Supreme Court No.
Court of Appeals No. 57919-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

CHEYNE C. PARHAM,

Petitioner,

v.

MARY JOY PARHAM,

Respondent.

PETITION FOR REVIEW

By:

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1. IDENTITY OF THE PETITIONER

Petitioner Cheyne Parham ("Cheyne Parham") requests this Court to review the decision of the Court of Appeals, Division Two, referred to in Section Two. Mary Joy Parham ("Mary Joy") is the Respondent.

2. COURT OF APPEALS DECISION

A year after final orders, a parenting plan, and property divisions and transfers had been filed and effectuated in a dissolution matter, Pierce County Superior Court granted Mary Joy's CR 60(b)(1) motion to vacate such orders and parenting plan. Represented by an attorney, she provided no specific reasons for the relief requested and filed the motion with no supporting evidence or declarations whatsoever. Cheyne filed an appeal pointing out the motion to vacate utterly failed to meet the requirements of CR 60(b)(1). Mary Joy did not respond to the appeal or appear in the appellate action at all. She has rarely elected to see the parties' children, either before or after the vacate motion was filed.

Division Two of the Court of Appeals, *Parham v. Parham*, 57919-7-II, 2024 WL 33928, at *1 (Wash. Ct. App. Jan. 3, 2024), dated January 3, 2024, affirmed the trial court despite having no responsive briefing from Mary Joy on appeal. In doing so, it misstated the timeline regarding filings within the trial court record, relied on an inadmissible declaration filed contrary to CR 59(c), and held Cheyne's military deployment record against him contrary to 50 U.S.C. § 3938(b). The Decision is contrary to published caselaw, presents a significant issue of constitutional magnitude regarding the due process clause and the right to have a meaningful opportunity to be heard, and raises substantial public policy issues that should be decided by this Court.

3. ISSUES PRESENTED

3.1. As an issue meeting all four reasons to grant review under RAP 13.4(b), whether a responding party to motion to vacate final orders regarding effectuated property division orders is entitled to notice of the basis of the motion so that he or she may have meaningful opportunity to be heard in responding to such motion? Yes.

3.2. As an issue under RAP 13.4(b)(1) and (2), whether Division Two's Decision conflicts with published decisions

establishing the elements a moving party must meet under CR 60(b)(1) before he or she may be granted relief? Yes.

3.3. As an issue under RAP 13.4(b)(2), whether Division Two's Decision conflicts with published decisions regarding admissibility and reliance of belated declarations filed contrary to CR 59(c)? Yes.

3.4. As an issue under RAP 13.4(b)(4), whether Division Two's Decision presents an issue of substantial public importance that should be decided by this Court because its reasoning holds the deployment status of a party against him contrary to 50 U.S.C. §3938(b)? Yes.

3.5. As an issue under RAP 13.4(b)(2) and (4), whether Decision Two's Decision presents an issue of substantial public importance that should be decided by this Court because the decision conflicts with published decisions and gives pro se parties special rights and deference not afforded to represented parties contrary to black letter law? Yes.

4. STATEMENT OF THE CASE

4.1. Cheyne and Mary Joy married in 2008. (CP 50). They raised three children together. (CP 53).

4.2. In 2021 Cheyne filed for divorce, including a proposed parenting plan. (CP 11-19). Mary Joy was served with the pleadings and a case scheduling order. (CP 31).

4.3. The summons advised a response was due within 20

days or default orders could be entered:

> If you do not serve your written response within 20 days . . . after the date this summons was served on you . . . the court may enter an order of default against you, and the court may, without further notice to you, enter a decree and approve or provide the relief requested in the petition.

(CP 20). It identified documents Mary Joy had to complete to respond, referenced websites and a phone number to access necessary forms, and advised to obtain an attorney. (CP 21).

4.4. When Mary Joy failed to answer any pleading, the trial court sent an email advising her to respond, also stating default orders could be entered if she did not. (CP 32-33).

4.5. Cheyne filed for default in December 2021 and the trial court entered final dissolution orders consistent with Cheyne's petition fairly distributing property and allocating all community debt to him. (CP 42-44, 45-48, 56-62). It entered a parenting plan. (CP 63-70).

4.6. The child support order identified how Mary Joy could claim their son as a dependent for tax purposes. (CP 78).

4.7. In the first week of January of 2022, the parties discussed fulfilling the orders, and began carrying out the ordered terms and division of property. (CP 124-25). By February of 2022, Mary Joy received all personal property requested and agreed consistent with the final orders. (CP 124). In April of 2022, Mary Joy filed her taxes consistent with final orders, claiming the parties' son on her tax return. (CP 125). The parties met and executed title transfers of the parties' vehicles consistent with the final orders. (CP 124-26). Real property was transferred, Mary Joy receiving title to eight properties in the Philippines. (CP 126). By August of 2022, Mary Joy was presenting herself to others with a new last name. (CP 125).

4.8. Nearly twelve months after final orders were entered and followed in the matter[1], Mary Joy used an attorney to prepare, and note a hearing for, a motion to vacate the final

[1] Mary Joy exercised residential time with the children only 21 of the 106 days she was entitled to in 2022. (CP 127). Through all of 2023 and 2024 to date, Mary Joy has seen her kids a total of nineteen days.

orders. (CP 102-04). She was not pro se. (CP 107-08, 174). She cited CR 60(b)(1), but did not include testimony or documentary evidence or argument besides two conclusory assertions:

> The final orders do not make a just and equitable distribution of assets and debts.
>
> ***
>
> The final parenting plan and order of child support are not in the children's best interests for reasons outlined in the motion for default accompanying this motion for order to show cause.

(CP 103-06).

4.9. Cheyne, upon receiving the motion to vacate, had no meaningful ability to respond to the motion because Mary Joy provided no specific nor substantive reasons justifying her requested relief. (*See* CP 103-06).

4.10. The trial court, without identifying how the motion to vacate satisfied the elements of CR 60(b)(1), granted the motion. (CP 174-75). The justification the trial court offered was that default judgments were disfavored, Mary Jo "was unrepresented and *asserts* she was prepared to go to court on

December 10, 2021, [for a scheduling conference] but was informed it was cancelled and did not see the final orders until September 2022." (CP 174-75) (emphasis added).

4.11. The trial court denied Cheyne's motion for reconsideration. (CP 197-99). Contrary to CR 59(c), it appears the trial court may have considered a declaration from Mary Joy filed with her response to the reconsideration motion when Cheyne's motion for reconsideration was not "based on affidavits."

4.12. Cheyne filed an appeal. (CP 203-10). Mary Joy refused to respond to the appeal at all. She filed no response brief to the appeal whatsoever, despite multiple orders from the Court of Appeals telling her to do so.

4.13. Despite not even the slightest acknowledgement of the appellate case from Mary Joy, Division Two issued an unpublished decision *in her favor*. It held that "Although we may not have made the same decision as the trial court, we cannot say that the superior court's decision was based on untenable grounds

or reasons" even though "It [wa]s true that not all of the factors of the 4-pronged test clearly weigh[ed] in favor of Mary Joy." *Parham*, 57919-7-II, 2024 WL 33928, at *3.

4.14. Central to decision were statements made in Mary Joy's February 7, 2023, declaration (CP 193-95)—*filed after Cheyne filed for reconsideration*. Contrary to CR 59(c), Division Two held this declaration somehow supported the previously filed motion to vacate from November of 2022 that included no such statements, evidence, nor testimony. (CP 179 to 192).

4.15. Nearly all of Division Two's reasoning was based on Mary Joy's February of 2023 declaration filed *after* the trial court had already ruled on the motion to vacate. The only testimony or evidence filed *before the trial court ruled on the motion to vacate* was from Cheyne. (CP 113-15, 122-163). This evidence he provided contradicted the February of 2023 declaration. (CP 113-15, 122-163).

4.16. Notably, and contrary 50 U.S.C. §3938(b)[2], Division Two also found persuasive that Mary Joy stated—in her February of 2023 reconsideration declaration— that Cheyne was not able to be the "primary parent during" his "periods of military service", *i.e.*, deployment.

4.17. Further reasoning of Division Two included Mary Joy's "pro se" status, which was not only irrelevant but not true because she had an attorney argue the motion to vacate and subsequent reconsideration motion brought by Cheyne. (CP 111-12; RP January 10, 2022; RP February 10, 2022).

5. WHY REVIEW SHOULD BE ACCEPTED

5.1. <u>The Decision Conflicts with Constitutional Due Process Under RAP 13.4(b)(1), (2), and (3), and Constitutes an Issue of Substantial Public Interest that Should Be Determined by this Court Under RAP 13.4(b)(4)</u>.

Article 1, section 3 of the Washington Constitution

[2] Stating "no court may consider the absence of the servicemember by reason of deployment, or the possibility of deployment, as the sole factor in determining the best interest of the child."

provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." *Dep't of Labor & Indus. v. Fowler*, 23 Wn. App. 2d 509, 526–27, 516 P.3d 831, 841 (2022), *review denied*, 200 Wn.2d 1027, 523 P.3d 1184 (2023). The Fourteenth Amendment to the United States Constitution similarly provides that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." *Id*.

Once a due process violation occurs, it cannot be undone. *Olympic Forest Products, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 430, 511 P.2d 1002 (1973). The order constituting the violation is void as are all subsequent orders based on it. *Hart v. Hawtin*, No. 50350-6-II, 2019 Wash. App. LEXIS 842, at *33 n.9, (unpublished opinion) (holding not following "procedures in any applicable statute" is a denial of "meaningful opportunity to be heard," a due process violation, and has the "potential to undermine the integrity of the legal system."). Meaningful opportunity to be heard is not just notice of hearing, but requires notice from the party of substantive arguments being made so

that the opposing party has something to respond to at a hearing involving property interests. *Id*. (holding "[Appellant] appears to have had adequate *time* notice of the hearing. However, [Appellant] was given little notice of the *subject matter* of the hearing because there was no formal motion for his counsel to make argument against" and because "[Appellant] did not know the subject matter of the hearing, he was denied a meaningful opportunity to be heard."). Void orders and judgments may be vacated irrespective of lapse of time. *In re Marriage of Maxfield*, 47 Wn. App. 699, 702, 737 P.2d 671, 673 (1987).

Here, to provide meaningful due process to the party responding to a CR 60(b)(1) motion involving property rights, the party moving to vacate final orders must state within the motion specific reasons as to why he or she believes they are entitled to relief. Without doing so, the responding party is left guessing as to how to respond the motion and is denied the fundamental due process right of meaningful opportunity to be heard.

This Court is called upon to affirm this fundamental constitutional right. A party cannot ignore a summons served upon her, ignore a specific hail from the trial court to respond to the action, effectuate the final orders transferring property interests and rights, and then nearly twelve months later request to vacate such final orders entered against them without giving specific reasons justifying such relief. Due process requires that the responding party be given meaningful notice of the specific reasons allegedly justifying the motion to vacate and specific reasons why those property interest transfers should be undone. Without notice of those specific reasons, the responding party can only guess and speculate in its response and is denied meaningful opportunity to be heard.

That is exactly what happened in this matter. Mary Joy filed a motion to vacate completely devoid of any non-conclusory reasons to grant her relief. Her motion literally only stated:

The final orders do not make a just and equitable

> distribution of assets and debts.
>
> ***
>
> The final parenting plan and order of child support are not in the children's best interests. . . .

(CP 103-06). Nothing else was filed to support these conclusory claims, no declaration nor supporting evidence or documents. Cheyne was entitled to much more so that he could formulate a response and be meaningfully heard. The barren motion provided nothing for him to do but speculate on what Mary Joy was claiming.

This is nearly an identical situation as was in *Hawtin*, where orders issued after a respondent was denied due process, in responding to a motion, were declared void by Division Two. There, a hearing was set involving the vacating of previous court orders. The hearing was set with sufficient temporal notice to the responding party. *But the respondent was not given sufficient substantive notice of the reasons justifying the requested relief.* Instead, the responding party was left guessing and speculating

as to the reasons underlying the motion. Thus, fundamental due process and meaningful opportunity to be heard was denied. The order issued at the end of the hearing had to be declared void.

This situation is also similar to *Fowler*, where Division Two declared void orders issued after a petition "wholly fail[ed] to state the reasons why" the relief requested should be granted. *See Fowler*, 23 Wn. App. 2d at 532 (holding petitioning party failed to give reasons why responding party could not be contacted prior to the ex-parte hearing and thus respondent's due process rights were violated).

In sum, Cheyne respectfully requests this Court take review of this matter under RAP 13.4(b)(1), (2), (3), and (4), because Division Two's decision conflicts case law regarding the fundamental right of meaningful opportunity to be heard and because the issue is one of substantial public importance.

5.2. Division Two's Decision Conflicts with Published Decisions Regarding Granting CR 60(b)(1) Motions to Vacate.

Under CR 60(b)(1) to be granted relief the moving party

must satisfy the following four-part test:

> "(1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated."

VanderStoep v. Guthrie, 200 Wn. App. 507, 517, 402 P.3d 883 (2017) (quoting *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007)). The first two factors are primary, the second two are secondary. *Id.*

To establish a prima facie defense, the moving party "must set out concrete facts." *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 449, 332 P.3d 991 (2014). Washington decisions repeatedly make clear that it is not enough to "merely state allegations." *Id.* This is because "the defendant must do more than present speculation regarding the existence of a defense." *VanderStoep*, 200 Wn. App. at 519. Rather, the moving party under CR 60(b)(1) must "produce evidence which, if later believed by the

trier of fact, would constitute a defense." *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 202, 165 P.3d 1271 (2007). "The strength of the defendant's defense determines the significance of the defendant's reasons for failing to timely appear and defend." *VanderStoep*, 200 Wn. App. at 518. "[C]ourt[s] will not consider claims insufficiently argued by the parties." *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440, 445 (1990).

Notably, an alleged "mistake of law will not support the vacation of a judgment" *In re Le Roux's Estate*, 55 Wn.2d 889, 890, 350 P.2d 1001, 1002 (1960); *Kern v. Kern*, 28 Wn.2d 617, 619, 183 P.2d 811, 812 (1947).

Here, this Court is called upon to review Division Two's decision because it conflicts cases governing and setting the proper standard for granting motions to vacate under CR 60(b)(1).

For example, as to the first element considered, there is a requirement "for substantial evidence supporting a prima facie

defense." Division Two's decision directly conflicts with *Little*, 160 Wn.2d at 704. In *Little* the defendant argued that "preexisting conditions may have contributed to Little's injury." 160 Wash.2d at 704. To support this argument, the moving party provided a declaration from an insurance adjuster stating that the plaintiff's medical records included reports of headaches, hip pain, and depression before the collisions. *Id.* However, the declaration wholly failed to demonstrate how the preaccident aches, pains, and depression were related in any way to her postaccident condition. *Id.* This analysis is equivalent to, and an analogous of, Mary Joy's bare claim that "The final orders do not make a just and equitable distribution of assets and debts" and "The final parenting plan and order of child support are not in the children's best interests." As Division One concluded in *Patten*, "the supposed lack of justice and equity in the asset distribution . . . isn't a defense." *Matter of Marriage of Patten*, 194 Wn. App. 1021 (2016). "That's dissatisfaction." *Id.*

In other words, in all of the above cases, "Even viewed in

the light most favorable to the parties moving to set aside the default judgment, mere speculation is not substantial evidence of a defense." *See Little*, 160 Wn.2d at 705.

Division Two's decision directly contradicts this plain statement of law. This is made plain because Mary Joy provided literally no declaration nor evidence that there was anything wrong with the parenting plan or order distributing assets when she filed to vacate the final orders. Instead, she seemed to claim a blanket error of law saying the final orders were not "fair", but alleged errors of law are not a valid reason to vacate final orders. *In re Le Roux's Estate*, 55 Wn.2d at 890.

Despite these realties, Division Two nonetheless concluded that "Mary Joy presented evidence establishing the equivalent of a prima facie defense to the final dissolution orders." But such a conclusion cannot be reconciled with the record because Mary Joy did not submit a single document or line of testimony identifying what made the parties' division of assets inequitable or parenting plan improper. Division Two's

decision directly contradicts this Court's decision in *Little*. Mary Joy provided no substantial evidence supporting a prima facie defense, and this Court should take review under RAP 13.4(b)(1).

As to the second element, "that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect": In *Morin*, this Court held that "when served with a summons and complaint, a party must appear." *Morin v. Burris*, 160 Wn.2d 745, 759, 161 P.3d 956, 964 (2007). The rationale is that "[t]here must be some potential cost to encourage parties to acknowledge the court's jurisdiction." *Id.* A party's failure to abide by a summons is therefore "not excusable neglect." *In re Marriage of Oster*, No. 78977-5-I,2019 WL 2502421 (Wash. Ct. App. Jun. 17, 2019).

Mary Joy's motion to vacate provides no explanation as to why she did not answer the summons or petition for divorce. Her assertion she did not attend a case scheduling hearing, or that she did not get informed of the motion for default, in no way excused

her from not answering the summons and complaint. Not only did she ignore the summons and petition, she ignored an email directly to her from the trial court telling her to respond or default orders could be entered. (CP 33).

Moreover, her assertion that she did not have the final orders almost immediately after they were entered is completely refuted by the only evidence actually submitted, from Cheyne, before the motion to vacate was heard by the Court. (CP 124-26). Not only did Mary Joy have and understand the final orders in January of 2023, she also immediately began effectuating them. (CP 124-26). Thus, Division Two's decision is contrary to decisions of this Court and Courts of Appeal regarding mistake, inadvertence, surprise, or excusable neglect, and this Court should grant review under RAP 13.4(b)(1) and (2).

As to the third element, "the defendant acted with due diligence after notice of the default judgment": In *Luckett*, Division One held that a motion to vacate under CR 60(b)(1) must be filed within a reasonable time and that "The critical

period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became *aware* of the judgment and the filing of the motion." (emphasis added). *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144, 1147 (1999). Division Three agrees. *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 305, 122 P.3d 922, 924 (2005). And Division Two has agreed to this standard as well, as recently as 2022. *Matter of Marriage of Piukkula*, 21 Wn. App. 2d 1014 (2022). *Luckett* went on to hold that "Major considerations in determining a motion's timeliness [we]re: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner." *Luckett*, 98 Wn. App. at 312.

Division Two's decision in the case at hand is completely contrary to the *Luckett* and other court of appeals decisions, including the ones cited above. Without any question, Mary Joy "became aware" of the final orders mere days after they were entered. (*e.g.*, CP 124-26). She acted upon them immediately

fulfilling the property division and taking residential time with the children under it. (*e.g.*, CP 124-26). Furthermore, the supposed excuse that Cheyne did not provide her copies of the final orders until September of 2022 is not supported by any evidence, is contrary to her clear actions effectuating the final orders during winter and spring of 2022, and—more to the point—is not the standard of law. The proper standard for which Division Two failed to follow was when Mary Joy "became aware" of the final orders—not when an adversarial party with no duty to provide a copy to her allegedly first gave a copy to her. *Luckett*, 98 Wn. App. at 312.

Having no "good reasons for failing to take appropriate action sooner" and having caused severe prejudice to Cheyne by upending the property transfers and divisions already effectuated, Division Two erred in holding otherwise. The error, conflicting with published decisions of other courts of appeal deserves review by this Court under RAP 13.4(b)(2).

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5.3. Division Two's Decision Conflicts with Published Decisions Under CR 59(c)

Under CR 59(c), when a party files for reconsideration but does not include any new affidavits, the responding party may not file responsive affidavits of their own. *Awana v. Port of Seattle*, 121 Wn. App. 429, 433, 89 P.3d 291, 292 (2004) (holding under CR 56(c) "Appellants were not permitted to submit new evidence in response [to the motion for reconsideration not based on new affidavits]. The declarations were improper. . . .").

Here, central to Division Two's decision on appeal was the fact that it included statements made in Mary Joy's February 7, 2023, declaration (CP 193-95)—filed after Cheyne filed for reconsideration—as evidence somehow supporting her previously filed *motion to vacate from November of 2022 that included no such statements, evidence, nor testimony*. (CP 179 to 192). Considering this February of 2023 declaration, by the trial court or on appeal, was a clear violation of CR 56(c) as parties

responding to a motion for reconsideration may *not* file new affidavits unless the party moving for reconsideration based its motion new affidavits of his own. *Awana*, 121 Wn. App. at 433.

Consequently, Mary Joy's belated arguments—raised months after the court ruled on her motion to vacate in February 2023 declaration—that she did not speak English was not properly before the trial court, even on reconsideration. For the same reason, under CR 59(c), it was an error for Division Two to consider anything in her belated declaration as supporting her motion to vacate; the declaration was inappropriately filed on reconsideration two months after the trial court already ruled on the motion to vacate.

The only evidence *that was properly before the trial court*, and the only evidence properly before Division Two on appeal on review, was evidence Cheyne provided that an official language of the Philippines is English, and that it is taught in all schools there. (CP 123). Additionally, he provided that before these parties ever met, Mary Joy spoke fluent English. (CP 123).

She even served as an English translator. (CP 124). He pointed out that the children only speak English as Mary Joy has no problem speaking English and the parties preferred English. (CP 122-23). Indeed, Mary Joy has had several jobs, all of which necessitated fluency in speaking English. (CP 122-23; RP January 20, 2023, at 7-10). Cheyne also provided that she had passed multiple licensing exams in English without any special assistance. (CP 122-23). The record is also clear that Mary Joy repeatedly signed legal documents in English (CP 103-04, 105-06, 193-95) and frequently corresponded in text messages in English without any problems. (CP 138-39).

In sum, Division Two's decision citing the belated declaration misstates when the declaration was filed with the trial court. *The decision erroneously includes the February 2023 declaration as evidence supporting the motion to vacate* when such declaration was not filed until months after the trial court ruled on the vacate motion. The decision also contradicts CR 59(c) as well as published case law from Division One regarding

that rule which prohibits consideration of such a belatedly filed declaration. For this reason, this Court should take review under RAP 13.4(b)(2)

5.4. Division Two's Decision is an Issue of Substantial Public Importance Because It Conflicts with 50 U.S.C. §3938(b)

Under 50 U.S.C. § 3938(b), "If a motion or a petition is filed seeking a permanent order to modify the custody of the child of a servicemember, no court may consider the absence of the servicemember by reason of deployment, or the possibility of deployment, as the sole factor in determining the best interest of the child."

Here, Division Two's decision holding Cheyne's military service and deployment against him was improper and a direct violation of federal law. *Compare Parham*, 57919-7-II, 2024 WL 33928, at *3 (affirming motion to vacate permanent parenting plan in part because "Mary Joy also identified concerns about the parenting plan not being in the best interests of the children due to her history of being the primary parent during Cheyne's

periods of military service") with 50 U.S.C. § 3938(b)). This Court should take review under RAP 13.4(b)(4) and because this is an issue of substantial public importance.

5.5. Division Two's Decision Conflicts with Published Decisions and Presents an Issue of Substantial Public Importance Because It Gives Pro Se Parties Special Rights and Deference Not Afforded to Represented Parties Contrary to Black Letter Law.

"The law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—*both are subject to the same procedural and substantive laws*." *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527, 530 (1993) (emphasis added) (citing *In re Marriage of Wherley*, 34 Wash.App. 344, 349, 661 P.2d 155, *review denied*, 100 Wash.2d 1013 (1983)).

Here, Division Two's decision is in conflict with numerous decisions, and black letter law, that pro se litigants and attorneys alike "*are subject to the same procedural and substantive laws*." *Olson*, 69 Wn. App. at 626 (emphasis added) (citing *Wherley*, 34 Wash.App. at 349). Division Two's holding

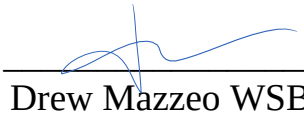
that Mary Joy's "pro se status" was a reason, in part, to affirm the trial court is plainly contrary to the law and cited authority above. *Parham*, 57919-7-II, 2024 WL 33928, at *3. In other words, Mary Joy's pro se status was not a proper reason, and could not contribute to being a proper reason, to grant the motion to vacate because pro se status is not a "mistake" justifying failing to appear. With or without an attorney, parties must respond to a summons. Pro se status is also not an excuse to ignore a direct request from the trial court to respond. This Court should take review of this issue under RAP 13.4(b)(2) and (4). The holding of the case contradicts settled law espoused on published cases and this is an issue of substantial public importance.

6. CONCLUSION

Pursuant to RAP 13.4, Cheyne respectfully requests this Court grant review, for the reasons stated herein.

Respectfully submitted this 18th day of March, 2024.

HARBOR APPEALS AND LAW, PLLC



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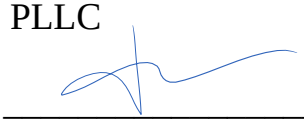

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Filed
Washington State
Court of Appeals
Division Two

January 3, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: CHEYNE C. PARHAM, Appellant, v. MARY JOY PARHAM, Respondent.	No. 57919-7-II UNPUBLISHED OPINION

PRICE, J. — Cheyne C. Parham appeals the superior court's order granting Mary Joy Parham's motion to vacate the order of default and final orders entered in their dissolution.[1] Cheyne argues the superior court abused its discretion by granting Mary Joy's motion to vacate. We disagree and affirm.

FACTS

On August 4, 2021, Cheyne filed a petition for dissolution of his marriage to Mary Joy. Cheyne also filed a proposed parenting plan. Mary Joy was served with the summons and petition. A trial setting hearing was noted for December. Mary Joy did not file a response.

On November 17, 2021, the superior court emailed the parties and informed them that no response to the petition had been filed so the December trial setting hearing was cancelled. The

[1] Because it appears from the record that the parties have the same last name, we use their first names for clarity. We intend no disrespect.

email also stated that a trial date would not be set unless a response was filed or the petitioner moved for an order of default. Still no response to the petition was filed.

About two weeks later, Cheyne moved for an order of default. On December 14, 2021, the superior court entered an order of default. Based on the default, the superior court did not assess Cheyne's proposed orders, but merely entered final dissolution orders that were consistent with his petition and proposed parenting plan.

After the final dissolution orders were entered, Cheyne and Mary Joy took steps to comply with the final dissolution orders. Mary Joy identified and obtained personal property from the family home that she wanted. Mary Joy also cooperated with Cheyne to transfer the title of the vehicle that was awarded to her in the dissolution.

However, eleven months later, on November 28, 2022, Mary Joy, with the assistance of an attorney, filed a motion to vacate the final dissolution orders. The motion was based on CR 60(b)(1) and CR 60(b)(11). In her motion, Mary Joy stated the grounds for relief:

> Respondent was never provided an opportunity to review final orders and was pro se and understood that December 10, 2021 was her opportunity to appear in court. Upon informing [Mary Joy] that the hearing originally set for December 10, 2021 was cancelled, [Cheyne] failed to inform [Mary Joy] of the motion for default and did not provide her with final orders until September 2022. The final orders do not make a just and equitable distribution of assets and debts. The final parenting plan and order of child support are not in the children's best interests . . . .

Clerk's Papers at 104.

Cheyne objected to the motion to vacate, arguing that Mary Joy failed to show that the final orders do not make a just and equitable distribution of property or that the parenting plan was not in the best interests of the children. In response, Mary Joy claimed that she was a non-native English speaker and pro se litigant and she did not understand she needed to file a response to the

petition. Mary Joy's lawyer also filed a declaration stating that she used a language line interpreter in order to meet with Mary Joy.

In a supplemental declaration, Cheyne declared that, although Mary Joy was born in the Philippines, English is an official language of the Philippines and Mary Joy was proficient and fully-functional speaking in English. Cheyne also documented all the steps Mary Joy had taken to comply with the final dissolution orders since they were entered, including transferring title to property and taking pieces of personal property from the family home.

At the hearing on Mary Joy's motion to vacate, Mary Joy argued that she mistakenly believed that she did not have to take any action except to show up at the trial setting hearing (initially scheduled for December 2021) because she was acting pro se. And she also argued that the language barrier contributed to her failure to respond. She contended that the final orders did not make a just and equitable distribution of property because Cheyne's military pension was awarded entirely to him. Finally, she alleged the parenting plan did not take into account Cheyne's military service or Mary Joy's history of being the primary parent during his military service.

The superior court noted that default judgments are generally disfavored and the motion to vacate was brought within one year of the default. The superior court also emphasized that the language barrier was a significant barrier that could not be overlooked. VRP 17. The superior court said,

> So I don't necessarily want to vacate the divorce unless you both agree on that. But I think the court needs -- the court needs to hear the fair and equitable division of the property and if there [are] any parenting plan issues. Because the court is the ultimate, even if the parents agree on a parenting plan, once there is some knowledge of, you know, agreement then the court must make the final decision on a parenting plan.

Verbatim Rep. of Proc. at 17.

Ultimately, the superior court granted Mary Joy's motion and entered an order vacating the order of default and the final dissolution orders. However, the superior court ordered that the parties' marital status remained dissolved. Cheyne filed a motion for reconsideration, which was denied.

Cheyne appeals.

ANALYSIS

Cheyne argues that the superior court erred by granting Mary Joy's motion to vacate the order of default and the final dissolution orders. We disagree.

We review the superior court's decision to set aside a default judgment for an abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). "A [superior] court abuses its discretion by making a decision that is manifestly unreasonable or by basing its decision on untenable grounds or untenable reasons." *VanderStoep v. Guthrie*, 200 Wn. App. 507, 518, 402 P.3d 883 (2017), *review denied*, 189 Wn.2d 1041 (2018). "[W]e are more likely to find an abuse of discretion when the [superior] court denies a motion to set aside a default judgment than when the [superior] court grants such a motion." *Id.* "[D]efault judgments generally are disfavored because courts prefer to resolve cases on their merits." *Id.* at 517.

CR 60(b)(1) provides for relief from a judgment for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." Courts apply a four-pronged test to determine if a default judgment should be vacated under CR 60(b)(1):

> (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the

> default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

Little, 160 Wn.2d at 703-04. The first two factors are the primary considerations in whether to set aside a default judgment. *Id.* at 704 ("Factors (1) and (2) are primary; factors (3) and (4) are secondary.").

The test is not mechanical; whether to set aside a default judgment is ultimately a matter of equity. *Id.* "Our primary concern is whether justice is being done." *VanderStoep*, 200 Wn. App. at 517. We must determine whether the superior court's decision is ultimately just and equitable. *Id.* "What is just and equitable must be determined based on the specific facts of each case, not based on a fixed rule." *Id.* at 517-18.

Applying each of the four-prongs of the test, especially the first two "primary factors," the superior court did not abuse its discretion by granting Mary Joy's motion to vacate. As to the first factor related to a prima facie defense, dissolution cases are different from other types of civil cases in that there are not formal claims and defenses. Instead, the superior court is mandated to make a just and equitable distribution of property and enter a parenting plan that is in the best interests of the children. RCW 26.09.002, .080. Here, Mary Joy raised concerns about the just and equitable distribution of property, specifically concerns related to the award of Cheyne's military pension to Cheyne in its entirety. Mary Joy also identified concerns about the parenting plan not being in the best interests of the children due to her history of being the primary parent during Cheyne's periods of military service. Therefore, Mary Joy presented evidence establishing the equivalent of a prima facie defense to the final dissolution orders.

As to the second factor related to whether the failure to respond was due to a mistake, Mary Joy alleged that as a pro se litigant and non-native English speaker, she mistakenly believed that she only had to appear when the superior court set a hearing date. The parties contested Mary Joy's fluency, but regardless, her pro se status combined with the fact that English was not her first language made it a reasonable conclusion that Mary Joy failed to appear due to a mistake.

As to the third factor related to delay, we recognize that 11 months is a significant period of time to wait to bring a motion to vacate. But there is evidence in the record that Mary Joy did not receive copies of the final orders until September 2022 and that it took some time for Mary Joy to obtain an attorney and determine there was reason to pursue a motion to vacate. And as to the fourth factor related to substantial hardship, there is obvious inconvenience to Cheyne in the potential redistribution of property when the final dissolution orders had been in place for almost a year. However, in light of the focus on equities involved in dissolution proceedings, this inconvenience does not, on balance, necessarily translate into a substantial hardship.

Although we may not have made the same decision as the trial court, we cannot say that the superior court's decision was based on untenable grounds or reasons. It is true that not all of the factors of the 4-pronged test clearly weigh in favor of Mary Joy. But the first two factors—factors to which we give primary consideration—do weigh in her favor. And we cannot ignore both the foundational principle that default judgments generally are disfavored and the considerable deference we give to superior courts on these questions. *See VanderStoep*, 200 Wn. App. at 517-18. Accordingly, we affirm the superior court's order vacating the order of default and the final dissolution orders.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

LEE, P.J.

VELJACIC, J.

Filed
Washington State
Court of Appeals
Division Two

February 15, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

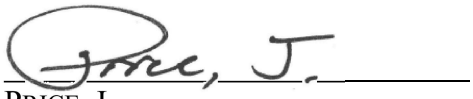
In the Matter of the Marriage of: CHEYNE C. PARHAM, Appellant, v. MARY JOY PARHAM, Respondent.	No. 57919-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the opinion filed January 3, 2024, in the above entitled matter. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj: LEE, VELJACIC, PRICE

FOR THE COURT:



PRICE, J.

HARBOR APPEALS AND LAW, PLLC

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