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STATE OF WASHINGTON, COURT OF APPEALS, DIVISION II

In re the Marriage of:
JANELL KAY HENDERSON

Respondent/Cross-Appellant,

and
RANDY GENE HENDERSON,

Appellant/Cross-Respondent.

NO. 35109-9-II

CROSS APPELLANT'S BRIEF

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4 **STATE OF WASHINGTON, COURT OF APPEALS, DIVISION II**

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Reply Brief

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3 **III. ARGUMENT**
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5 A. ALTHOUGH VOID PORTIONS OF A DIVORCE DECREE
6 MAY PERHAPS BE CHALLENGED AT ANY TIME,
7 VOIDABLE PROVISIONS MAY NOT BE CHALLENGED
8 WITHOUT A SHOWING OF DUE DILIGENCE.

9 Assuming *arguendo* that the default decree entered here was
10 voidable (a position respondent does not concede), the decisions cited by
11 appellant in his reply brief do not support his argument that a default
12 divorce decree be vacated because it is not completely consistent
13 with the relief requested in the petition. For example, *John Hancock v.*
14 *Gooley*, 196 Wn. 357, a 1938 case, dealt with the fundamental concern of
15 sufficiency of service of process. That is not at issue here.

16 *Marriage of Leslie*, 112 Wn.2d 612 (1989), involved a silent
17 petition. As noted in Respondent's first brief, that is not the situation here.
18 Further, in *Leslie*, the issue of timeliness was not raised in the trial court.
19 Here, it was an issue at trial. In *Marriage of Hardt*, 39 Wn.App.1386 (1985),
20 dealt with a silent petition signed by both parties. In *Hardt*, the "do-it-
21 yourself" petition "omitted a child support provision." Nevertheless, the
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2 trial court, apparently *sua sponte*, required the father to pay support. That is
3 not the situation here. The petition in this case asked for a fair and equitable
4 division of the marital property. It was not silent.

5 *In re Marriage of Markowski*, 50 Wn.App.633 (1988) is another
6 decision involving a divorce decree void for lack of sufficient service of
7 process. There is no question that a decree entered in the absence of
8 sufficient service of process of the initial summons and petition is void and
9 may be challenged at any time. *Mid-City Materials v. Heater Beaters*, 36
10 Wn. 480 (1984). Once again, that is not the case here. At worst, the default
11 decree entered below was *voidable*.

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13 B. BECAUSE RESPONDENT TOOK BENEFICIAL
14 ADVANTAGE OF THE DEFAULT DECREE, HE CANNOT
15 NOW BE HEARD TO SAY THAT THE DECREE WAS
16 EITHER VOID OR VOIDABLE.

17 In his reply brief, respondent somewhat disingenuously cites the
18 decision in *Markowski, supra*. in support of his position that his selling of a
19 tractor awarded to him in the default decree and his appropriation of the
20 proceeds therefrom do not rise to the level of estoppel. What the *Markowski*
21 court actually said is:

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It is also true that even though a decree is void, a party who procures such a decree or consents to it is estopped to question its validity *where he has obtained a benefit therefrom*, or has concurrently invoked the court's jurisdiction in order to gain affirmative relief (emphasis added, citations omitted).

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The court then ruled that the father's payment of child support and attempts to visit his children pursuant to the void decree did not rise to the level of estoppel.

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C. CERTAIN STATEMENTS MADE BY RESPONDENT IN HIS BRIEF ARE UNSUPPORTED BY THE RECORD AND/OR COMMON LAW.

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On Page 5 of his brief Randy states that the trial court "found that Husband had waived his right to contest the value of the marital home." That is not the case at all. The trial court allowed Randy to introduce evidence (including an appraisal) relevant to the fair market value of the home. Randy's real complaint is the date of valuation selected by the court.

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On Page 6 of his brief, Randy alleges that "there was evidence [he] continued to help with maintenance of the home after separation." This

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2 claim, even if relevant to the central issues of this case, is not supported by
3 the record. Rather, the testimony was that Randy left “an empty dirty
4 hole...and ...a muddy mess... tore up the whole back yard” and refused to
5 repair it. RP, p. 191, *et.seq.*, RP pp 230-31. Further, he left a bunch of junk
6 on the premises which he refused to move (RP, p. 196) and he attempted to
7 do some concrete work which proved inferior and which was never
8 remedied (RP, p. 218).

9 Randy claims that his refusal to pay child support was an event
10 “occurring after entry of the [Default] Decree.” That is not the case. Rather,
11 there was a history of non-payment of temporary support at the time of
12 entry of the decree from which one could reasonably anticipate that no, or
13 little, support would be paid in the future (which, as it turned out, would
14 have been entirely accurate). Further, Randy’s assertion that “this is not a
15 case in which the custodial parent received a disparate award in lieu of child
16 support” is not entirely accurate. The trial court offset unpaid child support
17 against the value of Randy’s modest interest in the family home. CP 90 and
18 91; see *Marriage of Babbit*, 50 Wn.App.190 (1987). Further, during the
19 proceedings below, Janelle urged the court to consider the economic
20 circumstances in which the division of the marital property would leave her
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2 to consider whose 'negatively productive conduct' depleted
3 the couple's assets and to apportion a higher debt load or
4 fewer assets to the wasteful marital partner.

5 *Marriage of Williams*, 84 Wn. App. 263 (1996) (citations omitted). The
6 court below was fully entitled to consider Janell's assertions that Randy
7 contributed little toward the family home, and had, in fact, engaged in
8 conduct deleterious to the value of the home. See *In re Clark's Marriage*,
9 13 Wn.App. 805 (1975).

10 IV. CONCLUSION

11 Janell reiterates her position that, under the circumstances of this
12 case, the default decree should not have been vacated or modified in any
13 respect. Alternatively, the determination made by the trial was well within
14 the bounds of its discretion.¹

15 **DATED** this 26th day of March, 2007...

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17 **JOHN M. CLARK, WSBA#05493**
Attorney for Respondent/Cross Appellant

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20 ¹ See *Marriage of Williams, supra*: "[T]rial court decisions in marital dissolution proceedings are
21 rarely changed on appeal... The party who challenges a....property distribution must demonstrate that
22 the trial court manifestly abused its discretion" (citations omitted). See also, *Marriage of Lindsey*,
101 Wn.2d 299 (1984); *In re Washburn*, 101 Wn.2d. 168 (1984); *Marriage of Brady*, 50 Wn.App.
728 (1988) ("Only in circumstances where the distribution is unfair, unjust or inequitable will we
modify or reverse the judgment.").