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

6 *In re the Marriage of:*
7 JANELL KAY HENDERSON

8 Respondent/Cross-Appellant,

9 and
10 RANDY GENE HENDERSON,

11 Appellant/Cross-Respondent.

NO. 35109-9-II

**RESPONDENT'S CORRECTED
BRIEF**

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STATE OF WASHINGTON
BY
COURT OF APPEALS
DIVISION II

Respondent's Brief

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**III. CROSS APPELLANT'S ASSIGNMENT OF ERRORS
AND ISSUES RELATED THERETO**

THE TRIAL COURT ERRED IN GRANTING APPELLANT'S MOTION TO VACATE.

1. *Did Randy make an adequate showing that his failure to appear in the action was the result of mistake, inadvertence, surprise or excusable neglect so as to warrant vacation of the decree?*
2. *Did Randy's delay of seven months in seeking vacation of the decree constitute due diligence on his part so as to warrant vacation of the decree?*
3. *Did Randy establish the existence of substantial evidence to support at least a prima facie defense to the default property allocation so as to warrant vacation of the decree?*

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2 4. *Did Randy adequately demonstrate that vacation of the*
3 *decree would not prejudice Janell so as to warrant such*
4 *vacation.*

5 5. *Should Randy have been estopped from seeking*
6 *vacation after he had taken advantage of the asset*
7 *allocation in the default decree in order to finance his*
8 *challenge thereto?*

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IV. FACTS

On February 18, 2004, Janell Henderson caused a Petition for
Dissolution of her fifteen year marriage to Randy Henderson to be
filed in Clark County Superior Court. Randy was duly served with
copies of the Petition, Summons, proposed Parenting Plan, Child
Support Worksheets and Motion for Temporary Orders with a Citation.

The Petition, *inter alia*, asked that the court “make a fair and
equitable division of” the parties’ property. The form and content
utilized in preparing the petition were derived from Mandatory
Domestic Relations Form DR1_0100.

On March 10, 2004, temporary orders were entered by default.
Eight days later, an *ex parte* Default Order was entered against Randy
as the result of his failure to appear or respond in the action.

1
2 On May 28, 2004, a Divorce Decree was entered by default. The
3 Decree made a specific division of the parties' modest assets, awarding
4 thirty eight items of personalty to Randy and twenty six items of
5 personalty and all interest in the family home to Janell.

6 On January 19, 2005, Randy filed a "Motion to Vacate
7 Distribution, Attorney Fees, and Child Support Provisions in the Final
8 Orders" with the trial court.¹ The motion was first heard by the trial
9 court on April 15, 2005. The court ruled as a matter of law that Randy
10 was adequately put on notice by the general property allocation request
11 in Janell's Petition, that specificity in this regard was not required and
12 that by electing not to defend, Randy assumed the risk that the court's
13 ultimate allocation might not be to his liking. The court did, however,
14 leave the door slightly open for Randy by ruling that his pleadings
15 presented a *prima facie* case that in choosing not to contest, he may
16 have relied upon certain extrajudicial statements allegedly made by
17 Janell. The court ruled that an evidentiary hearing would be
18 conducted, at which Randy would have to prove estoppel (or as the
20 trial court termed it "fraud") by clear, cogent and convincing evidence.

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22 ¹ Errors in the final Child Support Order and with regard to attorney fees were subsequently corrected by the parties
without the necessity of intervention by the court.

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2 On April 22, 2005, Randy filed a Motion for Reconsideration.
3 The motion was heard and taken under advisement by the trial court on
4 April 29, 2005. On the same day, the court issued a written decision
5 granting reconsideration on the basis that “*under the particular facts of*
6 *this case*, [Randy] has made a showing that the award of the entire
7 equity in the family home to [Janell] was not a ‘fair and equitable
8 division’ of the assets of the marriage and that therefore the decree
9 deviated from the prayer.”² The court imposed the burden upon Randy
10 to demonstrate at trial that that the allocation made by the default
11 decree was unfair and “that no reasonable judge would have made such
12 a distribution.” Further, the court once again preserved Randy’s
13 estoppel claim for trial.

14 Janell appealed from this ruling by way of a motion for
15 discretionary review filed with the Court of appeals on July 18, 2005
16 (No. 33241-8-II). The parties subsequently agreed that the appeal
17 would be withdrawn without prejudice (as the order appeared to be
18 interlocutory) and that the case would proceed to trial. A “Ruling of
20 Stipulated Dismissal” was issued by this court on September 9, 2005.

21 ² ACP 20. The court declined to hold that a “general prayer” can never support a “specific decree.” Because there
22 are two different indexes of clerk’s papers, each bearing identical numeration, “ACP” will refer to those papers
designated by Randy and “CACP” will refer to those papers designated by Janell.

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2 Trial was conducted on April 6 and 7, 2006. Both Randy and
3 Janell attended and testified. Further, each party presented the
4 testimony of a real estate appraiser. Janell's appraiser testified that the
5 family home was worth \$219,000 at the approximate *time of entry of*
6 *the default decree* (leaving equity of \$24,000). Randy's appraiser
7 testified that the property was worth \$350,000 at the approximate *time*
8 *of trial*, resulting in equity of \$116,000.³ The trial court once again
9 took the matter under advisement.

10 On May 2, 2006, the court ruled in writing as follows:

11 If this were a trial on the dissolution petition, which
12 [Randy] waived by defaulting, the court would attempt to
13 determine a fair market value of the home by considering all
14 the evidence. Where, however, the issue is whether or not the
15 award fits within the wide borders of reasonableness, the
16 court's chore is to decide whether (Janell's] valuation is one
17 which *could* be found; that is, is it supported by credible
18 evidence?

19 The answer to that question is clearly, yes. Mr. Metcalf
20 [Janell's expert] is an accredited, professional appraiser, who
21 utilized an accepted professional method for making his
22 evaluation. A reasonable judge could have accepted his
23 opinion on value...

24 In short, a reasonable judge could have considered, *at*
the time of default, that the equity was \$24,000, and that each
party's share, to be *equal*, would be \$12,000.

25 ³ See Trial Exhibits 1 and 30.

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2 ACP 19, at pp 129-30 (emphasis supplied). The court then offset
3 certain credits in favor of Janell, resulting in a marital lien to Randy in
4 the amount of \$9,000, to bear interest at 12% per annum and to be
5 paid by May 1, 2007.⁴

6 Randy again moved for reconsideration. On June 16, 2006, the
7 trial court, holding that “[since Randy] defaulted and gave up any
8 right to be present, he certainly can’t complain if the fair and
9 equitable distribution was one which was most favorable to his
10 wife...” denied Randy’s motion.⁵ An order titled “Order Granting
11 Partial Relief from Judgment” was then entered by the court. The
12 order granted Randy a marital lien of \$9,000 and then offset the sum
13 of \$11,776.80 (giving every benefit of the doubt to Randy) as child
14 support Randy had failed to pay since entry of and final support order
15 issued in March and May, 2004.⁶ Randy’s estoppel argument was
16 found not to be viable. The end result was an order awarding Janell
17 judgment in the sum of \$2,776.80 for unpaid child support.

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⁴ ACP 19 at p.131.

⁵ RP 295.

21 ⁶ACP 14. Randy paid very little child support during this two year period. See e.g. his trial testimony at RP 168-69.
22 However, the trial court gave him every benefit of the doubt with regard to his allegations that he had made some
cash payments to Janell.

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4 V. ARGUMENT

5 A. THE TRIAL COURT ERRED IN
6 PARTIALLY VACATING THE DEFAULT
7 DIVORCE DECREE

8 A proceeding to reopen a judgment is available only in
9 extraordinary circumstances. *Wagers v. Goodwin*, 92 Wn. App. 876
10 (2000). A party moving to vacate a default judgment must be able to
11 demonstrate that he was diligent in prosecuting the action, that his or
12 her failure to contest was not willful, and that *prima facie* at least, a
13 decisive issue exists, resolution of which would require trial on the
14 merits. *Shepard Ambulance, Inc. v. Helsell, et. al.*, 95 Wn. App. 231
15 (1999). Mere allegations that a default judgment should be vacated
16 for reasons of fairness, are insufficient justifications to invoke a
17 court's discretionary power to set aside a default judgment. *Shepard*
18 *Ambulance, supra*. A party seeking to vacate a default judgment
19 must show, *inter alia*, that his or her failure to appear was the result
20 of mistake, inadvertence, surprise or excusable neglect. *Johnson*
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2 *v. Cash Store*, 116 Wn.App.833 (2003); *Drew v. Drew*, 135 Wash
3 (1925).⁷

4 “Mistakes of law are not correctable in a motion brought
5 under Rule 60.” Editorial Commentary to CR 60 (citations omitted);
6 see also *Burlingame v. Consolidated Mines and Smelting Co.*, 106
7 Wn.2d 617 (1986). Further, the fact that a judgment may be
8 erroneous as a matter of law is not properly a basis to set it aside.
9 *Kern v. Kern*, 28 Wn.2d 617 (1947).

10 A motion to vacate must be accompanied by an affidavit
11 indicating, *inter alia*, the existence of a meritorious defense. CR 60
12 (e)(1). Here, Randy submitted a declaration in support of his motion
13 to vacate, in which he alleged that: (1) the pendency of the divorce
14 action was “a very emotional time for [him]; he “could not even stay
15 in the courtroom for the hearing on temporary orders” and “fled
16 without even making an appearance”; (2) he “was operating under
17 the false notion that my wife was going to reconcile with me” and
18

19
20 ⁷ It was not an abuse of discretion to refuse to vacate a divorce decree, entered by default, where the excuse for
21 defendant’s nonappearance was weak and the court exercised its discretion in determining whether injustice had been
22 done. *Drew, supra*. The “catch all” phrase of CR 60 allowing relief “for any other reason justifying [such action],” is
to be used sparingly in situations involving extraordinary circumstances and is generally confined to extrajudicial
irregularities. *In re Marriage of Furrow*, 115 Wn.App.661 (2003); *In re Marriage of Knutson*, 114 Wn.App.866
(2003).

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2 that she “did not abuse me of the this notion at that time” (although
3 he made no claim that Janell had encouraged such a notion or that
4 the two of them ever discussed it); (3) at some point Janell “indicated
5 that she would share any equity once the [family] home was sold”
6 (although he failed to say when such conversation occurred, what the
7 property was worth at that time, whether a specific amount was
8 agreed upon and when the property would be sold); (4) after
9 receiving a copy of the Decree in *June, 2004*, he paid a retainer to an
10 attorney in an attempt to have it vacated; (5) the following day he
11 discharged the attorney because Janell “threatened to stop making
12 payments on the house so that neither person would receive any
13 equity from the home because it would be foreclosed on”; and (6) he
14 “hoped that Wife would pay me my share in the house” and “became
15 paranoid about [her] intentions.” ACP 5.

16 Such allegations (most of which Randy failed to prove at trial)
17 hardly rise to the level of either excusable neglect or surprise, nor do
18 they constitute a meretricious defense. If anything, they indicate that
19 Randy’s unilateral hope to salvage the marital relationship significantly
20 impaired his abilities to act reasonably or to protect his interests.
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2 Even if Randy had contested the action in 2004, he would
3 have been awarded a marital lien of no more than \$12,000, a *de*
4 *minimus* amount given the ultimate expense of this litigation for both
5 parties. Unlike the situation in *Marriage of Furrow, supra*, for
6 example, substantial or fundamental rights were not trampled by the
7 default decree entered in this case.⁸ Rather, the circumstances here are
8 analogous to those in *Marriage of Knutson, supra*, in which the
9 husband sought to vacate and modify a divorce decree awarding wife a
10 specific dollar amount from his pension fund because the fund had lost
11 value in the three months following entry of the decree. Here, Randy,
12 in effect, attempted to take advantage of the significant gain in the
13 worth of Clark County real estate over the two year period following
14 entry of the decree. Had Randy contested when he should have, and
15 had the matter gone to trial in 2004, the only reliable evidence in the
16 record (that presented at trial by Janell's appraiser) indicates that the
17 property was then worth \$219,000.⁹

18 ⁸ In *Furrow*, the CR 60 movant's parental rights had been terminated by way of a default divorce decree.

19 ⁹ RP, pp 103-138, testimony of Michael Metcalf. Even where a default judgment is vacated, the defaulting party
20 bears some responsibility for [his or her] predicament. *Housing Authority v. Newbigging*, 105 Wn.App. 178 (2001).
21 Because Randy was unable to prove at trial that he had been wrongfully misled into not contesting the original
22 action, the appropriate time for valuation of the family home was 2004, rather than 2006. This was made clear by the
23 trial court in its April 29, 2005 ruling (ACP 20) when it in effect decided to limit the issues to review the 2004
24 division.

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2 finding that Randy, in his declaration, had made a *prima facie* case for
3 misrepresentation by Janell, it became clear at trial (and the court
4 ultimately found) that he could not prove such allegations.
5 Accordingly, his motion to vacate should have been denied following
6 trial.

7 A motion for relief from judgment should be brought as soon
8 as possible after entry of the judgment. Otherwise, the lapse of time
9 is a factor to be considered by the court in determining whether to
10 grant the motion. CR 60 (b), Editorial Commentary to CR 60. (1)
11 See e.g. *Housing Authority v. Newbigging*, 105 W2. App. 178 (2001),
12 wherein the court (citing *Norton v. Brown*, 99 W2. App. 118 (2001),
13 said:

14 When deciding a motion to vacate a default
15 judgment, the court must consider two primary and
16 two secondary factors that must be shown by the
17 moving party; the two primary factors are: (1) the
18 existence of substantial evidence to support at least
19 a prima facie defense; and (2) the failure to timely
20 appear was the result of mistake, inadvertence,
21 surprise or excusable neglect'... the secondary
22 factors are (3) the party seeking relief acted with
23 diligence after receiving notice of the default
24 judgment, and (4) the effect on the opposing party
would not be prejudicial if the judgment was {sic}
vacated (emphasis supplied, some citations
omitted).

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2 In *Newbigging, supra*. the court granted the defendant's
3 motion to vacate where she sought vacation *eleven-days* after entry of
4 the default judgment. In *Estate of Stevens*, 94 Wn. App. 20 (1999), the
5 appellate court ruled that the moving party's delay of *three-months* in
6 challenging a default judgment was not due diligence. See also
7 *Hardesty v. Stenchever*, 82 Wn, App. 253 (1996), *Canam Hambro*
8 *Systems*, 33 Wn. App. 452 (1982) and *Camarano v. Longmire*, 99 Wn.
9 360 (1918), in which delays of *seven* days, *twenty-three* days and *one*
10 day respectively, were held to constitute due diligence.

11 Here Randy admittedly received a copy of the divorce decree
12 "in June, 2004." Declaration of Respondent, ACP 5. He filed his
13 motion to vacate on January 19, 2005 – *seven months* later. This was
14 hardly due diligence on his part.

15 The due diligence requirement, to some extent embodies the
16 time honored policy favoring finality of judgments and decrees:

17
18 RCW 26.09.050 is explicit in requiring the
19 court to take action on ancillary provisions at the
20 time it enters a decree of divorce... A party to a
21 marriage dissolution has the right to have his interest
22 in the property of the parties definitively and finally
determined in the decree which resolves the
marriage... {W}e are told there are a number of
vexatious problems with respect to property

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2 ownership and management which may arise if the
property is not distributed in the decree.

3
4 *Marriage of Little*, 96 Wn. 2nd 183 (1981). This is a significant
5 concept. Property may have been sold, refinanced, pledged,
6 exchanged, given away, or otherwise disposed of or modified in
7 reliance upon the terms of a divorce decree. Third parties may have
8 relied to their detriment upon the finality of the decree. Community
9 debts may have been paid, satisfied, refinanced, or discharged in
10 bankruptcy. Irrevocable decisions or plans may have been made.
11 Court ordered property divisions should not be lightly overturned,
12 particularly where the party seeking to vacate the allocation cannot
13 show fraud, overreaching, irregularity, or violations of fundamental
14 procedural fairness.

15 Default judgments may be somewhat disfavored, but perhaps
16 of equal importance is “the necessity of having a responsive and
17 responsible system which mandates compliance with judicial process
18 and is reasonably firm in bringing finality to judicial proceedings,”

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20 *Peoples Bank v. Hickey*, 55 Wn. App. 367 (1989).

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2 The trial court erred in: (1) finding that a mere \$12,000
3 positive difference in value of the property awarded to Janell by the
4 decree was inequitable under the circumstances; and (2) attempting to
5 reallocate the property with mathematical precision.

6 ...{I}n making a division of the property
7 the law does not impel an equal or exact
8 division of the community property of the
9 parties. The disposition need only be just
10 and equitable...

11 *Rogstad v. Rogstad*, 74 Wn. 2nd 736 (1968). A trial court must
12 consider many factors (other than mathematical precision) in making
13 a disposition of marital property. Such factors include “the condition
14 in which {the parties} will be left by the divorce, the burdens
15 imposed by child custody... the necessities of the wife and the
16 financial ability of the husband...the sources through which the
17 property was acquired by the parties during the marriage...and what
18 each contributed to the community property.” *Baker v. Baker*, 80
19 Wn. 2nd 736 (1972). See also *Cleaver v. Cleaver*, 10 Wn. App. 14
20 (1973). The latter consideration involves analysis of the parties’
21 contributions toward mortgage payments, living expenses and
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2 insurance premiums while they cohabitated. *Clark v. Clark*, 13 Wn.
3 App. 805 (1975).

4 At trial, it became evident that Randy, having chosen not to
5 work during the latter years of the marriage, contributed very little
6 income toward household expenses and community property. See,
7 e.g. RP, 147-152 (Randy's income from 2002 through 2004 was
8 minimal). Further, it became clear that Randy was not going to pay
9 court
10 ordered child support for the parties' son (who resides with Janell).
11 At the time of trial, Randy owed Janell almost \$12,000 in unpaid
12 support. ACP 14, RP 168-169. If history is a reliable indicator of the
13 future, Janell will continue to struggle to meet her son's living
14 expenses with little, if any, assistance from Randy. This probability
15 should have been taken into consideration by the trial court when
16 deciding whether to vacate the default property allocation and
17 awarding a marital lien to Randy. It clearly was not. ACP 20.
18 Further, in rendering its determination to vacate the decree and
19 schedule an evidentiary hearing, the trial court does not appear to
20 have taken potential prejudice to Janell into account. If the court had
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2 fixed the value of the family home at \$285,000, as Randy had urged
3 in a earlier declaration (ACP 5 at P.2), or \$350,000 as Randy stated
4 at trial (RP, P.89-90) and divided the resulting equity, Janelle would
5 have been forced to sell or refinance the property in order to pay
6 Randy. This would have certainly been harmful to both Janell as
7 well as injurious to the parties' minor child.

8 Since Randy failed, as a matter of law, to establish that any
9 of the four factors set forth in *Newbigging*, had been or could be met,
10 his request to vacate should have been denied *ab initio*.

11 Finally, Randy's selling of a tractor, formerly a community
12 asset awarded to him by the default decree in order to pay his
13 attorney fees(see ACP 5, P.4) was fatally inconsistent with his
14 subsequent challenge of another property allocation provision in the
15 same decree. He cannot have it both ways. He should be judicially
16 estopped from using the decree where it is to his benefit and then
17 seeking to vacate what he does not like. *Haywood v. Aranda*, 97
18 Wn. App. 741 (1999); *Johnson v. Si-Cor Inc*, 107 Wn. App. 902
20 (2001).

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2 B. ALTERNATIVELY, THE TRIAL COURT PROPERLY
3 EXERCISED ITS DISCRETION IN GRANTING APPELLANT
4 SOME RELIEF FROM THE DIVORCE DECREE.

5 A motion to vacate a default judgment is addressed to the
6 sound discretion of the trial court. *Johnson v. Cash Store, supra*. CR
7 60 allows vacation of a judgment on “such terms as are just.” The
8 trial court could easily have denied Randy’s motion to vacate.
9 Instead, in an effort to be meticulously fair to him, it permitted the
10 convening of a trial. In so doing, it restricted the issues to whether:
11 (1) Randy was unfairly led not to contest; and (2) whether the default
12 property allocation was so unfair to Randy that no reasonable judge
13 would have so ordered.¹⁰

14 In allowing Randy to litigate issues which he otherwise
15 would have been precluded, by his default, from litigating, while
16 imposing upon him the burden of demonstrating that the property
17 allocation made by the 2004 divorce decree was unfair, the trial court
18 delicately and fairly balanced the interests of the parties. It permitted

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20 ¹⁰ Note that whereas setting aside a default *order* is subject to the provisions of CR 55 (c), vacation of a default
21 *judgment* “is judged by the more stringent requirements of Rule 60, although the courts apply a somewhat *hybrid*
22 standard in determining whether to set aside a default judgment” (emphasis supplied, citations omitted). *Editorial*
23 *Commentary to CR 55*. It is just such a “hybrid” approach that the trial court appears to have taken in the instant
24 case.

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2 Randy to address his claim that the parties' equity in the family home
3 had significant value when the decree was entered and that he did not
4 receive an equitable share thereof. On the other hand, the court did
5 not let him completely off the hook for having defaulted. The
6 question the court posed and ultimately answered is what would have
7 happened had Randy contested the petition two years earlier. In other
8 words, the court was careful not to allow Randy an advantage for
9 defaulting and then litigating the case two years later – where during
10 the interim, real estate values in Clark County skyrocketed.¹¹ Randy
11 labels the property allocation request in the petition “generic” and, at
12 trial, rested his fortunes upon *Ermev v. Ermev*, 18 Wn.2d 543, a 1943
13 decision issued long before Washington's Marriage Dissolution Act
14 (including RCW 26.09.020 and .050) was enacted.¹² There, the
15 petition prayed “only for a divorce, the return of [wife's] maiden
16 name and for such other and different relief as to the court
17 deems...just.” The husband failed to respond and the court
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20 ¹¹ See e.g. the testimony of Randy's appraiser. RP, P. 34.

21 ¹² RCW 26.09.020 requires that a petition set forth only “a statement specifying whether there is community or
22 separate property owned by the parties to be disposed of.” RCW 26.09.050 requires that a decree “make provision
23 for the disposition of property and liabilities of the parties.”
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2 entered a default decree which, *inter alia*, awarded spousal support
3 to the wife. The husband received no prior notice that maintenance
4 would be requested. The appellate court reversed the trial court's
5 refusal to vacate the decree.¹³ Here, Janell's petition was not silent
6 about division of the marital assets. It certainly put Randy on notice
7 that the court would make a property division with or without his
8 participation.

9 Randy is presumed to have been cognizant that a request for
10 dissolution of marriage "brings before the court all of the marital
11 rights of the parties." *Mose v. Mose*, 4 Wn.App.204 (1971). All he
12 needed to do was to make some type of appearance in the action to
13 ensure his interests were protected.¹⁴ He failed to take even this
14 elementary step. It is simply wrong for a party in litigation, when in
15 a defeatist, angry, or as Randy testified "emotional" mood to elect
16 not to contest and then, when in a different frame of mind months
17 after entry of a judgment or decree, come in and attempt to

18 ¹³ The same court apparently disregarded its decision in *Ermey* five years later when it permitted a default decree
19 including a provision for payment of spousal support to stand, although the petition did not specifically request such
20 relief. *Ackerman v. Ackerman*, 32 Wn. 2nd 53 (1948).

21 ¹⁴ Any action "manifesting a party's interest to contest the matter" is adequate to prevent entry of *an ex parte* default
22 order or judgment. *Newbigging, supra*. Randy evinced no such intent.

1
2 upset the apple cart.

3 For purposes of appeal, Randy now leans upon the decision
4 in *Marriage of Johnson*, 107 Wn.App. 500, a 2001 Division II case.

5 In that case, the wife filed a petition requesting that the family home
6 (which she valued at \$280,000) be allocated to the parties equally.

7 The husband defaulted. The decree granted judgment against the
8 husband for half of the home's value, directed him to pay interest at
9 12% per annum and compelled him to execute a deed of trust in
10 favor of the wife (without expressly awarding the property to either
11 party). Interest alone would have cost the husband \$1400 per
12 month. The trial court vacated the decree (only as to the family
13 home) and the appellate court affirmed on the basis that "the decree
14 substantially varies from the petition with respect to the house." In
15 the instant case, there was no such discrepancy. Janell asked for an
16 equitable division of the marital assets and, according to the trial
17 court, the decree came within \$9,000 of making such a division. This
18 *de minimus* difference was subsequently "corrected" by the court.

20 Accordingly, Randy has little, if anything, about which to complain.

1
2 Randy argues that “[o]nce the [decree] was vacated, [it]
3 should have been given no effect and the rights of the parties should
4 have been left as though the judgment had never been entered.”¹⁵
5 But that is precisely what the trial court did with respect to the
6 family home. Randy accuses the trial court of refusing “to consider
7 all the evidence concerning the value of the family home.” This is
8 false. The court considered all evidence presented with regard to the
9 fair market value of the property *at the approximate time the default*
10 *decree was entered*. Janell presented the testimony and written report
11 of an expert with respect to the worth of the home at such time.
12 Randy did not.¹⁶ The court considered, but ultimately discounted
13 Randy’s self serving opinion as to such value.

14 The trial court fairly, even exquisitely, balanced the parties
15 interests, as well as competing public policies, in fashioning relief
16 which neither rewarded nor punished Randy for having defaulted

18 ¹⁵ It is not clear what Randy’s claim is. If he argues that the *entire* decree must be vacated, his position is ill taken. In
19 *Marriage of Johnson, supra*, this court implicitly permitted vacation of *only* that provision in a default divorce
20 decree relating to division of the family home.

21 ¹⁶ See RP, 33-36. David Goggins, Randy’s appraiser, was asked to do an appraisal with regard to only the 2006
22 value of the home. Further, Mr. Goggins indicated he had done only a 15 to 20 minute exterior “walk around” of the
23 property in March, 2006.

1
2 two years earlier. In so doing, the court properly and wisely
3 exercised its considerable discretion. *Seek v. Lincoln*, 63 Wn. App.
4 266 (1991); *Lindgren v. Lindgren*, 58 Wn. App. 588 (1990).

5
6 **VI. REQUEST FOR ATTORNEY FEES**

7 As Randy accurately states in his brief, this court has discretion to award
8 fees and costs to the prevailing party based upon a showing of need.
9 *Peterson v. Koester*, 122 Wn. App 351 (2004); RAP 18.1; RCW 26.09.140.

10 Further, Randy's appeal is frivolous entitling Janell to an award of fees.
11 *Harrington v. Pailthorp*, 67 Wn. App. 901 (1992). On these bases, Janell
12 requests that she be awarded reasonable attorney fees upon appeal.

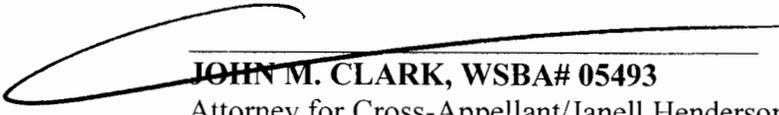
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14 **VII. CONCLUSION**

15 There was no legal or factual justification for the trial court's
16 vacation and/or modification of the 2004 divorce decree and the property
17 allocation set forth therein.

18 Alternatively, because the court did not significantly modify
20 the decree, because it struck a fair balance between the parties, because it
21

1
2 allowed Randy his day in court but did not permit him to benefit from
3 his earlier default, the court, in Solomon-like fashion, properly exercised
4 its considerable discretion.

5 **DATED** this 5th day of February, 2007.

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8 
9 **JOHN M. CLARK, WSBA# 05493**
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February 5, 2007

MR. DAVID C. PONZOHA, CLERK
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RE: Henderson v. Henderson

Case No.: ~~33241-8-H~~ 35109-9

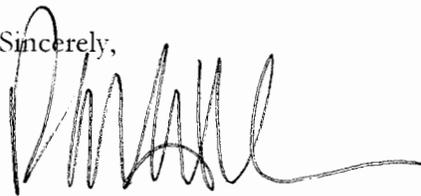
Dear Mr. Ponzoha:

Please find enclosed the original and one copy of Respondent/Cross-Appellant's Corrected Brief in relation to the above entitled case. Please file the original with the court and return a conformed copy of same in the enclosed pre-paid envelope.

I apologize for the delay in getting the enclosed delivered. Mr. Clark has had a personal emergency. We also lost our other assistant without notice which has also contributed to our delay. I again apologize for any inconvenience this may have caused.

Thank you for your assistance in this matter.

Sincerely,



RAI-SHEL R. GETZLAFF
Legal Assistant to
JOHN M. CLARK
Attorney at Law

JMC/rrg
Enclosures

cc: Dean K. Langsdorf
Janelle Henderson