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No. 65937-5-I

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

KRISTOPHER SCOTT MYERS,

Appellant,

v.

MELANIE ELAINE MYERS,

Respondent.

BRIEF OF APPELLANT

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A. INTRODUCTION

Four months after Kristopher Myers filed for divorce, his ex-wife Melanie Myers¹ had still not answered the dissolution petition despite stating in a declaration that she would be hiring an attorney and responding to it. Kristopher moved the trial court for an order of default and for entry of a default judgment after receiving notice that his case would be dismissed if the default was not taken. Although Melanie was given notice of the default proceedings, she failed to appear. A family law commissioner entered an order of default and then entered findings of fact and conclusions of law, a decree of dissolution, and a default judgment. The commissioner distributed the parties' liabilities consistent with the distribution proposed in Kristopher's unanswered pleadings and distributed their assets based on a written property settlement agreement they executed in August 2009.

Three months after the default Melanie persuaded a family court judge to set aside the default order, vacate the default judgment, and set the dissolution petition for a trial on the merits. In granting the motion to vacate under CR 60(b), the trial court found that Melanie had presented a prima facie defense to Kristopher's petition and that her failure to respond

¹ The parties will be referred to by their first names to avoid confusion. No disrespect is intended.

was excusable neglect based on her alleged mental incompetence while the divorce was pending. The court also found that there would be no substantial hardship to Kristopher if the default judgment was vacated. The trial court denied Kristopher's motion for reconsideration.

This Court should reverse the order denying reconsideration and reverse the order vacating the default judgment. Melanie failed to present a prima facie defense to Kristopher's petition. She presented no evidence that she was mentally incompetent and thus unable to handle her legal affairs during the dissolution proceedings. In fact, the evidence demonstrates just the opposite. For example, less than two months after Kristopher filed the dissolution petition, an Oregon probate court found Melanie competent to serve as the personal administrator of her father's estate. Her failure to respond to the dissolution petition was inexcusable.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error²

1. The trial court erred in finding on page two of its order vacating the default judgment that there is significant and substantial dispute over factual issues that cannot be resolved short of an evidentiary hearing or trial on the merits of this matter. CP 335.

² Kristopher cannot refer to the improper findings of fact by number as required by RAP 10.3(g) because the trial court did not number its findings. A copy of the order vacating the default judgment is in the Appendix for the Court's convenience.

2. The trial court erred in finding on page two of its order vacating the default judgment, with regard to the failure to timely appear and answer, that there is sufficient evidence to show that Melanie was undergoing significant emotional and mental distress while the dissolution was ongoing, that there is some evidence which the court cannot weigh that Kristopher may have led Melanie into believing that there was the potential for reconciliation, and that there was uncertainty about what exactly was in the will of Melanie's father and whether this was to go to the community or to Melanie as her separate property. CP 335.

3. The trial court erred in finding on page three of its order vacating the default judgment that Melanie acted with due diligence after receiving notice of the default and that her motion was brought on a timely basis where it was brought within one year of the default judgment. CP 336.

4. The trial court erred in finding on page three of its order vacating the default judgment that Kristopher would not suffer a substantial hardship if the default judgment was vacated. CP 336.

5. The trial court abused its discretion by entering an order on August 2, 2010 vacating the order of default, the findings of fact and conclusions of law, the decree of dissolution, and the default judgment entered on March 9, 2010.

6. The trial court abused its discretion by entering an order on August 17, 2010 denying Kristopher's motion for reconsideration.

(2) Issues Relating to Assignments of Error

1. Did the trial court abuse its discretion by vacating a default judgment where the defaulted ex-wife failed to establish a prima facie defense to her husband's dissolution petition because she could not demonstrate that the judgment was obtained by mistake, fraud, misrepresentation, or unavoidable casualty or misfortune, there was no evidence she was of unsound mind and unable to handle her legal affairs, and there were no extraordinary circumstances extraneous to the action to justify the order? (Assignments of Error Nos. 1-2, 5-6)

2. Did the trial court abuse its discretion by vacating a default judgment where the defaulted ex-wife failed to demonstrate that her failure to appear was due to excusable neglect because substantial evidence confirmed that she was mentally capable of timely and fully responding to the husband's dissolution petition? (Assignments of Error Nos. 1-2, 5-6)

3. Did the trial court abuse its discretion by vacating a default judgment where the defaulted ex-wife failed to demonstrate that she acted with due diligence after receiving notice of the default because she waited

nearly four months after the default to file the motion to vacate?
(Assignments of Error Nos. 1-3, 5-6)

4. Did the trial court abuse its discretion by vacating a default judgment where the husband presented evidence that he will suffer a substantial hardship if the default judgment is vacated because he waived the right to file a will contest challenging a will the ex-wife had admitted into an Oregon probate court in exchange for the ex-wife's payment of certain sums of money, and their settlement agreement was incorporated into the default judgment? (Assignments of Error Nos. 1-2, 4-6)

5. Did the trial court err by refusing to reconsider its decision vacating a default judgment where the ex-wife failed to meet her burden to justify vacating the default and the husband presented ample grounds for reconsideration? (Assignment of Error No. 1)

C. STATEMENT OF THE CASE

Kristopher and Melanie were married in May 2007 and separated in October 2008. CP 2. Although they both have children from prior relationships, they did not have any children together. CP 1-2.

Melanie has a documented history of domestic violence against and harassment of Kristopher. CP 22, 26, 76, 94. She pled guilty to assaulting him on December 10, 2008. CP 28-29, 187. Although a no contact order was issued at that time, she was later charged three times for

violating the terms of that order. CP 22, 29, 33, 35, 37, 188. She eventually pled guilty to those charges. CP 22, 32, 35, 37.

Melanie's father passed away in June 2009, leaving Melanie and Kristopher substantial assets worth over \$4 million. CP 22, 189. On August 1, 2009, Melanie and Kristopher agreed to settle Kristopher's portion of the estate for \$206,000 and the promise of an additional payment of \$207,000, which was the value of a TD Ameritrade account Melanie inherited from her father. CP 22, 39-41, 43-45, 189. In return, Kristopher agreed to waive any and all claims to her father's estate. CP 22-23, 189. Although Melanie paid Kristopher \$206,000, she never gave him the funds from the TD Ameritrade account. CP 22-23.

Melanie hired an attorney to probate her father's estate on August 20, 2009. CP 283.

Kristopher filed a petition to dissolve the parties' marriage on October 15, 2009. CP 1-7. He had Melanie served with copies of the summons, petition, order setting the case schedule, and the Family Law Handbook on October 19, 2010. CP 10-11.

On November 17, 2009, Melanie petitioned the Benton County, Oregon Circuit Court ("probate court") to be appointed personal representative of her father's estate. CP 23, 53-55. She stated under oath in her petition that she was qualified to serve as personal representative of

her father's estate and that she estimated its value at not less than \$1 million. CP 54. She did not file her father's current will, but rather a will he executed in April 2000 when she was still married to her first husband. CP 23, 56-64. Although her father revoked that will and wrote a new one naming Melanie and Kristopher as joint beneficiaries, she apparently destroyed the newer one. CP 23, 189.

On November 24, 2009, Melanie responded to the summons in the dissolution action by filing a declaration stating:

I will be responding to the Petition for Dissolution of Marriage as soon as a [sic] can hire a lawyer, which should be in the next few weeks.

CP 8-9. She filed no further response to the petition.³ CP 13, 24.

On December 18, 2009, the probate court appointed Melanie the personal representative of her father's estate and admitted his will to probate. CP 56.

On February 18, 2010, Kristopher moved the trial court for an order of default and for entry of a default judgment because Melanie failed to respond to the dissolution petition within 20 days of service.⁴ CP 12-69, 189. He asked the court to award him the funds Melanie had gifted to

³ Melanie is not a member of the armed forces or the dependent of an active duty National Guard member or Reservist. CP 13, 21.

⁴ Kristopher ran the risk of having his case dismissed if he failed to file the motion for default based on a noncompliance order issued by the court. CP 70.

him as part of the inheritance settlement, but not paid. CP 22, 189. He also asked the court to distribute the parties' assets and liabilities consistent with his proposed distribution. CP 2-4, 24, 232-35. He provided Melanie with proposed findings of fact and conclusions of law and a proposed decree. CP 189, 232-47. Melanie was provided with notice of the default hearing, but did not appear. CP 67, 69, 189.

On March 9, 2010, a family law commissioner entered an order of default against Melanie and then proceeded to enter findings of fact and conclusions of law, the decree of dissolution, and a judgment. CP 71-78, 82-87. The commissioner made specific findings relating to the settlement agreement Melanie and Kristopher executed on August 1, 2009:

A written separation contract or prenuptial agreement was executed on August 1, 2009 and is incorporated herein.

The separation contract or prenuptial agreement should be approved.

Other: The parties entered into an agreement of property settlement on August 1, 2009, which is evidenced by three letters on that date, whereby the wife gifted the sums of \$73,000, \$133,000, and \$207,000, to the husband. Those said letters are attached as Exhibits A, B, and C, hereto and are incorporated by reference herein.

The sums of \$73,000 and \$133,000 were given to the petitioner by the respondent on August 1, 2009, but the sum of \$207,000 (representing the TDA Ameritrade account) was not given to the petitioner by the

respondent, and the petitioner is entitled to that account or the minimum of \$207,000, plus the value of growth that sum would have it if had been invested in the Dow Jones Industrial Average on August 1, 2009. The growth of \$207,000, if it had been invested in the Dow Jones Industrial Average, would be worth today the sum of \$226,562.67.

CP 74. The commissioner also identified and distributed the parties' assets and liabilities based on Kristopher's proposed distribution. CP 75-76, 83-86, 190. Kristopher was awarded a \$226,562.67 judgment and a continuing restraining order against Melanie. CP 76, 82-83.

On June 8, 2010, Melanie moved the court for an order to show cause why the default judgment should not be vacated and the dissolution reset for trial. CP 88-93. She claimed that she had a mental breakdown and was hospitalized in June 2009 and again in September 2009. CP 89. Although she did not provide specific details, she also claimed the Social Security Administration found she had been "disabled" since May 2009. CP 89, 345. In short, she alleged that she was incompetent and incapable of responding to the dissolution action, and that Kristopher had manipulated her. CP 89-90. She also claimed that she was just then well enough to retain counsel and to respond to the dissolution action. CP 92.

A family law commissioner granted Melanie's motion to show cause and set the matter for hearing on the family law calendar on July 15, 2010. CP 117. Kristopher moved to strike the hearing, arguing

the matter had to be set before a judge rather than a family law commissioner. CP 120-22, 135-38. The hearing was rescheduled for July 26, 2010. CP 185; RP 1.

Kristopher also opposed the motion to vacate, arguing there was no evidence or psychiatric testimony to support Melanie's mental illness claim. CP 186-87, 266-73. He also argued she was competent because she was able to handle three criminal matters, hire an attorney in Oregon, and initiate the probate of her father's estate during the dissolution proceedings. CP 187-88, 190, 195. He also argued the purported settlement document that Melanie relied on to support her motion to vacate was faked. CP 186, 191. He hired a handwriting expert to examine the document; the expert confirmed Kristopher's signature on that document was forged. CP 194, 261-65.

Melanie filed a strict reply, and for the first time submitted documentation purporting to show she was hospitalized twice in 2009 for mental illness: once at Fairfax Hospital ("Fairfax") and once at Harborview Medical Center ("Harborview"). CP 274, 437-50. She also submitted the declaration of her counselor, Lyndsey Young ("Young"). CP 452.

At the beginning of the hearing, Kristopher objected to the court's consideration of the medical records and Young's declaration. CP 297-98;

RP 3-4. The trial court overruled Kristopher's objection, but noted that it would not consider them to the extent they were self-serving. RP 6. The trial court then heard argument on the motion to vacate. RP 7-19. The court issued an oral ruling, which was subsequently reduced to writing along with findings of fact and conclusions of law on August 2, 2010. RP 16-19; CP 289-92. The court also entered an agreed temporary restraining order. CP 293-95.

Kristopher moved for reconsideration and asked the trial court to reverse its decision vacating the default judgment. CP 296-328. Alternatively, he asked the court to stay enforcement of its vacatur order pending discovery on the issues raised for the first time in Melanie's strict reply in support of the motion to vacate. CP 297, 302. He also asked the court to consider newly discovered evidence confirming the prejudice to him if the default judgment was vacated. CP 297, 302-03.

The trial court denied the motion on August 17, 2010 without explanation. CP 332. Kristopher's appeal followed. CP 333-40.

D. SUMMARY OF ARGUMENT

While default judgments are generally disfavored, an orderly system of justice requires compliance with judicial process and finality to judicial proceedings. Default judgments are appropriate to protect the

interests of the diligent party when the adversary process has been halted because of an essentially unresponsive party.

A party against whom a default judgment has been entered may move to vacate it based on any of the eleven grounds listed in CR 60(b). The motion will be granted if the moving party can establish: (1) that there is substantial evidence to support a prima facie defense to the claim asserted; (2) that the failure to appear was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence; and (4) that the nonmoving party will not suffer substantial hardship if the default judgment is vacated. All four factors must be proven where they are listed in the conjunctive.

The trial court abused its discretion here by vacating the default judgment because the facts of this case do not justify application of any provision of CR 60(b). Melanie did not present sufficient evidence of a meritorious defense to justify vacating the default judgment. She failed to demonstrate that the judgment was obtained by mistake, fraud, misrepresentation, or unavoidable casualty or misfortune. CR 60(b)(1), (4), (9). She also failed to demonstrate that she was incompetent to handle her legal affairs during the dissolution proceedings. CR 60(b)(2). Substantial evidence contradicts her claim of incompetence. Moreover, the circumstances surrounding the entry of the default were anything but

extraordinary. CR 60(b)(11). Her failure to respond to the dissolution petition was inexcusable.

CR 59 governs motions for reconsideration and contains nine specific grounds upon which reconsideration may be granted. Reconsideration was warranted here because Kristopher presented ample evidence to support reconsideration based on irregularities in the proceedings, the discovery of new evidence, the absence of evidence to justify the decision, an error of law occurring during the proceeding and objected to, and because substantial justice was not done. CR 59(a)(1), (4), (7-9).

This Court should reverse the trial court's decision vacating the default judgment. The trial court should have denied the motion because Melanie was competent to handle her legal affairs during the dissolution proceedings. She is not entitled to relitigate the outcome of her divorce when she chose not to appear and respond to it.

Attorney fees are recoverable in dissolution proceedings pursuant to RCW 26.09.140. Kristopher is entitled to his reasonable attorney fees and costs on appeal where he will demonstrate in his forthcoming financial affidavit that he has the need for such fees and Melanie has the ability to pay them.

E. ARGUMENT

(1) Standards of Review

This Court reviews a trial court's rulings on a motion to vacate a default judgment and a motion for reconsideration for an abuse of discretion. *See, e.g., Kleyer v. Harborview Med. Ctr. of Univ. of Wash.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995) (motion for reconsideration); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990) (motion to vacate). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). *See also, Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010) (a trial court abuses its discretion when it adopts a view that no reasonable person would take, applies the wrong legal standard, or relies on unsupported facts).

This Court reviews findings of fact and conclusions of law by determining whether substantial evidence supports the challenged findings and whether the findings support the conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

(2) Default Judgments are Appropriate to Prevent Interminable Delay Caused by an Unresponsive Party and to Protect the Diligent Party

While default judgments are generally disfavored, this policy must be balanced against the necessity of having a “responsive and responsible

system which mandates compliance with judicial summons.”⁵ *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 237-38, 974 P.2d 1275 (1999), *review denied*, 140 Wn.2d 1007 (2000). *See also*, *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (an orderly system of justice requires compliance with judicial process and finality to judicial proceedings; it is not dependent on the whims of those who participate in it). The overriding principle in balancing these competing policies is whether justice has been done. *Id.* at 582. Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted. *Id.*; *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099, *review denied*, 150 Wn.2d 1020, 81 P.3d 120 (2003). Justice might, at times, require a default. *Griggs*, 92 Wn.2d at 582. *See also*, *Gage v. Boeing Co.*, 55 Wn. App. 157, 160-61, 776 P.2d 991, *review denied*, 113 Wn.2d 1028 (1989) (default judgments are appropriate when the adversary process has been halted because of an essentially unresponsive party; the diligent party must be protected to

⁵ “[T]he 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 Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155, *review denied*, 100 Wn.2d 1013 (1983) (citations omitted). A party proceeding pro se must comply with the applicable procedural rules. *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985). The trial court has no duty to inform a pro se party on the relevant rules of law.

prevent interminable delay and continued uncertainty as to that party's rights).

A party against whom a default judgment has been entered may move to vacate the judgment under CR 60(b).⁶ In deciding whether to vacate a default judgment, the trial court considers two primary and two secondary factors that must be shown by the moving party: (1) that there is substantial evidence to support, at least prima facie, a defense to the claim asserted; (2) that the moving party's failure to timely appear and answer the claim was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that the opposing party will not suffer substantial hardship if the default judgment is vacated. *See, e.g., White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968); *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007).

These factors vary in dispositive significance. *Id.* A strong defense requires less of a showing of excuse, but only if the failure to appear was not willful. If the party can show only a minimal prima facie defense, the court will scrutinize the other considerations more carefully. *Id.* at 352-53; *Shepard*, 95 Wn. App. at 242. Affidavits supporting the

⁶ CR 60(b) provides in relevant part that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding" for any one of eleven reasons.

motion to vacate must set out the facts constituting the defense. It is insufficient to merely state allegations and conclusions. CR 60(e)(1); *Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 104, 533 P.2d 852 (1975). *See also, White*, 73 Wn.2d at 352 (noting mere speculation is not substantial evidence of a defense). A court hearing a motion to vacate must decide whether the affidavits presented set forth substantial evidence to support a defense to the claim. *Shepard*, 95 Wn. App. at 239.

(3) The Trial Court Abused Its Discretion by Granting Melanie's Motion to Vacate the Default Judgment

Here, Melanie did not present sufficient evidence of a meritorious defense to justify vacating the default judgment. The evidence, including her medical records, does not support the court's findings that she was incompetent to handle her legal affairs during the dissolution proceedings or that she acted with due diligence after receiving notice of the default. Moreover, Kristopher presented evidence of the substantial hardship he will suffer if the order vacating the default judgment is not reversed. The trial court thus abused its discretion by vacating the default judgment.

The defenses Melanie alleged under CR 60(b) in support of her motion to vacate were a shifting target for Kristopher. Although she originally asked the trial court to vacate the default judgment pursuant to CR 60(b) generally, she failed to indicate which of the specific subsections

of the rule she was relying on for support.⁷ CP 91-93; RP 7. Because she failed to specify the basis for her motion, Kristopher had to guess which subsections applied.⁸ CP 267-68. In strict reply, Melanie argued for the first time that her motion was specifically based on mistakes, erroneous proceedings against an incompetent person, unavoidable casualty or misfortune, and for any other reason justifying relief.⁹ CR 60(b)(1), (2), (9), (11). CP 275-76.

The trial court granted the motion, but did not specify which subsection of CR 60(b) applied. CP 334-36. The facts of this case do not support a vacation of the default judgment under *any* provision of CR 60(b).

1. Melanie did not present substantial evidence to support a prima facie defense to Kristopher's claims

CR 60(b)(1) allows the trial court to relieve a party from a final judgment based upon mistake, inadvertence, surprise, excusable neglect, or irregularity in the proceedings. Here, Melanie argued that Kristopher improperly used the third property settlement agreement that they

⁷ Melanie initially asked the trial court to vacate the default judgment based on her mental incompetence, which she claimed had deprived her of a meaningful opportunity to be heard, and Kristopher's supposed fraud. CP 91-92. Later, she stated that her failure to appear was the result of mistake and excusable neglect. CP 93.

⁸ Kristopher thought that Melanie's motion was based on: CR 60(b)(4), fraud; CR 60(b)(2), erroneous proceedings against a person of unsound mind; and CR 60(b)(11), for any other reason justifying relief from the judgment. CP 267-68.

⁹ She did not continue to argue for the application of CR 60(b)(4).

executed in August 2009 to obtain an additional \$207,000 judgment against her and that this “mistake” warranted vacating the default judgment. CP 275. As the moving party, Melanie bore a heavy burden to prove an alleged mistake occurred in the default proceedings because the courts have strictly interpreted CR 60(b)(1). No mistake occurred here.

Melanie was personally served with the summons and the petition for dissolution, which described Kristopher’s proposed property division. CP 187. This proposed distribution incorporated the parties’ written property settlement agreement, which reflected Melanie’s gift of three different sums of money to Kristopher. Melanie had detailed knowledge regarding that agreement and the contents of her father’s will. The plain language of the summons required Melanie to appear and answer the dissolution petition within 20 days. If she believed Kristopher was seeking a property distribution in excess of what the parties contemplated with their settlement agreement, she could have challenged it in her response or during the default proceedings. She had ample opportunity to challenge the petition, but chose not to do so. CP 190. Her negligent disregard of process is not a basis for setting aside the default judgment. *See Commercial Courier*, 13 Wn. App. at 105. *See also, Hwang v. McMahill*, 103 Wn. App. 945, 952, 15 P.3d 172 (2000), *review denied*,

144 Wn.2d 1011 (2001) (failure to read a document does not constitute a tenable basis for vacating a judgment).

CR 60(b)(2) provides relief to a person of “unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings[.]” The Washington Supreme Court has defined an “unsound mind” as follows:

[W]e think it must include those persons only who are commonly called insane; that is to say, those suffering from some derangement of the mind rendering them incapable of distinguishing right from wrong. It cannot include within its terms the mere ignorant or uneducated, nor those who are incapable of receiving all of the impressions within the comprehension of those more commonly gifted. In other words, the statutory term refers to those who are without comprehension at all, not to those whose comprehension is merely limited. (Italics ours.)

State v. Wyse, 71 Wn.2d 434, 436, 429 P.2d 121 (1967) (discussing the definition in the context of RCW 5.60.050). Everyone is presumed sane, and this presumption is overcome only by clear, cogent, and convincing evidence. *Page v. Prudential Life Ins. Co. of America*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942).

Here, Melanie did not demonstrate that she was a person of unsound mind while the divorce was pending. At the time she submitted her motion to vacate, she offered only an ambiguous finding by the Social Security Administration that she was “disabled.” CP 345. But she

presented no actual evidence concerning the physical or emotional nature of that disability, whether her disability prohibited her from being able to generally handle legal matters, or whether her disability prohibited her from being able to answer the dissolution petition.

Although she later submitted several pages of medical records from Fairfax and Harborview and Young's declaration,¹⁰ this evidence merely confirmed that she was admitted to the hospital, treated, and released *before* Kristopher initiated the divorce. CP 438-50. It does not demonstrate that she was incompetent during the dissolution proceedings. For example, the doctor at Fairfax diagnosed Melanie with depression, but no general medical conditions. CP 439, 442. She was stabilized with medication and discharged from the hospital "in good spirits." CP 440-41. She drove herself home. CP 441. Importantly, there was no notation that she was incompetent or of the unsound mind. CP 438-42. The doctor at Harborview also diagnosed Melanie with recurrent major depression. CP 445. She was again stabilized with medication and eventually discharged to a friend's house. CP 448-49. Both hospitalizations occurred prior to the filing of the divorce. Melanie had no hospitalizations from October 2009 to March 2010, while the divorce was pending.

¹⁰ The records Melanie submitted were incomplete; she submitted only 6 out of 106 pages of her Harborview medical records. CP 305.

Young testified only that she began providing counseling for Melanie on April 29, 2010 and that she met with Melanie on a weekly basis. CP 452. But she did not address Melanie's medical condition or the basis for counseling. She also did not discuss Melanie's mental competence or alleged lack thereof. In fact, she started meeting with Melanie more than six months *after* Kristopher filed for the divorce and more than one month *after* the default. *See id.*

Not a single treating physician considered Melanie to be incompetent or even implied that she was incompetent. Moreover, there is no evidence she was under severe emotional or mental distress between October 16, 2009, when the dissolution was filed, and March 9, 2010, when the default was taken because she provided no medical records for that time period. While Melanie may have been suffering from depression, there is no evidence that it impacted her ability to understand or respond to the dissolution proceedings.

Moreover, Melanie was never legally adjudged mentally incompetent. *See Ness v. Bender*, 18 Wn.2d 243, 249, 138 P.2d 864 (1943) (finding contention that decedent's brother was defaulted, though mentally incompetent, without merit where he was never legally adjudicated mentally incompetent). In fact, quite the opposite occurred. When Melanie petitioned to have her father's will admitted into probate in

Oregon, she specifically attested that she “[was] not disqualified to serve under the provisions of [Oregon Revised Statute (“ORS”)] ORS 113.095.” CP 54. *See also*, CP 318 (ORS 113.095).¹¹ The probate court found Melanie competent to serve by appointing her the personal representative of her father’s estate on December 21, 2009. CP 56. This finding was made *after* the divorce was filed, but *before* the default proceedings. Melanie should therefore be collaterally estopped from claiming that she was not competent to handle her legal affairs during the pendency of this case. Substantial evidence confirms that Melanie was mentally capable of timely and fully responding to the dissolution petition.

CR 60(b)(4) authorizes a court to vacate a judgment for fraud, misrepresentation or other misconduct. In order to successfully establish a basis to vacate the judgment on this ground, Melanie had to prove fraud by clear, cogent, and convincing evidence. *See, e.g., Kirkham v. Smith*, 106 Wn. App. 177, 183, 23 P.3d 10 (2001). She had to establish that Kristopher’s conduct prevented her “from fully and fairly presenting [her] case or defense” and led to the entry of the decree. *See Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991). Moreover, she was required to establish fraud in one of two ways: she could have proven the nine common law elements of

¹¹ ORS 113.095(1) prohibits an incompetent person from serving as a personal representative.

fraud or she could have shown that Kristopher failed to disclose a material fact. *See Crisman v. Crisman*, 85 Wn. App. 15, 21, 931 P.2d 163 (1997).

Here, Melanie did not plead the nine elements of a traditional fraud action. CP 91-93, 275-78. In addition, her evidence was insufficient to prove that Kristopher owed her an affirmative duty of candor and breached that duty. Melanie was provided with numerous opportunities to respond to the dissolution petition. She was also given notice of and more than one an opportunity to respond to the default proceedings when it was continued. Even if she thought reconciliation was still a possibility at that time, the motion for default and supporting declaration made Kristopher's position clear. Melanie chose not to respond or to appear.

The trial court should have denied the motion to vacate to the extent it was based on Melanie's self-serving statement that Kristopher misled her into believing he would take no action on the dissolution petition and that they would attempt to reconcile. *See Beckett v. Cosby*, 73 Wn.2d 825, 440 P.2d 831 (1968). *Swasey v. Mikkelsen*, 65 Wash. 411, 118 P. 308 (1911) is dispositive of this issue. That case involved a motion to vacate a default judgment based on Mikkelsen's affidavit claiming he was misled by Swasey's promise to settle out of court. Mikkelsen claimed that he did not appear and answer the complaint based on that alleged promise. Swasey denied the representations in his responsive affidavit.

The Supreme Court affirmed the trial court's denial of the motion to vacate where the evidence was conflicting and other admitted circumstances corroborated Swasey.

Melanie failed to meet her burden to prove fraud or misrepresentation by clear, cogent, and convincing evidence; thus, the trial court abused its discretion by vacating the default judgment on this basis.

CR 60(b)(9) allows the court to set aside a final order due to unavoidable casualty or misfortune. Melanie argued below that the death of her father, the loss of custody of her children, and her three pending criminal matters exacerbated her alleged mental illness and made it impossible for her to defend the divorce action. CP 275-76. On the contrary, substantial evidence confirms that Melanie could have timely and fully responded to the dissolution petition if she had wanted to do so.

For example, Melanie appeared in the custody proceeding initiated by her ex-husband in June 2009 and represented herself at the adequate cause hearing. CP 163, 187. She also appeared in the Seattle Municipal Court four times between October 16, 2009 and February 26, 2010 to face the criminal charges pending against her. CP 188, 190. She hired an attorney to probate her father's estate. She also filed a pro se declaration in this case. Melanie had more than an ample opportunity to timely challenge the dissolution petition, but failed to do so.

Moreover, the materials Melanie submitted failed to establish that the underlying circumstances prevented her from contacting the court directly and requesting a continuance or otherwise communicating her desire to appear at trial. In fact, she acknowledged what was required of her when she filed her pro se declaration indicating her intent to hire counsel to prepare her response. But she chose not to follow through with that intent, despite being competent enough to hire legal counsel in Oregon to probate her father's estate. Melanie did not suffer any misfortune that made it impossible for her to defend the divorce. She simply chose not to act.

Relief under CR 60(b)(11) applies only to situations involving "extraordinary circumstances" not covered by any other section in CR 60.¹² *In re Marriage of Hammack*, 114 Wn. App. 805, 809-10, 60 P.3d 663, *review denied*, 149 Wn.2d 1033, 75 P.3d 968 (2003); *In re Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947 (1998), *review denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999). "[T]hose circumstances must relate to 'irregularities extraneous to the action of the court or questions

¹² Dissolution property settlements have been reopened under CR 60(b)(11) in only three Washington cases, each involving the same "extraordinary circumstance." *Wagers v. Goodwin*, 92 Wn. App. 876, 964 P.2d 1214 (1998) (citation omitted). All three of those cases involved the retroactive application of the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. *Id.* at 881. A "compelling policy interest favoring finality in property settlements" militates against setting aside dissolution decrees. *Id.*

concerning the regularity of the court's proceedings.'" *In re Marriage of Furrow*, 115 Wn. App. 661, 673-74, 63 P.3d 821 (2003) (quoting *Yearout v. Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)).

Here, the circumstances surrounding the entry of default were anything but extraordinary. Kristopher filed a petition for dissolution informing Melanie that he was seeking a fair and equitable distribution of all of their separate and community property. Melanie failed to respond and the court entered a default judgment against her. Based on Kristopher's final pleadings, which Melanie failed to oppose, the court made an equal distribution of the parties' assets and liabilities. Nothing in these proceedings rises to the level of "extraordinary circumstances" that courts have required in the past; neither party has suffered a manifest injustice. Again, Melanie could have objected to the proposed distribution but chose not to do so.

Moreover, emotional problems do not constitute the type of extraordinary circumstances that justify vacating a judgment. *Yearout v. Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (noting father's allegedly unstable emotional condition at the time of the original decree does not constitute extraordinary circumstances justifying relief under CR 60(b)(11)).

2. Melanie did not demonstrate excusable neglect

While Melanie may have been too upset to read Kristopher's dissolution petition when it was served, she failed to address why she did not take steps to read it later or respond in the 20 days between the time of service and the entry of the default judgment. Moreover, substantial evidence confirmed she was competent to handle her legal affairs. She was not hospitalized at the time. There is no tenable basis for the court's finding of mistake or excusable neglect under CR 60(b)(1). *See Hwang v. McMahill*, 103 Wn. App. 945, 15 P.3d 172 (2000).

3. Melanie did not demonstrate due diligence

A party must use diligence in asking for relief following notice of the entry of the default. *White*, 73 Wn.2d at 352. A party who has received notice of a default judgment but does nothing for three months has failed to demonstrate due diligence. *In re Estate of Stevens*, 94 Wn. App. 20, 35, 971 P.2d 58 (1999). Here, Melanie has not demonstrated due diligence. She did nothing for nearly four months upon notice of the default.

4. Kristopher will suffer a substantial hardship if the default judgment is vacated

To successfully vacate the default judgment, Melanie was required to demonstrate that Kristopher would suffer no substantial hardship if the trial court vacated the default judgment. She failed to meet this burden as

her only support is the conclusory statement that there would be “no negative effect” on Kristopher if the judgment was vacated. CP 93.

Kristopher will be severely prejudiced if the default judgment is vacated because he waived his right to file a will contest challenging the will Melanie had admitted into the probate court. CP 22, 189. The settlement agreement between the parties was based on the fact that Kristopher was named in the will of Melanie’s father as a co-beneficiary. Yet Melanie has now admitted that she destroyed that crucial evidence and is probating an earlier will. Melanie’s misconduct creates the risk of substantial harm to Kristopher if the judgment is vacated.

Even assuming that Melanie somehow demonstrated a lack of prejudice to Kristopher if the default judgment was vacated, the trial court abused its discretion by vacating it where she failed to prove the other three factors. The four factors required to successfully vacate a default judgment are connected by the word “and,” making them conjunctive. *See In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004) (noting all statutory factors must be considered where they are conjunctive because they are separated by the word “and”); *State v. Bolar*, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996) (noting use of the word “or” indicates a disjunctive intent). Thus, Melanie had to prove all four factors to successfully vacate the default judgment. She failed to do so.

Melanie failed to establish any circumstances warranting vacation of the dissolution decree under CR 60(b)(1), (4), or (9). Nor did she identify any “extraordinary circumstances” justifying relief under CR 60(b)(11). See *In re Marriage of Tang*, 57 Wn. App. at 655. Consequently, the trial court abused its discretion by granting the motion to vacate.

(4) The Trial Court Abused Its Discretion by Failing to Reconsider Its Decision Vacating the Default Judgment

Without explanation, the trial court denied Kristopher’s request to reconsider its order vacating the default judgment. The court’s refusal to reconsider this decision was error. Reconsideration was warranted because Kristopher presented ample grounds to grant the motion.

CR 59 governs motions for a new trial, reconsideration or amendment of judgment in both jury and non-jury cases. CR 59(a) applies to all motions under CR 59. The rule lists nine specific grounds upon which reconsideration may be granted, including irregularity in the proceedings, the discovery of new evidence, the absence of evidence to justify the decision, an error of law occurring during the proceeding and

objected to, or that substantial justice has not been done.¹³ CR 59(a)(1), CR 59(a)(4), CR 59(a)(7-9).

1. Irregularities in the proceedings prevented Kristopher from having a fair hearing

The first ground for reconsideration in CR 59 is irregularity in the proceedings of the court which prevent a party from having a fair and impartial trial of the issues. CR 59(a)(1). Such irregularities include those caused by the trial court. *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 938, 813 P.2d 125, *review denied*, 118 Wn.2d 1002 (1991). Here, the trial court's erroneous decision to admit Melanie's medical records over Kristopher's objection justified reconsideration.

Although Melanie claimed in her motion to vacate that she had suffered a mental breakdown and was incompetent to file an answer to the

¹³ A trial court order may be "vacated and reconsideration granted . . . for any of the following causes materially affecting the substantial rights of such parties," including:

- (1) Irregularity in the proceedings of the Court, jury or adverse party, or any order of the Court, or abuse of discretion, by which such party was prevented from having a fair trial.
...
- (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;
...
- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
- (8) Error in law occurring at the trial and objected to at the time by the party making the application; or
- (9) That substantial justice has not been done.

dissolution petition, she offered no evidence to support her claim of mental incompetence outside of her own self-serving statements and an ambiguous finding from the Social Security Administration that she was “disabled.” When Kristopher noted Melanie’s evidentiary deficiencies in his opposition papers, Melanie submitted several pages of medical records and the declaration of her counselor for the first time in strict reply. She did so four days before the hearing and just one day after receiving Kristopher’s opposition. CP 436-52.

At the beginning of the vacatur hearing, Kristopher objected to the court’s consideration of the medical evidence under LCR 7(b)(4)(G)¹⁴ because Melanie did not timely produce it, it was incomplete, and the delayed filing unfairly eliminated his opportunity to respond to it. CP 297-98; RP 3-5. The trial court denied the motion. RP 6. Yet it later relied upon this evidence to grant the motion to vacate. CP 335. Allowing Melanie to present this evidence in her rebuttal materials was improper and prejudicial. Kristopher could not introduce rebuttal evidence on the

¹⁴ LCR 7(b)(4)(G) provides:

Any material offered at a time later than required by this rule, and any reply material which is not in strict reply, will not be considered by the court over objection of counsel except upon the imposition of appropriate terms, unless the court orders otherwise.

subject of Melanie's mental health because the court rules do not permit a sur-reply to a strict reply. LCR 7(b)(3)(D), (E).

The court's decision to admit the evidence violates principals of due process,¹⁵ fundamental fairness, and LCR 7(b)(4)(G). It also constitutes an error of law occurring at the time of the hearing to which Kristopher objected. CR 59(a)(8).

2. The discovery of new and material evidence unavailable at the time of the hearing warranted reconsideration

Under CR 59(a)(4), reconsideration is warranted if the moving party presents new and material evidence that by due diligence could not have been discovered or produced at trial. Five requirements must be satisfied before reconsideration will be granted on this basis:

(1) the new evidence will probably change the result in a new trial; (2) the evidence was discovered after the trial; (3) it could not have been discovered previously by the exercise of diligence; (4) it is material; and (5) it is not merely cumulative or impeaching.

Nelson v. Placanica, 33 Wn.2d 523, 526, 206 P.2d 296 (1949) (citing cases; citations omitted); *Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987). Kristopher

¹⁵ Due process of law requires notice and an opportunity to be heard at a reasonable time and in an effectual manner. *See, e.g., Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422-24, 511 P.2d 1002 (1973).

satisfied all five requirements and reconsideration should have been granted on this basis.

As noted above, demonstrating a lack of prejudice to Kristopher was merely one of four necessary factors Melanie was required to prove to successfully vacate the default judgment. By granting the motion to vacate, the trial court essentially found that Kristopher would not be prejudiced if the motion were granted. Newly discovered evidence confirms the prejudice to Kristopher if the vacatur order is not reversed.

At the time of the hearing, Kristopher had presented all of the available evidence that was of value to establish prejudice. Four days after the hearing, he received notice from Melanie's Oregon counsel that they intended to sue him for nearly \$1 million plus attorney fees and costs because he had collected on the default judgment. CP 300, 326-27. That Kristopher could not have produced this letter prior to the hearing is indisputable. This is not a situation where the evidence was available to him, but he failed to offer it until after the opportunity had passed. *Cf. Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010) (holding the trial court properly denied reconsideration on the basis of newly discovered evidence where the evidence was not "newly" discovered; it could have been presented at the time the court considered the original motion and there was no showing it could not have been

presented then); *West v. Thurston County*, 144 Wn. App. 573, 579-80, 183 P.3d 346 (2008) (holding the trial court appropriately denied reconsideration where the moving party did not show why he could not have obtained the proffered documents earlier). Moreover, Melanie gave no notice prior to the hearing that she intended to sue him to recoup the funds he had collected. Her comment that Kristopher would not be prejudiced if the decree and judgment were vacated was disingenuous, and contradicted by the notice Kristopher received four days later.

The objective nature of Kristopher's newly discovered evidence and its singular importance in fairly determining the underlying issue made it substantially more than cumulative and readily elevated it out of the realm of being simple impeachment. Moreover, there is more than a passing probability that it would change the result of the hearing given that Melanie was required to demonstrate a lack of prejudice to successfully vacate the default judgment. See *Praytor v. King County*, 69 Wn.2d 637, 641, 419 P.2d 797 (1966). The newly discovered evidence called for and warranted reconsideration. The trial court erred by refusing to grant it.

3. The decision was contrary to the evidence

To prevail on a motion for reconsideration under CR 59(a)(7), a party must show that the outcome of the court's decision was contrary to the evidence. There was no evidence or reasonable inference to be

gleaned from the evidence that Melanie was incompetent to handle her legal affairs to warrant vacating the default judgment. On the contrary, her medical records confirm that she was competent at the time of the dissolution proceedings.

Melanie failed to offer any evidence that she was suffering from such debilitating emotional or mental distress during the pendency of the dissolution action that she was incompetent and incapable of responding to it in a timely manner. While she may have been “disabled” for Social Security purposes, she presented no actual evidence concerning the nature of that disability, whether her disability prohibited her from being able to generally handle legal matters, or whether her disability prohibited her from being able to answer the petition for dissolution of marriage. Although she later submitted medical records and Young’s declaration to support her claim of incompetence, this evidence merely confirmed that she was admitted to the hospital on two occasions, treated, and then released *before* Kristopher initiated the divorce. CP 438-50. Moreover, the Oregon probate court found her competent to serve as the personal administrator for her father’s estate while the dissolution action was pending. While she may have been suffering from depression, there is no evidence that condition impacted her ability to understand or respond to the dissolution proceedings.

4. Substantial justice has not been done

CR 59(a)(9) provides that an order may be vacated and reconsideration granted where substantial justice has not been done. Generally, reconsideration based on a lack of substantial justice is rare, due to the other broad grounds afforded under CR 59(a). *See Knecht v. Marzano*, 65 Wn.2d 290, 297, 396 P.2d 782 (1964); *Sligar*, 156 Wn. App. at 734. That is not to say, however, that it is never granted on this basis. *See, e.g., Barefield v. Barefield*, 69 Wn.2d 158, 417 P.2d 608 (1966) (finding substantial justice was not done where summary award of custody to father was not supported by the evidence and wife was deprived of the opportunity to cross-examine father on the issues or to introduce rebuttal evidence); *Barth v. Rock*, 36 Wn. App. 400, 674 P.2d 1265, *review denied*, 101 Wn.2d 1014 (1984) (granting a new trial where medical testimony was based on statements in a specified chapter of a medical textbook later discovered to be inaccurate).

Allowing Melanie to vacate the decree at this late date makes a mockery of the court's rules. Her failure to appear and answer the dissolution petition was clearly not due to "mistake, inadvertence, surprise, or excusable neglect," which is an essential factor that she had the burden to prove. *Little*, 160 Wn.2d at 703-04. She did not meet the burden to vacate the default decree and judgment.

The trial court's refusal to reconsider its order vacating the default judgment was error. Reconsideration was warranted.

(5) Kristopher Is Entitled to His Attorney Fees and Costs on Appeal

Attorney fees are recoverable in dissolution proceedings pursuant to RCW 26.09.140.¹⁶ In making the award, the Court must consider the financial resources of both spouses, the need of the party requesting fees and the ability of the other party to pay. *In re Marriage of Moody*, 137 Wn.2d 979, 994, 976 P.2d 1240 (1999); *In re Marriage of Shellenberger*, 80 Wn. App. 71, 87, 906 P.2d 968 (1995).

Kristopher is entitled to his reasonable attorney fees and costs on appeal. RAP 18.1(b); RCW 26.09.140. RAP 18.1(c) requires that where fees are based on need, the party requesting fees must file an affidavit of financial need no later than 10 days before oral argument. Kristopher will file his financial affidavit within the time limits established in RAP 18.1(c). A careful assessment of his financial need, balanced against

¹⁶ RCW 26.09.140 provides, in part:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith[.]

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

Melanie's ability to pay, firmly supports the conclusion that he should recover his fees and costs on appeal.

F. CONCLUSION

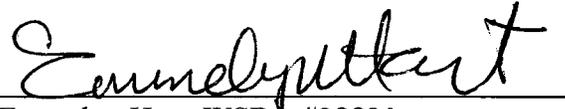
Melanie is not entitled to relitigate the outcome of her divorce when she failed to appear in that action after proper notice. Under the circumstances, there is no evidence Kristopher took advantage of her. Moreover, there is no evidence she was mentally incompetent during those proceedings. On the contrary, substantial evidence demonstrates that she was competent to handle her legal affairs. She had full and frequent opportunity to submit her case upon the merits prior to the default proceedings, but failed to avail herself of that opportunity. Moreover, she was deemed competent by the Oregon probate court less than two months after Kristopher filed for divorce.

Where Melanie failed to provide evidence of a prima facie defense and failed to show that her failure to appear was occasioned by mistake or excusable neglect, there was no equitable basis for vacating the default judgment. The trial court abused its discretion by doing so.

The Court should award Kristopher his attorney fees and costs on appeal.

DATED this 11th day of February, 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Emmelyn Hart", written over a horizontal line.

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APPENDIX

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7 **Superior Court of Washington
County of King**

8 In re the Marriage of:

9 KRISTOPHER SCOTT MYERS,
10 Petitioner,

11 and

12 MELANIE ELAINE MYERS,
13 Respondent.

No. 09-3-06959-3 KNT

**Order Granting Motion to
Vacate Default**

Clerk's Action Required

14 THIS MATTER having come upon the Show Cause Motion of Respondent to Vacate the Order
15 of Default, the Decree of Dissolution, and the Findings of Fact and Conclusions of Law, all entered on
16 March 9, 2010, and the court having read the motion, Petitioner's response thereto, and the Respondent's
17 strict reply, and having heard oral argument from the parties' attorneys and being fully advised, the Court
18 makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

19 The Respondent has cited numerous basis under CR 60(b) for setting aside the Decree of
20 Dissolution and Judgment. Both sides have cited the preeminent cases of *Little v. King*, 160 Wn.2d
21 696, 161 P.3d 345 (2007) and *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d
22 1289 (1979). In both cases, the court notes that default judgments are not favored, because it is
23 the policy of the law that controversies be determined on the merits. The courts have so found
24 because, if there is merit in a case, then a court should adjudicate on those merits; if there are no
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1 merits, then the court should not waste valuable judicial resources to litigate the case. Therefore
2 a party moving to vacate a default must be prepared to show that there is substantial evidence to
3 support a prima facie defense, that the failure to timely appear and answer was due to mistake,
4 inadvertence, surprise or excusable neglect, that the Respondent acted with due diligence after
5 notice of the default judgment, and that the Petitioner will not suffer a substantial hardship if the
6 default judgment is vacated.
7

8
9 It is not a mechanical test whether the default judgment should be set aside, as a matter of
10 equity. This court is in no position to weigh the evidence at this stage, or to resolve factual
11 disputes. However, the court may look at the quantum of evidence that the moving party has
12 presented to determine if there is sufficient evidence that the default should be put aside. In this
13 instance, when this court looks at the totality of evidence, it is very clear in reading both parties'
14 papers that there is significant and substantial dispute over factual issues that cannot be resolved
15 short of an evidentiary hearing or trial on the merits of this matter.
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18 With regard to the failure to timely appear and answer, the court finds that there is
19 sufficient evidence to show that the Respondent was undergoing significant emotional and
20 mental distress while the dissolution was on going. There is some evidence which this court
21 cannot weigh, that the Petitioner may have led the Respondent into believing that there was
22 potential for reconciliation, that there was uncertainty about what exactly was in the will and
23 whether this was to go to the community or to the Respondent as her separate property. Even if
24 half of it were to go to the Petitioner, all property is before the court in a dissolution, whether
25 characterized as community or separate, and thus it is not dispositive of the fact that the
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1 Petitioner would have received this property in the dissolution, even if left to him by
2 Respondent's father in his will.

3
4 The court finds that the Respondent acted with due diligence after receiving notice that
5 the default was entered. It is well within the one year maximum period for factors 1, 2, and 3,
6 and was brought therefore on a timely basis.

7
8 As for the Petitioner suffering a substantial hardship if the default judgment is vacated,
9 counsel for Petitioner makes an argument that he waived his rights to prosecute a will contest of
10 the probate of the Respondent's father because of the agreement to accept the funds indicated in
11 the letters of August 1, 2009. First, the court has no evidence that the probate has been closed
12 and that under Oregon law that Petitioner is precluded from making such a challenge. More
13 importantly, the court does not see any evidence before it that there was ever such an agreement.
14 There is an alleged transfer of funds for "love and adoration" with nothing to indicate it was for
15 the Petitioner's agreement not to challenge the will of the Respondent's father.
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18 IT IS HEREBY ORDERED:

19 The Respondent's motion to vacate is granted. The Order of Default, Decree of Dissolution,
20 Findings of Fact and Conclusions of Law entered March 9, 2010 are hereby vacated.
21

22 The clerk of the court shall issue a new case schedule setting trial in this matter for February 7,
23 2011.

24 *The issue of sanctions against the respondent for the motion to vacate (81)
default is reserved.*

25 Dated: August 2, 2010

26 *John P. Erlick*
Judge John P. Erlick

27 approved by Telephone by
28 Mark Sullivan. (81)

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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Appellant in Court of Appeals Cause No. 65937-5-I to the following:

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Original filed with:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 11, 2011, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick