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FOR PUBLICATION

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

MASAHIRO YOKOYAMA)	FCD CIVIL ACTION NO. 03-0429
)	
Petitioner/Counter-Respondent,)	
)	ORDER DENYING PETITIONER’S
v.)	MOTION TO STRIKE RESPONDENT’S
)	ANSWER AND COUNTERCLAIM AND
MERCEDES YOKOYAMA,)	TO ENFORCE SETTLEMENT
)	AGREEMENT AND ORDER SETTING
Respondent/Counter-Petitioner.))	STATUS CONFERENCE

This motion came before the Court on Petitioner/Counter-Respondent Masahiro Yokoyama’s (Mr. Yokoyama) *Motion to Strike Respondent’s Answer and Counterclaim and to Enforce Settlement Agreement* (Motion). Respondent/Counter-Petitioner Mercedes Yokoyama (Mrs. Yokoyama) opposes the motion. After reviewing all briefs submitted and having heard the testimony of witnesses and the arguments of counsel the Court enters the following decision.

BACKGROUND

On November 19, 2003, Mr. Yokoyama filed a *Request for Entry of Default* (“Request”). Following the Request, on December 3, 2003, an *Entry of Default* was entered by the Court because Mrs. Yokoyama waived service and consented to the entry of default. Based on that, Mr. Yokoyama then requested a hearing for the entry of a *Final Judgment by Default* and a *Decree of Divorce*. At the April 13, 2004 default judgment hearing, Mrs. Yokoyama petitioned this Court for time to find her own attorney and file an answer to the Request. The Court granted this petition. During all court appearances and filing of pleadings to this date, both Mr. and Mrs. Yokoyama were represented by the same attorney, Ms. Cindy Adams (“Ms. Adams”). On May 4, 2004, through her newly obtained attorney, Mrs. Yokoyama filed an *Answer and Counter-Claim to Petition for*

1 *Divorce* (“Answer”).

2 In the instant Motion before the Court, Mr. Yokoyama is seeking to have the Answer stricken
3 and have the Court enforce the original Settlement Agreement executed on November 6, 2003. Mr.
4 Yokoyama argues that procedurally, Mrs. Yokoyama should not be allowed to enter an answer to
5 the Request. He further argues that he was not given adequate notice of Mrs. Yokoyama’s desire
6 to file a response, and he was denied an opportunity to be heard in the event this Court allows Mrs.
7 Yokoyama to proceed in setting aside judgement. Finally, he contends that because the parties have
8 entered into a settlement agreement, the agreement and its terms should be binding on the parties
9 and enforced by the court.

10 In response, Mrs. Yokoyama argues that no final judgment had been issued by the court and
11 even if one had been entered, Mrs. Yokoyama’s response serves as an effective motion to set aside
12 the default. Additionally, because Mrs. Yokoyama proceeded pro se in her previous court
13 appearances, she argues that she should be allowed to set aside the default because she was confused
14 in signing the documents. Mrs. Yokoyama contends that 1) there is no prejudice to Mr. Yokoyama;
15 2) her conduct was not culpable due to her pro se status; and 3) she has a meritorious defense and
16 should be allowed to set aside the default and file an answer.

17 **DISCUSSION**

18 The Court finds that this matter is a request to set aside an entry of default. As such, the
19 Court applies the law pursuant to Commonwealth Rules of Civil Procedure Rule 55(c). Rule 55(c)
20 provides: “[f]or good cause shown the court may set aside an entry of default and, if a judgment by
21 default has been entered, may likewise set it aside in accordance with Rule 60(b).” Com. R. Civ. P.
22 55(c). Where timely relief from entry of default is sought and the movant has a meritorious defense,
23 a decision on the merits is favored. *O’Connor v. Nevada*, 27 F.3d 357, 364 (9th Cir. 1994). Criteria
24 that the court may consider include: (1) whether the moving party was willful or culpable in the
25 default; (2) whether the nonmoving party will be prejudiced; and (3) whether the moving party has
26 a meritorious defense. *Roberto v. De Leon Guerrero*, 4 N.M.I. 295 (1995); *see also, Meadows v.*
27 *Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987); *see generally*, 10 CHARLES ALAN WRIGHT,
28 ET AL., FEDERAL PRACTICE & PROCEDURE CIVIL 3D §§ 2692-2700 (1998). The underlying concern

1 is to determine whether there is some possibility that the outcome of the action after a full trial will
2 be contrary to the result achieved by the default. *Hawaii Carpenters' Trust Funds v. Stone*, 794 F.2d
3 508, 513 (9th Cir. 1986).

4 Although both parties have presented many issues for the Court to consider, the salient issue
5 for this Court is the fact that during critical stages of the divorce proceeding, only one attorney, Ms.
6 Adams, represented the interests of both Mr. and Mrs. Yokoyama. It has been held that the rule
7 which permits an attorney to represent adverse interests of a private nature, by consent of the parties
8 affected, does not apply in an action of divorce or separation. *In re Themelis*, 83 A.2d 507 (Vt.
9 1951); *Holmes v. Holmes*, 248 N.E.2d 564 (Ind. 1969); 7 AM. JUR. 2D *Attorney at Law* §§ 57-58
10 (1997). In the *Holmes* case, the court said:

11 Therefore, it is our opinion that the trial court should not permit an attorney to represent both
12 sides in a divorce action. Furthermore, an attorney should not present the trial court with an
13 agreed property settlement or custody and support agreement executed by both sides unless
14 it is satisfactorily shown that the defaulting party has conferred with competent counsel prior
15 to or during the execution of the proffered settlement, or such party is competent to fully
understand and does, in fact, understand, the contents of the instrument and its effects, and
the same is entered into without compulsion or duress. We believe this procedure is
necessary in order to guarantee that each divorce granted and property settlement . . . entered
into remains free from any fraud, duress, undue influence, or collusion.

16 248 N.E.2d at 570.

17 While this Court is not suggesting that there was fraud or duress underlying the settlement
18 agreement, there are inherent conflicts in attempting to represent both sides in matrimonial
19 situations. Lawyers are frequently urged to represent both parties in a divorce. The client may insist
20 that both parties know exactly what they want and that they have arrived at a complete
21 understanding. All that needs to be done is to put the agreement into written form and go to court.
22 In reality, the situation in which the parties have identical interests is so rare as to be exceptional.
23 For example, the division of support payments between alimony and child support has long-term
24 financial implications for each of the parties. What is good for the husband is not necessarily good
25 for the wife, and vice versa. Walzer, *The Role of the Lawyer in Divorce*, 3 FAM.L.Q. 212, 217
26 (1969)

27 The applicable standards, which are followed in the CNMI, are found in Canon 5, Ethical
28 Consideration ("EC") 5-1, EC 5-14 through 16 and Disciplinary Rules ("DR") 5-105 of the ABA

1 Model Code of Professional Responsibility. Under these provisions, lawyers are to serve their
2 clients, free of compromising influences and loyalties and are precluded from accepting or
3 continuing any employment that will adversely affect their judgment on behalf or dilute their loyalty
4 to any client. Likewise, under Canon 4, EC 4-1, EC 4-5 and DR 4-101, lawyers must preserve all
5 confidences and secrets of clients and not accept employment that would require the use or
6 disclosure of such information.

7 Under the ABA Model Code of Professional Responsibility certain circumstances permit a
8 fully informed client, able to understand all ramifications of a conflict, to consent to dual
9 representation (EC 5-16, DR 5-105) or to the adverse use of secrets and confidences (EC 4-1, DR
10 4-101). However, even with full disclosure, understanding and consent, DR 5-105(C) permits the
11 representation of clients with conflicting interests only “if it is obvious that [the lawyer] can
12 adequately represent the interest of each.” Because there is a substantial likelihood of prejudice or
13 profound conflict in every marital problem, particularly in matters involving child custody disputes,
14 this Court does not believe that adequate representation of both parties can be effectuated when a
15 lawyer undertakes to represent both husband and wife.

16 CONCLUSION

17 In light of the fact that Mr. Yokoyama was represented in his business dealings by Ms.
18 Adams,¹ coupled with the fact that Mrs. Yokoyama declared that she never had a face to face
19 meeting with Ms. Adams before signing the documents, this Court will allow Mrs. Yokoyama to go
20 forward at this time with independent co0ounsel. Based on the facts before this Court, it is not likely
21 that Mrs. Yokoyama was willful or culpable in the default. Mr. Yokoyama will not be prejudiced
22 by the Court re-examining this matter. Furthermore, because of the finality and severity of divorce,
23 property distribution and custody arrangements, fairness and the interests of justice require that Mrs.
24 Yokoyama be allowed to present her case before the court.

25 For these reasons, Petitioner’s Motion is **DENIED**. Respondent’s Answer shall not be
26 stricken, the Entry of Default is hereby set aside and a bench trial on child custody and property

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28 ¹ The record shows that Cindy Adams was the registered agent of Mr. Yokoyama’s Hiro Corporation. (See Respondent’s
Opposition Exhibit A).

1 division is set for **November 18, 2004** at **9:00 a.m.** in courtroom 205.

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3 **IT IS SO ORDERED**

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5 **ENTERED** this 28th day of September 2004.

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8 /s/
KENNETH L. GOVENDO, Associate Judge

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