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No. 65937-5-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Marriage of  
KRISTOPHER SCOTT MYERS  
Appellant  
and  
MELANIE ELAINE MYERS  
Appellant

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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BRIEF OF RESPONDENT

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PATRICIA NOVOTNY  
Attorney for Respondent  
3418 NE 65th Street, Suite A  
Seattle, WA 98115  
(206) 525-0711

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## I. INTRODUCTION

While Melanie Myers was suffering a life-threatening mental breakdown and incidental misfortunes, her husband, Kristopher Myers, obtained an order of default dissolving their one-year marriage. The decree awarded him a judgment of a quarter million dollars against an inheritance Melanie was due to receive from her father, who died while the dissolution was pending. Kristopher already had taken from Melanie an additional quarter million from this same inheritance, promising to use the funds to help her – a promise left utterly unfulfilled. Kristopher also promised her that she did not need to take any action in the divorce, and, Melanie, penniless, homeless, and seriously ill, relied on that promise. She found out Kristopher had obtained a default when he withdrew additional funds from her father's account. In the interests of equity and justice, the trial court vacated the decree and set the matter for trial. The only issue on appeal is whether the trial court, in requiring a trial on the merits, abused its discretion.

## II. RESTATEMENT OF ISSUES

1. Is a decision to vacate a default judgment reviewed for an abuse of discretion?

2. Is a decision to vacate a default judgment given even more deference than a refusal to vacate a default judgment, because the law so heavily favors a determination of cases on their merits?

3. When a judgment has been entered, does CR 60(b) govern motions to vacate that judgment, rather than CR 55?

4. Where a judgment has been entered by default, and the court analyzes whether to vacate that judgment under CR 60(b)(1) (i.e., on grounds of mistake, etc.), do the four factors of *White v. Holm, infra*, apply, and do they apply only to this provision of CR 60(b)?

5. When the court considers whether the moving party has established prima facie a meritorious defense, as part of the analysis under CR 60(b)(1), is the court required to view the evidence in the light most favorable to the moving party?

6. When the court finds the moving party has satisfied the four factors under CR 60(b), are those findings entitled to deference?

7. Where a spouse in a dissolution proceeding is disabled by a life-threatening depression, may a trial court vacate a

default decree on the basis of CR 60(b)(2), because of “unsound mind”?

8. May this Court affirm the trial court on any basis supported by the pleadings and the evidence?

9. Would the court also have been justified in vacating this default decree under CR 60(b)(4), for fraud, misrepresentation, or misconduct, where one spouse repeatedly breached his fiduciary duties?

10. Would the court also have been justified in vacating this default decree under CR 60(b)(9), for “unavoidable casualty or misfortune”?

11. Do the extraordinary circumstances here also justify vacating the decree under CR 60(b)(11)?

12. Did the court abuse its discretion when it denied reconsideration?

13. Should the wife receive her attorney fees on appeal?

### III. RESTATEMENT OF THE CASE

#### A. THE PARTIES WERE MARRIED FOR ONLY ONE YEAR.

Kristopher and Melanie married May 2007, a second marriage for both. CP 94. The record reveals little about the

marriage, including, pertinently, any relationship Kristopher may, or may not, have had with Melanie's father. See, e.g., CP 225-226.

In October 2008, the couple separated following an incident of domestic violence, which resulted in Melanie's arrest and incarceration. CP 94, 225, 447. In the aftermath of this incident, Melanie lost primary residential custody of her children, by her prior marriage, who were placed with their father. CP 94-95.

**B. MELANIE SUFFERED FROM A DISABLING MENTAL ILLNESS.**

Melanie has a history of depression, including post-partum depression. CP 442, 446. She has a family history of suicide. CP 447. Kristopher persuaded her to stop taking her medication. CP 442. They separated. CP 447. Her depression deepened over the winter of 2008 and spring of 2009 until, by May, she attempted suicide. Id. She was hospitalized for ten days, diagnosed with depression, stabilized on medication, and certified as disabled by the Social Security Administration. CP 95. She was then fired from her job and lost her insurance. CP 446-447. Then her father died of cancer. CP 95, 447. In September 2009, when Melanie learned the parenting plan had been modified, placing her children with their father, she again tried to kill herself. CP 445. She was admitted to Harborview with a diagnosis of recurrent major

depressive disorder. CP 445. The following month, Kristopher petitioned for dissolution. CP 97. In short, in less than a year, Melanie, with a history of mental illness, lost her marriage, her job, primary residential care of her children, and her father. She was charged with a crime, twice attempted suicide, and underwent two hospitalizations.

C. DURING MELANIE'S DISABILITY, KRISTOPHER ARRANGED TO RECEIVE HALF A MILLION DOLLARS OF HER INHERITANCE.

Melanie was the sole beneficiary of her father's estate, valued in excess of \$500,000.00. CP 95. Upon learning this, Kristopher proposed he and Melanie reconcile. CP 95, 287. They were then living separate and apart and Melanie was subject to a protection order, though it allowed telephone contact. CP 94, 287; see, also, CP 187 (Kristopher gives date of separation as 10/08). Kristopher promised Melanie he would help her fight for the return of her children and help her with other financial matters. CP 95. They signed an agreement to this effect in July 2009, though Kristopher claims his signature was forged. CP 100. However, he does not deny that during this period he took possession of nearly a quarter million dollars from Melanie, proceeds of her father's estate. Melanie tendered these funds to him about a week after they

executed the agreement, in performance of their agreement, and on Kristopher's advice regarding how to reduce her tax liability. CP 108-110.

Kristopher claimed he received these funds pursuant to a very different agreement: settlement of his interest in the estate of Melanie's father, though he presented no evidence to support this claim. RP 19; CP 284-285. He claimed Melanie's father executed a Will naming him as an equal beneficiary, entitling him to upwards of \$2 million. CP 189, 225-226. He did not say why Melanie's father would be so generous to him, or why this generosity would continue after Kristopher and Melanie had separated. CP 225-226, 285. Nor did Kristopher produce a copy of this Will and there is no evidence, aside from Kristopher's claim, that this Will exists. Kristopher claimed Melanie destroyed the Will, but does not explain why she was in possession of the original. CP 189, 228. She denies the existence of this Will, let alone destroying it. CP 283-284. The Will entered into probate was executed by Melanie's father in the offices of an attorney in 2000. CP 284.<sup>1</sup>

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<sup>1</sup> Kristopher misleads the court when he claims "Melanie has now admitted that she destroyed that crucial evidence and is probating an earlier will." Br. Appellant, at 29. Melanie did not admit to destroying any evidence, let alone

Kristopher failed to fulfill the July 2009 agreement with the funds he received from Melanie. CP 96-98. He did not help her pay for an attorney in her parenting modification action. He did not bring her bills current, so she lost her truck and her personal belongings. And, though he had promised her that he would not pursue the dissolution until September 2010, he instead sought and obtained a judgment by default. CP 97-98, 284. That judgment awarded him another quarter million dollars from Melanie's inheritance, with interest. CP 243-244. Melanie learned about the default judgment in April 2010 when she discovered Kristopher had withdrawn funds from one of her father's investment accounts, on the authority of the default judgment. CP 98.

**D. THE COURT VACATED THE JUDGMENT AND SET THE MATTER FOR TRIAL.**

Within three months of the default judgment, and within two months of learning about it, Melanie found counsel and filed her motion to vacate. CP 88-93. She presented evidence of the facts described above. CP 95-116, 282-288. She offered evidence and argument on the factors and authorities relevant to vacating default judgments. CP 88-93, 274-281. And she argued that

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"crucial evidence." Melanie is probating the last known Will of her father, not "an earlier will," as Kristopher puts it.

vacating the judgment was necessary in the interests of justice.

As her trial counsel summarized:

We have a situation where after one year of marriage by entry of this default decree, the husband has received \$334,132.34 of the wife's inheritance directly traceable to her father. And she is living on a Social Security Disability income of \$547.50. It's grossly inequitable.

RP 14; see, also Supp. CP \_\_ (sub 62: Motion to Preserve Assets) (Kristopher collected several hundred thousand dollars more from an estate account).

Kristopher offered his version of the facts, as described above, claiming an interest in the father's estate. The trial court observed that there was little to no evidence to support Kristopher's version. RP 13-14, 19. The trial court concluded there were factual issues to be resolved and the present motion was not appropriate for doing that. RP 13 and 16. Rather, the court found Melanie had established prima facie a meritorious defense as well as the other relevant factors. RP 17-19. The court vacated the judgment and set the matter for trial. CP 289-292. Further, the parties entered by agreement an order strictly restraining the use of property, including financial assets, pending resolution of the case. Supp. CP \_\_ (sub 43B: Agreed Order). In

particular, the order restrained the parties from using assets to pay their attorneys absent mutual agreement. Id.

Kristopher moved for reconsideration, attempting to augment the record. CP 296-331. He also again disputed that Melanie had proved she was in mental and emotional distress during the pendency of the dissolution action. CP 304. Kristopher also claimed he was prejudiced by vacating the default decree because he was now being sued by the estate of Melanie's father for recovery of funds he transferred to himself. CP 302-303, 327. The court denied his motion. CP 332. Kristopher appealed. CP 333-340.

Kristopher continued to use Melanie's funds to finance his litigation efforts, contrary to the temporary restraining order. See, e.g., Supp. CP \_\_ (Subs 62 & 67). As of now, Kristopher has obtained over \$525,000.00 from the estate of Melanie's father. Id. Melanie was forced to move for an order to preserve assets from further dissipation, which Kristopher opposed. Supp. CP \_\_ (subs 62, 66). The court ordered that neither party could use funds to pay fees or costs "in this matter or other litigation initiated by the other party" except by mutual agreement or by order of the court. Supp. CP \_\_ (sub 68).

#### IV. ARGUMENT IN RESPONSE

##### A. THE STANDARD OF REVIEW.

A trial court's decision to vacate a judgment is reviewed for an abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). More specifically, and pertinently, even greater deference is given to an order *vacating* a default judgment and setting the matter for decision on the merits. *Yeck v. Dep't of Labor & Industries*, 27 Wn.2d 92, 95, 176 P.2d 359 (1947). In other words, had the trial court here denied the motion to vacate, that decision would have been subjected to greater scrutiny than the decision to set this matter for trial. This distinction reflects the disfavor in which default judgments are held. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). Indeed, “[a] default judgment has been described as one of the most drastic actions a court may take to punish disobedience to its commands.” *Id.* Rather, the law strongly prefers that cases be decided on their merits. *Id.* (internal citations omitted). These principles are particularly compelling in this case, to prevent a gross miscarriage of justice.

B. THE TRIAL COURT HAD MULTIPLE GROUNDS FOR VACATING THE DEFAULT DECREE, INCLUDING, MOST IMPORTANTLY, TO SERVE JUSTICE.

Two court rules apply to motions to vacate a default judgment, though the principal inquiry is whether fairness and justice have been done. *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007); *see, also, Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007) (justice is principal inquiry in balancing the interest in determining controversies on their merits with the interest in judicial efficiency) (internal citations omitted). Under CR 55(c), the trial court may set aside entry of a default “for good cause.”<sup>2</sup> If a *judgment* by default has been entered, the court may set it aside in accordance with CR 60(b). CR 55(c). A decree of dissolution, as was entered here by default, is a judgment. CR 54(a)(1); *Bank of America, N.A. v. Owens*, 153 Wn. App. 115, 118, 221 P.3d 917 (2009). Accordingly, CR 60(b) applies. This rule offers eleven separate bases for vacating a judgment. The trial court properly found reason to vacate under CR 60(b)(1) and (2). CP 289-291.

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<sup>2</sup> In pertinent part, CR 55(c) provides:

(1) *Generally*. For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

However, additional provisions likewise would apply, and this Court may affirm the trial court on any grounds established by the pleadings and supported by the record. *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). For this reason, Melanie will address all of the relevant provisions seriatim.

1) The court was authorized by CR 60(b)(1) to vacate the default judgment.

CR 60(b)(1) provides that a court may vacate a judgment on the basis of “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” Only this CR 60(b) provision requires an inquiry into the four factors derived from *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). See *Lockett v. Boeing*, 98 Wn. App. 307, 314, 989 P.2d 1144 (1999) (four *White v. Holm* factors apply only to CR 60(b)(1) motion).<sup>3</sup> Thus, the court may vacate a default judgment when it finds:

- (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party;
- (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect;
- (3) that the moving party acted with due diligence

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<sup>3</sup> Kristopher ignores this distinction in organizing and analyzing the applicable rules. As a consequence, some of his arguments are conceptually flawed, as discussed further below (e.g., Br. Appellant, at 20-21, equating “unsound mind” with incompetence, a conflation of CR 60(b)(2) and CR 55(b)(1)).

after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

*White v. Holm*, at 352. Of these, the first two factors are most important. *Id.*

a) Meritorious defense

In considering whether Melanie presented prima facie evidence of a meritorious defense, it is important to acknowledge the nature of this proceeding, which is equitable in nature. *Miracle v. Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984). Indeed, statute specifically requires the court to make a “just and equitable” distribution of the property before it. RCW 26.09.080. Accordingly, “[t]he key to equitable distribution of property is not mathematical preciseness, but fairness.” *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989) (quoting *In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145 (1975)).

Because the dissolution action sounds in equity, Melanie can establish a prima facie defense with evidence that the distribution accomplished in the default judgment appears unfair. She does that easily. For example, the one-year duration of the marriage seems to cut against Kristopher receiving half a million dollars from Melanie’s inheritance, as well as the family home and multiple other

assets. RCW 26.09.080(3); see CP 113-114. In a short-term marriage such as this one, a just and equitable distribution typically leaves the parties as the marriage found them. 2 Wash. State Bar Ass'n, Family Law Desk Book, § 32.3(3), at 32-17 (2d ed. 2000 & Supp.2006); see also *Bundy v. Bundy*, 149 Wash. 464, 466, 271 P. 268 (1928); Winsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, Wash. St. Bar News, 14, 16 (Jan. 1982); compare *In re Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007) (long marriage). Here, Kristopher is leaving this very short marriage with considerable new wealth derived from Melanie's inheritance, a result which is, on its face and in polite terms, unfair at least.

Likewise, while characterization does not control distribution, it is a factor the court must consider. RCW 26.09.080(1) and (2). Here, the principal asset before the court appears to be Melanie's separate property, an inheritance. RCW 26.16.010. Moreover, she received this property after separation. CP 187; see RCW 26.16.140 (accumulations of husband and wife living separate and apart are separate property). Melanie's right in this separate property is "sacred." *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009). It is hard to imagine why Kristopher would

receive such a large portion of this separate property in a “just and equitable” distribution.

Finally, it is apparent that the default decree fails utterly to consider Melanie’s financial circumstances, specifically, her present inability even to support herself. RCW 26.09.080(4). Yet, the court’s paramount concern when distributing property is the economic condition in which the decree leaves the parties. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). Kristopher has been spending half a million dollars of Melanie’s inheritance on himself, contrary to their agreement that he would help her. Meanwhile, Melanie is barely surviving on disability. In light of these considerations, the trial court here was well justified in finding that Melanie established a meritorious defense to the distribution. It hardly seems just or equitable to leave these parties as the default decree does.

Kristopher makes no effort to defend the fairness of the distribution, understandably. Rather, his challenge to the trial court’s decision relies mainly on factual disputes about the nature and severity of Melanie’s illness and about purported agreements the two had made. See, e.g., Br. Appellant, at 2-3 (Assignments of Error 1-4). According to Kristopher, he is entitled to a half million

dollars after a one-year marriage because, for some unknown reason and in a Will no one can find, Melanie's father bequeathed as much money to him as he bequeathed to his own daughter. By contrast, according to Melanie, while she was enduring one of the worst years in her life and suffering from a life threatening mental illness, Kristopher lied, cheated, and stole her inheritance.

Kristopher proposes the trial court erred in failing to resolve this factual dispute in his favor. In fact, in deciding whether Melanie presented a meritorious defense, the trial court "does not act as a trier of fact ... and may not conclusively determine which party's facts control." *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 202, 165 P.3d 1271 (2007). This is what a trial is for. Rather, under CR 60(b)(1), the trial court "need only determine whether the defendant is able to demonstrate any set of circumstances that would, *if believed*, entitle the defendant to relief." *Id.*, at 203 (emphasis added).

In the most familiar formulation of this standard, the trial court was required to view the facts (i.e., the evidence and reasonable inferences therefrom) in the light most favorable to Melanie. *Pfaff v. State Farm Mutual Auto. Ins.*, 103 Wn. App. 829, 834-835, 14 P.3d 837 (2000). Put another way, the court did not

have discretion to reject Melanie's version of the facts. *Pfaff*, 103 Wn. App. at 834, 835. Put yet another way, the trial court here was required to rule as if it would be proved at trial that Kristopher is a cruel and greedy villain.

At the end of the day, the point of the meritorious defense analysis is to ensure merely that a trial would not be a "useless formality." *TMT Bear Creek*, 140 Wn.App. at 206. Melanie amply demonstrated the need for a trial on the equitable distribution of the parties' assets. See CP 190 (trial needed to resolve factual disputes).

b) Excusable neglect

During the pendency of the dissolution petition, Melanie tried twice to commit suicide. In the course of one attempt, she killed her dog. She was admitted twice to hospitals for emergency mental health treatment. She faced criminal charges for the assault upon Kristopher. She lost primary residential care of her children in a modification proceeding. She lost her job, her insurance, her vehicle, most of her belongings. And her father died. If this was not sufficient to excuse her failure to answer Kristopher's petition for dissolution, she was also persuaded by Kristopher that he was suspending prosecution of the dissolution. CP 97-98.

There is no “hard and fast rule” for whether a party has established mistake or excusable neglect. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) (internal citations omitted). Rather, “[e]ach case of excusable neglect must rest on its own facts.” *Pybas v. Paolino*, 73 Wn. App. 393, 402, 869 P.2d 427 (1994) (internal citations omitted). And it is for the trial court to determine the facts. See, e.g., *In re Marriage of Fiorito*, 112 Wn. App. 657, 667, 50 P.3d 298 (2008) (appellate court will not review credibility determinations).

In other cases, the excusable neglect requirement has been satisfied where “a defaulted party is lulled or induced into inaction by settlement discussions...” *Smith ex rel. Smith v. Arnold*, 127 Wn. App. 98, 108, 110 P.3d 257 (2005). Similarly, mental illness may support a finding of excusable neglect. *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 698 (9<sup>th</sup> Cir. 1997) (defendant's depression following spouse's death supports finding of excusable neglect); *Stirm v. Puckett*, 107 Idaho 1046, 695 P.2d 431 (1985) (setting aside default judgment against defendant apparently impaired by mental illness); *Brothers v. Brothers*, 71 Mont. 378, 230 P. 60 (1924) (setting aside default judgment where defendant had continuing mental health problems).

Altogether, here, the court had plentiful evidence upon which to find Melanie's neglect of the dissolution proceeding was excusable, both because of her own disability and because of the inducement by Kristopher. Certainly, this factual finding is entitled to the usual deference.

c) Due Diligence

Melanie found out about the default judgment in April 2010, when she discovered Kristopher had withdrawn funds from an asset of her father's estate. CP 98. By June 8, no more than three months after entry of the judgment and within two months of learning of the judgment, Melanie found and retained an attorney (despite having no income apart from \$550 in monthly disability), and her attorney had investigated, researched, written, and filed a motion to vacate.<sup>4</sup> CP 268, 282, 285. This is much more than doing nothing, as was the case in *In re Estate of Stevens*, 94 Wn. App. 20, 35, 91 P.2d 58 (1999), where the party did nothing for three months after notice of entry of the default judgment. Certainly, Melanie cannot be accused of having "slept on her rights"

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<sup>4</sup> Kristopher claims Melanie did nothing for "four months" after notice of the default. The judgment was not even entered until March, and Melanie filed her motion to vacate in June. That is three months by most calculations. Counting from when Melanie had actual notice, it is only two months.

before moving to vacate. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056 (1989). Rather, because of Kristopher's representations, Melanie believed the dissolution was on hold until September. She learned in April that, instead, it had been finalized in March. She acted immediately to obtain counsel and seek relief. The court properly found that she satisfied the requirement of due diligence, which is, in any case, of lesser importance than the preceding two factors and must, again, be framed in terms of equity and the particular facts of the case. CP 291; see *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007).

d) Substantial Hardship

Kristopher's claim to substantial hardship is hard to fathom when placed on the scales opposite Melanie's hardship. He is forced to go to trial and prove the equity in the very favorable distribution he achieved by default. He is also required to prove his improbable claims about the missing Will, etc. In any case, the possibility of a trial on the merits is not a substantial hardship. *Pfaff*, 103 Wn. App. at 836. Moreover, the fact that a trial delays resolution of the case where default was inequitably obtained does not constitute substantial prejudice. *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003).

In his motion for reconsideration, Kristopher also claims hardship because Melanie did not reveal that a lawsuit might be filed by her father's estate to recover from Kristopher funds misappropriated by him. CP 302-303, 327. Assuming for the sake of argument that Kristopher is entitled to be surprised by the estate's action, this collateral litigation does not create a substantial hardship for purposes of doing justice in the dissolution proceeding. In short, though justice, once done, may prove to be a hardship on Kristopher, it is not the kind of hardship the rule attempts to avoid. *See Cash Store*, 116 Wn. App. at 841 ("court applies equitable principles to ensure that substantial rights are preserved and justice is done."). In other words, if fairness is a hardship to Kristopher, that is of no import in the eyes of the law. In any case, as the trial court properly found, Kristopher failed to make a showing of substantial hardship. CP 291.

e) The trial court was correct to find CR 60(b)(1) satisfied.

Court properly viewed all circumstances and properly exercised its discretion when it granted the motion to vacate the default judgment under CR 60(b)(1). Even if there was some defect in its analysis under this provision, multiple other bases exist to reach the same result, as discussed below.

- 2) CR 60(b)(2), relating to “unsound mind,” also justifies the court’s order vacating the judgment.

CR 60(b)(2) specifically allows the court to vacate a default judgment “[f]or erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings ...” The trial court found sufficient evidence that Melanie “was undergoing significant emotional and mental distress while the dissolution was on going [sic].” CP 290. Though Kristopher disputes this evidence, it is the trial court’s call, since this Court will uphold a trial court’s decision if it is supported by findings of fact. *In re Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002). Those findings will be treated as verities on appeal if supported by substantial evidence in the record. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). “Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Burrill*, 113 Wn. App. at 868. Melanie offered extensive medical records in support of her declaration describing her mental illness. This satisfies her evidentiary burden.

Kristopher also claims that “unsound mind” as a matter of law must mean insanity. Br. Appellant, at 20. In the context of

determining competency to testify, that has been the accepted definition. *See, e.g., State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007) (respecting RCW 5.60.020). However, the context here is quite different and the governing principle is equity, not veracity. The consequence here of granting Melanie's motion to vacate is to enhance the reliability of the proceedings and is in fulfillment of the court's paramount job of doing justice. Kristopher cites to no case involving CR 60 where "unsound mind" is limited to insanity. In short, the context matters, and in this equitable context, severe mental illness takes on a different significance. *See, e.g., Barr v. McGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003) (clinical depression of attorney justified vacating dismissal of client's case). That is, the question of whether to receive testimony is different than the question of whether to vacate a default judgment. Here, both equity and reliability are enhanced by the court's granting Melanie's motion to vacate.

- 3) The court also could vacate on the basis of CR 60(b)(4) because of Kristopher's misrepresentations and misconduct.

CR 60(b)(4) permits the court to vacate a judgment based on "[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party..." This

provision's scope is broader than Kristopher argues. Br. Appellant, at 23-24. The rule is not limited to a requirement that fraud be proved. Rather, "misrepresentation or other misconduct" would also justify vacation of the judgment under CR 60(b)(4)." *In re Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985). This distinction is particularly appropriate in this case because this is a marital dissolution, not a tort or contract action. The relationship between the parties is not an arm's length relationship, such as in *Swasey v. Mikkelsen*, 65 Wash. 411, 118 P. 308 (1911), cited by Kristopher. Br. Appellant, at 24. Rather, the marital relationship is one of trust and confidence, with each spouse bearing the other fiduciary duties. *In re Marriage of Hadley*, 88 Wn.2d 649, 665, 565 P.2d 790, 798 (1977) (Horowitz, J. dissenting opinion), *citing Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972) and *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954). These duties continue until the marriage is terminated. *Peters v. Skalman*, 27 Wn. App. 247, 251, 617 P.2d 448 (1980); *accord, Gerow v. Covill*. 960 P.2d 55, 64 (Ariz.App. Div. 1,1998)

In short, spouses have duties to one another that affect the question of misconduct. Here, Kristopher appears to have induced Melanie to transfer considerable wealth to him, for the purpose of

aiding her. Instead of aiding her, Kristopher left her without resources to hire counsel in defense of the modification proceeding, or the criminal defense proceeding, or to obtain health care, or to retain ownership of her personal property. He induced her not to attend to the dissolution proceeding, then turned around and obtained a default judgment, which awarded him another substantial amount of money to which, as far as the evidence shows, he has no right. Altogether, the court had plenty of reason to vacate the judgment on the basis of CR 60(b)(4).

4) Melanie has also suffered “unavoidable casualty and misfortune” justifying relief under CR 60(b)(9).

CR 60(b)(9) authorizes a judgment to be vacated for “[u]navoidable casualty or misfortune preventing the party from prosecuting or defending.” There is “sparse Washington authority” on what precisely this rule means. *Stanley v. Cole*, 157 Wn. App. 873, 881, 239 P.3d 611 (2010). However, this Court recently interpreted the rule to apply “when events beyond a party’s control—such as a serious illness, accident, natural disaster, or similar event prevents the party from taking actions to pursue or defend the case.” *Id.*, at 882. *Stanley* had not been decided until after Melanie brought her motion, so neither she nor the court had benefit of this elucidation.

In *Stanley*, this Court held serious illness constitutes one example of “unavoidable casualty or misfortune.” *Id.*, citing *Adams v. Adams*, 181 Wash. 192, 42 P.2d 787 (1935). In *Adams*, the illness was influenza, which caused delirium in the defendant. Similarly, here, Melanie was disabled by mental illness, a life-threatening depression. This illness not only affected Melanie’s ability to think and act rationally, it caused a cascade of misfortunes: criminal action against her, loss of her children through judicial proceedings, loss of employment, loss of insurance, impoverishment.

Kristopher drastically minimizes the impact and sweep of Melanie’s illness, suggesting that because she was able to take some action on her behalf, she could have acted in the dissolution. Br. Appellant, at 25. Of course, this ignores that he induced her not to act. In any case, he very much overstates her ability to function. She was unable to appear for half of the criminal proceedings. CP 283-284. She was unable to defend against the parenting plan modification, both because of her disability and because Kristopher had the money she needed to do so. CP 283-284. She was able to retain a probate attorney only because there was no advance fee deposit required and because little else was required of her. CP

283. In short, what Melanie has managed to do is far overshadowed by what she has been unable to do. Penniless, distraught, bereft of her belongings, grieving the loss of most of her closest loved ones, Melanie certainly suffered “unavoidable casualty or misfortune” justifying relief from this inequitable default.

5) The “extraordinary circumstances” of this case likewise would justify relief under CR 60(b)(11).

Finally, CR 60(b)(11) allows the court to vacate a default judgment for “[a]ny other reason justifying relief from the operation of the judgment.” Kristopher correctly observes that this rule is reserved for “extraordinary circumstances.” Br. Appellant, at 26. Insofar as other provisions of CR 60 apply here, this rule need not come into play. Nevertheless, Kristopher is wrong to deny that what has happened to Melanie does not constitute an “extraordinary circumstance.” Fortunately, it is extraordinary to have one’s husband exploit a disabling mental illness to steal an inheritance. This drastic deprivation of Melanie’s rights under Washington marriage laws would satisfy CR 60(b)(11). *See In re Marriage of Furrow*, 115 Wn. App. 661, 63 P.3d 821 (2003) (ordering judgment vacated where mother’s parental rights terminated despite that children had no guardian ad litem). Had the trial court chosen, a decision to vacate on this basis would have

served the purpose of this “catch-all provision, [which is] intended to serve the ends of justice in extreme, unexpected situations.”

*State v. Ward*, 125 Wn. App. 374, 379, 104 P.3d 751 (2005).

C. THE COURT PROPERLY DENIED RECONSIDERATION.

Kristopher claims the court should have granted his motion to reconsider. Br. Appellant, at 30-39. This Court reviews the trial court’s decision denying reconsideration for a manifest abuse of discretion. *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010). Kristopher fails to carry this burden.

He claims the trial court should have reconsidered because it erroneously admitted Melanie’s medical records. But Kristopher did not even assign error to this evidentiary ruling, which this Court would in any case review for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). The trial court properly exercised its discretion here. Melanie submitted her medical records after Kristopher disputed her mental illness, despite that he had personal knowledge of her hospitalizations. CP 283; RP 4-5. The evidence was admissible.

Kristopher also argues the “newly discovered” evidence of a potential lawsuit by the estate of Melanie’s father, and the prejudice to Kristopher therefrom, required reconsideration. As already

discussed above, it is far from clear whether this potential lawsuit could be considered newly discovered, when Kristopher knew better than anyone the factual basis for the claim. In any case, this collateral lawsuit is irrelevant to the question of whether the dissolution decree entered by default achieved a “just and equitable” distribution.

Kristopher also argues, again, that Melanie presented “no actual evidence” of her disability. The record contradicts this claim. She was medically determined to be suffering severe depression. The Social Security Administration determined her to be disabled. Melanie carried her burden of proof.

Kristopher also claims to have suffered an injustice. It is hard to see how it is unjust to require a trial on the merits in the circumstances established by the evidence here. The court properly denied reconsideration.

#### V. MOTION FOR ATTORNEY FEES

This appeal is frivolous and worse. It rests on a claim that the trial court should have resolved facts in Kristopher’s favor, when the law requires just the opposite. It also relies on a claim the trial court abused its discretion when the trial court followed Washington law to require a trial on the merits. It further delays that trial, while

Kristopher continues to appropriate funds from the estate of Melanie's father, apparently to fuel this litigation. CP 282; Supp. CP \_\_\_ (sub 66: Response) (Kristopher arguing for right to spend Melanie's inheritance on his attorney fees). Under RAP 18.9(c)(2), this Court should award fees to Melanie. See *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 224, 241, 119 P.3d 325 (2005) (appeal frivolous if, considering whole record, it presents no debatable issues and is so devoid of merit that there is no possibility of reversal). The law in Washington requires that default judgments be "liberally set aside ... for equitable reasons in the interests of fairness and justice." *Morin v. Burris*, 160 Wn. 2d at 749. Requiring a trial in this case was the only way to avoid a gross injustice.

Moreover, because of the present disparity in financial resources, Melanie seeks attorney fees on the authority of RAP 18.1 and RCW 26.09.140. The statute provides that:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the

proceeding or enforcement or modification  
proceedings after entry of judgment.

Melanie is receiving Social Security Disability while Kristopher has received over half a million dollars from her father's estate, and is entitled to an additional sizable inheritance from his own parents. CP 282. Because of this disparity, Melanie should receive her fees.

#### VI. CONCLUSION

For the foregoing reasons, the trial court's order vacating the default judgment should be affirmed and this matter remanded to the superior court for a trial on the merits. Moreover, Melanie asks for her attorney fees on appeal.

Dated this 28th day of March 2011.

RESPECTFULLY SUBMITTED,



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PATRICIA NOVOTNY #13604  
Attorney for Respondent