

ORIGINAL

NO. 34551- 0 -II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of
SYLVIA CRAIG (n/k/a SAM BOYSEN),

Respondent,

vs.

ROB B. CRAIG III,

Appellant.

Diana Lynn Kiesel
Diana Lynn Kiesel, Inc. P.S.
Attorney for Respondent

FILED

COURT OF APPEALS

06 FEB 11 PM 3:15

BRIEF OF RESPONDENT

Diana Lynn Kiesel, WSBA #14740
Diana Lynn Kiesel, Inc. P.S.
Attorney for Respondent
424 Broadway
Tacoma, WA 98402
(253) 274-1196 (Office)
(253) 274-1199 (Fax)

TABLE OF CONTENTS

A.	Table of Authorities	2
B.	Statement of the Case	4
C.	Standard of Review	7
C.	Argument	8
	Assignment of Error No. 1	8
	Assignment of Error No. 2	9
	Assignment of Error No. 3	11
	Assignment of Error No. 4	26
D.	Conclusion	29

TABLE OF AUTHORITIES

State Cases

In the Matter of the Guardianship of Adamec , 100 Wn.2d 166, 667 P.2d 1085 (1983):	8
In re the Marriage of Anglin , 52 Wn. App. 317, 759 P.2d 1224 (1988)	21
Arnold v. Department of Retirement Systems, 128 Wn.2d 765, 912 P.2d 463 (1996)	21
Barouh v. Israel, 46 Wn.2d 327, 281 P.2d 238 (1955)	8,19
In re the Marriage of Getz , 57 Wn. App. 602, 789 P.2d 331 (1990)	14,15,16
In re the Marriage of Knutson , 114 Wn. App. 866, 60 P.3d 681 (2003)	23,24,25,26
Marchel v. Bunger, 13 Wn. App. 81, 533 P.2d 406 (1975) (review denied 85 Wn.2d 1012 1975))	15
In re the Marriage of McLean , 132 Wn.2d 301, 937 P.2d 602 (1997)	11
In re the marriage of Maddix , 41 Wn.App. 248, 703 P.2d 1062 (1985)	23
Millheisler v. Millheisler, 43 Wn.2d 282, 261 P.2d 69 (1953)	23
In re the Marriage of Moody , 137 Wn.2d 979, 976 P.2d 1240 (1999) (reconsideration denied July 2, 1999)	29
Rivard v. Rivard, 75 Wn. 2d 425 (1969)	24

In re the Marriage of Tang , 57 Wn. App. 648, 789 P.2d 118 (1990):	7
In re the Marriage of Thompson , 97 Wn. App. 873, 988 P.2d 499 (1999)	17,18,24
State of Washington v. Vahl , 56 Wn. App. 603, 784 P.2d 1280 (1990) (review denied May 8, 1990) (reversed on other grounds State v. Dolson, 138 Wn.2d 773, 982 P.2d 100 (1999))	10,11,28

State Statutes

RCW 26.09.140	29
RCW 26.09.170	24

Civil Rules

CR 60(a):	8,14,15,16,19
CR 60(b)	24,25
CR 60(e)(3)	9

A. STATEMENT OF THE CASE

Ms. Sylvia Craig (n/k/a Ms. Boysen) and Mr. Roy B. Craig III married on April 16, 1986 (CP 10). The marriage produced two (2) children, T.C. and H.C., currently ages seventeen (17) and fourteen (14) years old (CP 1-9). Mr. Craig was served with dissolution pleadings on June 24, 1996 (CP 10). The parties separated on August 28, 1996 (CP 11). At that time, their children were ages seven (7) and four (4) (CP 1-9). After approximately two and a half years, the divorce was finalized on December 21, 1998 (CP 15-25). The Findings of Fact and Conclusions of Law and the Decree of Dissolution were presented to the Court and signed by Commissioner pro tem Mark Gelman (CP 10-25). Both parties and their respective attorneys signed the Decree of Dissolution (CP 19).

On July 14, 1999, a Note for Motion Docket, Special Notice of Appearance, and Motion to Amend Decree were mailed to Mr. Craig by both first class and certified mail to 407 Valley Ave E., Apt Y105, Puyallup, Washington 98372 (CP 152). Mr. Craig was no longer living at the above address when the above listed documents were mailed to him. (CP 67).

The motion to amend the decree was made pursuant to CR 60(a) based on a mistake and inadvertent omission of Exhibit E to the Decree of Dissolution (CP 158-159).

The motion to approve the amended Decree of Dissolution including Exhibit E was set for July 30, 1999 (CP 149). Judge Tollefson signed the amended Decree of Dissolution at the hearing on July 30, 1999 (CP 136-146). Mr. Craig did not appear at the hearing (CP 139).

On August 27, 1999, the United States of America Railroad Retirement Board sent a letter to Ms. Simon of Diana Lynn Kiesel Inc. P.S. and a copy of the letter to Mr. Craig (CP 213-214). The letter from the Railroad Retirement Board dated August 27, 1999, states that the decree, order, judgment, or court approved property settlement received by the Bureau of Law of the Railroad Retirement Board on August 19, 1999 substantially complied with the regulations of the Board (CP 213). The letter states that beginning with the annuity accrual for the first month in which the employee begins to receive an annuity, whether on the basis of age or retirement due to disability, the Board will withhold a portion of the employee's benefits according to the following formula: 100 Percent of the Employee's Monthly Divisible Benefits (CP 213).

In January 2005, Mr. Craig was found to be disabled and the finding of his disability was made retroactive to October 1, 2003 (CP 167).

Ms. Boysen received the Tier II benefits (CP 69). The Tier II benefits are computed under the railroad retirement formula (CP167).

Ms. Boysen was awarded all of Mr. Craig's Tier II benefits as set forth in Exhibit B, Paragraph 9, in the Decree of Dissolution signed by both parties and their respective counsel (CP 123-133). Exhibit B to the Decree of Dissolution states that the Tier II benefits should be awarded to the wife consistent with the requirements of the Plan (CP 131). The requirements of the Plan were not included in Exhibit B (CP 130-131).

The Railroad Retirement Board provided a model paragraph that complies with the Board's regulations and requirements to award a spouse a portion of the divisible benefits (Tier II) (CP 196-197). Tier I benefits are not divisible (CP 196). The amended Decree of Dissolution is identical to the original Decree of Dissolution except that it includes the language required for the Plan to disburse the Tier II benefits to the wife (CP 123-146).

On May 4, 2005, an order of child support was entered that increased the father's child support obligation from \$120 per month to \$467 per month (CP 385-402, 407-420). Mr. Craig's income was based on his Railroad Retirement Benefits of \$1766 per month (CP 418). Ms. Boysen's income was based on her salary plus the railroad retirement benefits of \$982 that she receives every month (CP 418).

On November 10, 2005, Mr. Craig filed a motion to vacate the amended Decree of Dissolution (CP 113-168). Judge Tollefson heard the motion on February 17, 2006 (CP 257-258). Judge Tollefson was the Judge that had approved the amended Decree of Dissolution in 1999 (CP 136-146). The Court made the following findings: a) Mr. Craig received notice of the July 1999 hearing to amend the December 1998 Decree; b) Failure to add Exhibit E is a clerical mistake; c) The Court finds it has jurisdiction to amend the Decree (CP 257-258). Mr. Craig's motion to vacate the amended Decree of Dissolution was denied (CP 257-258). Attorney fees for both parties were denied (CP 257-258).

B. STANDARD OF REVIEW

A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should not be overturned on appeal unless it plainly appears that this discretion has been abused. In the Matter of the Guardianship of Adamec, 100 Wn.2d 166, 173, 667 P.2d 1085, 1089 (1983). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. In re the Marriage of Tang, 57 Wn. App. 648, 653, 789 P.2d 118, 121 (1990)

C. ARGUMENT AND AUTHORITY

1. **Appellant's Assignment of Error:** "The trial court erred in finding that "the Court finds it has jurisdiction to amend the decree." (CP 257-258).

The trial court has jurisdiction to correct clerical mistakes and errors arising from oversight or omission. Barouh v. Israel, 46 Wn.2d 327, 333, 281 P.2d 238, 242 (1955); CR 60(a). Such a correction can be made without notice. Barouh v. Israel, 46 Wn.2d at 333; CR 60(a).

As stated by the Appellant, the proper method to seek relief from a judgment or order is through CR 60.

Ms. Boysen moved to amend the Decree of Dissolution pursuant to CR 60(a) based on a clerical error and inadvertent omission of Exhibit E to the original Decree of Dissolution (CP 158-159).

Rule 60. *Relief from Judgment or Order* provides the proper procedure to correct clerical mistakes. CR 60 (a) states as follows:

(a) 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 the appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

As set forth by the Washington State Supreme Court in Barouh and as set forth in CR 60(a), the Trial Court had jurisdiction to correct the

clerical error in the present case by amending the Decree of Dissolution to include Exhibit E which was inadvertently omitted and consisted of the language that was required by the Railroad Retirement Board to properly distribute the retirement benefits to the wife per the Decree of Dissolution.

2. **Appellant's Assignment of Error:** The trial court erred in finding that "Mr. Craig received notice of the July 1999 hearing to Amend the Decree." (CP 257-258).

Mr. Craig alleges that the Court lacked jurisdiction because service was not made according to CR 60(e)(3). CR 60(e) requires personal service for a motion to vacate a judgment.

CR 60(e)(3) does not apply in the present case because Ms. Boysen did not file a motion to vacate the original Decree of Dissolution, she was not seeking to vacate the original Decree of Dissolution, and the Court did not find that the amended Decree was void and therefore should be vacated.

The amended Decree was identical to the original Decree except that it added the language required by the Railroad Retirement Board to distribute the Tier II benefits as agreed by the parties in the Decree of Dissolution. (CP 123-146).

Although the Note for Motion Docket, Special Notice of Appearance and Motion to Amend the Decree were inadvertently mailed to Mr. Craig's former address, the Trial Court had many reasons to find that Mr. Craig had received notice of the July 30, 1999 hearing.

The above-mentioned documents were mailed to Mr. Craig by both certified and first class mail on July 14, 2006. (CP 152). The documents sent by first class mail were not returned to sender (CP 189). The certified mail was returned to sender unopened on July 30, 1999 (CP 217). The returned envelope indicated that Mr. Craig received notice on July 15, 1999 and July 20, 1999, before the envelope was returned on July 30, 1999. The envelope was stamped as being "unclaimed." (CP 217).

According to the United States Postal Service Domestic Mail Manual, before certified mail is returned "unclaimed", the postal carrier leaves a notice with the addressee's ordinary mail. Five days later, the carrier delivers another notice. The article is endorsed "unclaimed" if it is not picked up within fifteen (15) days. State of Washington v. Vahl, 56 Wn. App. 603, 606, 784 P.2d 1280, 1282 (1990).

If the addressee has moved and left no forwarding address, the endorsement is "moved, left no address", not unclaimed. State of Washington v. Vahl, 56 Wn. App. at 606.

If delivery is attempted upon a person who does not know the addressee, the endorsement is “attempted-not known”. Vahl, at 606.

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. Refusing to claim certified mail is analogous to refusing in hand service of process, and if a person cannot defeat service by refusing tendered process, a person should not be able to defeat notice by certified mail by refusing to claim it. Marriage of McLean, 132 Wn.2d 301, 312, 937 P.2d 602, 607 (1997), Vahl, at 607.

In the present case, the envelope was clearly endorsed, “unclaimed”. (CP 217) Based on the fact that first class mail is forwarded for one (1) year, the envelope was marked unclaimed and the first class mail was not returned to the sender, the Trial Court reached the conclusion that Mr. Craig had received notice of the hearing.

3. **Appellant’s Assignment of Error:** The trial court erred in finding that “Failure to add the Exhibit E is a clerical mistake.” (CP 257-258)

Based on the evidence presented and the declarations filed, the Trial Court found that the omission of Exhibit E to the original Decree of

Dissolution was a clerical error, and the Court had jurisdiction to correct that error.

The original Decree of Dissolution signed by both parties and their attorneys awarded Ms. Boysen all of the Tier II benefits from Mr. Craig's Railroad Retirement benefits (CP 123-133). However, the required language necessary to distribute the benefits to Ms. Boysen was inadvertently not attached to the Decree upon entry with the Court. The required language was set out in Exhibit E to the Decree of Dissolution, and both parties and their respective counsel intended for Exhibit E to be attached to the Decree of Dissolution.

On August 31, 1998, nearly four (4) months before the original Decree of Dissolution was entered with the Court, Chyrl Slatton, the paralegal on Ms. Boysen's case, sent an email to Kimberly April, who was then a legal intern for Diana Kiesel, with a copy of the email to Diana Kiesel (CP 199). The email was to request that Kimberly April prepare the Qualified Domestic Relations Order for the Tier II pension (CP 174, 199). The email also stated that Mr. Craig's attorney's office apologized for not noticing the absence of the QDRO and thanked Mrs. Kiesel's office for preparing it (CP 174, 199).

On the following day, September 1, 1998, Kimberly April faxed Exhibit E to Mr. Craig's attorney and advised them that she had attached it

to the Decree of Dissolution in order to comply with the requirements of the Railroad Retirement Board (CP 177, 201). Ms. April also advised Mr. Craig's attorney that she added language to their Exhibit B to "See Exhibit E attached" (CP 177-178, 201-203). Ms. April had used a typewriter on Exhibit B to add, "See Exhibit E attached" (CP 178, 181).

On September 2, 1998, Ms. April faxed Exhibit E and the change to Exhibit B to Ms. Boysen to review (CP 178, 205).

In January 1999, Ms. April was closing Ms. Boysen's file and noticed that Exhibit E had not been attached to the Decree of Dissolution that had been entered with the Court the previous month (CP 178). On January 22, 1999, Ms. April emailed her discovery to Mrs. Kiesel and Ms. Slatton (CP 178, 207).

On January 26, 1999, Mrs. Kiesel asked Ms. April to prepare an amended Decree of Dissolution (CP 178, 207). Ms. April called Janice, the assistant for Mr. Craig's attorney, and requested that she reprint the Decree of Dissolution as the Amended Decree of Dissolution and make the necessary change to Exhibit B and send them to Mrs. Kiesel's office (CP 178, 207).

On February 1, 1999, Ms. Slatton spoke with the assistant at Mr. Craig's attorney's office and was informed that she had made the change

to Exhibit B and they were going to have Mr. Craig sign the amended Decree of Dissolution (CP 174, 207).

On February 17, 1999, Mrs. Kiesel sent a letter to Ms. Boysen informing her that Exhibit E was inadvertently left off the original Decree (CP 188, 209).

On February 22, 1999, the assistant from Mr. Craig's attorney's office called Mrs. Kiesel's paralegal and advised her that Mr. Craig agreed to sign the amended Decree (CP 174-175, 211).

After several months of trying to get Mr. Craig to voluntarily sign the amended Decree, Mrs. Kiesel filed a motion to approve the amended Decree. The motion was based on a clerical error and the inadvertent omission of Exhibit E to the Decree of Dissolution. (CP 158-159). As set forth above, CR 60(a) provides the proper method for correcting a clerical error.

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 contrast, 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. Bungler, 13 Wn. App. 81, 84, 533 P.2d 406, 408 (1975).

The parties in Getz had two separate pension plans as their principal assets: the State Plan and the National Plan. The Plans were disclosed to the Wife through discovery. The Court entered a Decree of Dissolution awarding each party one-half of the State Plan benefits that accrued prior to separation. The findings and decree did not specifically mention the National Plan. After entry of the decree, Wife requested benefits from the National Plan; she was denied because the Domestic Relations Order submitted did not pertain to the National Plan. Getz, at 603. Wife moved for entry nunc pro tunc of a Qualified Domestic Relations Order as to the National Plan. The trial court denied her motion with leave to file a proceeding under CR 60. Getz, at 603.

The Trial Judge found wife to be entitled to relief on several grounds including CR 60(a). He signed an order modifying the original decree to include the National Plan to the paragraph referencing the equal division of the State Plan. On appeal, the Court affirmed and held that the modification was properly made under CR60(a). Although provided with an inadequate record, the Court of Appeals reasoned that since the Trial Judge had intended to award the two pension plans equally, and not to award Husband all the benefits accrued under the National Plan the error

in omitting the National plan from the original findings and decree was correctable error under CR 60(a). Getz, at 604-605.

In Getz, the Court corrected the omission of an entire pension plan under CR 60(a) because the court intended to distribute the pension plans equally.

In the present case, both Tiers of the pension plan were included in the Decree and the wife was specifically awarded the entire Tier II pension plan. The Trial Court allowed the wife to amend the Decree of Dissolution under CR 60(a) to include the necessary language required by the Railroad Retirement Board which had been prepared and approved prior to the entry of the Decree of Dissolution but due to a mistake the property exhibits were not attached to the Decree.

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. The required language necessary to distribute the benefits of the Plan to the wife was mistakenly omitted from the final Decree and therefore the Decree needed to be amended to include the mandatory language in order to carry out the intent of the Court and the parties.

A Trial Court does not have authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment. Marriage of Thompson, 97 Wn. App. 873, 878; 988 P.2d 499, 502 (1999). An ambiguous decree may be clarified, but not modified. Marriage of Thompson, at 878.

The amended Decree did not modify the property division. Due to the fact that Tier I benefits cannot be divided, the parties bargained for and agreed the husband would receive all of the Tier I benefits, and the wife would receive all of the Tier II benefits (CP 184-220). There was no limitation in the Decree that the wife would lose her benefits if the husband retired based on disability. Through discovery both parties knew that unless the future benefits were specifically limited, the Board would apply the division of Tier II benefits to any retirement or disability benefits which became payable (CP 219-220).

The amended Decree did not even act to clarify the division of property, which is permissible. Thompson, at 878. It simply added the mandatory language to allow the Plan to distribute the Tier II benefits to the wife consistent with the terms of the Plan which was agreed by the parties in the original Decree and signed by both parties with full knowledge that wife would receive the Tier II benefits based on the husband's retirement whether based on age or disability. If the parties had

intended for the Tier II benefits to revert to the husband if he became disabled, it would have been included in the Decree of Dissolution. For the Court to make this finding, it would be a modification of the Decree that is impermissible. Thompson, at 878.

In the present case, both parties were represented by counsel and negotiated for their property distribution. The final divorce papers were prepared more than three (3) months prior to their entry with the Court (CP 201). In reviewing the final papers, counsel for both Ms. Boysen and Mr. Craig realized they had not included the necessary language to divide the Railroad Retirement Benefits (CP 199, 201). The necessary language was prepared as Exhibit E and was sent to Mr. Craig's attorney on September 1, 1998 to be attached to the Decree more than three (3) months prior to the entry of the Decree (CP 201). In the confusion of exchanging modified Exhibits, the wrong set of Exhibits were attached to the final Decree of Dissolution that was signed by the Court on December 21, 1998.

The month following the entry of the Decree of Dissolution, the error was discovered and Ms. Boysen and Mr. Craig's attorney were made aware of the error (CP 207, 209). Mr. Craig would have received notice from his attorney, and according to telephone calls received by Ms. Boysen's attorney's office, Mr. Craig was fully aware of the mistake

involving the omission of Exhibit E (CP 211). Counsel for both parties attempted to immediately remedy the error (CP 207-211). Ms. Boysen's counsel had been advised by Mr. Craig's attorney's office that Mr. Craig had agreed to sign the amended decree with the proper exhibits, including Exhibit E, attached (CP 211).

Given that it was the intention of the parties at the time the Decree was entered to award all of the Tier II benefits to Ms. Boysen and it was the intention of the parties to include Exhibit E to the Decree of Dissolution, the inadvertent omission of Exhibit E was a clerical error. As such, the clerical error may be corrected at any time by the Court's own initiative or upon the motion of any party and even without notice to a party. Barouh v. Israel, 46 Wn.2d 327, 333, 281 P.2d 238 (1955); CR 60(a).

Mr. Craig argues that Ms. Boysen should have moved to vacate the entire Decree of Dissolution in order to add the language in Exhibit E. Vacating the Decree would serve no purpose. All parties were aware of Exhibit E prior to the presentment of the original Decree and all parties intended that the corrected set of Exhibits would be attached to the Decree of Dissolution. The fact that the wrong set of exhibits were attached was a clerical error and as such CR 60(a) is the applicable mechanism for correction. There was no reason to vacate the entire Decree.

The amended Decree did not change the property distribution as alleged by Mr. Craig. The parties intended the wife to receive all of the Tier II benefits without limitation (CP 142).

Under Federal law Tier II retirement benefits whether based on age or disability is divisible pursuant to a dissolution of marriage. (CP 213-214). The United States Supreme Court previously held that Section 14 of the Railroad Retirement Board prohibited a court from awarding one spouse a property interest in any benefits, whether present or expected in the future, to which the other spouse may become entitled to under the Railroad Retirement Act (CP 196). However, Public Law 98-76 amended section 14 with respect to benefits payable for months after August 1983 (CP 196). Under the new law, the Board will honor a decree of divorce that complies with the Board regulations including the fact that the decree must provide for a division of the employee's benefits as part of a final disposition of property between the parties, rather than an award of spousal support (CP 196). All of this information was provided to both parties and their respective counsel by the Railroad Retirement Board prior to the entry of the Decree of Dissolution (CP 196, 219-220). The document also provided the model language that complies with the Board's regulations to award a portion of the divisible benefits to the non-employee spouse (CP 197).

The Washington State Supreme Court has held that disability pensions may be subject to allocation in a dissolution proceeding if there are substantial elements of either deferred compensation or retirement. Arnold v. Department of Retirement Systems, 128 Wn.2d 765, 778, 912 P.2d 463, 470 (1996). The courts look carefully at the payment received by the pension system member to determine whether the payment has characteristics of an earned pension in addition to disability. Arnold, 128 Wn.2d, at 778-779; In re Anglin, 52 Wn. App. 317, 322, 759 P.2d 1224, 1227 (1988).

In the present case, the husband retired based on disability, and according to the letter received from the Railroad Retirement Board, the Tier II benefits awarded to Ms. Boysen are computed based under the railroad retirement formula (CP 167).

It is clear from the letter from the Railroad Retirement Board that the Tier II benefits awarded to Ms. Boysen are in the form of Retirement Benefits based on an earned retirement and not based on a replacement for lost future wages.

The parties intentionally awarded the wife 100% of the Tier II Railroad Retirement Plan that was approximately just one-third of the total of both the Tier I and the Tier II Plans. There was no provision in the Decree that if the husband became disabled that the Tier II benefits would

revert to him. To reduce or eliminate the wife's award of the Tier II Plan would result in an impermissible modification of the Decree and the wife would receive substantially less than 50% of the community assets.

Furthermore, both parties knew the wife would receive 100% of the Tier II Plan whether on the basis of the husband's age or retirement based on disability. This information was provided to the parties and their respective counsel in a letter from the Railroad Retirement Board on September 17, 1996, two years before the Decree was entered (CP 219-220).

On August 27, 1999, the Railroad Retirement Board sent another letter directly to the husband which stated that the wife would receive 100% of the Employees Monthly Divisible Benefits (i.e. Tier II) beginning the first month in which the employee begins to receive the annuity, whether on the basis of age or retirement due to disability (CP 213-214).

If the husband disagreed with the Railroad Retirement Board's interpretation of what the wife was awarded, he should have raised the issue in 1999 when he received notice that the Plan approved the court-ordered property settlement and would distribute the property accordingly.

The Doctrine of Laches should be applied to bar Mr. Boysen's requested relief. He failed to exercise due diligence within a reasonable

amount of time to address his issues in the Superior Court. In re Marriage of Maddix, 41 Wn.App. 248, 703 P.2d 1062 (1985)

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).

In the present case, the original Decree, signed by both parties and their respective counsel, is not ambiguous. The Decree specifically states in Exhibit B, section 9, “The wife is to receive all benefits in the Burlington Northern – Santa Fe Railroad Company, Tier II, account upon husband’s retirement. Benefits should be awarded to the wife consistent with the terms of the Plan.” (CP 131).

After the amended Decree was approved by the Railroad Retirement Board, the Husband received notice directly from the Board that the Ms. Boysen would begin to receive the Tier II benefits whether he

retired on the basis of age or he retired on the basis of disability. (CP 213-214).

A decree is modified when the rights given to one party are extended beyond the scope originally intended, or reduced. A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary. Thompson, 97 Wn. App. at 878, (citing Rivard v. Rivard, 75, Wn.2d 425, 418 (1969)).

In the present case, the wife was clearly and unambiguously given 100% of the Tier II Plan. Although she is receiving the benefits because of the husband's retirement based on disability, the benefits were earned in the form of retirement and therefore remain divisible pursuant to the Decree. If the Court were to reduce her percentage in the Tier II plan, it would reduce the wife's rights in the property division and increase the husband's benefits in the property division beyond what was originally intended by the parties. The Court is prohibited from modifying the property division under RCW 26.09.170(1) and by case law cited above from the Supreme Court of the State of Washington.

A change in a party's financial circumstances will not justify application of CR 60(b)(11) to vacate a dissolution decree. Marriage of Knutson, 114 Wn. App. at 873.

In the present case, although the husband has retired on the basis of disability, there has been no change in circumstances with respect to the property division. The husband is still entitled to receive 100% of the Tier I benefits, and the wife is entitled to receive 100% of the Tier II benefits, whether designated “disability” or “retirement.” The husband’s financial circumstances cannot be used as a basis to modify the distribution of property in a Decree of Dissolution.

In Knutson, the Court entered a decree dividing the marital assets in a manner consistent with the intent of the parties as of the time of trial and further directed them to effectuate the decree through a QDRO. Neither party appealed the decree. The husband later went back to court and argued that the value of the plan had changed and affected his financial circumstances and therefore under CR60(b)(3), based on newly discovered evidence, the decree should be vacated. The Court held that CR60(b)(3) applies to evidence existing at the time the decree was entered, not later. The Court also held that CR(b)(11) applies sparingly to situations “involving extraordinary circumstance not covered by any other section of the rules.” Knutson, at 872. The interests of finality are well served by carefully observing the dictates of CR 60(b). Knutson, at 873.

In the present case, the parties agreed that the husband was to receive 100% of Tier I, which was twice as much as the wife was

awarded, and wife was to receive 100% of Tier II. Both parties signed the decree with their respective counsel. The division of the Railroad Retirement Benefits was a division of property that was based on the agreement of the parties with full knowledge the wife would receive the Tier II benefits upon husband's retirement whether on the basis of age or earned retirement disability.

In Knutson, the trial court abused its discretion in granting the husband's motion to vacate and reopen the decree for modification. The remedy is to reverse the trial court and remand for enforcement of the original decree and QDRO. Knutson, at 874.

In the present case, if the court is to enforce the original decree, it still provides that the wife is to receive 100% of the Tier II benefits which could not be reduced based on the husband's retirement due to disability given the fact that the benefits he receives are in the form of retirement benefits which are computed under the railroad retirement formula (CP 167).

It was not until April 2005, when Ms. Boysen petitioned to modify the husband's child support, that he raised the issue of the division of the Tier II benefits. The husband's child support was increased, and in November 2005, he obtained an attorney to attempt to vacate the amended Decree of Dissolution.

4. Appellant's Assignment of Error: "The trial court erred in not awarding Skip attorney's fees." (CP 257-258).

The Trial Court did not err in denying Mr. Craig's request for attorney's fees. Mr. Craig's motion to vacate the amended decree was brought in bad faith after his child support obligation was increased (CP 385-402, 407-420). Mr. Craig's motion to vacate and this appeal are an attempt to circumvent the agreement the parties made seven (7) years earlier. The parties litigated and negotiated their divorce for two and a half years before reaching an agreement that was incorporated into the decree of dissolution (CP 10-25). The extensive negotiations led to Mr. Craig receiving all of his Tier I Plan and Ms. Boysen receiving all of the Tier II Plan (CP 15-25).

Mr. Craig argues that Ms. Boysen should be required to pay attorney fees due to her refusal to vacate the amended Decree of Dissolution, however, there was no reason to vacate the amended Decree.

The amended Decree did not change the property distribution or the rights of either party. Exhibit E was approved by Mr. Craig's counsel more than three (3) months prior to the entry of the original Decree, and it is presumed that his client was also aware of it. (CP 199, 201). Mr. Craig was aware that the incorrect exhibits were attached to the Decree of Dissolution and that both his attorney and Ms. Boysen's attorney were

attempting to correct that error the month following the entry of the Decree (CP 207). Mr. Craig had agreed to sign the amended Decree with Exhibit E attached two (2) months after the original Decree was entered (CP 211). Mr. Craig received notice of the motion to amend the Decree two weeks before the hearing that scheduled for July 30, 1999 (CP 152).

The Motion and the Notice for Motion Docket were mailed to Mr. Craig by both certified and first class mail on July 14, 2006. (CP 152). The first class mail was not returned to sender. The certified mail was returned to sender unopened on July 30, 1999 with a stamp from the Postal Service that it was “unclaimed” (CP 217). If the Postal Service did not know where to send Mr. Craig’s mail it would have been returned to sender with a different endorsement stamped on the envelope. Washington v. Vahl, at 606-607.

Mr. Craig does not deny that he had his mail forwarded from his prior address to his current address. Mr. Craig argues that he did not continue to live within the same city, however, he continued to live within the same zip code (CP 114-115). Mr. Craig also does not deny that on August 27, 1999 he receive a letter directly from the Railroad Retirement Board that explained Ms. Boysen would begin to receive the Tier II benefits when he began to receive his benefits whether on the basis or retirement due to disability (CP 213).

Mr. Craig's motion to vacate the Decree and the subsequent Appeal are without merit and were filed in bad faith. Ms. Boysen should be awarded attorney fees for both actions under RCW 26.09.140. Mr. Craig's challenge to the amended Decree of Dissolution is a continuation of the original action brought under RCW 20.09. Marriage of Moody, 137 Wn.2d 979, 994, 976 P.2d 1240 (1999). Fees may be awarded on a motion to vacate. Moody, 137 Wn.2d at 994. Although the decision to award fees under RCW 26.09.140 is discretionary, Mr. Craig's motion to vacate was denied by the Trial Court, and Ms. Boysen has a substantial need for attorney fees that were incurred due to Mr. Craig's bad faith motion and appeal and his attempt to circumvent the agreement of the parties that was entered seven (7) years earlier.

D. CONCLUSION

Ms. Boysen respectfully requests the Court deny the Appellant's appeal to vacate the amended Decree of Dissolution. The parties engaged in extensive negotiations over a period of two and half years before entering into the Decree of Dissolution awarding wife 100% of the Tier II benefits under the Railroad Retirement Plan.

In August 1999, Mr. Craig received a letter directly from the Railroad Retirement Board that explained that Ms. Boysen would receive the Tier II benefits whether he retired due to age or his retirement was due

to disability. Mr. Craig waited more than six (6) years from that letter before attempting to vacate the division of property, and it was nearly a year after Ms. Boysen began receiving the Tier II benefits. The Doctrine of Laches should also apply in this case. Mr. Craig had notice directly from the Railroad Retirement Board in August of 1999 that Ms. Boysen would receive 100% of the Tier II benefits whether his retirement was on the basis of age or disability. If he did not agree with division, he should have raised the issue with the Superior Court in 1999.

The Trial Court did not abuse its discretion in denying Mr. Craig's motion to vacate the amended Decree of Dissolution. The Court had sufficient evidence showing that both parties and counsel approved of and intended for Exhibit E to be attached to the original Decree and that its failure to be attached was a clerical error. The Court had sufficient evidence showing that the error was discovered the month following the entry of the original Decree and both attorneys contacted their clients and made every effort to correct the error. The Court had sufficient evidence that Mr. Craig received notice of the error from his attorney's office, and that he had agreed to sign the amended Decree. The Court had sufficient evidence that Mr. Craig received notice of the motion to amend the Decree to correct the clerical error. The Court also had sufficient evidence regarding the intent of the parties in awarding the wife 100% of the Tier II

benefits, and that Mr. Craig had actual knowledge from the Railroad Retirement Board in August 1999 that Ms. Boysen would begin to receive the Tier II benefits whether he retired on the basis of age or he retired on the basis of disability. The Trial Court also had the court file showing that these parties were repeatedly in Court on several matters from September 1999 until the present matter was brought to the Trial Court in January 2006.

Based on the evidence presented to the Trial Court, it was not an abuse of discretion to deny Mr. Craig's motion to vacate the amended Decree.

Mr. Craig's motion to vacate and this subsequent appeal were brought in bad faith, and Ms. Boysen should be awarded attorney's fees and costs.

Respectfully Submitted,

Dated: July 12, 2006


Diana Lynn Kiesel, WSBA#14740
Attorney for Respondent

FILED
COURT CLERK

06/11/12 PM 0:27

STATE OF WASHINGTON

CLERK OF COURT

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In Re the Marriage of:
SYLVIA CRAIG, (n/k/a SAM BOYSEN)
Respondent,

and

ROB B. CRAIG III
Appellant

NO. 34551-0II
AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I DECLARE that I am now, and at all times relevant to this matter, have been a citizen of the State of Washington, over the age of eighteen years, not a party to this action or an officer of a Corporation in this action, competent to be a witness in this cause, did effect service as indicated below:

To: Christopher Nelson Attorney at Law
At: 10655 Northeast 4th Street, Suite 700, Bellevue, Washington 98004
On: July 11, 2006 Time: 12:17Pm
Documents: (1) Brief Of Respondent .

By personally delivering one copy of each document to a person who identified herself as Edna Paulson, she is the Legal Asst to Christopher Nelson and she said she is authorized to accept serve for him, an adult female of suitable age and discretion, at the office of Christopher Nelson .

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Signed at Lacey, Washington , On July 11, 2006
(City & State) (Date)

Frank R. Panion
Signature

Frank R. Panion & 06-0117-01
Print or Typed Name WSPS NO.

ORIGINAL