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No. 691414

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION ONE

HANS U. HELM,

Appellant,

vs.

KAREN S. HELM,

Respondent.

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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	ii
I. Reply to Restatement of Case	1
1. The 2005 Settlement.....	1
2. 2005 Settlement Was a New and Different Performance of the 50-50 Property Division.....	2
3. Effect of Karen’s Claim	4
4. Inconsistencies Bear on Credibility.....	4
II. Reply to Argument in Response	4
1. Standard Review is De Novo.....	4
2. Presumption of Burden of Proof.....	5
3. The Rules of Accord and Satisfaction Where the Amount in Dispute is Unliquidated - <i>Burrows v. Williams</i>	8
4. Credibility.....	12
5. Karen Claims There Was No Dispute to Settle in 2005.....	13
6. Understanding the 2005 Agreement.....	14
7. The 2002 Decree is Extinguished.....	15
8. Direct and Indirect Attacks on the Adequacy of the Consideration.....	15
9. Plain Meaning Contract Rule.....	22
10. Interpretation of Contracts.....	22
11. Order Converting Legal Separation to Dissolution.....	23

12. Attorney's Fees.....	24
13. Conclusion.....	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Arkansas Dept. of Health and Human Services v. Ahlborn</i> , 547 U.S. 268 (126 S.Ct. 1752, 164 L.Ed. 2d 459 (2006)).....	8
<i>Barth v. Barth</i> , 19 Wash.2d 543, 559, 143 P.2d 542, 549 (Wash.1943)...	7
<i>Berg v. Hudesman</i> , 115 Wash.2d 657, 801 P.2d 222 (1990)	22, 23
<i>Burrows v. Williams</i> , 52 Wash. 278, 100 P. 340 (1909)	6, 9, 10
<i>*Byrne v. Ackerlund</i> , 108 Wash.2d 445, 739 P.2d 1138 (1987).....	23
<i>City of Everett v. Estate of Sumstad</i> , 95 Wash.2d 853, 631 P.2d 366 (1981)	23
<i>Evans v. Columbia Int'l Corp.</i> , 3 Wash.App. 955, 478 P.2d 785 (1970)..	8
<i>First Nat. Bank v. White-Dulaney Co.</i> 123 Wash. 220, 212 P. 262 (Wash.1923)	7
<i>Hunter v. Hunter</i> , 52 Wash.App. 265, 758 P.2d 1019 (Wash.App., 1988)	4
<i>Hynes v. Hynes</i> , 28 Wash.2d 660, 184 P.2d 68, (Wash.1947)	16
<i>In re Buchanan's Estate</i> , 89 Wash. 172, 154 Pac. 129 (1916).....	16
<i>In re Marriage of Langham and Kolde</i> , 153 Wn.2d 553, 106 P.3d 212 (2005).....	4
<i>In re Marriage of Stern</i> , 68 Wn.App. 922, 846 P.2d 1387 (1993).....	4

<i>Kruger v. Kruger</i> , 37 Wn. App. 329, 679 P.2d 961 (1984).....	22
<i>N.W. Motors, Ltd. v. James</i> , 118 Wash.2d 294, 822 P.2d 280 (1992).....	8, 15
<i>Paopao v. State, Dept. of Social and Health Services</i> , 145 Wash.App. 40, 185 P.3d 640 (Wash.App. Div. 1, 2008)	8, 15
<i>Retired Pub. Employees Council of Wa.</i> , 104 Wn.App.147, 152, 16 P3d 65 (2001).....	15
<i>State, Dept. of Fisheries v. J-Z Sales Corp.</i> 25 Wash.App. 671, 610 P.2d 390 (Wash.App., 1980)	14, 15
<i>U.S. Bank National Association v. Whitney</i> , 119 Wn.App. 339, 350, 81 P.3d 135 (2003).....	7

Statutes

RCW 26.16.130	16
RCW 26.09.140	24, 25
RCW 26.16.140	17

I. Reply to Restatement of Case.

1. The 2005 Settlement. The parties signed an incomplete and ambiguous Decree of Legal Separation in 2002. Karen admits that “they didn’t divide anything in 2002 and they didn’t begin that process until 2005 which is when they made their final settlement.” (CP 32, line 13-14). Then in 2005, Karen admits that the parties reached a general settlement in mediation.¹ Karen maintains that the 2005 agreement reached by the parties at the conclusion of mediation in 2005 resolved all claims to assets and debts except for her claim to the Boeing Company Defined Benefit Plan, to be divided or litigated at a later date. Karen asserts that the Defined Benefit Plan was excluded because it was not “liquid” and the parties were dividing only liquid assets that had “dollars in [it].” (*Brief of Respondent*, p. 4).

Karen also argues that, because the Boeing Defined Benefit Plan was not referenced in the CR 2A, that this is positive proof there was no meeting of the

¹ Karen’s statements/admissions of settlement:

- a) “We were winding up our divorce and dividing our property according to our 2002 agreement.” (CP 167)
- b) “Just before entry of the decree of dissolution (*sic*), the parties executed a CR2A mediation agreement...” (*Brief of Respondent*, page 2)
- c) “The CR 2A agreement contained the ‘terms of settlement’...” (*Brief of Respondent*, page 3)
- d) “I agree that the payments to me [in 2005] included 50% of the value of the VIP and FSP accounts as well as all of the IRA accounts. I am not asking the Court for an order to divide the VIP, FSP or IRA accounts. I received everything that I was entitled to under our agreement except the QDRO for the Boeing pensions.” (CP 204, line 9-13.)
- e) “At the end of the day, the parties seem to agree that Karen received about what they expected her to receive in the decree of legal separation.” *Brief of Respondent*, page 4

minds regarding the Defined Benefit Plan in 2005. But none of the assets and debt retained by Hans was set out in the CR2A agreement. Neither was the \$25,037 cash payment that she received in January 2005 from Hans. The CR 2A was a recitation of the final payment to Karen on not a list of the final division of all assets.

2. 2005 Settlement Was a New and Different Performance of the 50-50 Property Division. Hans and Karen substituted a new and completely different performance of their 50-50 property division. Rather than effecting the 50-50 "in-kind," asset by asset division per the 2002 Decree, they performed a division by awarding 100% of each asset to one party or the other with an equalizing payment at the end as represented by the final payment to Karen in the CR 2A Agreement. Had they followed the 2002 Decree they would have divided each and every asset 50/50 in-kind.

But, the terms of the 2002 Decree anticipated an alternate method of division in the 2002 Decree where it provided that the 50/50 in-kind division of each asset was subject to an award to the Wife of not less than 50% of the net marital estate so long as she receives not less than approximately \$281,775. The new agreement in 2005 awarded the entirety of each asset to one party or the other culminating in the execution of a CR2A agreement representing the final payment of consideration to Karen, totaling \$75,747.50.

3. Effect of Karen's Claim. Karen took the \$51,747.50 in cash that Hans paid her for her 50% of the Defined Benefit Plan and invested it in real estate, from which she now receives monthly rental profits of \$2,425 per month. (CP 70-75) Karen wants another \$950 or so from Hans' Defined Benefit Plan payments of \$2,569 per month, leaving Hans \$1,618 per month gross. Karen will then have \$3,425 per month from her rental income and the Defined Benefit Plan. It is not equitable that she has the profits from the investment of the money Hans paid her in 2005 plus one-half of his Defined Benefit Plan payment. The result is not the 50-50 property division they agreed upon.

4. Inconsistencies Bear on Credibility. Karen's Responsive Brief and pleadings contain other inconsistencies:

a) Existence of Joint Debt. Karen says that the joint debt was minimal, but offers no proof otherwise. She ignores the plain language of the Decree at Exhibit W and Exhibit H (4) that "both parties agree that they may incur joint debt in the amount of the financial shortfall each month, if they need to meet the terms of this award." (CP 16-17). She does not deny that real estate tax and repairs are joint debts.

b) Equivocation About Defined Benefit Plan Discussions. Karen's Responsive Brief, at page 17, states, "Hans is certain he gave Karen the [Actuarial] valuation letter. Karen is just as certain she never saw it." Karen asserts that she was certain that they didn't include any cash value of the Boeing

Pension in the settlement. (*Brief of Respondent*, p. 4, CP 204) But Karen contradicted herself when she stated: “At best, we may have discussed it, but that is all, we never made any agreement that I would surrender my right to his pension.” (CP 169) It is simply not credible that the parties valued and divided two Boeing Pension Plans, the 401(k) and FSP, and then never discussed the Boeing Defined Benefit Plan.

II. Reply to Argument in Response.

1. Standard Review is De Novo. Karen relies on *In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 599 106 P.3d 212 (2005). The court in *Langham* did not hold, as Karen asserts, that de novo review is appropriate only if the record consists solely of documentary evidence and credibility is not an issue. Karen may be referring to the line of cases involving child support modifications heard on the family law trial by affidavit calendar. *In re Marriage of Stern*, 68 Wash.App. 922, 846 P.2d 1387 Wash.App. (Div. 1,1993), held that the standard of review in modification of support proceedings where the case is heard on the trial by affidavit calendar is whether the findings are supported by substantial evidence and whether the trial court has made an error of law that may be corrected upon appeal. *Stern* declined to follow *Marriage of Hunter*, 52 Wash.App. 265, 268, 758 P2d. 1019, 1022 (1988)(laches and estoppel defense to support collection) in the case of trial by affidavit support modification actions. Family law commissioners hear and determine hundreds of these cases on the trial

by affidavit calendar, so they develop experience for these types of facts. As Karen asserts the court of appeals defers to cases of “this kind of factual dispute.”

The case before this court is a mixed question of fact and contract law which is not strictly a family law issue under RCW 26.09. Commissioners rarely, if ever, hear cases on the family law motions calendar involving the defense of accord of satisfaction. There is no basis for deference here both in terms of time allowed to hear the case and in experience in subject matter. The parties have only five minutes per side to argue their case before the commission and the revision judge. Neither party testified orally, so the court had no opportunity to determine the credibility of either party. This court stands on equal footing with the Superior Court in determining the credibility of the parties. In this case, whether the standard is substantial evidence or de novo review, the court made an error of law, the findings entered by the court are not properly supported by substantial evidence.

2. Presumption of Burden of Proof. Karen misstates the rule on presumptions and burden of rebutting the presumption applicable to the facts of this case. Karen argues at page 8 of her brief that Hans cites no authority to support his claim that Karen has to show by clear and convincing evidence that there is no accord and satisfaction. This is not the issue before the court. The issue before the court is that Karen has the burden of rebutting the presumption

that the parties did consider and settle every existing difference including the Boeing Defined Benefit Plan.

The court commissioner erred in finding: “There is no evidence that the 2005 settlement was a full and final settlement in full satisfaction of all obligations.” (RP 7/6/12 at p. 31) The court should have applied the presumption that the parties considered and settled every existing difference. Instead, the judge found that Hans had not met his burden of proof. (RP 7/6/12, page 31).

Hans relies for authority on *Burrows v Williams*, 52 Wash. 278, 287, 100 P.340 (1909) for the proposition that a strong presumption attaches that the parties have considered and settled every existing difference where a settlement and the accord is actually performed, and that to overcome this strong presumption requires “testimony so clear and convincing that the Court can free the transaction from all doubt as to the intent of the parties.”

The only evidence offered by Karen to rebut the strong presumption of *Burrows* in support of her claim that the Boeing Defined Benefit Plan was excluded from the settlement is that (1) she doesn’t remember, or (2) she didn’t understand and that she only agreed to divide assets that “had dollars in it.” (*Brief of Respondent*, page 19, line 11-12). Her rebuttal relies upon her lack of memory after seven years and that she was ignorant and didn’t understand the facts or consequences of the settlement in 2005 so therefore there was no “meeting of the minds.” (*Brief of Respondent*, page 15) A reasonable person is presumed to

know the law; ‘ignorance of the law is no excuse.’ *Barth v. Barth*, 19 Wash.2d 543, 559, 143 P.2d 542, 549 (Wash.1943), *Retired Pub. Employees Council of Wa.*, 104 Wn.App.147, 152, 16 P3d 65 (2001). Presumptions exist to prevent a party from benefitting from a seven year delay in raising a claim.

The issue of understanding legal consequences was addressed in *First Nat. Bank v. White-Dulaney Company*, 123 Wash. 220, 212 P.262 (Wash.1923). The court found that it was not necessary to show that the bank officers knew the legal result of their acceptance of a check in settlement of an unliquidated claim. Karen knew and understood that the parties were in mediation to wind up and settle their property division, once and for all.

Karen relies on *U.S. Bank National Association v. Whitney*, 119 Wn.App. 339, 350, 81 P.3d 135 (2003) for the proposition that Hans has the burden to prove the existence of an accord and satisfaction. Karen’s reliance on this case is mistaken, because *U.S. Bank v Whitney* involves the collection of a liquidated amount; a sum that is certain is due. *U.S. Bank* held that the rule in cases involving liquidated amounts is that an accord and satisfaction requires a “meeting of the minds” and intention on the part of both parties to create an accord and satisfaction as a matter of law. But this rule does not apply to this case because the dispute in the Helm case involves an unliquidated claim². *U.S. National Bank v Whitney* at page 351 held that “if the amount of a debt is

² See Appellant’s Brief page 17 for definition of unliquidated damages.

unliquidated or disputed then the tender of a sum certain in full payment followed by acceptance and retention of the amount tendered, establishes an accord and satisfaction. This is the rule that applies to the Helm case.

Karen next tries to distinguish *Paopao v. Dept. of Social and Health Services*, 145 Wn.App. 40, 46, 185 P3d. 640 (2008). Karen asserts that in *Paopao*, an accord and satisfaction was proven. Karen is mistaken in her reading of the case. In *Paopao*, both parties acknowledged the existence of an accord and satisfaction. Paopao filed a suit against the Department of Health Services on the basis of unjust enrichment to set aside the accord and satisfaction that she had previously reached with DSHS. The issue upon which that case turned was whether Paopao's lawsuit was barred by the doctrine of accord and satisfaction and whether a subsequent change in the law, *Arkansas Dept and Health and Human Services v. Ahlborn*, 547 U.S. 268, 285, 283 (126 S.Ct. 1752, 164 L.Ed. 2d 459 (2006), regarding enforcement of a lien in excess of an amount representing medical expenses could be applied retroactively. The court upheld the accord and satisfaction.

3. The Rules of Accord and Satisfaction Where the Amount in Dispute is Unliquidated – *Burrows v. Williams*. An accord and satisfaction is a new contract, complete in and of itself. *Evans v. Columbia Int'l Corp.*, 3 Wn.App 955, 957, 478 P.2d 785 (1970). Its enforceability does not depend upon the antecedent agreement. *Northwest Motors Ltd. v. James*, 118 Wn.2d 294, 305, 822 P.2d 280

(1992). The issue before the court is whether or not the Boeing Defined Benefit Plan was an asset that was excluded from the 2005 settlement, as Karen claims it was. See FN #1(d).

Burrows v. Williams, supra, is similar to the Helm case. In May 1901, O.P. Burrows, agent for certain lands in Chehalis, entered into a contract with the firm of Johnson & Williams to log said lands. After several years of operations, there were insufficient proceeds from sales to cover the costs of operations, and there were no profits to divide. So, in 1903, a general settlement was reached regarding transfers in various parcels of land, plus a conveyance of a delinquent tax certificate from Burrows to Williams, and the assumption of a line of credit by Williams' firm that had been used by Burrows for payment and acquisition of the delinquent tax certificate. Williams paid all expenses of foreclosure and received the tax deed to the land acquired through the delinquent tax certificate. Burrows later sued when the tax deed was delivered to Williams, asserting that he had reserved a one-third interest in the tax title, and that the issue of ownership of the land had been left out of the 1903 settlement. The trial court ruled in Burrows' favor, granting him a one-third interest in the land in question. The Supreme Court reversed the trial court, based on the rule upon which Hans Helm now relies. The Court in *Burrows* found that the parties had come to a general settlement involving the conveyance of interests in several parcels of land, the assumption of debt, and the satisfaction of amounts due and owing under the

original 1901 contract. In response to Burrows' assertion that his claim to a one-third interest in the land had been left out of the general settlement or that he'd reserved his interest in the land so that it might be litigated later, the Court held at page 343, as follows:

The law raises a strong presumption of fact that, when parties are so engaged, they will consider and settle every existing difference. 'Courts do not encourage the overturning of settlements voluntarily made and long acquiesced in.' 8 *Cyc.* 533. In the case at bar, although in equity respondents may have had (although we do not so decide) an interest in the property, they can only overcome the presumption arising from the settlement, and declare a trust, by testimony so clear and convincing that the court can free the transaction from all doubt as to the intent of the parties. *Spencer v. Terrel*, 17 Wash. 514, 50 Pac. 468; *Burke v. Fuller*, 41 La. Ann. 740, 6 South. 557; *Desha v. Smith*, 20 Ala. 747; *Wells v. Erstein*, 24 La. Ann. 317; *Murray v. Ellston*, 24 N. J. Eq. 310; *Little v. Little*, 2 N. D. 175, 49 N. W. 736; 47 Cent. Dig. § 137; *Patterson v. Martin*, 28 N. C. 111.

The *Burrows* Court considered the conduct of the parties. Burrows' conduct did not indicate an ownership interest until he sued. Likewise Karen made no claim for seven years. Karen did not send a copy of the 2002 Decree to Boeing until November 2011. She never spoke of it despite Hans and Karen being together at family events occurring at the time when Hans retired in April 2011. (CP 80) She made no mention of her interest. Twelve months went by following Hans' retirement from Boeing before she moved to enforce the Decree. (CP 31)

Similar to the *Burrows* case, in which Williams conducted himself as the owner and paid all the expenses for the acquisition of the land, Hans did the same thing. Hans continued to work for Boeing for another nine years, contributing to the Defined Contribution Plan and to the Defined Benefit Plan. When he approached retirement, in order to increase his monthly annuity, he maximized his final salary by working overtime, which in turn increased the monthly annuity payment by reason of the formula that applies years of service times the last several years of salary. Hans also took early retirement program offered to him by Boeing upon which he relied, believing that he would not be sharing any portion of the benefit in his retirement years. When he retired, he applied for a single life annuity with no survivor benefit and did not indicate any interest by his former spouse. All of these actions by Hans are consistent with his understanding and belief that he had reached a full and final settlement regarding all interests in 2005 and that all assets were included in the settlement and that the Defined Benefit Plan was not reserved for division at a later date.

Hans has always maintained that the final settlement in 2005 was a full and final settlement and that nothing was left to be litigated, divided or completed at a later date.

The irresistible conclusion is that Karen is mistaken because all of the evidence, Hans' declarations, the actuarial letter, the totals of the final properties to each party, point to the conclusion that the Defined Benefit Plan, together with

all of the Boeing retirement plans, including the Defined Contribution Plan and the Financial Security Plan, were all discussed at the settlement and that Karen received valuable consideration in the funds and assets received and retained by her prior to and through the date of the CR 2A Agreement.

4. Credibility. It is more likely than not that all three Boeing retirement plans were discussed, as this was Hans' express desire. They met in mediation to wind up the division of all of the assets and debts. It is not credible to believe that Hans procured and paid for an actuarial net present value opinion letter for the Boeing Defined Benefit Plan and then never raised the issue or discussed it at the mediation sessions. The mediator did not prepare a QDRO. The mediator's review of the CR 2A Agreement and the level of detail exercised by the mediator in detailing the transfer of the Merrill Lynch IRA asset to Karen confirms the precaution taken to be certain that Karen received her full interest in the Merrill Lynch IRA account and cash payments. If her interest in the Boeing Defined Benefit Plan been reserved, the mediator would have included that in the CR 2A Agreement. The mistake in Karen's argument is that she tries to isolate the Boeing Defined Benefit Plan as if it were separate and distinct from the general settlement that the parties. Following her logic, the parties would have had to engage in 10 different settlements over each asset and debt in 2005. The settlement involved resolution and winding up of the entire property division in one general settlement. Karen isolates on sentence from the 2002 Decree for

application against one asset while at the same time admitting that all other terms of the 2002 Decree and all other assets and debts were finalized and divided in 2005. See footnote #1(d)&(e).

5. Karen Claims There was No Dispute to Settle in 2005. Karen's brief asserts that "there does not appear to be a dispute" about the value of the pension because the parties did not include a valuation in the 2002 Decree and that they agreed to divide the future monthly payments. In her motion to enforce the 2002 Decree, she argues that the Decree is clear and unambiguous.³ The court found that the Decree was clear and unambiguous. (CP 248-249) But then Karen did a 180 degree about face in her motion to enter the QDRO, filed April 2013, in which she argued that the 2002 is ambiguous, is missing essential terms and requires the court's interpretation.⁴ (See Appendix A, CP TBD). The dispute over the entry of the QDRO is unliquidated and the rules of *Burrows v. Williams* apply. There is a strong presumption that all claims and disputes existing in 2005 were resolved. Karen has the burden to demonstrate that the dispute was not

³ Motion page 4 line 5-12: Interpretation of a decree is a question of law. *In re Marriage of Gimlett*, 95 Wn.2d 699, 705, 629 P.2d 450 (1981). If a decree is clear and unambiguous, there is nothing for the court to interpret. *Byrne v. Ackerlund*, 108 Wn.2d 445,453, 739 P.2d 1 13 8 (1 987). In the case at hand, the *Decree* is clear and unambiguous. (CP 34)

⁴ Karen's Motion page 5 line 7-8: "When the parties to a contract have omitted a term that is essential to resolution of the ensuing dispute, the courts may supply a reasonable term in order to make a determination of the rights and duties of the parties. *Restatement (Second) of Contracts* § 204." Karen's Reply in Support of Motion to Enter QDRO asserts at page 3 line 18-22: "The parties did not set out the definition of Ms. Helm receiving 50% of the Boeing pension. This court can supply the missing term by reference to the law at the time the agreement was reached."

resolved in 2005. This ambiguity is a dispute that the parties settled when Hans cashed out Karen's interest. In 2005, Karen chose to avoid both the problem of valuation and the risk of not receiving anything from the deferred annuity payments in the event of Karen's death or Hans' death, and she accepted the cash funds in 2005 which she invested in the real estate market and from which she still derives an income.

6. Understanding the 2005 Agreement. Karen's explanation or rationalization for excluding the Defined Benefit Plan is that the limit of her understanding is described by her use of the phrase that they only divided assets that "had dollars in them." Karen goes on in her brief at page 13 to state that "Hans' offer was not clear" to her. She could only understand the discussion of assets that "had dollars in them." Ignorance is no excuse. All assets have "dollars in them" if any equity exists. Karen equates the term "dollars in them" with liquidity. She asserts in her argument then that Defined Contribution 401(k) Plan and FSP are liquid assets. They are not readily converted to cash because of penalties and federal income tax on any withdrawal. This is her best explanation in support of her claim that the Defined Benefit Plan was excluded from the 2005 general settlement.

Karen relies on *State v. J-Z Sales Corp.*, 25 Wn.App. 671, 681, 610 P.2d 390 (1980). Karen is mistaken about the holding of *J-Z Sales*. Karen asserts that the issue in *J-Z Sales* was whether one of the parties could accept the amount

tendered as full payment while still negotiating the other terms of the accord. That is not the issue in *J-Z Sales*. The Court concluded that because the amount in dispute was unliquidated, the State's negotiation of the check was deemed an acceptance of J-Z's offer even though the State continued to dispute J-Z's claim for offsets.

The final payments under the CR2A are synonymous to the final check paid by a debtor to a creditor. Karen accepted the two cash payments, 100% of the Merrill Lynch IRA and full release from all of the joint debt and she retained it. She has not offered to give it back.

7. The 2002 Decree is Extinguished. Karen argues that Hans' position is that the court is obligated to ignore the plain terms of the 2002 Decree and that he asking the Court to fulfill his understanding of the parties' intent. That is not Hans' position. Rather, Hans' argument is that because the 2005 accord was fully performed, the previous 2002 Decree is discharged and all defenses and arguments based on the underlying contract are extinguished. See *Paopao*, supra, and *NW Motors Ltd*, supra.

8. Direct and Indirect Attacks on the Adequacy of the Consideration. Karen indirectly challenges the sufficiency of the consideration for the final agreement by attacking the values used in the 2005 settlement. The consideration for a settlement cannot be later challenged as insufficient nor can the settlement be increased later if the party who previously accepted payment is later

dissatisfied with the bargain. *Hynes v. Hynes*, 28 Wash.2d. 660, 184 P.2d 68 (1947). The following is a reply to Karen's challenges:

a) Karen argues that she knew about none of the values in 2005 or the valuation dates. (*Brief of Respondent*, page 17) (CP 204 line 6-7) She states that Hans and Karen had no records and that Hans is now guessing about the values. All financial/bank statements in support of the values for the 2005 settlement are attached to Exhibit H to the Declaration of Hans Helm. (CP 128)

Valuation of assets was approached in the usual and customary manner. The 2005 value, or the closest statement available, was used for community accounts to which there had been no post separation, June 30, 2002, contributions. As a community account, appreciation and depreciation in the account value belongs to the community. RCW 26.16.030. *In re Buchanan's Estate*, 89 Wash. 172, 154 Pac. 129 (1916). The value as of the division in 2005 includes all appreciation or depreciation in the account after 2002.

b) Hans produced ScottTrade statements closest to April 2005, which were the only statements he could locate after so many years, as of March 31, 2004, Exhibit H-9, CP 141, as of January 31, 2004, H-10, CP 142 and as of January 31, 2003, H-11, CP 142. Karen tries to benefit from her seven year delay in bringing this action by using the problems caused by faded memories and misplaced or lost records that occurs when long period of time elapse.

c) The Merrill Lynch IRA account received by Karen in 2005 was valued as of 2005 in the CR 2A, because neither party had made any contributions to that account after separation and as a community asset, its fluctuations in value belong to the community. The entirety of the account, as represented in the CR2A agreement, was transferred to Karen in June 2005, represented by the trade confirmation. (Exhibit H-8B, CP 139, and H-8A, CP 138)

Karen alleged that Hans can't prove the existence of her IRA account. (*Brief of Respondent*, p. 17) Karen does not respond to or explain the proof admitted in evidence of the statement provided, Exhibit I, to the Declaration of Hans Helm (CP 151) showing IRA account #2735 with \$7,494 balance as of July 2005. Her own Bank of America Statement showed the \$87.50 per month contribution which she didn't deny. (CP 87)

d) The Boeing Defined Contribution 401(k) Plan and Defined Benefit Plan were valued as of June 30, 2002, under the 2002 Decree language, for a reason. Hans continued to contribute to the Defined Contribution Plan and Defined Benefit Plan after the parties' 2002 separation. This is separate property. RCW 26.16.140. Karen has no claim or interest to Hans' post-Decree income accumulations. Therefore the 2002 value was used.

e) Karen indirectly attacks the consideration exchanged for the settlement by saying that Hans is confused about the cash payment of \$28,557.50 paid to Karen on June 23, 2005. (CP 135) The canceled check is dated June 29, 2005 is

exactly \$28,557.50. (CP 135) At one location in Hans' Declaration, the check amount was wrong due to typographical error. In another location the amount was referenced as \$28,558 due to rounding up. Another reference was simply a rounded figure of \$28,500. The case should turn on the substantive content and not on a typographical error. An errata sheet was filed with the court, correcting several typographical errors in the Brief of Appellant.

f) 401(k) and FSP Values. Karen claims that the difference with respect to the Defined Contribution 401(k) Plan from her list and Hans' list is \$30,000. (CP 203) Karen states at page 17, "It is unknown whether they even agreed on valuation date for this asset [VIP 401(k)]; the Decree includes only a valuation date for the Defined Benefit Plan." The 2002 Decree, states that the Qualified Domestic Relations Order was to provide a 50% interest in the retirement assets Hans accrued at "the Boeing Company with the date of valuation being June 30, 2002." First, Karen's argument that the provision of the Decree that she enforces now does not apply to all three Boeing pension plans is untenable. The provision applies to all three pension assets divisible by a Qualified Defined Relations Order, which, under the Internal Revenue Code, include the Defined Benefit Plan, as well as the Defined Contribution 401(k) Plan the FSP Plan.

Second, Hans provided the June 30, 2002 statement from Boeing showing the exact value for the Defined 401(k) Contribution Plan, \$62,856.48 and FSP plan, \$3,926.80. (CP 136 and 137) Karen does not dispute that she and Hans did

come to an agreement on value of the Defined Contribution 401(k) Plan (VIP) in 2005 and that Karen received payment for her interest therein. But now Karen attempts to attack the consideration for the agreement by using the December 31, 2001 value for the Defined Contribution 401(k) Plan valuation which was \$30,000 greater, at \$91,912, rather than the value of \$62,856 as of June 30, 2002, due to a crash in the stock market that year.

g) Net Proceeds of the Sale of the House in 2004. Karen's arguments in her Brief attempts to confuse the division of the house sale proceeds with the payment of joint debt as provided in the Decree. Footnote 8 of Karen's brief casts Hans' statements as being inconsistent. The Decree, at Exhibit W and H, provides at (2) that "from proceeds, 100% of the debts of the marital community shall be retired."

The net proceeds from the residence after the sale, commissions and closing costs, according to the settlement statement, was \$365,933.46. (Exhibit H-2, CP 129) The Decree provides that the funds were to be used to retire 100% of the debts of the marital community, which totaled \$38,706. (CP 128) Karen does not dispute that Hans paid for the home improvements to get the house ready for sale, totaling \$9,006, (Exh. H-12, CP 144 and Receipts produced, CP 299-314) and the real estate taxes. (Exh. H-13, CP 145-148) Karen states in her Responsive Brief at page 18 that she "did not understand" that Hans wanted to be

reimbursed for 50% of these expenses, which also included Visa charges with a balance of \$14,000. (Exh. H-14, CP 149)

The 2002 Decree, required the \$365,933.46 net proceeds of sale to be reimbursed to Hans, off the top, and then divide the remaining amount, \$327,227.46, 50-50, which would have resulted in Karen receiving \$163,613.73, rather than the \$182,967 she in fact received. The parties performed differently than the terms of the 2002 Decree, and they divided the net proceeds of sale based upon the settlement statement, \$365,933.46. (CP 129) Hans assumed and paid all of the joint debt, \$38,706 in the general settlement.

h) The Net Marital Estate Value as of June 2002 vs. April 2005. The value of the net marital estate in 2005 differed from the calculations made by the parties and the mediator in 2002 because the total in 2002 was based on estimates. The values used in 2005 were based on the actual net proceeds, the actual joint debt and an expert actuarial valuation.

In 2002, the mediator estimated the sale price and the net proceeds of sale of the home. The 2002 Decree of Legal Separation stated that Karen was to be awarded not less than one half of the net marital estate of “approximately” \$281,775; total estate thereby being “approximately” \$563,550. In 2002, when the Decree was drafted, they estimated the house would sell for about \$750,000. (CP 83) In fact, the house sold in 2004 for \$684,441.12, which was \$66,000 less than they estimated. Then came deductions for taxes, commissions, and

settlement charges. There was no net present value calculation for the Defined Benefit Plan in 2002.

But then in 2005, the parties and the mediator used actual values. The 50% of the net marital estate in 2005 was therefore different; \$295,102, total net estate being \$588,247. (CP 128) The 2005 final numbers are different because the house proceeds were less, joint debt and the NPV of the Boeing Defined Benefit Plan.

The mediator's 2002 and 2005 notes were not preserved so in an effort to reproduce the calculations of the parties in 2002 at the time of the Decree, Hans prepared Schedule G (CP 119), which duplicates within a 1% margin of error of the estimated 50% to be awarded to Karen of \$281,925. Hans also prepared Schedule H (CP 128), which shows the actual 2005 total value of the net marital estate, and demonstrates that Karen received, as her net 50%, \$295,102, which includes the net present value of the Boeing Defined Benefit Plan. The schedules prepared by Hans are the supporting evidence for the fact that the Defined Benefit Plan was included in the 2005 settlement. To skew the numbers, Karen has to interject values from December 2001, a full seven months before separation, to avoid the conclusion that she received more than 50% of the net marital estate in 2005. There is no confusion about the total values used by the parties in 2002 and the total values in 2005. Karen did receive 50% of the net marital estate in the final 2005 settlement.

9. Plain Meaning Contract Rule. Karen argues in her brief that the IRC definition of a pension and requirement of a Qualified Domestic Relations Order is not as important as Karen's subjective definition, wherein she distinguishes between a defined benefit plan with monthly payment and the 401(k) plan that "had dollars in it." *Brief of Respondent*, page 20. As with any contract, the court's role is to ascertain the objectively manifested intention of the parties. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990). The parties' subjective intentions are irrelevant. *City of Everett v. Estate of Sumstad*, 95 Wash.2d 853, 855, 631 P.2d 366 (1981).

Hans didn't argue that there was any confusion about what the parties meant by the term "pension" as Karen asserts. (*Brief of Respondent*, page 20) Hans referred to both the Defined Contribution 401(k) Plan, also known as the VIP plan, as a pension plan. Hans also refers to the Boeing Defined Benefit Plan as a pension plan. This is consistent with the definitions under the Internal Revenue Code. All of these ambiguities were resolved by the 2005 settlement and the acceptance and retention of the valuable consideration paid to Karen for her interest therein.

10. Interpretation of Contracts. The parties have different interpretations of their final 2005 Agreement, which presents the Court with a question of law. *Kruger v. Kruger*, 37 Wn. App. 329, 679 P.2d 961(1984). The parties signed a CR2A Agreement on April 29, 2005, so, ergo, a new contract was formed. The

issue before the Court is what were the terms of the 2005 accord and was it performed. This issue is not whether the 2002 Decree of Legal Separation was modified or satisfied. Where the terms of the 2005 CR2A Agreement are subject to interpretation, the construction of the order and any agreement incorporated therein is a question of law. *Byrne v. Ackertlund*, 108 Wash.2d 445, 454, 739 P.2d 1138, 1143 (1987). Under the “Context Rule” of *Berg v. Hudesman*, 115 Wn. 2d 657, 801 P. 2d 222 (1990), a party may submit evidence of conduct leading to the formation of a document and actions in carrying out the document as an aid to contract interpretation, even if the contract is deemed to be unambiguous.^[1] Then, the facts and circumstances should be examined to determine if the new accord was satisfied. The burden of proof is on the Petitioner, not the Respondent. *Burrows v. Williams*, 52 Wash. 278, 287, 100 P. 340 (1909). There is insufficient evidence to support a finding that the settlement did include the Boeing Defined Benefit Plan. The lower court never addressed this issue.

11. Order Converting Legal Separation to Dissolution. Upon Motion, an Order Converting Legal Separation was entered on May 2, 2005 (CP 29), converting the 2002 Decree of Legal Separation to a dissolution of the marriage.

^[1] The “Context Rule” is limited to use of objective evidence to interpret the words actually used in the instrument, not some other “intent” not evidenced in those words. The purpose of external evidence is “to aid interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument.” *Berg*, 115 Wn. 2d at 669, quoting *J.W. Seavy Hop Corp v. Pollock*, 20 Wn. 2d 337, 348-49, 147 P 2d 310 (1944). Mutual intent. 105 Wn. App. 846 (2002).

Karen argues that the deal she made is contained in the decree of dissolution. There is no decree of dissolution. There is only an order converting the decree of legal separation to dissolution of marriage, and that order contains no provisions regarding the division of property. The only function of the order is to dissolve the marriage of the parties.

12. Attorney's Fees. Karen moves the court for attorney's fees based upon RCW 26.09.140. This matter was brought under the caption of the dissolution of marriage, but the issue before the court is the defense of accord and satisfaction. RCW 26.09.140 should not apply. Hans spent substantial funds and fees in defense of the 2005 settlement that he believed resolved all of these matters more than 7 years ago. Karen's attempt to take this asset away from him after having received payment for her interest in the asset is not good faith. If any attorney's fees are to be awarded in this matter, the attorney's fees and costs incurred by Hans Helm should be reimbursed by Karen Helm.

Karen seeks an award of fees based on an alleged disparity in the parties' financial circumstances at the time of their separation in 2002, 10 years ago. . Hans Helm retired in April 2011. His income currently consists of the Boeing pension plan with a net monthly payment of \$1,114.70, which is half of his retirement income, because Karen asked Boeing to hold 50% pending appeal. Karen has a greater income. Karen sets forth as her gross monthly income \$4,703. (CP 70) She claims to have gross monthly business profit of \$2,278 per

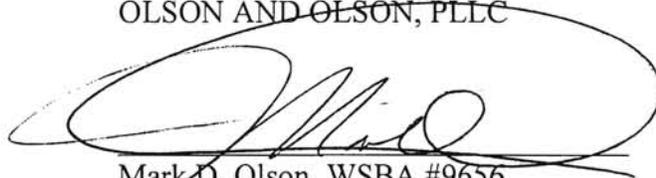
month. She also receives monthly rental income of \$2,425 from the real estate she purchased with the cash she received from Hans in 2005. Ten years after the Decree of Legal Separation was entered, there is no independent means to verify her income. Karen holds interests in real property, a duplex on Queen Anne Hill and a condominium in Bellevue, and she owns stocks and bonds and an annuity of \$62,000 plus cash on deposit in banks of \$4,000. The equity she has in real estate is undisclosed.

RCW 26.09.140 requires a showing of need. Karen has no greater need than Hans, and Hans has no greater ability to pay than Karen. Karen has significant resources to pay her own fees and costs. Hans has to pay substantial fees and costs of his own.

13. Conclusion. The orders entered by the trial court should be reversed. The court should find that accord and satisfaction was reached by the parties in 2005, and that Karen has not overcome the presumption that all interests, including the Boeing Defined Benefit Plan, were resolved at that time. Karen's motion to enforce the 2002 Decree should be denied, and Hans' motion that there was an accord and satisfaction, and that he owns 100% of the Boeing Defined Benefit Plan should be granted, thereby allowing Boeing Company to release the funds held by them to Hans and to restore to him all future monthly payments due under the plan.

Respectfully submitted this 29th day of April, 2013.

OLSON AND OLSON, PLLC

A handwritten signature in black ink, appearing to read 'Mark D. Olson', is written over a horizontal line. The signature is enclosed within a large, loopy oval shape.

Mark D. Olson, WSBA #9656
Counsel for Appellant

APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Karen S. Helm, <p style="text-align: center;">v.</p> Hans U. Helm, <p style="text-align: center;">Respondent.</p>		No. 02-3-04537-9 KNT MOTION TO ENTER QDRO
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I. Relief requested.

Karen Helm asks this court to enter her proposed QDRO which uses the court approved "time rule" to calculate her monthly benefit.

II. Brief Background.

After a 30 year marriage and 3 children, the parties separated in 2002 and divorced in 2005. The husband started working for Boeing in 1978 and he had a Boeing pension. In 2002, neither party was represented by counsel; instead they worked with someone who called himself a "paralegal" that drafted divorce papers. The final documents were drafted by the paralegal that was retained by both parties. The *Decree of Legal Separation* awarded the following:

1 As set forth in Exhibit W:

2 The wife is hereby awarded by way of a Qualified Domestic
3 Relations Order a 50% interest of the pension in the name of the
4 husband at The Boeing Company with the date of valuation
5 being June 30, 2002.

6 As set forth in Exhibit H:

7 The husband is hereby awarded all of the following in his name
8 if any,... 50% of pension plans, retirement plans, profit sharing,
9 401(k) plans, and life insurance policies on his life or owned by
10 him. SAID AWARD IS SUBJECT TO THE WIFE'S AWARD
11 OF 50% INTEREST IN THE ASSETS OF THE MARITAL
12 COMMUNITY PER EXHIBIT W.

13 See **Ex. 1**; *Decree of Legal Separation* dated September 2, 2002 and converted
14 to a *Decree of Dissolution* entered on May 5, 2005.

15 The parties did not prepare a QDRO in 2002 or in 2005 when the final Decree was
16 entered. In June 2011 the husband retired from Boeing and began collecting his pension
17 payments. The wife believed she would begin receiving payments for her share of his
18 pension directly from Boeing upon his retirement. When that did not happen, she consulted
19 with counsel who sent Mr. Helm a proposed QDRO. Mr. Helm refused to sign a QDRO.

20 Ms. Helm was forced to file a *Motion to Enforce* the Decree to obtain her share of Mr.
21 Helm's pension. The court granted the motion and found that the wife was indeed entitled to
22 a 50% share of the husband's pension. A copy of the order is attached as **Ex. 2**. The husband
23 then filed a *Motion for Reconsideration* – which was denied. The husband then filed for
24 revision and the order was upheld on revision. The husband has appealed those rulings and
25 the matter is now pending in the Court of Appeals.

26 At the hearing on the *Motion to Enforce*, the commissioner did not sign either party's
27 proposed QDRO stating that the form of the order should be agreed to, and if not it needed to

1 be briefed and argued. Mr. Helm would not agree to the wife's proposed QDRO. The issue
2 now before the court is how to calculate Ms. Helm's share of her ex-husband's pension.

3 The parties' final documents state the wife was awarded "a 50% interest of the
4 pension in the name of the husband at The Boeing Company with a date of valuation being
5 June 30, 2002." The question is how to interpret this language. The husband will argue that it
6 should be interpreted as meaning the wife is only entitled to receive 50% of the monthly
7 benefit he would have received had he retired on June 30, 2002. This method of calculating
8 the wife's benefit is known as the "subtraction method." The wife argues it should be
9 interpreted as meaning that she is entitled to 50% of the community's share of the pension.
10 This method of calculating the wife's benefit is known as the "time rule."

11 Obviously Mr. Helm's "subtraction method" results in a smaller pension payment to
12 Ms. Helm than does her proposed "time rule."

13 There is simply no extrinsic evidence available to suggest that the parties themselves
14 had any intention to use one formula or the other. The only pieces of extrinsic evidence
15 available to the court are 1) that all the pleadings were drafted in 2002 and 2) were drafted by
16 a paralegal who handled divorce cases that was retained by both of the parties. The husband
17 contacted the paralegal [he now lives in California] who has no files or papers or memory in
18 connection with this transaction. This is not disputed.

19 **III. Evidence relied upon.**

20 **Ex. 1:** Decree of Legal Separation and Order on Motion to Convert to Decree of
Dissolution;

21 **Ex. 2:** Order on Family Law Motion Granting Wife's Motion to Enforce;

22 **Ex. 3:** In re Matter of Angeline V. Bachmeier, Deceased, 106 Wash.App.862, 25 P.3d
498; and

23 **Ex. 4:** In re Marriage of Bulicek; 59 Wash.App. 630, 800 P.2d 394.

1 **IV. Issue.**

2 How should the language set out in the *Decree of Legal Separation* that awarded 50%
3 of the husband's pension to Ms. Helm be interpreted? Ms. Helm proposes using the "time
4 rule" for the QDRO while Mr. Helm proposes using the "subtraction method" which has
5 been explicitly rejected by Washington courts.

6 **V. Argument.**

7 **A. The court needs to interpret the Decree using principles of contract**
8 **construction.**

9 Interpretation of a decree is a question of law. *In re Marriage of Gimlett*, 95 Wn.2d
10 699, 705 (1981). When construing a written contract, the courts apply the following
11 principles: "(1) The parties' intent controls, (2) we ascertain their intent from reading the
12 contract as a whole, and (3) we will not read ambiguity into a contract that is otherwise clear
13 and unambiguous. A contract provision is ambiguous "if its terms are uncertain or they are
14 subject to more than one meaning." *Dice v. City of Montesano*, 131 Wn.App. 675, 684, 128
15 P.3d 1253 (2006).

16 The Supreme Court has said: "We take this opportunity to acknowledge that
17 Washington continues to follow the objective manifestation theory of contracts. Under this
18 approach, we attempt to determine the parties' intent by focusing on the objective
19 manifestations of the agreement, rather than on the unexpressed subjective intent of the
20 parties. We impute an intention corresponding to the reasonable meaning of the words
21 used..." *Hearst Commun., v. Seattle Times*, 154 Wn.2d 493, 503-04 (2005) (internal citations
22 omitted). The parties' objective intent can be ascertained by examining admissible extrinsic
23 evidence.

1 In the case at hand, there is no extrinsic evidence of the parties' intent as to the
2 meaning of the phrase at issue. There is simply no evidence that the parties intended to use
3 either the "subtraction method" or the "time rule." The only pieces of extrinsic evidence
4 available to the court are:

- 5 1. The *Decree of Legal Separation* was drafted in 2002, and
- 6 2. It was drafted by a paralegal that was retained by both parties.

7 When the parties to a contract have omitted a term that is essential to resolution of the
8 ensuing dispute, the courts may supply a reasonable term in order to make a determination of
9 the rights and duties of the parties. Restatement (Second) of Contracts § 226, comment c; *In*
10 *re Bachmeier*, 106 Wn. App. 862 (2001). Generally, courts will look to the contract itself, as
11 well as the parties' conduct and circumstances surrounding the contract to ascertain and apply
12 a reasonable term reflective of the parties' intent. However, if there is no indication as to
13 whether the parties considered or agreed upon an omitted issue, a court has a duty to supply a
14 term or provision that is reasonable and in keeping "with community standards of fairness and
15 policy rather than analyze a hypothetical model of the bargaining process." Restatement
16 (Second) of Contracts § 204; see also *In re Bachmeier, Id.* See generally 25 Washington
17 Practice "Contract Law and Practice" Chapter 5.

18 The *Bachmeier* court addressed the issue of whether the Bachmeiers, who had
19 executed a community property agreement, intended it to be effective if they permanently
20 separated. The decision is instructive:

21 When the parties have omitted a term that is essential to a determination of their rights
22 and duties, the court may supply a term which is reasonable in the circumstances."...
23 see also RESTATEMENT (SECOND) OF CONTRACTS § 204 ("When the parties to
a bargain sufficiently defined to be a contract have not agreed with respect to a term

1 which is essential to a determination of their rights and duties, a term which is
2 reasonable in the circumstances is supplied by the court.”).

3 Comment b to Restatement (Second) of Contracts § 204 illuminates how omission
4 occurs:

5 The parties to an agreement may entirely fail to foresee the situation which later arises
6 and gives rise to a dispute; they then have no expectations with respect to that
7 situation, and a search for their meaning with respect to it is fruitless....

8 Here, as stated earlier, there is no indication that the Bachmeiers ever considered or
9 addressed the issue of the agreement's continued effectiveness if the parties
10 permanently separated. The issue is essential to a determination of the parties' rights
11 and duties, thereby making this an omitted term case.

12 Comment d to Restatement (Second) of Contracts § 204 provides guidance on the
13 process of supplying an omitted term:

14 The process of supplying an omitted term has sometimes been disguised as a literal or
15 a purposive reading of contract language directed to a situation other than the situation
16 that arises. Sometimes it is said that the search is for the term the parties would have
17 agreed to if the question had been brought to their attention. Both the meaning of the
18 words used and the probability that a particular term would have been used if the
19 question had been raised may be factors in determining what term is reasonable in the
20 circumstances. But where there is in fact no agreement, the court should supply a term
21 which comports with community standards of fairness and policy rather than analyze a
22 hypothetical model of the bargaining process.

23 Id at 873-874. [A copy of the opinion is attached for the court's convenience.]

And parties to a contract are generally deemed to contract in reliance on existing law
unless the evidence is overwhelming they intended another outcome. 25 Washington Practice
“Contract Law and Practice” section 5.4.

**B. The “time rule” was the law in Washington in 2002 and it is
fundamentally fair as it fully accounts for the community’s contribution to
the pension benefit.**

The wife’s proposed QDRO directs her portion of the monthly pension benefit to be
calculated using the “time rule method” which has been routinely and repeatedly approved by
Washington courts. *In re Marriage of Bulicek*, 59 Wn.App. 630, 632 (1990) [copy attached]

1 is the seminal case on this issue. The rule has been repeatedly approved. See e.g. *In re*
2 *Marriage of Chavez*, 80 Wn.App. 432 (1996); *In re Marriage of Greene*, 97 Wn.App. 708
3 (1999). And *In re Marriage of Rockwell*, 131 Wn.App. 205 (2007) the court explicitly found
4 that application of the “subtraction method” was reversible error; the case was remanded with
5 instruction to apply the “time rule.”

6 The “time rule” factors the following items into a fraction:

7 Months from date of employment to date of separation
8 Months from date of employment to date of retirement

9 The fraction equals the community’s fractional share of the pension. Then the pension
10 benefit is multiplied by the fraction to arrive at the dollar amount of the monthly pension
11 payment which is community. If the spouses are each awarded 50% - the community’s share
12 is then divided in half.

13 This “time rule” method produces an equitable allocation of the pension. It recognizes
14 the community effort that laid the foundation for any increase in benefits resulting from
15 increased pay after separation. *In re Marriage of Bulicek*, 59 Wn.App. at 639; *see also In re*
16 *Marriage of Chavez*, 80 Wn.App. at 437.

17 The parties were married in 1972. The husband started working for Boeing in 1978
18 and the parties separated in 2002 after 30 years of marriage and after 24 years at Boeing.
19 Following separation, the husband worked 9 more years before he retired and began to collect
20 retirement in June 2011. His pension benefits increased between June 2002 and retirement in
21 June 2011. The increase in his pension benefits after separation is attributable to the earlier 24
22 years of community effort between 1978 and 2002. Because the community laid the
23

1 foundation for the later years of higher income, using the “time rule” equitably apportions the
2 final pension benefit.

3 *Bulicek’s* “time rule” was the law in 2002 when the parties separated. The “time rule”
4 was the law when the paralegal drafted the *Decree of Legal Separation*.

5 The wife’s proposed QDRO correctly orders application of the time rule method to
6 calculate her benefit:

7 The Alternate Payee is awarded X percent of the Participant’s
8 monthly benefit payments if, as and when they become payable
9 to the Participant. To determine “X” percent, the Plan shall first
10 determine the product of 50 and a fraction, the numerator of
11 which is the Participant’s months of benefit service in the Plan
12 from the date the Participant was first credited with benefit
13 service in the Plan through June 30, 2002 and the denominator
14 of which is the Participant’s months of benefit service in the
15 plan as of the Participant’s annuity starting date.

16 Simply dividing the monthly pension benefit in half as June 30, 2002, which is the
17 “subtraction method” fails to fully account for the community effort.

18 **C. Because the pension benefit was unknown at the time of the divorce,
19 application of the “time rule” is warranted.**

20 The time rule method is appropriate when a retirement benefit is to be divided in
21 dissolution proceedings, but at the time of the dissolution it is not in payout status because the
22 employee spouse has yet to retire. *See In re Marriage of Chavez*: “When a spouse continues to
23 accumulate pension benefits following divorce, case law does not support the trial court’s
approach of simply dividing the total pension in half.” 80 Wn.App. at 436.

At the time of separation in 2002, Mr. Helm was actively employed at Boeing. His
date of retirement and actual retirement benefit were unknown. Simply dividing the pension

1 benefit that "would" have been paid at the date of separation, or at the date of divorce, fails to
2 properly account for the community effort, thus necessitating use of the time rule method.

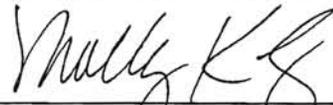
3 **VI. Conclusion.**

4 The parties failed to include in the *Decree of Legal Separation* a definition of how to
5 calculate an award of 50% of the husband's Boeing pension to the wife. The only extrinsic
6 evidence is that the *Decree* was drafted in 2002 when the "time rule" was the law in
7 Washington for dividing pensions. And the *Decree* was drafted by a paralegal who handled
8 divorce cases. The only fair and equitable manner to divide Mr. Helm's pension is by using
9 the "time rule."

10 Dated this 4 day of March, 2013.

12 LAW OFFICES OF MOLLY B. KENNY

13 By:


14 Molly B. Kenny, WSBA No. 11089
15 Attorney for Karen Helm

16 I have personal knowledge of the above facts and am competent to so testify. I certify
17 under penalty of perjury of the laws of the state of Washington that the foregoing is true and
18 correct.

19 DATED this 4 day of March, 2013, at Bellevue, Washington.

20 
21 Karen Helm
22 *phone authorization -*
23 *Original will be supplied*
upon receipt

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Karen S. Helm,

Petitioner,

v.

Hans U. Helm,

Respondent.

No. 02-3-04537-9 KNT

REPLY IN SUPPORT OF MOTION TO
ENTER QDRO

OBJECTION TO HEARSAY

The court should strike and not consider the evidence offered in Mr. Helm’s *Responsive Memorandum*. Specifically there were a number of “assertions of fact” made by counsel for which he has no personal knowledge. One example is the claim that Mr. Helm accepted an early retirement package that resulted in additional benefits. Another example is the claim that the parties already divided the pension and Ms. Helm was paid in cash. Mr. Helm argued that in the *Motion to Enforce* and lost that argument.

I. This motion is not premature.

Mr. Helm suggests that it is foolish for this court to proceed because the case is on appeal and when the court rules that ruling “might” mean more briefing on this percentage issue. While not entirely clear – he seems to be arguing that the court of appeals ruling “might” affect the issue now before this court. That is not the case. The court of appeals is

1 deciding whether the court's prior ruling that granted Ms. Helm a QDRO pursuant to the
2 Decree should be upheld. This court is being asked to decide a separate issue - the
3 percentage of the pension that should be awarded to Ms. Helm and set out in the QDRO.

4 If the court of appeals reverses the trial court's order and finds that Ms. Helm is not
5 entitled to a QDRO, whatever order is issued on the current motion will automatically be
6 void.

7 If the court of appeals affirms that Ms. Helm is entitled to a QDRO, then the order on
8 the pending motion, what percentage should be awarded, stands.

9
10 **II. The issue of the "stay" is a red herring and should not prevent this court from ruling on the percentage that should be awarded in the QDRO.**

11 Mr. Helms is really asking for a stay of the court's order on the percentage issue. Ms.
12 Helm has already agreed to a stay of this court's ruling [on the percentage issue] until the
13 court of appeals issues its opinion. Ms. Helm agrees to stay payment to her. Thus, there is no
14 danger that Boeing paying any funds to Ms. Helm. But inexplicably Mr. Helm wants to delay
15 getting a ruling on the percentage issue. He is not entitled to prevent this court from ruling on
16 the pending motion by arguing for a stay. There is no reason to delay getting a ruling on the
17 percentage issue. Mr. Helm is trying to create an issue where none exists.

18 **III. The court should adopt *Bulicek's* "time rule" for the QDRO at hand.**

19 Interestingly, Mr. Helm argues against the "time rule" – but he offers the court no
20 alternative formula.

21 Counsel infers that the *Bulicek* court approved other methods for dividing pension
22 benefits. That is not the case. The quote offered by Mr. Helm from the *Bulicek* opinion
23 begins with 'cf' which is a citation signal that means "compare with these decisions;" the

1 quote is taken from the court’s survey of prior Washington and out of state decisions that
2 addressed the same issue – does the “time rule” or the “subtraction rule” apply.

3 *In re Marriage of Rockwell*, 141 Wn. App. 235 (2007) is instructive. Seventeen years
4 after the *Bulicek* decision, the *Rockwell* court overruled the trial court’s use of the “subtraction
5 method.” In so doing, the court expressly stated:

6 Washington cases have only used the time rule method, not the subtraction method.
7 We conclude that the trial court erred when it used the subtraction method and reverse
8 and remand with instructions to characterize Carmen's federal pension according to
9 the time rule method. [Emphasis added]; Id at 253.

10 Mr. Helm claims that there are components of his pension that are his separate
11 property. But he presented no evidence to support that claim so it should be rejected.

12 **IV. Conclusion.**

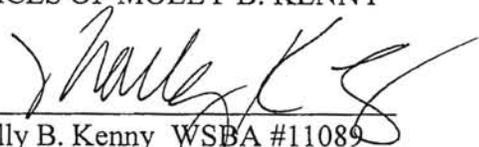
13 The court should rule on the pending motion which asks the court to decide the
14 percentage of the Boeing pension to be awarded to Ms. Helm in the QDRO. So long as
15 Boeing continues to hold 50% of the pension, Ms. Helm agrees that the order should be
16 stayed pending the court of appeals issuing its opinion. Thus, Mr. Helm is completely
17 protected. There is no legal or practical reason justifying any further delay on the court ruling
18 on the pending motion.

19 The parties did not set out the definition of Ms. Helm receiving 50% of the Boeing
20 pension. This court can supply the missing term by reference to the law at the time the
21 agreement was reached. Mr. Helm does not dispute this. The law is clear – the “time rule” is
22 the only fair way to compensate the community for its contribution to the pension benefits
23 earned by a spouse at retirement. Mr. Helm failed to offer any alternative proposal. *Bulicek*

1 was the law in Washington in 2002 when the parties executed their agreement and it remains
2 the law. Ms. Helm's proposed QDRO should be adopted.

3 DATED this 24 day of March, 2013.

4 LAW OFFICES OF MOLLY B. KENNY

5 By: 

6 Molly B. Kenny WSBA #11089
7 Attorneys for Karen Helm

8 CERTIFICATE OF SERVICE

9 On this day I sent by U.S. Mail, postage prepaid
[Legal Messenger [Fax [Email a copy of the document
on which this certificate is affixed to the attorneys of record.

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

11 DATED: _____, at Bellevue, Washington.