IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of	)	NO. 65937-5-I
	)	
KRISTOPHER SCOTT MYERS,	)	DIVISION ONE
	)	
Petitioner,	)	
	)	
and	)	UNPUBLISHED OPINION
	)	
MELANIE ELAINE MYERS,	)	
	)	
Respondent.	)	FILED: March 12, 2012
	)	

Leach, A.C.J. — Kristopher Myers appeals a trial court order vacating an order of default, findings of fact and conclusions of law, and a decree of dissolution (collectively, "default orders") dissolving his marriage to Melanie Myers.[1] Kristopher asserts four reasons why the trial court abused its discretion by granting this relief: (1) Melanie failed to present substantial evidence of a prima facie defense to Kristopher's claims, (2) Melanie failed to demonstrate excusable neglect, (3) Melanie failed to demonstrate due diligence, and (4) Kristopher demonstrated that vacating the decree would cause him substantial hardship. Because sufficient evidence supports the trial court's resolution of these contentions and the trial court appropriately exercised its discretion, we affirm.

[1] We refer to the parties by their first names to avoid confusion. No disrespect is intended.

FACTS

Kristopher and Melanie Myers married in May 2007. Both parties have children from prior relationships, but they have no children together. They separated in October 2008, after Melanie was arrested for domestic violence (DV) assault against Kristopher. She spent time in jail and was ultimately convicted. After the DV incident, Kristopher obtained a restraining order against Melanie, and her first husband gained full custody of their two children by a default judgment. Over the next year, Melanie was twice hospitalized for major depression and attempted suicide. In addition, her father died during that year.

Melanie's father, Donald Lee, left a substantial estate with a value in excess of $500,000. At its core, this case concerns Kristopher's claims to the assets of Lee's estate. Lee's will named Melanie the estate's sole beneficiary, and an Oregon probate court appointed her as personal representative. Kristopher filed for dissolution in October 2009, soon after Melanie's second hospitalization. Melanie responded to the petition by filing a brief declaration on November 24 that stated, "I will be responding to the Petition for Dissolution of Marriage as soon as a [sic] can hire a lawyer, which should be in the next few weeks." However, Melanie did not respond to Kristopher's petition, and Kristopher filed a motion for default on February 11, 2010. The court entered the default orders on March 9. The decree confirmed Kristopher's ownership of

the $206,000.00 Melanie previously paid to him and awarded Kristopher a judgment against Melanie for an additional $226,562.67, purporting to represent money still owed by Melanie to Kristopher under the third August 1 letter described below, together with additional amounts this sum would have earned if invested. Upon discovering this, Melanie filed a motion to vacate on June 8. The court heard the motion on July 26 and entered an order vacating the challenged orders on August 2.

Melanie claims she transferred her father's IRAs to Kristopher because he told her the transfer would avoid adverse tax consequences and because Kristopher promised to help pay her medical and legal expenses. Despite their separation, Melanie claims that Kristopher continued to assure her they would reconcile. To support her motion, Melanie produced an "Agreement" between Melanie and Kristopher, dated July 22, 2009, that states, in part, "It is agreed between the two parties involved to . . . [c]ash out inherited IRA's [sic] and used [sic] the sum to pay bills, hire a lawyer to gain custody of [Melanie's two children] back, and at some point purchase a home together." She also produced three letters she signed on August 1. The first states, "I, Melanie E. Myers, wife of Kris Myers gift the sum of $73,000.00 to Kris free and clear out of love and adoration." The second states, "I, Melanie E. Myers, wife of Kris Myers gift the sum of $133,000.00 to Kris free and clear out of love and adoration." The third

states, "I, Melanie E. Myers, wife of Kris Myers gift the grand total of $207,000.00 to Kris free and clear out of love and adoration." Melanie transferred approximately $206,000.00 from her father's IRA accounts to Kristopher. She states that she intended the third letter to be a summary of the first two and that the $1,000.00 difference is merely an addition error.

Kristopher's version of the facts differs significantly. In his response to Melanie's motion to vacate, he contends that either before or shortly after Lee's death, Melanie showed him a copy of the will that named both Melanie and Kristopher as co-beneficiaries of the estate, and according to Kristopher, the estate was valued at over $4,000,000. He claims Melanie told him she destroyed that will and probated an older version and that Melanie agreed to give him the sums listed in the three August 1 letters in exchange for his agreement not to contest her father's will. He denies ever telling Melanie that they might reconcile. Kristopher asserts that the July 22 "Agreement" is a forgery. He submitted the statement of his handwriting expert which stated that Kristopher's signature on that document was "probably not genuine." Melanie, in turn, denies the existence of any will naming Kristopher as her father's beneficiary.

STANDARD OF REVIEW

We review a trial court's decision vacating a default judgment for an

abuse of discretion.[2] "An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court."[3] "Abuse of discretion is less likely to be found if the default judgment is set aside."[4] "Our primary concern in reviewing a trial court's decision on a motion to vacate is whether that decision is just and equitable."[5]

ANALYSIS

Washington courts generally disfavor default judgments. Instead, "[w]e prefer to give parties their day in court and have controversies determined on their merits."[6] "But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules."[7] CR 60(b) states, in relevant part,

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
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> . . . .
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> (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
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> . . . .

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[2] Little v. King, 160 Wn.2d 696, 702, 161 P.3d 345 (2007).

[3] Little, 160 Wn.2d at 710 (citing Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000)).

[4] Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).

[5] TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 200, 165 P.3d 1271 (2007).

[6] Morin v. Burris, 160 Wn.2d 745, 754, 161 P.3d 956 (2007).

[7] Little, 160 Wn.2d at 703.

> (11) Any other reason justifying relief from the operation of the judgment.

In White v. Holm,[8] our Supreme Court set out four factors the moving party must demonstrate in order to have a default judgment vacated:

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

The first two factors are the principal considerations, while the third and fourth factors are secondary.[9] These four elements vary in dispositive significance according to the facts of each case. A strong defense to the claim or a strong reason for the delay may be almost dispositive, without consideration of the secondary factors.[10]

Here, the trial judge found (1) that there was "significant, substantial and substantial [sic] dispute of the factual issues that cannot be resolved short of an evidentiary hearing or trial on the merits of this matter"; (2) that there was sufficient evidence of Melanie's emotional and mental distress to justify her failure to timely appear and answer; (3) that Melanie acted with due diligence in appealing the default; and (4) that there was no evidence to indicate Kristopher

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[8] 73 Wn.2d 348, 352, 438 P.2d 581 (1968).
[9] White, 73 Wn.2d at 352.
[10] White, 73 Wn.2d at 352.

would suffer a substantial hardship if it vacated the default decree. Kristopher challenges each of these findings. Sufficient evidence supports the trial court's findings, and it did not abuse its discretion.

Prima Facie Defense

A party moving to vacate a default judgment must demonstrate a prima facie defense in order to avoid a useless trial.[11] To determine whether the moving party has made this showing, the trial court must review the evidence, drawing all reasonable inferences in the light most favorable to the moving party.[12] The moving party has presented a prima facie defense "if it produces evidence that, if later believed by the trier of fact, would constitute a defense to the claims presented."[13] In making its determination, the trial court does not weigh the evidence.[14]

Kristopher asserts that Melanie makes allegations against him but that she presents no evidence that would justify changing his proposed property division. However, Melanie presented a copy of her father's will that names her as the sole beneficiary of his estate. In addition, she submitted a signed, written agreement between her and Kristopher that supports her claim that the parties

[11] TMT Bear Creek, 140 Wn. App. at 203 (citing Griggs, 92 Wn.2d at 583).

[12] Rosander v. Nightrunners Transp., Ltd., 147 Wn. App. 392, 404, 196 P.3d 711 (2008).

[13] Rosander, 147 Wn. App. at 404.

[14] Pfaff v. State Farm Mut. Auto. Ins. Co., 103 Wn. App. 829, 835-36, 14 P.3d 837 (2000).

agreed to use those funds for her medical and legal expenses, as well as the three signed letters describing gifts of money to Kristopher. While Kristopher disputes the validity of the will and the agreement and claims that he is still entitled to the $207,000 described in the third letter, viewing the evidence and inferences in the light most favorable to the moving party, the court correctly determined that Melanie showed a prima facie defense to Kristopher's claim and that the decree's division of assets and liabilities was not fair and equitable.

Excusable Neglect

When the moving party does not have a virtually conclusive defense, then the reason for that party's delay is also a primary factor to be weighed by the trial court. The moving party must show that her failure to timely appear and respond was due to mistake, inadvertence, surprise, or excusable neglect.[15] Whether a party's failure to appear constitutes excusable neglect depends on the facts of each case.[16] Melanie alleges that while suffering from the effects of mental illness, she relied on Kristopher's assurances that they were going to reconcile and that she did not need to worry about responding. While this statement alone may not justify her delay, Melanie also submitted medical records relating to her recurrent mental illness and Social Security documents showing that she was adjudged fully disabled at about the same time as her

[15] CR 60(b).

[16] City of Goldendale v. Graves, 88 Wn.2d 417, 423, 562 P.2d 1272 (1977).

second suicide attempt and first hospitalization. Her documented history of depression and attempted suicides, exacerbated by then pending criminal charges, the death of her father, and the loss of custody, provide strong support for her claim of excusable neglect. Viewing this evidence in the light most favorable to Melanie, it more than sufficiently supports the trial court's finding that she had good cause for her delay.

Kristopher also argues that the trial court erred by not identifying the subsection of CR 60(b) it applied to find cause to vacate. We disagree. While the court's order does not recite a specific subsection, the court addressed Melanie's evidence in terms of excusable neglect.

Because of the strength of Melanie's defense and the sufficient reasons shown for her delay, the secondary White factors that Kristopher argues have not been met require little analysis. Melanie moved to vacate the default within three months of its entry, well within the "reasonable time" required by CR 60.[17] Further, Kristopher fails to demonstrate how the vacation causes him substantial hardship. Given the preference for resolving legitimate factual disputes on the merits, the requirement that a trial court make a just and equitable distribution of property in a dissolution, the grossly disparate distribution of assets after a short-term marriage, and Melanie's documented mental health issues, the trial court did not abuse its discretion.

[17] Luckett v. Boeing Co., 98 Wn. App. 307, 310-12, 989 P.2d 1144 (1999).

Motion for Reconsideration

Kristopher also appeals the trial court's order denying his motion for reconsideration of the default orders. We will disturb a trial court's decision to deny a motion for reconsideration only for an abuse of discretion or an erroneous interpretation of the law.[18] Kristopher first argues that the court should have granted his motion due to irregularities in the proceedings.[19] He claims that the trial court erroneously admitted Melanie's medical records "because Melanie did not timely produce [the medical evidence], it was incomplete, and the delayed filing unfairly eliminated his opportunity to respond to it." The trial court correctly determined that the medical documentation was appropriate in Melanie's strict reply because Kristopher disputed her mental illness in his response to the motion to vacate. Kristopher cites no authority for his assertion that his inability to file a surreply to Melanie's strict reply somehow violated his due process rights. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."[20]

Next, he alleges newly discovered evidence of a lawsuit against him threatened by the Lee estate warranted reconsideration. Again, we disagree.

[18] State v. Cho, 108 Wn. App. 315, 320, 30 P.3d 496 (2001).
[19] CR 59(a)(1).
[20] DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

To justify reconsideration, the newly discovered evidence must (1) probably change the result of the hearing, (2) have been discovered since the hearing, (3) not have been discoverable before the hearing by diligence, (4) be material, and (5) not be merely cumulative or impeaching.[21] Failure to satisfy any one of these five factors is a ground for denial of the motion.[22] Kristopher does not show that knowledge of the threat of this lawsuit would likely change the trial court's decision. The Lee estate threatened to sue Kristopher based upon a claim that he wrongfully utilized the default decree to withdraw funds from an estate account, leaving the estate insolvent and unable to pay creditors. Kristopher fails to explain how the vacation of the decree changed his exposure to that claim. Therefore, the court did not abuse its discretion in refusing to reconsider its order based on newly discovered evidence.

Finally, Kristopher claims that the court's decision was contrary to the evidence[23] and that substantial justice has not been done.[24] We find both arguments unpersuasive. As discussed above, Melanie's declarations and supporting evidence sufficiently support the trial court's decision. His argument about substantial justice can most generously be characterized as disingenuous. Our reading of the record suggests a less generous one.

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[21] Holaday v. Merceri, 49 Wn. App. 321, 329, 742 P.2d 127 (1987).
[22] State v. Fellers, 37 Wn. App. 613, 617, 683 P.2d 209 (1984).
[23] CR 59(a)(7).
[24] CR 59(a)(9).

Request for Attorney Fees

Both parties request attorney fees pursuant to RAP 18.1 and RCW 26.09.140. In an appeal in any proceeding under chapter 26.09 RCW, "the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs."[25] This award of attorney fees on appeal is not a matter of right but is determined by economic need and ability to pay.[26] Here, the trial court's division of assets and liabilities will affect each party's need and ability to pay. Additionally, resolution of each party's claims of misconduct by the other requires credibility determinations best decided by the trial court. Therefore, we deny both requests for attorney fees at this time, without prejudice to renewal of a request for fees on appeal at trial.

CONCLUSION

The record supports the trial court's findings and its exercise of its discretion. We affirm and remand for further proceedings consistent with this opinion.

Leach, A.C.J.

WE CONCUR:

[25] RCW 26.09.140.

[26] In re Marriage of Terry, 79 Wn. App. 866, 871, 905 P.2d 935 (1995).