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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34087-2-III

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

STACY R. CLIFFORD

Plaintiff / Respondent

v.

DOUGLAS CLIFFORD

Defendant / Appellant

APPEAL FROM THE SUPERIOR COURT OF BENTON COUNTY
HONORABLE VIC VANDERSCHOOR
BENTON COUNTY CAUSE NO. 15-2-02849-6

BRIEF OF APPELLANT

SCOTT E. RODGERS, WSBA # 41368
Rodriguez, Interiano, Hanson, & Rodgers, PLLC
Attorney for Appellant
7502 West Deschutes Place
Kennewick, Washington 99336
Telephone: (509) 783-5551

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERRORS

1. The Superior Court erred by issuing an order prohibiting Mr. Clifford from contacting his children, because the Superior Court did not have subject matter jurisdiction.
2. The Superior Court erred by issuing an order prohibiting Mr. Clifford from contacting his wife, because the Superior Court did not have personal jurisdiction over Mr. Clifford.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Can a Washington superior court issue a permanent order prohibiting a Florida resident from contacting his children located in Washington, when the children's home state is Florida, a proceeding to determine custody over the children had been initiated in Florida, and the superior court failed to follow the procedure mandated under UCCJEA?
2. Does a Washington superior court have jurisdiction to issue a permanent order prohibiting a Florida resident from contacting his wife located in Washington, when the only contact the Florida resident had with Washington is his wife's ability to access the Florida resident's password-protected e-mail account?

II. PREFACE REGARDING THE RECORD ON APPEAL

Appellant Mr. Clifford moved this Court to accept additional evidence, and this Court did agree to accept the additional evidence. Pursuant to this Court's order, Appellant Mr. Clifford filed the evidence

with the superior court, along with a supplemental designation of clerk's papers. The superior court's online record of this case indicates that the superior court did prepare and transmit the supplemental clerk's papers to this Court on or around August 19, 2016.¹ Appellant Mr. Clifford's attorney was expecting to receive a copy of the supplemental clerk's papers, but did not receive them. The supplemental clerk's papers should consist of 7 pages: 1) A two-paged attorney's declaration authenticating the following two exhibits; 2) a two-paged 4/7/2016 order affirming jurisdiction; and 3) a three-paged 4/18/2016 order. Appellant's attorney does not know how the superior court numbered these clerk's papers, but suspects that the papers are numbered starting with CP page 97. For the remainder of this brief, Appellant's attorney will refer to the supplemental clerk's papers as "CP 97-" and will further describe the specific papers. Appellant's attorney apologizes to the Court for this inconvenience.

III. STANDARDS ON REVIEW

The only questions presented in this matter are whether the superior court had jurisdiction, subject to various statutory requirements.

(1). *Subject matter jurisdiction* is a pure question of law that is reviewed

¹ Internet at URL

http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&crt_itl_nu=S03&casenumber=15-2-02849-6&searchtype=sName&token=6135DCC2D4AC3BC2412D7AFD164BE0DD&dt=79A1CFDE0D5C88CF87FF1CBCEFFC80E&courtClassCode=S&casekey=171381878&courtname=BENTON%20SUPERIOR%20CT [Accessed 6 October 2016]

de novo.² (2). Where facts are presented to the trial court outside the pleadings to determine *personal jurisdiction*, the question is treated as a motion for summary judgment under CR 56, and standard on review is the same as a summary judgment motion, where the facts are viewed in the light most favorable to the non-moving party.³ If the moving party is entitled to judgment as a matter of law, then dismissal must be awarded.⁴ (3). *Interpretation and construction of statutory language* is a pure question of law that is reviewed de novo.⁵ The court's fundamental purpose in construing a statute is to give effect to Legislature's intent.⁶ Where the plain language of a statute is unambiguous, the plain reading must be given effect.⁷

IV. STATEMENT OF THE CASE

On or about December 5, 2015, there was an incident in the state of Florida wherein Appellant, Mr. Clifford, ("Doug"),⁸ was arrested on

² E.g., *In re Ruff*, 168 Wn. App. 109, 115, 275 P.3d 1175 (Div. 3 2012) (and cases cited therein).

³ E.g., *Puget Sound Bulb Exchange v. Metal Buildings Insulation, Inc.*, 9 Wn. App. 284, 288-89, 513 P.2d 102 (Div. 2 1973) review denied at 82 Wn.2d 1013 (1973) and 415 U.S. 921 (1974) (and cases cited therein).

⁴ E.g., *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1973).

⁵ E.g., *Wilson v. Grant*, 162 Wn. App. 731, 258 P.3d 689 (Div. 3 2011), *as corrected*.

⁶ E.g., *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004); *City of Seattle v. Fuller*, 177 Wn.2d 263, 269-70, 300 P.3d 340 (2013) (and cases cited therein).

⁷ *Id.*

⁸ The names "Doug" and "Stacy" will be used to refer to the Appellant and Respondent, respectively, for the sole purpose of avoiding confusion. The author intends no disrespect in any way toward either party.

disputed allegations of domestic violence by his wife, Respondent Ms. Clifford, (“Stacy”), (CP 27, 97- (4/18/16 Order, para 4-5)). While Doug was being held, Stacy removed their three children from Florida to Benton County, Washington, without permission from or notice to Doug, (*id.* and CP 26-28).

On or about December 11, 2015, Stacy applied for an order of protection in Benton County, Washington Superior Court, which would prohibit Doug from contacting Stacy and their three children, (CP 1-7). On the same day, the superior court exercised emergency jurisdiction and issued a temporary order of protection prohibiting Doug from contacting Stacy or his three children, (CP 8-11).

On December 21, 2015, Doug filed for divorce in the home county of Pinellas, Florida, which action would include custodial determinations of his three minor children, (CP 27-28, CP 97- (4/7/16 Order, para 1-3)).

Doug’s attorney entered a special notice of appearance in Benton County Superior Court on December 23, 2015, (CP 13), and simultaneously filed a limited brief specifically challenging service and jurisdiction, moving the court to deny the petition and to vacate the temporary order, (CP 14-16). The limited brief and motion were supported by an attorney’s declaration and Doug’s affidavit, (CP 17-20), stating that Doug has resided continuously in the state of Florida for at

least five years, has not entered the state of Washington for at least five years, (CP 19), and has neither attempted nor had any contact with Stacy, “whether in person, by phone, by mail, through another person, or by any electronic or other means,” since she left the state of Florida, (CP 20). The matter was continued, (CP 12, 52). Doug’s attorney filed supplemental briefings challenging service and jurisdiction, (CP 30-39), supported by a declaration and affidavit testifying to additional facts specifically disputing personal jurisdiction over Doug, and disputing the superior court’s jurisdiction to prohibit Doug from contacting his children, (CP 24-29, 30-39).

On or about January 8, 2016, Stacy filed a declaration alleging that Doug attempted to contact her via electronic mail, (“e-mail”), on or about December 7, 2015, (CP 40-43), which Stacy later argued supplied Benton County, Washington Superior Court with jurisdiction, (RP). Doug disputed that the electronic mail was sent to Stacy, disputed that it constituted a contact with Stacy, and argued that the content of the e-mail message on its face was not targeted as a contact with Stacy, that the e-mail account was password protected and Doug changed the password when he learned that Stacy had accessed it, and argued that the e-mail message does not supply the court with jurisdiction, (CP 53-59, 60-64, RP).

Doug was careful in the proceedings not to engage in discovery, and not to dispute any facts other than those related to jurisdictional questions, specifically because he did not want to subject himself to Washington jurisdiction under certain case law that provides for consent to jurisdiction in some instances where engaging in discovery and arguing the merits of the case have been held to constitute waiver of jurisdictional challenges.⁹ Despite all of his briefings challenging jurisdiction, and his motion to continue the matter to permit him time to challenge the case on the merits should the court find jurisdiction, (CP 14), the court issued a permanent order of protection prohibiting Doug from contacting Stacy or his children, (CP 65-70).

Doug was not even permitted to complete his oral argument before the court abruptly and summarily declared, "I'm gonna [*sic*] sign the Order," (RP 7). When Doug's counsel objected that the court does not have jurisdiction, the court retorted, "You can appeal it. Go ahead, appeal it." RP 7.

On January 25, 2016, Doug filed a motion to reconsider, (CP 71-78), which was denied with no explanation, (CP 88-90). Doug filed notice of appeal on February 12, 2016, (CP 91-93).

⁹ *E.g., Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671 (Div. 1 2011).

Of particular note, even though the superior court invited Doug to appeal its decision, such remedy is itself a manifest injustice, because the order prohibiting the father from contacting his children would remain in effect during the appellate process. The author notes that this Appellate Brief is dated October 7, 2016, and even if this Court agrees that the order was improper, the superior court's suggested recourse to "[g]o ahead, appeal," would mean that the father and his children would not be able to contact one another for over a year. Such harm created by the court – particularly given the ages of the children – constitutes irreversible damage to the parent-child relationship, and is devastating to Doug, to his children, and to the principles of justice.

V. ARGUMENT

A. **THE ORDER IS VOID BECAUSE UNDER UCCJEA, THE SUPERIOR COURT LACKS SUBJECT MATTER JURISDICTION TO PROHIBIT DOUG FROM CONTACTING HIS CHILDREN.**

The Uniform Child Custody Jurisdiction and Enforcement Act, (“UCCJEA”), was promulgated to reduce the occurrence of “competing jurisdictions entering conflicting interstate child custody orders, forum shopping, and the drawn out and complex child custody legal proceedings often encountered by parties where multiple states are involved.”¹⁰

¹⁰ *E.g., In re Custody of A.C.*, 165 Wn.2d 568, 574, 200 P.3d 689 (2009).

Chapter 26.27 RCW codifies the UCCJEA.¹¹ Under UCCJEA, RCW 26.27.201(1) establishes “the exclusive jurisdictional basis for making a child custody determination by a court of this state,” (RCW 26.27.201(2)). The domestic violence protection order here is a “child custody determination:”

"Child custody determination" means a judgment, decree, parenting plan, **or other order** of a court providing for the legal custody, **physical custody, or visitation** with respect to a child. The term includes a **permanent, temporary, initial, and modification order**. The term does not include an order relating to child support or other monetary obligation of an individual.

RCW 26.27.021(3), *emphasis added*. Legislature signaled that domestic violence protection orders are child custody determinations when it stated in the same section,

"Child custody proceeding" means a proceeding in which legal custody, **physical custody**, a parenting plan, **or visitation with respect to a child is an issue**. The term includes a proceeding for dissolution, divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and **protection from domestic violence, in which the issue may appear**. The term does not include a proceeding involving juvenile delinquency, emancipation proceedings under chapter 13.64 RCW, proceedings under chapter 13.32A RCW, or enforcement under Article 3.

RCW 26.27.021(4), *emphasis added*. The protection order here is a child custody determination because at its essence it awards physical custody of

¹¹ The most recent version of UCCJEA was adopted by Washington in 2001 and codified at chapter 26.27 RCW.

the children to Stacy, and prohibits Doug from contacting his children. Our courts recognize that domestic violence protection orders involving children are child custody determinations.¹² The UCCJEA therefore provides the exclusive jurisdictional basis here to prohibit Doug from contacting his children, (RCW 26.27.201(2)).

Washington courts do not have jurisdiction to make a child custody determination unless the statutory requirements are met under RCW 26.27.201(1).¹³ Jurisdiction fails here because the statutory requirements are not met because Florida is the children's *home state*; and because no exception applies, (*below*). Before this court can exercise jurisdiction to make an initial child custody determination, UCCJEA requires that

[t]his state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state,

RCW 26.27.201(1)(a); *and*

[a] court of another state does not have jurisdiction under (a) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum,

RCW 26.27.201(1)(b); *and*

¹² *E.g., In re Parentage, Parenting, & Support of A.R.K.-K.*, 142 Wn. App. 297, 304, 174 P.3d 160 (Div. 1 2007).

¹³ *See In re Marriage of McDermott*, 175 Wn. App. 467, 483-84, 307 P.3d 717 (Div. 1 2013).

[a]ll courts having jurisdiction under (a) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child,

RCW 26.27.201(1)(c).

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.

RCW 26.27.021(7).

Washington is not the children's home state because the children did not live in Washington for at least six consecutive months immediately before the commencement of this action, (CP 26-29; CP 97- (4/7/2016 Order)). Florida, on the other hand, is the home state, and does have jurisdiction under RCW 26.27.201(1)(a), because the children had lived there continuously for a six-month period within the six months prior to commencement of the proceeding, and their father still lives in Florida, (*id.*). Florida has not declined to exercise jurisdiction. To the contrary, Doug had commenced an action in Florida concerning the initial custody of his children on December 21, 2015, (CP 27-28, CP 97- (4/7/16 Order)). Florida clarified that it had exclusive and continuing jurisdiction over the children since December 21, 2015, (CP 97- (4/7/16 Order)). Because Washington is not the children's home state; because Florida is the children's home state; and because Florida has not declined jurisdiction,

Washington courts do not have jurisdiction under UCCJEA to prohibit Doug from contacting his children.¹⁴

The *temporary emergency* exception at RCW 26.27.231 does not permit the court to enter a permanent protection order. This court may only exercise temporary emergency jurisdiction if the child is present in this state and it is necessary in an emergency to protect the child because the child or parent is subjected to or threatened with abuse, (RCW 26.27.231(1)), but jurisdiction can only remain in effect if a child custody proceeding has not been commenced in a court of a state having home state jurisdiction, (RCW 26.27.231(2)). Because a child custody proceeding had been commenced in Florida, Washington could not continue to exercise jurisdiction when it entered the permanent protection order, even if it could have exercised emergency jurisdiction to enter the temporary protection order before, (which Respondent does not concede). Our court has held that “the assumption of emergency jurisdiction under the UCCJA is to be undertaken only in extraordinary circumstances, such as where a child would be placed in imminent danger if jurisdiction were

¹⁴ See *In re Ruff*, 168 Wn. App. 109, 275 P.3d 1175 (Div. 3 2012); *In re Parentage, Parenting, & Support of A.R.K.-K.*, 142 Wn. App. 297, 174 P.3d 160 (Div. 1 2007) (Washington did not have jurisdiction where mother fled Montana with children to escape domestic abuse, because Montana was the home state); *In re Marriage of McDermott*, 175 Wn. App. 467, 307 P.3d 717 (Div. 1 2013) (Washington did not have jurisdiction where mother, father, and child moved from Kansas, lived in Washington together for over 2 months, but then the father moved back to Kansas; Kansas was the children’s home state).

not exercised.”¹⁵ Stacy failed to allege that the children were in imminent danger, (CP, RP).¹⁶ Even if temporary emergency jurisdiction was proper – which it was not – it can only remain in effect for as long as it takes the court to follow the procedure prescribed in the UCCJEA:

A court of this state that is exercising jurisdiction pursuant to RCW 26.27.201 through 26.27.221, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

RCW 26.27.231(4). This Court recognizes that this provision at RCW 26.27.231(4) requires both courts to communicate with each other, and that Washington cannot enter a permanent order, even if it properly exercised temporary emergency jurisdiction, unless the other state declines jurisdiction.¹⁷ Because the superior court failed to follow the procedure

¹⁵ *In re Marriage of Greenlaw*, 67 Wn. App. 755, 762, 840 P.2d 223 (Div. 2 1992), reversed on other grounds, 123 Wn.2d 593, 869 P.2d 1024 (1994) (quoted in *In re Ruff*, 168 Wn. App. 109, 276 P.3d 1175 (Div. 3 2012)).

¹⁶ Neither Stacy nor the children were subject to abuse in the state of Washington, and has not been threatened with abuse in the state of Washington, (CP 26-29). Petitioner’s only claim with respect to Washington is that she might be afraid that the father could take the children without permission, (the very act that she committed without the father’s permission, (CP 26-29)). Washington’s case law is clear that fearing a father might take his children without permission, does not constitute abuse, and is insufficient to assert emergency jurisdiction, (*see In re Parentage of Ruff*, 168 Wn. App. 109, 275 P.3d 1175 (Div. 3 2012)).

¹⁷ *E.g., In re Ruff*, 168 Wn. App. 109, 275 P.3d 1175 (Div. 3 2012).

prescribed by the UCCJEA, Washington is denied jurisdiction to enter the permanent order.¹⁸

This Court recognizes that noncompliance with the UCCJEA deprives the court of subject matter jurisdiction.¹⁹ Subject matter jurisdiction is purely a matter of law; it cannot arise by stipulation, consent, estoppel, appearance, or conduct of the parties.²⁰ Under CR 12(h)(3), subject matter jurisdiction can be raised at any time, even on appeal.²¹ Whenever a court is deemed to lack subject matter jurisdiction over an action, the court “shall dismiss the action,” (CR 12(h)(3)). An order entered by a court lacking subject matter jurisdiction is void as a matter of law.²² Because the protection order was entered by a court lacking subject matter jurisdiction, the protection order is therefore void as a matter of law.

¹⁸ *Id.* (court was deprived of jurisdiction because it did not follow the process prescribed in the UCCJEA).

¹⁹ *In re Ruff*, 168 Wn. App. 109, 275 P.3d 1175 (Div. 3 2012); *see also James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005) (noncompliance with jurisdictional statutes deprives the court of subject matter jurisdiction).

²⁰ *E.g.*, *Washington Local Lodge No. 104*, 29 Wn.2d 536, 183 P.2d 504 (1948); *Dyson v. King Co.*, 61 Wn. App. 243, 809 P.2d 761 (Div. 1 1991) (not waived by appearance); *In re the Marriage of Rene L. Furrow*, 115 Wn. App. 661, 667-68, 63 P.3d 821 (Div. 2 2012) (citing *Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959); *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994)).

²¹ CR 12(h)(3); RAP 2.5(a); *see also, e.g.*, *Matter of Saltis*, 94 Wn.2d 889, 621 P.2d 716 (1980); *State v. McNairy*, 20 Wn. App. 438, 580 P.2d 650 (Div. 3 1978).

²² *E.g.*, *Bergren v. Adams Co.*, 8 Wn. App. 853, 509 P.2d 661 (Div. 3 1973).

B. THE SUPERIOR COURT DOES NOT HAVE PERSONAL JURISDICTION OVER DOUG, AND SERVICE WAS IMPROPER, THEREFORE THE ORDER IS VOID AS A MATTER OF LAW.

The court cannot enter a valid, enforceable order against a non-party, or one over whom the court does not have personal jurisdiction.²³

An action commenced without jurisdiction over the defendant will be dismissed, and any judgment entered in the absence of personal jurisdiction is void.²⁴

1. Chapter 26.50 RCW does not supply personal jurisdiction over Doug.

Chapter 26.50 RCW specifies ways in which the court can obtain personal jurisdiction over petitioners and respondents to domestic violence protection orders. The statute does not, however, provide for personal jurisdiction over Doug. Stacy incorrectly argued that her right to file a petition in Benton County supplied the court with jurisdiction over Doug under RCW 26.50.020, (CP 80-81). While RCW 26.50.020 does address a victim's right to petition for a protective order in any county or municipality where the victim fled to avoid abuse, the section neither supplies nor addresses personal jurisdiction over a non-resident, (RCW 26.50.020).

²³ E.g., *State v. G.A.H.*, 133 Wn. App. 567, 137 P.3d 66 (Div. 1 2006); *Sharebuilder Securities Corp. v. Hoang*, 137 Wn. App. 330, 153 P.3d 222 (Div. 1 2007).

²⁴ E.g., *Bergren v. Adams County*, 8 Wn. App. 853, 509 P.2d 661 (Div. 3 1973) (judgment entered without jurisdiction is void).

It is rather section RCW 26.50.240 of the chapter that addresses personal jurisdiction over nonresidents, (RCW 26.50.240).²⁵ RCW 26.50.240 provides in part:

- (1) In a proceeding in which a petition for an order for protection under this chapter is sought, a court of this state may exercise personal jurisdiction over a nonresident individual if: . . .
 - (1)(d)(ii) As a result of acts of domestic violence or stalking, the petitioner or a member of the petitioner's family or household has sought safety or protection in this state and currently resides in this state; . . .
- (2) For jurisdiction to be exercised under subsection (1)(d)(i) or (ii) of this section, the individual must have communicated with the petitioner or a member of the petitioner's family, directly or indirectly, or made known a threat to the safety of the petitioner or member of the petitioner's family while the petitioner or family member resides in this state. For the purposes of subsection (1)(d)(i) or (ii) of this section, "communicated or made known" includes, but is not limited to, through the mail, telephonically, or a posting on an electronic communication site or medium. Communication on any electronic medium that is generally available to any individual residing in the state shall be sufficient to exercise jurisdiction under subsection (1)(d)(i) or (ii) of this section.
- (3) For the purposes of this section, an act or acts that "occurred within this state" includes, but is not limited to, an oral or written statement made or published by a person outside of this state to any person in this state by means of the mail, interstate commerce, or foreign commerce. Oral or written statements sent by

²⁵ The section at RCW 26.50.240 is labeled, "Personal jurisdiction – Nonresident individuals." See *State v. Day*, 96 Wn.2d 646, 649 n.4, 638 P.2d 546 (1981) ("It is a well-recognized rule of statutory construction that the title of the act may be resorted to as one means of ascertaining intent. *In re Estate of Kurtzman*, 65 Wn.2d 260, 265, 396 P.2d 786 (1964)").

electronic mail or the internet are deemed to have "occurred within this state."

Stacy argued that the fact she was able to retrieve an e-mail message from Doug's e-mail account, (CP 40-43), constitutes a communication under 26.50.240(2), which provides personal jurisdiction over Doug, (CP 81-82). Doug *did not*, however, send an e-mail message to Stacy. Doug testified through affidavit that he did not address the e-mail message to Stacy, in part:

4. [The e-mail message] *does not* represent an e-mail communication to Petitioner Stacy Clifford.
5. I created the e-mail account "thecliffordhouse@gmail.com" as a family e-mail account, and I use it primarily for personal information and information relating to the household in Florida. (Observe that "house" is in the account name). I often access the online Gmail website, and the account "thecliffordhouse@gmail.com" to make notes or to record information that I need to save for later. I accomplish that by "composing" an e-mail message from that account, and then "sending" the e-mail message back to the account. In that manner, the e-mail account serves as a record of information that I want to have available for managing my personal matters as well as those involving my house. That is precisely the purpose of the copy of the e-mail [message] attached to the declaration. Observe, for example, that [the message] does not begin by addressing any person, and in fact it is not at all intelligible as any kind of message to another person. It starts instead with a to-do list for myself, containing obscure references to myself that I understand, but that are not at all written so that anyone else would understand. Then it is followed by additional information, again written in language for myself, and

for me to understand, not for anyone else to understand. **The message, on its face, is not a communication to Stacy R. Clifford.**

6. I did not ever use that e-mail address, “thecliffordhouse@gmail.com” as a primary means of e-mailing Stacy. Stacy has her own separate personal e-mail address, and I would typically send mail to that other account if I e-mailed an item to Stacy.
7. In fact, I do not ever use the e-mail address, “thecliffordhouse@gmail.com” as an account from which I communicate via e-mail. I have my own e-mail address that I use for e-mail communication. It is “douglasrclifford@gmail.com”. If I had intended to communicate with Stacy via e-mail, it most certainly would have come from that e-mail account, and not from “thecliffordhouse@gmail.com”.
8. I had previously given Stacy R. Clifford access to my e-mail account, “thecliffordhouse@gmail.com”, because, again, I often used it for household information. I used it as an e-mail address to pay our bills, to get store coupons, and again, to document important information that we would need to keep. After I gave her access, she was able to access that information just like I was able to do.
9. The e-mail account, “thecliffordhouse@gmail.com”, is homologous to a physical mailbox. People can send something to the mailbox, even though both Stacy and I can access the mailbox. Just because something was sitting in the mailbox, addressed to that mailbox, does not mean that it was a communication to Stacy, even though Stacy might have access to it.
10. The unfortunate yet inadvertent confusion is that after I send an e-mail using that account, either my computer’s software or the Gmail host itself, adds a “descriptor label” in the “To” and “From” fields, that it believes is associated with that e-mail address. Sometimes it is accurate, and sometimes it is not. It can be observed, for example, that where address “thecliffordhouse@gmail.com” was in the “From” field, the computer filled in “THECLIFFORDHOUSE,” yet when the identical

address was in the “To” field, it most unfortunately automatically filled in “Wife Stacy Clifford.” I did not cause it to do this. I did not intend for it to do this. And I was unaware that it had done this.

11. As another demonstration of this feature, my attorney, Scott E. Rodgers, with whom I regularly communicate via e-mail, has told me that the e-mail address I use to communicate with him – again, my personal e-mail account that I always use for communication, “douglasrclifford@gmail.com” – sometimes appears as if it is from “DOUG_TIMES”, sometimes as if it is from “DOUGLAS_TIMES”, and sometimes as if it is from “Douglas Clifford”. I do not know why it associates different labels at different times; and if I have any control over that feature, then I am certainly unaware of it, and I do not know how to change it.
12. As of the time I wrote that note to myself, I was not sure where Stacy was, or what her intentions were. I was not certain that she had left the state, and I had no idea that she was in Washington.
13. When I learned earlier this week that Stacy R. Clifford had presented one of my notes to myself as evidence, in an attempt to state that I had somehow submitted to Washington jurisdiction, I immediately changed my password to my account, “thecliffordhouse@gmail.com” to prevent any further misrepresentation. I do not believe that there is any information stored in that account that is useful or necessary to Stacy R. Clifford. But if she believes there is, I will gladly work through my attorney to provide her any and all information from that account that she wants or needs.

(CP 55-59) emphasis in original. Doug’s attorney also declared, in part:

In addition to telephone communication, Mr. Clifford has communicated with me via e-mail very shortly after I began representing him. To date, he has sent me roughly 60 e-mail messages. Every e-mail message he has sent to me has been from the e-mail address douglasrclifford@gmail.com. He has never sent me an e-

mail message from the account thecliffordhouse@gmail.com.

Even though every e-mail I have received from Mr. Clifford has been sent from the e-mail address douglasrclifford@gmail.com, the name label for that account sometimes appears as “Douglas Clifford”, sometimes as “DOUGLAS_TIMES”, and sometimes as “DOUG_TIMES”. The name label is not anything that I ever entered. I do not know the source of those name labels. I do not know whether I have any control over which name displays in my e-mail client. There are other e-mail accounts from which I receive e-mail messages, which also display the same behavior described in this paragraph, which have nothing to do with Mr. Clifford.

(CP 53-54).²⁶

The e-mail message is not addressed to Stacy, as is evident from the content, (CP 42-43). As Doug testified, he has no idea why, when Stacy accessed his e-mail account, the e-mail address in the “From” box showed up on her client as “THECLIFFORDHOUSE,” while that same e-mail address appeared in her e-mail client’s “To” box as “Wife Stacy Clifford.” Those labels are something that would be under Stacy’s control, over the e-mail client she used to access the account, not under Doug’s control. Furthermore, the content of the e-mail message is clear that it is not a communication, directly or indirectly, to Stacy. Ultimately, personal jurisdiction is still subject to substantial fairness.²⁷ It cannot be said that when Doug used a password-protected e-mail account to jot some

²⁶ Note that there is a relaxed evidentiary standard under Chapter 26.50 RCW; see ER 1101(c)(4).

²⁷ *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989).

notes to himself, it is substantially fair to have him haled to Washington state simply because Stacy was able to access the e-mail account. The order is therefore void.

2. The long arm statute does not supply personal jurisdiction over Doug.

The court's inquiry under the long arm statute is whether the Respondent "purposefully availed [himself] of the privilege of conducting activities within the state, invoking the benefits and protections of our laws."²⁸ To obtain personal jurisdiction under Washington's long arm statute, RCW 4.28.185(1) requires that the person commit some act enumerated by the statute, which enumeration includes transacting business, (RCW 4.28.185(1)(a)), committing a tort within the state, (RCW 4.28.185(1)(b)), ownership of property situated in the state, (RCW 4.28.185(1)(c)), contracting to insure a person at the time the person is located in the state, (RCW 4.28.185(1)(d)), conceiving a child in the state, (RCW 4.28.185(1)(e)), or living in a marital relationship in the state, even though the person might have subsequently departed so long as the Petitioner has continued to reside in the state (RCW 4.28.185(1)(f)). None of these conditions applies, (CP 26-29).

²⁸ *Raymond v. Robinson*, 104 Wn. App. 627, 15 P.3d 697 (Div. 2 2001).

Even if one of the conditions applies – which it does not – then the cause of action must arise from one of those acts enumerated, (RCW 4.28.185(1)).²⁹ Such allegation is not even found within Petitioner’s pleadings. Furthermore, even if Respondent met some condition of the long arm statute – which he does not – jurisdiction would still be subject to substantial fairness.³⁰ Petitioner and Respondent lived in Florida with their children. Petitioner left Florida without Respondent’s knowledge, taking Respondent’s children with her. It would be fundamentally unfair now to hale Respondent to Washington to defend against a petition for a protective order. The order is therefore void.

3. Service was improper.

Proper service is prerequisite to obtaining personal jurisdiction over a party.³¹ An order is void if it is entered against a party over whom the court does not have personal jurisdiction.³² Service was improper here because Stacy did not comply with the requirements to serve non-residents out-of-state. Stacy failed to file an affidavit stating that service cannot be made within the state, (RCW 4.28.185(4)), and Stacy failed inform Doug that he has 60 days to answer, (RCW 4.28.180), (*see also* CR 4). Actual

²⁹ *Raymond v. Robinson*, 104 Wn. App. 627, 15 P.3d 697 (Div. 2 2001); *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989).

³⁰ *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989).

³¹ *E.g.*, *Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671 (Div. 1 2011).

³² *E.g.*, *Marley v. Dep’t of Labor and Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994).

knowledge is not sufficient to establish personal jurisdiction absent statutory requirements for service of process.³³ The superior court lacked personal jurisdiction over Doug, and therefore the order is void.

VI. REQUEST FOR COSTS AND FEES

Doug requests costs and fees under RAP 18.1, 26.27.511(1), and RCW 26.27.271.

VII. CONCLUSION

The superior court was deprived of subject matter jurisdiction under the UCCJEA, and the superior court lacked personal jurisdiction over Doug. Regardless of whether the superior court lacked subject matter jurisdiction, personal jurisdiction, or both, the order is void as a matter of law. Doug respectfully requests this Court to recognize that the protection order is void for lack of jurisdiction, to vacate the protection order, and to award him costs and fees.

RESPECTFULLY SUBMITTED this 7th day of October, 2016



SCOTT E. RODGERS, WSBA # 41368
Rodriguez, Interiano, Hanson, & Rodgers, PLLC
Attorney for Appellant Douglas Clifford

³³ *E.g., Veradale Valley Citizens' Planning Committee v. Board of County Com'rs of Spokane County*, 22 Wn. App. 229, 588 P.2d 750 (Div. 3 1978).

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this day, I served copies of the documents listed below with all required charges prepaid, by the methods indicated below, to the following persons:

BRIEF OF APPELLANT

TO: Renee S. Townsley, Clerk/Administrator
The Court of Appeals of the State of Washington, Division III
500 North Cedar Street
Spokane, Washington 99201-1903
Fax: (509) 456-4288

*Original plus one copy via Priority U.S.P.S. mail, postage prepaid
Also delivered via e-mail to Janet L. Dalton, Case Manager*

AND TO: Gail Hammer
University Legal Assistance
721 North Cincinnati Street
P.O. Box 3528
Spokane, Washington 99220-3528
ATTORNEY FOR RESPONDENT STACY R. CLIFFORD

Via e-mail and Priority U.S.P.S. mail, postage prepaid

On this 7th day of October, 2016,
*** After 5:00 p.m. ***



Scott E. Rodgers, WSBA 41368