

FILED
COURT OF APPEALS
DIVISION II

2014 OCT -9 PM 1:24

No.: 46298-2-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY.


DEPUTY

TIMOTHY PUTMAN, *Appellant*,

v.

DEANNE PUTMAN, *Respondent*.

REPLY BRIEF OF APPELLANT

Jennifer B. Johnson
WSBA #28227
Attorney for Appellant
P.O. Box 238
366 SW 13th Street
Chehalis, WA 98532
(360) 748-2111

ORIGINAL

I. ASSIGNMENTS OF ERROR & ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
A. <u>Assignments of Error</u>	1
B. <u>Issues Pertaining to Assignments of Error</u>	1
II. STATEMENT OF THE CASE.....	1
III. REPLY ARGUMENT.....	1
A. <u>Standard of Review</u>	1
B. <u>Mere allegations that the “findings” lack reference to property and obligations of the parties do not satisfy Deanne’s burden under CR 60(b)(1) and <i>White</i></u>	1
C. <u>The default judgment cannot be different in kind or exceed in amount that prayed for in the petition</u>	5
D. <u>The IRS obligation was addressed in the decree</u>	6
1. <u>The IRS debt is a corporate debt</u>	7
2. <u>The IRS debt is a personal debt of the parties</u>	7
E. <u>Vacation of default judgment is not the appropriate way in which to address undistributed assets and debts</u>	8
1. <u>An independent action for partition, declaratory relief or contribution is the proper procedure to adjudicate assets and debts not distributed by the decree</u>	8
2. <u>A motion for clarification is the proper procedure to address ambiguities in a decree with respect to distribution of assets and debts</u>	10
F. <u>Deanne did not seek to vacate the Final Order of Child Support/Order Re Post-Secondary Education Support and thus vacation of the same was in error</u>	10

G. Excusable neglect and substantial hardship.....11

H. Attorney Fees and Costs.....11

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

Table of Cases

<i>Hanson v. Hanson</i> , 55 Wn.2d 884, 887, 350 P.2d 859 (1960).....	9
<i>Little v. King</i> , 160 Wn.2d 696, 706, 161 P.3d 345 (2007).....	6
<i>In re Marriage of de Carteret</i> , 26 Wn. App. 907, 615 P.2d 513 (1980)	8
<i>In re Marriage of Jarvis</i> , 58 Wn.App. 342, 792 P.2d 1259 (1990).....	10
<i>In re Marriage of Monaghan</i> , 78 Wn. App. 918, 899 P.2d 841 (1995).....	10
<i>In Re the Marriage of Steadman</i> , 63 Wn.App. 523, 526, 821 P.2d 59 (Div. 1, 1991).....	4
<i>In re Marriage of Tang</i> , 57 Wn. App. 648, 655-56, 789 P.2d 118 (1990)	8,9
<i>Ross v. Pearson</i> , 31 Wn.App. 609, 643 P.2d 928, <i>review denied</i> , 97 Wn.2d 1030 (1982).....	8
<i>Wagers v. Goodwin</i> , 92 Wn. App. 876, 964 P.2d 1214 (1998)	8
<i>White v. Holm</i> , 73 Wn.2d 348, 352, 438 P.2d 581 (1968).....	1, 5, 9

Statutes

RCW 26.09.080	5
RCW 26.19.090	11

Rules

CR 15	6
CR 52	1
CR 52(a)(2)(B).....	1
CR 54(c).....	5
CR 60(b)(11).....	8

I. ASSIGNMENTS OF ERROR &
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments of Error

The Appellant, Tim Putman, relies on the Assignments of Error set forth in his Opening Brief.

B. Issues Pertaining to Assignments of Error

The Appellant, Tim Putman, relies on the Issues Pertaining to Assignments of Error set forth in his Opening Brief.

II. STATEMENT OF THE CASE

The Appellant, Tim Putman, relies on the Statement of the Case set forth in his Opening Brief.

III. REPLY ARGUMENT

A. Standard of Review.

The Appellant, Tim Putman, relies on the Standard of Review set forth in his Opening Brief.

B. Mere allegations that the “findings” lack reference to property and obligations of the parties do not satisfy Deanne’s burden under CR 60(b)(1) and *White*.

Under CR 52, “findings and conclusions are required... in connection with all final decisions... in divorce proceedings.” CR 52(a)(2)(B). CR 52 is silent as to what constitutes adequate findings and conclusions. See CR 52. In compliance with CR 52, Findings of Fact and

Conclusions of Law were entered in the present case. CP 26-31; 33. In the present case, the trial court determined the findings were entered after Tim appeared in court on December 11, 2013 and “gave testimony as to the Court’s jurisdiction, the irretrievably broken state of the parties’ marriage, the fairness and equity of his proposed asset and debt distribution, the dependency of the parties’ son, and the son’s need for post-secondary education support.” CP 147-48. The trial court determined the findings of fact and conclusions of law to be “necessary and appropriate...” CP 148. “Upon entering the necessary and appropriate findings..., a decree of dissolution of the parties’ marriage and final order of child support/order re: post-secondary education support were entered the same day.” CP 148.

Despite the contents of the Findings of Fact and Conclusions of Law, the trial court’s determination that the findings were necessary and appropriate, and Deanne’s failure to assert error with respect to the trial court’s determination, Deanne now alleges as her defense, “There is not a single reference to the extent of either the community or the separate property contained in the ‘findings’ entered by default,” *Respondent’s Brief*, at 8. Deanne’s allegation, however, is not supported by the record. The Findings of Fact and Conclusions of Law provide an extensive list of the community and separate property known to Tim. CP 27-28. The

items on this list are the same items set forth in the First Amended Petition for Dissolution of Marriage. CP 11-13. To Tim’s knowledge, all of their assets and debts were set forth in the documents. CP 101. Additionally, Deanne fails to identify or provide competent evidence of any specific item of community or separate property owned by the parties that is absent from the findings, or the decree for that matter.

Next, Deanne alleges as her defense that “the findings do not reference any specific obligation of the parties; nor [sic] any amount owing thereon.” *Respondent’s Brief*, at 8. However, several specific obligations of the parties are referenced in the Findings of Fact and Conclusions of law, namely, the debt on the home to PNC Mortgage, the debt on the 2003 Larson 190¹ to Bank of America, the debt on the 2013 Acura ILX to BECU, and the personal debts for which the parties or either of them may have a responsibility to pay with regard to the commercial property and the insurance companies. CP 32-33. Tim could not provide any more specificity with respect to the personal debts related to businesses because “[he] had no material participation in the insurance brokerage corporations.” CP 102.

Deanne also alleges the findings failed to identify a \$100,000 debt to the IRS.” *Respondent’s Brief*, at 8. Tim thoroughly addressed this

¹ This is a specific type of motor boat.

issue in his Opening Brief and relies on the same in addition to his reply set forth separately herein below.

Deanne goes on to allege that the findings “fail to... describe the economic circumstances of either party.” *Respondent’s Brief*, at 8. However, her position is contrary to law. This issue was addressed in *In Re the Marriage of Steadman*, 63 Wn.App. 523, 526, 821 P.2d 59 (Div. 1, 1991). In *Steadman*, the husband asserted the trial court erred in making the property division because, among other things, the court failed to consider his economic circumstances. *Id.* The *Steadman* court indicated the husband’s contention that formal findings were required was without merit. The *Steadman* court stated, “There is no such obligation. The obligation is to *consider* the respective circumstances of the parties.” *Id.*, at 526 (Emphasis added.) That the court met its obligation to consider the economic circumstances of the parties may be demonstrated by the findings and the oral opinion of the court. *Id.*

In the present case, the court took testimony from Tim as to the fairness and equity of his proposed asset and debt distribution, entered findings of fact and conclusions of law based on the testimony, and adopted a decree of dissolution in conformity with the First Amended Petition for Dissolution of Marriage, Tim’s testimony, and the Findings of Fact and Conclusions of Law. It is evident and reasonable to infer that the

court considered the factors set forth in RCW 26.09.080 in reaching its conclusion that the division was fair and equitable. Deanne makes no assertion that the court did not consider the economic circumstances of the parties, only that no formal findings were made. Therefore, her argument fails.

Despite all of Deanne's baseless assertions, Deanne has at no point actually asserted that the division of the assets and debts ordered by the court to be unfair or inequitable, nor did she present any evidence that, if believed, would lead a trier of fact to conclude the division of assets and debts was unfair, unjust or inequitable. Deanne has failed to establish the first factor of *White*. She failed to provide evidence to demonstrate that she has a prima facie defense to the claims made by Tim.

C. The default judgment cannot be different in kind or exceed in amount that prayed for in the petition.

"A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." CR 54(c). Under CR 54(c), Tim had an obligation to and did present default final orders consistent with the proposal for distribution of assets and debts and award of post-secondary education support set forth in the First Amended Petition. CR 54(c). By receipt of the summons, Deanne was on notice that if she did not serve her written response within 20 days after the date

the summons was served on her, the court may enter an order of default against her and the court may, without further notice to her, enter a decree and approve or provide for the relief requested in the petition. CP 5. Deanne was given an additional ten (10) days to respond after service of the First Amended Petition for Dissolution of Marriage. CR 15. If Deanne thought something was missing, it was incumbent on her to appear and respond to the action, not sit idly by and ignore the court action.

Further, and more importantly, Deanne fails to provide any *evidence* that would demonstrate any assets or debts were missing from the findings or decree, nor does she provide any *authority* that would indicate the findings were deficient. (Emphasis added.) The trial court did not find the Findings of Fact or Conclusions of Law to be lacking. Even if more formal findings of fact and conclusions of law were necessary “remand for their entry would be appropriate, not vacation of the default judgment.” *Little v. King*, 160 Wn.2d 696, 707, 161 P.3d 345 (2007).

D. The IRS obligation was addressed in the decree.

Tim’s position is that the trial court committed error in finding the IRS debt was not dealt with in the decree and in granting the motion to revise thereby vacating the default final orders. *Appellant’s Opening*

Brief, Assignments of Error No. 5 and 7, at 1. Tim's position is accurate on multiple theories.

1. The IRS debt is a corporate debt.

Deanne's states, "The corporation owes almost \$100,000 to the IRS." CP 38. If Deanne's statement is to be believed on its face, the IRS obligation is a debt of the corporation, not a debt of the individual parties. Thus, the IRS debt is not subject to distribution in the dissolution decree because the trial court lacks jurisdiction over the corporation. If this is the case, the trial court erred in inferring that the IRS should have been dealt with in the decree, as the debt is for the corporation to pay, not the parties. Deanne was awarded all interest in the parties corporations and LLC, and as the sole shareholder or member, respectively, she has full authority to govern how the corporation pays the IRS obligation.

2. The IRS debt is a personal debt of the parties.

If the IRS obligation is not a corporate obligation as Deanne asserts, then it is a personal debt related to the corporation distributed in Sections 3.3 & 3.5 of the Decree of Dissolution. Pursuant to Section 3.5 of the Decree of Dissolution, "The division of debts and liabilities is set forth in §3.3." CP 35. Section 3.3 states, in pertinent part:

10. Any and all personal debts for which the parties or either of them may have a responsibility to pay with regard to Main

Street Plaza, LLC; Twin City Insurance, LLC; Deanne Putman Insurance Agency, Inc.; and Putman Insurance Agency, Inc.

CP 34. Therefore, the IRS obligation is addressed in the decree, and the court erred in determining otherwise.

E. Vacation of default judgment is not the appropriate way in which to address undistributed assets and debts.

A motion to vacate a default judgment will generally fail as a procedure for adjudicating the parties' rights with respect to undistributed property and debts not disposed of by the decree. Parties in numerous cases have been denied relief under CR 60(b)(11) because an independent action is the appropriate action in which to adjudicate the rights of the parties with respect to undistributed property and debts not disposed of by the decree. *See, e.g., Ross v. Pearson*, 31 Wn.App. 609, 643 P.2d 928, *review denied*, 97 Wn.2d 1030 (1982); *Wagers v. Goodwin*, 92 Wn. App. 876, 964 P.2d 1214 (1998). An action to adjudicate rights in the original action should be dismissed without prejudice. *In re Marriage of de Carteret*, 26 Wn. App. 907, 615 P.2d 513 (1980).

1. An independent action for partition, declaratory relief or contribution is the proper procedure to adjudicate assets and debts not distributed by the decree.

The proper procedure for seeking adjudication of rights in assets not distributed by the decree is an independent action for partition of real property or declaratory relief as to all other property. *In re*

Marriage of Tang, 57 Wn. App. 648, 655-56, 789 P.2d 118 (1990). Community debts not disposed of by the decree become the joint and equal liabilities of the parties. *Hanson v. Hanson*, 55 Wn.2d 884, 887, 350 P.2d 859 (1960). Payment of a joint debt by a joint obligor will sustain an action for contribution. *Hanson*, at 888. It will also entitle a former spouse who pays the undistributed debt post decree to offset of the amounts owed to the other spouse. *Hanson*, at 888.

While Deanne provided no evidence of assets or debts in existence which were not set forth in the findings and decree, the trial court vacated on this mere allegation. The trial court rationalized:

We have the fact that there are assets, debts, the IRS debt for \$100,000 that is sitting out there that is not dealt with in this decree. It's a case where there's going to be ongoing litigation. Something is going to have to happen to clear some of these things. And, I can see that this case is going to have to come back in any event. So the – in this case I think there is – I think there is a basis to proceed to a trial on this.

CP 141-42. After giving its rationale for granting revision and vacating the default judgment, the trial court moves to the *White* factors and found they had been met, despite no supporting facts or evidence. This was an abuse of the trial court's discretion. If the court believed there were assets and debts not disposed of in the decree, it should have denied the motion

to vacate without prejudice in favor of an independent action as required by the case law set forth above.

2. A motion for clarification is the proper procedure to address ambiguities in a decree with respect to distribution of assets and debts.

There is one other alternative procedure, a motion for clarification. Tim's position is that all known assets and debts were addressed in the decree. Deanne's position, without providing evidence of the same, is that the language of the decree is not specific. In actions involving ambiguous language, it may appear that an asset was disposed of by the decree although the language of the decree is subject to interpretations. In that case, a motion to clarify is a property procedure to bring the decree back before the trial court. *In re Marriage of Monaghan*, 78 Wn. App. 918, 899 P.2d 841 (1995). A clarification of a decree explicitly defines the rights and obligations that were previously granted. *In re Marriage of Jarvis*, 58 Wn.App. 342, 792 P.2d 1259 (1990).

- F. Deanne did not seek to vacate the Final Order of Child Support/Order Re Post-Secondary Education Support and thus vacation of the same was in error.

Deanne did not seek to vacate the Order of Child Support/Order Re Post-secondary Education Support. CP 37. Therefore, the trial court's vacation of the support order was an abuse of discretion. It should never have been vacated on revision as the revision court has no authority to

make determinations beyond the scope of the requests made by the moving party.

Despite the fact that Deanne did not seek to vacate the support order, she now alleges the findings fail to describe any factual basis for awarding post-secondary education support. *Respondent's Brief*, at 8. Her assertion is belied by the findings and conclusions entered with the default judgment. Finding of Fact 2.17 states indicated Derek was “over 18, but remains dependent upon both spouses.” CP 34. Finding of fact 2.20 states, “Derek is in need of post-secondary education support. Child support should be set pursuant to RCW 26.09.090² [sic].” These determinations were made by the court after receiving testimony from Tim as to Derek’s need for post-secondary education support.

G. Excusable neglect and substantial hardship.

Tim relies on the statement of facts and argument set forth in his Opening Brief as to the issues of excusable neglect and substantial hardship.

H. Attorney Fees and Costs

Tim relies on his Opening Brief as to the issue of attorney fees and costs.

IV. CONCLUSION

² The reference to RCW 26.09.090 is a clerical error. The findings should have referred to RCW 26.19.090, the post-secondary education support statute.

Tim respectfully requests that the Court of Appeals reverse the trial court's order vacating the final orders entered December 11, 2013, reinstate the Decree of Dissolution, Findings of Fact and Conclusions of Law, and Final Order of Child Support/Order Re: Post-Secondary Education Support entered December 11, 2013, and award attorney fees to Tim in total.

Respectfully submitted this 8th day of October 2014.



Jennifer B. Johnson
WSBA #28227
Attorney for Appellant

2014 OCT -9 PM 1:24

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY  _____
DEPUTY

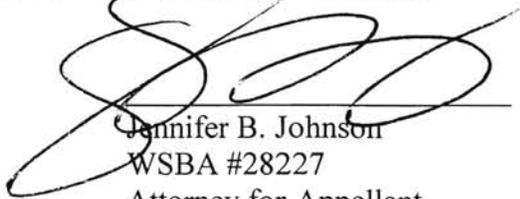
In re the Marriage of:)
TIMOTHY PUTMAN,)
Appellant,)
vs.)
DEANNE PUTMAN,)
Respondent.)

No.: 46289-2-II

DECLARATION OF
SERVICE

I, Jennifer B. Johnson, hereby declare under penalty of perjury under the laws of the State of Washington that on October 8, 2014, I caused to be hand-delivered a true and correct copy of the Reply Brief of Appellant to the law office of Margaret Brost, Attorney for Respondent, Deanne Putman, located at 1800 Cooper Point Rd. S.W. #18, Olympia, Washington 98502.

Signed this 8th day of October 2014, at Chehalis, Washington.


Jennifer B. Johnson
WSBA #28227
Attorney for Appellant