IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of JONI HONG, Respondent, and JERRY HONG, Appellant.	No. 39074-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Jerry Hong appeals the trial court's denial of his CR 60(b) motion in which he asked the trial court to vacate a final dissolution decree and findings of fact and conclusions of law entered after a dissolution hearing that he failed to attend. Jerry[1] asserts numerous grounds to vacate the decree. But Jerry had proper notice of the hearing that he failed to attend and his arguments are either an improper collateral attack on the underlying decree or are otherwise meritless. Accordingly, we affirm.

[1] We use the parties' first names for clarity.

FACTS

On October 6, 2006, Joni Hong filed a petition for dissolution of her marriage to Jerry, alleging that the marriage was irretrievably broken; requesting a division of the property, debts, and liabilities; and requesting spousal maintenance and attorney fees.[2] Jerry did not move out of the marital home until sometime in November 2007. Joni stated in a declaration that, while the couple lived together after she filed for dissolution, they "continued to live [their] lives exactly the same as prior to the filing." Clerk's Papers at 91. From December 2006 until November 2007, the couple shared meals, slept in the same bed, deposited their paychecks into a common account and paid their bills from this account, and Joni did the household chores.

On November 21, Joni moved the trial court to (1) restrain the parties from disposing of their property and/or insurance policies, (2) award temporary maintenance, (3) divide the parties' debts, (4) allow her to occupy the marital home, and (5) award her $1,000 in attorney fees. On December 17, the trial court held a hearing on this motion. Acting pro se at the time, Jerry initially failed to appear at the hearing and the trial court signed Joni's prepared orders. But Jerry arrived before the court docket ended and the trial court recalled the case, struck the previously signed orders, and continued the hearing to allow Jerry time to obtain an attorney.

Jerry secured Gary Jacobson as counsel in January 2008. On January 24, 2008, the trial court entered a temporary order requiring Jerry to pay $1,000 a month in maintenance, assigning mortgage payment duties to Joni, and awarding occupancy of the marital home to Joni. On March 12, Jacobson withdrew as counsel for Jerry because he retired from practicing law. Jerry

[2] Joni amended her dissolution petition on December 12, 2006, making nonsubstantive changes.

proceeded pro se for the next several months, participating in a settlement conference.[3]

On October 21, the trial court held a final dissolution hearing. Jerry failed to appear at the hearing. The trial court took sworn testimony from Joni and then entered findings of fact and conclusions of law, a dissolution decree, and a "judgment summary" order. The trial court included in the dissolution decree a provision that extended Jerry's maintenance obligations after his death.[4]

On October 28, Jerry arrived home from work and began to prepare for the hearing, which he believed was set for October 29. While gathering documents for the case, Jerry discovered his mistake and realized that he had missed the hearing. At 1:48 am on October 29, Jerry emailed the trial court explaining the situation and asking about his options. The trial court's assistant responded that final orders were entered and provided Jerry with referrals to resources that might be able to answer his questions and give him legal advice. Jerry also emailed Joni's attorney, who responded by mailing Jerry a copy of the dissolution decree and findings of fact and conclusions of law.

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[3] Jerry claims to have participated in two settlement conferences, but the record on review includes documentation of only a single settlement conference.

[4] We note that former RCW 26.09.170(2) (2002) may prohibit a trial court from imposing a maintenance obligation on the obligor after death unless the parties agree to such an arrangement in writing. Former RCW 26.09.170(2) provides in relevant part, "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." Whether the language "or expressly provided in the decree" grants the trial court sua sponte authority to provide for maintenance after the obligor's death without the parties' written consent is a matter of first impression in Washington. Jerry challenges the trial court's authority to impose spousal maintenance on his estate upon his death. Because this issue is an alleged error of law requiring a statutory construction analysis, it is not properly before us on appeal from a denial of a CR 60 motion. We cannot address this question and the trial court's order extending maintenance obligations after Jerry's death remains.

Jerry did not appeal the October 21, 2008 judgment or order. On December 18, Herbert Gelman began representing Jerry and filed a "motion for relief from judgment," citing various CR 60 grounds as reasons that the trial court should vacate its October 21, 2008 dissolution decree and findings of fact and conclusions of law. The trial court held hearings on this motion on January 30 and February 27, 2009.

On February 27, the trial court entered an order denying the motion to vacate but amending part of the property division in the dissolution decree. The trial court revised the distribution of certain pensions previously awarded so that now Jerry will receive his pension benefits accrued before the marriage as his separate property and equally split his benefits accrued during the marriage with Joni. The trial court cited CR 60(b)(11) as its authority for modifying the dissolution decree. Jerry filed a timely appeal of the February 27, 2009 order.[5]

ANALYSIS

CR 60(b) Motion

Jerry based his CR 60 motion to vacate the dissolution decree and findings of fact and conclusions of law on grounds of "mistakes" or "excusable neglect," "[f]raud" or "misrepresentation," that the "judgment is void," and for "[a]ny other reason justifying relief." CR 60(b)(1), (4), (5), (11).[6] Jerry assigns and argues numerous errors to the October 21, 2008

[5] On January 19, 2010, after briefs were filed with this court, Gelman withdrew as Jerry's counsel pursuant to RAP 18.3 and CR 71. Jerry appeared pro se at oral argument.

[6] CR 60(b) provides in relevant parts:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** 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;

dissolution decree and findings of fact and conclusions of law. Several of Jerry's assigned errors are not eligible for review in an appeal of a trial court's CR 60 motion decision. Based on the errors that are properly raised, we affirm and hold that the trial court did not abuse its discretion when it denied Jerry's motion to vacate.

Whether to grant a CR 60 motion to vacate is within the trial court's sound discretion. *Martin v. Pickering*, 85 Wn.2d 241, 245, 533 P.2d 380 (1975); *In re Marriage of Knutson*, 114 Wn. App. 866, 871, 60 P.3d 681 (2003). A trial court manifestly abuses its discretion if its decision is based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

A. "Meritorious Defense" Claims

Jerry presents two separate arguments that during the CR 60 motion hearing, he presented a meritorious defense requiring the trial court to vacate its decree and findings. We discern no error and hold that the trial court did not abuse its discretion when it denied Jerry's CR 60 motion.

Jerry's first argument appears to relate to a four-prong test that trial courts apply when considering a motion to vacate a *default judgment*. But this test, and all of the cases to which

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> . . . .
> (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (5) The judgment is void; [or]
> . . . .
> (11) Any other reason justifying relief from the operation of the judgment.
> The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

Jerry cites in support of this argument, apply only in cases involving *default judgments*. Here, the trial court did not enter a default judgment.

To obtain a default judgment, a party must file a "motion for default" with a supporting affidavit giving the opposing party at least five days notice of a default hearing and then the trial court can enter a default judgment after a hearing. CR 55. Here, Joni never filed a motion for default and, thus, the trial court's judgment and dissolution decree do not qualify as "default judgments."

Instead, on October 21, 2008, the trial court held the scheduled hearing on the merits, took sworn testimony from Joni, and then entered its findings, conclusions, and the dissolution decree. CR 40(a)(5) allowed Joni to proceed with the trial in Jerry's absence because

> [e]ither party, after the notice of trial, whether given by himself or the adverse party, may bring the issue to trial, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

Jerry concedes that he had notice of the dissolution hearing. When Jerry failed to appear, the trial court correctly allowed Joni to proceed with her case and it had authority to enter the appropriate orders under CR 40(a)(5) and CR 52.[7]

In re Marriage of Daley, 77 Wn. App. 29, 888 P.2d 1194 (1994), provides additional authority and support for our analysis. In *Daley*, a husband failed to appear at a dissolution hearing because he forgot about the hearing date. 77 Wn. App. at 29-30. After the trial court

[7] CR 52(a)(1) states,

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. Judgment shall be entered pursuant to rule 58 and may be entered at the same time as the entry of the findings of fact and the conclusions of law.

called the husband's name again at the end of its calendar, the wife presented her pro se drafted default order and the court entered the default order and a dissolution decree. *Daley*, 77 Wn. App. at 30-31. The trial court explicitly stated twice on the record that it entered the orders by default. *Daley*, 77 Wn. App. at 30-31. Division One of this court vacated the default decree because the husband lacked the five days notice for a default judgment as CR 55 required. *Daley*, 77 Wn. App. at 31. The wife argued that CR 40(a)(5) governed and the order was not a default judgment. *Daley*, 77 Wn. App. at 31-32. The *Daley* court stated,

> The situation would certainly have been different had [the wife] proceeded with her case. Specifically, if she had proceeded to trial and presented evidence on the record, then the trial court would have had the authority under CR 52 to enter findings, conclusions, and judgment without notice to [the husband]. The record does not reflect, however, that the trial court had evidence before it at the time it entered judgment. Therefore, the only applicable rule was CR 55.

77 Wn. App. at 32. Here, the trial court took sworn testimonial evidence from Joni on the date scheduled for trial, therefore CR 40(a)(5), and not CR 55, applies. The trial court did not enter a default judgment in this case and we will not consider Jerry's arguments based on a common law test for vacating default judgments.

For his second argument, Jerry contends that his personal mistake with regard to the hearing date constitutes "extraordinary circumstances" under CR 60(b)(11). We reject this argument.

Relief under CR 60(b)(11) applies only to situations involving "extraordinary circumstances" not covered by any other section in CR 60. *In re Marriage of Hammack*, 114 Wn. App. 805, 809-10, 60 P.3d 663, *review denied*, 149 Wn.2d 1033 (2003); *In re Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947 (1998), *review denied*, 137 Wn.2d 1023 (1999).

"[T]hose circumstances must relate to 'irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings.'" *In re Marriage of Furrow*, 115 Wn. App. 661, 673-74, 63 P.3d 821 (2003) (quoting *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)).

Merely forgetting a hearing date after a party has proper notice does not qualify as an "extraordinary circumstance" requiring a trial court to vacate a judgment or order. *See Furrow*, 115 Wn. App. at 673-74. Moreover, to the extent Jerry argues that the trial court or Joni had a duty to ask about his absence or attempt to call or locate him when he failed to appear at the hearing, he is incorrect. No such duty exists. As a pro se party at the time of the October 21, 2008 hearing, Jerry had the responsibility to show up and present his case. Pro se litigants are held to the same standard and same rules of procedure as attorneys. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993); *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155, *review denied*, 100 Wn.2d 1013 (1983).

Accordingly, the trial court did not abuse its discretion when it denied Jerry's CR 60 motion related to either of his "meritorious defense" arguments.

B. Pension Benefit Claim

Jerry next contends that, due to a misrepresentation Joni made, the trial court mischaracterized 15 years worth of his pension benefits accrued before the marriage as community property and erroneously awarded part of it to Joni. This error relates to Jerry's CR 60(b)(4) fraud or misrepresentation allegations. But Jerry concedes that, per his request, the trial court amended the dissolution decree to award Jerry the disputed portion of his pension as separate property. Thus, any error regarding the division of this portion of his pension is moot

and cannot serve as a basis for holding that the trial court abused its discretion when denying the CR 60 motion.[8]

C. Date of Separation Claim

Next, Jerry assigns error to the trial court's distribution of the marital assets, contending that substantial evidence does not support the trial court's finding that the couple separated on or about November 1, 2007. This error then allegedly resulted in the trial court terminating the accrual of community property interests at the wrong time and improperly awarding some of Jerry's pension to Joni. Although Jerry does not clearly identify which part of CR 60 relates to this error, it appears to relate only to the catch-all language in CR 60(b)(11). We discern no error.

We review findings of fact under a substantial evidence standard, defined as evidence sufficient to persuade a reasonable person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the standard is satisfied, a reviewing court will not substitute its judgment for the trial court's even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 685, 314 P.2d 622 (1957). We do not review a trial court's credibility determinations nor do we weigh conflicting evidence. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234, *review denied*, 129 Wn.2d 1030 (1996).

At the October 21, 2008 hearing, Joni testified that the couple did not physically separate until around November 1, 2007. Further, Jerry had requested that the trial court order the couple to file a 2007 joint tax return, and the trial court granted this request. This constitutes substantial

[8] Joni did not file a cross appeal or otherwise challenge the trial court's modification of the dissolution decree under CR 60.

evidence supporting the trial court's finding that the couple did not separate until November 1, 2007. Moreover, during the trial court's subsequent review of this finding as part of Jerry's CR 60 motion, Joni presented evidence that, until November 2007, the couple shared a bed, ate meals together, used a common bank account for depositing paychecks and paying bills, and Joni did household chores for both their benefit. This evidence reinforced the trial court's finding that the couple separated on or about November 1, 2007, and the trial court did not err by refusing to amend this finding.

Additionally, Jerry misapplies the law he cites from *In re Marriage of Nuss*, 65 Wn. App. 334, 828 P.2d 627 (1992).

> "[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."

65 Wn. App. at 344 (alteration in original) (quoting *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn. App. 351, 354, 613 P.2d 169 (1980)). Jerry is incorrect that the October 6, 2006 dissolution petition declaring that the marriage was "irretrievably broken" was a "clear renunciation of the community" that ended the accumulation of community property. Br. of Appellant at 13. The trial court looked objectively at both parties' conduct to determine when the parties renounced the community without an intention of resuming their marriage. The evidence is uncontradicted that the parties lived together and acted as a married couple until Jerry moved out of the marital home in November 2007. Moreover, the record is void of any legal action taken by either party to further the December 2006 amended dissolution petition until November 2007, when Jerry moved out of the marital home. This conduct clearly evinces that the parties did

not renounce the community without intending to resume the marriage until November 2007.

Jerry's reliance on former RCW 26.16.140 (1975) is also misplaced. This statute provides that when spouses live separate and apart, their respective earnings are separate property. The trial court's finding that community property stopped accruing on November 1, 2007, based on the parties' conduct that included a physical separation of the parties around that date, is in accord with the statute.

Substantial evidence supports the trial court's finding that Jerry and Joni separated on or about November 1, 2007, and Jerry's challenge to the trial court's separation date finding fails. Accordingly, the trial court did not abuse its discretion when it denied the CR 60 motion on this basis.

D. Errors of Law

Because Jerry appealed the trial court's denial of his CR 60 motion to vacate, and he did not timely appeal from the dissolution decree or findings of fact and conclusions of law, we cannot review Jerry's assigned errors 4, 5, and 6 because they allege errors of law.

Errors of law in a judgment may not be corrected by a CR 60 motion because they must be properly raised in a direct appeal of the judgment. *Thurston*, 92 Wn. App. at 499; *see In re Marriage of Moody*, 137 Wn.2d 979, 991, 976 P.2d 1240 (1999). An appeal from the denial of a CR 60(b) motion is limited to "the propriety of the denial not the impropriety of the underlying judgment." *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). "The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion." *Bjurstrom*, 27 Wn. App. at 451. Stated differently, "an unappealed final judgment cannot be restored to an appellate track by means of

moving to vacate and appealing the denial of the motion." *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

Whether the trial court's decree grants relief beyond what was pleaded in the petition for dissolution, whether the trial court erred by imposing maintenance obligations on Jerry even after his death, and whether the trial court erred by awarding maintenance without findings of Joni's need and Jerry's ability to pay, are all alleged errors of law in the underlying order and judgment, which Jerry failed to timely appeal. We cannot consider any arguments on these alleged errors in the underlying judgment and order because they are outside the scope of proper challenges in the context of an appeal from a CR 60 vacate motion.

Trial Attorney Fees

In his reply brief, Jerry appears to challenge the trial court's award of attorney fees to Joni. Although Jerry contended that the trial court erred by awarding Joni attorney fees in his CR 60 motion at the trial, he did not assign any error or provide argument on this issue on appeal. Jerry cannot present argument on appeal on this issue for the first time in his reply brief. RAP 10.3(c) ("A reply brief should be limited to a response to the issues in the brief to which the reply brief is directed.").

Attorney Fees on Appeal

Citing RCW 26.09.140, both Jerry and Joni requested attorney fees on appeal. RAP 18.1(b). Jerry failed to file the necessary financial declaration to justify an award in his favor. Although Joni filed a financial declaration stating her need and Jerry's ability to pay, there is no

documentation anywhere in the record, other than Joni's assertions, supporting Jerry's ability to pay. Accordingly, we decline to award attorney fees on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

ARMSTRONG, J.