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JOANNE M. GRAHAM

Appellant

and

ARCH DAVIN GRAHAM,

Respondent.

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR and ISSUES

Assignments of Error

1. The court erred in denying appellant's motion to vacate and modify the decree of dissolution¹ to include a Qualified Domestic Relations Order (QDRO) as to respondent's pension, which appellant requested due to respondent's total failure to meet his obligation to provide appellant's health insurance, which was agreed to in exchange for appellant's interest in respondent's pension.
2. The court erred in not giving effect to all the words of that portion of Paragraph 3.2 Other of the decree of dissolution which dealt with respondent's pension and appellant's health insurance.
3. The court erred in finding that the appellant, in drafting the language of Paragraph 3.2 Other in the decree of dissolution regarding respondent's pension and appellant's health insurance, drafted the remedy to seek contempt.
4. The court erred in concluding no provision of CR 60(b) supported appellant's motion to vacate the decree and enter a QDRO.

Issues Pertaining to Assignments of Error

1. Whether the trial court failed to give effect to all language of that portion of Paragraph 3.2 Other of the decree of dissolution which dealt with respondent's pension? AE 2
2. Whether the trial court abused its discretion in concluding that no provision of CR 60(b) supported appellant's motion to vacate the decree of dissolution and enter a QDRO? AE 1, 4
3. Whether the existence of another remedy precludes modification of that portion of Paragraph 3.2 Other of the decree of dissolution which dealt with respondent's pension and appellant's insurance when the language implies the possibility of modification and when the other available remedy is costly, its efficacy is uncertain and it entails a greater use of judicial resources? AE 3

¹ The language in question was in the decree of legal separation. CP 8-11, which was converted by court order, CP 23, to a decree of dissolution, though no separate document was entered.

4. Whether the property distribution of respondent's pension should be modified to include a QDRO? AE 1, 4
5. Whether appellant should be awarded attorneys fees under statutory and equitable principles?

B. STATEMENT OF THE CASE

Respondent, Arch D. Graham, joined in Petition for Legal Separation on April 25, 2008, which was filed in Thurston County Superior Court the same day by Appellant Joanne Peterson.² CP 3–7. Both parties signed pro se. In lieu of taking part of Mr. Graham's pension due her as a result of their years of marriage, Ms. Peterson agreed with Mr. Graham that she would instead have him cover her health care insurance. CP 31. This agreement was set forth in Paragraph 3.2 Other of the petition, Property to be Awarded to the Husband, Other, as follows:

The Respondent should be awarded his Northwest Ironworker Retirement Trust Pension and Annuity, providing he maintains medical, dental, and vision insurance for the Petitioner. In the event this insurance is not provided, Respondent shall pay to the Petitioner the cash amount needed for her to secure her own insurance.

The Findings of Fact and Conclusions of Law, CP 12–16, and the Decree of Legal Separation, CP 8–11, signed by both parties pro se on April 25, were entered May 6, 2008, and an Order Affirming Findings and Supporting Decree of Legal Separation was entered May 27. CP 18, 17. The Findings do not list the respondent's pension.

² Appellant's name was Joanne Graham at the time of filing the Petition.

Ms. Peterson filed a Motion and Declaration to Convert Decree of Legal separation to Decree of Dissolution on February 14, 2011. CP 19. Despite good faith efforts, Ms. Peterson was unable to have Mr. Graham served personally, SCP 53–55. She then obtained an Order for Service by Mail, CP 20–21, on July 26, 2011, so the documents could be sent to Mr. Graham’s parent or nearest relative in Idaho. CP 21. Though he received notice, Mr. Graham did not appear at the scheduled hearing; and the Decree of Legal Separation was converted to a decree of dissolution on August 25, 2011. CP 24. And among the documents the court ordered be sent to Mr. Graham was a Qualified Domestic Relations Order. CP 20

The next day, August 26, Ms. Peterson filed a Motion and Declaration for Qualified Domestic Relations Order. CP 25–27. She stated Mr. Graham had violated the Decree of Legal Separation from the outset because he had never kept medical, dental and vision coverage on Ms. Peterson, CP 26, as he had agreed and had been ordered, CP 9, nor had he paid her the cash equivalent that she might purchase her own insurance, CP 26, as he also had agreed and had been ordered. CP 9. Ms. Peterson said because he had failed to obey the Decree of Legal separation and because so much time had passed, he was unlikely to do so in the future and it was obvious to her Mr. Graham had no intention to either keep insurance on her or pay her the cash equivalent. CP 26.

In requesting a QDRO, Ms. Peterson noted that Mr. Graham was to receive his entire pension under the Decree subject to the proviso that he keep insurance on her. CP 26, CP 9. She also noted that entering a QDRO would not change his financial obligation under the Decree, it would only secure her rights under the Decree. CP 26. The cash amount needed per month for the Appellant to secure her own health insurance is \$672.79.

Ms. Peterson abandoned the motion for a QDRO, filing on October 11, 2011 a Motion and Declaration to Clarify Decree and Enforce Property Division, CP 29–32, requesting the court to order a QDRO as a remedy for Mr. Graham’s refusal to comply with the property division of the dissolution decree.³ The court denied the motion on October 19, 2011. CP 34–35.

Ms. Peterson then filed through counsel a CR 60 motion to vacate the decree as to paragraph 3.2 regarding Mr. Graham’s pension and Ms. Peterson’s health insurance, in order that a QDRO might be entered. CP 38–41. An order to show cause was obtained in keeping with the rule. CP 44. Ms. Peterson stated that Mr. Graham’s refusal to cover her health care insurance needs had “become a great hardship” to her and that she had had surgery for breast cancer within the prior six months. CP 41

³ Though not part of the record on appeal, Ms. Peterson filed a corrective declaration in the superior court file when she discovered she had mistakenly given 15 years as the length of the marriage, having thought instead of the length of time they had been together as a couple as of the date of dissolution, rather than as of the actual time of the marriage at the time the property division language in issue in this appeal was agreed upon.

Because the court's prior order had stated Ms. Peterson had a remedy under the decree of dissolution, CP 34, Ms. Peterson at the same time as the CR 60 motion obtained an order to show cause for contempt regarding the Mr. Graham's failure to provide for Ms. Peterson's health care insurance in violation of the decree. CP 42, 43. In the CR 60 motion, Ms. Peterson sought a QDRO that would address the cost of future health insurance and that would also reimburse her for her monthly insurance payments of \$672.79 from August 25, 2011 to June 30, 2012 in the total amount of \$6727.90.⁴ CP 40–41.

Ms. Peterson located Mr. Graham in Spokane and was able to have him served with the orders to show cause and the related documents. CP 40–41, SCP 56–59. The court noted on August 30, 2012 that Mr. Graham had been served but did not appear. CP 49. Nevertheless, as he had done throughout the entire case—including this appeal—since he signed the joinder, findings and decree on April 25, 2008, Mr. Graham did nothing.

On August 30, 2012 the court granted the motion for contempt in the amount requested, CP 46–48,⁵ and denied the CR 60 motion. CP 49.

⁴ Ms. Peterson did not include the 11 months unpaid insurance from December 2010 to October 2011, the date of her Motion to Clarify. CP 32. She also recognized that in requesting a QDRO in a specific amount, she would be bearing the risk that the cost of her insurance might rise. CP 32

⁵ The Order on Show Cause Re Contempt/Judgment contains no purging language and paragraphs 3.6 and 3.8 refer to the "amended Decree of

In denying the CR 60 motion, the court found that Ms. Peterson

as a pro se drafted the language regarding respondent's pension and payment of [her] health insurance, and that she has exercised the remedy she drafted, that is, to seek contempt provisions.

The court also concluded that "no provision of CR 60(b) supports [Ms. Peterson's] motion." CP 49. There was no motion to revise the commissioner's ruling, and this appeal timely followed. CP 50–51.

Subsequent to filing the appeal, Ms. Peterson obtained an attorney to enforce the contempt judgment of \$6,727.90, CP 46–48, through garnishment proceedings but was able to collect only \$183.81 from Mr. Graham's bank account before it was closed. She also learned the cost of locating other possible accounts was prohibitive. SUP EV, attached hereto.

C. SUMMARY OF ARGUMENT

The Court Commissioner's Order denying the Appellant's motion to vacate and enter a new decree failed to provide the Appellant the health insurance that she had agreed to take in exchange for not claiming her portion of the Respondent's pension. The Court Commissioner also failed to recognize the proviso of Paragraph 3.2 Other of the property division agreement; and in doing so the court gave the Appellant her own remedy in the form of a judgment that was not part of the proviso.

Dissolution." The undersigned, as trial counsel, had drafted the language in expectation of succeeding on the CR 60 motion, when it was handed to the court, both he and the court likely overlooked the language.

D. ARGUMENT

I. THE STANDARD OF REVIEW ON APPEAL OF A DECISION RULING ON A CR 60 MOTION IS ABUSE OF DISCRETION.

The trial court's disposition of a motion to vacate under CR 60 will not be disturbed on appeal unless the trial court clearly abused its discretion. *Lindgren v. Lindgren*, 58 Wn.App. 588, 595, 794 P.2d 526 (1990); *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable.

State ex rel. Campbell v. Cook, 86 Wn. App. 761, 766, 938 P.2d 345 (1997).

II. THE COURT ABUSED ITS DISCRETION WHEN IT FAILED TO PROPERLY CONSTRUE PARAGRAPH 3.2 OTHER SO AS TO GIVE EFFECT TO ITS BEING A PROPERTY DIVISION.

In the Decree of Separation at Paragraph 3.2, Appellant Joanne Peterson agreed to forego an interest in the Respondent's retirement account if he fulfilled a specified condition (emphasis added):

The Respondent should be awarded his Northwest Ironworker Retirement Trust Pension and Annuity, *providing he maintains* medical, dental, and vision insurance for the Petitioner. In the event this insurance is not provided, *Respondent shall pay* to the Petitioner the cash amount needed for her to secure her own insurance.

A. Paragraph 3.2 Other is a property settlement.

Ms. Peterson clearly states the reason for Paragraph 3.2 Other was "in lieu of my taking a portion of his pension, to which I was entitled". CP 31. She then stated his consideration, that "I agreed to have him cover my

insurance costs instead.” *Id.* Mr. Graham was given two options in keeping his part of the agreement. Either “he maintains” Ms. Peterson’s health care insurance or “he shall pay” Ms. Peterson the cash equivalent.

- B. Mr. Graham agreed to and was affirmatively required to take action to provide Ms. Peterson’s health care insurance.

The language is also clear that the burden was on Mr. Graham to do something. Though he had a choice, he was to either “maintain” or “pay”. Unfortunately, Mr. Graham has shown himself completely irresponsible in keeping what the decree required of him. After signing the joinder to the petition for legal separation, the findings and the decree, he has done nothing whatsoever. He did not maintain insurance for Ms. Peterson. He did not pay her the cash equivalent as an alternative. He did not participate in any way in at least five hearings in the trial court, even though he was personally served two orders to show cause. And as this court knows, he has not participated at all in the appeal.

- C. Ms. Peterson was not required to do anything in order to obtain the money to pay for her insurance.

Commissioner Schaller erred when she said Ms. Peterson “drafted” her own remedy, “that is, to seek contempt provisions.” Nothing in the decree indicates that Ms. Peterson separated her receipt of insurance from her property interest in Mr. Graham’s pension. The court told Ms. Peterson to enforce the order with contempt proceedings, CP 34–5.

Following the court's wishes, Ms. Peterson filed a motion for contempt as an alternative, yet expecting the court to grant her CR 60 motion. CP 48; *see also* note 5, *supra*. The court's imposing a remedy on Ms. Peterson has the effect of removing any sense that in Mr. Graham's covering the cost of insurance—by providing it or its cash equivalent—the insurance represented Ms. Peterson's property interest.⁶

D. The court failed to give effect to all words of Paragraph 3.2 Other, completely disregarding the word "providing".

1. *Orders are to be construed so that there is no superfluous language.*

Appellant asks the court to construe Paragraph 3.2 Other in its entirety and acknowledge that none of the words used were superfluous.

⁶ Ms. Peterson is not precluded by the election of remedies doctrine. "The purpose of the doctrine of election of remedies is to prevent a double redress for a single wrong." *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 112, 942 P.2d 968 (1997). The doctrine requires three elements be met to exclude redress: (1) there must be two or more remedies available when a remedy is selected; (2) the remedies are repugnant and inconsistent with one another; and (3) the party to be bound chose one of the remedies. *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971).

In this case, the court, not Ms. Peterson, selected the contempt remedy, thus defeating the application of the rule. Moreover, it is doubtful whether there was a second remedy available—modifying the decree of dissolution to include a QDRO—since the Commissioner consistently rejected and disregarded that as a remedy for Ms. Peterson. CP 34–35, 49.

Also, Ms. Peterson is not asking for a QDRO in addition to the judgment received. If the court grants her appeal, the judgment would be vacated, leaving an arrearage. An additional amount of payment \$200.00 per month would be included in the QDRO until the arrearage were paid off, making the election of remedies doctrine a nonexistent issue. CP 41.

When construing a decree, the court will use the “general rules of construction applicable to statutes, contracts and other writings.” *Chavez v. Chavez*, 80 Wn. App. 432, 436, 909 P.2d 314 (1996). “In construing a contract, a court must interpret it according to the intent of the parties as manifested by the words used.” *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980). Every word in a contract is assumed to have been used for a reason, and an interpretation that gives effect to all words should be applied instead of a reading that disregards some of the contract’s language. *Id.*; *Ball v. Stokely Foods*, 37 Wn. 2d 79, 83, 221 P.2d 832 (1950). The trial court completely disregarded the meaning of the word “providing”—that is, the proviso—in the decree.

2. *A proviso restricts what came before.*

While Appellant could find no Washington cases regarding contract provisos, except regarding real estate contracts, there are a number from other jurisdictions. “The purpose of a proviso clause is to restrict or clarify the scope of what came before.” *Nat’l Cas. Co. v. Lockheed Martin Corp.*, 764 F. Supp. 2d 756, 760 (D. Md. 2011).

3. *The meaning and effect of the proviso is to restrict the award of Mr. Graham’s pension.*

Though the court had previously said the decree is not vague and there was nothing to clarify, CP 34, it failed to account for the proviso. While a money judgment for Mr. Graham’s failure to “maintain or pay” is

a possible remedy, it is not the only remedy suggested by the language of the order. Considering the meaning of the proviso suggests another remedy that accounts for all language in the order. Specifically, Mr. Graham's receipt of the entire pension is dependent on *his* taking active steps to see that his wife (now ex-wife) had health care insurance. When he failed to so maintain or pay for her insurance, the award to him of his entire pension subsequently failed through the proviso. As suggested by the trial court in *Hammack v. Hammack*, 114 Wn. App. 805, 808, 60 P.3d 663 (2003) (n. 1) this was a "failure of consideration". And Mr. Graham, in the words of *In re Marriage of Thurston*, 92 Wn. App. 494, 497, 963 P.2d 947 (1998), "frustrated the terms of the property [division] and decree." There certainly needs to be clarification of the effect of Mr. Graham's failure to obey the terms of the property award.

Paragraph 3.2 Other reflected Ms. Peterson's exchange of a property interest in her husband's pension for the security of health care insurance. Any other reading disregards the word "provided" and should be avoided so as to give effect to all words in the paragraph. Since the Respondent did not fulfill his agreed obligation, he should not get his pension in its entirety. Ms. Peterson's remedy should be to have a QDRO. This would preserve the substance of the agreed order while also precluding Mr. Graham from denying *sub silentio* what Ms. Peterson was awarded.

4. *The court abused its discretion when it failed to give effect to all words in Paragraph 3.2 Other.*

The court commissioner exercised her discretion on untenable grounds or for untenable reasons, or her discretionary act was manifestly unreasonable. *State ex rel. Campbell v. Cook*, 86 Wn. App. at 766.

The court first failed to exercise its discretion liberally and equitably to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done. *See*, section III.A, immediately following. Her denial was thus manifestly unreasonable because she could have easily solved Ms. Peterson's true problem at no expense to Mr. Graham, while taking into account the language of the decree. Her decision was manifestly unreasonable because there was complete disregard, with no explanation, of the proviso in Paragraph 3.2 Other—which violated well-established rules of construction.

The court further based its decision on untenable grounds when it chose a remedy (contempt judgment) that disregarded language in the decree, especially when that remedy was significantly more burdensome on Ms. Petersen than the remedy of a QDRO would be on Mr. Graham. *See*, SUPP EV.

The court made its decision for an untenable reason when it found Ms. Peterson had drafted a remedy (to seek "contempt provisions") when such language is not found in the decree.

III. PARAGRAPH 3.2 OTHER OF THE DECREE SHOULD BE VACATED UNDER CR 60(b)(11).

- A. The court should exercise its authority in deciding a motion to vacate liberally and equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.

RCW 26.09.170(1) clearly limits the ability of a party to modify the property division of a dissolution decree, absent conditions.

. . . The provisions 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.

Such conditions are found in CR 60. In discussing CR 60, the court stated in *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985):

Proceedings to vacate judgments are equitable in nature and the court should exercise its authority liberally “to preserve substantial rights and do justice between the parties.” *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978).

Haller, quoted by *Hardt*, cited the case of *White v. Holm*, 73 Wn. 2d 348, 351, 438 P.2d 581 (1968) for the same principle:

At the outset, we pause to note that a proceeding to vacate or set aside a default judgment, although not a suit in equity, is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943). Thus, we early took occasion to endorse the proposition that in such proceedings the court, in passing upon an application which is not manifestly insufficient or groundless, should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done. *Hull v. Vining*, 17 Wash. 352, 49 P. 537 (1897).

Washington has thus long recognized—well before the civil rules were adopted, and at least as early as 1897—the equitable nature and goal of the procedure for vacating judgments.

Ms. Peterson’s motion is not manifestly insufficient nor is it groundless. She requested that her substantial rights be preserved because they were in fact being denied. And she requested a remedy that would explicitly preserve the rights of Mr. Graham as well, resulting in justice being fairly and judiciously done. The trial court, however, did not exercise its authority liberally or equitably to that end.

B. CR 60 provides several bases on which the court can liberally and equitably exercise its authority to preserve Ms. Peterson’s substantial rights and do justice between the parties.

1. *CR 60(b)(1): Mistake.*

CR 60(b) permits relief for a final judgment under subsection (1) for “Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” Ms. Peterson made a mistake in not clarifying in the decree what remedy would be available to her should Mr. Graham not comply with the proviso that limited his right to receive his entire pension. A further mistake was made in that, while the pension was addressed in the decree, there is no mention of it in the findings or conclusions of law. *Cf.* CP 12–16. The purpose of Paragraph 3.2 Other and the meaning of the proviso were thus not addressed in the findings.

2. *CR 60(b)(4): Misconduct of Mr. Graham.*

CR 60(b) permits relief for a final judgment under subsection (4) for “Fraud . . . , misrepresentation, or other misconduct of an adverse party”. Mr. Graham’s misconduct is the very reason Ms. Peterson has sought further relief in the courts. He has failed to fulfill his part of the bargain. Ms. Peterson gave up her rights to the security of pension payments in exchange for Mr. Graham’s providing her insurance. While it is not known whether he intended his misconduct at the time he signed the documents, there can be very little question that his total disregard of his obligation under the decree—as well as in the court process—has been intentional. Regardless of what Mr. Graham intended at the signing, “the fact that the acts complained of occurred after the entry of judgment does not bar relief” under CR 60(b)(4). *Suburban Janitorial Services v. Clarke Am.*, 72 Wn. App. 302, 309, 863 P.2d 1377 (1993).

3. *CR 60(b)(11): Any other reason justifying relief.*

In the event this court determines (b)(1) and (b)(4) to be inapplicable, CR 60(b)(11) also permits relief from a final judgment for “[a]ny other reason justifying relief from the operation of a judgment.” As *Hammack* stated: “A dissolution decree may be vacated for extraordinary circumstances to overcome a manifest injustice.” 114 Wn. App. 805, 810.

Application of this provision is limited to situations involving extraordinary circumstances not covered by any other

section of the rule. Such circumstances normally involve irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.

In re Marriage of Thurston, 92 Wn. App. 494, 499 (internal quotations and footnoted citations omitted). The irregularity in the present case—that Mr. Graham has completely failed to meet the insurance provision of the agreed property award—is extraneous to the action of the court as required under CR 60(b)(11).

Following *Thurston*, the *Hammack* court stated:

In *Thurston*, the appellate court affirmed the trial court's vacation of the property settlement because the husband failed to meet a material condition supporting the property division. *Thurston*, 92 Wn.App. at 503, 963 P.2d 947.

114 Wn. App. at 810. As the *Thurston* court had put it, “the nonoccurrence of that condition [to transfer property] constituted extraordinary circumstances warranting relief.” 92 Wn. App. at 503. In *Hammack*, the extraordinary circumstance was that a child support agreement in exchange for property was deemed void as against public policy; and there was thus, as noted *supra* at page 13, a “failure of consideration”. In *Thurston*, the husband did not cooperate in transferring property as mandated in the dissolution decree.

In the present case, health insurance was a material condition of Ms. Peterson’s agreed decree with Mr. Graham—she agreed to give up her interest in the retirement account in exchange for health insurance. Here,

as in *Thurston*, the husband failed to meet a material condition supporting the property division. And here, as in *Thurston*, the nonoccurrence of that condition [to maintain or pay insurance] constituted extraordinary circumstances warranting relief. And as in *Hammack*, due to Mr. Graham's complete failure to provide or provide for Ms. Peterson's insurance, Paragraph 3.2 Other of the decree should be vacated.

- C. The trial court abused its discretion in not vacating Paragraph 3.2 Other and in not replacing it with language that a QDRO be ordered.

Both *Thurston* and *Hammack* were appeals of trial court decisions granting motions to vacate the decree of dissolution. The present case is one where the trial court *denied* the motion to vacate.

1. *Ms. Peterson's CR 60 motion was the appropriate action to take.*

Though not involving a CR 60 motion, the case of *In re Marriage of Bobbitt*, 135 Wn. App. 8, 144 P.3d 306 (2006), explicitly states that a CR 60 motion is appropriate in Ms. Peterson's circumstances. There the (former) wife had judgments against the (former) husband, and the court modified the divorce decree to give her property that had been awarded to the husband. Pursuant to RCW 26.09.170(1), the appellate court held the trial court erred when it allowed the wife to sell the husband's property

to enhance her ability to collect her judgments against [him]. Because the time for appeal had run on the property division, her remedy was to file a Civil Rule 60 motion to vacate the decree or enforce any judgments by process of law.

Bobbitt, 135 Wn. App. at 18. The court in this case abused its discretion in limiting Ms. Peterson's remedy to enforcing the judgment, especially when it disregarded the language of the decree, as discussed *supra* at pages 11–12.

2. *The court abused its discretion in failing to recognize and advance the essential issue in Ms. Peterson's motion to vacate.*

The essential issue in Ms. Peterson's request for a QDRO is that the decree as it is written is prejudicial to Ms. Peterson due to Mr. Graham's intransigence. The solution she proposes would completely remove those prejudicial effects while having virtually no prejudicial effect on Mr. Graham's property interest or rights under the decree. He would get exactly what he would get after payment of Ms. Peterson's insurance. Though the order denying Ms. Peterson's motion, CP 49, is brief, one could infer, especially in light of the court's previous order denying clarification, CP 34–35, that the court was relying on the "doctrine of finality". *Cf. Flannagan v. Flannagan*, 42 Wn. App. 214, 215, 709 P.2d 1247 (1985). *Flannagan* dealt with the retroactivity of a federal statute dealing with military pensions. Though dealing with a different issue than here, the court stated:

[T]he proper test is "whether 'settled expectations honestly arrived at with respect to substantial interests' will be defeated." *Giroux*, 41 Wn.App. at 319–20, 704 P.2d 160, quoting 2 C. Sands, *Statutes and Statutory Construction* § 41.05 at 261 (4th ed. 1973).

42 Wn. App. at 223. In the same way, the settled expectations of the parties in the decree were that though Mr. Graham was to get his pension, he was

also going to be paying some of his money for Ms. Peterson's insurance. He thus reasonably expected that he would not have use of all of his pension money. The same result would obtain with a QDRO in place. He would not have practical use of all his pension money because some of it would pay for Ms. Peterson's insurance. But he would still get to keep all the pension money he would have gotten to keep legally before. And none of Mr. Graham's substantial rights would be defeated if there were a QDRO.

3. *Mr. Graham has made no objection to a QDRO.*

A maxim of equity is that "Equity imputes an intent to fulfill an obligation." 30A C.J.S. Equity § 134; *Anderson v. Purvis*, 211 S.C. 255, 264, 44 S.E.2d 611, 615 (1947). Mr. Graham signed his name to the joinder, the findings and the decree. He has made no objection to any of Ms. Peterson's motions regarding the decree, even though he was served with a copy of the proposed QDRO. CP 20. The court abused its discretion insofar as it saw itself as protecting Mr. Graham.

4. *The court abused its discretion in holding Ms. Peterson to all the negative consequences of having drafted the decree.*

The court found that "the Petitioner as a pro se drafted the language regarding Respondent's pension and payment of Petitioner's health insurance, and that she has exercised the remedy she drafted, that is to seek contempt provisions." It would appear that the court's emphasis on Ms. Peterson being pro se and having drafted the decree herself is almost

punishing her when the QDRO would help her, would not hurt Mr. Graham and would be consistent with the proviso in the decree.

IV. THE BEST SOLUTION FOR RESOLVING THIS MATTER IS TO ENTER A QDRO.

A. Money judgment is an incomplete and inadequate remedy.

Rather than interpreting Paragraph 3.2 Other in its entirety, the trial court substituted its own remedy for the Respondent's noncompliance.

While a money judgment ostensibly allows Ms. Peterson to recoup at least some of her judgment,⁷ in imposing that as the only remedy available, the court overlooked that Ms. Peterson bargained for the security of having her health care insurance provided, she did not just bargain for money. CP 41.

B. The best solution would be to have a QDRO in place.

In the context of a dissolution property award of a spouse's pension, it would appear the best way to address Mr. Graham's recalcitrance is to modify the decree to include a QDRO. A number of reasons are as follows:

- (1) Including a QDRO would accomplish the parties' intent;
- (2) A QDRO would not change the net division of property;
- (3) Ms. Peterson would have the security she had bargained for;
- (4) The parties would not be tied together indefinitely due to Mr. Graham having a monthly obligation to Ms. Peterson;
- (5) Mr. Graham would be freed from the administrative nuisance of having to worry about taking monthly action;

⁷ Ms. Peterson's Declaration, SUPP EV, clarifies the difficulty and ineffectiveness she has encountered in trying to enforce the judgment.

- (6) Conversely, Ms. Peterson would be free of the nuisance and emotional drain of continually having to hire an attorney and return to court to enforce the judgment due to the reasonably likely ongoing recalcitrance of Mr. Graham;
- (7) Ms. Peterson would be free from the additional emotional drain of having to worry about whether, even with a judgment, she would be able to collect from Mr. Graham;
- (8) Mr. Graham would be free from the emotional drain of not knowing whether his assets would be attached;
- (9) If Mr. Graham is inclined to hide his assets, it would free him from living in a condition of perpetually avoiding his obligations and “looking over his shoulder”;
- (10) The court would not be encumbered or clogged by repeated garnishment proceedings, even if they *were* to be fruitful for Ms. Peterson;
- (11) All administrative aspects of transferring money would be done by the pension fund, which is experienced and well-prepared to do for these parties as it does for numerous others at no expense to those parties.

There are likely other positive benefits to the parties and society from including a QDRO in a modified decree in this matter.

V. MS. PETERSON IS ENTITLED TO ATTORNEYS FEES, EXPENSES AND COSTS ON APPEAL.

Ms. Peterson requests attorneys fees and expenses under RAP 18.1 on both statutory and equitable grounds. She also requests costs under RAP 14.2. RCW 26.09.140 states in relevant part:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of

the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The second paragraph of the statute “must be read in light of the fact that the statute ties the award of fees to a consideration of financial circumstances.”

In re Marriage of Rideout, 150 Wn. 2d 337, 357, 77 P.3d 1174 (2003).

Ms. Peterson also requests attorneys fees based on Mr. Graham’s recalcitrance and intransigence.

Intransigence is a basis for awarding fees on appeal, separate from RCW 26.09.140 (financial need) . . . The financial resources of the parties need not be considered when intransigence by one party is established. *Marriage of Greenlee*, 65 Wn. App. at 711, 829 P.2d 1120; *Morrow*, 53 Wn. App. at 590, 770 P.2d 197.

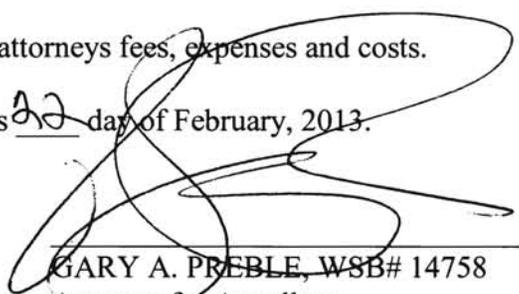
Mattson v. Mattson, 95 Wn. App. 592, 605–606, 976 P.2d 157 (1999). Mr. Graham’s intransigence and recalcitrance is seen first, in his failing to maintain or pay Ms. Peterson’s health care insurance as he agreed and was ordered, thus necessitating this action, and secondly, by his complete failure to appear or participate in the litigation below or this appeal.

Ms. Peterson thus requests that her attorney fees, expenses and costs on appeal be awarded pursuant to statute and on equitable grounds.

E. CONCLUSION

For all of the foregoing reasons, Appellant Joanne M. Peterson respectfully requests that the Court reverse the lower Court's Order denying her CR 60 Motion and Declaration to Vacate Decree of Legal Separation, and that the matter be remanded to the trial court to vacate Paragraph 3.2 Other, enter amended findings addressing Mr. Graham's pension, that a new Paragraph 3.2 Other be entered to include language for a QDRO, and that a QDRO be entered in the amount of Ms. Peterson's monthly insurance and to include arrearage and payment of attorneys fees, expenses and costs.

Respectfully submitted this 22 day of February, 2013.



GARY A. PREBLE, WSB# 14758
Attorney for Appellant,
Joanne M. Peterson (fka Graham)

**APPENDIX
Declaration**

COPY

RECEIVED
JAN 18 2013

**IN THE COURT OF APPEALS CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON DIV II STATE OF WASHINGTON**

JOANNE M. GRAHAM, Appellant, and ARCH D. GRAHAM , Respondent.	NO. 44016-4-II DECLARATION OF JOANNE GRAHAM nka PETERSON
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I, Joanne M. Peterson, above-entitled, declare as follows:

On August 30, 2012, Thurston County Court Commissioner Christine Shaller granted an order of Judgment against the Respondent, Mr. Arch Graham, in the amount of \$6,727.90, for arrearage payments owed to me by Mr. Graham from July, 2011 to July 2012.

On or about November 8, 2012, I contacted attorney Jack W. Hanemann of Olympia, Washington. Mr. Hanemann agreed to proceed with garnishment of Mr. Graham's Ironworkers Credit Union Bank account in which the main office for this purpose is in Portland, Oregon.

On November 20, 2012, the garnishment documents were sent to Mr. Graham's credit union. The Ironworkers Credit Union advised Mr. Hanemann there was \$183.81 in the account. These funds were deposited into the Thurston County Superior Court Registry, and I received those funds on December 20, 2012.

After I received the \$183.81, I contacted P. Larry Walsh of Bayside

Professional Investigations inquiring how to find any new bank accounts Mr. Graham may have opened for automatic deposit of his pension and other funds. Mr. Walsh told him he could do those bank searches for me, but at the cost of \$500.00 per search. I do not have the money to hire Mr. Walsh to do these searches, and I cannot afford to do bank searches in the future.

It has cost me more money to try and enforce the judgment, than I have received. The money I have spent to date to try and enforce the judgment given me by Commissioner Shaller, is more than I have received through the judgment.

I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct. Signed this 18th day of January, 2013 in Tacoma, Washington.



JOANNE M. PETERSON
fka GRAHAM

2013 FEB 25 AM 9:09

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

BY *cm*
DEPUTY

JOANNE M. GRAHAM,

Appellant,

and

ARCH D. GRAHAM ,

Respondent.

NO. 44016-4-II

**CERTIFICATE OF
SERVICE**

CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of February, 2013, she caused a copy of the Supplemental Designation of Clerk's Papers to be served on the party listed below by the method indicated:

Counsel/Party	Additional Information	Method of Service
Clerk of Court of Appeals Division II State of Washington	950 Broadway, Suite 300 Tacoma, Washington	USPS

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed this 22nd day of February, 2013, at Olympia, Washington.

 Trish Evans
TRISH EVANS

IN THE COURT OF APPEALS
STATE OF WASHINGTON DIVISION II

RECEIVED
FEB 25 2013

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

JOANNE M. GRAHAM, Appellant, and ARCH D. GRAHAM , Respondent.	NO. 44016-4-II CERTIFICATE OF SERVICE
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of February, 2013, she caused a copy of the Appellant's Amended Brief to be served on the party listed below by the method indicated:

Counsel/Party	Additional Information	Method of Service
Arch D. Graham, Pro Se Respondent	P.O. Box 15117 Spokane, Washington 99215	USPS Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed this 22nd day of February 2013, at Olympia, Washington.



TRISH EVANS