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Court of Appeals  
Division II  
State of Washington  
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No. 52892-4-II

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

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In re the Marriage of:

SEPPO J. KOSUNEN,

Petitioner/Respondent,

and

SUSAN M. KOSUNEN,

Respondent/Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY,

The Honorable Grant Blinn

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BRIEF OF RESPONDENT

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**A. INTRODUCTION**

The trial court correctly concluded that a claim of failure to value property and general unfairness of a separation agreement which is then incorporated by agreement into a decree of legal separation and subsequent decree of dissolution cannot be vacated on a CR 60(b)(4) motion because it can only be addressed on direct appeal to this court. The trial court properly concluded pursuant to *Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999) that because the issue is wholly legal it cannot be reached on a CR 60(b) motion.

Even if the issue were reachable, this court cannot find that fraud, misrepresentation or misconduct was “highly probable,” which is the applicable standard, because Susan presented no evidence on the value of the property she complains about and the agreement was reasonable. Further, her claimed instability of mind during the ten years since she signed is not a basis for relief under CR 60(b)(11) since *In re Marriage of Yearout*, 41 Wn.App. 897 (1985) clearly states such issues are irrelevant to the issue of the agreement’s fairness. Finally, Susan waited ten years to move to vacate so laches bars her claim. The trial court must be affirmed.

**B. RESTATEMENT OF ISSUES**

1. Did the trial court correctly conclude pursuant to *In re Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999) that the effect of any failure to value property in a property settlement agreement or other fairness issue is a wholly legal issue and as such may not be addressed in a CR 60(b) motion, and can only be considered on direct appeal?

2. If the argument can be considered in a CR 60(b) motion, does laches preclude relief as the wife waited ten years after the legal separation in which she joined, which incorporated the agreement, and almost two years after the divorce decree in which she joined to bring her motion?

3. Where the standard for proof of fraud at trial is clear, cogent and convincing evidence and on review the evidence must show fraud was “highly probable,” does Susan’s claim fail because she brought no evidence of fraud, only her allegation that she was treated poorly and her personal belief that Seppo’s retirement account ought to have contained several hundred thousand dollars at the time of legal separation in 2008?

4. Where relief under CR 60(b)(11) can only relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings, and where *In re Marriage of Yearout*, 41 Wn.App. 897 (1985) clearly states that a signatory's unstable emotional state at the time of signing a property settlement agreement is irrelevant to the issue of the agreement's fairness, does Susan's claim that she was in a weakened emotional state for over ten years until she and Seppo divorced fail under CR 60(b)(11)?

4. Should this court should award Seppo attorney's fees on appeal, since this is purely an appeal of settled issues?

**C. RESTATEMENT OF THE CASE**

Seppo and Susan married in 1999. CP 79. After being married for a while, Susan secretly began accumulating significant credit card debt. CP 82; CP 107-8. When Seppo found out about Susan's secret debt, he petitioned On October 30, 2008 for legal separation. CP 108; CP 114.

The petition for legal separation listed the parties' assets and liabilities. CP 115-16. The petition requested each party be awarded, among other assets, "[a]ny and all retirement, IRA, 401k and social security benefits accrued by [him/her] through [his/her] various

employments.” CP 115-16. The petition also requested that the credit card debt Susan had accumulated be allocated to her. CP 116-17. A camper, a BMW, a Cadillac, a Mitsubishi vehicle, and a continuing community interest in the parties’ residence were also listed for Susan, as well as her retirement benefits including her 401k account with Horizon Air. CP 126-28. Seppo was to receive his retirement benefits including his 401k with Northwest Airlines. CP 128. Two weeks after the petition was filed, Susan joined it. CP 119-20.

One month later, on Nov. 28, 2008, the parties executed the “Kosunen Legal Separation” (hereinafter “separation agreement.”) CP 125-132. The property provisions of the separation agreement mirrored those to which the parties had agreed in the joint petition for legal separation. CP 129-31.

On December 5, 2008, the parties were granted a legal separation and the separation decree incorporated the executed separation agreement. CP 121-24. From that point on, Seppo arranged his finances so as to benefit himself as a single person. RP 19.

The parties continued to share their residence and mortgage as described in the separation agreement, for financial reasons. CP

109. Susan bankrupted the debts she had been allocated in the separation decree. RP 16.<sup>1</sup> By early 2017 that arrangement was no longer working and Seppo decided to have the legal separation converted into a divorce. CP 109. Susan voluntarily left their shared residence. *Id.* Each party retained counsel. CP 110.

On April 4, 2017, the parties were granted an order converting the legal separation to a divorce. CP 134. Both parties' counsel signed the order. *Id.* Susan's attorney, John Thomas, is with McKinley Irvin. RP 9; CP 14-15; CP 134.

Twenty months after being granted the jointly-requested divorce, in December 2018, Susan filed a motion to vacate the divorce decree, the legal separation decree, and the separation agreement. CP 72. She alleged fraud and overreaching in execution of the separation agreement, substantive unfairness of the separation agreement, breach of fiduciary duty by Seppo for not informing Susan of the value of his retirement accounts, voidness from the inception of the separation agreement, rescission of the separation agreement for failure to observe its terms, and fraud against Susan in execution of the separation agreement. CP 72-3.

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<sup>1</sup> The Report of Proceeding consists of one volume, dated December 14, 2018. It shall be referred to as "RP" followed by the page designation.

Susan did not provide any value for the retirement account, or any evidence regarding it. Instead, she declared “I estimate Seppo’s accrued retirement benefits during the decades of our marriage amounts to several hundred thousand dollars.” CP 82. She asked for a hearing on fraud and supported her requests with allegations of a tumultuous emotional environment caused by what she claimed was chronic abusive behavior to her by Seppo. CP 79.

Susan claimed that she didn’t know or understand what the separation agreement said, but had signed it nevertheless because she loved him. CP 81, 83. Likewise, she said, she agreed to the legal separation because she wanted to protect him. CP 82. She told the court that Seppo had promised to dissolve the legal separation after she had declared bankruptcy and that she was provided no opportunity to seek independent counsel. CP 83. She complained that Seppo never told her how much money he made and kept money from their tax refunds. *Id.*

She did not address or explain why she instructed her attorney to sign off on the order converting the legal separation to a divorce. She simply argued that she had been “deprived of any meaningful share of the property we acquired” and that the

separation agreement was “perpetrated as a fraud upon my rights.” CP 86.

Susan never appealed the decree of separation or the order converting the separation to a dissolution.

Seppo responded denying all allegations of abusive behavior and denying that her extensive credit card debt had been accumulated for the community’s benefit. CP 107-08. He pointed out that Susan had over a month to review the documents for the legal separation decree and had every opportunity to obtain legal counsel, and had legal counsel for the conversion to divorce. CP 108, 110.

He argued that *Moody*, 137 Wn.2d 979 prevented the court from granting relief on a CR 60(b) motion, that Susan had not filed her motion to vacate within a “reasonable time” thus laches precluded relief, that there was no evidence of fraud or misconduct, much less that rising to clear, cogent and convincing evidence, and that there are no extraordinary circumstances warranting relief under CR 60(b)(11), pointing to *In re Marriage of Yearout*, 41 Wn.App. 897 (1985) for the principle that being in a depressed or weakened emotional state does not constitute extraordinary

circumstances that would justify relief under CR 60(b)(11). CP 140-47.

The trial court remarked that it appears that the analysis for a property settlement agreement is the same as for a prenuptial agreement and that if it is both procedurally and substantively unfair, it is void. RP 3. The trial court noted that the decree of separation is “still valid and binding” and that “[r]eally, what we’re talking about is a property settlement agreement and attacking that, not the finding of separation of dissolution.” RP 17.

The court also observed that *Moody* and other cases clearly state that “[w]hether the terms of a separation agreement are unfair is a legal issue which must be raised on appeal, not in a motion to vacate the decree.” RP 3. The court commented that he would appreciate argument from counsel addressing these two lines of cases. RP 5.

After hearing argument, the trial court concluded “[u]ltimately, however, I think *Moody* is clear” and denied the motion to vacate and for a hearing on fraud. RP 22-3.

**D. Argument in Response to Appeal**

**1. Standard of review.** “On appeal, a trial court’s disposition of a motion to vacate will not be disturbed unless it

clearly appears that it abused its discretion.” *Lindgren v. Lindgren*, 58 Wn.App. 588, 595, 794 P.2d 526 (1990). “Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable.” *Coggle v. Snow*, 56 Wn.App. 499, 507, 784 P.2d 554 (1990). “However, we note that the discretionary judgment of a trial court of whether to vacate a judgment is a decision upon which reasonable minds can sometimes differ. For this reason, if the discretionary judgment of the trial court is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. *Lindgren*, 58 Wn.App. 588, 595, 794 P.2d 526 (1990).

Proof of fraud under CR60(b)(4) must be by clear, cogent and convincing evidence. *Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990). Therefore, a court reviewing the sufficiency of the evidence to support the findings is limited to determining whether the evidence shows that fraud, misrepresentation or misconduct was “highly probable.” *Matter of Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

“Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere

preponderance of evidence, but only upon a certainty of the error.”  
*Matter of Marriage of Schweitzer*, 132 Wn.2d 318, 330, 937 P.2d  
1062 (1997) quoting *Slater v. Murphy*, 55 Wn.2d 892, 898, 339  
P.2d 457 (1959).

**2 The trial court correctly concluded that any unfairness of the property settlement agreement and the effect of any failure to value property in a property settlement agreement are wholly legal issues and as such may not be addressed on a CR 60(b) motion, but must be raised on direct appeal.**

The trial court correctly relied upon *In re Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999) for the settled principle that the fairness of a separation agreement cannot be raised in a CR 60(b) motion, but must be directly appealed. In *Moody*, the husband moved to vacate maintenance provisions in a decree of legal separation. *Id.* at 984-85. As in the case at bar, the *Moody* decree of legal separation incorporated the parties’ property settlement agreement, which the complaining party signed *pro se*. A year later, the husband moved under CR 60(b) to stay finalization of dissolution and to vacate and re-open the property settlement and maintenance agreement. *Id.* at 985.

The *Moody* court observed that “[a] decree of legal separation is final when entered, subject to the right of appeal.

RCW 26.09.150. It is not an interlocutory order, and it is not the equivalent of a common law order for separate maintenance.” *Id.* at 988. Regarding the husband’s complaint of unfairness of the property settlement agreement and the separation decree incorporating it, the Supreme Court refused to consider it:

Whether the terms of a separation agreement are unfair is a legal issue which must be raised on appeal – not in a motion to vacate the decree. *In re Marriage of Tang*, 57 Wn.App. 648, 654, 789 P.2d 118 (1990). *See also In re Marriage of Brown*, 98 Wn.2d 46, 48, 653 P.2d 602 (1982)(errors of law may not be corrected by a motion to vacate)..... [t]he issue of whether the provisions of the decree were unfair when entered is not properly before the court, and we decline to consider it.

*Moody*, 137 Wn.2d. at 991. This case is very like *Moody*. As in *Moody*, the property settlement agreement was signed and incorporated in the decree of legal separation. *Id.* at 984-85. The main differences are that while in *Moody* the moving party only waited a year to bring a motion to vacate, here the moving party waited ten years; and that here the moving party ratified the separation agreement yet another time by directing her attorney to agree to convert the separation agreement into a dissolution. CP 134.

*Moody* relies upon an earlier Supreme Court case, *In re Marriage of Brown*, 98 Wn.2d 46, 48, 653 P.2d 602

(1982), to arrive at its decision. In *Brown*, the marriages “contained property settlements which included a division of military pay. These property settlements were stipulated to by the parties and were unappealed. In Washington unappealed property settlements are immune from modification.” 98 Wn.2d at 48.

This division of the Court of Appeals applied *Moody* in a case that is quite similar to the one at bar; *Tang*, 57 Wn. App. 648. In *Tang*, the trial court made the mistake of vacating a decree under CR 60(b) for failure to list, characterize, and evaluate the items of property owned by the parties. *Id.* at 649. The *Tang* agreement did not list any property at all. *Id.* at 651. The *Tang* movant plead under CR 60(b)(1), (5), and (11). *Id.* at 651-2.

The *Tang* wife unsuccessfully argued that “a trial court must have before it a list identifying and stating the value of the relevant properties in order to determine whether a separation contract was ‘unfair at the time of its execution’ under RCW 26.09.070(3).” *Id.* at 654. This is precisely the same argument Susan makes here. Opening Brief at 2, 6, 18. (“The failure of Seppo to disclose the

amounts of his retirement benefits constitutes a breach of his fiduciary duty to fully disclose the amount of his assets and a fraud upon Susan.”) Opening Brief at 17.

The *Tang* court disagreed, specifically noting that “no purpose would have been served by submitting an affidavit in support of the motion, since it rested on legal rather than factual grounds.” *Id.* at 654. Because of this, the trial court “abused its discretion by granting the motion. The issues presented to it were exclusively matters of law, which were properly appealable and not suitable for a CR 60(b) motion.” *Id.* at 656. The argument Susan makes here has already been squarely rejected in *Moody, Brown, and Tang* and it must fail again here. The trial court correctly determined that *Moody* precludes relief under CR 60(b).

Susan’s reliance upon *Seals v. Seals*, 22 Wn.App. 652, 590 P.2d 1301 (1979) is misplaced. In *Seals*, there was no separation or prenuptial agreement, no legal separation, the wife brought her action only four months after entry of the dissolution decree, and she was able to prove that the husband had deliberately hidden several significant assets from her. *Id.* at 654-55. The action was brought as a motion

for partition, which the court noted in dicta also satisfied the requirements of CR 60(b)(4) and (3)(1). *Id.* at 657. *Seals* is completely different from this case and offers no support whatsoever for Susan's argument.

Susan also claims support *from In re Marriage of Mahalingham*, 21 Wn.App. 228, 584 P.2d 971 (1978), wherein the husband moved *ex parte* to convert a legal separation decree into a dissolution. *Id.* at 229. The trial court's denial of that motion was upheld on appeal because the husband had failed to give his wife 5 days' notice pursuant to CR 6(d). *See In re Marriage of Wherley*, 34 Wn.App. 344, 347, 661 P.2d 155 (1983).

Here, Susan not only received plenty of notice of the legal separation containing the property disposition she now complains of, she joined in it. Ten years later, she ratified it by instructing her attorney to sign the order converting the separation to a dissolution. This case is nothing like *Mahalingham*.

Susan also tries to avail herself of help from *Grant v. Grant*, 199 Wn.App. 119, 397 P.3d 912 (2017). But in *Grant*, it was shown that the husband hid a significant retirement

asset from the wife and it was thus never distributed by the trial court. *Id.* at 129. Accordingly, the court partitioned the asset and distributed half of it to the wife. *Id.* at 136. *Contra Robinson v. Robinson*, 37 Wn.2d 511, 225 P.2d 411 (1950) (holding that a decree which awards “all other property” includes assets about which the other party had no knowledge). *Grant* provides Susan no support as it deals with a bad faith failure to disclose an asset and resolution of a partition action, which is very different from this case.

Susan’s arguments that this court should follow the 2 part test in *Marriage of Shaffer*, 47 Wn.App. 189, 194, 733 P.2d 1013 (1987) to determine the validity of a separation agreement and her argument that the separation agreement is void from its inception both fail because, as the trial court correctly concluded, *Moody* precludes relief.

**3. Even if the issue could be addressed on A CR 60(b) motion, laches precludes relief as the wife waited ten years after the legal separation which incorporated the agreement and almost two years after the divorce decree to bring her motion**

Generally, cases holding that laches does not bar a motion to vacate a decree stem from circumstances very different from this

one, cases of default judgments where the court lacks jurisdiction to enter a decree because relief exceeded that sought in the complaint, or there was no service. *Matter of Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013 (1989); *Rutherford v. Rutherford*, No. 77139-6-I, Division I, November 13, 2018 (cited per GR 14.1); Here, there was no default judgment and the wife participated in and agreed to all the proceedings. A recent Division I case, *In re Marriage of Dornay*, No. 77654-1-I, January 22, 2019 (cited per GR 14.1) even applied laches to a default case. The husband filed a motion under CR 60(b)(4) and other bases to vacate dissolution orders that had been entered six years earlier, claiming that he had not become aware of the default orders until a year ago and that he had not had money for an attorney to bring the motion until now. This Court held that the movant had been dilatory and the doctrine of laches barred his claim. Six years was too long.

The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion. *Luckett v. Boeing Co.*, 98 Wn.App. 307, 312, 989 P.2d 1144 (1999). Major considerations in determining a motion's timeliness are: (1) prejudice to the nonmoving party due to the

delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner. *In re Marriage of Thurston*, 92 Wn.App. 494, 500, 963 P.2d 947 (1998), review denied, 137 Wn.2d 1023, 980 P.2d 1282 (1999). In determining what constitutes a reasonable time the court should consider the facts of each case, the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. *Luckett*, 98 Wn.App. at 313.

In *Luckett*, this Court held: “Luckett became aware the action was dismissed but waited four months to file to vacate order of dismissal. Although Boeing does not show how it is prejudiced by Luckett’s delay, Luckett fails to put forth any good reason for her attorney’s four-month delay in bringing a motion to vacate.” Four months was too long.

Here, the wife has no claim that she was unaware of the entry of orders. She was fully cognizant of the terms of the separation agreement and joined her husband in requesting that the separation agreement be incorporated into the decree of legal separation. Seppo then began arranging his finances as a single person. Almost ten years later, her attorney signed off on the order

converting the separation to a dissolution. Then almost two years after dissolution, she decided that she did not like the property settlement she had agreed to almost twelve years earlier. She never offered a reason for her delay, other than unhappiness. Seppo would be prejudiced if relief were granted because he has for the last twelve years arranged his financial life upon the belief that he and Susan were legally separated. RP 19. She has cited to no case granting CR 60(b) relief after such a long period of time after becoming aware of the judgment. Ten years is too long. Her claim is barred by laches.

4. **Even if the issue could be addressed on CR 60(b) and were not precluded by laches, the trial court could not have granted relief because Susan provided zero evidence of fraud, misrepresentation or misconduct, thus failing the clear, cogent, and convincing standard**

The fraudulent conduct or misrepresentation of a CR 60(b)(4) motion must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense. *Lindgren v. Lindgren*, 58 Wn.App. 588, 794 P.2d 526 (1990); *Peoples State Bank*, 55 Wn.App. 372, 777 P.2d 1056. The party attacking a judgment under CR 60(b)(4) must establish the

fraud, misrepresentation, or other misconduct by clear and convincing evidence. *Lindgren*, 58 Wn.App. at 596.

Here, the only evidence of Susan brought was in the form of her personal belief or wishful guesstimate: “I estimate Seppo’s accrued retirement benefits during the decades of our marriage amounts to several hundred thousand dollars.” CP 82. It is worth noting that Susan also had an airline retirement account listed in the separation petition and agreement and it was listed exactly the same way Seppo’s is, without a value. CP 96.

Susan admitted that she was given the separation agreement and legal separation documents to look at. CP 82-83. She claimed that she didn’t understand it, but apparently did not seek counsel, instead signing it because she loved Seppo. CP 81, 83. Likewise, she said, she agreed to the legal separation because she wanted to protect him. CP 82.

It is settled law that “a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.” *Matter of Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). Here, Susan admits that she deliberately chose to remain ignorant of the contents of the separation agreement and legal separation petition.

Because this was her choice – one she made on three separate occasions over the years -- she cannot complain about the separation agreement’s contents now. *Id.* Her claim of fraud or unfairness rests squarely on her blind supposition that Seppo’s airline retirement account was worth “several hundred thousand dollars.” CP 82. She provided no support for that estimate. She was not prevented from fully and fairly presenting anything. Her evidence falls far short of the clear, convincing, and cogent evidence standard. Relief is simply not available for her claim.

**5. Seppo should receive attorneys fees and costs on appeal pursuant to RAP 18.9(a) because this appeal is frivolous**

Seppo asks for an award of attorney fees and costs on the basis of RAP 18.9(a), frivolousness. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). Here, the appeal raises only issues which are governed by settled law and cannot succeed. Seppo should be compensated for being forced to defend this frivolous appeal.

**E. CONCLUSION**

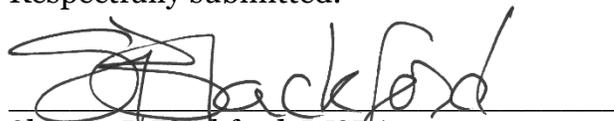
The trial court correctly concluded that any unfairness of the property settlement agreement and the effect of any failure to value property in a property settlement agreement are wholly legal issues and as such may not be addressed on a CR 60(b) motion, but must be raised on direct appeal.

Even if the issue could be addressed on a CR 60(b) motion, laches precludes relief as the wife waited ten years after the legal separation which incorporated the agreement and almost two years after the divorce decree to bring her CR 60 motion .

And even if the issue could be addressed on CR 60(b) and were not precluded by laches, the trial court could not have granted relief because Susan provided zero evidence of fraud, misrepresentation or misconduct, thus failing the clear, cogent, and convincing standard. This court must affirm.

DATED this 19<sup>th</sup> day of July, 2019.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "S. Blackford", written over a horizontal line.

Sharon J. Blackford, WSPA 25331  
Attorney for Seppo J. Kosunen, Appellant

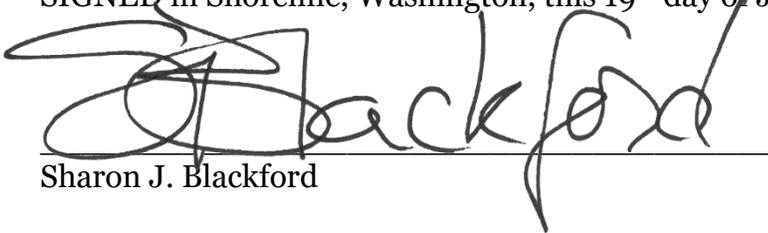
**CERTIFICATION OF SERVICE**

I, Sharon J. Blackford, certify that on the 19<sup>th</sup> day of July, 2019, I caused a true and correct copy of Opening Brief of Appellant to be served on:

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VIA the Court of Appeals eFiling portal

SIGNED in Shoreline, Washington, this 19<sup>th</sup> day of July, 2019.



Sharon J. Blackford

**SHARON BLACKFORD PLLC**

**July 19, 2019 - 2:01 PM**

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