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71953-0

No. 71953-0-I  
King County Superior Court No. 12-3-05750-1 SEA

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

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In re the Marriage of:

JANETTE R. WELLS, fka PEACOCK,  
Respondent,

v.

WILLIAM R. PEACOCK,  
Appellant.

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

The Honorable Judith Ramseyer, Judge  
The Honorable Palmer Robinson, Judge

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APPELLANT'S OPENING BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

1. The superior court erred in denying Mr. Peacock's motion to vacate the final orders under CR 60(b) because: (a) Mr. Peacock showed that his appointed counsel's release of confidential information to the trial judge created an appearance of unfairness; and (b) counsel labored under a conflict of interest when she put her interest to withdraw and to receive additional payment ahead of her client's interests.
2. The Judge handling the CR 60 motion should not have imposed attorney fees.
3. The trial judge abused her discretion by effecting an unfair division of assets. Specifically, Mr. Peacock assigns error to paragraphs 3.2-3.5 of the Decree of Dissolution (Supp. CP<sup>1</sup> \_\_\_\_\_), and to paragraph 3.8<sup>2</sup> of the Findings of Fact and Conclusions of Law (Supp. CP \_\_\_\_\_).

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<sup>1</sup> A second supplemental designation of clerk's papers was filed with the King County Superior Court on June 25, 2015. Appellant will submit an Amended Opening Brief with complete Clerk's Papers citations as soon as possible.

<sup>2</sup> The sub-paragraphs in this section begin with 3.8.1, but then mistakenly revert to 2.8.X for the remainder of the sub-paragraphs.

**II.**  
**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Despite Mr. Peacock's express, written requests that his appointed counsel keep all of his communications with her confidential, the lawyer secretly revealed privileged, prejudicial information to the trial judge. This information caused the trial judge to cancel a settlement conference and to suspend discovery. Further, the division of property favored Ms. Wells. Does this create an appearance of unfairness?
2. The appointed attorney acted in her own interest, rather than the interest of her client, during emails to the judge requesting to withdraw from the case, and emails requesting further funds. Does this amount to a reversible conflict of interest?
3. Should the judge handling the CR 60 motion have ordered Mr. Peacock to pay the opposing party's attorney fees?
4. After this 19-year marriage, Mr. Peacock is permanently disabled and in debt, and he will have little income other than social security payments for the rest of his life, while his younger, healthy wife can return to work and make a good living. Was it an abuse of discretion to provide the wife with the bulk of the assets?

### III. STATEMENT OF THE CASE

William Peacock and Janette Peacock (now Janette Wells) married in Woodinville, Washington on October 12, 1994. II RP 93. Ms. Wells was 49 at time of trial in 2014, and Mr. Peacock was 54. Supp. CP \_\_\_\_ (Dkt. 162, Findings of Fact and Conclusions of Law at 2.21.1). They have two boys, ages 17 and 15 at the time of trial. Supp. CP \_\_\_\_ (Dkt. 162 Findings of Fact and Conclusions of Law at 2.17). The parties separated on August 13, 2012. II RP 95.

Prior to the birth of their first child, Ms. Wells was working as a senior administrator for Entertainment Publications. II RP 98. For most of the marriage, Mr. Peacock worked long hours for many years as a CPA, at one point earning over \$160,000 per year. III RP 335-365. Mr. Peacock had to stop working, however, by December 2011 due to several physical and cognitive ailments. In June, 2013, the Social Security Administration (SSA) determined that Mr. Peacock was disabled due to affective mood disorder, effective December 2011. III RP 332.

Parenting evaluator Jennifer Bercot summarized Mr. Peacock's mental and physical issues as follows:

It appears that around 2009 the father began a period of decompensation and arising health issues that exacerbated his mental health symptoms, including back pain, back surgery, torn Achilles, chronic pain, restless leg syndrome,

narcolepsy, sleep apnea, and insomnia. It appears that the father was tried on different psychiatric medications and medications for his physical complaints, which contributed to eventually the father going on disability from work and experiencing significant paranoia.

II RP 189. *See also*, III RP 337-38. He also suffers from severe depression. *Id.*

Dr. Gandis Mazeika, Mr. Peacock's treating doctor for the sleep disorders, confirmed that the medications most likely to help Mr. Peacock's excessive sleepiness caused the unusual side effect of paranoia, and he therefore had to stop using those drugs. III RP 437-39. It is very unlikely that Mr. Peacock's condition will ever improve. He will continue to have problems with fatigue and concentration. III RP 439. "[D]isorders of excessive daytime sleepiness such as narcolepsy . . . are not curable." III RP 440.

The case went to trial before Judge Judith Ramseyer. After trial, Mr. Peacock filed a motion for reconsideration, which was denied. CP 16-62. He later filed a motion under CR 60(b), asking to set aside the final orders other than the parenting plan. (Mr. Peacock did not wish to disrupt the schedules of his children.) Judge Ramseyer recused herself and the matter was heard by Judge Palmer Robinson, who denied the motion. This Court consolidated the appeal from the trial with the appeal from the CR 60(b) motion.

**IV.  
ARGUMENT**

A. STANDARD OF REVIEW

A court's ruling on a motion to vacate judgment under CR 60(b) is reviewed for abuse of discretion. *Tatham v. Rogers*, 170 Wn. App. 76, 89, 283 P.3d 583 (2012). The same standard applies to challenging the trial court's distribution of property.

Abuse of discretion is defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

B. THE TRIAL COURT ERRED IN REJECTING MR. PEACOCK'S MOTION TO VACATE THE JUDGMENT BASED ON CONFLICT OF INTEREST AND THE APPEARANCE OF UNFAIRNESS

1. Introduction

The final orders (except for the parenting plan) must be set aside because Mr. Peacock's lawyer, Elise Buie, breached attorney-client privilege in her communications with the Court, thereby prejudicing, or at

least appearing to prejudice, the judge against Mr. Peacock. There does not appear to be any published case dealing with this precise fact pattern. But, as discussed below, reversal is required by two lines of case law: attorney conflicts of interest, and ex parte communications that create an appearance of unfairness.

2. Relevant Facts

In an order dated July 19, 2013, Judge Judith Ramseyer granted Mr. Peacock's request for appointment of counsel under GR 33 as a reasonable accommodation for his physical and cognitive impairments. The Court appointed Elise Buie. CP 69.

On October 15, 2013, Ms. Buie began an ex parte email string with Judge Ramseyer's bailiff, Elizza Byrd. Ms. Buie noted that she would "need to either withdraw or need to get a Litigation GAL appointed or something (Mr. Peacock vehemently objects to a litigation GAL fyi)." Ms. Byrd forwarded the email to Judge Ramseyer. Initially, Judge Ramseyer said she would meet with Ms. Buie privately in chambers and off the record. Judge Ramseyer canceled that meeting, however, after receiving advice that the matter should not be handled ex parte. On October 17, the judge informed Ms. Buie – through the bailiff – that Ms. Buie had the options of filing a motion to withdraw or a motion to appoint a GAL, but

that either motion would have to be served on opposing counsel. The full email string is located at CP 85-92.

On November 5, 2013, Ms. Buie began another email string with the Court, and to some extent with opposing counsel, concerning a motion to withdraw that she filed on the same day. CP 93-102. Ms. Buie's written motion to withdraw cited a breakdown in the lawyer-client relationship. CP 69. Her ex parte email to the bailiff on November 14, 2013, includes the following:

It would help me a lot if it were possible that my Motion to Withdraw be "heard" on the papers rather than via hearing. Additionally, *as I have stated before*, my client has significant concerns about the hearing fearing that anything I say will prejudice him in the eyes of the court or opposing counsel which makes a hearing virtually impossible from an ethical standpoint. (Emphasis added.)

The italicized portion suggests that there were further communications with the bailiff. The email string ends with her request to withdraw the motion. That request was granted. CP 69.

On December 3, 2013, Ms. Buie notified the bailiff that "Mr. Peacock has asked me this morning to immediately withdraw from this matter due to communication issues." CP 162-163. She filed a renewed motion on December 10, 2013. The note for motion was filed as Dkt. 136, but it does not appear that the motion itself was filed with the court clerk. A signed copy of the motion is located at CP 144-147. In the

renewed motion, Ms. Buie relied in part on her own serious medical issues. She also noted, however, that there was an outstanding settlement offer from opposing counsel since September and that Mr. Peacock's sister delivered a witness list to opposing counsel because Mr. Peacock prohibited Ms. Buie from communicating with opposing counsel.

On December 23<sup>3</sup>, 2013, the Court denied the renewed request to withdraw.

Given the delays of this case occasioned by Respondent's impairments and the impending March 10, 2014 trial date, it is imperative the parties put every effort into resolving outstanding issues. Withdrawal of counsel at this important stage of the case will impede those efforts. . . . Counsel shall continue to represent Respondent through the completion of alternative dispute resolution . . .

CP 70. On the same day, Ms. Buie sent an email to the Court noting that she had been working "pro bono" since November 27 and asking whether further funds would now be available. The bailiff responded that Judge Ramseyer would seek permission for further funds. CP 164-166.

On January 7, 2014, Mr. Peacock sent Ms. Buie an email with his thoughts on preparation for the mediation and for a possible trial. The email included the following: "As are all my communications to you, the

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<sup>3</sup> The clerk filed the order on December 24.

following is submitted with the expectation of complete confidence.” CP 148.

On January 14, 2014, Ms. Buie sent an email to Ms. Byrd which included the following: “I must file another Motion to Withdraw (or in Alternative appoint a GAL pursuant to RCW 4.08.060) today. I plan to note for January 21 without oral argument . . .” CP 128-129.

On January 15, 2014, despite Mr. Peacock’s request that his communications with her would remain confidential, Ms. Buie sent an ex parte email to the bailiff in which she breached attorney-client privilege. CP 167-169. She maintained that significant additional fees would be needed in view of Mr. Peacock’s request that she take on considerable work to move the case forward. In this email to the Court, Ms. Buie copied and pasted portions of confidential emails Mr. Peacock had sent to her regarding the work he believed advisable. *See* CP 127-128. His requests included review of about 15,000 pages of materials, depositions of several people, service of several subpoenas, a motion to modify his support obligation and a CR 60(b) motion. Ms. Buie wrote:

Obviously, the tasks above that I am being directed to accomplish will not be done in the fee order that is in place . . . Please let me know if you require additional information and/or how best I should proceed to work through this conundrum. I will await further order/clarification from the Court.

*See* CP 168. Ms. Byrd replied that she would forward the email to the judge. CP 169. Later that day, Ms. Byrd sent Ms. Buie an email stating: “Judge Ramseyer has a meeting at 1pm to discuss the matter. We will know more this afternoon and I will get back to you as soon as I have further information. Thank you.” CP 170.

The next day, January 16, 2014, Ms. Byrd sent an email to both parties which included the following: “Dear counsel, given the nature of this case Judge Ramseyer would like to set an in-person pre-trial conference next week.” CP 171. On the same day, Judge Ramseyer also issued an order for the parties to appear on January 21, 2014. The order included the following: “Discovery is suspended, including scheduled depositions, until case status can be discussed with the Court at the pretrial conference.” CP 71.

Ms. Buie informed Mr. Peacock of the court’s orders but actively hid from him how they came about. *See* CP 149-150. On January 16, 2014, Mr. Peacock wrote to Ms. Buie:

Elise,  
This is not something that is on the case calendar. Are these types of conferences typical? If not, why has the judge asked for a conference in this specific instance? Is this something you are involved in? Or is the judge’s order based on a request from Janette's attorney?

Ms. Buie responded:

Judges manage their dockets in many different ways. As I stated this morning, a pre-trial conference is the normal procedure in a dissolution with children rather than a joint pre-trial report. The judge's office sent the order.

Mr. Peacock replied skeptically:

Elise,

Given the judge suspended discovery, I don't believe that this conference is normal procedure. If this order was not something that came about as a result of actions you have taken, please contact opposing counsel to see if it is in response to a request they have made.

Rather than admit that her emails were the reason for the change,

Ms. Buie suggested that Mr. Peacock was being "paranoid":

Bill, I am not going to question opposing counsel or the court, it would not be appropriate or professional but rather it would seem paranoid and would diminish my credibility with both opposing counsel and/or the Court. As officers of the court, we are summoned to court for a variety of things and we generally don't ask motives, we just come with our happy faces on and do as we are told.

I will let you know the results of the pre-trial conference after it occurs.

*Id.* As her last sentence indicates, Ms. Buie did not give Mr. Peacock the option of attending the hearing. In fact, in his email of January 16 at 12:57 PM, Mr. Peacock expressly asked Ms. Buie whether he could attend the

hearing. She never answered that question. *See* CP 149-150. Nevertheless, he took it upon himself to appear with a new attorney.<sup>4</sup>

At the hearing on January 21, the Court changed its position regarding mediation, although both sides were still in favor of it. The Court opined that this was a relatively simple case “other than the complicating factor of Mr. Peacock’s health and mental health issues that have made it . . . difficult for the case to move forward.” I RP 10. The Court suggested that mediation might amount to another “detour.” I RP 11. “Mediation is a voluntary settlement and I’m not sure that the parties are in a position to reach a settlement.” Mr. Peacock’s new counsel, Christopher Rao, disagreed. He believed a settlement was likely. His only caveat was that it wait until the opposing party responded to discovery requests. He noted that there was plenty of time before trial to review the discovery responses and then engage in mediation. I RP 12. Opposing counsel also emphasized the likely benefits of mediation. I RP 7-8.<sup>5</sup> Nevertheless, the Court determined that “it may be most efficient to just put the facts in front of me and have a decision made.” I RP 14. Even before the hearing began, the Court informed Commissioner Watness that

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<sup>4</sup> Unbeknownst to Mr. Peacock, Ms. Buie had emailed the Court and opposing counsel that “We will plan to be there without clients on 1/21.” Ms. Byrd emailed back that clients were welcome. CP 157.

<sup>5</sup> Opposing counsel later became equivocal after hearing the Court’s views.

she might strike the mediation. I RP 20. Ultimately, the Court did cancel the mediation. I RP 25. The Court granted an additional two weeks for discovery but prohibited depositions – including the already scheduled deposition of Ms. Wells – without prior court approval and good cause. I RP 25-26. She did not “see a reason for a deposition in this case.” *Id.* at 26.

On February 28, 2014, the Court held an on-the-record phone conference with counsel regarding Janette Wells’s request to quash subpoenas filed by Mr. Rao. Mr. Rao explained orally and in a letter sent to the Court that the subpoenas were necessary because Ms. Wells had not provided complete responses to Mr. Peacock’s discovery requests. *See* I RP 48-53. Mr. Rao noted that he had voluntarily trimmed Mr. Peacock’s discovery requests substantially shortly after the January 21 hearing. I RP 49. Nevertheless, Ms. Wells did not provide her responses by the promised date of February 2. I RP 16; I RP 50. Even by the time of the February 28 hearing, “highly relevant” responses were still missing. *Id.* For example, Ms. Wells declined to provide information about her recent work history, claiming it was “privileged.” *Id.* Mr. Rao was suspicious that Ms. Wells had truly lost her job, particularly because she had been working for a personal friend. I RP 59. In view of the short time remaining before trial,

Mr. Rao believed it most efficient to send subpoenas to third parties to obtain the missing information. I RP 50-51.

The Court expressed concern that the issues in the case were not “unique enough that require these what are, frankly, extraordinary efforts in a dissolution to continue to put off resolution of these matters.” I RP 55. The Court therefore quashed the subpoenas. I RP 60-62. All these limitations were directed towards Mr. Peacock.

During the six months that Ms. Buie represented Mr. Peacock, she never informed him of any substantive, off-the-record communications with the Court. When Ms. Buie turned over her files to Mr. Peacock shortly after the January 21, 2014 hearing, she did not include the email strings with the Court from October and November, 2013. CP 128. Further, the version of her invoices provided to Mr. Peacock deleted all mention of those email exchanges. Mr. Peacock learned that about the emails when he requested copies of the invoices from the Clerk’s office, after the final rulings were entered. *See* CP 128, 136-143. (Undersigned counsel redacted the invoices to avoid revealing additional attorney-client confidences.) It does appear that Ms. Buie included a version of the January 15, 2014 email in the files she forwarded to Mr. Peacock. He was not aware of it, however, because he promptly forwarded all the file boxes to new attorney Christopher Rao. CP 127-128. Mr. Rao does not believe

he ever saw that email. He had only about six weeks to prepare for trial and reviewing email correspondence was not a high priority. CP 152-153. In June, 2014, after Mr. Peacock obtained his files back from Mr. Rao, he discovered among the documents the January 15, 2014 email from Ms. Buie to the Court. As discussed above, Mr. Peacock was clearly unaware of this email prior to trial.

Further, as with the invoices, the January 15 emails provided to Mr. Peacock were also altered. The version more recently provided through undersigned counsel's subpoena includes the following: "Please let me know if you require additional information and/or how best I should proceed through this conundrum. *"I will await further order/clarification/guidance from the Court."* (Emphasis added). The version provided to Mr. Peacock is missing the italicized sentence. Mr. Peacock's version is also missing Ms. Byrd's statements that "Judge Ramseyer has a meeting at 1 pm to discuss the matter . . .", and that she would "forward [Ms. Buie's] email to the judge and wait for her response." Compare CP 130-135 with CP 167-171.

Mr. Peacock would have moved for recusal had he known that Ms. Buie engaged in off-the-record and substantive communications with the Court. CP 129.

### 3. Legal Standards

More than 50 years ago, the Washington Supreme Court established that an appearance of unfairness is sufficient to overturn a judgment. *See Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966). In that case, the judge's former law partner gave a memo to the plaintiff which did not support his position. When the judge disagreed with the verdict of the advisory jury, the plaintiff moved for a new trial. Although the trial court denied any actual impropriety, it agreed that the motion should be granted. The judge's ruling included the following:

Notwithstanding the fact that the Court has no independent recollection of the letter or the contents thereof and has no prior knowledge of the facts involved in said action, nevertheless, the integrity of the Court is made an issue, and plaintiff may justifiably feel he has been denied a fair trial.

*Id.* at 699. The defendant appealed and the Supreme Court affirmed.

We are in complete agreement with the observation made by appellants that the record does not give the slightest hint that the forthright trial judge gave other than open mind and impartial ear to the cause tried before him. Even so, we are not disposed to hold that the trial court abused its discretion in granting respondents a new trial. While we are of the opinion that the cause was impartially decided, the conclusion cannot be escaped that the very existence of the letter beclouded the entire proceeding. It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties.

*Id.*

The principle recognized in *Dimmel* has been repeatedly affirmed. See, e.g., *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973, 987 (2010) (“Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing.”); *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156, 1161 (1972) (“The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge.”); *State v. Romano*, 34 Wn. App. 567, 569, 662 P.2d 406, 407 (1983) (“[e]ven where there is no actual bias, justice must satisfy the appearance of fairness”), citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

An appearance of unfairness may arise when the trial court receives prejudicial information about a party outside of open court proceedings. For example, in *Madry*, the criminal defendant, who was the manager of a local hotel, was convicted of assault in the first degree. The trial judge denied the defendant’s request for a probationary sentence and imposed the maximum sentence. The judge maintained at the sentencing hearing that the defendant was being untruthful about the prevalence of prostitution at the hotel. The judge apparently had learned about

prostitution from an investigation by other judges, who were concerned that one of their own brethren was the owner of the hotel. *Madry*, 8 Wn. App. at 62-67. The Court of Appeals noted that it would be unusual to grant probation for such a serious offense. *Id.* at 65. Nevertheless, it reversed the sentence due to an appearance of unfairness and remanded for a new trial before a visiting judge.

In *Romano*, the main issue at sentencing was the proper amount of restitution. The defendant testified that his earnings varied substantially depending on the season. The trial court contacted some friends in the jewelry business to verify that. The State asserted, apparently without contradiction, that the information obtained by the judge could not have prejudiced Romano since it verified his own testimony. *Romano*, 34 Wn. App. at 569. Further, “[a] careful search of the record fails to reveal even the slightest hint that the judge acted in any other but a forthright and open manner.” *Id.* Regardless, the “ex parte inquiry, to which defendant was unable to respond, clouded the proceeding.” The Court of Appeals therefore reversed and remanded for resentencing by a different judge.

Communications to the judge’s staff are treated the same as those to the judge. See *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120, 1129 (1997) (“The bailiff is in a sense the ‘alter-ego’ of the judge, and is therefore bound by the same constraints.”); *Sherman v. State*, 128 Wn.2d

164, 205-06, 905 P.2d 355, 379 (1995), *amended by*, 1996 WL 137107 (1996) (reversing judgment where judge's extern contacted drug treatment center to confirm plaintiff's progress).

4. The Ex Parte Communications in this Case Created an Appearance of Unfairness

Ms. Buie's secret communications with the Court in this case raise an appearance of unfairness. First, unbeknownst to Mr. Peacock, Ms. Buie informed the Court that a litigation GAL might be needed, which suggested that Mr. Peacock was incompetent.<sup>6</sup> Although Ms. Buie never actually moved for appointment of a litigation GAL, the seed was planted that Mr. Peacock was so out of touch with reality that his testimony could not be trusted. The Court properly noted that the matter should not be addressed ex parte, but, of course, the judge had already heard the prejudicial information. The renewed motion to withdraw on December 3, 2014, also portrayed Mr. Peacock in an unnecessarily negative light, but he was at least aware of the pleading and was therefore able to respond to it. *See* CP 77. It appears that the Court was influenced by these

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<sup>6</sup> It is true that Mr. Peacock's cognitive issues make it difficult for him to focus, organize materials, remember facts, and even to stay awake. But, as his trial testimony showed, he is clearly capable of assisting counsel in presenting his case as long as counsel takes the time to work with him at his own pace.

communications because, at trial, the Court rejected the vast majority of Mr. Peacock's testimony. *See* section C, below.

The most serious and prejudicial communications to the court took place in January 2014. First, on January 14, Ms. Buie notified the Court once again that she would move to withdraw or to appoint a litigation GAL. The next day, despite Mr. Peacock's express request that his communications with her remain secret, Ms. Buie flagrantly breached confidentiality by disclosing to the Court significant portions of emails he sent to her. The clear implication was that Mr. Peacock was insisting on an unreasonable level of litigation and was out of touch with reality.

Upon receiving these communications, Judge Ramseyer should have recused herself. The Code of Judicial Conduct generally prohibits judges from permitting or considering *ex parte* communications. Rule 2.9(A). There is an exception for "scheduling, administrative, or emergency purposes, which does not address substantive matters . . ." Had Ms. Buie simply informed the Court that she required certain additional funds because her preparation for the mediation would take a certain number of hours, that exception might apply.

But here, Ms. Buie's email frankly discussed the substance of the proposed work. Further, Ms. Buie made it clear that much of the work was not her idea. She stated that "Mr. Peacock believes" certain work to be

necessary. Worse, she then cut and pasted from Mr. Peacock's email to her, despite his express request to keep such communications confidential. The clear implication was that Ms. Buie did not agree with her client's position. Thus, the email essentially informed the judge that Ms. Buie believed her client to be overly litigious.

There was no valid reason for Ms. Buie to present such information to the Court. Apparently, she believed she was obligated to prepare for the mediation and potential trial in the way Mr. Peacock requested. In fact, a lawyer must follow a client's wishes regarding the *objectives* of the litigation, but it is up to the lawyer, after consultation with the client, to decide the best strategy for obtaining those goals. *See* RPC 1.2(a). For example, when Mr. Rao substituted for Ms. Buie, he promptly agreed to withdraw some of the more burdensome or unclear discovery requests, which had apparently been propounded at Mr. Peacock's request. Thus, there was no need for Ms. Buie to discuss Mr. Peacock's suggestions for the settlement conference when seeking additional funds; she had only to explain how many hours of work *she* believed necessary.

By all objective indications, Ms. Buie's emails to the Court on January 14 and 15 had a significant effect on the proceedings. The Court immediately halted discovery, informed the commissioner scheduled to

handle the mediation that his services might no longer be needed, and set a prompt date for a hearing. Although the Court had recently believed mediation to be “imperative,” it now considered it to be a waste of time.

The Court also took a harder line on discovery after reading the email. First, she cancelled the critical deposition of Ms. Wells, forcing Mr. Rao to obtain information about her finances through interrogatories. When Ms. Wells’s failed to produce significant information, the Court shot down Mr. Rao’s attempt to gather it through third parties. This prejudiced Mr. Peacock at trial because he had no way to disprove Ms. Wells’s testimony regarding important financial issues, such as the extent to which her IRA was funded during the marriage.

Further, the Court generally sided with Ms. Wells regarding property division. This is raised as a separate issue in section C, below. But even if this Court finds that the distribution was not an abuse of discretion, it certainly adds to the appearance of unfairness.

The errors in this case are perhaps understandable because this appears to be the first case in King County in which a family law litigant received appointed counsel. The judge and appointed counsel may not have received sufficient guidance in handling the unique issues surrounding appointed representation of a disabled litigant. Further, the trial court may have assumed that Ms. Buie obtained Mr. Peacock’s

permission before revealing confidential information. The good faith of the Court should be irrelevant, however, when assessing the appearance of unfairness.

Thus, the Court should remand on this basis for a new trial before a different judge.

5. Ms. Buie's Conflict of Interest is Another Ground for Relief

Another ground for a new trial is Ms. Buie's conflict of interest in disclosing prejudicial, privileged information regarding Mr. Peacock. *See, e.g., Teja v. Saran*, 68 Wn. App. 793, 846 P.2d 1375, *review denied*, 122 Wn.2d 1008, 859 P.2d 604 (1993). In that case, a conflict arose when a lawyer who had access to information about one party represented the opposing party. But, clearly, a conflict of interest can also arise from the actions of a party's own lawyer. *See* RPC 1.7(a)(2) (a prohibited conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."). Here, Ms. Buie put her own interests ahead of her client's, first in seeking withdrawal and second in the manner in which she sought additional fees. As noted above, both matters could have been raised by Ms. Buie without making improper disclosures. Ms. Buie also disserved

her client by hiding, and even affirmatively lying, about her communications with the Court.

Reversal is appropriate only when there is some showing of likely prejudice, but the moving party's burden is not high.

[W]e require the client to identify any portion of the record where it appears a confidence may have been utilized. If a confidence appears to have been employed, but the nature of its prejudice is unclear, then the presumption of prejudice will apply.

*Teja*, at 801. Here, there seems little question that Ms. Buie employed confidences of Mr. Peacock, particularly in her January 15 email seeking additional fees. Thus, there would be a presumption of prejudice even if the nature of the prejudice were "unclear." But in fact, as discussed in section 4, above, it seems quite clear that Ms. Buie's release of confidential information caused Mr. Peacock to lose his best chance for a settlement, and also limited his ability to engage in discovery. Further, because Ms. Buie hid her communications with the Court from Mr. Peacock, he lost his chance to ask Judge Ramseyer to recuse herself. *See* CP 129 (Declaration of Peacock) ("Had I known before trial that Ms. Buie engaged in off-the-record and substantive communications with the Court, I would have moved for Judge Ramseyer to recuse herself.").

In addition, by labeling Mr. Peacock as overly litigious, Ms. Buie prejudiced the judge against him throughout the trial. Reversal is therefore required based on conflict of interest.

6. The Trial Court Abused its Discretion When it Denied Mr. Peacock's Motion Under CR 60(b)

Judge Palmer Robinson heard this motion. Her written order denying relief does not provide any analysis. CP 270-272. In her oral comments, however, she gave some explanation for rejecting the appearance of unfairness issue. (She did not address the conflict issue at all.) Judge Robinson stressed that nothing prevented Mr. Peacock from using a different mediator after Judge Ramseyer called off Commissioner Watness. 2/6/15 RP 8-13, 17-18. This reasoning is untenable. Judge Ramseyer flatly stated: "I'm going to waive mediation and not have the mediation conducted." I RP 25. Further, Judge Ramseyer's comments caused opposing counsel to question the efficacy of mediation as well. Under these circumstances, it is understandable that Mr. Peacock and his new attorney believed that mediation was off the table. Further, the loss of mediation was not the only consequence of Ms. Buie's disclosures. Judge Ramseyer also limited discovery and appeared to accept Ms. Wells's testimony over Mr. Peacock's on almost every issue.

Thus, Judge Robinson's denial of the motion was based on untenable grounds and was an abuse of discretion.

7. The Court Should not have Imposed Attorney Fees

"Awards have been found to be an abuse of discretion when the benefitted spouse has received a majority of the parties' total assets, the same spouse is therefore in a better position to pay, and the other spouse already has an onerous financial burden." *Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). That reasoning clearly applies here. *See* Section C, below.

C. THE OVERALL DISTRIBUTION OF ASSETS IS  
INEQUITABLE BECAUSE IT DOES NOT LEAVE THE  
PARTIES IN SIMILAR POSITIONS

The trial court purported to award Mr. Peacock roughly 50% of the community property. Supp. CP \_\_\_\_ (Dkt. 160, Decree of Dissolution). This left each party with, in theory, about \$200,000 of community assets. *Id.* The Court left the parties with their own separate property, which resulted in a total of about \$274,000 to Mr. Peacock and \$386,000 to Ms. Wells, or a 42/58 split in favor of Ms. Wells. The inequity in the distribution was exacerbated by the judge choosing Ms. Wells's appraisal of the house over Mr. Peacock's. The difference in value was approximately \$41,000. Supp. CP \_\_\_\_ (Dkt. 162, Findings of Fact and

Conclusions of Law at 2.21.7). The Court's rigid division of separate and community property did not take into account the relative health and earning capacity of the parties.

RCW 26.09.080 states:

In a proceeding for dissolution of the marriage ... the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children.

"The trial court's paramount concern when distributing property in a dissolution action is the economic condition in which the decree leaves the parties." *Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997). Courts must take into account factors relevant to the parties' economic prospects, including their health, in reaching a decision on property division. If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. *Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1977). *See also*

*Eide v. Eide*, 1 Wn. App. 440, 444, 462 P.2d 562 (1969) (court “should take into consideration the age, health, education and employment history of the parties and their children, and the future earning prospects of all of them”).

“The character of the property is a relevant factor which must be considered, but is not controlling.” *Konzen v. Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, 101, *cert. denied*, 473 U.S. 906, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985). *See also, Marriage of Larson & Calhoun*, 178 Wn. App. 133, 135, 313 P.3d 1228, 1229 (2013), *review denied sub nom. Marriage of Larson*, 180 Wn.2d 1011, 325 P.3d 913 (2014) (RCW 26.09.080 “does not single out the property’s character or any other factor to be given more weight.”).

In *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055, 187 P.3d 752 (2008), the Court affirmed a trial court ruling providing a greater share of community property for the older, sicker spouse.

Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property. *In re Marriage of Schweitzer*, 81 Wn. App. 589, 915 P.2d 575 (1996).

*Rockwell* at 243.

Similarly, in *Marriage of Crosetto*, 82 Wn. App. 545, 918 P.2d 954 (1996), the court awarded 60% of community property in a 21-year marriage to the spouse with the lesser earning capacity.

The trial court noted that Laurel Crosetto was 47 years old, that her standard of living will be somewhat diminished and that James Crosetto's earning capacity was superior to hers. Future earning potential is a factor that may be considered in making a just and equitable property division. *Hall*, 103 Wn.2d at 248, 692 P.2d 175.

*Crosetto*, 82 Wn. App. at 557.

*Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990), is particularly pertinent to this case. As here, the length of the marriage was 19 years, and one of the parties (in *Tower*, the wife) was disabled. The trial court gave the wife the house, but awarded the husband an overall greater share of assets. "Such a disproportionate community property award in favor of the only spouse with any significant earning capacity would be an abuse of discretion were it not balanced by long term maintenance." *Id.* at 701, citing *Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). In this case, however, no maintenance was awarded to Mr. Peacock to ameliorate the inequitable property division.

The Court's division of assets did not leave the parties in similar positions. Ms. Wells was awarded a total of \$386,000, while Mr. Peacock

was awarded only \$274,000. The court gave Ms. Wells the home, which has over \$143,000 in equity. Supp. CP \_\_\_\_\_ (Findings and Conclusions at p. 2). Ms. Wells will likely pay off the mortgage before she is of retirement age and will be able to live in it for the rest of her life, mortgage-free. Alternatively, as that asset appreciates, Ms. Wells could take out loans from the equity, or sell the house and move into a smaller one once the boys are on their own.

Most importantly, Ms. Wells is five years younger than Mr. Peacock and is in good health. She should be able to obtain gainful, full-time employment. In 2010 Ms. Wells worked for RealChem. The president and owner testified that Ms. Wells was a “fantastic” employee, but she lost her job when the company was bought out. II RP 163-65. The president testified that she would be happy to provide a reference for Ms. Wells. II RP 172.

Further, the trial court awarded Ms. Wells 90% of her fidelity IRA, worth \$234,698. Supp. CP \_\_\_\_\_ (Dkt. 160, Decree of Dissolution at para. 3.2). The appreciation on this asset will provide her a comfortable retirement in itself, particularly if she adds to it over the years.

In contrast, Mr. Peacock will most likely never be able to work again. He had over \$92,000 in debt at the time of trial. IV RP 470. If he pays that off, he will be destitute. If he declares bankruptcy, he will be

unable to obtain credit. It is unlikely he will ever be able to own a home. His only significant income is \$2,300 per month in social security. CP 21-22. In addition, Mr. Peacock did not begin receiving social security benefits for over a year after he was ousted from his home. III RP 372. During that time he was forced to use up his \$13,000 Nautilus IRA for community expenditures and living expenses. III RP 383-85. Yet he was credited with the full Nautilus account as an asset. IV RP 7-8. He was also credited with \$17,000 of assets from a Morgan Stanley account, although he spent much of that on life insurance and storage fees – expenses that were mandated by temporary orders and benefitted the community. He also paid down community debt on an American Express card. The remaining amount was stolen. III RP 399-401. Thus, about \$30,000 of the funds credited to Mr. Peacock did not exist at the time of trial. Further, contributing to the inequity was that Mr. Peacock created Uniform Gift Act to Minors accounts of \$18,000 to each child from his separate inheritance. II RP 223-24; Ex. 38. Yet, he received no offset for that.

Further, the trial court failed to take into account Mr. Peacock's exceptionally hard work over the years, which greatly benefited the community. "The dissipation of marital property is as relevant to its disposition in a dissolution proceeding as would be the services of a spouse tending to increase as opposed to decrease those same assets."

*In re Clark's Marriage*, 13 Wn. App. 805, 808, 538 P.2d 145, 147, *review denied*, 86 Wn.2d 1001 (1975). *See also, Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.2d 679, 683 (1996), *review denied*, 131 Wn.2d 1025, 937 P.2d 1102 (1997) (“Washington courts recognize that consideration of each party’s responsibility for creating or dissipating marital assets is relevant to the just and equitable distribution of property.”). In *Williams*, the wife wasted marital assets on gambling, but the trial court properly found that was offset by her benefit to the community by working three jobs.

Here, at the beginning of the marriage, Mr. Peacock was working for Spacelabs as a CPA. III RP 360. He worked 50-70 hours per week at Spacelabs, ultimately reaching a salary of \$60,000-\$65,000. III RP 361. In 1999 he moved to ICOS with a starting salary of \$70,000. That ultimately went up as high as \$152,000. He worked even longer hours than at Spacelabs. III RP 363. He left when ICOS was acquired by another company. His next job was at Nautilus where he worked 100 hours a week for several months. His pay was \$160,000 per year plus a bonus. Nautilus released him after about nine months because he would not relocate to Vancouver. III RP 364-65. He then did some consulting for a year and a half before taking positions with two financial services companies in 2011. III RP 365. His income was now lower, largely

because of the recession. He had to stop work in December, 2011 because of the narcolepsy. III RP 369.

In short, for almost two decades, Mr. Peacock went beyond the call of duty to earn a good living for his family. This hard and stressful work probably hastened his medical problems. Yet, when he was forced out of his home, unemployed, disabled and scrounging for a place to sleep, every penny he spent or lost was counted against him.

For all of the above reasons, the distribution of property in this case was an abuse of discretion.

**V.  
CONCLUSION**

For these reasons, this Court should remand this case for a new trial with a new judge. Mr. Peacock will urge the trial court on remand to permit mediation in the hope of avoiding a trial.

DATED this 6<sup>m</sup> day of July, 2015.

Respectfully submitted,



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David B. Zuckerman, WSBA 18221  
Attorney for William Peacock

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served one copy of the foregoing document by First Class U.S. Mail, postage prepaid, and email on the following:

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07/06/2015  
Date

Peyush  
Peyush Soni