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Court of Appeals  
Division I  
State of Washington

71953-0

No. 71953-0-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Marriage of

JANETTE WELLS F/K/A PEACOCK  
Respondent

and

WILLIAM PEACOCK  
Appellant

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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BRIEF OF RESPONDENT

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## I. RESTATEMENT OF ISSUES

1. Peacock fails to show any kind of error or abuse of discretion in any of the trial court's orders.
2. The trial court accomplished a just and equitable distribution of the assets and liabilities of the marriage.
3. If a technical defect or error occurs in a trial proceeding, is that defect or error grounds for vacating a judgment if no substantial right has been affected, in other words, if the error is harmless?
4. Does CR 60 authorize vacating a final decree of dissolution based on an attorney email exchange with the court's bailiff regarding scheduling, fees payment, and other administrative matters, or is CR 60 reserved for extraordinary circumstances where justice requires a decree be vacated?
5. Should Wells be awarded fees because this appeal is frivolous and Peacock's pursuit of it and of the CR 60 relief is intransigent and, again, has unnecessarily increased the costs of litigating this case?

## II. STATEMENT OF THE CASE

Wells and Peacock began their relationship in 1990 and married in 1994. RP 93-94; CP 285 (FOF ¶ 2.4). They separated

in August 2012. CP 285 (FOF ¶ 2.5). They have two children; the oldest child just started college and the youngest is finishing high school. CP 288 (FOF ¶ 2.17); 2.21.1; RP 104-106. This appeal does not concern parenting issues, but it is relevant, and perhaps efficient, to note the parenting evaluator's description of Peacock's mental health problems, including the significant deterioration in his condition beginning in 2009. RP 189; CP 2273, 2276-2277. The evaluator describes multiple medical conditions, including paranoia, and recommends RCW 26.09.191 restrictions based on long-term emotional impairments, to which the father stipulated. RP 181-182, 185; CP 2278-2280; see, also, CP 289-290 (FOF ¶¶ 2.21.3, 2.21.4, 2.21.5, and 2.21.6). These problems, sad as they are, may help to explain why this straightforward dissolution became unnecessarily protracted.

Both parties were employed when they married, Peacock as a CPA and Wells, with no college degree, in clerical positions. CP 289 (FOF ¶ 2.21.2). After she became pregnant with the first of their two sons, the parties agreed she should stay home with their child. *Id.* A second child was born two years later. Peacock continued to work in accounting, holding prominent positions with SpaceLabs, ICOS, and Nautilus. *Br. Appellant*, at 32. He also ran

a small business of his own. Id. His income supported the family financially, since the parties agreed Wells would stay home with the children. RP 99.

In 2009, Peacock's mental health began to deteriorate. He lost his job, treated his sons and wife badly, and began to engage in paranoid behavior, including removing items from the house. RP 95-97, 348-351. Eventually, he became completely disabled and does not expect to work again. CP 289 (FOF ¶ 2.21.3). He receives \$2,299 in monthly disability payments and \$1,148 for child support. Id.

After three years of trying to support the family on her own and of ongoing difficulties with Peacock, including an assault upon her, Wells petitioned for dissolution. CP 295-299, 322-330. Trial was scheduled for 11 months later, July 2013. CP 1891.

Over the next 16 months, little progress in the dissolution was made. Peacock hired and fired three attorneys; he also represented himself at times. CP 396, 1677-1678, 1829, 1917,1949, 1980-1982, 1983-1985. The court granted three continuances. CP 1890-1891, 1945-1946, 1954-1955. During the pretrial proceedings, the court entered multiple judgments against Peacock – for back child support, contempt, discovery violations,

and “continued disregarding for local rules...”. CP 1645-1647, 1660-1661 (\$787.50), 1902-1909, see, also, CP 294 (FOF ¶ 3.8.5, sub nom 2.8.5).

On the eve of trial (now scheduled for March 2014), Peacock discharged his third attorney and asked for another trial continuance, based on his delay of a Family Court Services Report. CP 1917, 1918-1929. Wells opposed the attorney’s withdrawal, objecting to the delay and the increase in costs. CP 1918-1929. The court took the extraordinary step of appointing counsel for Peacock under GR 33, finding him disabled and having “demonstrated his unsuccessful efforts to retain private counsel and to meaningfully participate without representation in this proceeding.” RP 1947-1948. The court authorized payment to appointed counsel, Elise Buie, of up to \$6,000, at a rate of \$85/hour (or, 70.6 hours). *Id.* Notably, four months earlier, Peacock’s former attorney (Pierce) represented that Peacock had 80-90% “of all documents needed in this dissolution ....” CP 1649. In other words, there seemed little standing in the way of resolving the case.

Fourth months after her appointment, Buie sought to withdraw. CP 1956. Buie cited as reasons her own medical crises and a breakdown in client relations. Wells opposed Buie’s motion,

noting the issues in the case “are not complex” and asking that Peacock be ordered to respond to a settlement offer from two months earlier. CP 1957-1978. The court struck the hearing on the motion after Buie withdrew it. CP 69, 1979. The next month, Buie renewed the motion and Wells again objected, noting that she nets approximately \$30,000 annually and can no longer afford to pay her own attorney. CP 69-70, 1992-1993. The court denied Buie’s motion, finding that her withdrawal would impede resolution of the case and ordering her to continue as counsel through mediation, which the court arranged with a volunteer mediator. CP 2030-2031.

Approximately three weeks later, now only two months before the re(re)scheduled trial date, Buie advised the court’s bailiff she would file another motion to withdraw. CP 70-71. She explained her client expected substantial additional work be performed and that she had already exceeded the funds allowed by the court. CP 71. The court ordered the parties to appear for a pretrial conference. CP 2033.

At the hearing on January 21, another attorney appeared, Christopher Rao, who had represented Peacock earlier, and moved to be allowed to substitute for Buie. RP 13. Rao explained that

Peacock wanted an attorney who could provide full attention to the case, which Buie, given her health problems (including a recent cancer diagnosis), could not. RP 4. The only accommodation Rao requested, apart from the possibility of receiving the fees Buie would have received, was relaxation of some discovery deadlines. RP 4-5.

Wells objected to any further delay, again noting the facts of the case are not complicated, undeserving of all the “twists and turns” the case has taken. RP 6-8. She noted there had been no response to a months-old settlement offer, that Peacock’s interrogatories consisted of “64 pages of extremely, extremely intense questions,” and that the process had been extremely difficult so far. *Id.*; see, also, RP 16. Peacock complained he was being “vilified” and that he could not proceed to mediation without the discovery answers. RP 8-9.

The court described the case as “unprecedented,” with its history of delay and appointment of counsel and attendant administrative complexities. RP 10. The court said it was time to “get it resolved.” *Id.* The court queried counsel “whether mediation makes sense or not,” concerned about the prospects for success versus the prospects for costly failure. RP 11. For one thing, the

funds allocated for Buie to get through mediation had been expended and only a limited amount (\$1500) would be available to for the remainder of the case. RP 13-14. Thus, the court noted, “we need to move as efficiently as possible from today to resolution.” RP 13.

Peacock’s counsel thought mediation desirable, but also noting “this is a reasonably simple case;” still, he argued, any response to settlement proposals had to await receipt of discovery, acknowledging that the delay in discovery was not Wells’ fault. RP 12; see, also, RP 19-20. He agreed the goal was “to get this damn thing done.” RP 14.

The court noted mediation is “not determinative, and it may be most efficient to just put the facts in front of me and have a decision made. The parties, of course, are always free to negotiat[e] on their own.” RP 14.

Wells’ attorney expressed frustrations with the work entailed in answering Peacock’s interrogatories and how her client was at the end of her rope, financially and otherwise, having lost her job, and that counsel might have to withdraw. RP 16; see, also, RP 41 (fees before trial equaled \$25,000). She noted again, it’s “a very

simple case,” and equivocated on whether mediation would work or not. RP 18, 23-24, 25.

The court agreed the case was “not difficult on the merits,” but complicated on the personal plane. RP 19. The court also noted the parties had been married a long time and are acquainted with their finances and that voluminous documents had already been exchanged. RP 20. Ultimately, the court decided to waive mediation and proceed with trial, adjusting the discovery deadlines to accommodate Peacock, but with limits, so as not to further delay trial. RP 25-26. (For example, the court said no depositions could occur without permission, noting they are rare in dissolutions, a view with which Wells’ counsel concurred. RP 25-26, 41.) The court encouraged the attorneys to cooperate to improve efficiencies. RP 26-41.

Despite these instructions, the court ended up conducting an emergency telephonic hearing after Peacock issued multiple subpoena duces tecum (including blanketing storage unit facilities and providers of email back up services). RP 45-67. Peacock represented that the “missing” discovery was relevant to his request for spousal maintenance. RP 50. (Peacock did not request spousal maintenance. RP (04/18/14) 18; CP 287: “Maintenance

has not been requested.”) The court again expressed concerns about the case being overly litigated, questioned counsel closely on the purpose of this extensive discovery effort, and, hearing no adequate explanation, put a stop to it, ordering the parties to comply with the case schedule and prepare for trial. RP 55, 60.

After a three-day trial, the court took the parties’ modest estate, community and separate, and divided it in favor of Wells. CP 285-287 (court’s findings of estate net value, separate and community, of approximately \$600,000; awarding wife approximately \$350,000); RP (04/18/14) 6-18, 27-28). Wells received the family home, where she and the two children reside. Of the two house appraisals, the court accepted Wells’, a difference of \$41,000.00, in light of the extensive maintenance and repair work needed. RP 125-126. Wells has the potential to earn a modest income, with no expectation of that increasing substantially in her remaining working years. (She was unemployed at the time of trial, having lost her job.) CP 289. Peacock has a CPA, though he is disabled and receives a monthly income of \$2,294. Id.

Immediately after trial, Peacock’s attorney withdrew. Pro se, Peacock filed a motion to reconsider. CP 1681-1826. The court noted Peacock’s arguments were based in equity and that the

equities sometimes ran in Wells' favor. CP 64. The court denied the motion, noting that some claimed errors were worth less than the cost of motions practice. CP 64. The court encouraged the parties to negotiate these minor details, but allowed Peacock to renew his motion if such negotiations failed. CP 64-65. Peacock did not renew his motion.

Peacock filed a notice of appeal, then moved to vacate the trial court's order under CR 60. CP 68-171, 273-277. Judge Palmer Robinson denied the motion and awarded Wells \$5,255 in attorney fees on the basis of intransigence and the parties' relative financial circumstances. RP (02/06/15) 24-27; CP 270-272.

Peacock amended his notice of appeal to include the order denying his motion to vacate.

### III. ARGUMENT IN RESPONSE TO APPEAL.

#### A. THE SCOPE OF REVIEW AND GENERAL PRINCIPLES GOVERNING THE TRIAL COURT'S DECISIONS.

Peacock's challenge to the trial court's ruling focuses principally on the conduct of his attorney and the denial of his post-trial CR 60 motion. He agrees the standard of review for the CR 60 motion is abuse of discretion. Br. Appellant, at 5.

Peacock also takes issue with the court's distribution of assets and liabilities, a decision also reviewed for an abuse of

discretion. *Marriage of Rockwell*, 141 Wn. App. 235, 242-243, 170 P.3d 572 (2007). To prevail on this challenge, Peacock must show that “no reasonable judge would have reached the same conclusion” as did the judge here. *Marriage of Landry*, 103 Wn.2d 807, 809-810, 699 P.2d 214 (1985). For this reason, decisions in dissolution proceedings will seldom be changed on appeal. *Landry*, 103 Wn.2d at 809.

Moreover, in this effort, Peacock cannot retry the factual issues, since the trial court's findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence in the record. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). After all, it is the trial court's role to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of witnesses. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

These principles apply here to require the trial court be affirmed. Peacock acknowledges the trial court's broad discretion to distribute property and to deny a motion to vacate and acknowledges this Court's deferential review of those discretionary decisions. Br. Appellant, at 5. However, he fails to show any abuse of discretion by the trial court.

Because the merits of the dissolution itself, i.e., the distribution of the marital estate, helps to inform the CR 60 issue, those merits will be addressed first (in reverse order to the appellant's brief).

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISTRIBUTED THE ASSETS OF THE MARRIAGE.**

By the time Wells filed her petition for dissolution, these parties had been intimate for 22 years, married for 18 of those. RP 93, 306. It appears they were well acquainted with their joint and separate financial circumstances, at least up until the time Peacock began to secrete personal property and use marital assets for his own purposes. CP 290 (FOF ¶ 2.21.5). Up to this point, they had lived comfortably. RP 412. Peacock's salary alone supported them and allowed them to accumulate modest assets. Id. (Peacock testifying they had accumulated \$680,000 in savings prior to his illness in 2009). Wells had some pre-marital separate property and Peacock received a modest inheritance. RP 127-128, 152, 290-294, 299-307. The main assets included the marital residence, retirement accounts, vehicles (recreational and otherwise), medical settlement proceeds, insurance policies, a money market account, and some personal property. CP 285-287.

Peacock contests the court's discretionary decisions regarding characterization, valuation, and distribution of the assets, though not always clearly. Br. Appellant, at 1. Peacock assigns error to the trial court's identification of the assets in the decree, including value and character (Br. Appellant, at 1, citing to Decree ¶¶ 3.2-3.5), but he does not assign error to the trial court's findings of fact stating the values and character. CP 285-287. Accordingly, the unchallenged facts as found by the trial court will be treated as verities on appeal. For example, it is a verity that the list of assets is complete and that the values are accurate.

Peacock's complaint is that the court's division of assets was "unfair." Br. Appellant, at 1 (assigning error to the court's conclusions of law in ¶ 3.8).<sup>1</sup> As discussed further below, it is for the trial court to decide what is fair. Peacock's specific complaints are addressed seriatim.

1) The trial court may choose one appraisal over another.

The parties owned a modest home in Monroe. The parties offered different views on the value of the home, largely through appraisers, who came within \$41,000 of one another. RP 259-284;

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<sup>1</sup> This paragraph repeats the court's findings on characterization, but Peacock does not support any challenge to characterization with argument. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignment of error unsupported by argument will not be considered).

533; 558-584; Exhibits 28, 101. (Peacock’s appraiser had recently been disciplined by the state licensing body. RP 57-58.) The trial court adopted Wells’ for reasons set forth in the unchallenged findings and supported by the testimony of the appraiser and Wells. RP 262-265, 278, 280-281; CP 290 (FOF ¶ 2.21.7). Peacock does not assign error to this finding of value, though he complains that because of it the award of the home to Wells “exacerbated” the inequity of the overall distribution. Br. Appellant, at 26. This does not really make sense. Given there is no challenge to the value, it is a verity that the house is worth \$143,268 net (CP 285: ¶ 2.8.1; CP290: ¶ 2.21.7). *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Yet, for purposes of his “inequity” argument, Peacock must adopt the value the court did not accept. See Br. Appellant, at 26 (arguing Wells received an extra \$41,000). Either Peacock must show the court abused its discretion when it adopted the value of \$143,268, or Peacock must work with the facts as they are found. See *Worthington v. Worthington*, 73 Wn.2d 759, 762, 440 P.2d 478 (1968) (appellate court will not substitute its judgment of property valuation for that of trial court). He cannot add value to Wells’ award when he failed to persuade the court of that value. This argument is frivolous.

2) The court properly awarded the home to Wells, who remains the sole custodian of the two children.

Because Peacock complains of the overall distribution, it is difficult to determine whether the award of the house to Wells is challenged. See RAP 10.3(a); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990) (insufficient argument); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority). In any case, the facts here and Washington law support an award of the house to Wells, who is effectively the sole custodian the children. CP 290-291 (¶¶ 2.21.7 & 2.21.12). See RCW 26.09.080(4) (requiring court to consider “the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time”). See RP 124 (mother describing reasons to stay in family home).

It bears noting the house is modest, older, and requires “a number of repairs.” CP 290 (unchallenged finding FOF ¶ 2.21.7). Peacock speculates about the future value of this asset to Wells (Br. Appellant, at 30), but these are fantasies. Wells has a very

modest income (roughly \$40,000 annually), was out of the workforce for much of the marriage, and lost her job during the dissolution proceedings. CP 289 (FOF ¶ 2.21.2).<sup>2</sup> She supports two children in her home, with some modest help from the government due to the father's disability. CP 289 (FOF ¶ 2.21.3). Both children are approaching college age. To his credit, the father created accounts for the children of \$18,000 each from his separate inheritance, which are the only funds available for their college education. RP 112-116, 151, 223, 239. (The accounts are for the children's benefit, but the mother was ordered to control them. CP 279 (¶ 3.2, #10)). Given the father's disability, it falls to the mother to provide whatever additional support she can for the children's educational efforts.

Finally, the costs of the protracted dissolution proceedings, and now the cost of the protracted post-dissolution proceedings, have managed to shrink the assets awarded Wells. See, e.g., RP 255-256; CP 287 (acknowledging wife's debt of \$15,000); 294 (FOF ¶ 3.8.5 (sub nom 2.8.5) (husband not paying costs awarded wife for costs she has incurred)). A scenario just as likely as that spun by

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<sup>2</sup> During trial, she was receiving \$1,946 monthly in unemployment compensation. RP 111. Prior to losing her job, she was earning \$20.68 hourly (or around \$3,500 monthly gross). RP 224.

Peacock is that Wells will not be able to hold onto the home. In any case, the court was well within its discretion when it valued and awarded the home to Wells.

3) The trial court considered all relevant factors when distributing the property.

The father accuses the court of a “rigid division” of the property and claims the trial court failed to account for the parties’ relative health and earning capacity. Br. Appellant, at 27. It is not clear what Peacock means by “rigid,” but the “[t]he key to equitable distribution of property is not mathematical preciseness, but fairness.” *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989) (quoting *In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145 (1975)); *see, also*, RCW 26.09.080. The court’s paramount concern when distributing property is the economic condition in which the decree leaves the parties. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). *See, also*, RCW 29.09.080(4) (court must consider economic circumstances of the parties). Here, the parties were left in very comparable circumstances: Peacock with a fixed but certain income and at least \$150,000 in other liquid assets and Wells without any job, and with prospects for only modest employment, her premarital retirement, and the illiquid family home. CP 280, 285-286. Both parties face a

similar future financially – neither completely secure nor completely bleak.

Boiled down, Peacock asks for all the sympathy to be entered on his side of the ledger and none of the responsibility. Instead, the court took sympathetic views of both parties and accomplished a fair result under circumstances made more difficult by Peacock (e.g., unilateral dissipation of community assets, increasing costs of litigation). Certainly, the court did its statutory duty and considered all relevant factors. CP 292-293.

For example, the court considered Peacock's disability, taking him at his word that he likely would not work again; and, so, did not hold him to the future earnings potential that would normally be associated with his education, experience, and historical wages. RP 363 (making \$152,000 annually in 2008). But the court had also to account for Wells' position, with low earning capacity, also middle-aged, and raising two children by herself. CP 291 (FOF ¶ 2.21.12 (unchallenged finding that since separation wife has been responsible for all parenting functions, including costs not covered by child support); see, RP 116-117 (costs). Peacock's income, at least, is guaranteed, whereas Wells' is not, as her loss of employment pre-trial demonstrates.

The court also properly accounted for the father's pre-dissolution dissipation of assets, specifically for \$30,000 that remains unaccounted for. CP 290 (unchallenged FOF ¶ 2.21.5); CP 280 (¶ 3.3 #6). The courts have repeatedly permitted the consideration of conduct resulting in the dissipation or wasting of assets or the unnecessary accumulation of debts and liabilities. See, e.g., *In re Marriage of Clark*, 13 Wn. App. 805, 808-809, 538 P.2d 145, rev. denied, 86 Wn.2d 1001 (1975); *In re Marriage of Steadman*, 63 Wn. App. 523, 526-528, 821 P.2d 59 (1991) (court may consider spouse's conduct in deliberately incurring unnecessary tax liabilities); *In re Marriage of Wallace*, 111 Wn. App. 697, 707-709, 45 P.3d 1131 (2002) (court may consider spouse's waste or concealment of assets).

Notably, the court did not dock Peacock for the additional community funds he spent unilaterally, since they ultimately benefited the community. CP 290 (unchallenged FOF 2.21.5); CP 280 (¶ 3.3 #6). Not only were these decisions well within the court's discretion, the court modeled judicial balance and restraint, as the statute instructs.

Yet Peacock complains he should have received the same treatment as in *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d

572 (2007). However, in *Rockwell*, the disabled spouse was also considerably older (and retired) and the working spouse was not parenting two children alone. Likewise, the other cases cited by Peacock turn on a disparity in earning capacities that simply does not match the facts here. Br. Appellant, at 29. Wells was receiving \$449 weekly in unemployment benefits at the time of trial, less than Peacock's disability payment. Prior to trial, she had been earning \$20/hour. This is not Easy Street; it's just barely a living wage. These simply are not the circumstances pertaining in the cases Peacock cites, where one spouse's earning capacity far exceeds the other spouse's.

Peacock also complains of his pretrial expenses, but fails to acknowledge that much of that expense was self-inflicted, or to acknowledge that Wells shares this pain, at least as to the costs of litigating, and through no fault of her own. Br. Appellant, at 30-31; see, e.g., RP 155- 161. The storage lockers, for example, came to serve some uncertain purpose of Peacock's. RP 238, 384-385. His disability does not entitle him to impoverish the community.

Peacock also complains he should have received some greater credit for being the wage-earner during a significant portion of the marriage. Br. Appellant, at 31-32. Again, Peacock fails

utterly to acknowledge Wells' contribution during those same years, when she maintained the home and home-schooled their children. RP 106. Or to acknowledge that, beginning in 2010, when Peacock stopped working, she returned to the workforce to keep the family afloat. CP 289 (¶ 2.21.2). Simply, Peacock does not explain why Peacock's work was "beyond the call of duty" and Wells' is not. Br. Appellant, at 33.

Finally, the court's fairness (to Peacock) is further underscored by its denial of Wells' request for attorney fees, despite the finding that the father's intransigence drove up the cost of the litigation. The court essentially gave him a pass on \$20,000. CP 292 (FOF ¶ 3.7).

In sum, the court did not abuse its discretion when it balanced all of the facts of this family, many of them very sad, to arrive at an equitable distribution of the assets and liabilities. Peacock has failed to show otherwise.

C. THE COURT PROPERLY DENIED THE MOTION TO VACATE BECAUSE THERE IS NO ERROR, OR, IF THERE IS AN ERROR, IT IS MOST CERTAINLY HARMLESS.

As illustrated above, the court equitably distributed the relatively modest and very straightforward assets of these parties. And it did so after unnecessarily protracted litigation, out of

proportion to the issues presented. The court properly recognized Peacock as increasing the costs of litigation, but, in light of his disability, declined to award fees. Nevertheless, subsequently, Peacock moved to reconsider, filed a notice of appeal, sought CR 60 relief, then amended his notice of appeal. By local rule, the CR 60 motion would normally be heard by the trial judge. KCLR 60(e)(2) (“The return on the order to show cause to set aside a judgment following trial shall be before the judge who presided over the trial.”). However, Judge Ramseyer transferred the case to another judge, ultimately Judge Palmer Robinson, who denied the motion.

Peacock’s complaint focuses on an exchange of emails between one of his attorneys (Elise Buie) and Judge Ramseyer’s bailiff. It does not appear Buie or the bailiff acted in any improper way. The exchanges were administrative in nature, incidental to the GR 33 appointment, and revealed nothing not already known. However, assuming for the sake of argument, that some violation occurred, Peacock still must show the violation affected a substantial right of Peacock. Otherwise, the court must disregard the error as harmless. See RCW 4.36.240 (“The court shall, in every stage of an action, disregard any error or defect in pleadings

or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.”). This reason alone should end the inquiry, and should have dissuaded Peacock from these months of effort to upend the trial court’s work.

For example, Peacock claims he was limited in discovery, when, in fact, the court allowed Peacock incredible latitude in his own disregard of the discovery rules. See, e.g., CP 1645-1647, 1660-1661; RP 25-26. Even now, Peacock fails to indicate what is missing from the financial picture of this family, a picture with which he was (after 20 years of marriage) well-acquainted. RP 21. True, the court prevented him from abusing discovery, as in the last-minute subpoenas to random storage facilities and Wells’ email service providers. However, the court had the authority and the duty to contain Peacock’s efforts. See *City of Lakewood v. Koenig*, 160 Wn. App. 883, 891, 250 P.3d 113, 117 (2011) (“A trial court may also, sua sponte, act to limit abusive discovery.”).

Peacock also complains he was denied the chance to settle the case in mediation, but this makes no sense. The parties had two years to settle the case, during which Peacock showed zero interest in coming to terms, which is why the trial court waived

mediation. See, e.g., RP 8, 11. Moreover, though mediation can be helpful, it is not the only means to avoiding a trial. Parties can settle cases at any time. See RP (02/06/15) 10-17 (Judge Robinson noting the parties can settle the case on their own). Peacock fails to show how the court obstructed him from settling his case. Rather, the record and the ongoing litigation make plain that Peacock is unwilling or unable to agree to anything. When he points his finger at the judge as somehow impeding settlement, the criticism is misdirected, to say the least.

In any case, free mediation service is not a “substantial right,” and Peacock never claims it to be. In short, Peacock demonstrates no harm to any substantial right arising from the outcome in this case, let alone harm somehow arising from Buie’s emails to the court.

**D. THE TRIAL COURT PROPERLY DENIED THE MOTION TO VACATE SINCE PEACOCK FAILED TO DEMONSTRATE ANY BASIS FOR SUCH EXTRAORDINARY RELIEF.**

Peacock has taken a complaint about his attorney’s conduct and tried to make of it some wrongdoing on the judge’s part. (It bears noting that Peacock has had a total of six attorneys, seven if you count the two appearances by Rao.) Whatever the merits of the complaints against the attorney, the judge is not a proper target,

particularly here, where the record reveals the judge's extraordinary effort to accommodate Peacock. In short, this proceeding was fair and appeared fair; at least it was fair to Peacock, who fails to prove otherwise. See RP 8 (Wells' attorney pointing out high cost in fees to her and Peacock's failure to pay her fees where awarded).

Fairness is, after all, a two-way street in litigation.

Peacock also fails to analyze the issues under the applicable standards: equity for CR 60 motions and reasonableness for the appearance of fairness doctrine. Instead, Peacock's appeal merely continues the pattern of litigiousness evident in the proceedings below at a cost to Wells she simply cannot bear.

1) CR 60 relief is equitable in nature.

Peacock ignores the starting point for analysis of a trial court's denial of a motion to vacate a judgment. Perhaps that is because the touchstone of relief under CR 60 is equity, meaning courts should grant the extraordinary relief of vacating a judgment only where necessary to preserve substantial rights and do justice between the parties. In particular, CR 60 is not a remedy for an attorney's mistake (even assuming a mistake was made here), as discussed further below. Here, the trial court did everything possible to ensure a fair process for Peacock and, ultimately,

distributed the assets and liabilities equitably. Indeed, because of the accommodations extended Peacock, the trial proceedings were unnecessarily prolonged and costly, unfairly so, to Wells. It would be a gross injustice to put her through a second trial for no reason other than an alleged, technical error (if error it was) by Peacock's attorney. The trial court properly denied the motion to vacate and properly awarded fees to Wells.

2) CR 60 serves interests in equity and finality.

Not only did the trial court's decision serve interests in justice, it also served interests in finality, which are particularly acute in dissolution actions. *Marriage of Landry*, 103 Wn.2d 807, 809-810, 699 P.2d 214 (1985). Accordingly, a trial court may only reopen a final judgment when a statute or court rule specifically authorizes it to do so and within the constraints of that authority. *Marriage of Shoemaker*, 128 Wn.2d 116, 120, 904 P.2d 1150 (1995). Here, the law in no way justifies the extraordinary relief requested by Peacock. Indeed, the facts did not even justify bringing the motion, as Judge Robinson repeatedly noted. See, e.g., RP (02/06/15) 6, 25. Elise Buie revealed nothing to the court Peacock had not already revealed, directly and indirectly and in volume. Moreover, assuming arguendo that Buie engaged in some

form of improper conduct (not conceded), her conduct did not affect the proceedings in any way injurious to Peacock, as discussed above and below. Finally, even “the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action.” *Estate of Harford*, 86 Wn. App. 259, 265, 936 P.2d 48 (1997) (and additional authorities cited below).

Though Peacock pays little attention to the CR 60 cases, those cases set the standard for the relief he requests. Importantly, under the rule, the court may grant the extraordinary relief of vacating a judgment only when justice requires it. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). Yet, in his request to the trial court for relief, Peacock never once suggested how the dissolution decree was inequitable. It is not inequitable, despite his arguments to the contrary made for the first time on appeal. See Br. Appellant, at 26-32. As discussed above, the court fairly divided the assets and liabilities, and Peacock makes no credible argument to the contrary. He makes no showing of how the “bottom line” was affected by Buie’s actions, actions over which Wells had zero control. He makes no showing that he lost any substantial right or suffered an inequitable outcome. Indeed, the equities run in the other direction: it is hard to imagine a greater injustice than making

Wells go through a second trial to satisfy Peacock's claim of a technical, but harmless, attorney mistake.

Even assuming Buie's email exchange with the court was improper, CR 60(b) offers no remedy to Peacock. If he can show any prejudice, his remedy is to proceed against his attorney. Final judgments affect not only the rights of the parties, who rely on the finality of their judgments, but the rights of many others with whom the parties subsequently contract, etc., which is precisely why the standard for vacating judgments is so high, and does not include attorney error. The cases are clear on this point, as discussed below.

3) Attorney mistakes do not justify relief under CR 60(b)(11).

Here, Peacock relied on CR 60(b)(11), which provides that a judgment may be vacated for "[a]ny reason justifying relief from the operation of the judgment." As this Court has explained, this last provision of CR 60 "is a catch-all provision, intended to serve the ends of justice in extreme, unexpected situations." *State v. Ward*, 125 Wn. App. 374, 379, 104 P.3d 751 (2005) (emphasis added). That is, the rule applies only to "extraordinary circumstances," which constitute irregularities extraneous to the proceeding and applies only when there is no other provision of CR 60(b) that

applies to the circumstances.” *Id.* (internal citations omitted) (emphasis added).

Attorney mistakes are not extraneous and not extraordinary. See, e.g., *Lane v. Brown & Haley*, 81 Wn. App. 102, 106-109, 912 P.2d 1040, *rev. denied*, 129 Wn.2d 1028, 922 P.2d 98 (1996) (no relief for attorney mistakes under CR 60(b)(11)); *In re Marriage of Burkey*, 36 Wn. App. 487, 490-91, 675 P.2d 619 (1984) (inadequate representation did not justify relief under CR 60(b)(11)); see, also, *Bergren v. Adams County*, 8 Wn. App. 853, 857, 509 P.2d 661 (1973) (attorney mistake not a basis to vacate under CR 60(b)(11)).

Of particular significance here, the trial court in *Burkey* vacated a dissolution decree based on Wells’ claim that she was inadequately represented in the negotiated settlement. The appellate court reversed for an abuse of discretion, observing that permitting such collateral attacks “would open a Pandora’s Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses.” 36 Wn. App. at 489 (emphasis added). Moreover, the court observed, Peacock was not responsible for the inadequate representation provided by Wells’ attorney. *Id.*, at 490. Likewise, here, Wells had nothing to

do with Buie's communications, yet Peacock would have her pay the extreme penalty of enduring another trial.

In contrast to the allegations of attorney misconduct here, the few cases where CR 60(b)(11) relief has been proper are ones where clients have been deprived of substantial rights through no fault of their own. See, e.g., *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980) (attorney withdrew request for jury trial); *Barr v. McGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003) (clinical depression of attorney justified vacating dismissal of client's case); *In re Marriage of Furrow*, 115 Wn. App. 661, 63 P.3d 821 (2003) (ordering judgment vacated where mother's parental rights terminated despite that children had no guardian ad litem). Nothing of that magnitude occurred here. No rights, let alone substantial rights, were denied Peacock.

4) Reasonableness is key to the appearance of fairness doctrine.

Peacock cannot claim he lost a substantial right, so his argument attenuates to a claim the email exchange between Buie and the court's bailiff raise a *suspicion* of judicial bias. Here, the applicable standard is an objective one, that is, the appearance of fairness doctrine applies where the judge's "impartiality might be reasonably questioned." *Sherman v. State*, 128 Wn.2d 164, 206,

905 P.2d 355, 378 (1995) (emphasis added). Nothing in the facts of this case raises any question concerning the judge's impartiality, let alone a reasonable one. The judge has no close personal association with the trial attorney, as in *Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012). The judge's law partner did not write an opinion letter on the merits of the case, as in *Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966). The judge did not attempt to verify a party's income through independent research, as in *State v. Romano*, 34 Wn. App. 567, 569, 662 P.2d 406 (1983), or instruct his clerk to investigate facts of the case, as in *Sherman v. State, supra*. As Peacock concedes (Br. Appellant, at 6), there simply is no case with similar facts, and the facts here do not satisfy the objective standard.

Under that standard, to prevail on an appearance of fairness claim, Peacock has the burden to produce sufficient evidence demonstrating actual or potential bias, that is, some personal or pecuniary interest on the part of the judge. *Tatham*, 170 Wn. App. at 96. It is not enough merely to speculate, as Peacock repeatedly does, on the effect of the emails (to the bailiff) on the judge. *Id.* See, e.g., Br. Appellant, at 19-22 (referring to email to bailiff as "prejudicial" and indicating Peacock is "overly litigious"). Peacock

does not even show the judge saw the emails. See RP (02/06/15) 25 (Judge Robinson describing as speculative whether Judge Ramseyer was aware of the emails, after the first one); see, also, RP (02/06/15) 14 (Peacock acknowledging no evidence Judge Ramseyer aware Buie was communicating “confidential” information). Peacock never shows any personal or pecuniary interest of Judge Ramseyer in the case.

In short, a judicial proceeding satisfies the appearance of fairness doctrine if a “reasonably prudent and disinterested person” would conclude that all parties obtained a fair, impartial and neutral hearing. *Tatham*, 170 Wn. App. at 96. The doctrine does not guarantee a particular result, but a process that appears fair objectively. The proceeding in this case certainly satisfies that standard. The exchange of ministerial emails between the bailiff and Buie in no way casts suspicion on the judge’s impartiality, any more than riding together in the elevator would. Every ex parte communication does not trigger the appearance of fairness doctrine. Indeed, the judicial system would grind to a halt if every ex parte email communication between a judge’s bailiff and one of the parties or their attorneys became grounds for a mistrial or new trial. Here, in fact, the court took pains to avoid any potential

problem: all communication occurred through the bailiff and addressed only the ministerial issues.

And this is the crux of the issue. The emails convey nothing prejudicial about Peacock and, certainly, nothing about him not already part of the record. Peacock claims Buie planted a “seed” when she opined that he might need a litigation GAL. But Peacock planted that seed himself, when the litigation started, and nurtured the seed every time he fired another attorney or filed a pro se pleading. The court’s awareness of Peacock’s litigation difficulty gave rise to the GR 33 appointment. Does Peacock mean to argue the court must recuse itself whenever it becomes aware of revealing information about the parties? So whenever a GR 33 motion is made, or a request for fees, or a motion for a litigation GAL, or, for that matter, a parenting evaluation or other psychological evaluation? As Judge Robinson noted, the court routinely must address requests for fees in criminal matters. See RP (02/06/15) 14-16.

In sum, Buie did not reveal Peacock to be “overly litigious”; he revealed that himself. See, e.g., RP 32 (Peacock listed 150 witnesses for trial). And, he relied on his disabilities as the cause and the reason for numerous accommodations. See, e.g., RP 202

(explaining delay at trial). He also used his disabilities to argue for relief from various obligations and liabilities (family support, attorney fees), but now argues he should get a new trial because the court knew about his disabilities. This does not make sense.

Peacock seems to know this, since he tries to read meaning into the emails. In addition to the “seed” of skepticism mentioned above, he declares the “clear implication” of Buie’s withdrawal was that “Mr. Peacock was insisting on an unreasonable level of litigation and was out of touch with reality.” CP 19. Obviously, attorneys withdraw for all kinds of reasons and sometimes the court must be made aware of those reasons. Here, Buie described serious health concerns. In any case, three other attorneys had already withdrawn from representing Peacock, so any implication about Peacock’s litigiousness was merely cumulative.

Simply, there was no cat to let out of the bag. Buie’s appointment came about because Peacock was impeding resolution of the case; her withdrawal was but another chapter in the same saga. In any case, Peacock does not get to draw these conclusions about what the emails say. The court read them, and found that they simply did not add up the way Peacock claimed.

At the end of the day, nothing in the email exchanges gives rise to any concerns of bias. "Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). Even where a court loses patience with the conduct of a party, threatens incarceration and sanctions, the law distinguishes between frustration and bias. *In Re Custody of R.*, 88 Wn.2d 746, 947 P.2d 745 (1997).

Here, the court had the duty and the authority to conduct the proceedings in an orderly and efficient manner. *In re Marriage of Robertson*, 113 Wn. App. 711, 714, 54 P.3d 708 (2002) (trial court has inherent powers to do 'all that is reasonably necessary' to efficiently administer justice). That is all and precisely what the court here did.

5) A conflict of interest, if any, does not justify relief from judgment.

Peacock also claims Buie had a conflict between her interests and those of her client. Br. Appellant, at 23-25. This claim again turns on the problematic premise that Buie revealed confidential information. She did not. Nothing was revealed to the court's bailiff that had not been made plain by a year of litigation. Indeed, Judge Robinson was incredulous that a statement from

Buie that she needed "to review the pleadings" somehow revealed a confidence. RP (02/06/15) 26-27; see, also, RP (02/06/15) 25-26.

RPC 1.6 prohibits an attorney from disclosing client confidences and secrets. A "confidence" is defined as "information protected by the attorney-client privilege under applicable law." *In re Schafer*, 149 Wn.2d 148, 159, 66 P.3d 1036 (2003). A "secret" refers to "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.* As apparent in the record, Peacock's condition and his manner of conducting litigation were well known to the court. They were not confidences or secrets. In any case, even confidences can be disclosed, under implicit authorization, "in order to carry out the representation,..." RPC 1.6. Buie either needed additional funds to continue or she needed to withdraw because of Peacock's objections to her. She communicated with the court in service of these goals.

But even if she disclosed confidences, there is no prejudice. Peacock received counsel, he received leniency in conducting discovery, he received an equitable award of property, freedom

from a maintenance obligation, and a pass on liability for the attorney fees he caused with his intransigence. He claims he “lost his best chance for settlement,” but there is not any evidence in these long proceedings of an interest in settling. He made no offers and no responses to the settlement proposals from Wells. Consequently, his claim that Buie cost him his “best chance for settlement” is not merely speculative; it is simply false.

Peacock also claims the court limited his ability to conduct discovery. Well, so do the court rules. See, e.g., CR 26. Peacock had already been found in violation of discovery requirements and he acknowledged he was the cause of delay in submitting interrogatories to Wells. He had demonstrated a penchant for pursuing levels of detail out of proportion to the case, which even his attorney admitted did not involve “a lot of money.” RP 618. The court’s duty here is not to Peacock alone, but also to Wells, and to the general interest in judicial economy and finality. Simply, the court can and should limit discovery when discovery is abusive.

Peacock demonstrates no harm to him arising from any of these claimed defects. He proves instead a stubborn resistance to resolving the end of his marriage. The court properly brought the proceedings to conclusion.

E. THE TRIAL COURT PROPERLY AWARDED FEES FOR THE CR 60 MOTIONS AND WELLS SHOULD RECEIVE HER FEES ON APPEAL.

Peacock challenges the trial court's award of fees for his CR 60 motion, arguing it can be an abuse of discretion to award fees to the spouse who received a majority of the parties' assets. Br. Appellant, at 26. That does not mean the award here is an abuse of discretion, particularly as Wells requested and the court granted fees on the basis of intransigence, irrespective of RCW 26.09.140 considerations. CP 184; RP (02/06/15) 23, 28 (also on the basis of relative need and ability to pay). Trial court decisions on whether to award attorney fees, and what amount to award, are left to the discretion of the trial court, which this Court reviews for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). That is, an attorney fee award is subject to reversal only if the trial court exercised its discretion on untenable grounds or for untenable reasons. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

Here, the award by Judge Robinson was not the first award of fees against Peacock, nor the first based on intransigence. See, e.g., CP 1646; see, also CP 287-288 (finding intransigence but declining to award fees). The court did not abuse its discretion

when it awarded fees for the CR 60 motion. As the trial court noted, given the multitude and variety of email correspondence between bailiffs and attorneys, the court “would be granting a new trial in every case” if the contested email here gave rise to an appearance of unfairness. RP (02/06/15) 17. “There would not be a trial in this county that was final.” Id.

Likewise, this appeal has no merit, involving only baseless challenges to the court’s discretion, which was exercised in full compliance with the applicable statutory mandates and in consideration of the pertinent facts. RAP 18.9 permits this Court to sanction a party who files a frivolous appeal, one where there are no debatable issues upon which reasonable minds could differ and which is so totally devoid of merit that there is no possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 732 P.2d 510 (1987). In substance, the costs of Peacock’s arguments exceeds the value of the assets in dispute. Indeed, all this appeal can achieve is a reduction in funds available for life’s necessities, including, in Wells’ case, the need to support the parties’ two children. For example, in addition to her attorney fees, Wells has had to spend nearly \$1000 to supplement the clerk’s papers so that this Court would have before it the reasons for Judge Ramseyer’s

efforts to bring closure to the case, Peacock having failed to provide any of that context. Because the appeal is frivolous, he should pay her fees and these costs.

Likewise, here, intransigence supports an award of fees. Throughout trial, Peacock's conduct unnecessarily increased the cost of litigation. RP 10-11. He was sanctioned several times, but he was also relieved of responsibility for fees at trial because of his "mental health issues." RP 11. At some point, he must be made accountable, since the effect on Wells is the same. Whether caused by mental illness or meanness, the conduct is unacceptable. As this Court has held, an award of attorney fees is justified where the conduct of one of the parties causes the other "to incur unnecessary and significant attorney fees." *Burrill v. Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993, 998 (2002). Such an award is justified here, particularly as the ongoing litigation effectively undermines the just and equitable result the court sought to achieve in the distribution. For these reasons, this Court should award Wells her fees.

#### IV. CONCLUSION

For the reasons above, Janette Wells respectfully asks this Court to affirm the trial court in all respects and to award her fees.

Dated this 8th day of September 2015.

RESPECTFULLY SUBMITTED,

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