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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

BY cm
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In re Marriage of:

RICHARD B. FERGUSON,

Respondent

and

PAMELA M. FERGUSON,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE STEPHANIE A. AREND

BRIEF OF RESPONDENT, Richard B. Ferguson

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I.INTRODUCTION.....	1
II.STATEMENT OF THE CASE.....	1
A. Procedural History	
III. COUNTER – STATEMENT OF THE FACTS.....	3
IV. ARGUMENT.....	8
B. The Court Properly Exercised its Discretion in Refusing to Vacate the Decree of Dissolution And its Ruling Should be Affirmed.....	8
1. The Motion to Vacate was not Brought Within a "Reasonable time" Pursuant To CR(60)(b).....	8
2. The Trial Court had Discretion to Refuse to Vacate the Decree Because it was Not a "Void Judgment" under CR(60)(b)(5).....	9
3. The Decree is not a void Judgment or Order, therefore, CR(60)(b)(5) does not apply and the Trial Court’s order should be affirmed.....	8
C. The Trial Court properly exercised its discretion in Denying Pamela’s Request for Attorney’s Fees, and the court should award attorney’s fees to Richard for this appeal.....	14
V. CONCLUSION.....	16
DECLARATION OF SERVICE.....	17

TABLE OF AUTHORITIES
STATUTES

RCW 26.09.020.....12

RCW 26.09.140.....16

WASHINGTON CASES

Gustafson v. Gustafson, 54,
Wn.App 66, 772 P.2d 1031 (1989).....8

Marriage of Hardt, 39 *Wn.App.*
493, 693, P.2d 1386 (1985).....11

Marriage of Johnson, 107 *Wn.App.* 500,
27 P.3d 654 (2001).....10

Marriage of Leslie, 112 *Wn.2d* 612,
772 P.2d 10134 (1989).....9

In re Marriage of Burky, 36, *Wn.App* 487,
675, P.2d 619 (1984).....8

Stablein v. Stablein, 59 *Wn 2d* 465,
368 P.2d 174 (1962).....9, 11

Marriage of Flannigan, 42 *Wn.App* 214, 222-223,
709 P.2d 1247, Rev. Denied
1985).....8

WASHINGTON COURT RULES

CR 54(c).....9

CR 60.....2, 8, 13, 14

CR 60(b).....2, 8

CR 60(b)(4).....6

CR 60(b)(5).....2, 7, 8, 9, 16

CR 60(b)(11).....2

I. INTRODUCTION

Richard Ferguson requests the court affirm the trial court's entry of the Dissolution Decree entered on December 14, 2004, and also affirm the trial court's refusal to vacate the Decree.

II. STATEMENT OF THE CASE

A. Procedural History: This appeal stems from the underlying dissolution of marriage action.

Pamela Ferguson (hereinafter referred to as "Pamela" for clarity and meaning no disrespect) and Richard Ferguson (hereinafter referred to as "Richard" for clarity and meaning no disrespect) were married on November 23, 1992. CP 31.

The parties separated on April 2, 2004. CP 80.

Richard filed for dissolution on August 10, 2004. CP 1-5. Pamela was personally served with the Summons and Petition for Dissolution, and proposed Parenting Plan on August 12, 2004. CP 180. ¹ Pamela failed to appear or respond. CP 181.

On September 1, 2004, an Order of Default was entered against Pamela and a copy of the Order was mailed to her on September 3, 2004. CP 181. On October 1, 2004, the final Parenting Plan was entered and a copy was mailed to Pamela on October 5, 2004. CP 181.

1. On September 5, 2012 Richard filed his Supplemental Designation of Clerk's papers with the trial court and this court. References to CP 180-222 herein are to the page numbers set forth in that supplemental Designation of Clerk's papers.

Pamela failed to appear or respond after receiving these Orders. ² CP 181.

On December 14, 2004 Richard appeared in court and testified. RP 12-14-04 @ 4. The court entered the Decree of Dissolution on December 14, 2004. ³ CP 181.

On December 16, 2011, and over seven (7) years since the Decree was entered, Pamela moved for relief from judgment under CR 60. CP 25-30. The grounds for relief under CR 60(b) were as follows:

- (4) Fraud, misrepresentation, or other misconduct of an adverse party;
- (5) The judgment is void;
- ...
- ...
- (11) Any other reasons justify relief from the operation of the judgment. CP 25-30.

The court considered argument and on January 30, 2012 the Court Commissioner denied Pamela's motion on all grounds. RP 1-30-12 @ 25.

On February 2, 2012 Pamela moved the Court to revise the Court Commissioner's Order as it related only to the denial of her Motion to Vacate the Decree as a void judgment pursuant to CR 60(b)(5). CP 90-91. Pamela abandoned her Motion to Vacate on the grounds of fraud pursuant to CR 60(b)(4), and for any other reasons pursuant to CR 60(b)(11). CP 90-91.

On February 24, 2012 the Court considered argument and denied Pamela's Motion for Revision. RP 2-24-12 @ 19-20.

2. Pamela did not appeal the entry of the Default Order.

3. Three (3) days later, Pamela also filed a Petition for Equitable Distribution from a Committed Intimate Relationship

On March 2, 2012 Pamela moved the Court to reconsider its prior ruling. CP 92. The Court again heard argument, and on March 16, 2012 entered an Order denying the Motion for Reconsideration.

The Notice of Appeal was filed on April 6, 2012. CP 107.

III.COUNTER - STATEMENT OF FACTS

Pamela and Richard were married on November 23, 1992. CP 31. They have two (2) children, to wit: William, age 19 and Alex, age 17. CP 31. William attends Portland State University and Alex will be a senior at Curtis High School and resides with his father. CP 182. Richard has paid, and continues to pay, all of the expenses associated with William's post secondary education. CP 185.

Richard is a dentist and owns a dental practice which he purchased approximately three and a half (3.5) years prior to marrying Pamela. CP 203. Pamela is a smart and educated woman with a Master's Degree. CP 183. She has been employed as an Intervention Specialist at BCH Fairfax Hospital since 2006. CP 120.

The parties separated on April 2, 2004, when Pamela moved out of the family home and then completely abandoned the children for the next four (4) months. CP 80. Mutual altercations existed during the marriage and Pamela once pulled a knife on Richard and was subsequently taken to jail. CP 81.

Pamela was personally served with the Summons and Petition for Dissolution of Marriage, Confidential Information Form, and Proposed Parenting Plan on August 12, 2004. CP 180. It is uncontested by her that, after

having been personally served with these pleadings, she completely failed to respond or appear to this action. CP 181.

The Petition stated as follows:

¶ 1.8. There is community or separate property owned by the parties. The Court shall make a fair and equitable division of all the property.

3.9 . . . The Court shall make a fair and equitable division of debts and liabilities. . .

. . .

. . .

II. RELIEF REQUESTED

1. The Petitioner REQUESTS the Court to enter a Decree of Dissolution and to grant the relief below.

. . .

. . .

Divide the property and liabilities.

Pamela clearly knew a dissolution action had been commenced against her and that Richard was requesting the Court to dissolve the marriage and divide the property and liabilities. CP 61. Still, Pamela did nothing, even after she received the Order of Default and Final Parenting Plan, she did nothing to defend the action. CP 61.

On December 14, 2004, four (4) months after Pamela was served with the Dissolution action, and three (3) months after she received a copy of the Order of Default, the Decree of Dissolution of Marriage was entered. CP 181. The Decree dissolved the marriage, set forth the parties' community and separate property, divided the property, and allocated liabilities, CP 16-24. The Decree was presented to the court Commissioner Pro-Tem for his review prior to the commencement of formal proof. RP

12/14/04 @ 3. Richard provided testimony that the distribution of property and debt as set forth in the Decree was fair and equitable. RP 12/14/04 @ 6.

On or about January 1, 2005, Pamela began residing with Richard and the children in Richard's Gig Harbor home. CP 81. Pamela saw the Decree while residing there and knew she and Richard were divorced. CP 183 and CP 219. ⁴ Additionally, the children knew their parents were not married and Pamela acknowledged to the boys that she and Richard were

During the time Richard and Pamela resided together, things had changed from when they were married. They did not have joint financial accounts, wedding rings were not worn, anniversaries were not celebrated, they would sleep in separate rooms, sometimes they would sleep together, they purchased goods separately, and more. CP 183. They each filed individual tax returns. CR 84. This arrangement continued until about June, 2011. The relationship between them began to deteriorate and Richard wanted Pamela to move out. She refused and Richard was forced to have her evicted. CP 50-59, 87. The eviction process lasted about two (2) months and Pamela was ousted 88. from the home on or about November 17, 2011. CP 50-59, 87. Pamela commenced her legal action against Richard less than one (1) month later. CP 25-30.

On December 16, 2011, and over seven (7) years after the Decree was entered, Pamela filed a Motion to Vacate the Decree and the Final Parenting

4. Pamela initially alleged that she did not discover her marriage to Richard was dissolved until November 17, 2011, when she was evicted from Richard's home.

Plan based upon CR 60(b)(4), (5), and (11). CP 25-30. In support of her motion, Pamela filed declarations under penalty of perjury stating that "for the past seven (7) years I believed the two of us to be married." CP 33. Pamela also declared that ". . . I recently found out that Richard had lied to me and had obtained a dissolution by default." CP 33. She further declared that "Richard and I have been married since 1992 and that I did not believe at any point that we were divorced, nor was I aware of any final pleadings." CP 33-34. All of these statements were completely false. CP 184. Pamela was well aware that her marriage to Richard was dissolved in December, 2004. CP 184. Yet, she intentionally made these false statements to the court to support her allegation of fraud against Richard. CP 79-80. It was only after Richard provided the court with substantial evidence that Pamela knew their marriage had been dissolved that she finally admitted knowing of the dissolution, and abandoned the fraud claim. ⁵CP 85.

On January 30, 2012, Court Commissioner Mark L. Gelman heard oral argument on Pamela's Motion to Vacate the Decree of Dissolution of Marriage and denied her motion. RP 1-30-12 @ 25. Commissioner Gelman discussed the issue of whether the Decree was void and commented: ". . . you know, things I like to see in Final Decrees are, you know, actual estimated, or at least fair market value or approximate estimated value of assets so that I know I can ascertain whether I have got fair and equitable distribution." RP 1-30-12 @ 24.

5. The substantial evidence Richard provided were declarations from Pamela's and Richard's counselor (John Shobe) and their son (William Ferguson) CP 219-222.

". . . and again, **(I don't see anything that causes me to vacate this Decree based upon that [sic] grounds under CR 60(b)(5).)** The Motion to Vacate is denied. RP 1-30-12 @ 25." Emphasis added.

The Commissioner then held Clearly, Commissioner Gelman considered all of the materials submitted by both parties and explained his ruling. Additionally, Commissioner Gelman never ruled on Pamela's request for attorney's fees, and Pamela's counsel never requested an award of attorney's fees at the hearing. RP 1-3-12 @ 1-20.

On February 2, 2012 Pamela filed a Motion to Revise Commissioner Gelman's ruling, but limited the revision to the denial of her CR 60(b)(5) Motion to Vacate the Decree as a void judgment. CP 90-91. The trial court upheld Commissioner

Gelman's ruling and denied Pamela's Motion for Revision. RP 2-24-12 @ 19-20. The trial court found that it could not determine whether the Decree's distribution of property and debt was not fair and equitable, or different in kind, as argued by Pamela's counsel. RP 2-24-12 @ 19.

On March 2, 2012 Pamela filed a Motion for Reconsideration of the trial court's order on Motion for Revision dated February 24, 2012. The trial court denied the Motion for Reconsideration, and clarified its prior ruling by making it clear that it could not, as a matter of law, declare that the Decree was a void judgment and, therefore, the court did not need to address the issue of whether it has discretion to vacate void judgments:

". . . so I could not, as a matter of law, declare that the judgment was void. And I did not declare that the judgment was void."

"So you don't need to get to the issue of, is it discretionary or is it not discretionary," RP 3-16-12 @ 13.

On April 6, 2012 Pamela filed a Notice of Appeal.

IV. ARGUMENT

A. GENERAL STANDARD OF REVIEW

1. A trial court's decision whether to grant a CR 60 Motion to Vacate a judgment is within the trial court's sound discretion and will not be revised absent a manifest abuse of that discretion. *Gustafson v. Gustafson*, 54 Wn.App. 66, 70, 772 P.2d 1031, 1034 (1989). A trial court manifestly abuses its discretion if its decision is based on untenable grounds or reasons. In re *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1987). Abuse of discretion requires a finding that no reasonable person would have reached the same decision of the court. In re *Marriage of Burky*, 36 Wn.App 487, 489, 675 P.2d 619 (1984). Substantial policy favoring finality of judgments must be considered before exercising the discretion to vacate a final order. *Marriage Flannigan*, 42 Wn. App 214, 222, 223, 709 P.2d 1247, Rev. Denied (1985).

B. THE COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO VACATE THE DECREE OF DISSOLUTION AND ITS RULING SHOULD BE AFFIRMED.

1. The Motion to Vacate was brought within a "reasonable time" Pursuant to CR 60(b).

CR 60(b)(5) Motions apply to "void" judgments only. If the judgment is not void, the Motion to Vacate must be brought within a reasonable time. CR 60(b). Even if it was conceded that if a judgment or order is found to be void, the Motion to Vacate it may be brought at any time pursuant to *Marriage*

of *Leslie*, 112 Wn.2d 612 (1989), the trial court never reached this issue because it did not find or rule that the judgment (Decree) was void. RP 3-16-12 @ 13. The courts commentary following its holding that the judgment (Decree) was not void is simply dicta, but if it is categorized as a holding by this court, then it is respectfully submitted that it is harmless error.

2. The trial court had discretion to refuse to Vacate the Decree because it was not a “Void Judgment” under CR 60(b)(5).

The trial court did not declare that the Decree was a void judgment. RP 3-16-12 @ 13. That was the crux of its ruling. Therefore, the court did not need to address the issue of whether it has discretion to vacate void judgments. The trial court's implication that CR60(b) provides it with discretion to vacate void judgments, if contrary to law is, therefore, is again harmless error.

3. The Judgment (Decree) is not Void, so CR 60(b)(5) does not apply.

A default judgment may not provide relief "different in kind from or exceed in the amount that prayed for in the demand for judgment." CR 54(c). "If the order entered by default exceeds the demand of the complaint, the amount in excess of the complaint is void." *Stablein v. Stabein*, 59 Wn.2d 465 (1962).

On August 10, 2004, Richard filed a Petition for Dissolution of Marriage with the court which provided as follows:

- 1.8 COMMUNITY OR SEPARATE PROPERTY
There is community or separate property owned by the parties. The court should make a fair and equitable division of all property." "The division of the property should be determined by the court at a later date."

1.9 DEBTS AND LIABILITIES.

The parties have debts and liabilities. The court should make a fair and equitable division of all debts and liabilities. The division of debts and liabilities should be determined by the court at a later date.

These two provisions were a basis for the Petition. Richard was not required to specifically list his proposed division of assets and debts, and this has been confirmed by Pamela's counsel and the court. RP 2-24-12 @ 17-18. Again, the basis for the Petition is that the court should make a fair and equitable division of all property and debts, and determine the division at a later date. The Petition also provides as follows:

II. RELIEF REQUESTED

The Petitioner REQUESTS the court to enter a Decree of Dissolution and to grant the relief below.

...
...

Divide the property and liabilities.

The Decree dissolved the marriage and divided the property and liabilities of the parties. Accordingly, the relief granted mirrored the relief requested by entering a Decree and dividing the property and liabilities of the parties, and there was not error.

Pamela, however, now argues that the Decree is void because it granted relief different from what was requested in the Petition under the test set forth in *Marriage of Johnson*, 107 Wn.App. 500, 27 P.3d 654 (2001). Basically, Pamela is arguing that she did not have notice of the contents of the Decree,

and therefore, the Decree is void. Pamela's argument is misplaced and the facts of our case are much different than in *Marriage of Johnson*.

In *Marriage of Johnson*, the Petition for Dissolution alleged that the family home was worth \$280,000.00 and that each party shall receive half of its value. Id @ 502.

Mr. Johnson was served with the Petition and defaulted. Subsequently, the Decree awarded Ms. Johnson a judgment against Mr. Johnson in the sum of \$140,000.00 with interest at 12% per annum. Id @ 503. It also required Mr. Johnson to execute a Deed of Trust securing Ms. Johnson's interest of \$140,000.00 in the family home. Id @ 503. The court held that the Decree substantially varied from the Petition with respect to the house, provided inadequate notice to Mr. Johnson, violated Mr. Johnson's due process rights, and was therefore void with respect to the house. Id @ 504.

In Johnson, the Petition provided for a specific relief and gave Mr. Johnson sufficient notice that if he defaulted, each party would receive half the value of the house. However, the Decree went beyond that and exceeded the relief requested, especially with respect to the interest attached to Ms. Johnson's judgment.

The majority, if not all, of the other cases cited by Pamela relate to child support amounts ordered in the Decree which exceeded the specific amounts requested by the Petition. See Marriage of Hardt, 39 Wn.App 493 (1985) and Stablein v. Stablein, 59 Wn.2d. 465 (1962). In these cases, the court voided the amounts that exceeded the specified amounts in the Petition.

In all of these cases, the responding party had sufficient notice of the specific relief requested in the Petition to make an intelligent decision to appear and contest, default. However, the Decree or judgment entered by default exceeded that relief. This is not the case here.

It is uncontested by Pamela that, after having been personally served with the Summons and Petition for Dissolution, she completely failed to appear or respond to the legal action filed against her. CP 61. Clearly, she was aware that Richard was seeking to dissolve their marriage and have their assets and debts divided by the court. CP 181. Pamela is a smart and educated woman with a Master's Degree. CP 183. Yet, now she argues that she did not have "sufficient notice to make an intelligent decision to appear or default" because Richard never provided her with a specific proposal of a property and debt distribution. Again, the statute does not require a Petition in a dissolution action to specifically set forth a list of proposed property and debt division and Pamela agrees with this contention. RP 12/24/12 @ 17 & 18;7 RCW 26.09.020. The Summons and Petition notified Pamela that if she defaulted, the court would determine the distribution of property and debts at a later date. CP 1-5. It also requested the court to enter a Decree, which dissolved the marriage. CP 1-5. The Order of Default was mailed to Pamela on September 3, 2004. CP 181. The Final Parenting Plan which restricted her residential time with the children was mailed to Pamela on October 5, 2004. CP 181. Clearly, the receipt of all these pleadings would provide any reasonable person, and especially Pamela, with "sufficient notice to make an intelligent decision to

appear or default" in a legal action filed against her. The Decree did not vary from the Petition and the Summons and Petition provided adequate notice to Pamela that the court would divide the property and liabilities of the parties as requested in the Petition if she did not respond or appear. Accordingly, Pamela received adequate notice, her due process rights were not violated, and the Decree is not void.

Pamela argues further that the Decree did not divide the property fairly and equitably as the court is required to do and is, therefore, void. On December 14, 2004 Richard appeared in court and presented formal proof of the Findings of Fact and Conclusions of Law, and the Decree of Dissolution of Marriage. RP 12/14/02 @ 4. The pleadings were presented to the court for review and approval. RP 12/14/02 @ 3. The Decree distributed the parties' property and liabilities, as requested in the Petition for Dissolution. CP 24. After Richard was sworn and under oath, he testified that the distribution of property and allocation of debts as contained in the Decree was fair and equitable. RP 12/14/02 @4.

Pamela now asserts, over seven (7) years later, that the distribution of property and debts as set forth in the Decree was not fair or equitable, yet she has failed to provide any proof at all to support her claim. CP 63. Richard respectfully submits that the issue of whether the Decree divided property and debts fairly and equitably is not before the court when determining challenges in the context of an appeal from a CR 60 vacate motion. Pamela is, in effect, alleging an error in the underlying dissolution Decree/judgment

because the division was not fair or equitable. However, the alleged error appear to be outside the scope of proper challenges to the trial courts denial of Pamela's CR 60 Motion to Vacate. Regardless, because Pamela goes to great lengths to persuade this court that the final distribution of property and debts was "extremely one-sided," a response is necessary. Pamela argued below that Richard received the Gig Harbor "waterfront" home, five (5) parcels of real property, his dental practice, any and all retirement accounts in his name, and an Alfa Romeo automobile, all of which were "community property." CP 18, 22-24. In order to combat the appearance that the Decree was not fair or equitable, Richard filed documents with the court which demonstrated that he had inherited, or was gifted, the five (5) parcels of real property from his mother on August 5, 2003. CP 180-218. These parcels were listed as Richard's separate property in Exhibit "A" to the Findings of Fact and Conclusions of Law and the Decree. CP 23-24. Richard also filed documentation with the court demonstrating that he purchased his dental practice, including all the assets, in 1988 and he purchased the building on December 18, 1989, all prior to his marriage on November 23, 1992. CP 180-218.

Further, the Gig Harbor "waterfront" home, the Decree lists its value at five hundred thousand dollars (\$500,000.00) and Richard filed a declaration stating that the indebtedness thereon at the time the Decree was entered was approximately four hundred seventy thousand dollars (\$470,000.00), and that he also used approximately fifty thousand dollars (\$50,000.00) of his separate funds as a down payment. CP 64. Furthermore, Richard was allocated almost

all of the debt, which included approximately fifteen thousand five hundred dollars (\$15,500.00) to the IRS, as reflected in the Decree. CP 64. Pamela has never denied any of these facts.

Accordingly, the Petition noted that the parties have separate and community assets and liabilities. The Petition requested a fair and equitable distribution of the assets and liabilities. The Decree set forth the separate and community property of the parties and granted relief which mirrored the relief requested and, therefore, there was not error by the trial court.

**C. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION IN DENYING PAMELA'S REQUEST FOR
ATTORNEY'S FEES, AND THE COURT SHOULD AWARD
ATTORNEY'S FEES TO RICHARD FOR THIS APPEAL.**

Interestingly, in all the hearings below, Pamela's counsel never argued the issue of attorney's fees. RP 1-30-12, 2-24-12, and 3-16-12. Pamela's pleadings requested attorney's fees, but her counsel never requested them during oral argument. RP 1-30-12, 2-24-12 and 3-16-12. That is probably why the court did not specifically address the issue of attorney's fees.

Richard's financial declaration clearly shows that he does not have the ability to pay Pamela's attorney's fees. CP 163-168. Richard's monthly expenses substantially exceed his monthly net income. CP 163-168. Among Richard's monthly expenses are his son's college tuition, room and board, and other educational costs in the sum of approximately "\$2,800" per month. CP 167. Richard's monthly expenses do not include the significant attorney's fees

he has incurred since January 24, 2012. CP 168. The trial court did not error in denying Pamela's request for attorney's fees.

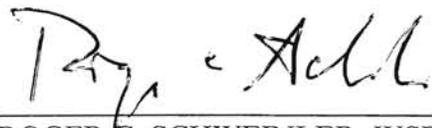
Richard should be awarded reasonable attorney's fees and costs for responding to this appeal. Richard has been forced to incur substantial attorney's fees based upon Pamela's bad faith conduct.

Pamela filed her Motion to Vacate the Decree on several grounds and alleged that she never knew that her marriage was dissolved in December, 2004. Richard was then forced to defend against her claims and provided proof that her allegations were false. CP 219-222. Pamela then abandoned two (2) of her causes of action. Richard submits that Pamela did not bring her legal action against him in good faith. Furthermore, Richard has prevailed at every hearing leading up to this appeal. Pamela's appeal does not have merit and Richard respectfully requests an award of attorney's fees.

V. CONCLUSION

The court should affirm the trial court because the Decree is not a void judgment or order pursuant to CR 60(b)(5), and should not be vacated.

RESPECTFULLY SUBMITTED THIS 5th day of September, 2012.



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