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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 39936-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

In Re The Marriage of:

RUSSELL NIBLOCK

Respondent

v.

CHERYL NIBLOCK

Appellant.

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

The Honorable Judge John P. Wulle

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

The trial court erred in the following manner:

Assignment of Error No. 1

By refusing to vacate the erroneous Qualified Domestic Relations Order (QDRO) and refusing to direct that a corrected Qualified Domestic Relations Order be entered.

Assignment of Error No. 2

By refusing to enforce the provisions of the decree and refusing to order the full award provided for the wife in the decree.

Assignment of Error No. 3

By allowing an improper modification of the decree in direct opposition to the holding in *In Re Marriage of Knutson*, 114 Wn. App 866, (2003) which resulted in a windfall for the husband.

II. Statement of the Case

Mr. and Mrs. Niblock were married on October 10, 1994 and separated on September 3, 2004 (CP 3). On June 10, 2008, the parties agreed to a distribution of the debts and assets of the marriage. (RP1). As a result of the agreement, Mr. Niblock was to

keep all pensions, social security, and retirement benefits in his name, less the amount of one hundred and seven thousand, five hundred dollars (\$107,500.00) to be taken from his 401K account to be dispersed to Mrs. Niblock upon the entry of the final decree.

(RP2 lines 1-5). Mrs. Niblock was awarded all interest in the home, located at 369 Gun Club Road, #55, in Woodland, Washington, free of any claim by Mr. Niblock and he was to sign off any ownership interest in that home. (RP 2 lines 6-9). Further, she was entitled to all pension, social security, and retirement benefits in her name and receive the fixed sum of one hundred and seven thousand, five hundred dollars (\$107,500.00), from her husband's 401k account.

(RP 2 lines 10-13.) The amount was to be fixed at one hundred and seven thousand, five hundred dollars (\$107,500.00) to be released to Ms. Niblock and she could do with it as she wished.

(RP 3 lines 12-16). The parties agreed to the terms of the distribution of property. (RP 4). The husband's attorney was required to make the necessary arrangements for the transfer of the funds (RP 5). The final decree contained language indicating that the wife would receive a sum certain from the husband in the amount of \$107,500.00 and that if the disbursement required a QDRO, the husband would be required to have one prepared. (CP

5-6). The attorneys stipulated that the matter could be returned to the judge for clarification should there be a problem with the language. (CP10). Thereafter, a QDRO was prepared. (CP 12-15). The language contained a provision whereby the fixed sum would be adjusted by market fluctuations. (CP 13 lines 12-13). The attorneys of record signed the document, but the parties did not. (CP 15). Noting the erroneous amount, Dan Ricks was contacted as the drafter of the QDRO, who stated that if someone had told him that here was an agreement for the wife to receive the lump sum of \$107,500, without adjustment for market conditions, the QDRO would have been written differently. (SRP 32). On September 1, 2009, the wife filed a motion to vacate the QDRO and to enforce the provisions of the decree. (CP 16 -20 SRP 28-30). The wife also asked for attorney fees to be awarded pursuant to paragraph 3.6 of the marital decree. (CP 8, lines 18-20). The wife cited *In Re Marriage of Knutson*, 114 Wn. App 866, (2003) in support of her contention that the husband had modified the decree by the addition of the language in the QDRO which allowed for adjustment due to market fluctuation. (CP 20-21). As a result of the language in the QDRO, the wife did not receive the designated sum certain of \$107,500.00, but instead received \$77,083.59. (CP 16).

On September 25, 2009, the trial court heard argument on the issue of whether a market fluctuation would allow the sum certain to be reduced. (RP 8-9). The court found that a specific amount of \$107,500 was designated in the decree to be awarded to the wife. (RP 10 line 24). The court found that the amount set in the decree was a sum certain but the language of the QDRO allowed for fluctuation. (RP 11 lines 1-5) Because the parties' attorneys signed off on the language of the QDRO, the wife would receive the reduced amount based on market fluctuation. (RP 11, lines 6-8). The court found that the language did not exist in the decree, but in the QDRO. (CP lines 14-22). The court directed that the wife would have to appeal to obtain relief because of the language of the QDRO. (CP 11, lines 14-18). As a result of the trial court's ruling, an order denying the wife's requested relief was filed on October 13, 2009. (CP 22-24). This appeal followed.

III. ARGUMENT

A. Issues Pertaining to Assignment of Error No. 1

The trial court erred by refusing to vacate the erroneous Qualified Domestic Relations Order (QDRO) and refusing to direct that a corrected Qualified Domestic Relations Order be entered.

CR 60(b)(1), (4), (5) and (11) provide as follows:

(b) On motion and upon such terms that are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining judgment or order;

(4) Fraud (whether heretofore denominated intrinsic or extrinsic).

(5) The judgment is void.

(11) Any other reason justifying relief from the operation of the judgment.

Standard of Review: The decision to vacate an order under CR 60 will be overturned on appeal where it plainly appears that the trial court has abused its discretion. *In Re Guardianship of Adamec*, 100 Wn.2d 166 (1983). Discretion is abused where it is based on untenable grounds or for untenable reasons. *In Re Schuoler*, 106 Wn. 2d 500 (1986). Here, the denial to vacate the Qualified Domestic Relations Order and direct that the decree be enforced amounted to an abuse of discretion on the part of the court. While finding that the language of the decree was

unambiguous, and that the wife was to receive a sum certain, because the QDRO contained erroneous language the court found that the language of the QDRO overrode the language of the decree. (RP 11). The court found that, the QDRO could not be vacated or corrected (RP 11). Despite the untenable grounds as evidenced by the admission of the drafter of the QDRO that he would have drafted the order differently, had he been told that the decree called for a sum certain. (SCP 32). The lawyers who entered the full agreement of the allocation of debts and assets were very specific in this case. The wife was to receive the full amount of \$107,500. Both the testimony from the record of proceedings and the pleadings – specifically the findings of fact and conclusions of law, as well as the decree delineated that the wife was to receive a sum certain of \$107,500.00. (CP 5-6). Both parties agreed that this fixed sum was fair and equitable. (CP4 lines 7-11). There was no agreement whatsoever that the transfer of funds would be adjusted for market fluctuations. (CP 10-11). Despite the attorneys acknowledging that they do not prepare QDRO's, they signed off on the QDRO which was a mistake because the language of the QDRO did not reflect the agreement of the parties. (RP 11-12). Dan Ricks, who prepared the QDRO advised the

attorney's via e-mail that had he known the decree called for a sum certain, he would not have included the fluctuation language and the amount transferred would have been the sum certain the parties agreed upon.(SCP 38). Despite the obvious mistake in the preparation of the order, the court failed to grant the CR 60 motion for the wife and this amounts to an abuse of discretion. (CP 22-23).

B. Issues Pertaining to Assignment of Error No. 2

The trial court erred by refusing to enforce the provisions of the decree and refusing to order the full award provided for the wife in the decree.

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 68 1, 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, "The wife is to receive \$107, 500.00 from the husband's 401K. (CP11). 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. *Rivard v. Rivard*, 75, Wn.2d 425,418 (1969). In the present case, the wife was clearly and unambiguously given a sum certain of \$107,500.00 The trial court improperly reduced 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. While the Court admitted the amount was fixed in the decree, it mistakenly concluded that the language of the QDRO would override the language of the decree. This is clearly in error. 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. 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 CR60(b)(II) 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 wife was to receive \$107,500.00. It was a sum certain and not subject to any market fluctuation (CP 10-11). The division of property that was based on the agreement of the parties with full knowledge the wife would receive the full \$107,500.00 from her husband's retirement account. In *Knutson*, the appellate court held that the trial court abused its discretion in granting the husband's motion to vacate and reopen the decree for modification. The remedy was 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 will direct that the Qualified Domestic Relations Order be modified

or vacated so as to correct the error which was created by the improper language. The QDRO does not in and of itself correct or modify a decree. The QDRO is supposed to reflect the intentions of the parties, not the other way around. The trial court while accepting the terms of the decree which specifically called for a sum certain to be awarded to the wife, allowed the mistaken QDRO to remain in effect and that action must be reversed.

C. Issues Pertaining to Assignment of Error No. 3

The trial court erred By allowing an improper modification of the decree in direct opposition to the holding in *In Re Marriage of Knutson*, 114 Wn. App 866, (2003) which resulted in a windfall for the husband.

The decree is unambiguous in its award of a fixed amount to the wife. The language of the QDRO modified the clear language of the decree and in fact, has modified the decree without authority. See *In re Marriage of Knutson*, 114 Wn. App. 866, 60 P.3d 681 (2003), in which the court held that a drop in market value prior to entry of a QDRO did not justify the trial court's modification of a decree that unambiguously awarded a sum certain from a 401(k) account. Cheryl Niblock contends the decree unambiguously

awarded her \$ 107,500 from Petitioner's 401(k) account, and any changing of her award based on the fluctuations of the market value is an improper modification of the decree without legal authority. *Knutson*, 114 Wn.App. 866, 60 P.3d 681; *In re Marriage of Thompson*, 97 Wn. App. 873, 988 P.2d 499 (1999). She thus requests enforcement of the decree.

This case is analogous to *Knutson*, in which the wife was awarded a specified dollar amount of the husband's 401(k) account to be distributed pursuant to a QDRO. The account lost significant value in a falling market before the QDRO was processed, leaving the husband with considerably less than the even split originally contemplated by the parties. At the husband's request, the trial court vacated and modified the decree to adjust for lost market value. The court attributed no fault to either party. This court reversed on appeal, holding that market fluctuations in account value did not justify vacation and modification of an unambiguous dissolution decree. *Knutson*, 114 Wn. App. at 872. The principle held by the court is applicable here: market fluctuations do not justify modification of a decree likewise applies to enforcement of the unambiguous decree here. As in *Knutson*, the drop in account market value does not justify changing the specific amount the

parties agreed to award her in the overall property distribution. The intentions of the parties was for the wife to receive \$107,500 for value of her portion of the community. In fact, a QDRO was not even required in this case. (CP 5-6). The husband was left with the option of how he would remove the funds from the account in order to pay the wife this amount. (CP 5-6). It was his option to prepare a QDRO instead of perhaps a loan, or direct withdrawal. The mere fact that he chose to utilize a QDRO should not result in him obtaining a windfall not anticipated by the parties in their original agreement and the wife to suffer a loss through no fault of her own. It was only because the husband sought to pay his marital lien via a QDRO that the wife suffered the loss. No matter what happened to the funds contained in the 401K, the husband could have chosen other means to pay his debt to his wife, via loan, withdrawal or QDRO. The wife should not be made to suffer because of the husband's choice of withdrawal, or his timing of the transfer.

IV. Attorney Fees

The court has the ability to award attorney fees. Appellant should be awarded attorney fees for prosecuting the terms of the decree as established in paragraph 3.6 of the decree. (CP 8). She should

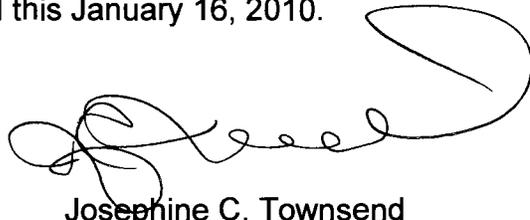
also be awarded attorney fees for appealing the trial court's errors and abuse of discretion. The appellant is of modest means and she has supplied her financial declaration in support of her request for fees.

V. Conclusion

Appellant Cheryl Niblock asks the appellate court to

1. Reverse the decision of the trial court, remand the action and direct that the QDRO be vacated or modified to allow for the remaining funds to be awarded to her with interest.
2. Award her attorney fees for having to prosecute the terms of the decree and the costs of this appeal.

Respectfully submitted this January 16, 2010.

A handwritten signature in black ink, appearing to read 'Josephine C. Townsend', with a large, sweeping flourish at the end.

Josephine C. Townsend

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DIVISION II
STATE OF WASHINGTON

RUSSELL NIBLOCK)	Court of Appeals No. 39936-9-II
Petitioner)	Trial Court No. 04-3-01503-8
v.)	
CHERYL NIBLOCK)	
Respondent.)	

1. My name is Josephine C. Townsend and I am the attorney for Cheryl Niblock.
2. I served Jerry Hall, and Catherine W. Smith, attorneys for the Russell Niblock with the following documents:

Brief of the Appellant
Clerk's papers Volume I
Supplemental Clerk's papers Volume II

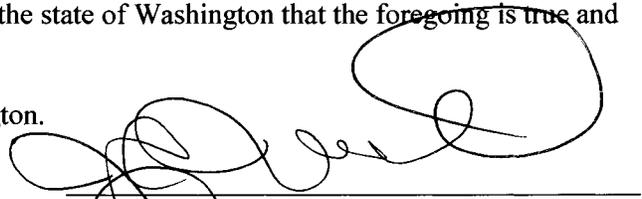
2. I served these documents by placing them in the U.S. Mail, postmarked and pre-paid on January 16, 2010 at these addresses:

Jerry Hall, Attorney At Law
12214 S.E. Mill Plain, Suite 203, Vancouver , WA 98684

Catherine W. Smith
1109 First Avenue
Suite 500
Seattle WA 98101-0974

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED January 16, 2010 at Vancouver, Washington.

A handwritten signature in black ink, appearing to read 'Josephine C. Townsend', is written over a horizontal line. The signature is highly stylized and cursive.

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