

NO. 39074-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JONI HONG,

Respondent,

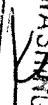
v.

JERRY HONG,

Appellant.

APPELLANT'S REPLY BRIEF

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I. REPLY TO RESPONDENT'S STATEMENT OF FACTS

There is no question that Mr. Hong missed his trial date for the reasons and explanations set forth in his opening brief.

The question of the Respondent's name change has never been an issue on appeal. Her passwords at work, her credit card name, telephone numbers, the filing of her income tax returns as a single woman are not issues of concern in this appeal and are not issues within the scope of this appeal. The filing of this appeal has had no effect on her ability to perform all of the acts Respondent claims have been affected and which are being performed by her.

The Respondent without explanation describes Mr. Hong's pursuit of his right to appeal the entry of the Decree in this matter as being morally objectionable.

No cross-appeal has been filed by Respondent which in any way questions the Court's post-trial ruling wherein the Decree of Dissolution was modified in part to disallow Respondent's taking of what was clearly the separate property of the Appellant. That ruling likewise corrected Respondent's attempt to wrongfully classify assets as community assets.

The Respondent's characterization of her employment struggles are irrelevant for the issues of this case, but in any event she obtained an education and obtained employment prior to the filing of this dissolution action [CP 7].

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II. ARGUMENT

Respondent acknowledges that Appellant's motion to vacate the Court's decision is to be determined based upon whether or not that decision was just and equitable. [Respondent's Brief, page 5].

Respondent cites CR 40 (a)(5) as the proposition that on the date set for trial in the absence of one party, the other may proceed to have the case heard.

Respondent admits that once Mr. Hong failed to appear on the trial date, she elected to go forward with the trial. [CP 97]. Respondent then testified as to what the parties' assets and obligations were and what the characterization of those assets were. [Verbatim Report of Proceedings Hearing, October 21, 2008].

CR 52 (5)(c) refers to Notice of Presentation of Findings of Fact and Decree. This rule provides as follows:

"(5) When unnecessary. Findings of fact and conclusions of law are not necessary:

(c) Presentation. Unless an emergency is shown to exist, or a party has failed to appear at a hearing or trial, the court shall not sign findings of fact or conclusions of law until the defeated party or parties have received 5 days' notice of the time and place of the submission, and have been served with copies of the proposed findings and conclusions. Persons who have failed to appear at a hearing or trial after notice, may, in the discretion of the trial court, be deemed to have waived their right to notice of presentation or previous review of the proposed findings and conclusions."

The predecessor to this Civil Rule did not contain the latter part of the rule which provides as follows...

"Persons who have failed to appear at a hearing or trial after notice, may, in the discretion of the trial court, be deemed to have waived

their rights to notice of presentation or previous review of the proposed findings and conclusion.”

This latter paragraph, CR 52 (a)(5) was amended as a result of the case of *Tacoma Recycling v. Capital Material*, 34 Wn. App. 392, 661 P.2d 609 (1993). In the *Tacoma Recycling* case, the Court had held that if one party did not appear at trial and testimony was taken, the non-appearing party was nevertheless entitled to receive notice of the presentation of the findings and conclusions. As a result of that decision, this rule was amended and the paragraph cited above was added.

It should be noted however, that the amended rule does not state that notice shall not be required to be given. It states that the court may in its discretion, waive notice of presentation. There is nothing in the findings of fact and conclusions of law that would indicate that the court waived Mr. Hong’s right to review the proposed findings and conclusions [CP 53 – 57]. It is also interesting to note that the *Tacoma Recycling Case, supra*, was almost identical on a factual basis as the present case. In that case, the Plaintiff filed his lawsuit and the Defendant filed their responsive pleadings, just as was done in this case. Defendant’s counsel withdrew from his representation of the Defendant prior to trial, which occurred in this case as well. In the Notice of Withdrawal, the defense attorney notified the Defendant of the trial date. There was a question as to whether the Defendant was aware of the date, but in any event, he did not appear for trial. Mr. Hong had been an active participant in this litigation. The Respondent, Mrs. Seaman admitted that she saw his vehicle at his home following her appearance in court for the trial. No attempt was made by Ms.

Seaman to contact him, nor did anybody attempt to contact him prior to the Petitioner/Respondent going forth with the trial either.

CR 40 (a)(5) also states that either party may bring the issue to trial "... [I]n the absence of the adverse party, unless the Court for good cause otherwise directs..."

The *Tacoma Recycling case, supra*, also stated that if a party who has filed a responsive pleading does not appear at trial, that party is not subject to having a default taken against him. See *Tacoma Recycling, supra* at 395. Had a default been taken, the procedure would have required the filing of a motion to vacate default pursuant to CR 59. In Appellant's opening brief, cases involving default judgment were cited. The rationale employed in those cases are equally applicable to the resolutions of this issue under a CR 60 (b) motion.

Appellant likewise cites cases involving default judgments. One, is *In re the Marriage of Daley*, 77 Wn. App. 29, 888 P.2d 1194 (1995), which was cited to support the proposition that a court would have had the authority under CR 52 (a)(5) to enter findings of fact and conclusions of law. That case does not support this proposition, nor does CR 52(a)(5) provide that the Court shall enter findings and conclusions. Nor, do any of the cases cited by Respondent stand for the proposition that the court has the authority to enter findings and conclusions which are contrary to law or which exceed the parameters of requested relief stated in the original Petition for Dissolution.

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Respondent cites *In Re Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999), to support the proposition that errors of law are subject to review by appeal and not by a CR 60 (b) motion.

The *Moody case, supra*, did not involve a CR 60 (b) motion. It was an appeal of a Commissioner's ruling refusing to reopen a property settlement and maintenance agreement entered as part of a decree of legal separation entered on February 22, 1991. The motion to reopen the case was made in November of 1995, some four years later. The property settlement agreement was incorporated into the findings of fact and conclusions of law and decree of legal separation. Mr. Homer Moody appeared pro se and Mrs. Moody was represented by her attorney at the hearing.

Nor is RCW 26.09.170 applicable to this case as stated by Respondent. That statute relates to modification of support and maintenance. It is interesting, however, that Respondent cites a portion of RCW 26.09.170 which states as follows:

“...The provision as to property disposition may not be revoked or modified, unless the Court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.”

That is applicable to this action. There are conditions to justify the reopening of this judgment. Further that is exactly what The Honorable Beverly Grant did in part as to the characterization on Mr. Hong's retirement. She excluded an award to Respondent of Mr. Hong's separate property, acquired prior to the marriage of the parties, but which was represented to the court by the Petitioner/Respondent as being community property.

Response to Section E of Respondent's Brief

Respondent cites *TMT Bear Creek Shopping Center v. PETCO Animal Supplier*, 140 Wn. App. 191, 165 P.3d 1271 (2007), in support of the proposition that Mr. Hong's failure to appear at trial was due to inexcusable neglect.

In *TMT Bear, supra*, there were significant instances of notice having been given to the Defendant. In the instant case, there was only one notice; that being the Notice of the Trial Date. What becomes strikingly evident in the *TMT Bear Creek case, supra*, was the giving of the following instances of notice:

- (1) Defendant served Plaintiff with a Summons and Complaint;
- (2) Defendant served an Amended Summons and Amended Complaint upon the Plaintiff;
- (3) The Defendant served a Summons and Complaint on the parent company of the Plaintiff;
- (4) The Plaintiff called the Defendant and notified them that they were in danger of default by not having made an appearance.

In the instant case, on the date of trial, the Respondent knowing that the Appellant had been active in his participation throughout the entire proceeding and knowing that his car was at his home, which meant that he was not on a flight as a steward, nevertheless never lifted a telephone from its cradle to inquire whether Mr. Hong was at home, ill, or extend to him a courtesy call to explain what was going on in court. Had he been represented by an attorney, no doubt some inquiry would have been made, or directed by the court to be made, if the

attorney failed to appear on the date of trial. In any event, the *TMT Bear case*, *supra*, although it involved the setting aside of an Order of Default, states that in an inquiry as to whether a default judgment should be a set aside, the court does not look at the issue of excusable neglect, if in fact there is a strong conclusive defense or a prima facie showing is made of a defense. The fact that Judge Grant did amend part of the original judgment is evidence of a strong and conclusive defense and it likewise makes a prima facie showing of a defense. On an appeal from Judge Grant's refusal to grant Appellant's CR 60 (b) motion, a significant issue is whether such a refusal was fair and equitable. While the exact same rationale is not always applicable, there has been a showing that the court should have set aside the judgment and allowed the case to proceed to trial.

Response to Paragraph F of Respondent's Brief - Misrepresentation

There were in fact, misrepresentations made by the Respondent in her characterization of property. Some of them were identified and rectified by the Honorable Beverly Grant, Judge. It should again be noted that the Respondent raises no objection in their Reply Brief as to the modification made by the court in response to Appellant's CR 60 (b) motion. The court's modification corrected the misrepresentation of the character of the properties owned by the parties. Nor, did the Respondent file a counter-appeal objecting to the amended judgment of the Court [CP 114-115].

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Response to Paragraph H of Respondent's Brief

CR 60 (b) (11) does in fact apply to this case. Respondent cites *In re the Marriage of Yearout*, 41 Wn. App. 897, 707 P.2d 1367 (1985), in support of its position. The *Yearout* case dealt with the issue of a requested modification of a maintenance award, the motion being brought two years after a decree of dissolution was entered by the court.

In *Yearout, supra*, the Court said the following at page 902:

“The use of CR 60(b)(11) is to be “confined to situations involving extraordinary circumstances not covered by any other section of the rule.” *State v. Keller*, 32 Wn. App. 135, 140, 647 P. 2d 35 (1982). Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court’s proceedings.” *Keller*, 32 Wn. App. at 141.

What is at issue in this case is whether the Court under the circumstances, should have proceeded with the taking of testimony of Ms. Seaman or whether the Court should have entered the findings of facts and conclusions of law without Mr. Hong being given the opportunity to review them. Or whether the matter would have been allowed to proceed had the Court been aware of the misrepresentation of facts made as to the property, and the failure to make reasonable inquiry as to Mr. Hong’s whereabouts. Additionally, there should be an inquiry as to whether Mr. Hong was in fact available to be at the trial.

State v. Keller. 32 Wn. App. 135, 647 P.2d 35 (1985), cited by Respondent is not applicable. That was a criminal case, and the Court observed that the only issues upon which a CR 60 (b)(11) motion were raised were exclusively ‘legal issues’ relating to a criminal procedural rule.

Response to Paragraph I of Respondent's Brief

a). Respondent sets forth a four prong test to determine if a CR 60(b) case can be made. They address those issues in paragraphs J, K, L. and M of their brief.

In *Johnson v Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003), the Defendant was served with a Summons and Complaint. The defendant was served with a Notice of Default and a default judgment was entered. From the onset of the filing of the case to the entry of default, forty-four (44) days passed.

In the present case, the Petition for Dissolution was filed on October 6, 2006 [CP 1]. An Amended Petition was filed December 12, 2006 [CP 4]. The Response was filed January 18, 2008 [CP 15]. A Temporary Order was entered on January 24, 2008 [CP 27]. A Notice of Intent to Withdraw was filed on March 12, 2008, a decree of dissolution on October 21, 2008 [CP 58]. The findings of fact and conclusions of law were filed on October 21, 2008 [CP 53].

When the trial date occurred and Mr. Hong failed to appear, he received no notice and no attempt was made to give him notice.

Respondent then proceeds to make a determination as to whether Mr. Hong has met the criteria that the court establishes to vacate a judgment pursuant to CR 60(b).

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Response to Paragraph J of Respondent's Brief

Not only did Mr. Hong assert a conclusive case and a prima facie case, it was evident that the decree was based upon inappropriate representations made by Respondent.

Respondent alleges that the Court made a ruling, based upon the evidence, but never addresses the fact that the evidence as contained and outlined in the decree of dissolution was skewed. The date of separation, a key factor in determining the time span in which community assets are acquired was incorrect and obviously altered from a previously prepared set of findings of fact and conclusions and law. The documents clearly show that on the day of trial, they were interlineated. These were documents which were not forwarded to Mr. Hong prior to the trial date.

Respondent does not address the fact that the accumulations of Mr. Hong's separate property retirement interests (ie. those accumulated prior to his marriage to Ms. Seaman) were unaccountably included as a community asset in the findings of fact and conclusions of law. This was later modified by the Court pursuant to the Appellant's CR 60 (b) motion and not challenged in this appeal by the Respondent.

Respondent does not address the fact that no attempt was made to contact Mr. Hong on the date of trial, when Ms. Seaman acknowledged that his car was at home and which indicated that he was in fact at home and not on a trip. Mr. Hong stated that when he was on a trip, he left his car at the airport. [CP 71, line 14-18].

Respondent does not address or explain how all of the above leads to a conclusion that there was a fair and equitable distribution of property.

Respondent suggests that a financial disparity is not a basis to vacate a judgment. That would be a correct assumption if the court had all the relevant and accurate facts which would allow the court to then make a fair and equitable distribution. In the *Johnson case, supra*, the court stated as follows at page 841:

“A motion to vacate a default judgment pursuant to CR 60(b) is addressed to the sound discretion of the trial court. *Id.* In deciding a motion to vacate, the court addresses two primary and two secondary factors that must be shown by the moving party: (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of the default judgment; and (4) that the opposing party will not suffer substantial hardship if the default judgment is vacated. Establishment of the first factor avoids a useless subsequent trial. The trial court examines the evidence and reasonable inferences in the light most favorable to the moving party to determine whether there is substantial evidence of a prima facie defense. If a “strong or virtually conclusive defense” is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, provided the moving party timely moved to vacate and the failure to appear was not willful. However, when the moving party’s evidence supports no more than a prima facie defense, the reasons for the failure to timely appear will be scrutinized with greater care.” [Citations omitted].

(K) Response to Second Prong Argument of Respondent

Mr. Hong’s attempt to timely respond to the entry of the findings, conclusion, and decree were adequately addressed in Appellant’s opening brief.

(L) Response to Third Prong Argument of Respondent

Mr. Hong’s action in ordering a review pursuant to a CR 60(b) motion was evidence of his due diligence. His partial success is evidence of his due diligence.

(M) Response to Fourth Prong Argument of Respondent

Mrs. Seaman will not suffer if the decree is vacated. Her name has been changed as well as her credit cards. There is nothing complained of that will create any difficulty for her. She filed her taxes as a single person in 2008 and was entitled to do that in any event.

(N) Response to Respondent's Argument that Findings Supported by Substantial Evidence and Errors of Law Are Not Subject to CR 60.

A review of the testimony presented to the court on the trial date shows a dearth of evidence relating to the findings, conclusions, and decree. With regard to community property the sole testimony at the hearing was as follows:

“Q And do you have community property with Mr. Hong?

A Yes.

Q And is the community property fully listed in the findings of fact, conclusions of law with correct values?

A Yes.”

Verbatim Transcript of Proceedings Hearing, 10/21/2008, p. 4, lines 12 – 18).

“Q And are you asking that the Court divide the property as set forth in the decree?

A Yes.

Q Is that division fair and equitable?

A. Yes.”

Verbatim Transcript of Proceedings Hearing, 10/21/2008, p. 5, lines 1-5.

Respondent suggests that the above recitation constitutes compliance with RCW 26.09.080 which provides as follows:

RCW 26.09.080 Disposition of property and liabilities – Factors.

“In the proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.”

The nature and extent of the community property was misrepresented to the court. The nature and extent of the separate property was incorrect as well.

As to the date of separation argument, Respondent fails to acknowledge the cases that clearly recognize the proposition that it is not necessary to be living separate and apart for a marriage to be defunct. Actual physical separation is not necessary. Courts have ordered parties to reside in the same household during the course of a dissolution when financial situations so dictate.

The only testimony on this subject taken was as follows:

“Q Did you and Mr. Hong physically separate on or about November 1st, 2007?

A Yes.”

(O) Characterization of Property.

Respondent cites *The Marriage of Tang*, 57 Wn. App. 648, 789 P.2d 118 (1990) in support of the notion that the mischaracterization of property is not a basis to vacate a decree pursuant to CR 60 (b).

The *Tang* case involved a trial where both parties had entered into an agreed property settlement agreement. It listed all of their property without disclosing the values of those properties. The decree was entered on an agreed basis. Mr. Tang moved to set the decree aside.

The trial court vacated the dissolution decree and set aside the property settlement agreement stating that the decree was defective because it failed to list, characterize, and evaluate the items of property owned by the parties, leaving the parties as tenants in common. thus failing to effectively dispose of the property. One issue argued that it is the absence of the property valuations constituting an irregularity in the proceedings which would allow a CR 60 (b)(1) motion to prevail.

The Court, however in denying this issue and in reversing the trial court, stated the following:

“Furthermore, the case Linda Tang relies on, is distinguishable. There, a default judgment was taken against a defendant who alleged that the plaintiff’s failure to attach a challenged lease to the complaint was an “irregularity” under CR 60(b)(1). The court held that if the trial court had seen the lease, which had been altered in such a manner as to raise a question concerning the defendant’s liability, the default order might never have been entered. Thus, the

omission put “the integrity of the proceedings” into question.”
[Citations omitted].

The court clearly stated that the absence of a challenged lease was an irregularity because had the court known about it, it would have raised some serious questions for the court to consider. In this case, Ms. Seaman’s misstatement of dates representing the separation of parties was a failure to adequately describe to the court what was separate and what was community property. This might have alerted the court to relevant facts which would have prevented the court from entering the findings of fact and conclusions of law. Truly, in this case, the integrity of the proceedings are brought into question.

P. Maintenance

The amount of maintenance was not predicated upon any substantial evidentiary information given to the court. The following colloquy took place at the final hearing:

“Q Are you currently receiving spousal maintenance by an order entered by the court commissioner in the amount of \$1,000 per month?

A Yes.

Q Are you asking for spousal maintenance to continue until your husband retires and you begin receiving your share of the retirement?

A Yes.

THE COURT: Is that retirement anticipated to be in the next couple years?

MS. HONG: Yes.

Q And then that the spousal maintenance will be reduced to \$300.00 a month for four additional years; is that correct?

A Yes.”

Verbatim Transcript of Proceedings, 10/21/2008, p. 5, lines 11-25.

Respondent alluded to a Commissioner’s temporary ruling dated January 24, 2009, to support the awarding of maintenance in a decree entered nine months later. The finding of fact merely state that the wife had a need and husband had the ability to pay [CP 55].

This award of maintenance was to continue for years, the exact number conditioned upon the date Appellant was to retire and when Respondent received her payments from Northwest Airlines Pension for contract employees and her share of Northwest Airlines Pension Plan for salaried employees. [CP 61].

That provision had nothing to do with any concept of Appellant’s ability to pay.

Again, the provision providing for the survival of maintenance beyond Appellant’s death [CP 61, line 12] is in violation of RCW 26.09.170.

Respondent argues that a court may extend maintenance beyond a party’s death, if noted in the decree. The case of *In re Marriage of Short*, 71 Wn. App., 426, 859 P.2d 636 (1993), categorically requires an agreement of the parties to support such a conclusion. No agreement was reached in this case.

There are existing conditions to justify the reopening of that judgment. Further, that is exactly what The Honorable Beverly Grant did in part; however, it related only to a part of the characterization of Mr. Hong’s separate property

retirement earned prior to the marriage, but allowed accumulation to the community portions, beyond the date of the parties' separation.

It is also interesting to note that Respondent cites a portion of RCW 26.09.170 (1) which states in part as follows: "The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state."

(Q) Attorney Fees

The following colloquy took place before Judge Beverly Grant:

"Q And you are asking for an award of attorney's fees and costs in the amount of \$3000 to be paid by your husband; is that correct?

A Yes.

Q And are your actual attorney fees and costs higher than the amount we're requesting?

A Yes.

Q And the court reserved the issue of attorney fees and costs at the initial temporary hearing; is that correct?

A Yes."

Verbatim Transcript of Proceedings, 10/21/2008, p. 6, line 16 – 25 and p. 7, line 1.

Nothing was presented to the court to support any need of the Respondent or Appellant's ability to pay as is required by RCW 26.09.140 which states in part as follows:

"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 therewith, ..."

No such consideration was given to determine the resources of the parties in this case.

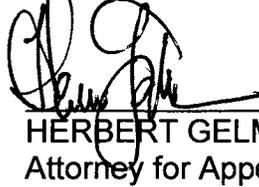
III. CONCLUSION

Respondent Does Not Answer

The court should remand this case for a new trial on the issues of the awarding of and the term of maintenance, the characterization and disposition of property, and attorney fees.

RESPECTFULLY SUBMITTED this 12 day of November, 2009.

GELMAN & ASSOCIATES



HERBERT GELMAN, WSBA #1811
Attorney for Appellant

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DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

In re the Marriage of:

JONI HONG,

Petitioner,

and

JERRY HONG,

Respondent/Appellant.

SUPERIOR NO.: 06-3-03419-7

APPEALS NO. : 39074-4-II

DECLARATION OF MAILING

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

That on the 12th day of November, 2009, I deposited into the United States mail receptacle located at the corner of 11th and Fawcett, Tacoma, Pierce County, Washington, an envelope that was postage paid, regular first class mail, containing the following true and correct copies of the original pleadings filed with the above-entitled court: ***Appellant's Reply Brief*** to the following:

**Boyd Wiley and Hillary Holmes, Attorneys at Law
Campbell Dille Barnett Smith & Wiley
317 South Meridian
Puyallup, Washington 98371-5913**

Further, that on the 12th day of November, a true and correct copy was sent by ABC Legal Messenger Service to said attorneys to be delivered by Friday, November 13, 2009, and that a copy of same was faxed to said counsel on Thursday, November 12, 2009, to (253) 845-4941.

DATED this 12th day of November, 2009 in Tacoma, WA.

[Signature]
Elizabeth A. Latsis
Legal Assistant to
HERBERT GELMAN, WSBA #1811

DECLARATION OF MAILING
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