael requested in his petition for dissolution. It is axiomatic that a court does not have jurisdiction to grant by default relief that exceeds or substantially differs from that sought in the petition. *In re Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989). *Accord In re Marriage of Hughes*, 128 Wn. App. 650, 116 P.3d 1042 (2005) (default decree void where wife obtained it after changing petition, without notice, to reflect she was pregnant, where original petition declared she was not); *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985) (decree granting more relief than requested in petition constitutes irregularity under CR 60(b)(1), justifying relief). A judgment so entered is void. *Leslie*, 112 Wn.2d at 618. A void judgment may be vacated at any time. CR 60(b)(5). Indeed, a trial court has a nondiscretionary duty to vacate a void judgment. *In re Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988).

Here, Michael filed a generic petition for dissolution, as Judge Fleck found. CP 925 (¶ 1), 929 (¶ 8). It is not clear whether Michael actually challenges this factual finding. See Br. Appellant,

at 1-2. He later argues whether the petition could be characterized as “generic” and argues further that because the parties had litigated temporary orders, Inesa was “on notice of the relief Michael was requesting.” Br. Appellant, at 26; see, also, 24-28. He cites no authority for the proposition that temporary relief and discovery satisfy the requirement that an order of default be limited to the relief requested in the petition. Without citation, this argument will not be considered. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any case, there does not appear to be any authority for this proposition.

Indisputably, in the petition for dissolution, Michael made reference to but never filed a proposed parenting plan. CP 3. By this failure, Michael violated the statutory mandate that he do so, which, ironically, would entitle Inesa to entry of her parenting plan by default. RCW 26.09.181.<sup>3</sup> Certainly, Michael’s failure absolutely precludes him from obtaining a parenting plan by default, both by

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<sup>3</sup> In pertinent part, the statute provides:

(d) A party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party’s parenting plan if the other party has failed to file a proposed parenting plan as required in this section.

statute, court rule, and due process. It is obvious the parenting plan entered by default at Michael's request substantially differs from the relief requested in the generic petition, since the petition requested no specific relief (in the form of a proposed parenting plan), let alone the Draconian curtailing of the mother's residential time, decision-making authority, etc. effected by the default parenting plan. CP 166-174. Similarly, all the other final orders vary substantially from the vague requests in the generic petition. CP 1-4, 175-183, 184-196. For example, the child support order relieved Michael of his obligation to support his child by failing to impute income to him.<sup>4</sup> Indeed, Michael's attorney flatly violated court rule when he certified to the contrary, i.e., certified the judgment did not vary from the relief requested in the petition. CP 758-759; CR 54(c).<sup>5</sup> See, also, RPC 3.3(a).<sup>6</sup> Accordingly, these

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<sup>4</sup> It is not clear on what authority Michael is relieved of his independent obligation to support his child. See RCW 26.19.071(6) (income must be imputed); *In re Marriage of Brockopp*, 78 Wn. App. 441, 445, 898 P.2d 849 (1995) (parent cannot avoid obligations to child by voluntarily remaining in a low paying job or refusing to work at all). There appears to be no reason Michael cannot work.

<sup>5</sup> CR 54(c) provides:

Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

orders are void and the trial court properly vacated them under CR 60(b)(5) and set the matter for trial.

**B. THE COURT ALSO PROPERLY VACATED BECAUSE MICHAEL DID NOT GIVE NOTICE THAT HE WAS SEEKING DEFAULT.**

CR 60(b)(1) provides that a court may vacate a judgment on the basis of “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” This rule applies because the judgment exceeded the prayer for relief, as noted above. This rule also applies because there was lack of notice. *See, e.g., State ex rel. Cole v. Blake*, 123 Wash. 336, 212 P. 549 (1923) (summons sent to wrong address).

Specifically, under CR 55(a)(3), because Inesa had appeared and pleaded, she was entitled to notice of the motion for

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<sup>6</sup> The Rules of Professional Conduct provide, in pertinent part:

3.3(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

default. *In re Marriage of Daley*, 77 Wn. App. 29, 888 P.2d 1194 (1994). "A party who has appeared in an action is entitled to notice of a default judgment hearing and, if no notice is received, is generally entitled to have judgment set aside without further inquiry." *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). That is, if an order of default is entered without notice, it is void. *Housing Auth. v. Newbigging*, 105 Wn. App. 178, 190, 19 P.3d 1081( 2001) (without notice, the trial court lacked authority to enter default judgment (internal citation omitted)). Accordingly, a party who has not received proper notice is "entitled as a matter of right" to have any resulting default judgment vacated." *Id.*

King County local rule requires 14 days notice in family law matters. LFLR 5.<sup>7</sup> Judge Fleck found Inesa did not receive the required notice. CP 930-931. Those findings will be treated as verities on appeal if supported by substantial evidence in the

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<sup>7</sup> King County Local Rule 5 provides in pertinent part:

(1) Entry of Agreed and Default Final Decrees Parenting Plans and Custody Orders: Uncontested final Decrees of Marriage Dissolution, Legal Separation and Invalidity as well as all Final Parenting Plans or Residential Schedules and Final Dissolution of Domestic Partnership Orders shall be presented to the Ex Parte and Probate Department by noting the motion on the uncontested dissolution calendar on at least fourteen (14) days notice, provided that, the matter need not be noted for hearing when presented by an attorney of record, who as an officer of the court, has signed and filed a certificate of compliance in the form prescribed by the court.

record. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). Inesa provided substantial evidence that she did not receive notice because her address had changed. CP 224-227.

Moreover, Michael's attorney admitted he emailed the motion to her (on 10/11, CP 774), without her apparent agreement (CP 878: "as a courtesy"), and mailed the motion to her at her prior address (on 10/06, CP 875), despite notice that she had moved. CP 224.

Simple arithmetic makes clear 14 days notice was not given.<sup>8</sup>

Michael does not seriously contest this fact, but, rather, relies on his "actual notice" argument (by email), which fails for two reasons. First, his challenge to Judge Fleck's factual finding turns entirely on credibility (Br. Appellant, at 19-21), a determination left entirely to the judge, since it is for the trial court to determine the facts. *See, e.g., In re Marriage of Fiorito*, 112 Wn. App. 657, 667, 50 P.3d 298 (2008) (appellate court will not review credibility determinations).

Second, he utterly fails to take into account, when arguing that courtesy emailing was sufficient notice, that there was no

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<sup>8</sup> LR 5(b)(2) provides that service by mail is "deemed complete upon the third day following the day upon which [the pleadings] are placed in the mail, unless the third day falls on a Saturday ... , in which event service shall be deemed complete on the first day other than a Saturday ... following the third day." October 6, 2010 was a Wednesday. Thus, the third day fell on a Saturday (October 9). Service was not effective until October 11, merely 11 days before the court granted an order of default on October 22. The court entered final orders on October 27.

agreement for email service and Inesa's computer was not working. Though she had some sporadic access to email via other means, Michael does not show these other means allowed her to access large documents. Moreover, his citation to *Lindgren v. Lindgren*, 58 Wn. App. 588, 594, 794 P.2d 526 (1990) does not support his argument, since the defective notice in that case did not affect the party's ability to respond, which is hardly the situation in this case. Thus, for all these reasons, the court also properly vacated the default for lack of notice.

C. THE STANDARD OF REVIEW WITH RESPECT TO THE OTHER ISSUES MICHAEL RAISES.

Except as to void judgments, a trial court's decision to vacate a judgment is reviewed for an abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). More specifically, and pertinently, even greater deference is given to an order *vacating* a default judgment and setting the matter for decision on the merits. *Yeck v. Dep't of Labor & Industries*, 27 Wn.2d 92, 95, 176 P.2d 359 (1947). In other words, had the trial court here denied the motion to vacate, that decision would have been subjected to greater scrutiny than the decision to set this matter for trial. This distinction reflects the disfavor in which default judgments are held. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d

576, 581, 599 P.2d 1289 (1979). Indeed, “[a] default judgment has been described as one of the most drastic actions a court may take to punish disobedience to its commands.” *Id.* Rather, the law strongly prefers that cases be decided on their merits. *Id.* (internal citations omitted). These principles are particularly compelling in this case, not only to prevent a gross miscarriage of justice, but to protect the child’s best interests, into which the court must conduct an independent inquiry. *Bay v. Jensen*, 147 Wn. App. 641, 657, 196 P.3d 753 (2008).

**D. MULTIPLE OTHER REASONS REQUIRED THE ORDERS BE VACATED, MOST IMPORTANTLY, EQUITY.**

As a first principle, the law in Washington requires that default judgments be “liberally set aside ... for equitable reasons in the interests of fairness and justice.” *Morin v. Burris*, 160 Wn.2d at 749; *see, also, Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007) (justice is principal inquiry in balancing the interest in determining controversies on their merits with the interest in judicial efficiency) (internal citations omitted)). For these reasons, and for the particular necessity of getting it right when it comes to a child’s interests, Judge Fleck properly and repeatedly invoked equity in her ruling.

In service to equity, Judge Fleck cited CR 60(b)(1), discussed above, and CR 60(b)(6), which permits the court to vacate a judgment where “it is no longer equitable that the judgment should have prospective application,” and CR 60(b)(11), which allows the court to vacate a default judgment for “[a]ny other reason justifying relief from the operation of the judgment.” Here, Judge Fleck found the default and the striking of Inesa’s pleadings as a sanction for her purported discovery violation to be too severe. CP 928-929. Precisely this same error justified grant of a new trial in *Teter v. Deck*, 2012 Wash. LEXIS 294 (Wash. Apr. 5, 2012). In *Teter*, a judge excluded a witness as a sanction for a discovery violation. A successor judge granted a motion for a new trial because that exclusion was too severe and our Supreme Court affirmed. That principle applies here with greater force, since “it is inappropriate and erroneous to withhold an inquiry into the best interests of the children as a penal remedy” for failing to comply with a court order. *Bay v. Jensen*, 147 Wn. App. 641, 657, 196 P.3d 753 (2008) (internal citations omitted).

Michael complained to the court about incomplete discovery answers. Even if true, which is not conceded here, this is nothing like the kind of egregious, abusive and frivolous litigation that might

justify the extreme sanction of excluding a necessary witness, let alone a default. Here, not only did the default orders deprive Inesa of her rights pursuant to dissolving the marriage, the orders simply bypassed the issue of greatest importance: the child's welfare.

Judge Fleck got this absolutely right.

E. JUDGE FLECK PROPERLY HEARD THIS MATTER.

Michael argues it was somehow improper for Inesa to seek CR 60 relief and improper for Judge Fleck to grant it, rather than Judge Spearman. Br. Appellant, at 15-16. This is a distraction.

First, Michael is in no position to argue propriety. He violated the mandatory requirement to submit a proposed parenting plan and his attorney falsely certified to the court the default parenting plan (and other orders) did not vary from the relief requested in the petition. By these acts alone, they caused the court to enter a void judgment, driving up costs to the parties and the court.

Second, Inesa had nothing to do with the scheduling of her CR 60 motion before Judge Fleck, contrary to Michael's insinuation. Br. Appellant, at 15. Inesa tried first to schedule it before Judge Spearman, as local rule requires, but was directed by the judge's clerk/bailiff to file the motion elsewhere, since Judge Spearman had

rotated off the family court calendar. CP (sub 224). Judge Spearman has the power to control her own calendar. *Swan v. Landgren*, 6 Wn. App. 713, 715-716, 495 P.2d 1044 (1972). Inesa could not force the judge to hear the motion. Certainly, Inesa acted with complete propriety in her effort to comply with the local rule.

Finally, Judge Fleck did not owe deference to Judge Spearman's ruling, as the Washington Supreme Court recently observed in similar circumstances. *Teter v. Deck*, 2012 Wash. LEXIS 294, 11-12 (Wash. Apr. 5, 2012). In *Teter*, the court upheld a decision by a successor judge granting a new trial because a prior judge had improperly excluded a witness. The court rejected the argument that the successor judge sat as an appellate judge. *Id.* Further, the court observed, "the succession of judges cannot be considered by this court; the office is a continuing one; the personality of the judge is of no legal importance." *Id.*, citing *Shephard v. Gove*, 26 Wash. 452, 454, 67 P. 256 (1901). Certainly, too, Judge Spearman could have corrected the same error as did Judge Fleck here, and likely would have, when accurately apprised of the facts.

## VI. MOTION FOR ATTORNEY FEES

The mother requests fees on the basis of intransigence and this being a frivolous appeal. This appeal is frivolous. The judgment entered by default was void, as described above. Indeed, it was twice void! As Judge Fleck rightly understood, the judgment had to be vacated. Accordingly, under CR 11 and RAP 18.9(c)(2), this Court should award fees to Inesa. See *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 224, 241, 119 P.3d 325 (2005) (appeal frivolous if, considering whole record, it presents no debatable issues and is so devoid of merit that there is no possibility of reversal). Because the law so clearly required the relief granted here by Judge Fleck, this appeal is devoid of merit.

Likewise, the law is well established that intransigence will support an award of attorney's fees regardless of financial ability. *Fleckenstein v. Fleckenstein*, 59 Wn.2d 131, 133, 366 P.2d 688 (1961); *In re Marriage of Crosetto*, 82 Wn. App. 545, 563-564, 918 P.2d 954 (1996); *In re Marriage of Morrow*, 5 Wn. App. 579, 590, 770 P.2d 197 (1989). Inesa asks this Court to award fees on this basis. Michael obtained his default judgment by improper means, including, prominently, his failure to comply with the statutory requirement to file a proposed parenting plan and his attorney's

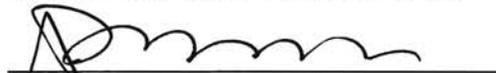
false certification that the final orders did not grant greater or different relief from that requested in the petition. Likewise, the lack of notice to Inesa, in light of her earnest participation in this litigation, contributed to this costly detour from the main event: a trial on the merits. By this conduct, Michael has driven up the costs of litigation and delayed the necessary inquiry into the child's best interests. This is intransigent.

#### VII. CONCLUSION

For the reasons above, Inesa Levitz respectfully asks this Court to affirm the trial court's order vacating the default judgment and to remand this case for trial. Inesa also requests her fees and costs incurred on appeal.

Dated this 30<sup>th</sup> day of April 2012.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY  
WSBA #13604



EDWARD HIRSCH  
WSBA #35807

Attorneys for Respondent

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Lisa S. Reed, PLLC

SUPERIOR COURT OF WASHINGTON  
COUNTY OF KING

In re the Marriage of:

MICHAEL D. LEVITZ, Petitioner,

and

INESA LEVITZ, Respondent.

No. 09-3-05615-7 SEA

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND ORDER  
ON RESPONDENT'S MOTION TO  
VACATE PURSUANT TO CR 37, CR 55  
AND CR 60

*Clerk's Action Required*

This matter, having come on regularly for hearing on June 3, 2011, pursuant to the motion of the Respondent, having reviewed the records and files herein, and having heard extensive argument of counsel, the Court makes the following findings of fact and conclusions of law:

1. There was a significant amount of litigation in this case from the time of the Petitioner's filing of his generic (non-specific) petition on August 20, 2009, through the entry of the decree of dissolution on October 27, 2010. The amount of pleadings filed in this case gives an indication of the active involvement of both parties in this case. The Respondent's financial affidavit indicates that she paid substantial

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ON  
RESPONDENT'S MOTION TO VACATE ORDER OF DEFAULT AND FINAL  
PLEADINGS PURSUANT TO CR 37, CR 55, and CR 60 (b) - 1

COPY

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1 attorney's fees during the period of time she was represented, providing additional  
2 evidence of the Respondent's participation in this matter. The Respondent appeared  
3 and responded in this case.  
4

5  
6 2. The Respondent was originally unrepresented in this matter. Mr. Burnett  
7 appeared on the Respondent's behalf on December 15, 2009 and filed the  
8 Respondent's response to petition on that date. A status conference was held on  
9 January 8, 2010. The status conference checklist indicated that neither party had  
10 filed a proposed parenting plan and that neither party had attended the parenting  
11 seminar. The Respondent filed the first of her proposed parenting plans on January  
12 19, 2010. The Respondent attended the parenting seminar in King County on  
13 February 12, 2010. The Respondent filed her second proposed parenting plan on  
14 September 30, 2010. The Petitioner failed to file a proposed parenting plan at any  
15 time during this case. The Petitioner attended a parenting seminar in Pierce County  
16 on October 26, 2010, the day before the final pleadings were entered by default.  
17  
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19  
20 3. The Petitioner served his interrogatories and requests for production on the  
21 Respondent's attorney, Mr. Burnett, on May 19, 2010, after the Respondent had  
22 moved to Hawaii. The attorneys participated in a CR 26/LR 37 conference on June  
23 23, 2010, three days before the effective date of Mr. Burnett's withdrawal from  
24 representing the Respondent. Three months later, on September 23, 2010, the  
25 Petitioner filed a Motion to Compel Answers to Interrogatories and Responses to  
26 Requests for Production of Documents and for Sanctions and Terms. The hearing  
27

1 on the Petitioner's motion was set for October 4, 2010. The Petitioner's motion was  
2 stricken after the Petitioner's attorney received the Respondent's discovery  
3 responses, while acting pro se, on or about September 27, 2010. The only evidence  
4 regarding the Respondent's delay in providing her discovery responses is that the  
5 Respondent believed based on a conversation she had with her attorney prior to his  
6 withdrawal, that he had taken care of the discovery requests.  
7

8  
9 4. The Petitioner's attorney filed another Motion to Compel Answers to  
10 Interrogatories and Responses to Requests for Production of Documents and for  
11 Sanctions and Terms setting the hearing for October 19, 2010. Another CR 26/LR 37  
12 conference was not conducted to identify in which respects the Respondent's  
13 responses were insufficient. Although the parties' attorneys has conducted a  
14 discovery conference in June 2010 in compliance with CR 26/LR 37, that was three  
15 months prior to the Respondent providing discovery responses while acting pro se.  
16 Under these circumstances, another CR 26/LR 37 conference should have been held  
17 in order, and may have been required to be held, to be consistent with the purpose of  
18 these rules.  
19  
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21  
22 5. The Order on the Petitioner's Motion to Compel Answers to Interrogatories  
23 and Responses to Requests for Production of Documents and for Sanctions and  
24 Terms was entered on October 18, 2010, one day prior to the scheduled hearing  
25 date. The Order provided that the Respondent's answers were due in three days; by  
26 October 21, 2010. The Respondent was residing in Hawaii. The Petitioner had the  
27

1 responsibility to serve the Order on the Respondent and was allowed to serve the  
2 Respondent by mail. Applying CR 5, and assuming the Order was mailed to the  
3 Respondent the day it was signed, the Respondent would have been properly served  
4 three days after the date of mailing, which would have been October 21, 2010; the  
5 date required for compliance, essentially providing the Respondent with no time to  
6 respond or comply.  
7

8  
9 6. The Order on Motion to Compel Answers to Interrogatories and Responses to  
10 Requests for Production of Documents and for Sanctions and Terms also provided  
11 that the Respondent's pleadings could be stricken and that an Order of Default could  
12 be entered ex parte if the Respondent failed to comply. Taking a default, and in this  
13 case without notice to the other party, is among the three most severe discovery  
14 sanctions. Case law requires that the court select the least severe sanction that will  
15 be adequate to serve the purpose of the sanction. In the Petitioner's motion and  
16 pleadings, no such analysis of sanctions was offered to the court. When court's  
17 impose one of the three most severe discovery sanctions pursuant to CR 37(b) (i.e.  
18 exclusion of evidence, dismissal, or default) the reasons for that choice must be  
19 clearly stated on the record, and where dismissal or default is ordered, it must be  
20 apparent from the record that the trial court explicitly considered whether a lesser  
21 sanction would have sufficed and whether it found the due process factors of "willful  
22 or deliberate refusal to obey a discovery order, which refusal substantially prejudices  
23 the opponent's ability to prepare for trial" requirements established in the following  
24 cases were present. See Mayer v. Sto Industries, Inc., 156 Wn.2d 677 (2006),  
25  
26  
27

1 clarifying Burnet v. Sacred Heart Hospital, 131 Wn.2d 484 (1997), Snedigar v.  
2 Hodderson, 114 Wn.2d 153 (1990), and Associated Mtg. Invest. V. G.P. Kent Const.  
3 Co., Inc., 15 Wn.App. 223 (1976). There is no evidence in the record that the court  
4 considered any of the above issues.  
5

6  
7 7. In dissolution cases, the court sits as a court of equity as well as a court of  
8 law. It is well established that the courts in Washington disfavor defaults and favor  
9 resolving cases on their merits. This is particularly true with a Unified Family Court  
10 case such as this where the caretaking of a young child is at issue and where the  
11 court has ordered a parenting evaluation; something that was never done.  
12

13  
14 8. The Petitioner filed a "generic" petition which did not specify what relief he  
15 requested. The Petitioner did not file an amended petition identifying what specific  
16 relief he sought as a basis upon which final pleadings could be entered following the  
17 entry of the Order of Default. With generic petitions for dissolution of marriage, there  
18 is no basis upon which to make a determination that the relief being requested is  
19 within the prayer for relief. The point of CR 54(c) precluding default judgments from  
20 exceeding the prayer for relief is procedural due process. A responding party is  
21 allowed to rely on the relief requested and if that party prefers to allow a judgment to  
22 be taken consistent with the prayer for relief rather than litigate, he or she can do so.  
23 The Petitioner elected not to file a proposed parenting plan at the time of filing. The  
24 Petitioner did not comply with the statutory requirement to file a proposed parenting  
25 plan within 180 days of filing his petition pursuant to RCW 26.09.181. As a result, the  
26  
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1 Petitioner did not provide notice to the Respondent of what he was seeking with  
2 respect to the parenting plan for the child. Instead, the Petitioner entered a final  
3 parenting plan on October 27, 2010.  
4

5 9. There was no basis to make a specific award of assets and liabilities, spousal  
6 maintenance or attorneys' fees. There was not basis upon which to enter a parenting  
7 plan by default, except perhaps a parenting plan that complied with the Respondent's  
8 position as stated in her proposed parenting plan dated September 30, 2010.

9  
10 Without a parenting plan there was no basis to award child support. Numerous  
11 family law cases stand for the proposition that granting relief beyond that which  
12 appears in a specific petition, a joint petition, or where a default is taken, violates due  
13 process and such final orders are void as a matter of law. See In re Marriage of  
14 Hardt, 39 Wn.App. 493 (1985) and Matter of Marriage of Leslie, 112 Wn.2d 612  
15 (1989). Cases such as these hold that decrees or the portion of decrees providing  
16 relief beyond that which was pled, are void. This court does not believe that final  
17 papers can be entered prior to the scheduled trial date based on a generic petition.  
18 However, even if this could be accomplished by the taking of detailed testimony, no  
19 such testimony was taken in this case.  
20  
21

22  
23 10. The parties disagree on the requirement of notice pursuant to CR 55 when a  
24 CR 37(b) sanction is imposed, and also disagree about actual notice in this case,  
25 given the Respondent's move from one residence to another in Hawaii, her receipt of  
26 emails and the notice they may have provided, as well as the issue related to her  
27

1 personal computer being repaired around the time that these orders were being  
2 entered. The Respondent asserts that she was not provided the proper notice  
3 required by CR 55 of the Petitioner taking an Order of Default, ex parte, following the  
4 entry of the October 18, 2010, Order to compel. The Respondent provided legal  
5 authority in support of her position. King County LFLR 5(c)(9) sets forth a fourteen  
6 day notice requirement prior to a hearing on default if the other party has appeared.  
7 The Petitioner relies on the Associated Mortgage case for the proposition that he was  
8 not required to provide notice. However, that case is distinguishable from the instant  
9 case because the Order to Compel in Associated Mortgage did provide notice of a  
10 hearing on the Motion for Default to be held at a specific date and time about ten  
11 days later if the other party did not comply with the Order to Compel.  
12

13  
14 11. Like all temporary orders, including orders on summary judgment, this Order  
15 on Motion to Compel Answers to Interrogatories and Responses to Requests for  
16 Production of Documents and for Sanctions and Terms was an interlocutory order  
17 that could have been changed by the trial court. Therefore, contrary to the  
18 Petitioner's position, notice would not have been a useless act, and there is nothing  
19 in CR 37 that eliminates the notice requirements of CR 55 when a party has  
20 appeared, as the Respondent has in this case, despite the striking of her pleadings.  
21

22  
23 12. The court in Hardt, stated that "proceedings to vacate judgments are equitable  
24 in nature and the court should exercise its authority liberally to "preserve substantial  
25 rights and do justice between the parties[.]" citing to Haller v. Wallis, 89 Wn.2d 539,  
26 543, 573 P.2d 1302 (1978); accord, Pamelin Indus., Inc. v. Sheen-U.S.A., Inc., 95  
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1 Wn.2d 398, 404, 622 P.2d 1270 (1981). The Petitioner may assert that the Order on  
2 Motion to Compel Answers to Interrogatories and Responses to Requests for  
3 Production of Documents and for Sanctions and Terms (providing for the Order of  
4 Default to be entered ex parte) overrides the requirements of CR 55. However, given  
5 the court's application of equity in family law cases, the equitable nature of CR 60  
6 motions and the requirement under CR 60 that courts exercise their authority  
7 liberally, as well as the totality of the circumstances of this case including the court's  
8 responsibility to create a parenting plan in the best interest of the parties' young child,  
9 the Petitioner's failure to provide any notice required by due process of what he was  
10 seeking in terms of all issues related to this dissolution, it is not equitable to allow  
11 these orders to stand. Without notice required by due process, the court lacked the  
12 authority to enter the orders, the orders, are void, and the Respondent is entitled to  
13 have them set aside.  
14  
15

16  
17 13. The following orders should be vacated: 1) Order Striking Pleadings,  
18 Adjudicating Respondent in Default and Granting Other Relief entered on October  
19 22, 2010; 2) Order on Motion for Adjudication of Unpaid Child Support and  
20 Maintenance, Award of Attorney's Fees and Costs, and Order Authorizing  
21 Distribution of Funds to the Parties entered on October 25, 2010; 3) Final Parenting  
22 Plan entered on October 27, 2010; 4) Final Order of Child Support entered on  
23 October 27, 2010; 5) Findings of Fact and Conclusions of Law entered on October  
24 27, 2010; and the 6) Decree of Dissolution entered on October 27, 2010, except for  
25 the portion of the Decree of Dissolution which dissolves the parties' marriage. These  
26 orders should be vacated on the following bases: 1)"irregularities in obtaining the  
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1 judgment or order" under CR 60(b)(1); 2) the order are void under CR 60(b)(5); 3) "it  
2 is no longer equitable that the judgment should have prospective application" under  
3 CR 60(b)(6); and under the catchall provision of "any other reason justifying relief  
4 from the operation of judgment" under CR 60(b)(11). This case has been vigorously  
5 litigated. Substantial issues exist relating to the appropriate parenting plan for a  
6 young child and with respect to significant financial issues. These issues taken  
7 together with the irregularities described in the above findings, the law's disfavor of  
8 defaults generally, and the particular requirements with respect to the severe  
9 sanction of default as a discovery sanction pursuant to CR 37, constitute such "other  
10 reasons" under CR 60(b)(11).  
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13 14. The Order on Motion to Compel Answers to Interrogatories and Responses to  
14 Requests for Production of Documents and for Sanctions and Terms entered on  
15 October 18, 2010, should also be set aside because the time requirements of the  
16 Order cannot be met and because it appears a CR 26/LR 37 conference needs to be  
17 conducted prior to a hearing on that matter.  
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20 15. A new trial date should be assigned to this case and a new case schedule  
21 should be issued in this matter.  
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23 Based upon the above findings, it is hereby ORDERED, ADJUDGED AND  
24 DECREED as follows:  
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1. The Order on Motion to Compel Answers to Interrogatories and Responses to Requests for Production of Documents and for Sanctions and Terms entered on October 18, 2010, is hereby vacated.

2. The Order Striking Pleadings, Adjudicating Respondent in Default and Granting Other Relief entered on October 22, 2010, is hereby vacated.

3. The Order on Motion for Adjudication of Unpaid Child Support and Maintenance, Award of Attorney's Fees and Costs, and Order Authorizing Distribution of Funds to the Parties entered on October 25, 2010, is hereby vacated.

3. The Final Parenting Plan, Final Order of Child Support, Findings of Fact and Conclusions of Law, and Decree of Dissolution entered on October 27, 2010, except for the portion of the Decree of Dissolution which dissolves the parties' marriage, are hereby vacated.

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4. ~~The Clerk of the Court shall set a new trial date shall and a new case schedule shall be issued.~~ *An order setting trial date & case schedule were attached, along with an order designating the case to Judge Jeffrey Ramsdell.*

DONE IN OPEN COURT this 14 day of <sup>July</sup> ~~June~~, 2011.

151 Deborah D. Fleck  
Judge Deborah D. Fleck

Presented by:

Approved as to Form:  
Notice of Presentation Waived:

Lisa S. Reed, WSBA #24365  
Lisa S. Reed, WSBA #24365  
Attorney for Respondent

David J. Ordell, WSBA #5303  
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