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B. STATEMENT OF THE CASE

Ms. Boysen¹ claims “The Amended Decree of Dissolution is identical to the original Decree of Dissolution except that it includes the language required for the plan to distribute the Tier II benefits to wife”. Brief of Respondent, Pg. 6. That statement is not true.

Paragraph 9 of Ex. “B” to the Decree of Dissolution states:

“9. The wife to receive all benefits in the Burlington Northern – Santa Fe Railroad Company, Tier II, account **upon husband’s retirement**. Benefits should be awarded to wife consistent with the requirements of the plan.” [Emphasis Added]. CP 23.

Ex. “E” to the Amended Decree is the difference. It states:

Railroad Retirement Benefits - Sylvia Craig is awarded, and the Railroad Retirement Board is directed to pay, an interest in the portion of Roy B. Craig’s benefits under the Railroad Retirement Act (45 U.S.C. § 231 et seq) which may be divided as provided by section 14 of that Act (45 U.S.C. § 231m). Sylvia Craig’s share shall be the entire divisible portion of Roy B. Craig’s monthly benefit as defined in the above referenced sections. This decree may be modified if additional language is required to award Sylvia Craig her interest in the above-mentioned benefits. CP 61

Ex. “E” does not include language conditioning wife’s receipt of Tier II benefits “upon husband’s retirement” and the effect is significant.

In January 2005, husband was found to be disabled retroactive to October 2003. Husband will not be eligible to retire until 2012 when he

¹ Ms. Boysen, the former Mrs. Craig, the Respondent, is hereafter referred to as “wife”, Mr. Craig, the Appellant, is hereafter referred to as “husband”.

reaches age 66. CP 69. Because the railroad relied on Ex. “E”, and it contained no language making husband’s Tier II benefit available to wife “upon husband’s retirement” wife received husband’s entire Tier II disability benefit, 10 years earlier than intended or agreed to.

This is not a case where husband took disability at a time when he could have retired. Husband’s disability began in 2003 and he will not be eligible to retire until 2012. CP 69. It was never intended that wife would have any benefits of the Tier II before husband’s retirement. Husband’s disability 10 years before his normal retirement was an unintended windfall to wife and a direct unintended cost to husband, who, because of his disability, cannot work to replace the income otherwise provided by the Tier II benefit.

The real question is not whether wife is entitled to a QDRO to award her the Tier II benefits upon husband’s retirement. The question is whether husband will be allowed his day in court.

Wife also claims “There is no dispute that the original Decree ordered and intended for Mr. Craig to receive all of his retirement benefits under Tier I and for Ms. Boysen to receive all of the retirement benefits under Tier II whether Mr. Craig retired due to age or disability.” Brief of Respondent, Pg. 16. That statement is simply not true.

Mr. Craig has not retired and there is no evidence that it was ever intended that wife receive any portion of the Tier II benefit until he did retire. In fact, the Decree states specifically wife is to receive the Tier II benefits “upon husband’s retirement”. CP 23.

The best and most substantial evidence is that there was no agreement as to Ex. “E” at the time of the entry of the Decree. Mr. Craig states that he was never aware an Ex. “E”. CP 68. The Decree, as entered, makes no reference to Ex. “E” although it does refer to all other exhibits. Additionally, an e-mail of February 1, 1999, post Decree, from Ms. Kaisel’s legal assistant, Cheryl Slatton, states as follows:

“Spoke with Janice². She read your e-mail to her about # 9 saying See exhibit E. She doesn’t see any exhibit E mentioned in any of the other previous documents”. [Emphasis Added]. CP 207

At best, wife’s claim that there was an agreement as to the entry of Ex. “E” is based upon hearsay, double hearsay, triple hearsay, and impermissible assumptions and conclusions. There is no document signed by husband’s former attorney referencing an Ex. “E”, there is no Declaration to support an alleged agreement signed by him, and there is nothing in the record to show he or Mr. Craig were even aware of Ex. “E” prior to the entry of the Amended Decree.

² Janice is the legal assistant to Mr. Trutillo, Mr. Craig’s former attorney CP 174.

C. STANDARD OF REVIEW

Wife claims that the Standard of Review is abuse of discretion based upon a Motion to Vacate a Judgment. That would only be correct if, in fact, there was jurisdiction for the court to act at all. If the trial court lacked jurisdiction, the failure of the trial court to vacate the order as requested by Appellant is reviewed as a matter of law and *de novo*. Scott v. Goldman, 82 Wn.App. 1, 917 P.2d 131 (1996).

D. REPLY TO ARGUMENT

1. **The Trial Court Erred in Finding that “The Court Finds it has Jurisdiction to Amend the Decree”.**

Wife admits and there can be no dispute that, the only notice provided to husband of her motion was sent by mail to an address that the husband had not lived at for almost one year. Brief of Respondent, Pg. 4.

Wife knew husband’s correct address as she had served him with garnish proceedings one month before at the correct address. CP 111. Husband categorically denies receiving any notice of the hearing. CP 37.

Wife seeks to support the court’s finding that it had jurisdiction to amend the decree by claiming that her motion was a CR60(a) motion and that no notice was required. CR60(a) states:

Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and

after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

As more fully set forth, *infra*, the addition of Ex. “E” to the Decree was not a correction of a clerical mistake and wife’s motion was not a CR60(a) motion. However, even if it was, notice was required.

Wife cites the case of *Barouh v. Israel*, 46 Wash.2d 327, 332-333 for the proposition that notice to a party is not required under CR60(a).

In the divorce action between Albert and Rachel Israel, Rachel was awarded the parties’ home upon which she had filed a Declaration of Homestead described, in part, as “Lot 32, except the South 15 ft. thereof” [Emphasis Added]. Rachel then sold the property to Earl Barouh. Soon after, Leon Israel, not a party to the divorce action, was granted a judgment against Albert and the Marital Community. Sometime later it was learned that the actual legal description of the property, in part, was “Lot 32, except the South 5 ft. . . .”. On January 15, 1951 the court entered a *nunc pro tunc* order in the divorce proceeding between Albert and Rachel correcting the legal description of the property awarded to Rachel. In 1952 Leon secured a Writ of Restitution on his judgment and Barouhs filed the subject action seeking to quiet title as against Leon and to enjoin the sale.

In response, Leon claimed that the Homestead Declaration and the Deed given Barouh were invalid because they did not contain the correct legal description. The court disagreed. Leon then claimed that the court lacked authority to correct the legal description *nunc pro tunc* because he, Leon, was not provided notice. The court found that Leon, the Judgment Creditor, and not a party to the divorce action, was not entitled to notice. Barouh at 332-333. There was never any claim that notice would not be required to be given to the parties to the case, Albert and Rachel.

While CR60(a) states that the court may correct a clerical error “on its own initiate or on the motion of any party, and after such notice, if any, as the court orders”, it is clear that it is only when the court learns of the clerical error on its own, that it may correct the error without notice to the parties. CR60(a) does not exempt a party from being required to give notice to the other party of any such motion to the court.

RPC 3.5 states, in part, “**A lawyer shall not:**

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order; RPC 3.5

The claimed clerical error or inadvertence was brought to the attention of the court by wife’s counsel. She presumably knew of the prohibition against *ex parte* communication with the court and attempted to provide husband notice. Although not intended by counsel, such

communication with the court, without notice to husband, was an *ex parte* communication that would be improper. See State v. Perala, 132, Wn.App. 98, 111-112, 130 P3d 852 (2006).

CR60(a) was not intended to avoid the notice requirement where counsel brings the alleged error to the court's attention and it should not be read as a license to violate proper court procedure and due process requirements.

Wife's "Motion to Amend Decree" was not a proper CR60(a) motion to correct a clerical mistake. CP 37. That determination will control the result in this case. The correct nature of wife's motion establishes the procedure to initiate the action. If wife's motion is a CR60(a) motion or even a CR59(h)³ Motion to Amend, it is begun by the filing and service of a motion. Although the Amended Decree, including Ex. "E", should still be set aside for lack of notice to the husband and on due process grounds, the court's action may not be void for lack of jurisdiction. If however, wife's motion, if proper at all, was a CR60(b) motion, it would be required to be commenced by the issuance of an Order to Show Cause which "shall be served upon all parties affected in the same manner as in the case of Summons in a Civil Action". CR60(e)(3). In this latter case, wife's attempted service of a motion sent by mail to the

³ CR59(h), Motion to alter or amend judgment, is not appropriate here as it is required to be filed not later than 10 days after entry of the judgment.

husband's wrong address would be the wrong procedure and insufficient service to establish jurisdiction over the husband. The Amended Decree would thereby, be void.

To determine the nature of the motion required to add Ex. "E" to the Decree, the court must determine the nature of that act. Wife correctly states the law at Pg. 23 of her brief as follows:

The provisions of a Dissolution Decree "as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." In re the Marriage of Knutson, 114 Wn. App 866, 871, 60 P.3d 681, 684 (2003); RCW 26.09.170(1). It is equally well settled that the disposition of property made either by a divorce decree or by agreement between the parties and approved by the divorce decree cannot be modified. Millheisler v. Millheisler, 43 Wn.2d 282, 283, 261 P.2d 69 (1953).

If however, the addition of Ex. "E" was the correction of a clerical error, as wife claims, it may be allowed under CR60(a). Wife also correctly states the law in this regard at Pg. 14 of her brief:

A clerical error is ordinarily mechanical in nature, such as an arithmetical miscalculation or a minor unintentional mistake in a property description. A judicial error, in contract, may not be corrected under this provision. In re the Marriage of Getz, 57 Wn. App. 602, 604, 789 P.2d 331 (1990). "A judicial error involves issue of substance, whereas, a clerical error involves a mere mechanical mistake; the test for distinguishing between judicial and clerical is whether, based on record, the judgment embodies the trial court's intention." Marriage of Getz, 57 Wn. App.

at 604; Marchel v. Bunger, 13 Wn. App. 81, 84, 533 P.2d 406, 408 (1975).

Wife then states Marriage of Getz, *supra*, as support. In *Getz*, husband had two pensions and the court awarded each one-half thereof. When wife presented a Domestic Relations Order to the pension authority she was advised that the QDRO did not relate to the national pension. Wife moved the court for an Order *nunc pro tunc* entering the QDRO for the national plan. The court denied that motion but left open relief under CR60(a). The trial judge that tried the case heard that CR60(a) motion and he found that it was the intend of the court that wife share in both pensions, that the failure to include the national pension was a clerical error and that the QDRO could be entered on the basis of CR60(a). Significant to the Appellate Court was that the court that heard the case found that “he intended to award the two pensions equally as they existed as of the end of December 1985.” *Getz* at 605. Critical was the fact that the Decree, as entered, did not express the court’s intention and that the court specifically recalled those contrary intentions.

Here, the trial judge did not hear the case and did not express any intention except to approve the pleadings agreed to and presented by the parties. No judge can make the specific findings made in *Getz* or, testify as to the specific intentions in the similar case of Estate of Kramer, 49

Wash.2d 829, 307 P.2d 274 (1957), to allow for a CR60(a) finding. Accordingly, *Getz* is not applicable to the case at bar.

On point are the cases of Foster v. Knutson, 10 Wn.App. 175, 516 P.2d 786 (1973) and the Estate of Harford, 86 Wn.App. 259, 936 P.2d 48 (1997).

Foster was a foreclosure action. The parties agreed to what properties were to be foreclosed and they were described in Ex. “H” attached to the court’s Order. After the Order was entered it was discovered that one of the properties, Sunny Slope Farm Residence, described only the residence property and not the surrounding farmland. Plaintiff claimed a clerical error and requested relief under CR60(a).

The court addressed the matter of what was meant by a “clerical mistake” as follows:

The term ‘clerical mistake’ does not mean that it must be made by a clerk. That phrase merely describes the type of error identified with mistakes in transcription, alteration or omission of any papers and documents which are traditionally or customarily handled or controlled by clerks but which papers or documents may be handled by others. It is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney.

The action requested by plaintiffs involves an issue of substance rather than a mere mechanical mistake.

Foster v. Knutson at 177.

It then made the following holding:

The matter was submitted to the court upon the description set forth in the complaint. A stipulation that only those properties listed in Exhibit H were being foreclosed, was agreed to by the plaintiff. Hence, the judgment and other documents do embody that which the court intended to foreclose, based upon the record before it. As such, there was not a 'clerical mistake.' Plaintiffs' motion is denied. [Emphasis Added]
Foster v. Knutson at 177.

So it is here. The findings and decree were presented to the court and approved by the court. Those documents were the only ones presented to the court and they do embody the court's intention. A CR60(a) Motion will not lie.

Estate of Hartford, 86 Wn.App. 259, 936 P.2d 48 (1997) is stronger yet.

Defendants' attorney mistakenly left language in the third draft, which language had been in each of the two prior drafts. This language left one quarter of the estate to the plaintiffs. Defendants' attorney did not intend this language to be in the order, but made a mistake in editing the draft on his computer. Defendants and their attorney failed to notice that the language was in the order they had drafted. Upon discovering his mistake, defendants' attorney promptly notified opposing counsel.

In re Estate of Harford at 261-262.

The trial court vacated the Order under CR60 and it was appealed.

Thus, we will accept that Harford did not intend to draft a settlement agreement that granted Birchfield an interest in the estate. The real question is whether this sort of error

justifies the vacation of an order based on a settlement agreement.

In re Estate of Harford *supra* at 262.

If [the judgment] conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing. It will not be set-aside on the ground of surprise and excusable neglect. Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it.

Here, there was no conclusive evidence of a mutual mistake, rather the evidence was contested. Most significantly, the trial court did not make a finding that Birchfield intended to have a settlement agreement that only addressed the administration of the estate. Such silence must be interpreted as a finding that there was not a mutual mistake since Harford had the burden of proving this point.

Harford also relies on *In re Kramer*, [49 Wash.2d 829, 830, 307 P.2d 274 (1957)] in which an order was amended because the lawyer's secretary made a mistake and the lawyer missed it. That case does not apply here. **The rationale of *Kramer* was that the order did not express the court's intent and therefore was properly modified. Because the trial court here did not express any opinion as to its intention other than to ratify what the parties had agreed to, *Kramer* does not apply. For similar reasons, the clerical error rule, CR60(a), does not apply.**

In re Estate of Harford , *supra* at 263-264.

Wife's only available relief to amend the decree and add an Ex.

“E” is under CR60(b) and that requires that the action be initiated by

obtaining a Show Cause Order and that husband be served in the same manner as in a civil action. CR60(e)(3). Husband's Motion, upon which this appeal is based, was to vacate the Amended Decree as void for lack of personal jurisdiction.

First and basic to any litigation is personal jurisdiction, and first and basic to jurisdiction is service of process. *Dobbins v. Mendoza* 88 Wn. App. 862, 947 P.2d 1229 (1997). When a trial court lacks personal jurisdiction over a party, any judgment entered by the court against the party is void. Scott v. Goldman, *supra*, 6. Courts have a mandatory duty to vacate void judgments. Scott v. Goldman, *ibid*. Here, the Trial Court lacked personal jurisdiction over husband and the Amended Decree it entered without that jurisdiction was and is void and the trial courts finding of jurisdiction here did not, in fact, make it so.

2. The Trial Court Erred in Finding that "Mr. Craig received notice of the July 1999 hearing to amend the Decree".

It is undisputed that wife mailed the notice of the Motion to Amend the Decree to husband at the wrong address. CP 33, 38. Husband unequivocally states that he did not receive any notice of the hearing. CP 222. The best evidence that wife can present is to state, "I believe that he received notice of the hearing, but as with everything else he refused to cooperate". CP 189-190. Wife places significance on the fact that the

certified mail notice was returned “Unclaimed” rather than endorsed “Moved, Left No Forwarding Address”. This of course presumes that the postman recalled Mr. Craig had moved the year before and that the postman would make the proper endorsement. There is no evidence that this occurred and, there certainly can be no inference made that Mr. Craig received the notice when in fact the certified mail states clearly that it was unclaimed.

Wife then states, “Mr. Craig does not deny that he had his mail forwarded from his prior address to his current address, and he cannot argue that he did not receive notice based on his refusal to claim the certified mail”. Respondent’s Brief P. 11. Mr. Craig had moved nearly one year before and there is no evidence in the record that his mail continued to be forwarded. There is no evidence whatsoever in the record that Mr. Craig received notice of the certified mail, much less refused to accept it. In fact, the record is that the certified mail and the regular mail were sent to the wrong address, one at which Mr. Craig had not resided for almost one year. Mr. Craig categorically states that he did not receive any notice of the proceeding and the purchase of a 39-cent stamp and the mailing of an envelope to the wrong address cannot overcome that. CP 222.

It seems hard to understand how wife can argue, and the trial court can find, that the husband received notice when, husband categorically states he did not and there is absolutely no evidence in the record that he did. Further, it is hard to understand how wife can assign blame to husband for not receiving notice in this case when the wife knew of his proper address, and despite that knowledge, mailed the notice of the hearing to an address that the husband had not resided at for almost one year. CP 33, 38. For the court to make such a finding there must be some evidence in the record to support it. In this case there is none.

'But before passing to a discussion of the evidence, it may be well again to call attention to our rule with reference to the character of evidence necessary to establish the affirmative of an issue. We have long since held that a scintilla of evidence, as these terms are commonly defined, is not sufficient for that purpose; that on a question of fact, before the trier of the fact is warranted in finding the fact established, there must be substantial evidence in its support. This does not mean that the fact sought to be established must be supported by direct evidence, or mean that it may not be established by the proof of facts from which the fact sought to be established is necessarily or reasonably inferred, but it does mean that a disputed question of fact, by whatever character of evidence it is sought to be proven, must have in its support that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact, before it can be said to be established.'

Smith v. Yamashita 12 Wash.2d 580, 582-583, 123 P.2d 340, 341 (1942).

A finding cannot be supported by speculation or conjecture. State v. Hutton, 7 Wn.App. 726, 728, 502 P2d 1037 (1972). In this case, all evidence presented to the court is in the record. There was no oral testimony and this court's deference to trial court's findings based upon potential credibility of witnesses should not apply. State v. Camarillo, 115 Wash.2d 60, 71, 794 P2d 850 (1990).

Wife cites State v. Vahl, 56 Wn.App. 603, 784 P.2d 1280 (1990) as authority to allow the court to draw an inference to support a proposition that sending notice to the wrong address may constitute notice. The case is not relevant here.

In *Vahl* the Department of Motor Vehicles sent Vahl a notice that his license was being revoked as a habitual traffic offender. The notice was sent to the last known address as provided by Vahl to the Department of Motor Vehicles however Vahl no longer lived there. The court held that the mailing satisfied the State's burden under the statute to provide notice. The court noted that even then, such notice may not be adequate if the department was aware of the correct address citing State v. Baker, 49 Wn.App. 778, 782, 745 P2d 1335 (1987).

In *Baker*, the department sent a notice to the last address provided by the driver however, it had, in its records, notice of Baker's current

address. In finding that the department's notice, in that situation, was inadequate, the court stated:

The notice given before deprivation of a significant right must be notice reasonably calculated, under all the circumstances, to inform the affected party of the pending action and afford him an opportunity to present his objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950)...In determining whether reasonable notice under the circumstances has been provided, the nature of the individual right at stake should be balanced with the relative burden imposed on the party who must give notice. The circumstances of the case provide the answer.

State v. Baker, 49 Wash.App. 778, 781, 745 P.2d 1335 (1987).⁴

Here are that the wife knew of the husband's correct address but she nonetheless sent notice of the hearing to husband's former address. CP 33, 38. Husband did not receive notice of the proposed motion on the amendment. The balance is between the wife receiving approximately \$1,000 per month of husband's disability, contrary to the specific language of the Decree as a result of a hearing he had no notice of and if the Decree is vacated, husband gets his day-in-court.

3. The Trial Court Erred in Finding that "Failure to Add the Exhibit E is a Clerical Mistake".

In support of the court's decision, wife claims "the required language necessary to distribute the benefits to Ms. Boysen, was

⁴ The result is now controlled by statute. Notice is required to be sent to the address the driver provides the Department. RCW46.20.205.

inadvertently not attached to the Decree upon entry with the court”. Brief of Respondent, Pg. 12. There is no substantial evidence that that was the case. In fact, the compelling evidence is to the contrary.

The evidence of “inadvertence” to support the original motion was contained in the Declaration of wife and stated “When final papers were submitted for formal proof in my dissolution on December 21, 1998 an Ex. “E”, relating to retirement, was inadvertently omitted from the Decree of Dissolution. I have signed an identical Decree with the proper exhibits attached. Attempts to have Mr. Craig sign the Decree have been unsuccessful and I would ask the court to approve the Amended Decree”. CP 38.

The evidence of the “inadvertence” is a mere conclusion. There is no explanation as to how this “inadvertence” occurred or, to explain the fact that there is no reference to any Ex. “E” anywhere in the Decree. Nor was there any proof that Ex. “E” was in existence or agreed to at the time. The court, based on wife’s declaration, clearly had notice that Mr. Craig had not signed the Amended Decree or approve the addition of Ex. “E”. Because husband was not notified of the hearing, no opposition was presented and the court granted the motion.

When husband challenged the Amended Decree based on the jurisdictional grounds due to lack of personal service and notice, wife

supplied more. That evidence is the Declaration of Cherly Slatton, paralegal to wife's attorney Diana Kiesel, Kimberly April, legal intern, now associate to wife's attorney, and the wife herself. The declarations are almost exclusively hearsay, double hearsay, triple hearsay and, the balance is conclusions. Wife alleges that there was an agreement that Ex. "E" would be attached but nowhere does she provide any evidence of any such agreement from the attorney representing Mr. Craig. In fact, the most significant "evidence" she presents is the February 1, 1999 e-mail from CS (Cheryl Slatton) to DK (Diana Kiesel) and KA (Kimberly April), all from the office representing the wife, stating:

Spoke with Janice.⁵ She read your e-mail to her about the # 9⁶ saying See exhibit E. **She doesn't see any exhibit E mentioned in any of the other previous documents.** [Emphasis Added]. CP 207.

If, as wife claims, the Ex. "E" was in existence and agreed to prior to the entry of the Decree in December 1998 then certainly there should have been some "mention" of it in the previous documents. There apparently was none. It is also curious that wife can provide all of the e-mails containing the hearsay statements made by the assistants to wife's attorney but failed to provide the e-mail to Janice herself referenced above.

⁵ Janice was the legal assistant to husband's former attorney, James Trutillo. CP 174.

⁶ 9 is a reference to Exhibit "B" paragraph 9 awarding wife Tier II benefits. CP 23.

It is also significant that there is no evidence provided by any of the real parties to any purported agreement to allegedly attach Ex. "E" to the Decree. There is no Declaration of wife's attorney or husband's attorney in support of any such agreement. Wife claims that Ex. "E" was prepared and approved nearly four months prior to the entry of the Decree. CP 186. She does not say who approved it and she does not claim that it was agreed. Husband states that he never saw Ex. "E" until after the Decree was amended and it was never agreed to. CP 68. This is hardly the evidence to allow any reasonable person to conclude as a **matter of law** that there was an agreement to attach Ex. "E" to the Decree and that its failure to be so attached was mere inadvertence. This is not the first time, and it will not be the last, that parties or counsel have disagreed as to the existence or terms of a purported "agreement". Fortunately, the court has provided a simple answer to resolve these situations: **There was no agreement.**

CR 2(a) states: No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

The rule is absolutely clear. There is no agreement as to Ex. "E" or its attachment or to the Decree unless the proof required by CR 2(a) is provided and none was.

There was no agreement as to the attachment of Ex. "E" to the original Decree as a matter of fact and there was no agreement as a matter of law. Accordingly, as a matter of law, Ex. "E", being an un-agreed to exhibit, could not have been inadvertently not attached. Similarly, the failure to attach Ex. "E", that had not been agreed to, could not be a clerical mistake necessary to support a CR60(a) motion and/or the court's conclusion in support of its amending the decree.

4. The Trial Court Erred in Not Awarding Husband Attorneys' Fees.

Wife claims that husband should not be awarded attorneys' fees because his motion was brought in bad faith and then restates her argument in support of the amendment. It is hard to imagine that husband has acted in bad faith in this case. The wife brought a motion under the wrong procedure, failed to serve it as a civil summons as required, and in fact mailed it to the husband's wrong address. If not enough, the wife knew of the husband's correct address. The Amendment to the Decree, entered without notice to the husband, added an Ex. "E" that was contrary to the clear language of the Decree. The Decree states that the wife is to

receive the Tier II portion of husband's benefits "upon husband's retirement". No such limitation exists under Ex. "E". Following entry of the Amended Decree, without notice, Ex. "E" was presented to the pension authority. On the basis of Ex. "E", which is not limited to benefits accruing after husband's retirement as specified in the Decree and agreed to by the parties, the pension authority awarded wife 100% of the Tier II benefits otherwise payable to husband on his disability occurring 10 years prior to his anticipated retirement date. This meant that the wife would receive an early unanticipated and un-agreed to windfall distribution of Tier II benefits 10 years prior to husband's retirement. Wife has received and kept all of the Tier II benefits notwithstanding husband's Motion to Set Aside the Amended Decree. The trial court's lack of jurisdiction in this matter was not the making of the husband. Notwithstanding the clear lack of jurisdiction in this case, the wife has done all in her power to oppose husband's motion and to deny him his day in court. Husband is entitled to an award of attorneys' fees to compensate him for a long and expensive process he has endured to obtain relief due to wife's improper and wrongful actions. CR60(b). Housing Authority v. Newbigging, 105 Wn.App. 178, 19 P.3d 1081 (2001); Pamelin Industries, Inc. v. Sheen-USA, 95 Wash.2d 398, 622 P.2d 1270 (1981). Further the

court has authority under RCW 26.09.140 to grant husband attorneys' fees. In re Marriage of Moody, 137, Wash.2d 979, 976 P.2d 1240 (1989).

E. SUPPLEMENTAL AUTHORITY

Wife submitted the recent case of In re Marriage of Anderson, 134 Wn.App. 111 (2006) to the court as Supplemental Authority.

The *Anderson* case involves a marriage, the division of railroad retirement Tier I and Tier II benefits and the issue of an application of retirement and disability benefits. Because the facts of the Anderson case are fundamentally different than the case at bar, the application of the Anderson to the case here will yield a different result.

Mrs. Anderson was awarded a portion of husband's Tier II benefits equal to two-thirds or \$200 of the benefit per month whichever is less at the time "she became entitled to it". Anderson at 114.

The question in *Anderson* was whether Mrs. Anderson "became entitled to" the Tier II benefits that Mr. Anderson was receiving.

The Andersons themselves were very different than the parties here. The Andersons were married in 1961. Anderson 113. The parties here were married in 1986, 25 years later. We do not know Mr. Anderson's age but it is safe to assume that Mr. Anderson is substantially older than Mr. Craig who is 59 and cannot retire until 2012 when he is 66 years old. CP 69.

The *Anderson* court reaffirms the rule that disability income is generally separate property but it can become a retirement benefit when it effectively replaces it. The court states as follows:

Retirement income is generally considered to be deferred compensation. *Arnold v. Dep't of Ret. Sys.*, 128 Wn.2d 765, 778, 912 P.2d 463 (1996). The portion of retirement income earned during the marriage may be divided as community property. *Id.* **In contrast, disability income is generally considered future income that is not divisible as community property unless it appears that the disability compensation has "substantial elements of either deferred compensation or retirement."** *Id.* [Emphasis added]

If a party, "would be receiving retirement benefits but for a disability, so that disability benefits are effectively supplanting retirement benefits, the disability payments are a divisible asset to the extent they are replacing retirement benefits." [Emphasis Added]. *Anderson*, 116-117.

Although not specifically stated, the court must have found that Mr. Anderson was of retirement age as it determined that the benefits that he was receiving were not disability:

The payments received by Mr. Anderson were pension benefits under the RRA. The court determined that the decree provided that Ms. Anderson should receive payment from the Tier II benefits when Mr. Anderson received these benefits. [Emphasis added]. *Anderson*, 116-117.

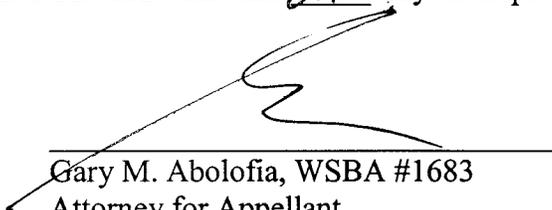
Here, the Tier II benefits husband is receiving are clearly disability and will continue to be disability at least until 2012 when husband is 66

years of age and able to retire. Another dramatic difference in our case is that the wife was to receive the Tier II benefits “upon husband’s retirement” not when “she became entitled to it” as in *Anderson*.

F. CONCLUSION

The trial court lacked personal jurisdiction over husband and this court should enter an Order directing the trial court to vacate the Amended Decree, restore husband his Tier II benefits and award husband reasonable attorneys’ fees for being required to set the same aside including costs and attorney’s fees on appeal.

RESPECTFULLY SUBMITTED this 29th day of September, 2006.



Gary M. Abolofia, WSBA #1683
Attorney for Appellant

CERTIFICATION OF SERVICE

Gary M. Abolofia, attorney for Appellant, certifies that:

I served this document on September 29th, 2006, upon Respondent through her counsel, by depositing a true and complete copy thereof, in the United States mail, enclosed in a sealed envelope, with first class postage prepaid addressed as follows and also faxing a copy at the facsimile number shown below:

Diana Lynn Kiesel
Attorney at Law
424 Broadway
Tacoma, WA 98402
Telephone Number: 1-253-1199
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DATED at Bellevue, Washington this 29th day of September 2006.



Gary M. Abolofia, WSBA#1683
Attorney for Appellant

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