97906-5

NO. 78622-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re Marriage of.

VIKRAM KUMAR,

Appellant,

v.

SMITHA NAIR SHIVSHANKARAN,

Respondent.

PETITION FOR REVIEW

Vikram Kumar
Appellant, Pro Se

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A. IDENTITY OF PETITIONER

Vikram Kumar ("Kumar"), pro se, requests this court to accept review of the Court of Appeals decision identified in Part B of this petition.

B. COURT OF APPEALS DECISION

Kumar requests this court to review the following three decisions of the Court of Appeals, Division 1:

1. Opinion terminating review filed Sep 16, 2019.

2. Order denying Motion for Reconsideration filed Oct 18, 2019.

3. Order denying Motion to Publish filed Oct 30, 2019.

A copy of all three decisions is attached in Exhibits 1, 2 and 3 respectively.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the appellate courts decision (affirming the trial courts decision) had any statutory authority or precedent (case law). The trial court had vacated only a portion of the property distribution (only a handful of Fidelity retirement accounts were vacated, the reamining property distribution and spousal support portions of the decree were left intact). There is no authority or case law to support this partial vacation of only a ***sub-portion*** *of the property*

distribution.

2. Whether the appellate court erred in ruling that partial vacation was the only relief sought in Shivasankaran's CR 60(b) motion. Shivshankaran's CR 60(b) in fact did not even seek this relief. Shivasankaran's CR 60(b) motion sought to reform this portion of the decree or alternatively sought a full vacation. Both the trial court and the appellate court ended up granting relief that was never ever sought by either party.

3. Whether the appellate court erred in denying the common relief sought by both parties. Both parties (in both trial court proceedings and appellate court proceedings) sought to vacate the divorce decree entirely – this was the only was to guarantee a fair and equitable division overall. This common relief was, however, denied by the appellate court with no reason cited. The courts current ruling, in fact, does not allow fair and equitable division.

4. Whether the appellate court erred in ruling that "the trial court implicitly concluded that vacating only the distribution of the retirement accounts would be adequate to accomplish an overall just and equitable property distribution on remand" and furhter stating that "The parties do not argue

otherwise". Achieving a just and equitable property distribution on remand is impossible if only the vacated retirement accounts are retried (ignoring all the concessions made elsewhere in the property distribution). In addition, both parties did argue otherwise. Appellant clearly stated in his briefs that achieving a just and equitable property distribution was no longer possible. Still the appellate court erroneously ruled that "The parties do not argue otherwise".

5. Whether the appellate court made an error in awarding attorney fees to the Respondent. The appellate court awarded attorney fees to Respondent under RCW 26.09.140 stating that "Shivshankaran has demonstrated that Kumar has greater financial ability to bear the costs of this appeal". Respondent had filed a largely cooked up Financial Declaration which the Petitioner objected to. The Financial Declaration lacked supporting documents (proof) required by King County LFLR10 – yet the appellate court made the egregious error of granting attorney fee when the other party did not even comply with LFLR 10 supporting documents and petitioner had objected to the false information provided in Respondents financial declaration. The appellate court should have, at a

minimum, asked the Respondent to furnish LFLR 10 (b) Supporting Documents.

6. Whether the appellate courts ruling to deny non-party motion to publish without any explanation was tenable and reasonable.

D. STATEMENT OF THE CASE

Kumar and Shivshankaran married in 1999. During their marriage, Kumar worked and handled the family's finances, while Shivshankaran was homemaker.

The parties separated in May 2016 and jointly petitioned for dissolution in August 2016. In April 2017, the parties negotiated via e-mail and entered several agreed final orders. In all, they entered a dissolution decree, child support order, findings and conclusions, and parenting plan.

In February 2018, Shivshankaran moved to clarify or vacate the dissolution decree as to the parties' distribution of the Fidelity retirement accounts. She sought relief under CR 60(b)(1) (mistake), (b)(4)(fraud), and (b)(11)(any other reason justifying relief from the operation of the judgment). The trial court denied the motion to clarify, found insufficient evidence to vacate the decree based on fraud, and requested supplemental briefing on the issue of mistake. After considering the parties' additional briefing, the trial court

vacated the decree "as it related to the division of the total Fidelity 401(k) accounts totaling $178,870.71 on January 31, 2017 (#6305, #9766, #3919) and Roth IRA, acct. #3321.

Kumar appealed stating multiple assignments of error. Kumar's multiple assignments of error can be reduced to four basic issues, including claims that the trial court (1) failed to articulate grounds for vacating the decree, (2) lacked authority to partially vacate only a sub-portion of the property distribution of the decree, (3) erred "by not upholding the consent decree," and (4) improperly considered extrinsic evidence to vacate the decree.

Kumar requests the Supreme Court to review the appellate courts ruling as it relates to the issues outlined in section C. above.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Both the trial court and appellate court abused their discretion vacating only a sub-portion of the property distribution of the decree. Appellant had stated in his appellant’s brief that the trial court’s decision to vacate only a portion of the property distribution lacked tenable grounds and was unreasonable. Appellant contends that there exists no authority or case law that supports vacating only a sub-portion of the property distribution of a decree. None of the authorities cited by the court in support of their argument

involve a case where a portion of the property distribution of the decree was vacated. See Exhibit 4 – Motion for Reconsideration for more detailed argument.

2. The appellate court erred in ruling that partial vacation was the only relief sought in Shivasankaran's CR 60(b) motion. Shivshankaran's CR 60(b) in fact did not even seek this relief. Shivasankaran's CR 60(b) motion sought to reform this portion of the decree or alternatively sought a full vacation. Both the trial court and the appellate court ended up granting relief that was not even sought by either party ever.

3. The appellate court erred in denying the common relief sought by both parties. Both parties (in both trial court proceedings and appelate court proceedings) sought to vacate the divorce decree entirely. This commonly sought relief was, however, denied by the appellate court.

4. The appellate court erred in ruling that "the trial court implicitly concluded that vacating only the distribution of the retirement accounts would be adequate to accomplish an overall just and equitable property distribution on remand" and furhter stating that "The parties do not argue

otherwise". Achieving a just and equitable property distribution on remand is impossible if only the vacated retirement accounts are retried (ignoring all the concessions made elsewhere in the property distribution). In addition both parties did argue otherwise. Appellant clearly stated in his briefs that achieving the just and equitable property distribution was no longer possible. Still the appellate court ruled that "The parties do not argue otherwise". See Exhibit 4 – Motion for Reconsideration for more detailed argument.

5. Whether the appellate court made an error in awarding attorney fees to the Respondent. The appellate court awarded attorney fees to Respondent under RCW 26.09.140 stating that "Shivshankaran has demonstrated that Kumar has greater financial ability to bear the costs of this appeal". Respondent had filed a largely cooked up Financial Declaration which the Petitioner objected to. The Financial Declaration lacked supporting documents (proof) required by King County LFLR10 – yet the appellate court made the egregious error of granting attorney fee when the other party did not even comply with LFLR 10 and petitioner objected to the false information provided in Respondents financial declaration. The

appellate court should have, at a minimum, asked the Respondent to furnish LFLR 10 (b) Supporting Documents.

RCW 26.09.140 and King County LFLR 10 is reproduced below.

RCW 26.09.140

Payment of costs, attorneys' fees, etc.

The court from time to time **after considering the financial resources of both parties** may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

LFLR 10. Financial Provisions

(a) When Financial Information is Required.

(1) Each party shall complete, sign, file, and serve on all parties a financial declaration for any motion, trial, or settlement conference that concerns the following issues:

(A) Payment of a child's expenses, such as tuition, costs of extracurricular activities, medical expenses, or college;

(B) Child support or spousal maintenance; or

(C) Any other financial matter, including payment of debt, **attorney and expert fees**, or the costs of an investigation or evaluation.

(2) A party may use a previously-prepared financial declaration if all information in that declaration remains accurate.

(3) Financial declarations need not be provided when presenting an order by agreement or default.

(b) Supporting Documents to be filed with the Financial

Declaration. Parties who file a financial declaration **shall** also file the following supporting documents:

(1) Pay stubs for the past six months. If a party does not receive pay stubs, other documents shall be provided that show all income received from whatever source, and the deductions from earned income for these periods;

(2) Complete personal tax returns for the prior two years, including all Schedules and all W-2s;

(3) If either party owns an interest of 5% or more in a corporation, partnership or other entity that generates its own tax return, the complete tax return for each such corporation, partnership or other entity for the prior two years;

(4) All statements related to accounts in financial institutions in which the parties have or had an interest during the last six (6) months. "Financial institutions" includes banks, credit unions, mutual fund companies, and brokerages.

(5) If a party receives or has received non-taxable income or benefits (for example, from a trust, barter, gift, etc.), documents shall be provided that show receipts, the source, and any deductions for the last two (2) years.

(6) Check registers shall be supplied within fourteen (14) days if requested by the other party.

(7) If a party asks the court to order or change child support or order payment of other expenses for a child, each party shall also file completed Washington State Child Support Worksheets.

(8) For additional requirements for a Settlement Conference, see LFLR 16.

(c) Documents to be filed under Seal. Tax returns, pay stubs, bank statements, and the statements of other financial institutions should not be attached to the Financial Declaration but should be submitted to the clerk under a cover sheet with the caption "Sealed Financial Source Documents". If so designated, the Clerk will file these documents under seal so that only a party to the case or their attorney can access these documents from the court file without a separate court order.

RCW 26.09.140 required the court to consider the financial resources of both parties. LFLR 10 requires that a finanicial

declaration must be filed for attorney fee requests and that a financial declaration **shall** be accompanied by supporting documents like pay stubs, bank statements, tax returns etc. Here the Respondent filed a Finanical declaration without any supporting documents. This was a clear violation of LFLR 10. The Appellant objected to the Respondents financial declaration pointing out mutliple false statements where Respondent had overstated her expenses and understated her earnings. The court should have sustained Appellants objection in the absense of supporting documents (and asked Respondent for LFLR 10 supporting documents). The appellant court did neither but went on to erroneously conclude that "Shivshankaran has demonstrated that Kumar has greater financial ability to bear the costs of this appeal". The court cannot make this conclusion in the absence of LFLR 10 supporting documents. The suprement court should guide the appellate court in correcting this error.

6. The appellate courts ruling to deny non-party motion to publish without any explanation was untenable and unreasonable.This case presented new issues that have never been ruled on before. The appelate court has a duty to publish such opinions – a denial to

publish with no explanation is an error. Non-party petitioner Igor Lukashin has filed a separate Petition for the Suprement Court to review this unexplained denial to publish.

D. CONCLUSION

Based on the arguments above, Vikram Kumar respectfully requests this Honorable Court accept review of the issues outlined in Section C above.

Respectfully submitted this 30th day of November 2019.

_____
Vikram Kumar
Appellant, pro se

Exhibit 1

Opinion terminating review filed Sep 16, 2019

FILED
9/16/2019
Court of Appeals
Division I
State of Washington

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

In the Matter of the Marriage of VIKRAM KUMAR, Appellant, and SMITHA NAIR SHIVSHANKARAN, Respondent.	No. 78622-9-I UNPUBLISHED OPINION FILED: September 16, 2019

VERELLEN, J. — Vikram Kumar appeals the trial court's CR 60(b) order partially vacating the decree of dissolution with his former spouse, Smitha Shivshankaran. The court set aside the parties' division of Kumar's 401K retirement accounts and ordered that the distribution of those assets be resolved at trial. Kumar contends the court abused its discretion. But finding no such abuse, we affirm.

FACTS

Kumar and Shivshankaran married in 1999. During their marriage, Kumar worked and handled the family's finances, while Shivshankaran managed the household and raised their two children.

The parties separated in May 2016 and jointly petitioned for dissolution in August 2016. In April 2017, the parties negotiated via e-mail and entered several agreed final orders.[1] Only the parties' negotiations regarding the division of their retirement accounts are relevant to this appeal.

Initially, Kumar proposed that he receive two accounts, his "Fidelity 401K (6305)" and "Fidelity Brokerage Account."[2] Shivshankaran countered and requested "40 [percent] of the Fidelity retirement funds."[3] Kumar agreed to this split.[4] Shivshankaran then sent Kumar a proposed decree that awarded him the Fidelity Brokerage Account and the Fidelity 401K (6305) subject to her being awarded "40 [percent] of Fidelity 401K in [Kumar]'s name as of 5-5-2016."[5]

After reaching agreement on other issues, Kumar sent Shivshankaran a second proposed decree indicating that any changes were "highlighted in green."[6] Though neither highlighted nor mentioned, Kumar's proposal changed the account numbers assigned to the previously identified Fidelity retirement accounts and

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[1] During negotiations, Shivshankaran was represented by counsel but Kumar was not. Clerk's Papers (CP) at 23-24. In all, they entered a dissolution decree, child support order, findings and conclusions, and parenting plan. CP at 363, 370, 385, 392.

[2] CP at 28-29.

[3] CP at 38-39.

[4] CP at 38.

[5] CP at 47-48.

[6] CP at 58-59. While the parties highlighted their changes to the proposed decree in various colors, those colors are not preserved in the record on appeal.

inserted an additional account that he was to be awarded.[7] Thus, according to the second proposed decree, Kumar would receive "Fidelity 401K (9766)," "Fidelity Brokerage Account (3919)," and "Fidelity BrokerageLink (6305)" while Shivshankaran would receive 40 percent of the "Fidelity 401K."[8]

Later, Kumar sent Shivshankaran a third proposed decree and again stated that he highlighted any changes in green.[9] But, without any highlighting or mention, Kumar added a number to the account from which Shivshankaran's portion of retirement funds would be taken such take the proposal stated she would receive 40 percent of "Fidelity 401K (9766)."[10] The parties then executed and filed the decree.[11]

In October 2017, during postdissolution contempt proceedings, Kumar declared that as of May 25, 2016, the Fidelity BrokerageLink (6305) account contained $160,639.37 and the Fidelity 401K (9766) account contained $7,201.24 and that Shivshankaran was aware of these amounts before agreeing to the dissolution decree.[12] Shivshankaran disagreed, stating that Kumar had only

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[7] CP at 65-66. Kumar recalls highlighting all changes made to the proposals but acknowledges such highlights may not have been saved due to user error or an inadvertent computer error. CP at 114.

[8] CP at 65-66.

[9] CP at 72.

[10] CP at 80-81.

[11] CP at 87, 91-92, 363.

[12] CP at 414-17.

disclosed a January 2017 401K statement indicating a balance of $179,000 and that

> [i]t was agreed that I would receive 40 [percent] of the value of the 401K account. There was never a mention of multiple accounts and never a discussion of splitting some accounts to one person and some to the other. . . . The exact account number was never verified by my then lawyer and it was assumed that I would receive 40 [percent] of the account 401K [sic] statement that was provided during our discovery. . . . I only received a single statement for a single account with a single total amount and we used this as the basis for our final decree following a lengthy process of negotiation.[13]

In February 2018, Shivshankaran moved to clarify or vacate the dissolution decree as to the parties' distribution of the Fidelity retirement accounts.[14] She sought relief under CR 60(b)(1) (mistake), (b)(4)(fraud), and (b)(11)(any other reason justifying relief from the operation of the judgment).[15] The trial court denied the motion to clarify, found insufficient evidence to vacate the decree based on fraud, and requested supplemental briefing on the issue of mistake.[16] After considering the parties' additional briefing, the trial court vacated the decree "as it related to the division of the total Fidelity 401(k) accounts totaling $178,870.71 on January 31, 2017 (#6305, #9766, #3919) and Roth IRA, acct. #3321."[17]

Kumar appeals.

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[13] CP at 472-74.

[14] CP at 1, 7-15.

[15] CP at 7-15.

[16] Report of Proceedings (RP) (May 3, 2018) at 19-21; CP at 183.

[17] CP at 525-26. The parties agreed that Kumar's Roth individual retirement account (IRA) be held in common. CP at 1, 6-7, 98.

ANALYSIS

Kumar's multiple assignments of error can be reduced to four basic issues, including claims that the trial court (1) failed to articulate grounds for vacating the decree, (2) lacked authority to partially vacate the decree, (3) erred "by not upholding the consent decree," and (4) improperly considered extrinsic evidence to vacate the decree.[18]

Vacation of a judgment under CR 60(b) is within the trial court's discretion.[19] We will affirm the trial court's ruling if it is "based upon tenable grounds and is within the bounds of reasonableness,"[20] but will reverse it if "there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons."[21] The trial court did not abuse its discretion here.

I. Lack of CR 60(b) Findings or Conclusions

Kumar argues that the trial court abused its discretion by omitting necessary findings of fact and conclusions of law to support its decision to vacate the decree.[22] We disagree. Though the trial court did not make formal findings or

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[18] Appellant's Br. at 8-12.

[19] Lindgren v. Lindgren, 58 Wn. App. 558, 595, 794 P.2d 526 (1990).

[20] Id. at 595.

[21] Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)

[22] Appellant's Br. at 15. Kumar cites Scanlon v. Witrak, 110 Wn. App. 682, 686, 42 P.3d 447 (2002), for this proposition, but Scanlon does not address a purported requirement to support a CR 60(b) order with findings and conclusions.

conclusions when it ruled on Shivshankaran's CR 60(b) motion, it was not required to do so.[23]

Here, the basis of the court's ruling is clear from the record. Shivshankaran moved to vacate the decree on three grounds, including CR 60(b)(1), (b)(4), and (b)(11). The court denied her CR 60(b)(4) fraud argument.[24] The court was silent about her CR 60(b)(11) "any other reason" argument. Thus, the sole ground remaining for the court to resolve, and the only one for which it sought supplemental briefing, was mistake under CR 60(b)(1).[25]

II. Partial Vacation of a Dissolution Decree

Kumar contends the trial court lacked authority for, and therefore abused its discretion, by vacating only the retirement distribution portion of the parties' decree.[26] He is incorrect. Ample authority exists for a trial court to vacate only a portion of a dissolution decree.[27] Vacation proceedings are equitable in nature and trial courts should exercise their authority liberally "to preserve substantial

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[23] In re Marriage of Hammack, 114 Wn. App. 805, 811-12, 60 P.3d 663 (2003) (noting that there is no authority requiring courts to make findings and conclusions pursuant to CR 60(b)); see also CR 52(a)(5)(B) (findings and conclusions are not necessary on "decisions of motions under rules 12 or 56 or any other motion).

[24] RP (May 3, 2018) at 19-21.

[25] Id. at 20.

[26] Appellant's Br. at 15-18, 21-22; Appellant's Reply Br. at 10-12.

[27] See, e.g., Rock v. Rock, 62 Wn.2d 706, 707-10, 384 P.2d 347 (1963); In re Marriage of Powell, 84 Wn. App. 432, 438, 927 P.2d 1154 (1996); In re Marriage of Thurston, 92 Wn. App. 494, 502-04, 963 P.2d 947 (1998); In re Marriage of Akon, 160 Wn. App. 48, 62, 248 P.3d 94 (2011).

rights and do justice between the parties."[28] Here, the court was not required to vacate the parties' entire decree when vacating distribution of their retirement funds, which was the only relief sought in Shivshankaran's CR 60(b) motion.

Of course, the overall distribution of property must be "just and equitable."[29] The trial court implicitly concluded that vacating only the distribution of the retirement accounts would be adequate to accomplish an overall just and equitable property distribution on remand. The parties do not argue otherwise.[30]

III. Grounds Supporting Partial Vacation

Next, Kumar contends there was no mistake in the parties' division of the retirement funds. He argues that the parties explicitly agreed to this distribution, Shivshankaran should have read the decree more thoroughly before signing it, and, therefore, the trial court had no grounds to partially vacate an agreed, unambiguous decree.[31] We disagree.

A decree entered into by consent, such as the dissolution decree at issue here, is contractual in nature.[32] "A party to a contract is entitled to reformation of the contract if either there has been a mutual mistake or one party is mistaken and

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[28] Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978).

[29] RCW 26.09.080.

[30] For their own reasons, both parties invite this court to remand the entirety of their property distribution for retrial. But we decline to grant relief beyond that sought from and granted by the trial court.

[31] Appellant's Br. at 19-22.

[32] Haller, 89 Wn.2d at 544.

the other party engaged in fraud or inequitable conduct."[33] Here, the record supports either kind of mistake.

"A mutual mistake has occurred when the parties, although sharing an identical intent when they formed a written document, did not express that intent in the document."[34] Here, during their negotiations, the record shows that Kumar and Shivshankaran clearly intended to split the retirement account in an agreed fashion. Despite their intentions, both parties were unaware that 401K account 9766 had not been explicitly identified in the retirement portfolio prior to entering the final decree.[35] The evidence leaves no doubt that Shivshankaran would not have agreed to split 40 percent of account (9766) had she known the amount of funds it contained.[36] Based on the parties' misunderstandings as to scope of the retirement account to be divided, the trial court could vacate this portion of the decree for mutual mistake.

Alternatively, under the "snap up" doctrine "a court may decide not to enforce a contract where a party made a unilateral mistake in entering the contract

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[33] Wash. Mut. Sav. Bank v. Hedreen, 125 Wn.2d 521, 525, 886 P.2d 1121 (1994).

[34] Halbert v. Forney, 88 Wn. App. 669, 674, 945 P.2d 1137 (1997); see also Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 396, 739 P.2d 648 (1987) ("A contract is voidable on grounds of mutual mistake when both parties independently make a mistake at the time the contract is made as to a basic assumption of the contract, unless the party seeking avoidance bears the risk of the mistake.").

[35] CP at 111-12, 133-34.

[36] CP at 118, 133.

and the other party knew of the other party's mistake at the time of acceptance and unfairly exploited the mistaken party's error."[37] Spouses have a fiduciary duty to disclose all community assets and separate property prior to dissolution.[38] Accordingly, Kumar was obligated to fully disclose information about all of the Fidelity retirement accounts to Shivshankaran prior to entering the dissolution decree. By changing the account names and account numbers in successive drafts without fully disclosing the amounts contained in those accounts, Kumar unfairly exploited Shivshankaran's mistaken belief that she was receiving 40% of the largest account.

On appeal, Kumar acknowledges that he did not explicitly disclose the smaller retirement account to Shivshankaran:

> Here the account number 6305 was known to Ms. Shivshankaran from the financial statements that were filed with the court in February 2017 and is the bigger account awarded to the Petitioner. The smaller account (9766) was not explicitly mentioned in the financial statements filed with the court but was still known to Ms. Shivshankaran (definitely before the signing of the decree).[39]

Though he claims Shivshankaran was aware of the smaller retirement account prior to executing the decree, Kumar does not cite the record to support

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[37] Lietz v. Hansen Law Offices, P.S.C., 166 Wn. App. 571, 579 n.10, 271 P.3d 899 (2012).

[38] See Seals v. Seals, 22 Wn. App. 652, 655-56, 590 P.2d 1301 (1979) ("A fiduciary duty does not cease upon contemplation of the dissolution of a marriage."); In re Marriage of Sievers, 78 Wn. App. 287, 311, 897 P.2d 388 (1995) ("We hold that a party to a property settlement agreement owes a fiduciary obligation and a duty of good faith and fair dealing to attempt to draft formal contract language that will honor that agreement.").

[39] Appellant's Br. at 19 (emphasis added).

this claim.[40] Kumar's "unfairly exploiting" Shivshankaran's lack of knowledge regarding the full scope of retirement accounts supports vacation of that portion of the decree. Thus, the trial court did not abuse its discretion in doing so.[41]

IV. Consideration of Extrinsic Evidence

Lastly, Kumar contends the trial court improperly considered extrinsic evidence in determining whether the parties' made a mistake in their decree.[42] He is incorrect because "[a]lthough extrinsic evidence is generally not admissible to show intent contrary to the provisions of a written contract, it is admissible to show mutual mistake."[43] Because the trial court reviewed extrinsic evidence to render a decision on Shivshankaran's CR 60(b)(1) claim of mistake, the trial court did not err.

V. Attorney Fees

Both parties request fees under RAP 18.1. Shivshankaran also seeks fees under RCW 26.09.140[44] In awarding fees on appeal, we examine "the arguable

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[40] See Appellant's Br. at 19-22. Nor does our independent review of the record reveal any support for this proposition.

[41] Kumar argues that Shivshankaran is bound by the decree because she had an obligation to read the decree before signing it. See Appellant's Br. at 19-20. His argument is misplaced. "Any deliberate effort to draft language intended to subvert [a settlement] agreement," as alleged by Shivshankaran "is a breach of the fiduciary obligations of marriage." Sievers, 78 Wn. App. at 311.

[42] Appellant's Br. at 22-24.

[43] In re Marriage of Schweitzer, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997).

[44] RCW 26.09.140 states: "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost of the other party of maintaining the appeal and attorneys' fees in addition to statutory costs."

merit of the issues on appeal and the financial resources of the respective parties."[45]

Shivshankaran has demonstrated that Kumar has greater financial ability to bear the costs of the appeal. And the issues raised by Kumar on appeal lack merit. We award Shivshankaran her reasonable fees and costs on appeal.

Accordingly, we affirm.[46]

WE CONCUR:

[45] In re Custody of Thompson, 34 Wn. App. 643, 648, 663 P.2d 164 (1983).

[46] As a final matter, Shivshankaran argues that Kumar's "reply brief makes numerous factual representations without a single citation to the record" and requests that we strike his reply brief as violating RAP 10.3(a)(5). See Motion to Strike at 1-2. This rule requires that the statement of the case be "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5). Because we confine our review of Kumar's reply arguments to those articulated in its argument section, we deny Shivshankaran's motion to strike.

Exhibit 2

Order denying Motion for Reconsideration filed Oct 18, 2019.

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

In the Matter of the Marriage of VIKRAM KUMAR, Appellant, and SMITHA NAIR SHIVSHANKARAN, Respondent.	)	No. 78622-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the opinion filed September 16, 2019. Following consideration of the motion, the panel has determined it should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE PANEL:

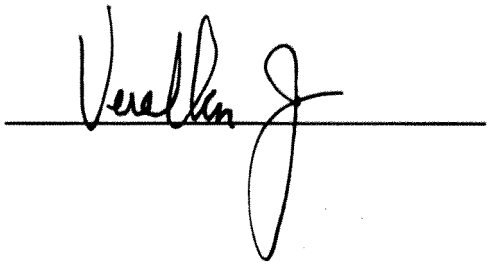

Exhibit 3

Order denying Motion to Publish filed Oct 30, 2019

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

In the Matter of the Marriage of VIKRAM KUMAR, Appellant, and SMITHA NAIR SHIVSHANKARAN, Respondent.	)	No. 78622-9-I ORDER DENYING MOTION TO PUBLISH

Non-party Igor Lukashin filed a motion to publish the opinion filed September 16, 2019. Following consideration of the motion, the panel has determined it should be denied.

Now, therefore, it is hereby

ORDERED that non-party Lukashin's motion to publish is denied.

FOR THE PANEL:

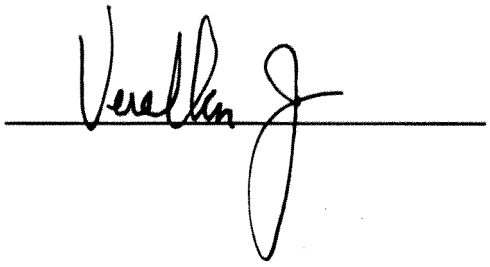

Exhibit 4

Copy of Motion for Reconsideration

STATE OF WASHINGTON COURT OF APPEALS
DIVISION ONE

Vikram Kumar, Appellant, and Smitha Nair Shivshankaran Respondent.	**Court of Appeals No. 78622-9-I** **Superior Court No. 16-3-05088-7 SEA** Motion to Reconsider

1. Identity

Vikram Kumar, Pro Se respectfully requests this honorable court to reconsider its order of Sep 16, 2019 denying appellants sought relief and reaffirming the trial court's decision to *vacate only a portion of the property distribution* of the decree.

2. Statement of Relief Sought

A. This court should either uphold the consent decree in its entirety or vacate the entire property distribution portion of it.

B. The court should reconsider its decision to award attorney fee to Respondent under RCW 26.09.140 since she did not establish any present showing of "Need".

3. Facts Relevant to the Motion

The same as the facts set forth in Appellants original Brief and Appellants Reply.

4. Grounds for Relief and Argument

Appellant had stated in his appellant's brief that the trial court's decision to *vacate only a portion of the property distribution* ***lacked tenable grounds and was unreasonable****.* Appellant contends that there exists no authority or case law that supports vacating only a sub-portion of the property distribution of a decree. None of the authorities cited by the court in support of their argument involve a case where a portion of the property distribution of the decree was vacated. The case law cited by the court involve cases where various portions of

the decree were vacated but when it came to property distribution either the entire property distribution was vacated in its entirety or it was fully preserved vacating other provision of the decree (like spousal support etc.). So although decree itself was partially vacated and there is ample case law supporting partial vacation of a decree there is no authority to partially vacate only a sub-portion of the property distribution portion of the decree.

The court cited the following authorities stating that “Ample authority exists for a trial court to vacate only a portion of a dissolution decree”. Each case law is analyzed in detail below.

See, e.g., **Rock v. Rock**,62 Wn.2d 706, 707-10, 384 P.2d 347 (1963);
In re Marriage of Powell,84 Wn. App. 432, 438, 927 P.2d 1154 (1996);
In re Marriage of Thurston,92 Wn. App. 494, 502-04, 963 P.2d 947 (1998);
In re Marriage of Akon,160 Wn. App. 48, 62, 248 P.3d 94 (2011).

Rock v. Rock,62 Wn.2d 706, 707-10, 384 P.2d 347 (1963);

In **Rock vs Rock** the following are relevant portions of the "Order Vacating Portions of Decree and Granting New Trial on Certain Issues”

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Decree of Divorce in the above cause dated the 27th day of December, 1961, and the necessary, allied and supporting Findings of Fact in support thereof be vacated in the following particulars:

"1. Unnumbered paragraph three, page 1 of the Decree of Divorce and paragraph V of the Findings of Fact and paragraph II of the Conclusions of Law pertaining to rights of visitation with the minor children of the parties.

"2. Unnumbered paragraph four on pages 1 and 2 of the Decree of Divorce and also the last paragraph on page 3 of the Decree of Divorce, and paragraph VIII of the Findings of Fact and paragraph III of the Conclusions of Law pertaining to the amount and provisions for support payable by the defendant to the plaintiff for the benefit of the two minor children of the parties.

"3. Unnumbered paragraph five of the Decree, appearing in full on page 2 of the Decree, paragraph IV and X of the Findings of Fact and Paragraph IV of the Conclusions of Law pertaining to the division of property.

"IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that a new trial herein be granted on the motion of defendant, said new trial to finally determine and resolve the following issues:

"1. The defendant's rights of visitation with the minor children of the parties;

"2. The amount of support to be payable by the defendant to the plaintiff for the benefit of the minor children of the parties; and

"3. The division of property between the parties to this action."

As cited above in Rock vs Rock ***the entire property distribution was vacated*.**

In re Marriage of Powell,84 Wn. App. 432, 438, 927 P.2d 1154 (1996);

Mr. Powell did not appear, so the court also entered an order of default. On April 15, 1991, the court entered findings and conclusions and a decree of dissolution. The decree distributed the property and liabilities as follows: Mrs. Powell received a 1975 Chevrolet, the furniture, her retirement benefits and her personal effects; she was ordered to pay her household bills and any obligations she incurred after the separation. Mr. Powell received a 1978 motorcycle, a Buick, and his personal effects and was ordered to pay an IRS debt, a car loan, hospital bill, the capital gains taxes, any debts not listed, and any debts he incurred after separation. The court also ordered Mr. Powell to pay $200 per month from July 1, 1991 until July 1, 1996 to Mrs. Powell as an equalization distribution.

In October 1990, Mr. Powell had seen a draft of the dissolution agreement and told Mrs. Powell he would not agree to her terms. Several months later, Mrs. Powell told Mr. Powell she had served him by publication in order to obtain the divorce. She told him he had to pay the IRS and that he owed her other money. Mr. Powell did not receive a copy of the decree until August 31, 1993, when he applied for a home loan and learned of discrepancies on his credit due to the dissolution. He then

obtained a copy of the 1156*1156 decree and learned of the property distribution and $200 a month equalization distribution.

On November 9, 1993, Mrs. Powell filed a motion to establish judgment for non-payment of the equalization distribution since Mr. Powell had not made any of his monthly payments. Mr. Powell filed an affidavit in support of the motion to vacate, although no motion was ever filed. On January 20, 1994, Mr. Powell filed a motion and declaration in opposition to Mrs. Powell's motion for judgment. In that motion, Mr. Powell sought vacation of the April 15, 1991 equalization judgment.

On October 18, 1994, the commissioner determined the judgment was unenforceable. The court held no in personam jurisdiction existed and the relief granted in the decree exceeded the relief requested. Thus, the original judgment was void. The court then denied Mrs. Powell's motion for judgment.

Here the court denied Mrs Powells motion for judgement on an equalization distribution of $200 per month that it had ordered Mr Powell to pay from July 1, 1991 until July 1, 1996. The court determined that the judgement was unenforceable as “no in personam jurisdiction existed and the relief granted in the decree exceeded the relief requested”. This is not a case where a portion of the property disposition was vacated.

In re Marriage of Thurston,92 Wn. App. 494, 502-04, 963 P.2d 947 (1998);

Here the court of Appeals concluded that a retrial of the property distribution (after Mandells motion to vacate was granted) resulted in a just and equitable property division.

Further, the trial court's characterization of assets as expressed in its findings of fact is supported by substantial evidence, and the findings support the conclusions of law.

Finally, the property division is just and equitable,

considering all the circumstances. Accordingly, we affirm.

Having determined that the motion [to vacate property distribution] was timely, we next consider whether it was properly granted. Mandel's motion was directed to paragraph 8 of the 1989 decree, which stated:

[Mandel] is hereby awarded, as her sole and separate property, free and clear of any claims of [Thurston], and [Thurston] hereby quit claims, releases, and relinquishes unto [Mandel] all right, title, and interest in and to the ... described property:...
(8) Two units of Pacific Recreation Associates, a limited partnership, held in the name of the Westernsun [sic] Company, a corporation. [Thurston] hereby relinquishes all right, title, and interest in said two units to [Mandel], provided that she shall not sell said two units to [Thurston's] brother, Bill Thurston[,] or Joe Shepard, or their assignees or designees, without the prior express written permission of [Thurston].

Mandel essentially argued that she was to obtain a prompt transfer to her of the two partnership units of PRA and that the property settlement was conditioned on that prompt transfer. Thurston opposed the motion, taking the position that the transfer was not to occur until a future time. It was uncontested that Westersun, the corporation in which Thurston held stock, held the two partnership units described in the decree at the time of its entry. After considering the affidavits of the parties, the memoranda, and the oral argument of counsel, the court concluded that the award of the two units to Mandel was a material condition of the settlement and that the nonoccurrence of that condition constituted extraordinary circumstances warranting relief. In reaching this conclusion, the court focused, in great part, on the colloquy of then counsel for the parties at the time of the entry of the 1989 decree:

The colloquy among the Court and both counsel clearly contemplated [that the transfer of the two partnership units] was a "condition to this agreement" which, if it did not occur, would "throw the whole settlement out". That's the language of [Thurston's then counsel] on December 18 of 1989. It was not "an interest in a future contingency" which might not occur for several years, as now argued by [Thurston].

The court's decision to grant the requested relief was well within the bounds of its discretion. Counsel for the parties clearly expressed the view at the time of entry of the 1989 decree that the conveyance of the two partnership units to Mandel was an express condition of the agreement. This is confirmed by the record, which shows that the partnership units represented a significant part of the settlement. Thus, the condition was material. Moreover, the decree clearly provides that Thurston "quit claims, releases, and relinquishes unto [Mandel] all right, title, and interest" in the two partnership units. This language cannot reasonably be reconciled with Thurston's assertion just prior to Mandel's motion that he retained an interest in the partnership units after the decree and until some future time when Mandel would receive those units. The court did not abuse its discretion in setting aside the prior decree.

Here again although the decree was partially vacated the property distribution portion itself was fully set aside and re-tried. After re-trial the appeals court denied both parties appeal stating that "**the property division is just and equitable, considering all the circumstances".**

In re Marriage of Akon,160 Wn. App. 48, 62, 248 P.3d 94 (2011).

Ms. Awan did not respond to the dissolution petition. Counsel for Mr. Akon obtained an order of default. A decree of dissolution and parenting plan was also entered. 98*98 Those documents awarded the children to Mr. Akon.

¶ 15 The Spokane judgment was enforced by the Tennessee courts and the children were returned to Spokane to live with Mr. Akon. Ms. Awan then returned to Spokane and obtained counsel. Her attorney moved to vacate the default judgment.

¶ 16 The superior court partially vacated the judgment; it limited relief to the child custody and parenting plan issues. A guardian ad litem (GAL) was appointed to represent the interests of the children only with respect to a parenting plan. The court declined to decide whether the parties had ever

married or whether Mr. Akon was the legal father of the children.

Here again the partial vacation of the decree was limited to child custody and parenting plan issues.

When the property distribution portion is vacated there is no case law or authority that supports only vacating a sub-portion of the property distribution. The overall goal of “fair and equitable division” is hampered significantly if only a sub-portion of the property distribution is vacated.

Here by vacating only the 401k account, only the 401k account account will be re-tried. A fair and equitable division of the 401k account in isolation will skew the overall fairness significantly in favor of the respondent (as extra concessions made elsewhere in the property distribution will be ignored). Thus, overall fairness cannot be achieved without looking at the entirety of property disposition. Here Respondent received an additional $40,000 in home equity from the marital home. By retrying only the 401k account the court will not adjust for extra concessions made elsewhere in the property distribution.

There really is no authority or case law that support partially vacating only a sub-portion of the property disposition of a decree – because common sense says that it will severely hamper the ability to reach an overall fair and equitable division.

Lacking any authority or case law, the trial court did abuse its discretion by partially vacating only a sub-portion of the property distribution. Since the trial courts decision is untenable and unreasonable the appellate court can reverse it.

The appellate court also erred in stating that this partial vacation was the only relief sought in Sivasankaran’s CR 60(b) motion. Shivshankaran’s CR 60(b) motion sought to reform this portion of the decree or alternatively sought a full vacation.

The Respondent joined the Appellant in requesting to fully vacate the property disposition of the decree, but court declined this relief too.

The respondent in her Respondent Brief agreed with the Appellant that overall fair and equitable property distribution cannot be achieved by vacating only the 401k portion of the property disposition of the decree. The court noted this joint demand but declined to offer this relief stating that –

"For their own reasons, both parties invite this court to remand the entirety of their property distribution for retrial. But we decline to grant relief beyond that sought from and granted by the trial court."

Overall fair and equitable property distribution cannot be achieved without considering the entire property distribution.

The court order stated the following –

Of course, the overall distribution of property must be "just and equitable." The trial court implicitly concluded that vacating only the distribution of the retirement accounts would be adequate to accomplish an overall just and equitable property distribution on remand. The parties do not argue otherwise. For their own reasons, both parties invite this court to remand the entirety of their property distribution for retrial. But we decline to grant relief beyond that sought from and granted by the trial court.

Appeals court has erred in concluding that the trial court implicitly concluded that vacating only the retirement account would be adequate to accomplish an overall just and equitable distribution and that the partied do not argue otherwise. A large section of the Appellants brief makes the argument that by partially vacating only the 401k account the court cannot achieve an overall just and equitable distribution without considering and taking into account all the other concessions made elsewhere in the property distribution.

This court should at a minimum instruct the trial court to consider the overall property distribution even if the retrial is limited to settling only the 401k account.

Argument against Attorney Fee award

The court ordered attorney fee stating:

Shivshankaran has demonstrated that Kumar has greater financial ability to bear the costs of the appeal. And the issues raised by Kumar on appeal lack merit. We award Shivshankaran her reasonable fees and costs on appeal.

The court awarded attorney fee to the Respondent under RCW 26.09.140. The court noted that "Shivshankaran has demonstrated that Kumar has greater financial ability to bear the costs of this appeal". Appellant raises the following objections against this award –

1. Respondent filed a Financial Declaration that was largely "cooked" up inflating her own expenses and omitting significant assets. Appellant had filed objections against this financial declaration.
2. The Respondent did not demonstrate sufficient "Need".
3. Even though this court ruled that the appellants arguments lacked merit, the respondent did not substantially prevail in the appeal either – the respondents majority argument and effort was towards recharacterizing the case and make her own argument towards fully vacating the decree – which the court denied. I request the court to exclude the costs of the significant effort wasted by the Respondent in her attempt to fully vacate the decree. See excerpt of court's ruling below –

"For their own reasons, both parties invite this court to remand the entirety of their property distribution for retrial. But we decline to grant relief beyond that sought from and granted by the trial court."

A party relying on RCW 26.09.140 “must make a showing of need and of the other's ability to pay fees in order to prevail." Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 808, 929 P.2d 1204 (1997) (citing In re Marriage of Konzen, 103 Wn.2d 470, 693 P.2d 97 (1985)).

More specifically, the party requesting the attorney's fees under RCW 26.09.140 must make a ***present*** showing of need to support the award. In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97, CERT. DENIED, 473 U.S. 906 (1985).

The Respondent has not demonstrated present showing of need, she has excluded her assets and inflated her expenses in the financial declaration.

5. CONCLUSION

Appellant respectfully requests this court to reconsider its order dated Sep 16, 2019 primarily because there is no authority or case law supporting partial vacation of a sub-portion of the property distribution portion of the decree. An isolated re-trial of only the 401k account cannot achieve an overall fair and equitable division. For this reason even the Respondent had joined the Appellant in requesting that the decree be fully vacated. Lastly the Respondent did not show a present showing of “Need” because her financial declaration was inaccurate and thus should not have received the attorney fee award.

Submitted Oct 07, 2019.

Vikram Kumar
25013 SE 18TH ST,
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MR.

November 30, 2019 - 9:44 AM

Filing Petition for Review

Transmittal Information

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