

No. 66525-1

COURT OF APPEALS WASHINGTON STATE  
DIVISION ONE

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CECIL T. HERRIDGE, Appellant,

v.

STACEY A. HERRIDGE, Respondent.

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APPELLANT'S REPLY BRIEF

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### ARGUMENT

1. Respondent's attorney has a conflict of interest and should be disqualified 3
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Respondent's attorney had a conflict of interest during the entire proceeding. Respondent is the mother, appellant is the father in this case. The father was the first party in this case to consult with attorney Lyons. Before Mr. Lyons appeared for the mother, the father paid Mr. Lyons a fee and Mr. Lyons gave him legal advice on this case. The father (appellant) was not asked for nor did he grant a waiver of the conflict of interest to Mr. Lyons. The matter of the conflict was addressed by the trial court in May, 2008, and the court concluded a conflict did not prevent Mr. Lyons from continuing to represent the mother.

Mr. Lyons asserts that there is a time bar to raising this issue on appeal. The issue was first raised by this counsel in appellant's Designation of Clerks Papers and Statement of Arrangements, dated Feb. 28, 2011. Opposing counsel argues it should have been appealed when the motion to disqualify him was denied in 2008, or the issue should have been raised when the motion to vacate the orders on SCRA grounds was filed, briefed and argued.

However, appellant/father's current counsel did not discover the issue and ruling until reviewing the four volumes of the Island Superior Court files for the purpose of designating the record for this appeal.

The parties are directly adverse and the father paid money for legal advice, which made him a client. There is no apparent time bar to raising the issue of an attorney's conflict of interest. There either is a conflict or there is not. In re Disciplinary Proceeding Against Haley, 157 Wn.2d 398, 138 P.3d 1044 (Wash. 2006)

The issue was promptly designated after discovery in this appeal process.

## 2. Standard of review

The court is asked to apply the federal statute, 50 U.S.C. App. §§ 502, et seq. SCRA stay provisions to this case. It is a question of law. The standard of review is not abuse of discretion.

Construction of a statute is a question of law reviewed de novo. Anthis v. Copeland (Wa. Supreme Court, 2/16/12).

State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (citing City of Pasco v. Pub. Emp't Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)). A court interpreting a statute must discern and implement the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). Where the plain language of a statute is unambiguous and legislative intent is apparent, we will not construe the

statute otherwise. Id. Plain meaning may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (citing Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001)).

3. The notice was sufficient under the law of this case and the SCRA.

The meaning of the statute is clear. A stay of proceedings for no less than 90 days shall be granted at any time prior to final judgment upon application of a service member. 5 USC 522 b) 1) and 2). The information was presented to the court by a Declaration of the servicemember (appellant) and a brief verification from his Commanding Officer. There is no dispute that he was deployed when the case was tried.

Subsequently (within 90 days), he provided additional verification of his deployment. His motion for reconsideration was procedural and was not a request for affirmative relief that waived his right to request the stay. In any case, the court did reconsider when the partial stay and remand of the parenting plan issue was granted.

Washington has not interpreted the adequacy of a request for stay, but the Georgia case cited by respondent supports an order of a minimum stay of at least the length of deployment. The case of City of Pendergrass v. Skelton, 278 Ga.App. 37, 628 S.E.2d 136 (Ga.App. 2006) was a case where the soldier was suing police officers and failed to respond to discovery and instead requested a stay ex parte. The court held the stay was not based on proper verification to support the length of the stay. The stay itself was granted. “Although the commander's statement is sufficient to establish Skelton's unavailability on the date of the letter and until April 30, 2005, the evidence submitted in support of the request for a stay did not warrant the full stay granted. The commanding officer's letter did not mention whether or when Skelton would be deploying to Iraq, and did not state that Skelton could not take leave after that date. Therefore, we find that the application was not sufficient under the Act, and did not warrant the length of the stay granted.” Id.

The orders entered in this case (Herridge) were entered ex parte. Counsel continues to argue there was a sufficient basis for the court's rulings regarding child support, but it was clearly an ex parte proceeding. The court heard argument from counsel that was not briefed or sent to

him prior to the hearing, and he did not have an opportunity to respond before final orders were entered. The argument regarding his failure to respond to discovery as a basis for a finding of intransigence was not in the moving papers, it was allegedly in previously filed documents from the year before.

The stated intent of the statute is to protect servicemembers against default judgments [*Sec. 201*] a) Applicability, (P.L. 110-181, effective January 28, 2008 extended to child custody proceedings) [*Sec. 201*] b).

4. Appellant's non-lawyer power of attorney should have been permitted to speak to the court as a pro se litigant on his behalf

The case cited by opposing counsel is distinguishable because it is a prosecution of a man for unlicensed practice of law. The defendant, Mr. Hunt, was representing at least eight people in civil cases, but he was not licensed to practice law.

A statement of the facts of this case in the Respondent's brief show that Declarations by the father's wife (Barbara Herridge) were accepted by counsel as proof of the father's deployment in 2008 and that discovery motions were withdrawn "voluntarily" by counsel because of his deployment. (Br. Of Resp. p. 3-4) This case history is relevant to show the subsequent documentation from the soldier's command on his next

deployment, at issue here, was much more precise and should have been a basis to grant the formal stay requested.

CONCLUSION

Respondent's attorney has a conflict, on the facts presented, and should be disqualified. Appellant properly requested a stay. The case should be remanded and fees awarded to the Appellant.

Dated: 2/17, 2012

  
\_\_\_\_\_  
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Attorney for the Appellant

Certificate of Service

I certify under the penalty of perjury under the laws of the State of Washington, that on \_\_\_\_\_, 2012, I served by regular US mail, postage pre-paid, the original of this document to

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Dated: \_\_\_\_\_