

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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In re the Marriage of:

JONI HONG,

Respondent,

v.

JERRY HONG,

Appellant.

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

The Honorable Beverly G. Grant

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**BRIEF OF APPELLANT**

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Herbert Gelman, WSBA # 1811  
Attorney for Appellant  
1101 S. Fawcett, Suite 300  
Tacoma, WA 98402  
(253) 383-4611

 ORIGINAL

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## I. ASSIGNMENTS OF ERROR

The trial court erred in the following manner:

### **Assignment of Error No. 1**

By refusing to vacate the *Findings of Fact and Conclusions of Law* and the *Decree of Dissolution* and for refusing to grant a new trial to Appellant pursuant to CR 60(b)(1), (4), (5), and (11).

### **Assignment of Error No. 2**

By entering a Decree of Dissolution which exceeded the parameters requested in the original *Petition for Dissolution* and the *Amended Petition for Dissolution*, more specifically, by entering a final decree which awarded property to the Appellee labeled as a community asset which was clearly known to the Appellee to have a significant separate property portion.

### **Assignment of Error No. 3**

By entering *Findings of Fact and Conclusions of Law* and a *Decree of Dissolution* which provided for the distribution of assets as community accruing through November 1, 2007, when it fact the accrual of any community assets terminated as of October 6, 2006, the date the original *Petition for Dissolution* was filed.

### **Assignment of Error No. 4**

By entering *Findings of Fact and Conclusions of Law* and the *Decree of Dissolution* which was exceeded the Appellee/Petitioner's request in her *Petition for Dissolution* that stated, "The court should make a fair and equitable distribution of all the property." The decree granted relief that was beyond the relief sought in the *Petition for Dissolution*.

### **Assignment of Error No. 5**

By allowing a *Decree of Dissolution* to be entered which contained provisions contrary to law, more specifically, by ordering the Appellant, (and presumably his estate) to pay maintenance which would also continue after his death. That such a provision, absent an express agreement of the parties to continue making payments after the death of the obligor, was improper and was void as a matter of law.

## Assignment of Error No. 6

By entering a *Decree of Dissolution* providing for maintenance, where there were no supporting *Findings of Fact and Conclusions of Law* as to Appellee's need, or the Appellant's ability to pay maintenance.

### II. STATEMENT OF THE CASE

Mr. and Ms. Hong were married on March 7, 1981 [CP ]. She was 25 ½ years of age and Mr. Hong was 37 years of age. Both were employed by Northwest Airlines, however, Mr. Hong had been employed by Northwest for a period of 15 years prior to the marriage [CP 72]. Ms. Hong (now Seaman and hereinafter referred to as Ms. Seaman) filed an action for divorce by a *Petition for Dissolution* on October 6, 2006 [CP 1-3], which was amended on December 12, 2006 [CP 4-6]. Mr. Hong filed his *Response* to the petition on January 8, 2008 [CP 15-16].

The parties continued to reside in the home during the pendency of the action. The parties attended a settlement conference and returned for a second settlement conference, neither of which culminated in the parties reaching an agreed settlement of the issues. Mr. Hong participated in a preliminary hearing resulting in the issuance of a temporary order [CP 24-26].

Mr. Hong had been represented during a portion of the proceedings by attorney Gary Jacobson, who having decided to retire from the active practice of law, withdrew as his active counsel on March 12, 2008 [CP 27-28]. Mr. Hong did not retain new counsel and thereafter acted pro se. His contact thereafter was directly with Ms. Seaman's attorney [CP 71]. He acted as his own counsel thereafter.

There is nothing in the record to indicate any abandonment of his participation in this proceeding. To the contrary, all of his actions indicated his desire to be actively involved until the matter was resolved.

Mr. Hong is a flight attendant with Northwest Airlines and has been employed by Northwest. His primary route is Seattle to Honolulu, working an average of 27 days per month.

As a result of his seniority, he was in an excellent position to arrange his schedule to meet his needs.

He believed his trial date was set for October 29, 2008 [CP 71, lines 4-6]. He arrived home the previous evening and in getting the documents ready for his trial discovered that the actual trial date was October 21, 2008. When he learned of his error he took immediate steps to let the court and opposing counsel know.

The case was originally assigned to Superior Court Judge Susan Serko and later transferred to Department 8, Judge Brian Tollefson. Believing that the trial was to be held before Judge Tollefson, Mr. Hong e-mailed the Judge explaining his error as to the date of the trial and why he did not appear on that date. As explained in the e-mail [CP 77], he had not yet seen any final pleadings and was not aware that Pierce County Superior Court Administration had assigned the matter to Superior Court Judge Beverly Grant on the assigned trial date to take testimony relating to the dissolution.

The e-mail sent to Judge Tollefson was apparently forwarded to Judge Grant's court. Judge Grant's judicial assistant responded to Mr. Hong's e-mail a few hours later [CP 76].

Judge Grant never became aware of the e-mail [RP January 30, 2009, p.4, lines 3-15].

When Ms. Seaman appeared before the court on the date set for trial, the following introduction was made to the court:

Ms. Holmes' testimony was as follows:

"MS. HOLMES: Your Honor, this is our day of trial and for the record, I will note that it's about 10:37. Our report time was 9 a.m., and Mr. Hong has not appeared so court administration has indicated we put on testimony to finalize the dissolution at this time. ..."

[RP October 21, 2008, p.3, lines 13-19]

Mr. Hong likewise contacted Appellee's counsel by e-mail informing her of his error [CP 75]. No reply from Appellee's attorney was ever received by Mr. Hong. The only response he received was contained in an envelope postmarked 11/07/2008, which contained copies of the *Findings of Fact and Conclusions of Law* and the *Decree of Dissolution* [CP 71-72], which were entered by the court on October 21, 2008.

When Mr. Hong was able to obtain counsel, the time for appeal had expired. He likewise was able to discern that serious overreaching occurred in the presentation of the issues to the court on the day the *Findings of Fact and Conclusions of Law* and the *Decree of Dissolution* were entered.

Mr. Hong filed a motion for relief from the *Decree of Distribution* in December 18, 2008 [CP 67-69]. Argument was held on January 30, 2009, [RP January 30, 2009] before the Honorable Beverly Grant, Superior Court Judge for Pierce County. On February 27, 2009, Judge Grant heard further argument and

entered her oral opinion in this matter [RP February 27, 2009]. A written Order was entered on February 27, 2009 [CP 114-115] which modified the Decree of Dissolution in one respect only. Instead of awarding Ms. Seaman one-half of Mr. Hongs entire Northwest Airlines Pension for Contract Employees through November 1, 2007, she awarded Ms. Seaman an interest of one-half of this pension plan from the date of marriage, March 27, 1981 through November 1, 2007. In all other respects, the Decree of Dissolution was left intact.

### **III. ARGUMENT**

#### **A. Issues Pertaining to Assignment of Error No. 1**

The Superior Court erred by refusing to vacate the *Findings of Fact and Conclusions of Law* and the *Decree of Dissolution* and refusing to grant a new trial to Appellant by way of his motion for relief from judgment pursuant to Civil Rule 60(b)(1), (4), (5), and (11) of the Civil Rules for Superior Court.

#### **SUMMARY OF ARGUMENT**

The court granted relief to Mr. Hong in only one instance, despite the existence of other significant errors and misrepresentations which when viewed cumulatively, support the Appellant's request for a new trial.

CR 60(b)(1), (4), (5), and (11) provides as follows:

(b) 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:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

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

Relief from a judgment lies within the sound discretion of the court. In Morgan v. Burks, 17 Wn. App. 193, 563 P.2d 1260 (1977) our court said at p. 197:

“It has long been the rule in Washington, both under prior statute, and now in court rule, that motions to vacate or for relief from judgments are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of clear or manifest abuse of that discretion.” (citation omitted).

In the Morgan case, the appellant was not aware of the rights that he was giving up in agreeing to a settlement. The settlement was reached in an injury case. At the time of trial appellant believed that claims against the other party were reserved when in fact the settlement barred all other claims. His wife, a party as well, was not present during all of the proceedings and the appellant could not hear all that was said. The court granted a motion to vacate.

Motions to set aside a default judgment have been treated similarly by the courts in viewing the criteria necessary to setting aside a judgment or a default judgment.

In Dalgardno v. Trumbull, 25 Wash. 362, 65 Pac. 528 (1901) a defendant mistakenly noted the date service was made. When he had prepared a responsive pleading he learned that a default judgment was entered. The court held that under these facts the default judgment should be vacated.

In Titus v. Larsen, 18 Wash. 145 (1897) the Defendant mistakenly wrote down the day of service as the 19<sup>th</sup>, when in fact it was the 18<sup>th</sup>, and delivered that information to his attorney. He presented the court with evidence of a

meritorious defense justifying the court to say that under the circumstances, it was an abuse of discretion to refuse to set aside the judgment.

Here Mr. Hong mistakenly missed the trial date. He had been active in all phases of the case. He had a meritorious defense and acted quickly to inform the Petitioner and the court concerning his mistake.

In Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hodkinson, 95 Wn. App. 231, 238, 974 P.2d 1275 (1999), a default judgment was entered against Shepard who then hired the Helsell firm to have the judgment vacated. Helsell moved to vacate the default judgment 6 months after its entry. The court held that a motion to set aside the default judgment under CR 60(b)(1) must be made within four months after the entry. However, the court allowed the judgment to be vacated where there was a showing that the evidence before the court was insufficient to support the amount of damages.

In this case, Mr. Hong presented evidence of a meritorious defense and submitted evidence that there was no evidence to support a finding that the retirement earned by the Respondent was in its entirety a community asset. Ms. Seaman was aware of that fact. There is no factual or legal basis to support an award of maintenance to Ms. Seaman nor any evidence to support the *Decree of Dissolution* which provided that the obligation to pay maintenance would survive the death of Appellant. Nor was there any evidence to initially support the award of any maintenance or to support the division of assets made by the court.

These errors will be specifically addressed in the following assignments of error, but their cumulative effect was sufficient to support Appellant's motion for relief from judgment.

**B. Issues Pertaining to Assignment of Error No. 2**

By entering a *Decree of Dissolution* which exceeded the parameters requested in the original *Petition for Dissolution* and the *Amended Petition for Dissolution*, and more specifically, by entering a final decree which awarded property to the Appellee labeled as a community asset which was clearly known to the Appellee to have a significant separate property portion.

**SUMMARY OF ARGUMENT**

Ms. Seaman's Original and Amended Petition for Dissolution alleged the existence of separate and community assets and requested a fair and equitable division of all property [CP 5]. The original *Petition for Dissolution* filed October 6, 2006 had the very same provision [CP 2]. The *Findings of Fact* indicated that there was no separate property acquired prior to the marriage [CP 54]. This was clearly an erroneous finding.

CR(60)(b)(4) provides for the vacation of a judgment if there is a misrepresentation. Mr. Hong was employed with Northwest Airlines for 15 years prior to his marriage. Ms. Seaman knew this, however the Findings of Fact list all of his retirement interest with Northwest Airlines as a community asset [CP 54].

In testifying before the trial court on October 21, 2008, the date the *Decree of Dissolution* was entered, the following oral testimony by Ms. Seaman was submitted to the court as to the status of property:

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

[RP October 21, 2008, p. 4, lines 12 to 18]

The findings listed as community property the following assets:

The parties have the following real or personal community property:

1. Real property located at 610 15<sup>th</sup> Avenue SW, Puyallup, WA 98371.
2. 1997 Ford Explorer
3. 1996 Saturn Automobile
4. Accrued sick leave and vacation pay through husband's employment with Northwest Airlines.
5. Northwest Retirement Savings Plan for Contract Employees 401K Plan
6. Northwest Pension Plan for Contract Employees
7. Northwest Pension Plan for Salaried Employees
8. Northwest Employees Retirement Plan
9. Northwest Airlines stock
10. Any retirement benefits earned by wife
11. Furnishings, housewares, home decor items, tools and equipment

[CP 54, lines 11 – 18]

This is a gross misrepresentation of the facts. Mr. Hong commenced accumulating his interest in Northwest Pension Plan for Contract Employees in 1966 [CP 72], 15 years prior to his marriage to Ms. Seaman in 1981.

Ms. Seaman was aware that Mr. Hong had been employed with Northwest Airlines for 15 years prior to her marriage to Mr. Hong. She now admits that. The Northwest Pension Plan for Contract Employees was in existence prior to the marriage but says it "[I]s hopelessly commingled so it is presumed to be community." [Declaration of Joni Seaman, January 26, 2009, CP 92, lines 16-18].

How in the world did his retirement plan get co-mingled?

Ms. Seaman also states that there was no testimony to the contrary at trial. Of course not, she was the sole person at trial and represented that all of the retirement interests were community assets. She stated that all the retirement assets listed in the *Findings of Fact and Conclusions of Law* and were community assets [RP October 21, 2008, p. 4, Lines 12-18]. This was not true.

Dividing pensions occur everyday in dissolution actions. Generally, it is done by identifying the separate portion from the community portion, and then dividing the community portion in a fair and reasonable manner.

Seeking to obtain an interest in a significant portion of Mr. Hong's separate property was not consistent with the original pleadings filed by Ms. Seaman which requested a fair and equitable distribution of property.

The court corrected the division of Mr. Hong's retirement accruing prior to the marriage, by awarding that portion to Mr. Hong. However, nothing was changed as to Ms. Seaman's retirement, all of which being awarded to her.

### **C. Issues Pertaining to Assignment of Error No. 3**

The Superior Court erred by entering *Findings of Fact and Conclusions of Law* and a *Decree of Dissolution* which provided for the distribution of assets as community accruing through November 1, 2007, when in fact the accrual of any community assets terminated as of October 6, 2006, the date the original *Petition for Dissolution* was filed.

### **SUMMARY OF ARGUMENT**

While the trial judge amended the division of one particular asset, i.e., Northwest Plan for Contract Employees [CP 114-115], it modified only one of the errors in the findings of fact and the decree of dissolution which were based on the testimony delivered to the court by Ms. Seaman on October 21, 2008.

The second issue relates to the timeline in which the decree determined to be the period in which community assets accumulated.

The original *Petition for Dissolution* and the *Amended Petition for Dissolution* stated that, "Husband and wife are not separated" [CP 2, 5].

The findings of fact stated that the parties separated on or about November 1, 2007. This date was obviously interlineated on the date the matter was heard before Judge Grant [CP 54, line 4]. The division of the pensions were divided as of November 1, 2007. Ms. Seaman testified that she and Mr. Hong physically separated on November 1, 2007.

Q Did you and Mr. Hong physically separate on or about November 1<sup>st</sup>, 2007"

A Yes.

[RP October 21, 2008, p. 4, lines 7-9]

As of November 1, 2007, the parties' dissolution action had been pending for more than a year. It was based upon this trial testimony that the court approved a finding and entered a *Decree of Dissolution* which awarded to Ms. Seaman one-half of the community assets acquired through that date [CP 60]. It did not matter that Ms. Seaman's retirement interest also fell into that category because there were no accumulations to her retirement during that period. In any event, she was awarded all of her retirement interest to the exclusion of Mr. Hong.

Mr. Hong's retirement was the only property that was affected by the use of the date of separation of November 1, 2007 and not the date of the filing of the petition for dissolution. Ms. Seaman concluded that community assets were

being accumulated while the parties resided in the same home, despite the existence of a pending action for dissolution.

RCW 26.16.140 states in part as follows:

“When spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each.” (This statute has been substantially modified, but the modification has no effect on the issues in this case).

In re Marriage of Nuss, 65 Wn. App. 334, 344, 828 P.2d 627 (1992) the issue of community accumulations was before the court. The court stated the following at page 344:

“RCW 26.16.140 provides, in pertinent part: ‘When a husband and wife are living separate and apart, their respective earnings and accumulations shall be separate property of each.’ The determination whether a husband and wife are living separate and apart turns on the peculiar facts of each case.

The trial court found the date of the parties’ separation to be February 1988. Appellant asserts that the parties did not separate until October 31, 1989, 1 month prior to the filing of the petition for dissolution.

[M]ere physical separation of the parties does not establish that they are living separate and apart sufficiently to negate the existence of a community. ‘The test is whether the parties by their conduct have exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship’.” (emphasis added)(citations omitted).

The filing of this dissolution action stating that the marriage was irretrievably broken was such a renunciation and was so indicated in paragraph 1.4 of the Petition for Dissolution [CP 1] filed by Ms. Hong. Paragraph 1.6 acknowledges that the parties had not physically separated and paragraph 1.8 of the petition stated as follows:

“There is community or separate property owned by the parties. The court should make a fair and equitable division of all the property. The division of the property should be determined by the court at a later date.” [CP 2]

Living together in and of itself does not justify a conclusion that the parties have a viable community. In the *Petition for Dissolution* filed on October 6, 2006 [CP 1, line 24] and in the *Amended Petition for Dissolution*, paragraph 1.4, Ms. Seaman alleged that the marriage was irretrievably broken [CP 5]. This is a clear renunciation of the community and yet the parties can still be in the same household. Mr. Hong in his response to the petition admitted that the marriage was irretrievably broken [CP 15]. This is also a clear renunciation of the community. The mandatory domestic relations form WPF DR 01.100, *Petition for Dissolution of Marriage* (PTDSS) makes that acknowledgment in section 1.6.

Similarly, WPF DR .04.0300, *Findings of Fact and Conclusions of Law* (FNFCL) addresses the “Status of the Parties” in paragraph 2.5 which states:

- Husband and wife separated on \_\_\_\_\_ [Date].
- Husband and wife are not separated.

This contemplates a factual situation where the parties will be divorced, yet continue to reside together.

This paragraph immediately precedes paragraph 2.6 of the Washington Pattern Forms, which addresses the “Status of Marriage” and addresses whether this is going to be a dissolution, legal separation, or an invalidity of marriage document.

Merely living together does not support a conclusion that the parties continue to acquire community property in light of a pending and active dissolution action.

This was a defunct marriage.

In the case of In re Marriage of Short, 125 Wn.2d 865, 871, 890 P.2d 12 (1995) the court was faced with having to decide the issue of classification of post separation stock accumulations under the living separate and apart statute, RCW 26.16.140. In reversing the Court of Appeals, which held that the stock was a community accumulation rather than separate, the court said as follows at p. 871:

“The "living separate and apart" statute contemplates a permanent separation, a "defunct" marriage. A marriage is considered "defunct" when both parties to the marriage no longer have the will to continue the marital relationship. In other words, when the deserted spouse accepts the futility of hope for restoration of a normal marital relationship, or just acquiesces in the separation, the marriage is considered "defunct" so that the "living separate and apart" statute applies. ..." (citation omitted).

The way this issue was presented to the trial court on the date oral testimony of Ms. Seaman was taken consisted of the following:

Q Were you married to Jerry Hong on March 7<sup>th</sup> 1981 in Missoula, Montana?

A Yes.

Q Did you and Mr. Hong physically separate on or about November 1<sup>st</sup>, 2007?

A Yes.

[RP October 21, 2008, p. 4, lines 4 - 9]

Physical separation is not the operative fact to support a conclusion that until there was a physical separation the parties intended to accumulate community assets. Nor is there any legal basis to support that conclusion. The prepared *Findings of Fact and Conclusions of Law and Decree of Dissolution* appear to have a different date which was by interlineation changed to November 1, 2007.

Had the parties continued to cohabit after the entry of the *Decree of Dissolution*, Ms. Seaman's rationale would have the court believe that the parties nevertheless would continue to accumulate joint assets.

Both parties had acknowledged that the marriage was irretrievably broken. The court erred in dividing alleged community assets effective through the date of November 1, 2007, rather than the date of filing the dissolution action. The court further erred in not correcting this error by denying Appellant's CR 60 motion, and not vacating the judgment.

In Marriage of Moody, 137 Wn.2d 979, 976 P.2d 1240 (1999), our court said at p. 989:

"The marriage dissolution act does not require the parties to be separated in order to file a petition for dissolution or legal separation. RCW 26.09.020(1)(d) (stating the information that must be included within the petition, including "[i]f the parties are separated the date on which the separation occurred" (emphasis added)). The only "ground" for dissolution that need be alleged is that the marriage is irretrievably broken. RCW 26.09.030."

#### **D. Issues Pertaining to Assignment of Error No. 4**

The court erred by entering *Findings of Fact and Conclusions of Law* and the *Decree of Dissolution* which was exceeded the Appellee/Petitioner's request in her *Petition for Dissolution* that stated, "The court should make a fair and

equitable distribution of all the property.” The decree granted relief that was beyond the relief sought in the Petition for Dissolution.

### SUMMARY OF ARGUMENT

Petitioner’s original pleadings requested the court to make a fair and equitable distribution of property. Viewed as a whole, the final pleadings were not fair, nor equitable and disproportionately favors the Petitioner.

The original Petition for Dissolution [CP 2] as well as the Amended Petition for Dissolution [CP 5] states in Section 1.8 as follows:

#### “PROPERTY

There is community or separate property owned by the parties. The court should make a fair and equitable division of all the property.

The division of property should be determined by the court at a later date.”

[CP 2, 5]

The court’s *Findings of Fact and Conclusions of Law and Decree of Dissolution* were based solely on the testimony of Ms. Seaman. Ms Seaman knew that Mr. Hong had accumulated substantial retirement benefits with Northwest Airlines prior to their marriage.

Ms. Seaman knew that the marriage was irretrievably broken as of the date of the filing of the Petition for Dissolution in 2006. However, for the purposes of determining the date through which community property would accrue, she testified that the date was the time the parties physically separated, which was a year after the *Petition for Dissolution* was filed.

Despite her knowledge of these factors, she nevertheless requested and was awarded assets which were not community assets.

In re Marriage of Leslie, 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989)

the court set out the law relating to the extent in which property and obligations may be dealt with in default judgment situations.

The court said as follows at p. 617:

“In entering a default judgment, a court may not grant relief in excess of or substantially different from that described in the complaint. Sceva Steel Bldgs., Inc. v. Weitz, 66 Wn.2d 260 , 262, 401 P.2d 980 (1965); Stablein v. Stablein, 59 Wn.2d 465 , 466, 368 P.2d 174 (1962); In re Marriage of Campbell, 37 Wn. App. 840 , 845, 683 P.2d 604 (1984); In re Marriage of Thompson, 32 Wn. App. 179 , 183-84, 646 P.2d 163 (1982); Columbia Vly. Credit Exch., Inc. v. Lampson, 12 Wn. App. 952, 954, 533 P.2d 152 (1975).

Further, a court has no jurisdiction to grant relief beyond that sought in the complaint. To grant such relief without notice and an opportunity to be heard denies procedural due process. Conner v. Universal Utils., 105 Wn.2d 168, 172-73, 712 P.2d 849 (1986); Watson v. Washington Preferred Life Ins. Co., 81 Wn.2d 403 , 408, 502 P.2d 1016 (1972); Ware v. Phillips, 77 Wn.2d 879 , 884, 468 P.2d 444 (1970).

To the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void. Stablein, 59 Wn.2d at 466 ; Sheldon v. Sheldon, 47 Wn.2d 699 , 702-03, 289 P.2d 335 (1955); State ex rel. Adams v. Superior Court, 36 Wn.2d 868 , 872, 220 P.2d 1081 (1950); In re Marriage of Markowski, 50 Wn. App. 633 , 635, 749 P.2d 754 (1988); In re Marriage of Hardt, 39 Wn. App. 493 , 496, 693 P.2d 1386 (1985); Allison, 36 Wn. App. at 282.

Superior Court Civil Rule 60(b)(5) provides that upon a motion to vacate, a court may relieve a party from a final judgment, order or proceeding if that judgment, order or proceeding is void. A vacated judgment has no effect. The rights of the parties are left as though the judgment had never been entered. Anacortes v. Demopoulos, 81 Wn.2d 166, 500 P.2d 546 (1972); Weber v. Biddle, 72 Wn.2d 22, 28, 431 P.2d 705 (1967); In re Estate of Couch, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986).

In re Marriage of Hardt, 39 Wn. App. 493 , 496, 693 P.2d 1386 (1985), the Court of Appeals affirmed vacation of a dissolution decree where, among other reasons, the decree failed to conform

to the spouses' stipulation and the decree provided more relief than the petition requested. Further, the Court of Appeals affirmed the vacation and awarded reimbursement to the husband for child support payments he made pursuant to the void decree despite a 5-year lapse of time between entry of the dissolution decree and the husband's motion to vacate it. The court held that void judgments may be vacated irrespective of the lapse of time." (citations omitted)(emphasis added).

In re Marriage of Hardt, 39 Wn. App. 493 , 496, 693 P.2d 1386

(1985), the court said as follows at p. 495:

"First, the State contends the court improperly vacated the 5-year-old dissolution decree. CR 60(b) allows this court to

relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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

Courts may vacate judgments involving irregularities even where an order is unappealable for error of law. (CR 60 allows relief in extraordinary circumstances).

Mr. Hardt contends two irregularities justify his motion to vacate: that the decree was void since it provided more relief than the petition requested, and that Mrs. Hardt fraudulently entered the child support amount in the do-it-yourself decree. Proceedings to vacate judgments are equitable in nature and the court should exercise its authority liberally "to preserve substantial rights and do justice between the parties." The superior court's decision to vacate should be disturbed only upon a showing of clear or manifest abuse.

With respect to Mr. Hardt's first alleged irregularity, void judgments have long been recognized as that type of irregularity justifying a motion to vacate. Void judgments may be vacated irrespective of the lapse of time." (citations omitted).

In any dissolution action, the court pursuant to RCW 26.09.080 must first characterize the property and then make a fair and equitable distribution. That was not done in this case.

CR 60(b)(1) likewise provides for the vacation of a judgment for irregularity in obtaining a judgment, misrepresentation, or any good reason justifying relief from the operation of the judgment. This case should not be treated differently than the one in which a default judgment was taken, considering the manner in which Ms. Seaman obtained her judgment.

#### **E. Issues Pertaining to Assignment of Error No. 5**

The court erred by allowing a *Decree of Dissolution* to be entered which contained provisions contrary to law, more specifically, by ordering the Appellant, (and presumably his estate) to pay maintenance which would continue after his death. That such a provision, absent an express agreement of the parties to continue making payments after the death of the obligor, was improper and was void as a matter of law.

#### **SUMMARY OF ARGUMENT**

The provision for a maintenance award to continue beyond the obligor's death was contrary to law.

RCW 26.09.170(2) as it relates to maintenance states as follows:

“Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.”

RCW 26.09.070(7) provides as follows:

“When the separation contract so provides, the decree may expressly preclude or limit modification of any provision for maintenance set forth in the decree. Terms of a separation contract pertaining to a parenting plan for the children and, in the absence of express provision to the contrary, terms providing for maintenance set forth or incorporated by reference in the decree are automatically modified by modification of the decree.”

The decree of dissolution provides in part as follows:

“The spousal maintenance shall terminate upon the remarriage of the wife or the death of the wife. The spousal maintenance obligation shall survive the death of the husband.” [CP 61, line 11-12].

This is contrary to the statutory provisions found in RCW 26.09.170(2), and there is no written agreement between the parties to create an exemption as set forth in RCW 26.09.070(7).

In re Marriage of Hulscher, 143 Wn. App. 708, 713-14, 180 P.3d 199 (2008), is a recent Division II appeals case in which the court reversed a Pierce County decision modifying a non-modifiable maintenance order which resulted from a specific and express written separation agreement entered into by the parties. The court stated the rule, that in the absence of an express agreement or a decree signed by both parties, the court cannot *sua sponte* provide for maintenance which is contrary to the mandate of the statute, i.e. RCW 26.09.170(2).

The court stated on p. 714:

“We look to Short to begin our analysis. There, the trial court entered a nonmodifiable maintenance award in the absence of any agreement between the parties. In re Marriage of Short, 71 Wn. App. 426, 442, 859 P.2d 636 (1993), rev’d on other grounds, 125 Wn.2d 865, 890 P.2d 12 (1995). Division One of this court reversed, holding that a trial court may not enter a nonmodifiable maintenance award provision *sua sponte*, absent an express agreement by the parties. Short, 71 Wn. App. at 443. The Washington State Supreme Court affirmed Division One’s analysis on this issue, finding that because the parties did not enter into a separation contract, the trial court had no authority to include a nonmodifiable maintenance award provision in the decree of dissolution. Short, 125 Wn.2d at 876. Thus, Short is inapposite; it addressed the trial court’s actions and not the parties’ actions. There is no language in Short that permits a trial court to order modification of parties’ nonmodifiable separation agreement. Rather, Short stands for the proposition that a trial court may not

sua sponte enter nonmodifiable maintenance provisions, absent an express agreement by the parties. Short, 125 Wn.2d at 876; Short, 71 Wn. App. at 443-44.

Nor does Short stand for the proposition that the parties' separation agreement must be a separate document from the decree of dissolution. See Short, 125 Wn. App. at 875-76; Short, 71 Wn. App. at 442-44. This proposition is further supported by Division One's decision in In re Marriage of Glass, 67 Wn. App. 378, 835 P.2d 1054 (1992).

In re Marriage of Glass, there was no formal separation contract in the record. Glass, 67 Wn. App. at 390 n.13. But there was a decree of dissolution, signed by both parties and their attorneys, which the parties entered into by agreement. Glass, 67 Wn. App. at 390 n.13. The decree even referred to itself in some places as the "property settlement agreement." Glass, 67 Wn. App. at 390 n.13. Division One found a separation contract was "embodied into a decree" and, thus, it was required to enforce the separation contract as proscribed by RCW 26.09.070(7). Glass, 67 Wn. App. at 390. Division One refused to modify the spousal maintenance because under the separation contract embodied in the decree, it was nonmodifiable. Glass, 67 Wn. App. at 390; see also 19 Kenneth W. Weber, *Washington Practice: Family and Community Property Law*, § 19.8, at 408 & n.3 (1997) (stating that "[i]f the decree has been signed by both parties as a stipulated instrument, it may be considered to also constitute a separation contract.").

Again, Division One's decision in Glass is consistent with the Supreme Court's decision in Short. The Glass court refused to modify the nonmodifiable spousal maintenance agreement embodied in the decree of dissolution because the parties expressly agreed to the provision. Glass, 67 Wn. App. at 390. Whereas in Short, Division One and the Washington Supreme Court refused to uphold the nonmodifiable spousal maintenance provision at issue because the trial court imposed it sua sponte, without agreement from the parties. Short, 125 Wn.2d at 876. (at 715)." (emphasis added).

The court was without authority to allow spousal maintenance to continue beyond the death of Mr. Hong absent an agreement required pursuant to the provision of RCW 26.09.170(2). Such an agreement does not exist in this case.

Secondly, both parties and their attorneys were not signatory to the decree, as was the case in Hulscher, *supra*.

Additionally, there are no findings as to the need for maintenance in the amounts set forth in the decree, nor any findings as to Mr. Hong's ability to pay. If in fact it was negotiated and agreed upon by the parties the court need not make a determination of the fairness. Short, *supra*, 125 Wn.2d at 876. It therefore follows that the question of fairness is one that needed to be resolved in this case where there is no agreement.

The court likewise noted in the Short case, *supra*, that the parties had reached an agreement by stating as follows on page 716:

*"There is no written separation contract or prenuptial agreement. The parties have reached an agreement on the terms of the settlement of this marriage dissolution action. The final pleadings signed by the parties constitute that agreement and the parties have asked that the Court adopt their agreement."* (italics theirs).

Again, this did not occur in the Hong dissolution. The pleadings were not signed by both parties.

The court was without authority to approve such a provision. This was not only contrary to law, but is an additional showing that the Decree of Dissolution exceeded the parameters of the Petition for Dissolution, and viewed cumulatively with the other issues of overreaching should have been the basis for granting relief to the appellant from the judgment.

CR 60(b)(11) is the vehicle to cure the action that was taken.

In re Marriage of Tang, 57 Wn. App. 648, 789 P.2d 118 (1990), our court in discussing CR 60(b)(11) said as follows at p. 655:

"Finally, Linda Tang asserts that the trial court's order can be upheld under CR 60(b)(11), which permits the vacation of a judgment due to "[a]ny other reason justifying relief from the operation of the judgment." 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." "Such circumstances must relate to irregularities extraneous to the action of the court." The rule has previously been invoked in unusual situations which typically involve reliance on mistaken information." (citations omitted)(emphasis added).

#### F. Issues Pertaining to Assignment of Error No. 6

The court erred by entering a Decree of Dissolution providing for maintenance, where there were no supporting *Findings of Fact and Conclusions of Law* as to Appellee's need, or the Appellant's ability to pay maintenance.

#### SUMMARY OF ARGUMENT

The court ordered maintenance to be paid without any finding of a need or an ability to pay. The only testimony presented to the trial court relating to maintenance was as follows:

Q Are you currently receiving spousal maintenance by an order entered by the court commissioner in the amount of \$1000 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 a month for four additional years; is that correct?

A Yes.

Q Are you asking for a restraining order?

A No.

Q And as far as income for the purposes of calculating spousal maintenance, is it correct that your husband earns in excess of \$60,000 a year employed by Northwest Airlines?

A Yes.

Q And do you earn approximately \$30,000 a year working for a medical office?

A Yes

[RP October 21, 2008, p. 5, line 11 - p. 6, line 9]

The only reference to maintenance was a statement that had to do with a prior temporary order. Temporary maintenance is governed by RCW 26.09.060 which provides that in a proceeding for a divorce, temporary maintenance may be awarded.

RCW 26.09.060(1)(b) states as follows

“Disposition of property or liabilities, maintenance, or support following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner; either party may move for temporary maintenance or for temporary support of children entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.”

RCW 26.09.060(10) provides in part as follows:

“(10) A temporary order, temporary restraining order, or preliminary injunction:

(a) Does not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding;

(b) May be revoked or modified;

(c) Terminates when the final decree is entered, except as provided under subsection (11) of this section, or when the petition for dissolution, legal separation, or declaration of invalidity is dismissed. ...”

RCW 26.09.090 provides as follows:

“(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.”

There was no testimony as to need or the ability to pay. There was no financial documentation provided to the court as to the Petitioner's need nor the Respondent's ability to pay.

There is no evidence to support any finding or conclusion or a decree for maintenance. The provisions for maintenance is totally unsupported.

Maintenance is not awarded as a matter of right. In re Marriage of Luckey, 73 Wn. App. 201, 208, 868 P.2d 189 (1994).

It may be argued that an appeal regarding the award of maintenance is subject only to an argument that the court abused its discretion and is therefore not properly before the court on a motion for relief from judgment pursuant to CR 60. However, when a maintenance award is not based on a fair consideration of statutory factors, not only is it an abuse of discretion, but it is improper for the court to make an award of maintenance when financial issues are unknown. In re Marriage of Marzetta, 129 Wn. App. 607, 616, 120 P.3d 75 (2005), *review denied*, 157 Wn.2d 1009 (2006).

A further argument might be made that maintenance is subject to modification, hence that would be the appropriate remedy.

However, in reviewing this case in its entirety, that being the award of maintenance beyond a period of time which was legally permissible, an honest and legitimate mistake of the appellant resulting from him missing the trial date, the total absence of any evidence to support an award of maintenance coupled with characterization of property as community which was clearly separate

property, when taken as a whole, is sufficient reason to support a vacation of the judgment based on CR 60(b)(1), (4), (5), and (11).

### **III. Attorney Fees**

Appellant requests an award for his attorney fees and costs pursuant to RAP 18.1. Appellant is entitled to attorney fees pursuant to RCW 26.09.140. He has incurred substantial fees and costs and believes the Appellee will have the ability to pay these fees.

### **V. Conclusion**

Mr. Hong made a mistake. He certainly should be held accountable for not correctly remembering the trial date and as a pro se respondent he nevertheless is not relieved from compliance.

If this had been a case where the Respondent had been represented by an attorney and on the trial date neither he nor his attorney appeared, the court would have inquired of counsel for Petitioner if she tried to contact the Respondent's attorney before proceeding. That is the general procedure in all trial courts and for hearings before commissioners. No such inquiry was made to determine the whereabouts of Mr. Hong. Was he ill? Did he have an accident? In fact, Mr. Hong later learned that on the date of the actual hearing Ms. Seaman drove by his home and saw that his car was there. When he was on a trip, his vehicle was left at the airport. [CP 71, lines 15-17]. She knew he was actively involved in this proceeding and was home on the date of trial. He did not appear in court because he believed the date for trial was a different date.

Mr. Hong, when learning of his error, took immediate steps to notify the court and counsel of what had occurred.

It is unfortunate that he did not immediately file a notice of appeal.

One could argue that as a result of not having appealed the court's decision, he must therefore suffer the effects of the decree. Were that the case, there would be no reason for the existence of CR 60, Relief from Judgment or Order.

Does Mr. Hong make a case under CR 60(b)(1), (4), (5), (11).

The Appellee in her *Petition for Dissolution* requested the court to make a fair and equitable distribution of property. She failed in that endeavor by the mischaracterization of properties and she failed in that by knowingly asserting in her testimony an interest in properties that were clearly earned before the marriage of the Petitioner and Respondent (Appellant) and earned after their separation.

She failed in her endeavor to obtain fair and equitable results by seeking and obtaining a decree that provided for maintenance to be paid for periods beyond the time permitted by law.

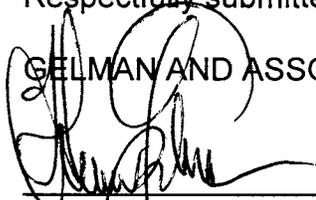
She failed in her endeavor to obtain fairness by seeking and obtaining substantial maintenance without providing the court with any evidence to support the award of maintenance.

While the court did vacate a portion of the decree which awarded Ms. Seaman one-half of Mr. Hong's retirement that was clearly earned prior to the marriage, the court did not fully correct the other issues raised in this appeal.

For all of the above reasons, the court should have granted appellant's motion to vacate the judgment pursuant to CR 60(b)(1), (4), (5), and (11), and this court should remand the case for further proceedings to correct the errors which are addressed in this brief.

Dated this 10 day of August, 2009.

Respectfully submitted,

  
GELMAN AND ASSOCIATES,  
\_\_\_\_\_  
Herbert Gelman, WSBA # 1811  
Attorney for Appellant

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

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DEPUTY

In re the Marriage of:

JONI HONG,

Petitioner,

and

JERRY HONG,

Respondent/Appellant.

Appeals Case No. 39074-4-II

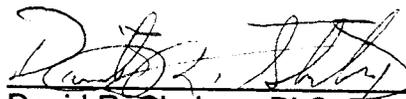
PROOF OF SERVICE

THAT on the 21 day of August 2009, the undersigned delivered, via US Postal Service, First Class postage paid, a true and correct, conformed copy of the Appellant's Brief and attached is said copy of proof, addressed to:

Campbell Dille Barnett Smith & Wiley  
317 S Meridian  
Puyallup, WA 98371-5913

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

DATED this 21 day of August 2009, at Tacoma, Washington.

  
David R. Shelvey, PLS, BA

HERBERT GELMAN  
ATTORNEY

GELMAN & ASSOCIATES  
ATTORNEY AT LAW  
1101 SOUTH FAWCETT, STE. #300  
TACOMA, WA 98402  
OFFICE: (253) 383-4611 / FAX: (253) 383-3317

DAVID R. SHELVEY  
PARALEGAL

August 20, 2009

Sent via First Class Mail

Campbell Dille Barnett Smith & Wiley  
317 S Meridian  
Puyallup, WA 98371-5913

Attn: Boyd Wiley  
Hillary Holmes

Re: Dissolution of Hong, PCSC Case # 06-3-03419-7  
Court of Appeals Case # 39074-4-II  
Brief of Appellant

Dear Mr. Wiley and Ms. Holmes,

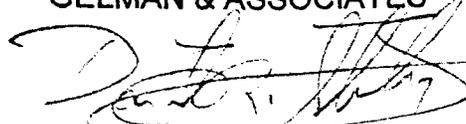
Enclosed for your records is the *Brief of Appellant* that was filed with the Court of Appeals on August 21, 2009. Also attached are the *Report of Proceedings* for October 21, 2008, January 30, 2009, and February 27, 2009.

If you have any questions, please do not hesitate to call.

Thank you for your cooperation and working with us on this matter.

Very truly yours,

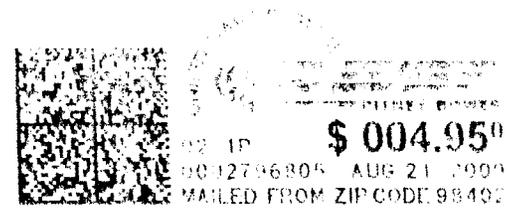
GELMAN & ASSOCIATES



David R. Shelvey, PLS, BA  
Paralegal to Herbert Gelman

cc: Client  
Court file

 COP



venue, Suite 350  
ngton 98402

**GELMAN & ASSOCIATES**  
ATTORNEYS AT LAW  
1101 South Fawcett, Suite 300  
Tacoma, Washington 98402

**TO:** CAMPBELL DILLE BARNETT  
317 S MERIDIAN  
PUYALLUP, WA 98371-5913

FIRST CLASS MAIL

*Report of Proceedings*

for

October 21, 2008

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

COPY

JONI HONG, )  
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Petitioner, )  
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vs ) Superior Court  
 ) No. 06-3-03419-7  
 ) Court of Appeals  
JERRY HONG, ) No. 39074-4-II  
 )  
Respondent. )  
 )

VERBATIM REPORT OF PROCEEDINGS  
HEARING

BE IT REMEMBERED that on the 21st day of  
October, 2008, the above-captioned cause came on  
duly for hearing before the HONORABLE BEVERLY G.  
GRANT, Superior Court Judge in and for the County of  
Pierce, State of Washington; the following  
proceedings were had, to-wit:

Reported by: Kristine M. Triboulet, CCR  
License No. TRIBOKM35904

Kristine M. Triboulet, Official Court Reporter

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**APPEARANCES**

**FOR THE PETITIONER:            HILARY HOLMES**  
**Attorney at Law**

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PROCEEDINGS

October 21, 2008

Hearing

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THE COURT: Good morning every one. This is the Hong versus Hong matter.

Ms. Holmes, good morning.

MS. HOLMES: Your Honor, this is our day of trial and for the record, I will note that it's about 10:37. Our report time was 9 a.m., and Mr. Hong has not appeared so court administration has indicated we can put on testimony to finalize the dissolution at this time. So I would ask you to swear in my client

JONI HONG, being first duly sworn on oath by the Court testified as follows:

THE COURT: All right. Go ahead, Ms. Holmes.

EXAMINATION

1 BY MS. HOLMES:

2 Q Can you, please, state your name?

3 A Joni Hong.

4 Q Were you married to Jerry Hong on March 7th

5 1981 in Missoula, Montana?

6 A Yes.

7 Q Did you and Mr. Hong physically separate on or

8 about November 1st, 2007?

9 A Yes.

10 Q Do you have any dependent minor children?

11 A No.

12 Q And do you have community property with Mr.

13 Hong?

14 A Yes.

15 Q And is the community property fully listed in

16 the findings of fact, conclusions of law with

17 correct values?

18 A Yes.

19 Q And do you have some community debts with Mr.

20 Hong?

21 A Yes.

22 Q And are those fully listed in the findings of

23 fact, conclusions of law with the correct

24 values?

25 A Yes.

1 Q And are you asking that the Court divide the  
2 property as set forth in the decree?  
3 A Yes.  
4 Q Is that division fair and equitable?  
5 A Yes.  
6 Q Are you asking the Court to divide the debts as  
7 set forth in the decree?  
8 A Yes.  
9 Q Is that fair and equitable?  
10 A Yes.  
11 Q Are you currently receiving spousal maintenance  
12 by an order entered by the court commissioner  
13 in the amount of \$1000 per month?  
14 A Yes.  
15 Q Are you asking for spousal maintenance to  
16 continue until your husband retires and you  
17 begin receiving your share of the retirement?  
18 A Yes.  
19 THE COURT: Is that retirement anticipated  
20 to be in the next couple years?  
21 MS. HONG: Yes.  
22 Q And then that the spousal maintenance will be  
23 reduced to \$300 a month for four additional  
24 years; is that correct?  
25 A Yes.

1 Q Are you asking for a restraining order?

2 A No.

3 Q And as far as income for the purposes of

4 calculating spousal maintenance, is it correct

5 that your husband earns in excess of \$60,000 a

6 year employed by Northwest Airlines?

7 A Yes.

8 Q And do you earn approximately \$30,000 a year

9 working for a medical office?

10 A Yes.

11 Q Are you asking that your name be changed to be

12 Joni M. Seemon?

13 A Yes.

14 Q And are you currently pregnant?

15 A No.

16 Q And you are asking for an award of attorney's

17 fees and costs in the amount of \$3000 to be

18 paid by your husband; is that correct?

19 A Yes.

20 Q And are your actual attorney fees and costs

21 higher than the amount we're requesting?

22 A Yes.

23 Q And the court reserved the issue of attorney

24 fees and costs at the initial temporary order

25 hearing; is that correct?

1     A     Yes.

2             MS. HOLMES: Do you have any questions,  
3     Your Honor?

4             THE COURT: Not right now. I was looking  
5     at the distribution of the pensions and I think  
6     my question has been answered, basically he  
7     gets to keep his and she gets to --

8             MS. HOLMES: She is being awarded part of  
9     his. He has four. I have two QDRO's on that.  
10    He has four different retirements. He has a  
11    Northwest pension plan for contract employees  
12    and that one is the very large one. So she is  
13    going to be awarded half up until the date of  
14    separation. Then there is Northwest Airlines  
15    pension plan for salaried employees. That's a  
16    smaller one. She will get half. He gets all  
17    of the Northwest Airlines retirement plan, all  
18    of the Northwest Airlines retirement savings  
19    plan for contract employees and she will get  
20    her flight attendant one but she is much  
21    younger than him so it did not make sense to  
22    award him part because he wouldn't be able to  
23    collect until he is 77 years old so we awarded  
24    all this to Ms. Hong.

25            THE COURT: How old is he currently?

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MS. HOLMES: 62.

MS. HONG: 63. I think he is going to be  
64 in November.

THE COURT: And you are how old.

MS. HONG: 53.

MS. HOLMES: That's why we anticipate that  
he will retire in the next year or two.

THE COURT: I think there are some  
mandatory age limits on pilots but I know  
certain airlines have been challenged on that  
issue.

MS. HOLMES: He is actually a flight  
attendant.

THE COURT: All right. Consent  
congratulations and I have signed your  
paperwork.

MS. HOLMES: Thank you, Your Honor.

THE COURT: Have a good day.

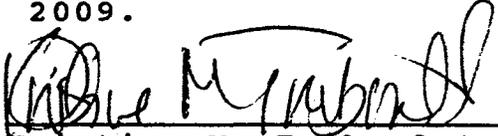
(Court in recess)

1 STATE OF WASHINGTON )  
2 ) ss  
3 COUNTY OF PIERCE )

4 I, Kristine M. Triboulet, a certified  
5 court reporter in and for the State of Washington do  
6 hereby certify that the oral testimony of said  
7 matter was recorded in shorthand and later reduced  
8 to print.

9 I further certify that I am neither attorney or  
10 counsel for, nor related to or employed by any of  
11 the parties to the action in which this testimony is  
12 taken; and furthermore, that I am not a relative or  
13 employee of any attorney or counsel employed by the  
14 parties hereto or financially interested in the  
15 action.

16 IN WITNESS WHEREOF, I have hereunto set my hand  
17 this 6th day of April, 2009.

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20 Kristine M. Triboulet  
21 Certified Court Reporter  
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*Report of Proceedings*

for

January 30, 2009

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

JONI HONG, )  
 )  
 Petitioner, )  
 )  
 -vs- )  
 )  
 JERRY HONG, )  
 )  
 Respondent. )

**COPY**

NO. 06-3-03419-7  
COA NO. 39074-4-II

VERBATIM REPORT OF PROCEEDINGS

30 JANUARY 2009

FILED  
IN COUNTY CLERK'S OFFICE

A.M. MAY 05 2009 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

HONORABLE BEVERLY GRANT  
Superior Court Judge  
Pierce County Superior Court

APPEARANCES:

FOR THE PETITIONER: Ms. Hillary A. Holmes  
317 South Meridian  
Puyallup, WA 98371-5913

FOR THE RESPONDENT: Mr. Herbert Gelman  
1101 Fawcett Avenue, Suite 300  
Tacoma, WA 98402-2015

ANITA LOPEZ  
CERTIFIED COURT REPORTER  
PIERCE COUNTY SUPERIOR COURT  
TACOMA, WA  
(360) 990-5904

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THE COURT: The Hong matter. This is Hong versus Hong, Cause Number 06-3-03419-7. Please identify yourselves for the record.

MR. GELMAN: For the record, I'm Mr. Gelman, representing Mr. Hong in this matter, who is the respondent, present in court.

THE COURT: Thank you.

MS. HOLMES: Hillary Holmes, representing Joni Seaman, who is also present in court. She is the petitioner; responding party in this motion.

MR. GELMAN: Motion brought pursuant to Civil Rule 60, asking for vacation of judgment, which will allow Mr. Hong to have his matter tried on its merits. The rule --

THE COURT: When was this entered, Mr. Gelman -- when was this decided, October?

MS. HOLMES: October 21st.

MR. GELMAN: It was done, based upon the fact that there was inadvertency, irregularity, misrepresentation, questionable judgment, and pursuant to Subsection 11, request any other reasons justifying relief from the -- relief from the judgment.

Now, what had happened in this case was that there was a trial set for I think October 21st. My client believed that it was October 28th or 29th. He's a

1 flight attendant with Northwest Airlines. He's gone  
2 about 27 days a month. And he had arranged to be off on  
3 the 28th or 29th to attend trial.

4 Now then he discovered that in fact and admits  
5 that it was error on his part --

6 THE COURT: He was at home living with his  
7 daughter?

8 MR. GELMAN: Yes, and his wife knew that, that  
9 he was home that day. She went by, after she had gone to  
10 court, and saw him. Says that in the declaration. When  
11 he's at work, the car is at the airport. So if the car  
12 is there, he's home. This was not a case where Mr. Hong  
13 was careless about his participation.

14 Now at the time the judgment was entered, he was  
15 not represented by counsel. Mr. Gary Jacobsen, who had  
16 been his attorney, retired and withdrew, wasn't  
17 representing anybody. Mr. Hong attended two settlement  
18 conferences. There was a show cause hearing, and he  
19 attended that. He was an active participant in this  
20 entire matter.

21 And as soon as he discovered that this matter had  
22 been heard, the first thing he did, he e-mailed counsel  
23 and said, "I may have made a mistake. I don't know what  
24 happened here." Never got a response. He e-mailed your  
25 office and got an e-mail from your JA who said, "I can't

1 give you legal advice. You're going to have to seek  
2 counsel."

3 THE COURT: And of course she could not submit  
4 that to me. It would be ex parte. So I didn't know  
5 anything about it.

6 MR. GELMAN: I attached that to the declaration.  
7 So he said, "I want to forget about this thing." They  
8 ended up in my office and got final papers sometime, I  
9 think, in November.

10 And I imagine that this action and the final  
11 papers that were entered were what one would consider  
12 fair and equitable, in light of the statutory  
13 requirements under 26.09; matter probably would have gone  
14 away.

15 That just didn't happen. If you look at the  
16 original and there's a comment in the declaration of  
17 Ms. Hong, that this case was filed in December of '06.  
18 That's not correct. It was filed in October of '06. The  
19 parties then moved to dismiss the action in November, and  
20 then in December of '06, Ms. Hong moved to have that  
21 vacated. And in fact the motion to dismiss was vacated  
22 so we're back to October.

23 THE COURT: Hold on. I want to make sure you  
24 have my undivided attention.

25 MR. GELMAN: There was a filing, dismissal, and

1 then vacated.

2 THE COURT: You said on December '06, the case  
3 was filed and then on --

4 MR. GELMAN: The amended petition was filed.  
5 The original petition was filed in October.

6 THE COURT: On 12-06, it was the amended.

7 MR. GELMAN: The amended, but that was based  
8 upon vacation of the order dismissing the original one,  
9 in October.

10 THE COURT: Okay.

11 MR. GELMAN: So at the time this action was  
12 filed was in October of 2006.

13 (The hearing was interrupted,  
14 and then continued.)

15 THE COURT: Shouldn't be anymore interruptions.  
16 Mr. Gelman, go ahead.

17 MR. GELMAN: I want to go back to the original  
18 petition, because it's important and it has to be looked  
19 at in the context of my entire argument.

20 The petition states in it the marriage is  
21 irretrievably broken. The petition also provides that  
22 the court should make a fair and equitable division of  
23 the assets, and that's the premise upon which this case  
24 started.

25 And what happened -- what happened at the time of

1 trial, the matter originally was set in front of Judge  
2 Tollefson, transferred to Judge Serco. And I believe the  
3 day of trial it was bumped and ended up in your court,  
4 from the records I see. They got there at 10:35, and  
5 10:41, they were out. It was just a matter of taking  
6 formal proof.

7 You have to look at the findings and decree that  
8 were entered.

9 On the front page of that, it said -- the case  
10 was heard in trial and what was blacked out appears to be  
11 the word 'agreement' and then in the portion that talks  
12 about the date of separation of the parties there was a  
13 date that was in there and I have no idea -- I couldn't  
14 read it. I held it up to the light -- what that original  
15 date was.

16 THE COURT: Take me back to the particular  
17 pleading you're talking about, the original findings.

18 MR. GELMAN: Original findings. On the first  
19 page on the findings, dated October 21st, 2008 --

20 THE COURT: Yes.

21 MR. GELMAN: -- says the findings are based on  
22 and looks like 'agreement' was crossed out. And says,  
23 'testimony on day of trial,' interlineated.

24 THE COURT: Testimony on day of trial. Right.  
25 Because he wasn't there.

1 MR. GELMAN: Right. Second page, Paragraph 2.5,  
2 it says, "Husband and wife separated on..."

3 THE COURT: 11-1-2007.

4 MR. GELMAN: That's interlineated.

5 THE COURT: Right. Looks like 4-30-07.

6 MR. GELMAN: I couldn't make it out.

7 THE COURT: Is that correct, Ms. Holmes. Is it  
8 4-30-07?

9 MS. HOLMES: I don't know what date is in there.  
10 I don't know what the legal significance is, because Your  
11 Honor, what those papers are -- I made an offer of  
12 settlement, and I said here's our proposal, if we can  
13 reach an agreement. We didn't. I made revisions to that  
14 and I'll address when they separated, because they  
15 continued to live together until November 1st, '07.  
16 That's the date we used. We didn't use trial date of  
17 October 21, '08. They separated November 1 of '07. They  
18 were still co-habiting at the time.

19 THE COURT: Do you agree with that or not, that  
20 date of 11-1-07?

21 MR. GELMAN: No, we disagree with that. The  
22 amount of child support was interlineated.

23 MS. HOLMES: There's no child support, Your  
24 Honor.

25 MR. GELMAN: I mean, fees and costs and the

1 amount of maintenance, I believe, was inserted in the  
2 decree by interlineation, of \$1,000 a month.

3 Now, in this case the date of separation was  
4 changed and apparently, as I read the declarations and  
5 brief of counsel, she says, no, the parties lived  
6 together after the filing, and they left and separated on  
7 November of '07 and that constitutes the date of  
8 separation which in fact then says, until then, the  
9 presumption is that it's an accumulation of community  
10 assets.

11 Well, you know, that's an interesting point  
12 because when you look at the forms, the forms say the  
13 parties are living together or they're separated.

14 And it's interesting, you look at the standard  
15 findings of fact in the divorce. The findings of fact,  
16 and the conclusions say right in it that -- 2.5 status of  
17 the parties. This is the finalization. "Husband and  
18 wife separated on..." put the date in "...or husband  
19 and wife are not separated."

20 So the mere fact -- the mere fact that they're  
21 not separated doesn't have anything to do with the  
22 accumulation of community assets.

23 The law, as it applies to the acquisition of  
24 community assets, there has to be an on-going community.  
25 In the absence of that, there are no further

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accumulations.

And the petition, it says, "This marriage is irretrievably broken." And I cited a case that says if there's some overt showing by the parties or a party that says this marriage is over, then that stops the accumulation of community assets. And it's interesting too because --

THE COURT: Is that the Hardt case? Which case are you referring to?

MR. GELMAN: The name of the case I cited on that point was 65 Wn.App. 334, Nutt case. And it says, when physical separation of parties does not -- mere separation of parties does not establish that they are living separate and apart sufficiently to indicate the existence of a community.

THE COURT: Slow down. Wait. Give us a page number that you're on.

MR. GELMAN: Page 5 of my original brief, supplemental, line 8. Says, "The test is whether the parties by their conduct have established a decision to renounce the community, with no intention of returning to resume the marital relationship." We have a petition that says this marriage is irretrievably broken.

It's also interesting the case that was cited by counsel in their brief, the Marriage of Moody. In that

1 case the parties had a decree of legal separation entered  
2 and they continued living together, and the argument was  
3 later, you know, we continued living together after that.

4 THE COURT: Wasn't that --

5 MR. GELMAN: Here's what the court said about  
6 cohabitation. This is on page -- I have a copy for you.

7 MS. HOLMES: Do you have a copy for each of us?

8 THE COURT: We'll make copies.

9 (Copies made.)

10 THE COURT: Go ahead, Mr. Gelman.

11 MR. GELMAN: On the Moody case, Page 989, in  
12 talking about the relationship of living together or  
13 separation, having to do with whether or not the  
14 community is now defunct --

15 THE COURT: You said Page 989?

16 MR. GELMAN: Yes. At the bottom it says, "The  
17 Marriage Dissolution Act does not require the parties to  
18 be separated in order to file a petition for dissolution  
19 or a legal separation." And then it says at the bottom,  
20 the last sentence, "The only grounds for dissolution that  
21 need be alleged is that the marriage is irretrievably  
22 broken." And that was done in this case.

23 The mere fact they lived together, as they did in  
24 the Moody case and they did in the Hong case, has nothing  
25 to do with the date of separation. So to come in and

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then --

THE COURT: Is this still good case law?

MR. GELMAN: Yes, that's still good case law.

THE COURT: Hasn't been overruled?

MR. GELMAN: No. And it was even cited by  
counsel in her brief. So to come in at the time when he  
was not present in court and then to change that date  
with --

MS. HOLMES: I'll object. No date was changed.  
My petition says the parties are not separated.

MR. GELMAN: No. My argument is what the date  
of separation was.

MS. HOLMES: My petition says the parties aren't  
separated.

THE COURT: Let's look at the petition.

MR. GELMAN: Your Honor, what counsel's comment  
is, is misleading.

MS. HOLMES: I object.

THE COURT: Wait. One person at a time. Let me  
first get to the original petition.

Okay. I have the petition here, that was filed  
on October 6th, 2006. Is that the one we're talking  
about?

MS. HOLMES: I don't know which one he's talking  
about. He's saying I changed a date. Both of them say

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husband and wife are not separated. If you go to October or December.

THE COURT: The October says, at 1.6, "Separation - husband and wife are not separated." That's 1.6. And what does the amended petition say at 1.6. Amended petition at 1.6 says, "Husband and wife are not separated."

MR. GELMAN: And she says in findings, "They separated November 1st, 2007." But the fallacy in her argument is that she divided assets of these parties as of November 1st, 2007. And she's saying, in effect, that there is a community that exists for more than a year after the separation of the parties for the purpose of accumulation of assets.

THE COURT: When the marriage was already irretrievably broken?

MR. GELMAN: Absolutely. You cannot accumulate assets beyond that. When she said they separated then, that might have been true, as a fact, but to go back and say I am now going to use that date to determine what the cut-off is for accumulation of community assets is absolutely a misrepresentation of the facts and the law.

MS. HOLMES: That's a misrepresentation.

MR. GELMAN: I'm not finished with my argument.

THE COURT: I'm going to limit it to one at a

1 time. Right now, he has the floor. You have it for  
2 another 5 minutes to wrap this up.

3 MR. GELMAN: She also provided in the decree  
4 that Mr. Hong's obligation for paying maintenance would  
5 survive his death. The statute is absolutely clear that  
6 the death of the payor or the payee on maintenance,  
7 terminates maintenance.

8 MS. HOLMES: I'll object. He's misstating the  
9 law. If he can cite the law, I challenge him to cite the  
10 law that says that.

11 MR. GELMAN: In my brief. 26.09.170 (2) says,  
12 "Unless otherwise..."

13 THE COURT: I'm sorry. Where are you again?

14 MR. GELMAN: On page 7 of my brief. "Unless  
15 otherwise agreed in writing or especially provided in the  
16 decree, the obligation to pay future maintenance is  
17 terminated upon the death of either party or the  
18 remarriage of the party seeking maintenance."

19 MS. HOLMES: "Or expressly provided in the  
20 decree."

21 MR. GELMAN: Right.

22 MS. HOLMES: Or it is expressly provided in the  
23 decree.

24 MR. GELMAN: That's correct. And she's right.  
25 That's what it says. Let me finish.

1                   What does, "Expressly provided for in the decree"  
2 provide?

3                   There's been a lot of cases on that, and the most  
4 recent case is Holsure, and that says, one, the parties  
5 can have a separation agreement, because 070 says when  
6 the separation provides, the decree may expressly  
7 preclude -- limit modification. And the Holsure case  
8 says if you have an agreement, that's fine. And that had  
9 earlier been interpreted as saying you have to have a  
10 special prenuptial, separation agreement, or something  
11 that the parties signed. The court went on to say, if in  
12 fact --

13                   MS. HOLMES: Is it in the brief. I don't mean  
14 to be rude, but is this in your brief?

15                   THE COURT: He's citing case law.

16                   MR. GELMAN: It's in my brief.

17                   MS. HOLMES: I didn't know he had it in his  
18 brief. Whereabouts?

19                   MR. GELMAN: The Holsure case is in my brief.

20                   MS. HOLMES: I see it.

21                   MR. GELMAN: Page 8.

22                   MS. HOLMES: I know what you're saying.

23                   MR. GELMAN: The Holsure case says if in fact  
24 that provision is put in the decree and both parties sign  
25 the decree, that's an express right. That's "Otherwise

1 provided in the decree." It requires both parties to do  
2 that. And what the Holsure case also says the court may  
3 not sue sponte, on judge's -- alone -- declare that and  
4 waive that provision. The court doesn't have authority  
5 to do that.

6 MS. HOLMES: I'll object again. He's misciting  
7 the case.

8 THE COURT: We're talking about the Holsure  
9 case?

10 MR. GELMAN: Right. It says in here, "Trial  
11 court may not enter non-modifiable maintenance or sue  
12 sponte, absent an express agreement by the parties." And  
13 they want it to say, there was a decree of dissolution  
14 signed by both parties and attorneys, which the parties  
15 entered into by agreement. And then it goes on to talk  
16 about the Glass case, which is still good law. The  
17 agreement was in the body of the decree of dissolution,  
18 because the parties expressly agreed to the provision.

19 So the parties didn't do it in this case. The  
20 court has no authority to do it, and it is void as a  
21 matter of law, and counsel should have known that.

22 The amount -- then talks about the question of  
23 separate property.

24 THE COURT: Do you have a copy of the Holsure  
25 case, otherwise we'll have to pull it up in Westlaw.

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MR. GELMAN: My client had been working for Northwest Airlines for 15 years prior --

THE COURT: Both of them worked for --

MR. GELMAN: Right, but prior to the marriage. What they did was to take the entire term of his employment, including the 15 years and give her 50 percent through that extended time after the actual time.

THE COURT: So you're saying that the 15 years that was his separate property was made a part of the formal --

MR. GELMAN: Absolutely, and hers was all given to her in any event. And what -- the declaration of Ms. Hong, she said, and I have never heard of this nor can I imagine it, she said, "I assumed that that pension was co-mingled." I don't know how you co-mingle a pension. I have never heard of it. There is nothing under the federal law that allows everything to be co-mingled, that there was any overt act by any party to co-mingle. That's what she said was the reason why I put all of that in there.

The attorney's fees were changed, from what she says was an agreement, in an amount put in there.

THE COURT: Let's tie it up. You have been talking for awhile. I'll give you 3 more minutes.

MR. GELMAN: I've put, in context, this idea of

1 what they did to his pension, and taken all of her  
2 pension and given a hundred percent to Ms. Hong, flies in  
3 the face of the original petition, that says the court  
4 could make a fair and equitable distribution of the  
5 property.

6 And the petitioner in this case knew, one, what  
7 the extent of the assets were, two, the characterization  
8 of property which the court has to make in any  
9 dissolution action. And went beyond what their own  
10 pleadings were, and there's a case cited in my brief that  
11 says, that in effect, is the basis for a CR 60 (b)  
12 motion.

13 Counsel says, you know, this wasn't timely  
14 brought. The cases that I cited, in one case there,  
15 where there was a void judgment, for 5 years later. If  
16 you talk about waiting too long, my client from the time  
17 it started, right to the first day he found out, he  
18 started sending e-mails, got no reply. He was not  
19 represented by counsel. That's unfortunate. So he did  
20 what he should have done. Got no reply. All he got back  
21 from counsel was a copy of the pleadings, and he saw this  
22 and then he contacted counsel and all of this was  
23 discovered.

24 I tell the court this is a classic case that  
25 requires that the matter be vacated and the matter be

1 sent down for trial and Mr. Hong have his day in court.

2 THE COURT: Thank you. Ms. Holmes, go ahead,  
3 please. You will get 30 minutes.

4 MS. HOLMES: Thank you. I want to indicate how  
5 important this hearing is for my client. We are asking  
6 that the court deny the motion to vacate, and second, to  
7 award attorney's fees and costs to my client in the  
8 amount of -- my affidavit was \$1,005. We have another  
9 two hours today that we've been here. That's \$1,405. I  
10 charge \$200 an hour. The award of fees is under CR 60  
11 (b), and RCW 26.09.140.

12 THE COURT: Let's not get to the fees until we  
13 get to the merits.

14 MS. HOLMES: I'm just telling you the two things  
15 I'm asking for.

16 As to the case law, Mr. Gelman absolutely is  
17 misrepresenting some of the cases and misrepresenting the  
18 law. And the court has to read through the smoke and  
19 mirrors that he's put up.

20 First there was a trial on the merits. We  
21 appeared on October 21st. My client testified. The  
22 court made a ruling. We entered findings and we entered  
23 a decree at that time. He had notice of this hearing.  
24 He doesn't deny it. He doesn't deny his notice had the  
25 proper date of trial, that he was home, and that there

1 was no plausible reason for his lack of appearance,  
2 illness, work, emergency, personal emergency. Nothing of  
3 that sort.

4 THE COURT: He just says it was mistake on my  
5 part.

6 MS. HOLMES: Yeah. CR 40 (a) (5) provides that  
7 we are allowed to proceed to trial. It says, "...in the  
8 absence of the adverse party, unless the court for good  
9 cause otherwise directs, may proceed with his case and  
10 take a dismissal of action or a verdict or a judgment as  
11 the case may require." And that's what we did. We are  
12 allowed to proceed to trial.

13 And the second is CR 52 acknowledges the  
14 authority of this court to enter findings of fact and  
15 conclusions of law and a decree. And there is on point  
16 case that is the only one, I think, out of what Mr.  
17 Gelman and I cited, In Re Marriage of Daily case, 77  
18 Wn.App., 29, 1981, and that was the case the husband  
19 failed to appear at trial. Exact same circumstances, as  
20 we have here. Wife then made a fatal error in how she  
21 chose to proceed, and my client did not make that fatal  
22 error.

23 In the Daily case, the wife chose to enter a  
24 default judgment against the husband. And the Court of  
25 Appeals said that's the wrong procedure. You should have

1           proceeded to trial, and the court commented, "The  
2           situation would certainly have been different had Linda  
3           proceeded with her case, specifically if she had  
4           proceeded to trial and presented evidence on the record,  
5           then the trial court would have had the authority under  
6           CR 52 to enter findings, conclusions, and judgment  
7           without notice to Dan." And that's exactly what my  
8           client did, and that's the on-point case here.

9                       Third, all of Mr. Gelman's cases are  
10           distinguishable. He cites all these cases and I won't go  
11           through the long cites, but the short names are the  
12           Nortin case, Shepard Ambulance, Delgado and Titis. All  
13           of these are default judgment cases. There was no  
14           default, Your Honor. All of those cases are  
15           distinguishable.

16                      Then in his supplemental brief, that's where he  
17           mentions this Hardt, H-A-R-D-T case. And that was a case  
18           where a child support order was entered but not pled.  
19           There's no dispute here that my client pled an open-ended  
20           petition for the court to make a disposition on assets  
21           and debts at a later date and to order spousal  
22           maintenance in a duration to be determined by the court  
23           at a later date. We got relief that we pled for and it  
24           was pled. The Hardt case is not applicable. We had a  
25           trial on the merits.

1                   And what's important here is when you have a  
2                   trial on the merits, under CR 40, with findings and a  
3                   decree entered under CR 52, the remedy is not a CR 60  
4                   motion. The remedy is a CR 59 motion for Mr. Hong to  
5                   petition for a new trial or reconsideration by the court.  
6                   He didn't file a CR 59 motion. He filed a CR 60, citing  
7                   case law on default judgments which are inapplicable.

8                   Fourth, he's trying to say there are errors of  
9                   law. And this is where he gets into the date of  
10                  separation, the division of property, and the spousal  
11                  maintenance, duration. I'm going to address all of  
12                  those. This is the over-riding thing. Let's pretend  
13                  he's right. He's not. Let's pretend that he's right.  
14                  There was an error of law made.

15                  Under the Moody case, errors of law are to be  
16                  raised on appeal and do not support a motion to vacate.  
17                  It's the wrong remedy, if there is an error of law.

18                  Let me address the issues on separation date. We  
19                  made an offer of settlement. We were trying to settle  
20                  this case. It didn't get settled.

21                  The court determines the separation date under  
22                  the Nutt case, by the conduct of the parties. That's the  
23                  authority Mr. Gelman gives you. So let's look at the  
24                  conduct of the parties and why November 1st, 2007 was the  
25                  date of separation.

1                   They co-habitated. They jointly put their  
2                   paychecks into a joint account. They slept in the same  
3                   bed, Your Honor. They cooked meals together. My client  
4                   cleaned the house. She did Mr. Hong's laundry, cleaned  
5                   his toilet. They ate meals in common and paid their  
6                   bills in common and continued to do that until November  
7                   1st, 2007 when Mr. Hong quit depositing his paycheck into  
8                   the account, quit paying the bills in common, packed up  
9                   his personal property and moved out and quit sleeping in  
10                  the bed, eating the meals my client prepared and having  
11                  my client do his laundry. That's why November 1st, 2007  
12                  is the date. It is not the date of filing the petition.

13                 If that was the date of separation, Your Honor,  
14                 every case that came before the family law court or this  
15                 court, or any other Superior Court judge, the date of  
16                 separation would be boom, the day we filed it. That's  
17                 not the date of separation. It is under Nun, it is a  
18                 factual determination based upon conduct.

19                 My client's declaration is unrefuted that they  
20                 co-habitated, slept in the bed together and lived as a  
21                 marital community.

22                 Next is we kind of have an issue of property.  
23                 And 26.09.080 provides that all property is before this  
24                 court, community and separate property. And so this  
25                 court has powers to divide everything, and that further,

1           there is an important case on this, the Curtis case.  
2           This is a quote, "The overall fairness of a settlement is  
3           not an adequate ground to vacate a final decree." Even  
4           if it's unfair, that is not the remedy here.

5                     Then on the issue of spousal maintenance. This  
6           is where Mr. Gelman miscites the law. He miscites the  
7           RCW and he miscites the Holsure case to the court.

8                     He has heartburn over the issue that the  
9           maintenance terminates upon my client receiving her share  
10          of the pension, the retirement benefits. So when she  
11          gets her pension check, that's when maintenance goes  
12          away. Maintenance was set in the exact same amount as a  
13          contested hearing, in the amount of \$1,000 per month and  
14          the duration of maintenance can be beyond death, if  
15          expressly ordered by the court. And that's RCW 26.09.170  
16          (2). It provides that unless otherwise quote "expressly  
17          provided in the decree," the obligation to pay future  
18          maintenance terminates upon the death of either party.  
19          So if the decree is silent, it terminates when they die.  
20          Our decree is not silent. It says that.

21                     Here's where he tries to confuse the court with  
22          the Holsure case. He tries to say the court doesn't have  
23          this power. The court doesn't have the power to make  
24          maintenance non-modifiable. That's what the Holsure case  
25          stands for. It has nothing to do with the duration of

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spousal maintenance.

I agree. Non-modifiable maintenance is counter to the law, counter to the case law, and counter to public policy. We don't have non-modifiable maintenance. Point out the provision in the decree or findings that says it's non-modifiable. His beef is with the duration and he cites a case on non-modifiable here. Two different propositions here, and the law provides for that.

We go back to the proposition, even remember, if there was an error of law, under the Moody case, errors of law are to be raised on appeal and don't support the motion to vacate.

Next, he just can't unilaterally re-open a property division. RCW 26.09.170 provides the provisions as to property division may not be revoked or modified unless the court finds existence of conditions that justify the reopening of the judgment under the laws of the State of Washington. CR 60 is not applicable. It should have been a new trial or reconsideration and he might not have prevailed on that, but he has chosen the wrong remedy.

Finally, CR 60 deals -- and the analysis he has on that four-prong analysis deals with default judgments. First, you have to present under the four-pronged

1 analysis that there is a prima facie defense, and he  
2 goes, it's not fair. It's not a prime facie defense,  
3 remember, Your Honor, because under Curtis the overall  
4 fairness ~~of a~~ settlement is not an adequate ground to  
5 vacate.

6 The second prong is failure to answer was due to  
7 inadvertent surprise or neglect. He answered. He filed  
8 a response for the petition for dissolution. He just  
9 didn't appear at trial.

10 Third is was he diligent. He waited a couple of  
11 months. He learned of this, he said, before October  
12 28th, I believe, on or about that date, and he waited two  
13 months to go forward.

14 And the fourth factor is there can be no  
15 substantial hardship if a default judgment is vacated.  
16 Again this is not a default judgment, but Mr. Gelman went  
17 through this analysis, so I'm going to refute it.

18 There is a substantial hardship. My client  
19 changed her name to Ms. Seaman, changed her credit cards,  
20 changed her social security card. She got new checks  
21 issued at the bank, got a new driver's license, had all  
22 her bills changed, got new passwords at work, changed her  
23 health insurance, processed quadros through the 401-k  
24 plan, changed her health insurance, filing for taxes as a  
25 single person for this year because she was divorced as

1 of December 31st of '08, and then there's this emotional  
2 factor that my client has very strong moral and religious  
3 objections to being married to Mr. Hong that he was  
4 engaged in some activity that is --

5 MR. GELMAN: Your Honor, I'll object. All that  
6 goes is goes to fault for divorce. Has no relevancy here  
7 and done for the purposes of trying to put smoke and  
8 mirrors in this case. No relevancy.

9 MS. HOLMES: The substantial hardship is there is  
10 an underlying moral and religious factor for my client,  
11 that would cause her great hardship, why she needs to be  
12 apart and away from Mr. Hong, because of his conduct.

13 THE COURT: I want to make sure, before I  
14 forget, that you address the issue on the pension, 15  
15 years prior to marriage. Make sure that's on your radar  
16 screen. Go ahead.

17 MS. HOLMES: I think Mr. Gelman's analysis is  
18 off.

19 Now, on the issue of the pension, there are  
20 several different pensions that my client and Mr. Hong  
21 had.

22 THE COURT: They both had Northwest pensions,  
23 but with different names. Address the one with the 15  
24 years prior to marriage. What was that one called?

25 MS. HOLMES: I don't know the name of that one,

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but he might have cited it in his brief.

The case law says regardless of how the court characterized that, that a failure to list, value, or to properly characterize are legal issues that aren't correctable by CR 60 (b) motion but are raised on appeal. That's In Re the Marriage of Tank. It is a matter, if that pension was improperly divided or not. My client's position is under the circumstances of the case, considering debts she took on, her retirement values, that the division of the retirement was fair and equitable. Again under Tank and I believe under Curtis that is not a basis to vacate. It's an appealable issue, but not a vacation issue.

So I believe Mr. Gelman applied the wrong analysis to this. The court should not vacate. This isn't a default, and that an award of fees is appropriate under RCW 26.09.140. You can base it upon need, and also under CR 60 (b), the court can also award attorney's fees and costs. Thank you.

THE COURT: Mr. Gelman.

MR. GELMAN: Briefly. She mentioned a comment of there being a settlement. There never was a settlement of this case.

THE COURT: I'm not interested in settlement because we had a trial.

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MR. GELMAN: There was no trial on the merits,  
Your Honor.

THE COURT: Not on the merits.

MR. GELMAN: She keeps talking about a trial on  
the merits, and it never happened in this case.

I point out to the court, under Rule 60 (11),  
"Any other reason justifying relief from the operations  
of judgment." There's more reason in this case than I  
can imagine. One, there was a characterization of  
property, where she said there ought to be a fair  
distribution of assets in this case. Makes no  
explanation why it was done. Said why don't you appeal  
it. Too bad. We'll sweep that under the rug.

She's absolutely wrong under Holsure. The law  
says it is not modifiable, unless there's an express  
agreement by statute, and the court can't do it on their  
own. And they did it in this case.

She can talk all she wants about what that means.  
All you have to do is have a clear reading of that. And  
again, on the question, the fact they may have lived --

By the way, let me point out. She made a comment  
to the effect that nothing was stated in response to Ms.  
Hong's declaration. My client is gone 27 days a month.  
Counsel asked me for a continuance on the 2nd of January.  
I said, "Sure. But please do me a favor. Get me your

1 stuff ten days before the hearing, so I have a chance to  
2 respond, get ahold of my client." When did I get it?  
3 The last day I could get it. Monday afternoon of this  
4 week, and I couldn't get ahold of my client to respond.  
5 And she stands here and says, "Well he didn't respond to  
6 the declaration." That's not fair and that's exactly  
7 what happened in this final decree.

8 The court has every good reason to have this  
9 matter vacated.

10 The fact that she talks about the name change.  
11 None of that is going to be hardship for her. Nobody is  
12 suggesting anybody is going to want to send letters, do  
13 anything about that. That's going to happen anyway. The  
14 court order can say let that be preserved to her, the  
15 fact she changed her name and changed her social  
16 security, so she doesn't have problems dealing with that.

17 Anyway, that's not the issue in this case. Thank  
18 you.

19 THE COURT: All right. I am going to take this  
20 under advisement. It's been a long day. I'm going to  
21 look at the cases that were cited and under what theories  
22 they were cited, and also perhaps even a transcript, but  
23 that being as it may, we go on recess next week, so more  
24 than likely you're not going to get a response from me  
25 until two or three weeks out. All right. That's where

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we are. Thank you for the argument.

MR. GELMAN: Thank you.

MS. HOLMES: Thank you.

\* VERBATIM REPORT OF PROCEEDINGS CONCLUDED \*



*Report of Proceedings*

for

February 27, 2009

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF PIERCE

3  
4 JONI HONG )

5 Petitioner, )

6 -vs- )

7 JERRY HONG, )

8 Respondent. )  
9

**COPY**

NO. 06-3-03419-7  
COA NO. 39074-4-II

10 VERBATIM REPORT OF PROCEEDINGS

11  
12 27 FEBRUARY 2009

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. MAY 05 2009 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

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16 APPEARANCES:

17  
18 FOR THE PETITIONER: Ms. Hillary A. Holmes  
317 South Meridian  
19 Puyallup, WA 98371-5913

20 FOR THE RESPONDENT: Mr. Herbert Gelman  
1101 Fawcett Avenue, Suite 300  
21 Tacoma, WA 98402-2015

22  
23 ANITA LOPEZ  
24 CERTIFIED COURT REPORTER  
PIERCE COUNTY SUPERIOR COURT  
25 TACOMA, WA  
(360) 990-5904

1 THE COURT: The Hong dissolution matter. This is  
2 Cause No. 06-3-03419-7. Present are counsel, Mr. Gelman  
3 and Ms. Holmes.

4 This comes upon the court's ruling regarding a  
5 hearing that we had, that was based upon the motion of  
6 Mr. Gelman, under CR 60.

7 The court has had the opportunity to review the  
8 file, along with the argument that was presented, and it  
9 appears to me that Mr. Hong failed to appear at trial,  
10 that this case was not one in which a default judgment  
11 was entered, but a trial, and as such, I note that there  
12 were some challenges with regard to what the date of  
13 separation was.

14 It was contended that 11-1-07 wasn't the date of  
15 separation. This court finds that in looking at the  
16 pleadings that were filed and in looking at particularly  
17 the conduct of the parties surrounding that date, that  
18 there is justifiable reason to believe that 11-1-07 was  
19 the date in which the parties were separated.

20 And I acknowledge in the Nuss case, in which  
21 you're correct, Mr. Gelman, mere separation does not  
22 establish that they're living apart, and what the court  
23 has to do is look at the conduct of the parties and the  
24 conduct of the parties showed that they were, for all  
25 intents and purposes, doing things together. There was

1 the payment of bills, cooking, laundry, other chores. So  
2 I don't find in the, in Mr. Hong's favor with regard to  
3 that.

4 The other issue that was brought up dealt with  
5 whether or not the decree was silent as to the  
6 maintenance issues and whether or not he should -- the  
7 decree should be upheld for paying maintenance and  
8 whether or not that would survive his death. The case  
9 law seems to indicate that unless it is expressly  
10 provided in the decree, then that cannot be done.

11 Mr. Gelman, however, points out that it requires  
12 both parties to agree, and here there wasn't a mutual  
13 agreement, however it was expressly provided in the  
14 decree, and I want to hear argument on that because I'm  
15 concerned with the arguments that you presented,  
16 Ms. Holmes, on that part.

17 My recollection was that there were various types  
18 of Northwest Airline pensions, and one of those, Mr. Hong  
19 had 15 years prior to the marriage which would clearly  
20 imply to me that it was separate property.

21 In your brief, you rationalize, Ms. Holmes, that  
22 this is proper because given the debt and the asset  
23 allocation, that Ms. Hong should be awarded all of the  
24 pension, and I want some clarification on that issue.  
25 You also argued that because in the decree itself there

1 was an express provision that the maintenance would  
2 survive his death, that that is sufficient, without any  
3 agreement. So I need some argument on that part. Okay.

4 And I still believe that CR 60 was not the  
5 correct remedy in this, and I know that with regard to  
6 this pension matter, Ms. Holmes, you were arguing that it  
7 should be something that should not be vacated but rather  
8 it's an appealable issue, so I want to hear further  
9 argument on that point, and I'll start with Mr. Gelman,  
10 since he is the one challenging the issue on the pension.

11 MR. GELMAN: What Ms. Holmes did in the decree  
12 was to characterize all the pension as community  
13 property, knowing that in fact 15 years, that was  
14 acquired prior to the marriage of the parties. That is a  
15 clear misstatement of fact, clear misstatement of the  
16 law. Then gave her one-half interest in all of that  
17 pension, and without any finding as to value. Took all  
18 of what is -- and there's no question about Ms. Hong's  
19 pension, characterized correctly as community property --  
20 and awarded all of that to Ms. Hong.

21 And in fact, and one of the arguments is too if  
22 she's there by herself, without Mr. Hong present, she's  
23 bound by the original petition, that the court should  
24 make a fair and equitable settlement, and that was  
25 grossly unfair. And that would be consistent with what

1 her own petition requested and what the responsibility to  
2 the court is as well, with regard to the post  
3 maintenance, surviving death. The cases are clear, says  
4 unless expressly provided for. And typically, what had  
5 been going on before the recent cases is that the parties  
6 entered a separate agreement, and it specifically  
7 provided for post-death.

8 Then the court said no, if the parties provide  
9 for that and the court, start with the premise, court  
10 can't do it on their own. If the parties agree, it is  
11 okay. What is the agreement. We have a CR (2) (a) or we  
12 have -- and the cases talk about it -- we have a decree  
13 signed by the parties. And they said if both parties  
14 sign the decree and findings, that will constitute a  
15 sufficient agreement of the parties, which says expressly  
16 provided for.

17 THE COURT: If the party does not appear, does  
18 the failure to appear constitute an agreement?

19 MR. GELMAN: No. You can't imply agreement by  
20 absence. That's the old argument back in law school. If  
21 you don't reply, I'll assume you accept my offer.  
22 Remember we went through that in first year of law school  
23 and that's no different here. They said if you don't  
24 show up, I will assume you agree you will pay post  
25 separation -- post-death maintenance. And if the court

1 -- interesting analogy. If the court on its own motion  
2 can't do it, I don't know what rationale would follow  
3 that says if he doesn't show up, then it happens. It  
4 says expressly provide for. Not impliedly. To say it's  
5 okay because he didn't show up, imply it. That's  
6 contrary to what the statute says. It says expressly  
7 provided for. It has to be an affirmative act.

8 THE COURT: Let me hear your response.

9 MS. HOLMES: The issue of spousal maintenance.  
10 Mr. Gelman really confused this court, as to there's two  
11 different statutes here. Your Honor, one is a duration  
12 of maintenance. The other is non-modifiability of  
13 maintenance.

14 Mr. Gelman is confusing the court to think these  
15 are the same thing. Duration of maintenance says that if  
16 your decree is silent and you don't mention when the  
17 maintenance ends, it terminates upon a party re-marrying  
18 or dying. That's all it is.

19 Non-modifiability goes to the issue of the court  
20 orders \$700 a month, husband loses his job. If it's  
21 non-modifiable, husband can't come in and ask for relief  
22 and plead, I lost my job. Everything is non-modifiable.  
23 The duration, the amount, the term. So Mr. Gelman  
24 confused the court.

25 26.09.070 deals with separation contracts. It

1 says under Subsection 7, the decree may expressly  
2 preclude or limit modification of any provision for  
3 maintenance as set forth in the decree and goes onto  
4 discuss the case law under that, that 26.09.070, (7),  
5 precludes a court from making maintenance non-modifiable  
6 in the absence of an express or written agreement by the  
7 parties. You can't say maintenance is non-modifiable.  
8 Only Mr. Hong and Ms. Seaman can do that. As to the  
9 duration, the court can say duration will survive the  
10 parties death. It has to be in writing, in the decree.

11 THE COURT: Do both parties have to agree?

12 MS. HOLMES: No. It's or. 26.09.170 (2), is  
13 or, unless otherwise agreed in writing or expressly  
14 provided for in the decree. It's expressly provided for  
15 in the decree. Not and. It does not have to be  
16 expressly provided for and put into the decree. He  
17 confused two provisions. What we have done is perfectly  
18 legal.

19 On the issue of the pension. My client, with my  
20 assistance, we did what we believe is fair and equitable.  
21 The pensions, this is a very long-term marriage, and we  
22 don't have evaluation of these figures before the court,  
23 but Mr. Hong certainly made more money in the latter  
24 years of his employment, and the majority of the value of  
25 that pension was earned during the marriage. And based

1 upon my client's division that she is taking a house,  
2 that really had no value because they borrowed all the  
3 equity out for credit card debts run up by Mr. Hong, and  
4 my client has a home probably with negative value, given  
5 what happened since October. We don't know.

6 MR. GELMAN: Object to facts not reflected in  
7 the declaration.

8 THE COURT: That will be sustained.

9 MS. HOLMES: But what happened is, so there is  
10 debts that are rolled into this house, credit card debts  
11 that were incurred by the husband, that my client is  
12 having to pay. If the court has equity over all  
13 property, to do what is fair and equitable, for my client  
14 paying debts for next thirty years, it is appropriate for  
15 her to have a share of the retirement, and it's the only  
16 way she will be able to service those debts. What the  
17 court has done is fair and equitable, and the court  
18 shouldn't vacate it.

19 THE COURT: Let me hear the response to that  
20 last argument.

21 MR. GELMAN: Well, what counsel is doing is  
22 attempting to confuse the issues, by saying there are  
23 facts that support what I said. Mr. Hong never had an  
24 opportunity to do that. That's why we came in and asked  
25 the matter be vacated, and we be allowed to present

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facts. We don't know whether those are correct.

THE COURT: He had an opportunity. He didn't show.

MR. GELMAN: He made a mistake, confused the date.

You have to realize, he took immediate action to correct it, contacted the court, spoke to the JA, sent an e-mail, and he had been active throughout the entire proceeding. It wasn't that he was lethargic, didn't show up, didn't come to settlement conferences. He was at show cause hearings. It was just that --

And to say that justifies us dividing his separate property. That allows us to say we'll disregard what interest he had in her retirement and that's fair. That's a conclusion which is not supported by the facts in this case. It just isn't.

And again, with this expressly provided. You look at all the cases, it says in the Glass case, there was a decree of dissolution signed by both parties. That's what the court said constitutes an express provision.

And it said, the court again -- the Glass case is clear about that, and so is the Short case.

THE COURT: What about the or provision?

MR. GELMAN: Or expressly provided.

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THE COURT: What is expressly provided?

MR. GELMAN: In the decree.

THE COURT: If it is in the decree?

MR. GELMAN: Yes, decree signed by both parties, not by default. If the court can't do it sua sponte, and say I'm going to do this, the argument would be it's in the decree, so we're outside of the requirement. If you can do it yourself, judge, and yet still in the decree, then her argument would say even though you can't do it, we win.

MS. HOLMES: Glass is a non-modifiable case, discusses non-modifiability, not about 26.09.172, the provision he's arguing, it's about 26.09 -- I'm sorry. I don't have the one. That's on separation contracts. It's two different statutes that he's confusing.

MR. GELMAN: But the talk incorporates the statute dealing with duration and non-modifiability of maintenance payments.

THE COURT: All right. This is really where I am. With regard to the -- I am going to use the provision under 'other reasons justifying relief,' under CR 60, and the part that concerns me focuses on the 15 years, what would appear to have been a pension, 15 years that he had accrued as part of his separate property. I don't think that should -- I think that should be

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modified in the sense that it should not have been construed or taken from him. 15 years is his separate property before they got married.

With regard to the decree, it will be subject to interpretation by the Court of Appeals, but I agree with Ms. Holmes because it says or, and I'll leave that as it is and you can take it up on appeal.

MS. HOLMES: I'll clarify. Is the court going to vacate the one provision, regarding pension, but not the decree. But vacating the pension?

THE COURT: Yes.

MR. GELMAN: Awarding 15 years to him?

THE COURT: Yes.

MR. GELMAN: Thank you.

\* VERBATIM REPORT OF PROCEEDINGS CONCLUDED \*

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF PIERCE )

I, Anita Lopez, a Certified Court Reporter  
for Pierce County Superior Court, do hereby  
certify that the foregoing is a true and accurate  
transcript of the proceedings as taken by me in the  
above-entitled matter.

DATED: 4.23.09

ANITA LOPEZ  
ANITA LOPEZ  
CERTIFIED COURT REPORTER

# PHOTOCOPY SERVICE REQUEST

Separate Form Must Accompany EACH Request

Date: October 15, 2009

Case Manager: Kim Division No. II Phone No: 593-2970

Case No: **390744** (no hyphens)

Case Name: **In re the Marriage of Joni & Jerry Hong**

Indigent Defense? Yes  No

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Attorney to bill: **Herbert Gelman #01811**

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