IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re the Marriage of RUSSELL A. NIBLOCK, Respondent, v. CHERYL C. NIBLOCK, Appellant.	No. 39936-9-II UNPUBLISHED OPINION

Worswick, A.C.J. — Cheryl Niblock appeals from the trial court's denial of her CR 60 motion to vacate a qualified domestic relations order (QDRO). She argues that the QDRO impermissibly modified her divorce decree and failed to award a sum certain as outlined in the property distribution award. We affirm.

FACTS

Russell and Cheryl Niblock were married on October 26, 1991. After nearly 13 years, the parties separated in September 2004. The parties entered their dissolution decree on July 18, 2008. The decree awarded various community properties, including $107,500 from Russell's Puget Sound Freight Lines 401(k), to Cheryl.[1] Exhibit A of the decree, which detailed the property award to Russell, provided in relevant part:

[1] We refer to the Niblocks by their first names for the sake of clarity. We intend no disrespect.

> PROPERTY TO HUSBAND:
> . . .
> 2) All pension, social security and retirement benefits in his name, less $107,500.00 from husbands [sic] 401k at Puget Sound Freight Lines to be disbursed to [Cheryl] upon entry of Final Decree. Should a QDRO be required to make the transfer, Husband shall arrange * this at his expense. *
> . . .
> * Matter can be placed before Judge by motion if problem with language

Clerk's Papers (CP) at 10. And Exhibit B, which detailed the property award to Cheryl, provided in relevant part:

> PROPERTY TO WIFE:
> . . .
> 4) $107,500.00 from Husbands [sic] 401k to be disbursed upon entry of the Final Decree. Should a QDRO be required to make the transfer, Husband shall arrange this at his expense.
> . . .

CP at 11.

An attorney otherwise unrelated to the case drafted the QDRO. On September 2, 2008, the parties' attorneys signed a QDRO and filed it with the court to effectuate the 401(k) distribution. The QDRO awarded Cheryl "$107,500 of Participant's account in the plan as of July 18, 2008 *adjusted for earnings, losses or fluctuations in asset values* from July 18, 2008 until the benefits awarded to the Alternate Payee are distributed to her." CP at 50 (emphasis added). After the decree was entered, the 401(k) account lost considerable value. As a result, Cheryl only received $77,083.59, not $107,500 as noted in the decree. After this, Cheryl's sister contacted the attorney who drafted the QDRO to inquire.[2]

[2] The attorney's response to Cheryl's sister was as follows:

> Ms White, If someone told me there was an agreement that your sister was to receive the lump sum amount of $107,500 without adjustment for market conditions (earnings/losses), and if the dissolution decree provided that your sister was to receive the lump sum amount of $107,500 without adjustment for market

On September 1, 2009, Cheryl filed a CR 60 motion asking the court to set aside the QDRO and enter a revised QDRO to direct the transfer of the full $107,500.[3] Cheryl argued that the QDRO was entered by mistake. The trial court denied the motion, stating that "the language of the QDRO, entered after the entry of the decree contains language which allowed the fluctuation of the market to affect the actual amount of the transfer." CP at 54. The trial court also described its reasoning as follows:

> I think that the – one of the errors was that it set the amount in the Decree but then when you look at the QDRO it says subject to market fluctuation. I think that's clearly signed off by everybody and clearly it says this is what our agreement was. I don't think there's any place for me to go.

Verbatim Report of Proceedings (VRP) (Sept. 25, 2009) at 11. Cheryl appeals.

ANALYSIS

CR 60 Motion to Vacate the QDRO

Cheryl contends that the trial court erred when it denied her CR 60 motion to vacate the QDRO for refusing to enforce the decree as written and for allowing an improper modification of the decree. Whether to grant a CR 60 motion to vacate is within the trial court's sound discretion. *In re Marriage of Knutson*, 114 Wn. App. 866, 871, 60 P.3d 681 (2003). A trial court manifestly abuses its discretion if its decision is based on untenable grounds or untenable

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> conditions (earnings/losses), neither of which occurred, the QDRO could have been written to provide that your sister would receive the lump sum amount of $107,500 as of the date of distribution without adjustment for market conditions (earnings/losses), and the investment losses then would have been borne by your sister's former husband. I believe I have answered your questions fully.

CP at 32.

[3] CR 60 relief allows the trial court to vacate a judgment or order in the case of mistakes, neglect, newly discovered evidence, and other errors, subject to certain conditions.

reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Cheryl argues that the language subjecting the 401(k) retirement award to market fluctuations in the QDRO was a mistake and that the trial court should have granted her CR 60 motion as a result. The trial court, in denying Cheryl's motion, reasoned that the QDRO was "clearly signed off by everybody and clearly it says this is what our agreement was." VRP at 11. To demonstrate mistake, Cheryl also refers this court to the email between her sister and the attorney that drafted the QDRO. But that email in and of itself does not demonstrate mistake. There is a lack of evidence in the record to support Cheryl's argument that the QDRO language was truly a mistake. Because Cheryl has failed to demonstrate an abuse of discretion here, her argument fails.

Decree Enforcement & Modification

Cheryl next contends that the trial court erred by refusing to enforce the provisions of the decree and refusing to order the full award provided to her in the decree. Cheryl essentially argues that the QDRO served as an improper modification of the decree. The interpretation of a dissolution decree is a question of law. *In re Marriage of Chavez*, 80 Wn. App. 432, 435, 909 P.2d 314 (1996). Questions of law are reviewed de novo. *In re Marriage of Thompson*, 97 Wn. App. 873, 877-78, 988 P.2d 499 (1999). If a decree is ambiguous, this court seeks to ascertain the intention of the court that entered it by using general rules of construction applicable to statutes and contracts. *Thompson*, 97 Wn. App. at 878.

An ambiguous decree may be clarified, but not modified. *Thompson*, 97 Wn. App. at 878. A trial court does not have the authority to modify even its own decree in the absence of

conditions justifying the reopening of the judgment. *Thompson*, 97 Wn. App. at 878; RCW 26.09.170(1).[4] A decree is modified when rights given to one party are extended beyond the scope originally intended, or reduced. A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary. *Thompson*, 97 Wn. App. at 878.

Cheryl argues that the provision, which awarded her "$107,500.00 from Husbands [sic] 401k to be disbursed upon entry of the Final Decree" was modified by the provision in the QDRO that subjected that award to market fluctuations. CP at 11. But as Russell counters, the provision of the decree at issue created a latent ambiguity because the funds were not distributed on the day the decree was entered. We agree with Russell.

A latent ambiguity is one that becomes apparent when applying the instrument to the facts as they exist. *In re Estate of Bergau*, 103 Wn.2d 431, 436, 693 P.2d 703 (1985). The QDRO in this case simply clarified the decree's ambiguity that became apparent only after the account's value declined months after the entry of the decree. It did not modify the decree, as Cheryl suggests. Thus, her argument fails.

Cheryl also argues that the trial court erred by allowing an improper modification of the decree contrary to the court's holding in *Knutson*. *Knutson* involved a situation in which the trial court awarded the wife a specified dollar amount of her former husband's 401(k) plan pursuant to a QDRO. *Knutson*, 114 Wn. App. at 867. During the interim period between entry of the

[4] RCW 26.09.170(1) provides, in part, that "[t]he 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."

divorce decree and the QDRO, the 401(k) plan's value decreased. *Knutson*, 114 Wn. App. at 867. In light of this, the husband moved to vacate and amend the decree. *Knutson*, 114 Wn. App. at 868. The trial court granted the motion and modified the decree to award the wife a lower, but current valuation of the 401(k) along with a new lower equalizing judgment. *Knutson*, 114 Wn. App. at 870. Division Three of this court reversed, holding that the husband was not entitled to relief under CR 60 because the husband's failure to appreciate the plan's vulnerability to market forces did not rise to an "extraordinary circumstance" justifying application of CR 60(b)(11). *Knutson*, 114 Wn. App. at 874.

As Russell points out, the situation here differs from *Knutson*. In *Knutson*, the decree awarded a true sum certain, a fixed amount of $234,572 of the 401(k) with no reference to a point in time. *Knutson,* 114 Wn. App. at 868. In this case, however, the decree awarded "$107,500.00 from Husbands [sic] 401k to be disbursed upon entry of the Final Decree." CP at 11. The "to be disbursed upon entry of the Final Decree" language, coupled with the directive to the husband to arrange for a QDRO if that was necessary to transfer the funds qualified the $107,500 award and led to the latent ambiguity in this instance. This is because the disbursement did not occur "upon entry of the Final Decree," which put into question whether the $107,500 was a true sum certain or a representation of the award's value on the date of the decree's entry. Cheryl's reliance on *Knutson* is misplaced. Thus, her argument fails.

ATTORNEY FEES

Cheryl finally requests attorney fees on appeal under RAP 18.1 and paragraph 3.6 of the divorce decree. Paragraph 3.6 provides, "Each party shall hold the other party harmless from any

collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party." CP at 8. And reasonable attorney fees under RAP 18.1 are recoverable only "if allowed by statute, rule, or contract." *In re Guardianship of Wells*, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009).

As Russell argues, the plain language of paragraph 3.6 does not appear to support Cheryl's position that it authorizes attorney fees in this instance. This is not a "collection action relating to separate or community liabilities." CP at 8. But even though Cheryl fails to cite to any applicable statute, rule or provision in the decree, RCW 26.09.140 obviously applies in this instance. RCW 26.09.140 provides:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.
>
> Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.
> . . .

RCW 26.09.140. A fee award on appeal is within this court's discretion after consideration of "the arguable merit of the issues on appeal and the financial resources of the respective parties." *In re Marriage of Johnson*, 107 Wn. App. 500, 505, 27 P.3d 654 (2001) (quoting *In re Marriage of Griffin*, 114 Wn.2d 772, 779-80, 791 P.2d 519 (1990)).

Cheryl filed a financial need affidavit, as required by RAP 18.1(c), and the court has considered her financial resources. While Cheryl certainly has "modest means," as she describes, her appeal lacks merit. We deny her request for fees.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Bridgewater, J.

Casey, J.P.T.