

No. 39817-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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SHERRY KAY GARLINGTON, Petitioner

v.

JAMES DALE GARLINGTON, Appellant

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BRIEF OF APPELLANT – JAMES GARLINGTON

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N/A

## **I. INTRODUCTION**

This case revolves around an action for dissolution of marriage. The husband had been actively participating and representing himself in that action and was led to believe by the wife's attorney the case was still in the discovery phase and that no trial was at hand.

When he failed to appear at the scheduled time of trial, the court entered an order of default against the husband and entered findings of fact/conclusion of law and a decree of dissolution, which had the practical effect of granting the wife 100% of the parties community property, 100% of the husband's pension, and lifetime spousal maintenance that would eventually exceed his income. These facts were not disputed by the wife/petitioner in opposition to the husband's motion to vacate.

This appeal stems from the court's refusal to set aside its order of default and refusal to vacate the findings of fact/conclusions of law and decree.

## **II. ASSIGNMENT OF ERRORS**

### **Assignment of Errors**

1. The trial court erred in entering the order of September 18, 2009, denying James Garlington's motion to set aside the order of default and to vacate the decree of dissolution and findings of fact/conclusions of law entered on October 21, 2008.

### **Issues Pertaining to Assignment of Errors**

1. Does the court abuse its discretion when it refuses to set aside the order of default and vacate the findings of fact/conclusions of law and decree when the appellant had appeared and participated in the case, but was not notified prior to the entry of the order of default?
2. Does the court abuse its discretion to set aside the order of default and vacate the findings of fact/conclusions of law and decree when the enforcement of the decree would be inequitable?
3. Does the court abuse its discretion to set aside the order of default and vacate the findings of fact/conclusions of law and decree when the appellant's failure to appear for the trial was occasioned by mistake, inadvertence, irregularity or excusable mistake

### **III. STATEMENT OF THE CASE**

The parties were married in 1977 (CR 60). They separated on June 11, 2007, and on June 20, 2007, the wife / petitioner filed for dissolution of marriage (CP 60). Initially, husband/ respondent hired an attorney to represent him and that attorney filed a notice of appearance on July 2, 2007 (CP 60). On July 12, 2007, the husband filed a response to the petition for dissolution of marriage (CP 49). Over the next 6 months, there were at least 4 hearings in this case and husband's attorney participated in each of those hearings (CR 61). On January 14, 2008, the husband's

attorney withdrew from the case after receiving more than \$9,500 in fees (CP 61).

At that point, the husband did not have any funds or credit to hire a new attorney, so he continued pro se (CP 61). Between the time the husband's attorney withdrew and October 3, 2008, there were no fewer than seven (7) hearings in the case. On each of those hearings, except one, the husband respondent appeared in court and participated in the hearing on his own behalf (CP 61).

The one hearing the husband did not appear, was a hearing on March 14, 2008 to adjust the trial date (CP 68). The husband did meet with and speak to the wife's attorney regarding her request to adjust the trial date (CP61). The husband was told he did not need to appear at the hearing and was handed a document entitled "Agreed Order RE: Motion To Adjust Trial Date." (CP 61 & 69-70). The order had a blank line where the new trial date was to be listed (CP 61 & 69). It was explained to the husband that the wife's attorney would hand write in the new trial date once he received the date from the court (CP 61). The husband was never served with a copy of the revised case schedule, or with a copy of the entered Agreed Order of Continuance (CP 61). In fact, the only two items that were mailed to the husband from the March 14, 2008 hearing date was

a Note for Motion \* renote (from March 14, 2008); and a Declaration of Mailing/Service (CP 71).

After the March 14, 2008 hearing date through October 3, 2008, the husband was notified of several hearings during that period of time and he appeared and participated in each of them (CP 61).

In September 2008, the wife/petitioner filed a motion to have the husband held in contempt and sought jail time as a sanction. The husband/respondent filed a declaration in response to the imposition of jail as a sanction on September 18, 2008 (CP 4-7). In husband's pro se declaration, he was critical of the court and even stated the following "I have not been given fair and equal treatment by Judge Orlando or Jeffrey Robinson" (CP 4).

At a hearing on September 26, 2008 in front of Judge Orlando, the husband was ordered to pay  $\frac{1}{2}$  of his monthly income, but not less than \$1,500 per month to his wife (CP 61). The husband was further ordered to appear for monthly review hearings on the first Friday of each month at 11:00 a.m. with proof of his monthly income (CP 61).

On October 3, 2008, the husband appeared as ordered by the Judge and provided his pay stubs (CP 62). At that time, the husband was unaware the trial date was just  $2\frac{1}{2}$  weeks away (CP 62). In fact, he was

led to believe by the wife's attorney that the trial would not be happening anytime soon (CP 62). On October 7, 2008, the wife's attorney contacted the husband by phone and told him that he had until October 16, 2008 to produce documents or the wife's attorney would file a motion to compel (CP 61). The wife's attorney further informed the husband that counsel would be scheduling his motion to compel for October 24, 2008 (CP 61). The wife's attorney sent the husband a confirmation letter of the conversation (CP 72).

Contrary to the attorney's representations that the trial would be sometime after October 24, 2008, the trial was held on October 21, 2008 (CP 62). Unaware of the trial date, the husband did not show up for trial (CP 62). The husband did however, appear in Judge Orlando's court at 11:00 a.m. on the first Friday of November, 2008, as he had been ordered by the September 26, 2009 order (CP 62). Judge Orlando inquired as to why the husband was there. Judge Orlando then advised the husband that the September 26 order had been superseded by the October 21<sup>st</sup> Decree finalizing the dissolution in the matter, and that the husband no longer needed to appear (CP 62).

Judge Orlando instructed the husband that there was a no contact order in place, and that the husband was to have no contact with the wife or he would be violating the law (CP 62). The husband was also told that

the no contact order and decree would be mailed to him. In the meantime, husband was instructed that he no longer had to comply with the September 26, 2008 order (CP 62).

After his court appearance in November of 2008, the husband complied with Judge Orlando's instructions and had no contact with the wife (CP 63). The husband did not receive a copy of the Decree, nor was he made aware of the terms of the Decree until June 30, 2009 when he was served with an Order to Show Cause and the Motion/Declaration for Order to Show Cause (CP 63).

After receiving the Order to Show Cause, the husband went down to the clerk's office and reviewed the court file. The husband discovered that the wife had obtained an order of default and a decree of dissolution against him (CP 63).

The Decree ordered the husband to pay the sum of \$3,635 per month in maintenance and credit card payments in the amount of \$405 per month (CP 63). Therefore, the total maintenance and monthly credit card payments the husband was ordered to pay totaled \$4,035 per month (CP 63). That award exceeds the husband's entire monthly net income (CP 63).

According to the wife's trial brief, the wife alleged the husband essentially earned \$6,936.82 in gross earnings per month (CP 64). The wife did not calculate the husband's net income in the trial brief. Had the

wife made such a calculation, the Court would have been presented with a net income figure of \$4,884.24 (CP 64). In essence, even using the wife's own imputed income numbers for husband, which is disputed as being accurate, the Decree awarded the wife \$4,035 of the husband's \$4,884.24 in net income (CP 64). Thus leaving the husband with just \$849.24 per month to live on (CP 64).

Furthermore, the Decree granted the wife 100% of the husband's civil service retirement (CP 65). This means the husband would have no retirement other than social security retirement (\$2,323 per month) (CP 65 & 74-75). However, the Decree further granted the wife spousal maintenance for the remainder of her life after the husband retired in the amount of \$2,800 per month (CP 65). This spousal maintenance award was even to survive the husband's death. In other words, the husband would be responsible for paying maintenance after he died (CP 39). The practical effect of this maintenance award is the transfer of the husband's social security benefits to the wife thereby leaving the respondent with nothing to live on in retirement (CP 65). In fact, based on today's social security benefits, the husband would be in arrears to the wife in the amount of \$477 per month while the wife would have \$6,646 per month to live on in retirement (CP 65).

With regard to property award, the practical effect of this Decree is that the wife/petitioner received 100% of the community property, 100% of husband's civil service retirement, lifetime maintenance that exceeds husband's net income and which continues even after husband's death, and a net judgment against respondent for \$27,001.03 (\$64,728.43 in Judgments - \$37,727.40 in Property awarded to husband (CP 65-66).

As indicated above, the husband/ respondent was served with an Order to Show Cause and the Motion/Declaration for Order to Show Cause (CP 63). After receiving the Order to Show Cause in June of 2009, respondent went down to the clerk's office and reviewed the court file and discovered the terms of the default decree of dissolution (CP 63).

On September 3, 2009, the husband/respondent filed a motion to set aside the order of default and to vacate the findings of fact/conclusions of law and decree of dissolution (CP 49-59). In support of his motion the husband filed a declaration on his own behalf (CP 60-75). This declaration contained a copy of the confirmation letter the wife's attorney sent him informing him that discovery would continue through October 24, 2008 (CP 73). The wife/petitioner did not file a declaration in opposition to the husband's motion, however, the wife's attorney, Scott Candoo, filed a declaration from him in opposition to the motion (CP 76-

79). Mr. Candoo did not dispute the representations of his predecessors to the husband (CP 76-79).

Specifically, Mr. Candoo did not dispute the fact that the husband/respondent was informed that a discovery motion was going to be brought on October 24, 2008; a date that was after the trial date of October 21, 2008 (CP 76-79). Nor did Mr. Candoo dispute the testimony of the husband that he did not receive notice of the motion for default and subsequent order of default before its entry on October 21, 2008 (CP 76-79).

The hearing on the husband/petitioner's motion was held on September 18, 2009. The trial court denied the husband/respondent's motion (CP 83-84). Despite providing a copy of the confirmation letter from the wife's attorney (CP 73), and despite the uncontroverted facts listed in the husband/respondent's declaration, the trial judge refused to consider the evidence or address the legal standards for a motion to set aside an order of default and vacation of a judgment. The court in its verbal ruling, stated:

There is nothing about Mr. Garlington's presentation at any point that I find credible. There's no declaration that he could sign...That I would find credible.

RP 10, ln 13-16. In essence, the court would not entertain the husband/respondent's motion.

#### IV. SUMMARY OF ARGUMENT

The court abused its discretion when it refused to set aside the order of default and refused to vacate the findings of fact/conclusions of law and decree of dissolution.

#### V. ARGUMENT

The standard of review for ruling on a motion to aside orders of default and vacating judgments is the abuse of discretion standard. *Sacotte Const., Inc. v. National Fire & Marine Ins. Co.* 143 Wn. App 410, 415 (2008).

Any discussion of a default judgment begins with the proposition that they are not favored in the law. *Griggs v. Averbek Realty, Inc.*, 92 Wn. 2d 576, 581 (1979). The overriding policy is that controversies should be determined on their merits, not by default. *Id.* Citing, *Dlouhy v. Dlouhy*, 55 Wn. 2d 718, 721 (1960). Our courts “will liberally set aside default judgment’s pursuant to CR55(c) and CR60 and for equitable reasons in the interest of justice.” *Morin v. Burris*, 160 Wn.2d 745, 749 (2007).

5.1 The trial court erred in denying the husband’s motion to set aside the order of default and to vacate the FOF/COL and Decree since he was not given notice of the motion for default before its entry and it is therefore void.

CR55(a)(3) requires that notice of a motion for default be given to any party who has appeared in the action for any purpose. *Sacotte Const.*,

*Inc. v. National Fire & Marine Ins. Co.* 143 Wn. App 410, 415 (2008). If the court enters an order of default where the appearing party lacks notice, the order is void and the defaulting party is entitled to have the judgment set aside as a matter of right. CR55(a)(3); *Shreve v. Chamberlin*, 66 Wn. App 728, 731 (1992).

In this case, the husband had not only appeared, but he had been actively participating in what can only be described as a very contentious and litigious dissolution action. The husband appeared in court just 2 ½ weeks before the trial as instructed, and appeared in court just two weeks after the scheduled trial date.

According to the memorandum of journal entry for October 21, 2008 (CP 14-15), the wife presented a motion for default at the hour of 2:39 p.m., and the motion was granted. There is no indication in the record that notice was ever provided to the husband that the trial was going to proceed on the October 21, 2008 date. In fact, the confirmation letter sent by counsel for the wife on October 7, 2008, contradicted that fact by informing husband that discovery would be continuing through October 24, 2008. Nowhere in that confirmation letter did the wife's attorney inform, suggest, or imply the trial would occur on October 21, 2008, nor did he inform the husband that he would file or present a motion for default on the afternoon of the 21<sup>st</sup>.

In this case, it is without dispute that the husband who had previously appeared and defended in this action was not provided notice of the presentment of the motion for default and pursuant to CR55(a)(3) the order is void and the appellant is entitled to having the order set aside as a matter of right.

5.2 The trial court erred in not considering petitioner's conduct in obtaining the final orders and the inequitable nature of the order of default and final judgment.

“...[B]ecause a proceeding to vacate a default judgment is equitable in character, a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable.” *Sacotte Const. Inc.*, 143 Wn. App at 416-417. In *Sacotte*, the court held that it would be inequitable to allow the plaintiff to take advantage of the defendant's counsel's conflict of interest, when the plaintiff had a hand in creating the conflict. *Id.*

In this case, the wife has taken advantage of the fact that husband did not appear for trial on October 21, 2008, after causing in part, the husband's misunderstanding of when the trial was to occur. In March of 2008, counsel for the wife obtained an order continuing the trial date without the husband's presence. Then, two days later, he caused a hearing re-note to be served on the husband, but did not cause the entered order of continuance or new case schedule to be served on the husband.

Furthermore, the wife's attorney telephoned the husband and notified him that discovery was still continuing through October 24, 2008. This was 3 days after the actual scheduled trial date. No attorney, let alone a pro se litigant would expect discovery to continue after a trial date. The logical conclusion of the husband when informed that discovery was to continue through October 24, 2008, was that the trial was not at hand.

This is not the typical case of a defaulting party where one litigant has the other responding party personally served, is unaware of the personal circumstances of the responding litigant, and then receives no communication, answer or response, and can therefore assume that a non-responding litigant has no intention of defending the lawsuit.

Precisely to the contrary, the wife was well aware of the husband's desire to respond. This was a highly litigious case with more than a dozen hearings. The husband had responded to the petition and was actively participating in the case. Furthermore, the communications from the wife's attorney to the husband would lead to the logical conclusion that the trial was not near.

Furthermore, the default Decree of dissolution had the practical result of awarding the wife 100% of the community property, 100% of the husband's civil service retirement, lifetime maintenance that exceeds the husband's net income, and which continues after the husband's death. All

Decrees, even one's entered by default, must provide for the fair and equitable distribution of property and liabilities. The Decree presented by the wife can hardly be considered equitable and should be vacated.

5.3 The trial court erred in not vacating the order of default and decree because the respondent's failure to appear at the trial was occasioned by mistake, inadvertence, irregularity or excusable neglect.

Even if husband was not entitled to notice prior to entry of default, he is still entitled to an order vacating the Decree. When considering whether to vacate a default judgment under CR 60(b), courts consider whether the defaulting party has shown:

(1) that there is substantial evidence to support at least a prima facie defense to the claim asserted, (2) that its failure to appear was occasioned by mistake, inadvertence, surprise, excusable neglect, or that there was an irregularity in obtaining the judgment, (3) that the party acted with due diligence after receiving notice that the default judgment was entered, and (4) whether substantial hardship would result to the plaintiff if the judgment were set aside.

*Sacotte Const., Inc.* 143 Wn. App at 418. Further, the court "will spend little time inquiring into the reasons for the failure to appear and answer if the moving party demonstrates a strong or virtually conclusive defense, the motion was timely, and the failure to appear was not willful." *Id.*

The husband has several defenses to the final orders entered in this matter. The Decree provides for an inequitable division of assets and

of the Decree. His response is reasonable and timely in light of the facts and circumstances of the case.

Since this is a dissolution action, the wife's claims are not bared by any statutes of limitations, and therefore, she will not be prejudiced by the vacation of the default orders because her claims are preserved. In light of the facts surrounding the husband's failure to appear at the time of trial, and in light of the inequality in the default Decree, these orders should be set aside and vacated under CR60(b).

## **VI. CONCLUSION**

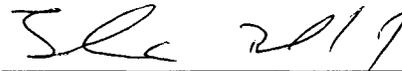
The court abused its discretion when it refused to set aside the order of default and refused to vacate the findings of fact/conclusions of law and decree of dissolution. Based upon the foregoing arguments and authority, the appellant, James Garlington respectfully request an order reversing the trial court's decision and setting aside the order of default, and vacating the decree of dissolution, findings of fact and conclusions of law.

In light of the fact that Judge Orlando explicitly stated on the record that "there is no declaration appellant could sign that he would find credible," the court should remand the case to a new trial judge at the Superior Court.

The appellant, James Garlington, respectfully request attorney's fees and cost for the appeal.

DATED this 2<sup>nd</sup> day of February, 2009.

RESPECTFULLY SUBMITTED



Thomas A. Baldwin, Jr., WSBA #28167  
Attorney for Appellant

## DECLARATION OF SERVICE

I, Amy L. Baldwin, declare under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct and based upon my own personal knowledge.

I certify that I caused one copy of the foregoing Brief of Appellant to be served on the following parties of record and/or interested parties by hand delivery, to the below named parties as follows:

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Dated this 2<sup>nd</sup> day February, 2010, at Puyallup, Washington.

  
\_\_\_\_\_  
Amy L. Baldwin