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STATE OF WASHINGTON

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NO. 39936-9-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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In Re The Marriage of:

RUSSELL NIBLOCK

Respondent

v.

CHERYL NIBLOCK

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY

The Honorable Judge John P. Wulle

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REPLY BRIEF OF APPELLANT

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Josephine C. Townsend, WSBA 31965

Attorney for Appellant

211E. 11<sup>th</sup> Street Suite 104

Vancouver WA 98660

360-694-7601

Facsimile: 360-694-7602

[jctownsend@aol.com](mailto:jctownsend@aol.com)

## TABLE OF CONTENTS

I.	Statement of the case	.....	1
II.	Argument	.....	2
III.	Request for Attorney Fees	.....	8
IV.	Conclusion	.....	9

## TABLE OF AUTHORITES

### CASES

<i>In re the Marriage of Knutson</i> , 114 Wn. App 866, 871, (2003)	....	6
<i>In re Marriage of Moore</i> 99 Wn. App 144, 993 P.2d 271 (1999)	.....	2
<i>Millheisler v. Millheisler</i> , 43 Wn.2d 282, 283, 261 P.2d 69 (1953)	.....	3
<i>State v. Scott</i> , 110 Wn.2d 682, 685 757 P.2d 429 (1988)	.....	4

### REGULATIONS AND RULES

CR 60(b)	.....	3
RAP 2.5(a)	.....	4
RAP 18.1(c)	.....	8

## I. Statement of the Case

Mr. Niblock claims that the Qualified Domestic Relations Order properly modified the language of the divorce decree which specifically awarded a sum certain to the wife. This is inaccurate.

Mr. Niblock claims that the sum certain was \$107,500, and that this amount represented an equal division of the retirement account. Respondent's Brief pg.2. This is not true.

Mr. Niblock claims that if the distribution could not be awarded to Cheryl upon entry of the decree, this sum certain would fluctuate depending on market conditions and fluctuations. Respondent's brief pg. 3. This is not true.

Mr. Niblock claims that Mrs. Niblock did not file her motion for CR60 relief, combined with her motion to enforce the decree in a timely fashion. Respondent's brief at pg. 2. This is not true.

Mr. Niblock claims that because the Qualified Domestic Relations Order contained fluctuation language, the reduction to the wife's sum certain award could be adjusted. This is not true.

## II. ARGUMENT

### A. MR. NIBLOCK DOES NOT DISPUTE THAT THE DECREE CALLED FOR THE WIFE TO RECEIVE A SUM CERTAIN OF \$107,500.00

The use of a Qualified Domestic Relations Order was not mandatory for the wife to receive her sum certain. (CP 10). The amount of money the wife was to receive was a sum certain; the only issue which was open for interpretation was how the husband was to pay that sum certain.(CP 5). It would be at the husband's discretion whether or not to obtain a QDRO, or pay her the money via some other means. (RP 2). This case can be distinguished from *In Re Marriage of Moore*, 99 Wn. App. 144, 993 P.2d 271 (1999). In *Moore*, the wife was not awarded a sum certain. In this case, the decree is unambiguous that Mrs. Niblock was to receive \$107,500. (RP 2). If the husband had intended for her to suffer market fluctuations, it was incumbent upon him to put that language in the decree or in the agreement which was placed on the record. (RP 2). No such agreement to adjust the amount based on market fluctuation was ever authorized or recorded. It is the absence of any language regarding market fluctuations which makes the decree unambiguous. (RP 2). Nowhere did Mr. Niblock have his wife agree that she would receive less than the sum certain they

agreed upon in the decree. (CP 11). Mr. Niblock would have this court add language to the decree which does not exist. That is in effect, what the QDRO did. It added language which was not authorized by the decree and improperly modified the terms of the language of the decree. It is well settled that the disposition of property made either by a divorce decree or by agreement between the parties and approved by the divorce decree cannot be modified. *Millheisler v. Millheisler*, 43 Wn.2d 282, 283, 261 P.2d 69(1953). Validating a QDRO which contained erroneous language violates this premise.

**B. MRS. NIBLOCK MOVED FOR CR60 RELIEF AND SHE ALSO MOVED FOR ENFORCEMENT OF THE PROVISIONS OF THE DECREE.**

Mr. Niblock did not object to the CR60 motion as untimely at the trial court level. He also fails to mention that the motion was also to enforce the provisions of the decree. This was specifically authorized by the language in the decree. (CP 10). Mrs. Niblock tried albeit unsuccessfully to obtain relief without court process. (CP 29). Mrs. Niblock properly brought the issue back before the trial court in a timely manner and within the time frame established by CR60. Because the motion was proper, and because there was no

argument against the timeliness of the motion, Mr. Niblock has waived the issue. Issues not raised at the trial court level are considered waived. RAP 2.5(a). The waiver rule serves the interests of judicial economy by requiring the party to raise the challenge in a timely manner that permits the court to consider it without unnecessarily wasting resources. See *State v. Scott*, 110 Wn.2d 682,685, 757 P.2d 429 (1988). As provided for in the decree, the wife properly brought a motion before the court to enforce the provisions of the decree. (CP 10). She had previously attempted to get her prior attorney to correct his mistake, but he refused to cooperate. (CP 29). The wife should not be punished by her attorney's errors. Even if the Appellate court were to consider this argument, it should be rejected as under the totality of the circumstances as the wife's motion to the court was timely.

**C. THERE WERE NO LATENT AMBIGUITY IN THE LANGUAGE OF THE DECREE AND THE QUALIFIED DOMESTIC RELATIONS ORDER DOES NOT REFLECT THE PARTIES AGREEMENT.**

The attorney who drafted the QDRO admitted that if he had been told that the wife was to receive a sum certain, he would have written the QDRO to reflect that agreement. (CP32). He further stated that he had not been told differently by the attorneys. (CP

32). Judge Wulle clarified to the parties that the clear language of the Decree awarded the wife a sum certain. (RP 3, 11 ).

“Judge: Mr. Hall, I need to clarify something with you sir. When we were discussing this case in the settlement conference earlier, the distribution of the hundred and seven thousand five hundred dollar (\$107,500) at one point being discussed as so much for a home, for this and” (RP 3). “ Mr. Hall : No, that will be up – it will be a hundred and seven thousand five hundred dollars (\$107,500) will be released to Ms. Niblock and she can do with it as she wishes in terms of how she will pay off certain debts.”(RP 3). Therefore this fixed amount was to compensate the wife for her equitable division of the entire martial community property, not just the retirement account the money was coming from. The QDRO was the means of how to transfer the value of the community awarded to the wife by agreement. (RP 2). Judge Wulle admitted that the issue was “above him” and that Mrs. Niblock would have to take the issue up with the Court of Appeals for her to prevail. (RP 11). Judge Wulle stated, “I think one of the errors was that the QDRO says subject to market fluctuation. I think that’s clearly signed off by everybody and clearly it says this is what our agreement was”. (RP 11). Despite acknowledging that the language of the QDRO did not match the

decree, the judge did not vacate the QDRO. If Mrs. Niblock's attorney signed off on the QDRO out of error, Mrs. Niblock should not be held responsible. Mrs. Niblock never signed off on the QDRO. (CP15). To state that Mrs. Niblock agreed to the QDRO and thus the language of the QDRO became an agreement, is clearly an abuse of discretion at the trial court level. The QDRO was supposed to reflect the agreement set forth in the decree, and it did not. The trial court further abdicated their role when it told Mrs. Niblock, "I think you are going to have to address that issue above me." (RP 11). It was clear from the proceedings that the language of the QDRO did not match the language from the decree, but the trial court improperly chose the language of the QDRO as controlling. This is the type of abuse of discretion that the Appellate Court must remedy. To hold otherwise, would render settlement negotiations meaningless. Any party who did not wish to follow the provisions of the decree, could fashion supplemental orders which fit their own purpose and undermine the settlement agreement through crafty word smithing.

**D. In Re Marriage of Knutsen is on point and relevant.**

Just like *In Re Marriage Knutsen*, 114 Wn. App 866, 60 P.3d 682 (2003), the decree awarded Mrs. Niblock a sum certain. There was

no ambiguity of any kind in the decree (CP 11 ). She was not awarded any percentage of the retirement income and there was no agreement that this money was subject to any kind of fluctuation. (CP11). Mr. Niblock would have this court believe that the straight-forward language of the decree somehow infers that the amount awarded to the wife should fluctuate based on market activity. No such provision was entered with the decree (CP 7-11). As in *Knutsen*, the husband here is attempting to have the court alter the agreement and award the wife an amount less than the amount set forth in the decree.(CP 6). Mr. Niblock improperly opines that this amount represents 50% of the community interest in the retirement account. Respondent's Brief pg.2 In fact, there was no finding that the distribution equaled any specific percentage of the wife's interest in the 401k. (CP 11).Respondent's brief erroneously states that somehow the amount that the wife was awarded represented only her share of the retirement benefits. Respondent's brief pg. 2. The record indicates that this amount in fact represented her share of the community assets. (RP 2), not any one asset. The language of the decree specifically stated, "Property to wife: (4) \$107,500 from husband's 401K, upon entry of the final decree. Should a QDRO be required to make the transfer,

Husband shall arrange this at his expense.” (CP11). The QDRO was only to be used as a means of delivery of the wife’s share of the entire value of the community. The parties met at settlement conference and as a result of the settlement agreement, Mrs. Niblock agreed to accept \$107,500 as a sum certain, in return for other properties, money and assets which were awarded to the husband. (CP 29-30 ). This amount represents the actual money which represented the wife’s complete interest in the community. It was never proffered as her portion of just the 401K.(CP 29). In return for this payment, Mrs. Niblock had agreed to pay certain debts.(RP 3-6). To accept Mr. Niblock’s position renders the settlement agreement and subsequent decree meaningless.

**E. The wife is entitled to attorney fees.**

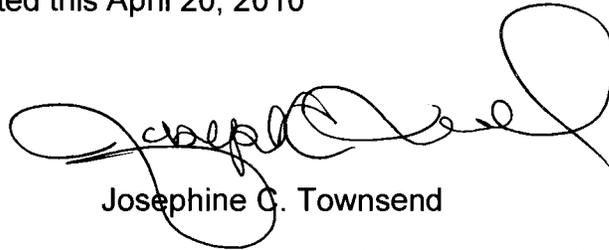
Under RAP 18.1 (c), Mrs. Niblock submits her financial declaration in support of her need for attorney fees. In addition, the decree requires that the husband pay for reasonable attorney fees to enforce provisions of the decree. (CP 8). Based on her financial need and the provisions of the martial decree, she asks for attorney fees and costs to be awarded.

## Conclusion

Appellant Cheryl Niblock asks the appellate court to

1. Reverse the decision of the trial court, remand the action and direct that the QDRO be vacated or modified to allow for the remaining funds to be awarded to her with interest as provided for in the decree.
2. Award her attorney fees for having to prosecute the terms of the decree and the costs of this appeal.

Respectfully submitted this April 20, 2010

A handwritten signature in black ink, appearing to read 'Josephine C. Townsend', with a large, stylized flourish at the end.

Josephine C. Townsend

Attorney for Cheryl Niblock, Appellant

205 E. 11<sup>th</sup> Street, Suite LL8

Vancouver WA 98660

JCTownsend@aol.com

COURT OF APPEALS  
DIVISION II

RUSSELL NIBLOCK	)	Court of Appeals No. NO. 39936-9-II
Respondent	)	Trial Court No. 04-3-01503-8
v.	)	
CHERYL NIBLOCK	)	
Appellant.	)	

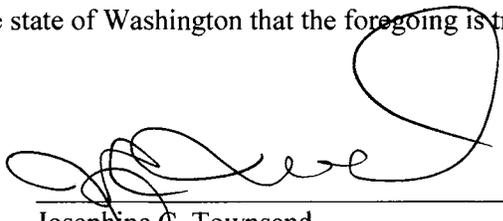
1. My name is Josephine C. Townsend and I am the attorney for Cheryl Niblock.
2. I served Jerry Hall, attorney for the Respondent\_ with the following documents:

APPELLANT'S REPLY BRIEF  
AFFIDAVIT OF FINANCIAL NEED

I served these documents on April 21, 2010 at this address: 12214 S.E. Mill Plain, Suite 203, Vancouver WA 98684 and also to Catherine W. Smith, Attorney At Law, 1109 First Avenue, Suite 500 Seattle WA 98101-0974

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED April 21, 2010 at Vancouver, Washington.



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Josephine C. Townsend  
Attorney At Law  
WSBA # 31965  
211 E. 11<sup>th</sup> Street Suite 104  
Vancouver WA 98660  
360-694-7601