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NO. 32158-4-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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JOANNE M. GRAHAM

Appellant

and

ARCH DAVIN GRAHAM,

Respondent.

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REPLY BRIEF

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## A. FOCUS OF ARGUMENT

This case centers around the meaning of Paragraph 3.2 Other of the Decree of Legal Separation, CP 9, 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.

(Emphasis added.) *See also*, Petition, CP 5, and Order on Motion to Convert Decree of Legal separation to Decree of Dissolution, 24.<sup>1</sup>

## B. REPLY TO RESPONDENT’S BRIEF

### 1. Respondent’s Statement of Case Should be Stricken.

Ms. Peterson has filed a separate Motion to Strike the bulk of Mr. Graham’s Statement of the Case because it is not found in the record.

### 2. Like the trial court, Respondent fails to address the proviso in Paragraph 3.2 Other.

Respondent repeats the same fundamental error made by the trial court—he fails to address the meaning of the proviso in the language of the decree in question quoted above, proceeding as if the words “providing that” are not part of the decree. *See* Appellant’s Brief at 9–12.

### 3. Respondent claims with little if any basis in law that a Decree will be construed against its drafter.

Mr. Graham also repeats the trial court’s error that the Decree is to

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<sup>1</sup> Though converted to a Decree of Dissolution, the language of the Decree of Legal Separation will be referred to herein as the “Decree”.

be construed against Ms. Peterson because she drafted it. CP 49. Mr. Graham's error begins with a critical misstatement of fact—"Here the Court had to interpret the Legal Separation Contract as it was written." Respondent's Brief at 9. Nowhere in the record is there any mention of a "legal separation contract". Use of that term is a questionable attempt to confuse terms in order to justify his construction of the Decree. RCW 26.09.070(3) speaks of both legal separations and separation contracts, but they are clearly identified as two different things.<sup>2</sup>

After his attempt to denominate the Decree as a contract, Mr. Graham cites in support of his position *McKasson v. Johnson*, 178 Wn. App. 422, 315 P.3d 1138 (2013), a case construing a noncompete clause in an employment contract. However, apart from quoting the trial court's statement that Ms. Peterson "as a pro se drafted the language" in question, Mr. Graham cites no authority that a Petition for Legal Separation with a Joinder is a contract or that it should be construed against the drafting petitioner. WestlawNext lists 54 cases from 1914 until *McKasson* in December 1913 for the Contracts KeyNumber entitled "155 —Construction against party using words". None of those cases in the last 100 years

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<sup>2</sup> Respondent's confusion of terms may have come from *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980), cited by Petitioner for the principle that all words of a contract are to be given effect. Appellant's Brief at 10. *Wagner* dealt with a Separation Contract, which by statute is "binding upon the court" as to property division. RCW 26.09.070(3). See also, *Chavez*, 80 Wn. App. at 435–36, *infra*. Nevertheless, Respondent's use of his own term "Legal Separation Contract" nine times, Respondent's Brief at 6, 7, 9, 10, 16 and 18, suggests more than mere confusion.

addresses construction of a court order, let alone a dissolution decree.

**4. The long-standing rule for construing a decree is to ascertain the intent of the court that entered the decree.**

A Decree is an order signed by the court and it is the court's intention—not the intention of the party who drafted the order for the convenience of the court—that is reviewed on appeal.

Construction of a decree is a question of law. *In re Marriage of Gimlett*, 95 Wn.2d 699, 704–05, 629 P.2d 450 (1981). Thus, it is reviewed de novo. *State v. Campbell*, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995). This court recently affirmed the long-standing rule regarding interpretation of judgments:

‘Where a judgment is ambiguous, a reviewing court seeks to ascertain the intention of the court entering the original decree by using general rules of construction applicable to statutes, contracts and other writings.... Normally the court is limited to examining the provisions of the decree to resolve issues concerning its intended effect.’

*In re Marriage of Sager*, 71 Wn.App. 855, 862, 863 P.2d 106 (1993) (quoting *Gimlett*, 95 Wn.2d at 704–05, 629 P.2d 450).

(Emphasis added.) *Chavez v. Chavez*, 80 Wn. App. 432, 435–36, 909 P.2d 314 (1996). It should be obvious that if the intention of the court is the inquiry, it is immaterial who drafted the language.

**5. Mr. Graham's citation of *Wherley* is misplaced in opposition to Ms. Peterson's claim of mistake.**

In response to Ms. Peterson's claim of mistake under CR 60(b)(1), Mr. Graham cites *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983) for the proposition that the pro se litigant takes a risk in

representing herself. *Wherley*, however, is inapposite because it deals with a case where the person claiming mistake claimed the property division was unfair. Ms. Peterson makes no claim of unfair division. Her claim is that the mistake precludes her in all reality from receiving what was ordered. She only wants to receive what the court awarded her had the mistake not enabled Mr. Graham to keep it from her.

**6. Mr. Graham's citation of *Marriage of Curtis* is misplaced as to Ms. Peterson's claim of misconduct by Mr. Graham.**

In response to Ms. Peterson's claim of mistake under CR 60(b)(4), Mr. Graham cites *In re Marriage of Curtis*, 106 Wn. App. 191, 23 P.3d 13 (2001) for the proposition that a property division will not be set aside as unfair. In the case, the husband was found in contempt when he refused to fulfill a monetary obligation under the decree because the wife refused to acknowledge she had received all personal property due her. The wife's complaint was that the property division she had agreed to was unfair. Again, Ms. Peterson makes no claim of unfair division. Her claim is that Mr. Graham's recalcitrance and disregard precludes her in all reality from receiving what was ordered.

And though, as Mr. Graham correctly points out, *Suburban Janitorial Services v. Clarke Am.*, 72 Wn. App. 302, 309, 863 P.2d 1377 (1993), is "strictly limited" to its facts, that case nevertheless stands for the proposition that misconduct occurring after entry of the judgment does not necessarily bar relief. *See* Appellant's Brief at 15.

**7. Mr. Graham's other arguments.**

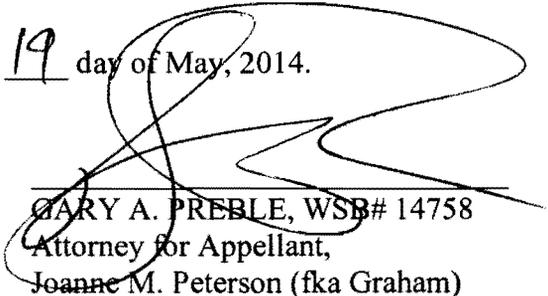
Mr. Graham's remaining arguments are already sufficiently addressed in the Appellant's Brief.

**C. 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.

If Ms. Peterson's appeal is denied, Mr. Graham would have a windfall and she would receive virtually none of the insurance awarded to her. Granting Ms. Peterson's appeal would secure what the Decree awarded and would leave Mr. Graham in no different position than had he paid her insurance all along.

Respectfully submitted this 19 day of May, 2014.

  
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