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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  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

RUSSELL NIBLOCK,

Respondent,

v.

CHERYL NIBLOCK,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR CLARK COUNTY  
THE HONORABLE JOHN WULLE

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BRIEF OF RESPONDENT

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& GOODFRIEND, P.S.

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## I. INTRODUCTION AND RESTATEMENT OF ISSUE

At the end of their marriage, the parties agreed to divide the husband's 401(k) plan equally. Their dissolution decree awarded the wife \$107,500 (her one-half interest) from the 401(k) plan, with the intent that it be disbursed upon entry of the decree. The decree was silent whether the wife's award would be subject to market conditions if the disbursement occurred after the decree was entered, but less than two months later, the parties entered an agreed QDRO awarding the wife \$107,500 as of the date of the decree, "adjusted for earnings, losses or fluctuations in asset values." A day short of one full year after the agreed QDRO was entered, and after she had accepted her market-adjusted one-half interest in the 401(k), the wife moved to vacate the QDRO, claiming that she was entitled to a sum certain, with no adjustment for market conditions. The sum demanded by the wife would have reduced the husband's share of the retirement account by forty percent.

Did the trial court abuse its discretion in denying the wife's motion to vacate the agreed QDRO after determining that the

parties had agreed that the award in the decree would be subject to market conditions?

## II. RESTATEMENT OF FACTS

Appellant Cheryl Niblock, age 59, and respondent Russell Niblock, age 64, were married on October 10, 1992. (CP 2, 37) The parties have no children together. (CP 3) Russell filed for dissolution on September 9, 2004. (CP 37) The parties entered into an agreed decree of dissolution on July 18, 2008. (CP 1, 7)

Among the assets distributed in the decree was Russell's 401(k) at Puget Sound Freight Lines. (CP 10, 11) The parties agreed to divide the 401(k) plan equally as of the date of the decree. (CP 43) The decree awarded Cheryl "\$107,500 from the Husband's 401(k) to be disbursed upon entry of the Final Decree." (CP 11) It is undisputed that the \$107,500 awarded to Cheryl represented one-half of the 401(k) plan on July 18, 2008, the date the decree of dissolution was entered. (CP 43) Cheryl did not challenge Russell's assertion that \$107,500 "represented an equal division of the retirement account as of July 18, 2008." (CP 43)

It was understood that if distribution could not be effected on the day the decree was entered, the amount awarded to Cheryl

would increase or decrease depending on market conditions and fluctuations. (See CP 43) The decree contemplated that a QDRO might be necessary to effect the distribution, and that “[s]hould a QDRO be required to make the transfer, Husband shall arrange this at his expense. Matter can be placed before judge by motion if problem with language.” (CP 10) The parties’ understanding was confirmed when the QDRO required to accomplish the distribution was entered on September 2, 2008, awarding Cheryl “\$107,500 of Participant’s account in the plan as of July 18, 2008 *adjusted for earnings, losses or fluctuations in asset values from July 18, 2008 until the benefits awarded to the Alternate Payee are distributed to her*”. (CP 50, emphasis added)

Both parties’ attorneys signed the agreed QDRO subjecting the wife’s interest in the 401(k) to market fluctuations. The wife’s attorney presented the agreed QDRO for entry with the court. (CP 52)

The market declined after the decree was entered. (CP 43) As a result, the plan lost value, and in September 2008, Cheryl received \$77,083.59 – one-half of the value of the plan on the date of distribution. (CP 29)

On December 17, 2008, Cheryl's sister emailed the attorney who had been retained to prepare the QDRO. (CP 29, 32) Cheryl's sister apparently complained to the attorney that Cheryl had received \$77,083.59 rather than \$107,500. (CP 32) The attorney explained that because the decree did not specifically provide that Cheryl was entitled to a lump sum without adjustment for market conditions, he prepared the QDRO to reflect that Cheryl's award would be adjusted for market conditions:

[I]f someone told me there was an agreement that your sister was to receive the lump sum amount of \$107,500 without adjustment for market conditions (earnings/losses), and if the dissolution decree provided that your sister was to receive the lump sum amount of \$107,500 without adjustment for market conditions (earnings/losses), neither of which occurred, the QDRO could have been written to provide that your sister would receive the lump sum amount of \$107,500 as of the date of distribution without adjustment for market conditions (earnings/losses), and the investment losses then would have been borne by your sister's former husband.

(CP 32)

Ten months later, on September 1, 2009, Cheryl filed a Civil Rule 60 motion. (CP 16) Cheryl claimed she was entitled to a lump sum payment of \$107,500. (CP 28) Cheryl asked the court "to set aside the original QDRO and enter either a revised QDRO

directing the transfer with interest for the difference” between \$107,500 and \$77,083.59, or for the husband to pay this sum to the wife with interest. (CP 18) Cheryl based her motion on her claim that the QDRO was entered by “mistake” and was an “irregularity.” (CP 17-18)

Clark County Superior Court Judge John Wulle, who had presided over the parties’ settlement conference and entered the parties’ decree of dissolution, denied Cheryl’s CR 60 motion on October 13, 2009. (CP 28, 54-55) The trial court found that “the language of the QDRO, entered after the entry of the decree contains language which allowed the fluctuation of the market to affect the actual amount of the transfer.” (CP 54) The trial court noted that the parties’ agreement regarding the transfer of the 401(k) was embodied in the QDRO, which provided that any award to Cheryl would be subject to market fluctuation:

[I]t set the amount in the Decree but when you look at the QDRO it says subject to market fluctuations. I think that [the QDRO is] clearly signed off by everybody and clearly it says this is what our agreement was. I don’t think there’s any place for me to go.

(9/25 RP 11) The trial court ordered that “there shall be no change to the reduced transfer awarded to the wife by result of the QDRO

being entered. The reduction in wife's transfer award was due to market fluctuation which was authorized." (CP 55) Cheryl appeals. (CP 53)

### III. ARGUMENT

#### A. **The Trial Court Did Not Abuse Its Discretion In Denying The Wife's Motion To Vacate The QDRO.**

Motions to vacate orders under CR 60 are "addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a manifest abuse of discretion, *i.e.*, only when no reasonable person would take the position adopted by the trial court." ***Marriage of Burkey***, 36 Wn. App. 487, 489, 675 P.2d 619 (1984). The trial court did not abuse its discretion in denying the wife's motion to vacate the QDRO, which awarded her an interest in the husband's 401(k) plan "adjusted for earnings, losses or fluctuations in asset values from [the date the decree was entered] until the benefits awarded to the [wife] are distributed to her." (CP 13)

Below and on appeal, the wife does not deny that the parties intended that she receive one-half of the value of the husband's retirement account as of the date the decree was entered. She now asks the court to order the husband to absorb all of the loss in

the retirement account due to market fluctuations that occurred after the decree was entered. This would result in the wife receiving 70% of the retirement account, contrary to the parties' agreement. The trial court did not abuse its discretion in rejecting such a result.

**1. No Evidence Supports The Wife's Claim That The QDRO Was Entered By Mistake.**

The wife first claims that the QDRO was entered by "mistake." (App. Br. 6-7) But the wife fails to cite to any evidence showing a mistake. The husband testified, unchallenged, that "it was clearly understood by the parties and attorneys that the amount could increase or decrease depending on market conditions and fluctuations." (CP 43) The attorney who drafted the QDRO, who represented neither party, drafted the language that the award was subject to market fluctuations based on the language of the decree, and because he was not told to do otherwise by either party's attorney. (CP 32) The wife's attorney, (who did not represent her in her motion to vacate), presented the QDRO for entry with the court (CP 15), and clearly did not agree with her claim that there was a "mistake." (See CP 29: "[My attorney] told us that he could not go back and change it.")

The only evidence of any mistake was the wife's self-serving declaration that she was entitled to a lump sum. (CP 28-29) But on the wife's appeal, the husband is "entitled to the benefit of all evidence and reasonable inference therefrom." ***Keever & Associates, Inc. v. Randall***, 129 Wn. App. 733, 737, ¶ 4, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006). Because there was no evidence that the QDRO was entered by "mistake," the trial court did not abuse its discretion in denying the wife's motion to vacate.

**2. The QDRO Is Not Inconsistent With The Decree Of Dissolution.**

The wife also claims that the trial court should have vacated the QDRO because it modified the dissolution decree. (App. Br. 7-10) But the QDRO is not inconsistent with the parties' agreed dissolution decree. The decree contemplated that the distribution from the husband's retirement account would occur on the day the decree was entered. (CP 11: the wife was awarded "\$107,500 from Husband's 401(k) to be disbursed upon entry of the Final Decree") The decree was silent as to what would happen if the disbursement occurred sometime after the decree was entered, except to note that if a QDRO was necessary to effect the distribution, any

disputes over the language of the QDRO should be resolved by a motion before the court. (CP 10)

The funds were not distributed on the day the decree was entered because a QDRO was necessary to effect the distribution. This created a latent ambiguity in the decree. See ***Estate of Bergau***, 103 Wn.2d 431, 436, 693 P.2d 703 (1985) (“A latent ambiguity is one that is not apparent upon the face of the instrument alone but which becomes apparent when applying the instrument to the facts as they exist.”). The decree was ambiguous because it failed to address whether the amount awarded to the wife would be affected if distributed at a later date. ***Logan v. Logan***, 36 Wn. App. 411, 420, 675 P.2d 1242 (1984) (“‘ambiguous’ has been defined as ‘Capable of being understood in either of two or more possible senses’”). The parties’ agreed QDRO clarified this ambiguity, providing that the wife’s award would be subject to any market fluctuation until it was distributed to her. If the wife disagreed with the language of the QDRO, she could have brought a motion to the court before the QDRO was entered, as contemplated by the decree. (CP 10) She did not.

The QDRO did not “modify” the decree of dissolution. (App. Br. 7-8) Instead, the QDRO clarified the decree to ensure that its original intent was properly carried out. “A decree is modified when 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.” **Marriage of Thompson**, 97 Wn. App. 873, 878, 988 P.2d 499 (1999). This is exactly what the QDRO accomplished here. The QDRO clarified the decree by defining the wife’s award as of the date of the decree as \$107,500 – one-half of the husband’s retirement at that time – and by further “spelling [her rights] out” by making clear that because the award could not be distributed to her when the decree was entered, the award would be subject to market fluctuations until it was distributed.

Awarding the wife one-half interest of the husband’s retirement and making both parties share equally in any market gain or loss was consistent with the parties’ intent. See e.g. **Marriage of Moore**, 99 Wn. App. 144, 993 P.2d 271 (1999). In **Moore**, the parties’ 1985 dissolution decree awarded the wife “half the community interest in the pension,” to be received when it was

distributed. When the parties were divorced, 87% of the pension, or \$42,781, was community property. Thirteen years later, when the husband was ready to retire, he offered the wife \$21,390 – the value of half of the community pension in 1985, when the decree was entered. The court instead entered an order awarding the wife 43.5% of the total pension funds – one-half of the *current* value of the 1985 community interest. The appellate court affirmed, rejecting the husband’s claim that the order improperly modified the decree and holding that the trial court did not abuse its discretion in clarifying the decree to carry out the trial court’s original intention – awarding the wife a one-half of the community interest in the pension – regardless of the change in value since the decree was entered. **Moore**, 99 Wn. App. at 147.

Because the QDRO did not modify the decree of dissolution, the wife misplaces her reliance on **Marriage of Knutson**, 114 Wn. App. 866, 60 P.3d 681 (2003) (App. Br. 7, 9-12). In **Knutson**, the dissolution decree ordered the husband to pay a sum certain from his retirement account to the wife. The QDRO awarded the wife the sum set forth in the decree of dissolution. Between the time the decree was entered and the QDRO was entered, the husband’s

retirement plan decreased in value. The husband sought to “vacate and amend the provisions” of the decree of dissolution awarding the wife her interest in the husband’s retirement. The trial court granted the husband’s motion and modified the decree by awarding the wife a one-half interest in three other investment accounts plus an additional, significantly smaller sum, from the husband’s retirement plan. Division Three reversed, holding that it was improper to vacate the decree and QDRO because it worked a modification of the decree of dissolution. *Knutson*, 114 Wn. App. at 874.

This case is different from *Knutson* because the decree in that case unambiguously awarded the wife a sum certain, regardless of the date of distribution. Unlike the decree here, the *Knutson* decree did not award the wife an interest in the husband’s retirement as of a certain date, creating an ambiguity when the interest could not be distributed to the wife on that date. In *Knutson*, the issue was whether the trial court could modify an unambiguous dissolution decree to award the wife a sum less than set forth in the decree. Here, the issue is whether the trial court properly upheld a QDRO that clarified a latent ambiguity in the

decree by providing that the wife's interest be subject to market conditions after the decree was entered.

Indeed, it would have been reversible error under *Knutson* had the trial court awarded the wife the amount she was seeking, because it would have worked a modification of the decree by awarding her a 70% interest in the husband's retirement, and not the 50% that the parties intended. The QDRO was not inconsistent with the decree of dissolution and did not modify the decree. The trial court did not abuse its discretion in refusing to vacate the agreed QDRO.

**B. The Wife's Motion To Vacate Was Not Timely As It Was Not Brought Within A Reasonable Time From The Time The QDRO Was Entered.**

Although not the expressed basis for the trial court's order denying the wife's motion to vacate, it also would have been within the trial court's discretion to deny the wife's motion to vacate because it was not timely. See e.g. *Marriage of Wintermute*, 70 Wn. App. 741, 744, 855 P.2d 1186 (1993) (the appellate court can affirm on any theory established by the pleadings and supported by proof), *rev. denied*, 123 Wn.2d 1009 (1994). Under CR 60(b)(1), a motion to vacate an order due to mistake or irregularity must be

brought “within a reasonable time and [ ] not more than 1 year after the judgment, order, or proceeding was entered or taken.” “The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion.” **Luckett v. Boeing Co.**, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999), *rev. denied*, 140 Wn.2d 1026 (2000).

Here, the wife brought her motion just one day short of one year after the QDRO was entered, even though it was clear that she had known of her challenge to the QDRO within two months of its entry, as evidenced by her sister’s email to the attorney who drafted the QDRO. (See CP 32) The fact that the wife brought her motion “not more than one year from the date of the judgment” does not in and of itself make it within a “reasonable time” as required by CR 60(b)(1). “[A] motion brought under CR60(b)(1) [ ] is timely only if it meets *both* time requirements.” **Luckett**, 98 Wn. App. at 311. “The one-year time limit [ ] is merely the outermost limit; in individual cases, the court may find that the motion should have been earlier made.” **Luckett**, 98 Wn. App. at 312 (*quoting 4*

Lewis H. Orland and Karl B. Tegland, Washington Practice sec. 723 (4th ed. 1992)).

The wife's motion to vacate the QDRO was not made within a reasonable time as it was brought nearly ten months after she first raised her allegation that the QDRO was inconsistent with the decree. While the wife claimed in her motion that she "has been trying for the last year to get it fixed and correct the QDRO" (CP 29), she provided no evidence of her efforts except her sister's email to the drafting attorney ten months earlier. The wife provided no explanation why she waited to seek the extraordinary relief of vacation of an order that was entered by agreement a year earlier. It would have been within the trial court's discretion to deny her motion to vacate for this reason alone.

**C. This Court Should Deny The Wife's Request For Attorney Fees And Award Attorney Fees To The Husband For Having To Respond To This Appeal.**

This court should deny the wife's request for attorney fees. "Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract, and the request is made pursuant to RAP 18.1(a)." *Guardianship of Wells*, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009). The wife cites no statute or rule for her request

for attorney fees. (See App. Br. 12-13) The wife cites only to the decree's "hold harmless provision," which states: "each party shall hold the other party harmless from any collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party." (App. Br. 12, *citing* CP 8) This provision does not, as the wife claims, allow for an award of attorney fees "for prosecuting the terms of the decree." (App. Br. 12) Instead, the provision is, by its terms, related to any "collection action relating to [ ] liabilities" made the responsibility of either party in the decree.

If the decree can be interpreted to allow for an award of attorney fees "for prosecuting the terms of the decree," this court should award attorney fees to the husband for defending the trial court's decision and enforcing the terms of the decree as clarified by the parties' agreed QDRO.

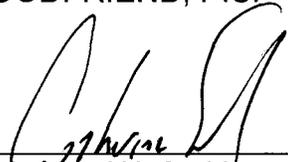
#### **IV. CONCLUSION**

The trial court did not abuse its discretion in denying the wife's motion to vacate the QDRO. This court should affirm, and to

the extent appropriate under the decree, award attorney fees to the husband for having to respond to this appeal.

Dated this 22<sup>nd</sup> day of March, 2010.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 22, 2010, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 22nd day of March, 2010

  
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