

64739-3

64739-3

NO. 64739-3-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

BLAINE J. WEBER, APPELLANT

v.

CORRIE WEBER, RESPONDENT

Appeal from the Superior Court of King County
The Honorable Jeffrey M. Ramsdell

No. 07-3-00384-7

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS
DIVISION I
2010 JUL 12 PM 12:42

By Philip C. Tsai
Philip C. Tsai, WSBA #27632
Todd R. DeVallance, WSBA #32286
Attorney for Respondent

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF ISSUES IN RESPONSE.....1

 A. The Trial Court did not abuse its discretion by refusing to vacate the property division as set forth in the Decree of Dissolution dated March 14, 2008 under CR 60(b)(6) and (11) where Blaine’s motion to vacate was filed a year and half after the Decree was entered and the basis for the motion was a post-decree change in the value of Blaine’s partnership interest with Weber + Thompson, LLC.....2

 1. Did the Trial Court err by denying Blaine’s CR 60(b)(6) motion to vacate the decree where the basis for the motion was a post-decree change in the value of an asset awarded to Blaine, distinctively where the judgment was entered pursuant to settlement agreement?.....2

 2. Did the Trial Court err by denying Blaine’s CR 60(b)(11) motion to vacate the decree due to a post-decree change in the value of an asset awarded to Blaine?.....2

 B. Corrie should be awarded attorneys’ fees pursuant to RCW 26.09.140 for the costs incurred in responding to Blaine’s CR 60 motions and subsequent appeal.....2

III. <u>STATEMENT OF THE CASE</u>	2
IV. <u>ARGUMENT</u>	7
A. A post-decree change in the value of an assets is not a basis to set aside a judgment under CR 60(b)(6) or CR 60(b)(11). To set aside a final dissolution decree pursuant to CR 60(b)(11), which permits the court to vacate a judgment for “any other reason justifying relief,” the requesting party must show more than a post-decree change in the value of assets.....	8
1. CR 60(b)(6) does not provide relief from a judgment due to a post-decree change in the value of an asset, distinctively where the judgment was entered pursuant to settlement agreement	8
2. Pursuant to RCW 26.09.170(1) and <i>In re Marriage of Knutson</i> the court properly denied Blaine’s CR 60(b)(11) motion to vacate the property division as set forth in the March 14, 2008 Decree of Dissolution.....	17
B. Corrie should be awarded attorneys’ fees pursuant to RCW 26.09.140 for the costs incurred in responding to Blaine’s CR 60 motions and subsequent appeal.....	26
V. <u>CONCLUSION</u>	26
VI. <u>CERTIFICATE OF SERVICE</u>	27

TABLE OF AUTHORITIES

Washington Cases

In Re Marriage of Giroux, 41 Wn.App. 315, 322,
704 P.2d 160 (1985).....10, 11

Haller v. Wallis, 89 Wn.2d 539, 573 P.2d 1302 (1978).....7

In re Marriage of Irwin, 64 Wn.App. 38,
822 P.2d 797 (1992).....11, 17, 19, 20

In re Marriage of Jennings, 138 Wn.2d 612,
980 P.2d 1248 (1999).....8, 22, 23, 24

In re Marriage of Knutson, 114 Wn.App. 866,
60 P.3d 681 (2003).....11, 17, 18, 19, 20, 21

Metropolitan Park District of Tacoma v. Griffith, 106 Wn.2d 425,
723 P.2d 1093 (1986).....12, 13, 14

In re Marriage of Thurston, 92 Wn.App. 494,
963 P.2d 947 (1988).....24, 25

Shaw v. City of Des Moines, 109 Wn.App. 896,
37 P.3d 1255 (2002).....7, 25

In re Marriage of Yearout, 41 Wn.App. 897, 902,
707 P.2d 1367 (1985).....11, 19

Washington Statutes

RCW 26.09.07016

RCW 26.09.14025

RCW 26.09.170(1)17

Rules and Regulations

Civil Rule 60(b)(6).....8, 11, 13

Civil Rule 60(b)(11).....8, 11, 17, 18, 19

I. INTRODUCTION

Appellant, Blaine Weber, has requested a review of the Trial Court's ruling dated December 14, 2009 denying his Motion to Revise the Commissioner's Ruling of November 5, 2009 in which the Court denied his Motion to Vacate the Decree of Dissolution entered on March 14, 2008 pursuant to CR 60(b)(6) and CR 60(b)(11). Blaine seeks to vacate only that portion of the Decree that awards a promissory note to the Respondent, Corrie Weber, in the amount of \$465,000, representing her equitable interest in the marital assets awarded to Blaine. Specifically, Blaine argues that because the value of his partnership interest in Weber + Thompson, LLC has decreased since the entry of the decree he should be excused from that portion of the decree that required him to buy out Corrie's marital interest in the partnership. Blaine's motion fails to recognize the fact that many of the assets awarded to Corrie have also decreased in value since the entry of the Decree on March 14, 2008.

II. STATEMENT OF ISSUES IN RESPONSE

A. The Trial Court did not abuse its discretion by refusing to vacate the property division as set forth in the Decree of Dissolution dated March 14, 2008 under CR 60(b)(6) and (11) where Blaine's motion to vacate was filed a year and a half after the decree was entered and the

basis for the motion was a post-decree change in the value of Blaine's partnership interest with Weber + Thompson, LLC.

1. Did the Trial Court err by denying Blaine's CR 60(b)(6) motion to vacate the decree where the basis for the motion was a post-decree change in the value of an asset awarded to Blaine, distinctively where the judgment was entered pursuant to settlement agreement?
2. Did the Trial Court err by denying Blaine's CR 60(b)(11) motion to vacate the decree due to a post-decree change in the value of an asset awarded to Blaine?

B. Corrie should be awarded attorneys' fees pursuant to RCW 26.09.140 for the costs incurred in responding to Blaine's CR 60 motions and subsequent appeal.

III. STATEMENT OF THE CASE

Appellant, Blaine Weber (hereinafter 'Blaine'), and Respondent, Corrie Weber (hereinafter 'Corrie'), were married in August of 1974. CP 295. Blaine matriculated at the University of Hawaii and University of Washington where he studied architecture. CP 299. Blaine later attended architectural courses at the Harvard Graduate School of Design. CP 299. During the course of their marriage, Blaine founded Weber + Thompson, LCC in 1987, a successful and highly regarded architecture firm in Seattle, Washington. CP 149, 299. Blaine was named one of 18 city shapers by Seattle Magazine in 2006, he has written numerous articles and

publications over the years, and in 2007 his adjusted gross income reached \$514,958.00. CP 296.

In May 2006, the parties separated. CP 25. At the time of separation, Corrie was unemployed and had not worked since September 2005. CP 71. Prior to September 2005, Corrie was employed as a legal assistant where she earned approximately \$60,000.00 a year. CP 68-71.

During their 33 years of marriage, the parties had accumulated mutual assets, including but not limited to real property, business interest, retirement accounts, bank accounts, personal property, and life insurance policies, with a net value of \$2,018,919. CP 262-263. After two separate mediation sessions with retired Judge Larry Jordan in November 2007 and February 2008, the parties reached a settlement agreement on March 14, 2008. CP 149. In order to effectuate a 56%/44% division of the assets and liabilities, a transfer payment of \$465,000.00 was awarded to Corrie, secured by a promissory note. CP 26.

Pursuant to the Property Settlement Agreement, a Decree of Dissolution was entered with the King County Superior Court on March 14, 2008. CP 297. Specifically, the Property Settlement Agreement states:

5.3 Property Transfer Payment to Wife. In addition to the property division, in order to effectuate the overall 56%/44% community property division, the Wife shall receive a property transfer payment of \$465,000. No interest shall run on this transfer payment for the first 12 months (i.e. interest will not accrue until 2/8/09). Thereafter simple interest shall accrue at 6% per annum. Monthly interest payments shall be made from February 8, 2009 through August 8, 2009, paid on the 8th of each month. Quarterly interest payments shall be made on the remaining balance thereafter, due and payable on January 1, April 1, July 1, and October 1. Twenty-five percent of the transfer payment shall be paid on August 8, 2009, 25% on August 8, 2010, 25% on August 8, 2011, and 25% on August 8, 2012. If payment is not timely made, interest shall run at the statutory rate. This payment shall be secured and payable per the terms set forth in the attached Promissory Note and Pledge and Escrow Agreement (Exhibit 2). The entire balance due shall be paid in full to the wife on or before January 1, 2012 or sooner per the terms of the Promissory Note and Pledge and Escrow Agreement. If the Pledge and Escrow agreement cannot be honored by Weber + Thompson the security for this obligation shall be determined via binding arbitration under RCW 7.04A before the Honorable Larry Jordan (Ret.). This Section 1041 property transfer payment to the wife is expressly not maintenance. This payment is not taxable to the wife and not tax deductible to the husband.

CP 297, 491-492 (Respondent's Sealed Financial Source Documents).

The Decree of Dissolution specifically incorporates the provisions of the Property Settlement Agreement into Paragraphs 3.2 and 3.3 as follows:

3.2 Property to the Husband

The husband is awarded as his separate property the property set forth in the Property Settlement Agreement

executed by the parties on March 14, 2008. The Property Settlement Agreement is incorporated by reference as part of this Decree. Pursuant to RCW 26.09.070(5), the Property Settlement Agreement is not filed with the Court.

3.3 Property to the Wife

The wife is awarded as her separate property the property set forth in the Property Settlement Agreement referenced above.

CP 297-298, 360-361.

The terms of both the Property Settlement Agreement and Decree of Dissolution reflect the agreement reached between the parties. CP 298. Similar to most settlement agreements, both parties made compromises which took into consideration a variety of factors. For example, Blaine was awarded 100% of the community's interest in Weber + Thompson, LLC. CP 298. Blaine's expert witness, Steve Kessler, valued the marital interest in Weber + Thompson, LLC at \$539,000. CP 113. Whereas Corrie's expert witness, Bob Duffy, valued the marital interest at \$900,000. CP 298. The parties agreed to a value \$700,000 in the Property Settlement Agreement. CP 298, 492. Blaine was awarded various assets, including the community's entire interest in Weber + Thompson, CP 303, CP 438 (Property Settlement Agreement ¶ 5.4). In exchange, Corrie agreed to accept a promissory note in the amount \$465,000 as an equalizing payment to reach the desired 56%/44%

division of assets. CP 303, CP 438 (Property Settlement Agreement ¶ 5.3).

At the time the Property Settlement Agreement was reached, the U.S. economy had been experiencing a recession for approximately three months. CP 30. Since March 14, 2008 all of the terms of the Property Settlement Agreement have been completed except for Blaine's obligation on the transfer payment to Corrie in the amount of \$465,000. CP 438 ¶ 5.3. Blaine received proceeds in the amount of \$233,180.90 from the sale of real property, Blaine received \$115,664.00 from his Weber + Thompson 401(k) Plan, and Blaine received all of the other assets awarded to him in the Property Settlement Agreement. CP 438-441. Conversely Corrie sustained a loss in the amount of \$32,147.35 from the sale of the Aliso Viejo, California real estate that was awarded to her, she incurred tax liabilities in the approximate amount of \$145,000.00 from the assets awarded to her, and she has yet to receive a payment from Blaine on the \$465,000 promissory note. CP 438-441.

On September 24, 2009, Blaine filed a Motion for Order to Show Cause pursuant to CR 60. CP 140. Blaine sought to vacate the Decree of Dissolution and Property Settlement Agreement dated March 14, 2008. CP 140. The parties appeared before Commissioner *Pro Tempore* Marilyn Sellers on November 5, 2009 and the Court denied Blaine's

Motion to Vacate the Decree of Dissolution. CP 481. In denying the CR

60 Motion, the Commissioner stated:

The Court's ruling is based on the legal standard set forth in Civil Rule 60(b). The Court finds that if this motion were granted, it would open the flood gates of litigation as the change in value of an asset is not a basis to set aside the property settlement agreement.

CP 482.

Blaine then filed a Motion for Revision of the Commissioner's Ruling. On December 14, 2009, Judge Jeffrey M. Ramsdell confirmed the Commissioner's ruling. CP 483.

Blaine seeks review of the Trial Court's Order on Revision entered on December 14, 2009 denying his Motion to Revise the Commissioner's Ruling of November 5, 2009. CP 237.

IV. ARGUMENT

The vacation of a judgment under CR 60 lies within the discretion of the Trial Court and an abuse must be plainly apparent to warrant reversal on appeal. *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978). A Trial Court's decision on whether to vacate a judgment or order is reviewed for an abuse of discretion; the decision will not be overturned on appeal unless it plainly appears that the Trial Court exercised its

discretion on untenable grounds or for untenable reasons. *Shaw v. City of Des Moines*, 109 Wn.App. 896, 37 P.3d 1255 (2002).

A. A post-decree change in the value of an asset is not a basis to set aside a judgment under CR 60(b)(6) or CR 60(b)(11). *In re Marriage of Knutson*, 114 Wn.App. 866, 60 P.3d 681 (2003). To set aside a final dissolution decree pursuant to CR 60(b)(11), which permits the court to vacate a judgment for “any other reason justifying relief,” the requesting party must show more than a post-decree change in the value of assets. *In re the Marriage of Jennings*, 91 Wn.App. 543, 958 P.2d 358, review granted 137 Wn.2d 1007, 978 P.2d 1097, reversed 138 Wn.2d 612, 980 P.2d 1248, amended on denial of reconsideration (1998).

1. CR 60(b)(6) DOES NOT PROVIDE RELIEF FROM A JUDGMENT DUE TO A POST-DECREE CHANGE IN THE VALUE OF AN ASSET, DISTINCTIVELY WHERE THE JUDGMENT WAS ENTERED PURSUANT TO SETTLEMENT AGREEMENT.

Civil Rule 60(b)(6) allows a party to bring a motion for relief from a final judgment if “the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.” Blaine argues that a temporary decrease in

the value of a marital asset (i.e. Weber + Thompson, LLC) is grounds to vacate the property division. Blaine is not seeking to vacate the entire decree, but only that portion of the decree that pertains to Corrie's equitable interest in the assets awarded to Blaine.

Blaine's basis for vacating the decree under CR 60(b)(6) is that he received "essentially nothing from the marital assets." App. Br. at 2-3. Blaine's position that he received "essentially nothing" is conclusory and unsupported by the record. The net value of the assets awarded to Blaine was \$1,353,588.00 and included 100% of the community's interest in Weber + Thompson, LLC. CP 263. The intended 56%/44% division of assets was contingent on Blaine making the cash transfer payment of \$465,000.00 (thus decreasing the value of the assets awarded to Blaine to \$888,588). The exclusion of the \$465,000.00 promissory note that was awarded to Corrie would have resulted in Corrie receiving less than 33% of the community assets. If Corrie would not have agreed to accept a promissory note in the amount of \$465,000.00, there would have been a substantial change in the overall property division to attain the desired 56%/44% division of property. CP 262-263, 491. Moreover, Blaine fails to recognize those assets awarded to Corrie that have decreased in value since the date of the decree. For instance, the Aliso Viejo, California

property that Corrie was forced to sell at \$110,000.00 less than the value stated in the Property Settlement Agreement. CP 304, CP 439 ¶ 5.7.

Blaine cites *In Re Marriage of Giroux*, 41 Wn.App. 315, 322, 704 P.2d 160 (1985) in support of his CR 60(b)(6) motion to vacate the March 14, 2008 decree. The facts in *Giroux*, however, involved a motion to vacate that was filed under CR 60 (b)(11) after a post-decree change in federal legislation. Prior to the decree being entered in *Giroux*, the United States Supreme Court had recently decided *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), holding that federal law prohibited state courts from dividing military retirement pay pursuant to state community property laws. *Id.* at 317. Following *McCarty*, the President signed the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. §1408 on September 8, 1982, which, with some limitations, permitted state courts to treat military retired pay payable for pay periods beginning after June 25, 1981, as community property. The Act set February 1, 1983, as its effective date. On January 27, 1983, Rose Giroux filed a motion under CR 60(b)(11) for relief from judgment, arguing that the enactment of the USFSPA constituted a "reason justifying relief" from the amended decree. *Id.* at 317. The *Giroux* Court, having determined that the retroactive application of the USFSPA was constitutional,

considered whether the enactment of the USFSPA was a proper ground for a motion to vacate under CR 60(b)(11). *Id.* at 321

As the Senate report accompanying the Act indicated, Congress intended to provide post-judgment relief to those individuals “who were divorced (or who had decrees modified) during the interim period between June 26, 1981, and the effective date of this legislation.” *Id.* at 321-322. In dicta, the *Giroux* Court commented that “a CR 60(b)(11) or CR 60(b)(6) motion appears to be the only procedure by which to obtain relief’ in accordance with the USFSPA. *Id.* at 322. Giroux’s motion was filed under CR 60(b)(11), not (b)(6). Subsequent case law distinguished that a change in the law is a basis to vacate a decree under CR 60(b)(11), where as a change in circumstances is not. See *In re Marriage of Knutson*, 114 Wn.App. 866, 60 P.3d 681 (2003); *In re Marriage of Irwin*, 64 Wn.App. 38, 63, 822 P.2d 797 (1992); *In re Marriage of Yearout*, 41 Wn.App. 897, 902, 707 P.2d 1367 (1985). Due to a change in the law, the Court in *Giroux* remanded the case back to the Trial Court for a reconsideration of the entire decree. *Giroux*, 41 Wn.App. at 323. Clearly, *Giroux* does not provide a basis to vacate every decree in which the value of an asset depreciated at a later date. A vacation of the promissory note owed to Corrie would require further proceedings by the Trial Court. All

of the assets would have to be revalued, including those assets that were awarded to Corrie – many of which have also decreased in value.

In *Metropolitan Park District of Tacoma v. Griffith*, 106 Wn.2d 425, 723 P.2d 1093 (1986), the Court specifically addressed the filing of CR 60(b)(6) motion. In *Griffith*, the Metropolitan Park District of Tacoma owned a number of parks and recreation areas throughout Tacoma and Pierce County. *Id.* at 427. As some of the facilities had seriously deteriorated, the District advertised for proposals from interested parties to operate the concessions. *Id.* *Griffith* presented a proposal which included remodeling and cleaning up of the Boat House Grill. *Id.* As time passed, the District became increasingly concerned that the agreement was not in its best interests. The District filed a complaint for declaratory judgment in superior court, asking the Court to cancel the concession agreement. *Id.* at 429.

A judgment was entered in favor of the District, but provided Griffith with the right of first refusal on providing future concessions. Griffith appealed to the Court of Appeals. *Id.* at 430. After Griffith's appeal was filed with the Court of Appeals, a fire occurred at the boathouse complex, completely destroying the restaurant and gift shop operated by Griffith. *Id.* at 431. Subsequently, the District brought a motion in Superior Court for an order to declare the lease of the boathouse

and gift shop terminated. *Id.* A hearing was held and the trial judge stated that the Court was bound by its previous conclusion of law and that Griffith would have the exclusive rights to operate the concessions if the District chose to rebuild. *Id.*

The District filed a CR 60(b)(6) motion requesting relief from the final judgment because it was “*no longer equitable that the judgment should have prospective application.*” *Id.* at 438. The District contended that the Trial Court should have granted its CR 60(b)(6) motion on the grounds that it was excused from performing the agreement under the doctrines of impossibility and commercial frustration. *Id.* The *Griffith* Court denied the District’s CR 60(b)(6) motion and held:

The doctrine of impossibility excuses a party from performing a contract where performance is impossible or impracticable due to extreme and unreasonable difficulty, expense, injury or loss. Thornton v. Interstate Sec. Co., 35 Wn.App. 19, 30, 666 P.2d 370 (1983); Restatement of Contracts § 454 (1932). The event which renders performance impossible must be fortuitous and unavoidable on the part of the promisor. Thornton, at 31, 666 P.2d 370. When the existence of a specific thing is necessary for the performance of a contract, the fortuitous destruction of that thing excuses the promisor unless he has clearly assumed the risk of its continued existence. 18 S. Williston, Contracts § 1948 (3d ed. 1978); Restatement of Contracts § 460 (1932).....

We agree that the fire which destroyed the boathouse was fortuitous and unavoidable, but we are not persuaded that it rendered the District's performance under the agreement impossible or impracticable. The District's suggestion that the existence of the boathouse was essential to its performance is not

well taken.... The destruction of the boathouse did not alter or impede the District's ability to perform these obligations. The fire did not make it impossible or impracticable for the District to perform, and therefore the defense of impossibility is unavailable to the District.

Id. at 440-441.

Applying the Court's rationale in *Griffith*, Blaine's ability to pay his court-ordered obligations to Corrie is not impossible, but merely difficult. A plethora of options are available to Blaine which would provide him with the ability to pay the promissory note, or at least make a good faith effort to do so. As Corrie stated in her supporting declaration, Blaine has "invested hundreds of thousands of dollars in real property and other business ventures subsequent to [the Decree being entered.]" CP 294. Since the time of their divorce in March of 2008, Blaine has entered into the following transactions:

- On May 29, 2008 Blaine purchased a high-rise condominium at Mosler Lofts for a price of \$449,000 and made a cash down payment of \$79,976. CP 299, 393-396.
- In approximately June of 2008, Blaine entered into a Partnership called "Four Amigos TSB, LLC" in which he invested \$33,500 according to his K-1. CP 299.
- According to his K-1, Blaine wrote a check for \$62,000 on June 23, 2008 from his Wells Fargo Checking account for attorneys' fees related to the Four Amigos TSB, LLC venture. CP 299.

- In approximately August of 2008, Blaine contributed \$124,904 towards a partnership called “Cherry Pick, LLC.” CP 300, 398-399.
- In approximately August of 2008, Blaine contributed \$16,066 towards a retail store investment located at 1521 Second Avenue with his fiancé. CP 300, 398-399.
- In September of 2008, Blaine deposited \$9,610.00 into his 401(k) account without explanation. CP 300.
- On November 25, 2008, Blaine purchased a high-rise condominium at 1521 Second Avenue with his fiancé for \$1,200,000 and made a cash payment of \$261,556.50. CP 300, 401-403.
- From December of 2008 to February of 2009, Blaine made substantial purchases for high end furniture and other household items totaling over \$20,000. CP 300, 405-409.
- Blaine signed a residential loan application on May 29, 2008 which he declared his monthly income to be \$37,203.00. CP 300, 411-415.

Moreover, RCW 26.09.070 specifically provides parties involved in a marriage may reach settlement of the division of their assets pursuant to a separation contract. Specifically, RCW 26.09.070 provides:

(1) The parties to a marriage or a domestic partnership, in order to promote the amicable settlement of disputes attendant upon their separation or upon the filing of a petition for dissolution of their marriage or domestic partnership, a decree of legal separation, or declaration of invalidity of their marriage or domestic partnership, may enter into a written separation contract providing for the maintenance of either of them, the disposition of any property owned by both or either of them, the parenting plan and support for their children and for the release of

each other from all obligation except that expressed in the contract. ...

(6) Terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms.

Pursuant to Section 1.7 of the parties Property Settlement Agreement, the agreement they reached is specifically enforceable pursuant to contract law in addition to it being enforceable as a binding decree of the Court. Specifically, Paragraph 1.7 of the Property Settlement Agreement provides:

Nevertheless, this Agreement shall be enforceable independently of such decree, and each party shall have the all rights provided by this contract in addition to any and all rights accorded by law.

Pursuant to RCW 26.09.070 and the plain language of the Property Settlement Agreement, Blaine's request to set aside the decree should be denied as the Property Settlement Agreement is a binding and enforceable contract entered into voluntarily between the parties independently of the decree. Both parties were represented by counsel and knowingly and voluntarily entered into the contract. Both attested that the contract was fair and equitable at the time of its execution.

For the foregoing reasons, the Court should deny Blaine's motion to set aside the property division in the decree.

2. PURSUANT TO RCW 26.09.170(1) AND *IN RE MARRIAGE OF KNUTSON* THE COURT PROPERLY DENIED BLAINE'S CR 60(b)(11) MOTION TO VACATE THE PROPERTY DIVISION AS SET FORTH IN THE MARCH 14, 2008 DECREE OF DISSOLUTION.

RCW 26.09.170 specifically prohibits the Court from making any modifications to a property division entered in a Decree of Dissolution.

Specifically, RCW 26.09.170(1) states in pertinent part:

... 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. ...

Id.

Therefore, pursuant to RCW 26.09.170(1), it is clear that the Court shall not revoke or modify provisions as to property division unless there is a legal and factual basis to reopen the judgment and the Court finds sufficient conditions to justify reopening the judgment under the laws of this state. *Id.*

Civil Rule 60(b)(11) allows a party to bring a motion for relief from a final judgment for “any other reason justifying relief from the operation of the judgment.” The application of CR 60(b)(11) is narrowly limited to situations “involving extraordinary circumstances not covered by any other section of the rules” *In re Marriage of Irwin*, 64 Wn. App. 38, 63 (1992) quoting *State v. Keller*, 32 Wn.App. 135, 140 (1982).

Motions under CR 60(b)(11) are also circumscribed by the general doctrine: the reasons for the vacation must be extraneous to the court's actions or must affect the regularity of the proceedings. *In essence, a change in the law justifies granting the motion, whereas a change in circumstances of the party does not.* (Emphasis added). *Id.* at 64.

The issue of whether a sharp decline in value of an asset is justification for the reopening of a judgment pursuant to CR 60(b) was addressed in the case of *In re Marriage of Knutson*, 114 Wn. App. 866 (2003). In *Knutson*, the Trial Court awarded an equal division of the parties' assets. *Id.* at 868. The husband was ordered to transfer a specific amount of his 401(k) to the wife using a June of 2000 valuation date for the 401(k). *Id.* The parties' Decree of Dissolution of Marriage enumerating the property division, including the 401(k) division was entered in September of 2000. *Id.* A Qualified Domestic Relations Order was entered with the Court in December of 2000 providing a specific dollar figure to the wife. *Id.* at 868-869. In December of 2000, the husband argued that the wife's share of the 401(k) should be reduced because the 401(k) account had diminished in value by \$58,553 between June of 2000 and December of 2000 when the Qualified Domestic Relations Order was entered with the Court. *Id.* at 869. The husband filed a Motion pursuant to CR 60(b)(3) and (11) asking the Court to set aside

the decree because of the diminished value of the 401(k). *Id.* The Trial Court granted the motion pursuant to the husband's request. *Id.* at 870. However, the Court of Appeals *reversed* the Trial Court's ruling specifically finding that a sharp decline in value of an asset after the Decree of Dissolution of Marriage is not a sufficient basis to set aside the decree. The Court in *Knutson* stated:

The issue is whether the trial court erred in vacating and modifying the September 2000 dissolution decree, considering it had unambiguously awarded Ms. Knutson a division of assets based upon the valuations decided at about the time of trial and incorporated into the original decree. ...We review a trial court's decision to on a motion to vacate for an abuse of discretion. DeYoung v. Cenex Ltd., 100 Ne. app. 885, 894, 1 P.3d 587 (2000), ...

CR 60(b) 11 applies sparingly to situations, "involving extraordinary circumstances not covered by any other section of the rules. In re Marriage of Irwin, 64 Wn.App., 38, 822 P.2d 797 (1992) (quoting In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)). "Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." Yearout, 41 Wn. App. at 902 (citing State v. Keller, 32 Wn. App. 135, 141, 647 P.2d 35 (1982)); see also Irwin, 64 Wn. App. at 63 (quoting Yearout with approval). A change in a party's financial circumstances will not justify application of CR 60(b)(11) to vacate a dissolution decree. Irwin, 64 Wn. App. at 64; see also Yearout, 41 Wn. App. at 901-02; 1 BARBARA BARKER & IRENE SCHARF, WASHINGTON PRACTICE: METHODS OF PRACTICE §10.5, at 141 (3d ed. 1989).

While the Putnam plan's value change was certainly unfortunate from Mr. Knutson's point of view, it was not an extraordinary event for purposes of CR 60(b)(11). The trial

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. Both parties were unhurried in processing the QDRO while the Putnam plan fluctuated in value.

Mr. Knutson complains Ms. Knutson had control of the QDRO for some period of time to his disadvantage. But, both parties had more or less equal incentives and disincentives to process the QDRO in a volatile market environment. In a stable stock market, this type of argument would be hollow; naturally, in a rising and falling market both parties bear some risk in deciding upon a particular valuation date. The evidence here shows a June 2000 valuation date was agreed. In light of all the other assets to be divided by the court and its use of a balancing judgment at that time to effect an equal division between the parties, the interests of finality are well served by carefully observing the dictates of CR 60(b).

*Moreover, Mr. Knutson did not appeal the decree, remained silent for more than a month after Ms. Knutson filed the QDRO, and took no action until more than three months after the trial court entered the decree. Mr. Knutson's failure to appreciate the Putnam plan's vulnerability to market forces does not rise to an extraordinary circumstance justifying resort to CR 60(b)(11). See *Irwin*, 64 Wn. App. at 63-64 (reasoning the husband's declining income did not justify granting relief under CR 60(b)(11)).*

Id. 871-873.

The ruling in *Knutson* is dispositive of the issue of whether a decline in value due to market conditions is a sufficient basis to reopen a judgment pursuant to CR 60(b). Blaine's argument is almost identical to the argument the husband made in *Knutson* that was rejected by the

Appellate Court. In this case, Blaine is arguing that because the market conditions have impacted the value of Weber + Thompson, LLC, approximately 1.5 years after entry of the decree, that the Court should find this to be an “extraordinary circumstance” and set aside the decree. However, this is the same argument that the Court in *Knutson* discarded. In rejecting this argument, the *Knutson* Court’s specifically stated,

“...naturally, in a rising and falling market both parties bear some risk in deciding upon a particular valuation date. The evidence here shows a June 2000 valuation date was agreed.” In light of all the other assets to be divided by the court and its use of a balancing judgment at that time to effect an equal division between the parties, the interests of finality are well served by carefully observing the dictates of CR 60(b).”

Knutson, 114 Wn. App. at 873.

In the instant case, the parties used a specific valuation date for Weber + Thompson, LLC, as determined by their relative experts. Blaine used Steve Kessler as his valuation expert and Corrie used Bob Duffy. The parties mediated their case with Retired Judge Larry Jordan on two separate occasions until finally reaching an agreement and executing a Property Settlement Agreement. Both parties were well aware of the fact that the valuations used during the mediations were subject to changes in the market. Blaine requested to be awarded his architectural firm and Corrie agreed to a value that was far lower than the value her own expert

provided in his valuation report. Pursuant to the holding in *Knutson*, Blaine's motion pursuant to CR 60(b) was properly denied by the Trial Court.

Blaine further relies on *In re Marriage of Jennings*, 138 Wn. 2d 612, 980 P.2d 1248 (1999) to support his position that the declining market value of an asset such as Weber +Thompson, LLC 1.5 years after entry of a Decree of Dissolution is authority to set aside the Decree. However, Blaine's reliance on *Jennings* is misplaced as the facts in *Jennings* are clearly distinguishable from the case presently before this Court. In *Jennings*, the Court essentially ruled that the parties should be placed in the same position they were at the time the original decree was entered. At the time the decree was entered, Mr. Jennings was receiving both military retirement and disability payments. *Id.* at 1249. The military retirement was community property divisible by the state Trial Court; however, the disability payments were not divisible pursuant to federal law. As such, the wife was awarded \$813.00 a month from the husband's military retirement. *Id.* After the Decree was entered, Mr. Jennings's disability worsened and his military retirement was reduced from \$2,139.00 to \$272.90 per month while his disability payments were increased from \$318.00 per month to \$2,285.00 per month. *Id.* at 1250. This change in status resulted in Ms. Jennings' retirement payments being

drastically reduced from \$813.00 to \$136.00. *Id.* at 1251. By setting aside the decree and awarding the wife compensatory spousal support, the Court's ruling merely followed the original intent of the decree by providing sufficient support to Ms. Jennings. The *Jennings* Court stated:

The trial court in the March 26, 1992 dissolution decree appropriately made a disposition which was intended to equally divide the two significant community assets of the parties: the equity in the family residence (approximate value of \$32,000.00), awarding the residence to Petitioner Karen Rae Jennings and awarding a lien of \$16,000.00 to Respondent Michael Kevin Jennings; and one-half of Respondent's unliquidated military retirement to each party, the pension then being paid in monthly installments of at least \$2,139.00 for the remainder of Respondent's life. At the time of the decree, it was reasonable for the court to expect the \$813.50 payable to Petitioner would continue to be paid from that source for the remainder of Respondent's life.

Id. at 1255.

As can be seen from the above analysis, *Jennings* did not involve the declining market value of an asset at all. The issue in *Jennings* was a change in characterization of the military disability payments to the husband and a resulting increase in spousal maintenance to Ms. Jennings to rectify the change in characterization. The analysis of the court in *Jennings* shows the Court used the original values of the assets at the time of the Decree to put the parties in the same position they would have been but for the change in characterization.

In the instant case, almost all of the assets changed in value from the original Decree of Dissolution because of market conditions. For example, the residence located at 37 Indigo Place, Aliso Viejo, California that was awarded to Corrie decreased \$111,000 between the date of the Property Settlement Agreement through the date of sale. Corrie had to pay \$32,147.35 in order to close on the residence when it was sold. Rather than being an asset awarded to her, in a matter of months, this asset declined in value to the point where it became a liability. All of the stock accounts and other real property values changed, which is commonplace and was contemplated by the parties at the time the decree was entered, as the economy had been in a recession since December 2007. The *Jennings* case does not support Blaine's motion to set aside the property division in the Property Settlement Agreement and Decree of Dissolution merely because the value of Weber + Thompson, LLC declined due to market conditions. As such, Blaine's CR 60(b) Motion should be denied.

Blaine also cites *In re Marriage of Thurston*, 92 Wn.App. 494, 963 P.2d 947 (1988), as authority for the Court to vacate the March 14, 2008 Decree under CR 60(b)(11). The facts in *Thurston* actually support Corrie's position that Blaine should not benefit from his failure to honor the terms of the Property Settlement Agreement. In *Thurston*, the Property Settlement Agreement awarded the wife two units in a limited

partnership that was owned by a parent corporation. *Id.* at 497. When the corporation failed to cooperate in the transfer of the partnership units, the wife filed a CR 60(b)(11) motion to vacate the property disposition provisions of the decree. *Id.* The *Thurston* Court held:

The court's decision to grant the requested relief was well within the bounds of its discretion. Counsel for the parties clearly expressed the view at the time of entry of the 1989 decree that the conveyance of the two partnership units to [the wife] was an express condition of the agreement. This is confirmed by the record, which shows that the partnership units represented a significant part of the settlement. Thus, the condition was material. Moreover, the decree clearly provides that [the husband] "quit claims, releases, and relinquishes unto [the wife] all right, title, and interest" in the two partnership units. This language cannot reasonably be reconciled with [the husband's] assertion just prior to [the wife's] motion that he retained an interest in the partnership units after the decree and until some future time when [the wife] would receive those units. The court did not abuse its discretion in setting aside the prior decree.

Id. at 503-504. *Thurston* further affirms that a Trial Court is given broad discretion in deciding whether or not to vacate a decree under CR 60(b)(11). As stated above, a Trial Court's decision whether or not to vacate a decree under CR 60 will not be overturned on appeal unless it plainly appears that the trial court exercised its discretion on untenable grounds or for untenable reasons. *Shaw v. City of Des Moines*, 109 Wn.App. 896, 37 P.3d 1255 (2002).

B. Corrie should be awarded attorneys' fees pursuant to RCW 26.09.140 for the costs incurred in responding to Blaine's CR 60 motions and subsequent appeal.

The Revised Code of Washington 26.09.140 in part, states:

"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 attorney's fees in addition to statutory costs."

Additionally, the Property Settlement Agreement states in Paragraph 3.8 as follows:

Any party failing to carry out the terms of this Agreement shall be responsible for any court costs and reasonable attorney's fees of the other party incurred as the result of such failure.

Blaine filed his CR 60 Motion and subsequent appeal without a sufficient legal basis to support his request relief. The case law is contrary to Blaine's position that a post-decree change in the value of an asset is grounds to vacate a decree. The cases cited by Blaine involve either a change in the law or a clarification of the court's ruling. None of the cases cited by Blaine take an asset away from one party and award it to the other due to a market change in value.

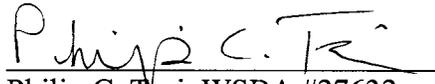
V. CONCLUSION

For the foregoing reasons, the Court should affirm Judge Ramsdell's Order dated December 14, 2009 which confirmed the

Commissioner's ruling of November 5, 2009 and deny Blaine's Motion to Vacate the Decree of Dissolution entered on March 14, 2008 pursuant to CR 60(b)(6) and CR 60(b)(11). The Court should further award Corrie the cost of her attorneys' fees incurred in responding to Blaine's CR 60 motions and subsequent appeal.

Dated this 12th Day of July, 2010

TSAI LAW COMPANY, PLLC



Philip C. Tsai, WSBA #27632

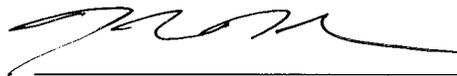
Todd R. DeVallance, WSBA #32286

Attorneys for Respondent Corrie Weber

VI. CERTIFICATION OF SERVICE

This is to certify that on July 12, 2009, I, Todd R. DeVallance, delivered a copy of this Response Brief to Appellant's attorney, LuAnne Perry, at the Law Office of Michael Bugni.

TSAI LAW COMPANY, PLLC



Todd R. DeVallance, WSBA #32286

Attorneys for Respondent Corrie Weber

FILED
COURT OF APPEALS
STATE OF WISCONSIN
2010 JUL 12 PM 12:42

1
3
5 **IN THE COURT OF APPEALS OF**
7 **THE STATE OF WASHINGTON, DIVISION 1**

9 In re the marriage of:)

11 BLAINE J. WEBER,)

13 Appellant,)

15 and)

17 CORRIE WEBER,)

19 Respondent.)

Court of Appeals No. 64739-3-1

**DECLARATION OF SERVICE
OF RESPONDENT'S BRIEF**

FILED
COURT OF APPEALS
DIVISION 1
2010 JUL 12 PM 12:42

21 I, Todd R. DeVallance, an associate for Philip Tsai, attorney for Respondent, Corrie

23 Weber, in the above matter, residing within King County, Washington declare:

25 That on the 12th day of July, 2010, I personally delivered to LuAnne Perry of the Law Office of

27 Michael Bugni, a copy of the *Respondent's Brief*, to:

29 Law Office of Michael Bugni

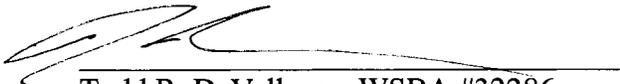
31 Attn: LuAnne Perry

33 11300 Roosevelt Way NE

35 Suite 300

Seattle, WA 98125

37 DATED at Seattle, Washington this the 12th day of June, 2010.

39
41 
Todd R. DeVallance, WSBA #32286

43 DECLARATION OF SERVICE
OF RESPONDENT'S BRIEF - 1

 ORIGINAL

TSAI LAW COMPANY, PLLC
2101 Fourth Avenue, Suite 1560
Seattle, WA 98121
206.728.8000