

70995-0

70995-0

No. 70995-0-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

WILLARD GIBSON,

Appellant,

v.

MARIE-CLAIRE PAGH

Respondent.

BRIEF OF RESPONDENT

Mark Rising, WSBA #14096
Lauren Parris Watts, WSBA #44064
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144
Attorneys for Respondent

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I. RESPONSE TO ASSIGNMENT OF ERROR

Respondent Marie-Claire Pagh (“Mother”) responds to the assignment of error claimed by Appellant Willard Gibson (“Father”) as follows:

1.1 The trial court did not abuse its discretion/err in finding that the acts and directives of the Father establish personal jurisdiction over the parties because, as stated by this Court in its December 3, 2012 decision, a party may consent to personal jurisdiction by appearing in the proceedings and arguing the case on its merits or seeking affirmative relief.

1.2 The child, born in June 2008, was 5 years of age when the Second Amended Findings of Fact and Conclusions of Law were entered in October 2013.

1.3 The trial court did not abuse its discretion/err in finding that the Father was intransigent by failing to attend the court-required parenting seminar because the record shows that the Father failed to attend and the seminar is required under LFLR 13(c)(2).

1.4 The trial court did not abuse its discretion/err in finding that the Father was intransigent by failing to submit a Financial Declaration or other required financial disclosures as

the Father was required to do under LFLR 10.

1.5 The trial court did not abuse its discretion/err in finding that the Father failed to comply with the court rules and discovery requirements because the Father failed to serve the Mother with his Disclosure of Possible Primary Witnesses or Disclosure of Additional Witnesses, and served his answers to interrogatories five days after the discovery cut-off.

1.6 The trial court did not abuse its discretion/err in finding that the Father failed to meet Case Schedule deadlines because the Father failed to serve the Mother with his Disclosure of Possible Primary Witnesses or Disclosure of Additional Witnesses, and served his answers to interrogatories five days after the discovery cut-off.

1.7 The trial court did not abuse its discretion/err in finding that the Father failed to clear up various warrants for his arrest because he had criminal warrants that prevented his participation in six hearings, as well as at trial on February 11, 2011. Moreover, the Father's inability to appear for trial was the basis of his Motion for Trial Continuance filed in November 2010.

1.8 The trial court did not abuse its discretion/err in finding that the Father contacted the Mother in violation of the

DVPO entered on January 14, 2010 because the Father emailed the Mother a sexually explicit video on January 31, 2010, which required the Mother to file a police report.

1.9 The trial court did not abuse its discretion/err in finding that the Father failed to timely disclose trial witnesses because the Father did not serve the Mother with his primary and rebuttal witness list until December 29, 2010, despite the fact that the deadline for Disclosure of Possible Primary Witnesses was September 27, 2010 and that the deadline for Disclosure of Additional Witnesses was October 11, 2010.

1.10 The trial court did not abuse its discretion/err in finding that the Father failed to meaningfully participate in the case because the Father was not present at any of the six hearings, failed to comply with discovery or the case schedule, and did not attend trial.

1.11 The trial court did not abuse its discretion/err in finding that the Father requested several continuances because the Father requested a continuance on three separate occasions—June 1, 2010, November 29, 2010 and February 1, 2011.

1.12 The trial court did not abuse its discretion/err in describing the Father's conduct as wrongful.

1.13 The trial court did not abuse its discretion/err in finding that the Father's intransigence permeated the proceedings.

1.14 The trial court did not abuse its discretion/err in finding that any of the Father's conduct caused the Mother to unnecessarily incur attorney fees and costs because the Mother had to file motions in limine in response to the Father's refusal to comply with discovery; the Mother had to file a police report in response to the Father's DVPO violation; and the Mother had to unnecessarily over-prepare for trial when the Father did not appear or call any witnesses at trial.

1.15 The trial court did not abuse its discretion/err in finding that the Mother reasonably incurred \$45,074 in attorney fees and \$802.48 in costs because the Mother supported her request for fees with a detailed affidavit that included the hours billed and the specific task(s) performed for segments of time billed.

1.16 The trial court did not abuse its discretion/err in finding that the Father persistently attempted to manipulate, harass and intimidate the Mother by delay, failure to personally appear or engage in the parenting plan process.

1.17 The trial court did not abuse its discretion/err in

finding that the Father attempted to manipulated, harass and intimidate the Mother by substitution of counsel.

1.18 The trial court did not abuse its discretion/err in finding that the Father attempted to manipulate, harass and intimidate the Mother by failing to cooperate with court scheduling orders or discovery as a continuing pattern of domestic abuse.

1.19 The trial court did not abuse its discretion/err in finding that the impact of the Father's manipulation was manifest in the Mother's demeanor—anxiety and fear at multiple hearings.

1.20 The trial court did not abuse its discretion/err in finding that any intransigence by the Father frustrated or delayed the court's obligation to arrive at an outcome which serves the best interest of the child independent of the parties' positions.

1.21 The trial court did not abuse its discretion/err in finding an increase in fees borne by the Mother's attorney's monitoring and reporting to the court the status of the Father's criminal matters and delays resulting therefrom because those fees were supported by a detailed attorney fee affidavit.

1.22 The trial court did not abuse its discretion/err in finding the intransigence by the Father as a basis for an award of

attorney fees to the Mother.

1.23 The trial court did not abuse its discretion/err in finding that the Mother was entitled to the full amount of attorney fees and costs incurred in this action because the Father's intransigence permeated the entire proceedings.

1.24 The trial court did identify the method of calculation by finding that the Father's intransigence permeated the entire proceedings, and by reviewing the entire record and the amount of attorney fees incurred as laid out in an affidavit.

1.25 The trial court did not abuse its discretion/err in assigning this matter on remand to Judge Doerty, retired, as a *pro tem*, without the Father's consent, because RCW 2.08.180 does not require written consent of the parties.

1.26 The trial court did not abuse its discretion/err in finding that the Father appeared and submitted to jurisdiction by consent because the finding refers to personal jurisdiction, and, as stated by this Court in its December 3, 2012 decision, a party may consent to personal jurisdiction by appearing in the proceedings and arguing the case on its merits or seeking affirmative relief.

II. RESTATEMENT OF THE CASE

2.1 Background and Procedural Facts.

This matter arises out of a domestic violence protection order action and a parenting plan/child support action between Appellant Willard Gibson (“Father”) and Respondent Marie-Claire Pagh (“Mother”), which were assigned to Chief Unified Family Court Judge James Doerty in March 2010 and then consolidated before Judge Doerty in May 2010. CP 30. The case proceeded to trial in February 2011, and the trial court issued a final DVPO protecting the Mother and the parties’ minor child as well as a Corrected Parenting Plan Final Order and an Amended/Corrected Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan, both favorable to the Mother. CP 641-659. The Father appealed the case on the issues of jurisdiction, duration of the DVPO with respect to the minor child, and the award of attorney fees and costs. CP 1019-1023.

This Court’s December 3, 2012 decision upheld the trial court’s decisions relating to the DVPO and parenting plan issues. On page 39-40 of its December 3, 2012 decision, this Court noted that the Father made five arguments in support of his position “that the trial court erred in awarding the Mother \$45,876.48 in

attorney fees because of intransigence.” On page 40 of its decision, this Court discussed case law supporting the fee award based upon King County Superior Court Judge James Doerty’s conclusion at trial that the Father (“Gibson”) was “intransigent throughout these proceedings” and then noted:

“Here the trial court awarded Pagh [the Mother] the entire amount of fees and costs she requested—\$45,876.48—because Gibson’s misconduct “permeated the entire proceedings” Burrill, 113 Wn. App. at 873. It explained, “The Court finds that [Gibson’s] intransigence throughout these proceedings warrants an award of attorneys fees and costs in favor of [Pagh].” (Emphasis added.) Because the court made no factual findings to support its award amount and “intransigence throughout these proceedings” conclusion, we remand for entry of appropriate findings of fact. Under Burrill, fee segregation is not required where the findings support the court’s determination that a party’s wrongful conduct permeated the entire proceedings.”

CP 1063. The Father filed a Petition for Review with the Supreme Court. Appendix A (“Petition for Review,” Cause No. 88562-I). The Petition was denied on July 13, 2013. Appendix B (“Order Denying Petition for Review,” Cause No. 88562-I).

On August 13, 2013, finding that there were fact-specific details for the issues presented on remand, Judge Fleck assigned the case to retired Judge James Doerty *pro tempore* under RCW 2.08.180, specifically noting that there was no need for written consent of the parties:

The Court of Appeals mandate (66833-1-I) remands this matter for entry of findings regarding attorney fees awarded. The trial in this matter was heard by the Honorable James Doerty, *retired*, in 2011.

RCW 2.08.180 provides, *inter alia*:

... if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

CP 1067. Neither party made any objections to Judge Fleck regarding the judge assignment.

On August 14, 2013, the trial court asked the parties to submit, by August 28, 2013, a short memorandum of argument based on the parties' respective positions of what should be clarified. CP 1074. On August 27, 2013, the Father filed a Motion for Extension of Time and/or permission to submit a reply brief in response to the Mother's memorandum. CP 1068-1074. The trial court granted the Father's Motion. CP 1328-1329.

The Mother timely filed her memorandum on August 28, 2013, CP 1075-1326, and the Father filed his on September 18, 2013, CP 1330-1358. In his memorandum, *two months after Judge Fleck assigned the case to Judge Doerty*, the Father raised, for the first time, an objection to the service of Judge Doerty *pro tempore*.

On October 1, 2013, Judge Doerty entered Second Amended Findings of Fact and Conclusions of Law with factual findings supporting its award amount and its conclusion that the Father was intransigent throughout the proceedings. CP 1359-1364. Paragraph 2.10 of Judge Doerty's October 1, 2013 Second Amended Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan on Remand Pursuant to Mandate states:

Respondent [the Father] failed to attend the court-required parenting seminar, failed to give the court or petitioner a Financial Declaration or other required financial disclosures, failed to respond to discovery requests before the Discovery Cut-off, and failed to meet Case Schedule Deadlines. Respondent failed to clear up various warrants for his arrest, contacted petitioner in violation of a DVPO, failed to personally attend any of the multiple hearings scheduled in this case, substituted counsel several times, and failed to appear at trial. Respondent failed to timely disclose trial witnesses, causing petitioner's attorney to file motions in limine. Despite respondent's failure to meaningfully participate in this case, respondent requested several continuances. Respondent's wrongful conduct and intransigence permeated the entire proceedings, made this case unduly difficult for petitioner, and caused petitioner to unnecessarily incur attorney fees and costs. Given these circumstances, Petitioner reasonably incurred \$45,074.00 in attorney fees and \$802.48 in costs in this action for 199 hours of legal work required to take this matter through trial.

The court finds that the Respondent persistently attempted to manipulate, harass and intimidate the

Petitioner by delay, failure to personally appear or engage in the parenting plan process, multiple substitutions of counsel, and cooperate with court scheduling orders or discovery as part of his continuing pattern of domestic abuse. The impact of this manipulation was manifest in the Petitioner's demeanor – anxiety and fear at multiple hearings.

Because of the Respondent's repeated deliberate intransigence the court's statutory obligation to arrive at the best interest of the child outcome independent of the position of the parties was frustrated and delayed.

The necessity of the Petitioner's attorney to monitor and report to the court on the status of the delays purportedly caused by Respondent's criminal matters contribute to Petitioner's attorney fees and permeated the entire case.

CP 1359-1364. Judge Doerty went on to conclude in paragraph 3.3 of his October 1, 2013 Second Amended Findings of Fact and Conclusions of Law on Petition for Residential Schedule/ Parenting Plan on Remand Pursuant to Mandate:

2. Because respondent's wrongful conduct and intransigence permeated the entire proceedings the Court awards petitioner the full amount of attorney fees and costs she has incurred in this action.

CP 1359-1364. The Father filed this appeal on October 8, 2013.

CP 1365-1372.

2.2 Facts Related to the Father's Intransigence.

From the beginning, the Father failed to “engage in the proceedings.” Verbatim Report of Proceedings from February 1, 2011 (“2/1/11 Trial VRP”) at p. 100. He failed to clear up various criminal warrants for his arrest so as to meaningfully participate in hearings. See Verbatim Report of Proceedings from June 1, 2010 (“6/1/10 VRP”) at p. 6; Verbatim Report of Proceedings from March 3, 2010 (“3/11/10 VRP”) at p. 25 (Court notes that the Father is apparently more concerned about his Fifth Amendment rights than participating in this case); 6/1/10 VRP at p. 6 (the Father is “notably absent from proceedings”); Verbatim Report of Proceedings from June 28, 2010 (“6/28/10 VRP”) at p. 7 (the Father was not present because warrants still out for his arrest); Verbatim Report of Proceedings from January 18, 2011 (“1/18/11 VRP”) at pp. 5-6 (the Father walked out of criminal courtroom after conviction and another bench warrant was issued); 2/1/11 Trial VRP at p. 100 (noting that the Father failed to appear for a single hearing). Additionally, the Father failed to appear at trial. 2/1/11 Trial VRP at p. 4 (the Father was absent from trial for fear of arrest).

The Father also made the trial unduly difficult and increased legal costs by his actions outside of the courtroom. He failed to timely disclose trial witnesses by not serving the Mother with his primary and rebuttal witness list until December 29, 2010, CP 224-227, despite the fact that the deadline for Disclosure of Possible Primary Witnesses was September 27, 2010, and that the deadline for Disclosure of Additional Witnesses was October 11, 2010. Supplemental CP ____ (“Case Schedule”). The Father also violated a DVPO issued on January 14, 2010 by emailing the Mother a sexually explicit video on January 31, 2010, which required the Mother to file a police report, 2/11/11 Trial VRP at p. 42. At trial, the Mother testified that she was contacted by someone using the Father’s Facebook account on the Father’s computer multiple times, again in violation of the DVPO. 2/11/11 Trial VRP at p. 42, 45.

The Father failed to sign up or attend the mandatory parenting seminar. CP 176, 182, and 184. He also requested several trial continuances. See 6/1/10 VRP at p. 3 (requested continuance to respond to reissuance of protective order); CP 1530 (“Order for Continuance of Trial Date”) and CP 1531 (“Declaration in Support of Motion for Continuance”); 2/1/11 Trial

VRP at p. 5 (requested another trial continuance). The Father's request for a continuance on November 29, 2010 stated that he was "unable to appear" at the scheduled trial date of November 30, 2010. CP 1531. The court rescheduled the trial based on the Father's motion, CP 195; however, the Father still failed to appear at the rescheduled trial. 2/1/22 Trial VRP at p. 4.

Moreover, the Father failed to comply with the court rules and discovery requirements, including the case schedule deadline for Disclosure of Possible Primary Witnesses and the deadline for Disclosure of Additional Witnesses. CP 217-230. As a result, the Mother incurred unnecessary attorney fees. *Id.*; CP 587-517.

III. ARGUMENT

3.1 Standard of Review

The appellate court reviews a trial court's award of attorney fees for abuse of discretion. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

3.2 The Trial Court Did Not Need To Indicate the Method It Used To Calculate the Fee Award Based On Intransigence.

“If a court grants attorney fees under RCW 26.09.140, the court must state on the record the method it used to calculate the award.” *In re Marriage of Obaidi and Qayoum*, 154 Wn. App. 609, 617, 226 P.3d 787 (2010) (citing *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994)). In calculating a fee award a court should consider: (1) the factual and legal questioned involved, (2) the time necessary for preparation of the case, and (3) the value of the property involved. *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994).

A trial court may also award attorney fees based on a party’s intransigence. *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). For an attorney fee award based solely on intransigence, the trial court is deemed to have considered the requisite factors if it reviewed the record and the amount of fees incurred as laid out in an attorney fees affidavit, and the court identifies the intransigent behavior. *In re Marriage of Foley*, 84 Wn. App. 839, 933, 930 P.2d 929 (1997).

Here, the trial court’s attorney fees award was based solely on intransigence, and the trial court considered the requisite

factors set out in *Foley*. It reviewed the entire record: “[t]he findings are based upon trial (except the findings Section 2.10 and 3.3 regarding attorney fees which are based on the entire record),” CP 1359, which included an affidavit of the attorney fees, CP 699-729. Additionally, the trial court considered at length the Father’s intransigent behavior. CP 1362 at ¶ 2.10 (“Given [the Father’s intransigence], Petitioner reasonably incurred \$45,074.00 in attorney fees and \$802.48 in costs in this action for 199 hours of legal work require to take this matter through trial.”). *See also* CP 1364 at ¶ 3.3(2) (“Because respondent’s wrongful conduct and intransigence permeated the entire proceedings the Court awards petitioner the full amount of attorney fees and costs she has incurred in this action.”)

3.3 The Record Supports an Award of Fees Based on the Father’s Intransigence.

A court may award attorney fees if one party’s intransigence caused the other party to incur attorney fees. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). “Intransigence is the quality or state of being uncompromising.” *In re Marriage of Schumacher*, 100 Wn. App. 208, 216, 997 P.2d 399 (2000). “Attorney fees based on intransigence are an equitable

remedy.” *Mattson v. Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). Intransigence does not have to be within the current litigation; it can be found for failing to follow a final order, thereby forcing an unnecessary return to court. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

Here, the record fully supports the trial court’s findings of intransigence under paragraph 2.10 of the Second Amended Findings of Fact and Conclusions of Law:

3.3.1 Failure to attend the court-required parenting seminar. The Father’s failure to attend the court-required parenting classes is supported by CP 176 (“6/28/10 Notice of Noncompliance”); CP 182 (“7/14/10 Notice of Noncompliance”); and CP 184 (“7/28/10 KCFCS Case Closure Notice”).

3.3.2 Failure to submit a Financial Declaration or other financial disclosures. In his appeal brief, the Father does not contest that the record supports the trial court’s finding that he did not submit a financial declaration. Instead, he disingenuously represents to this Court that he was not required to file a financial declaration under LFLR 10, which provides that:

“[e]ach party shall complete, sign, and serve on all parties a financial declaration for any motion, trial, or settlement conference that concerns the following

issues:

- (A) Payment of a child's expenses, such as tuition, costs of extracurricular activities, medical expenses, or college;
- (B) **Child support or spousal maintenance;**
- (C) **Any other financial matter, including payment of debt, attorney and expert fees, or the costs of any investigation or evaluation.**

Id (emphasis added).

The petition in this case was for the establishment of a residential schedule, parenting plan, and child support. CP 1-9. Because the petition sought child support, LFLR 10 required that he provide a financial declaration. The issue of attorney's fees was also before the court. 2/1/11 VRP at p. 107. Therefore, under LFLR 10(b), again the Father was required to provide a financial declaration. Furthermore, on July 30, 2010, the parties issued a joint statement alleging that "[n]either party has the means to afford a private parenting evaluator or Guardian ad Litem." CP 584. In so doing, the Father brought the cost of the evaluation before the trial court, which required that he submit a financial declaration. There were numerous reasons why the Father was required to file a financial declaration. His failure to do so is just another to add to the list of failures demonstrating his "foot dragging" behavior, and the trial court properly included it as a

finding of fact.

Moreover, the Father's argument that there was no discussion regarding the Father's finances at trial is without merit because the Father decided not to be present at trial. See Appellant's Brief at p. 19; 2/1/11 Trial VRP at p. 4.

3.3.3 Failure to participate in discovery. The Father's failure to participate in discovery is supported by the record. He did not serve the Mother with his primary and rebuttal witness lists until December 29, 2010, despite the fact that the deadline for Disclosure of Possible Primary Witnesses was September 27, 2010, and that the deadline for Disclosure of Additional Witnesses was October 11, 2010. Supplemental CP ___ ("Case Schedule"). In addition, the Father untimely served incomplete and inaccurate answers to interrogatories five days after the discovery cut-off. CP 581.

3.3.4 Failure to meet case schedule deadlines. As stated in Paragraph 3.3.3 above, the record clearly shows the Father's failure to meet case schedule deadlines.

3.3.5 Failure to attend hearings. In his appeal brief, the Father does not contest that the record supports the trial court's finding that he did not attend any hearings. See Appellant's Brief

at p. 22; 6/1/10 VRP at p. 6; 3/11/10 VRP at p. 25; 6/1/10 VRP at p. 6; 6/28/10 VRP at p. 7; 1/18/11 VRP at pp. 5-6; 2/1/11 Trial VRP at p. 100. Additionally, the Father failed to appear at trial. 2/1/11 Trial VRP at p. 4.

Instead, the Father argues that his failure to appear at the hearings and trial did not cause delay or increased costs. This is simply untrue. His claimed inability to appear at trial was the basis for the trial court's continuance in November 2010. CP 1530-31. Additionally, as stated in the joint statement dated July 30, 2010, the Mother was unable to advance this case due to the Father's outstanding warrants. CP 584.

3.3.6 Failure to clear up warrants for arrest. The Father failed to clear up various criminal warrants for his arrest so he could meaningfully participate in hearings. He missed no fewer than six hearings during the pendency of the action due to warrants for his arrest, which made it difficult for the Mother to advance this case. See 6/1/10 VRP at p. 6; 3/11/10 VRP at p. 25; 6/1/10 VRP at p. 6; 6/28/10 VRP at p. 7; 1/18/11 VRP at pp. 5-6; 2/1/11 Trial VRP at p. 100. See also CP 582.

3.3.7 Violation of a court-issued DVPO. The record supports that trial court's finding that the Father repeatedly

violated a court-issued DVPO protecting the Mother. The Father first violated a DVPO issued on January 14, 2010 by emailing the Mother a sexually explicit video on January 31, 2010, which required the Mother to file a police report. 2/11/11 Trial VRP at p. 42. He then committed repeated cyber violations of the DVPO when he, or someone with access to his Facebook account who logged in from the Father's computer, contacted the Mother on multiple occasions. 2/11/11 Trial VRP at p. 42, 45.

3.3.8 Substitution of counsel. As discussed above, the Father engaged multiple attorneys in this matter, which resulted in various continuances. The Mother incurred fees in opposing at least one of the continuances, and each continuance caused further delay.

3.3.9 Failure to timely disclose trial witnesses causing the Mother to file motions in limine. As discussed above, the Father failed to timely disclose trial witnesses, causing the Mother to incur fees for filing motions in limine. Then, despite identifying a long list of trial witnesses in his disclosure, the Father did not call a single witness at trial. His representations as to trial witnesses caused the Mother to unnecessarily incur fees when her attorney's office attempted to contact each witness. CP 231-33.

3.3.10 Failure to appear for trial. Again, the Father does not dispute that the record supports the trial court's finding that the Father failed to appear at trial. The Father alleges that the Father's failure to appear did not cause the Mother to incur fees. However, based on the Father's representations about trial witnesses and because the Mother did not know whether the Father would appear, it was necessary for the Mother's counsel to prepare for a full trial, including interviewing and preparing witnesses, preparing motions in limine in an effort to exclude untimely disclosed witnesses, and preparing the Mother for cross-examination. Therefore, though the trial was significantly shortened by the Father's non-appearance, it meant that the trial preparation conducted by the Mother's attorney was largely unnecessary.

3.3.11 Request for multiple continuances. As discussed above, there is evidence in the record of the Father's multiple requests for trial continuances, at least one of which was granted based on the Father's claim that he would appear at trial. He failed to do so, and the continuance caused the Mother to incur additional fees.

3.3.12 The Father's intransigence caused the Mother to

unnecessarily incur attorney fees and costs. As discussed above, the Father's failure to attend a single hearing or appear for trial meant that the Mother's counsel's extensive preparation was unnecessary. The Father's absence from all proceedings directly impacted the Mother's cost of litigation by needlessly increasing costs and fees.

3.3.13 The trial court did justify its basis for fees, and segregation of the attorney fees was not required. A court may award attorney fees on the basis of intransigence if one party's conduct caused the other party to require additional legal services. *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Where a party's misconduct "permeate[s] the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not." *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002).

Here, the trial court entered a finding that the Father's intransigence permeated the entire proceedings and explained that it was on that basis that it awarded the Mother the full amount of her fees. CP 1364. Segregation of the fees was unnecessary.

3.3.14 The record supports the trial court's finding of

“manipulation, harassment, intimidation, delay, failure to cooperate with court scheduling or discovery.” As discussed above, the record supports the trial court’s findings that the Father delayed, and that he failed to cooperate with court scheduling and discovery. Additionally, the record supports its findings of “manipulation, harassment, [and] intimidation.” The Father violated the DVPO issued on January 14, 2010 by emailing the Mother a sexually explicit video on January 31, 2010, which required the Mother to file a police report, 2/11/11 Trial VRP at p. 42. He also contacted the Mother through his Facebook account, again in violation of the DVPO. 2/11/11 Trial VRP at p. 42, 45.

3.3.15 The record supports the trial court’s finding of “deliberate intransigence” and that the Father “frustrated or delayed’ the court process by his actions. As discussed above, the record supports the trial court’s finding of deliberate intransigence on the part of the Father, and that the Father frustrated and delayed the court process by his conduct—failure to attend the parenting seminar, failure to submit a financial declaration, failure to participate in discovery, failure to meet case schedule deadlines, failure to attend hearings or trial, failure to clear up warrants for arrest, violation of a court-issued DVPO, failure to

timely disclose trial witnesses, and his multiple requests for continuances.

3.3.16 The Father's criminal proceedings. Because of the Father's DVPO violation and his other acts of intransigence, the Mother's counsel attended certain of the Father's criminal proceedings to keep informed as to the Father's activities. Furthermore, because the Father's intransigence permeated the proceedings, segregation is not necessary here. A line-by-line review of the billing statements is inappropriate in light of the trial court's proper findings.

3.3.17 The Father claimed that his criminal law problems and his Nevada case were issues before the court. The Father cites no authority to support his contention that the trial court had to exclude from its award fees incurred for time spent by counsel on matters in the Nevada case and in the Father's criminal matters. Appellant's Brief at pp. 33-34. No such authority exists because the trial court has the authority to award the amount of reasonable fees incurred because of the issues before the court.

The Father would have this Court believe that the trial court awarded the Mother fees for time spent on unrelated, random matters that had no relation to this case. It is obvious

upon review of the attorney fee affidavit, however, that the time that the Mother's counsel spent on the Nevada case and the Father's criminal matters directly pertained to this case. See CP 587-89, 591 (coordinating with Nevada counsel and preparing for UCCJEA conferences between Nevada and Washington courts—an issue raised on appeal by the Father and discussed at length during his first appeal); CP 592 (checking the status of outstanding warrants for purposes of DVPO proceedings); CP 596 (checking on the status of outstanding warrants in preparation for DVPO hearing); CP 597 (discussing the courts' decisions regarding jurisdiction); CP 599 (discussing the Nevada's court's decision to relinquish jurisdiction); CP 612-14 (strategizing on how the Father's criminal proceedings and guilty verdict affect trial, and whether to subpoena a police officer to testify as a witness).

Because the Father made his criminal law problems and his Nevada case issues in this case, he cannot complain that the Mother's attorney monitored those matters. Regardless, a line-by-line review of the Mother's billing statements is inappropriate in light of the trial court's proper findings.

3.3.18 The trial court's findings of fact were consistent with this Court's December 3, 2012 decision. The sole mandate on

remand was to enter findings of facts to support the trial court's conclusion that the Father's intransigence permeated the proceedings:

Because the court made no factual findings to support its award amount and "intransigence throughout these proceedings" conclusion, we remand for entry of appropriate findings of fact.

CP 1063. As discussed at length above, the trial court's additional factual findings support its conclusion of intransigence.

As noted by this Court in its December 3, 2012 decision and by the Father in his appeal brief, any other findings of fact to which the Father objects are "irrelevant," CP 1041, CP 1054, and Appellant's Brief at p. 24, and such objections certainly do not warrant the time and expense of a third appeal on a case that was tried over three years ago.

3.3.19 The record supports the trial court's finding that the father consented to jurisdiction. As stated by this Court in its December 3, 2012 decision, a party may consent to personal jurisdiction by appearing in the proceedings and arguing the case on its merits or seeking affirmative relief. This issue was decided by this Court, is the law of the case, and should not be reconsidered here.

3.4 **The Trial Court's Findings and Conclusions that the Father Was Intransigent Were Not Based on the Fact that the Father Litigated a Highly Contested Case.**

As discussed above, the trial court's finding of intransigence was based not on the fact that the Father "litigated" this case, but rather on the fact that the Father refused to litigate this case and instead engaged in foot dragging and obstructionist behavior that caused delay, frustrated the proceedings, and caused the Mother to incur additional fees.

3.5 **Case Law Supports a Finding of Intransigence on the Father's Part.**

A court may award attorney fees on the basis of intransigence if one party's conduct caused the other party to require additional legal services. *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Intransigent conduct also includes "foot-dragging" or obstructionist behavior, or making a trial unduly difficult with increased legal costs. *In re Marriage of Greenlee, supra*, 65 Wn. App. at 708.

Additionally, intransigence of an opponent is a basis for awarding attorney fees and costs to the other party where it is clear that the opponent chose not to fully participate in the proceedings. *State ex rel. Stout v. Stout*, 89 Wn. App. 118, 127, 948

P.2d 851 (1997) (finding intransigence where the party failed to timely respond to the petition for modification, obtained continuances for discovery which was not conducted, failed to comply with discovery, and then failed to appear for trial). Attorney fees for intransigence of a party have also been granted when that party made the trial unduly difficult and increased legal costs by his or her actions. *In re Marriage of Greenlee, supra*, 65 Wn. App. at 708.

Case law clearly supports the trial court's finding of intransigence on the part of the Father in the present case. The Mother incurred additional attorney fees and costs because the Father forced her to file a motion in limine in response to the Father's failure to comply with discovery, because the Father forced her to respond to his multiple requests for continuances, because the Father forced her to respond to his violation of the DVPO, and because the Father forced her to unnecessarily over-prepare for trial when the Father did not appear or call any witnesses at trial. The Father's "foot-dragging" and obstructionist behavior made trial, as well as the preparations for trial, unduly difficult and increased the legal costs for the Mother.

In addition, like the intransigent party in *Stout*, here the

Father chose not to fully participate in the proceedings. He failed to attend his parenting seminar, he failed to submit a financial declaration, he failed to participate in discovery, he failed to meet case schedule deadlines, he failed to attend hearings or trial, he failed to clear up warrants for his arrest, he violated of a court-issued DVPO, he failed to timely disclose trial witnesses, and he requested multiple continuances.

3.6 The Trial Court Was Not Required to Segregate the Fee Award.

Although a court should segregate the fees caused by a party's intransigence from those incurred for other reasons, *Matter of Marriage of Crosetto*, 82 Wn. App. 545, 565, 918 P.2d 954 (1996), segregation is not required if the intransigence permeates the entire proceedings, *In re Marriage of Burrill, supra*, 113 Wn. App. at 873.

Here, the trial court found that the Father's intransigence permeated the entire proceedings, and its finding is supported by the record. Therefore, segregation of the award is not required.

3.7 The Father Seeks to Re-Argue the Underlying Case Before This Court.

To support his argument that the Father was not intransigent, the Father makes allegations (regarding jurisdiction, the child's home state, and forum shopping) that he made before this Court during his first appeal. This Court found those allegations to be unsubstantiated, CP 1049, and therefore they deserve no additional consideration here. This Court's December 3, 2012 decision is the law of the case.

3.8 Additional Findings Regarding the Reasonableness of "The Billing Rate, The Hours Spent, and the Type of Work Done" Are Not Necessary Here.

When the trial court bases an attorney fee award on intransigence, it is not required to make findings regarding the reasonableness of the hours spent, rate and type of work performed. See *In re Marriage of Wallace*, supra, 11 Wn. App. at 710; *In re Marriage of Sievers*, 78 Wn. App. 287, 312, 897 P.2d 388 (1995). Here, the Mother supported her request for fees with a detailed affidavit including the hours billed and the type of work performed, and the affidavit was part of the record which the trial court reviewed.

As is noted above, the Mother submitted her briefing to Judge Doerty on August 28, 2013. The Father was allowed an additional three weeks (until September 28, 2013) to respond to all previous submissions of the Mother on attorney fees, and the Mother did not have an opportunity to respond to the Father's September 28, 2013 submissions. Thus, the Father had plenary opportunity to respond to all of the Mother's attorney fee submissions – both the attorney fee declaration submitted at trial and the Mother's argument on remand.

Paragraph 2.10 of Judge Doerty's October 1, 2013 Second Amended Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan on Remand Pursuant to Mandate states, in part:

. . . Respondent's wrongful conduct and intransigence permeated the entire proceedings, made this case unduly difficult for petitioner, and caused petitioner to unnecessarily incur attorney fees and costs. Given these circumstances, Petitioner reasonably incurred \$45,074.00 in attorney fees and \$802.48 in costs in this action for 199 hours of legal work required to take this matter through trial.

CP 1359-1364. Paragraph 3.3 of the same findings and conclusions states:

2. Because respondent's wrongful conduct and intransigence permeated the entire proceedings the Court

awards petitioner the full amount of attorney fees and costs she has incurred in this action.

CP 1359-1364. The Father was given extraordinary opportunity to address the reasonableness of the Mother's attorney fee submissions at trial. The trial court expressly found the Mother's attorney fees and costs reasonable.

3.9 An Award for Fees Based on Intransigence Does Not Require That the Mother Request Fees in Her Petition.

The Father's contention that the trial court was without authority to award fees because the Mother did not request them in the petition she filed in January 2010 is nonsensical. The award was based on the Father's intransigence, and the Mother had no way of knowing that the Father would be intransigent when she filed her petition. It might be appropriate to include attorney fees as relief requested in the petition in those cases in which the parties seek attorney fees under RCW 26.09.140 on the basis of financial need and ability to pay, or some other statutory provision. However, that was not the basis for the award of attorney fees here.

3.10 Judge Doerty Was the Judge at Trial And Therefore It Was Proper for Him to Rule on Remand.

As Judge Fleck noted in her assignment of this case on

remand to Judge Doerty, CP 1067, RCW 2.08.180 does not require written consent of the parties when the judge is a previously elected judge of the superior court who made discretionary rulings and then retired leaving the case pending. RCW 2.08.180; Wash. Const. Art. 4, sec. 7 (amend. 80). In determining the meaning of “case” as used in RCW 2.08.180, the court looks to the meaning of “case” in the context of RCW 4.12.050. *See State v. Belgarde*, 62 Wn. App. 684, 692, 815 P.2d 812 (1991) (holding that a case on remand with the same facts, parties and cause number is not a new proceeding).

... RCW 4.12.050 uses the more inclusive word “case” rather than “trial.” [The court] reasoned that a retrial was not a “new proceeding” for purposes of RCW 4.12.050 because it did not present “new issues arising out of new facts occurring since the trial.”

Belgarde, 62 Wn. App. at 690 (citing *State v. Clemons*, 56 Wn. App. 57, 60, 782 P.2d 219 (1989)). A remand following an appeal “does not present any new issues arising out of new facts occurring since the first trial. After remand the facts remain the same, the parties remain the same, even the cause number remains the same.” *Belgarde*, 62 Wn. App. at 691. A case commences when it is first tried, and continues through the appellate courts and on remand. *Belgarde*, 62 Wn. App. at 690-92.

Here, Judge Fleck assigned the remand to Judge Doerty under RCW 2.08.180. The sole issue on remand was entry of additional findings of fact to support the trial court's conclusion in February 2011 that the Father's intransigence permeated the proceedings. On remand, the case involved the same facts, the same parties, and even the same cause number. Therefore, it was a case that was pending when Judge Doerty retired, and written consent by the parties of Judge Doerty's assignment as judge *pro tempore* was not required.

Moreover, while service of a judge *pro tempore* requires agreement by the parties, RCW 2.08.180; *State v. McNairy*, 20 Wn. App. 438, 440, 580 P.2d 650 (1978), a party is required to "promptly" object to the assignment. *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 41, 104 P. 159 (1909); *State v. Belgarde, supra*, 62 Wn. App. at 684 (holding that a party constructively consents for a judge *pro tempore* to preside over case where defendant proceeded without objection). If the objections is "not made promptly, [the objection is] deemed waived." *Meisenheimer*, 55 Wash. at 41. When a challenge to the service of a judge *pro tempore* is not timely raised below, the appellate court will not consider it. *Cole v. Department of Social*

and Health Services of State of Wash., 54 Wn. App. 342, 349, 773 P.2d 866 (1989).

Here, despite ample time and opportunity to make an objection to the assignment of the case by Judge Fleck to Judge Doerty, the Father failed to do so. Judge Fleck assigned the remand to Judge Doerty on August 13, 2013. The Father was aware that Judge Doerty would rule *pro tempore* and made no objection to Judge Fleck of the appointment. The Father had the opportunity to file an objection or a motion for reassignment to Judge Fleck. He also had the opportunity to raise the issue of jurisdiction in his motion filed on August 27, 2013 requesting a continuance to file his memorandum, or, alternatively, permission to file a reply to the Mother's memorandum. He did not. It was not until September 18, 2013, *nearly two months after the judge assignment*, that the Father made any objection. This is not a "prompt" objection, and therefore this Court should deem the Father's objection as waived.

3.11 Attorney Fees on Appeal Should Be Awarded to the Mother, Not to the Father.

"[A] party's intransigence in the trial court can also support an award of attorney fees on appeal." *In re Marriage of Mattson*,

supra, 95 Wn. App. at 606. See also *In Re Marriage of Wallace*, *supra*, 111 Wn. App. at 710 (holding that when the husband demonstrated his intransigence at trial, “[t]o appeal the result justifies an attorney fees award to [the wife] on appeal”).

Here, the Father, whom the trial court found to be intransigent at the trial court level, is the one appealing the result. Therefore, his appeal justifies an attorney fee award to the Mother.

Additionally, a party can seek an award of fees under RCW 4.84.185 and RAP 18.9(a) when the appellant’s appeal is frivolous. An appeal is “frivolous,” as a basis for awarding attorney fees to appellee as sanctions against appellant, if, “considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal.” *Advocates for Responsible Development v. Western Washington Growth Management Hearings Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). When determining whether to award appellate attorney fees against a party who brought an allegedly frivolous appeal, a court considers the record as a whole and resolves all doubts against finding the appeal frivolous. *Stanley v.*

Cole, 157 Wn. App. 873, 889, 239 P.3d 611 (2010).

This is the Father's third appeal in regards to this matter. This appeal ignores well-established case law, and presents issues that have already been heard and decided upon by this Court during the first appeal. On page 48 of his brief, the Father vaguely alleges that the Mother's attorneys engaged in "bad faith and overreaching" in submissions to Judge Doerty, but fails to identify a single instance of "raising new issues on appeal" or "new factual information outside the trial transcript." The Father's attorneys then claim that the Father should be awarded attorney fees against the Mother for "intransigence." No such intransigence exists on the part of the Mother.

Therefore, the Mother requests all of her fees beginning with the brief on remand, through and including fees related to this appeal from the proceeding. *Marriage of MacGibbon*, 139 Wn. App. 496, 511, 161 P.3d 441 (2007) (holding that CR 11 sanctions are to address the amount of reasonable expenses incurred because of the filing of the pleading, motion or legal memorandum).

IV. CONCLUSION

The record here amply supports the Court's finding that the Father was intransigent, and that his intransigence permeated the proceedings below, causing the Mother to needlessly incur attorney fees and costs. As such, this Court should affirm the trial court's Second Amended Finding of Facts and Conclusions of Law. The Court should also award the Mother additional attorney fees on the grounds that the Father's appeal was frivolous.

Respectfully submitted this 27th day of February, 2014.

HELSELL FETTERMAN LLP

By 
Mark Rising, WSBA #14096
Lauren Parris Watts, WSBA #44064
Attorneys for Respondent Pagh

CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.
2. I am now and at all times herein mentioned was employed by Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154, who are counsel of record for Respondent.
3. In the appellate matter of Gibson v. Pagh, I did on the date listed below, (1) cause to be filed with this Court a Brief of Respondent; and (2) cause a true and correct copy of said Brief of Respondent to be delivered via messenger to Laura Christensen Colberg, of Michael W. Bugni & Associates, PLLC, at 11300 Roosevelt Way NE, Suite 300, Seattle, WA 98125, who are counsel of record for Appellant.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: February 27th, 2014, at Seattle, Washington.



KYNA GONZALEZ

APPENDIX A

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HELSELL FETTERMAN

NO. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 66833-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Parentage and Support of
BRITTON LAWRENCE HARPER GIBSON,
a minor child,

MARIE-CLAIRE HARPER PAGH,

Petitioner/Mother,

and

WILLARD GIBSON,

Respondent/Father

PETITION FOR REVIEW

Laura Christensen Colberg, WSBA #26434
Attorney for Petitioner
MICHAEL W. BUGNI & ASSOCIATES, PLLC
11300 Roosevelt Way NE, STE 300
Seattle, WA 98125
Telephone: (206) 365-5500

OPPOSING COUNSEL

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A. IDENTITY OF PETITIONER

Willard Gibson, Respondent in the Superior Court and Appellant in the Court of Appeals, asks this Court to accept review of the Court of Appeals' decision denying his request to vacate the trial court's orders, and denying reconsideration. See also Part B, below.

B. COURT OF APPEALS' DECISION

The Court of Appeals' decision, filed on December 3, 2012, reversed, remanded, and affirmed in part the trial court decision. A copy is in the Appendix, **A1-A41**. The Court of Appeals amended its decision as to factual particulars and otherwise denied reconsideration on January 29, 2013. A copy of this order is in the Appendix at **A42-A43**.

C. ISSUES PRESENTED FOR REVIEW

1. Does a minute entry of the decision made on Interstate jurisdiction issues constitute the "recording" contemplated in the UCCJEA (the "Uniform Child Custody Jurisdiction and Enforcement Act," RCW 26.27) for communication between courts of different states before such a determination is to be made?
2. If not, then does this failure to strictly comply with the UCCJEA defeat the decision by Washington to assert jurisdiction,

there being no record showing that the required statutory factors were considered before Nevada declined its home state jurisdiction?

3. Is the lack of a reviewable record in this context a violation of due process, defeating the intent of the UCCJEA to correct the problem previously present in the UCCJA where no record was required?

4. Does a UCCJEA decision made before the date when a party's Response due violate due process, where the Washington court relied only on the initial pleadings and considered them "unrebutted"?

5. Alternatively, was "emergency" jurisdiction sufficiently plead when a parent alleged only that there is a concern that the other parent might remove the child from his/her care?

6. Does the failure by a party to completely and accurately state the child's residential history defeat a finding of jurisdiction for purposes of making an "initial custody determination" in an Ex Parte proceeding under RCW 26.50?

6. Does a term in a draft, unsigned proposed Finding of Fact submitted by counsel constitute "evidence" or an "admission" for purposes of establishing jurisdiction where that party has elsewhere and consistently preserved his objection to same?

D. STATEMENT OF THE CASE¹

This case is about the application of the UCCJEA (RCW 26.27) when a parent visiting from another state, with child in hand, seeks Ex Parte protection from the court without providing the court the information required by the UCCJEA (RCW 26.27.281). It also involves the definition of "recording" where the UCCJEA (RCW 26.27.101) requires that communication between courts be recorded and reviewable. To the extent that noncompliance exists, a violation of due process rights is implicated. Appellant asks that all Washington orders in this matter be vacated for lack of jurisdiction.

Factual history. Will Gibson, father of Britton (now 4), was deprived of all contact with his son when the child's mother, Marie-Claire Pagh, obtained in Ex Parte a Temporary Domestic Violence Protection Order in King County Superior Court, using a cause number from five years prior (predating the birth of the child), alleging no harm to the child other than a fear that the Father might remove him from her care.

Will, Marie-Claire and Britton were residents of Nevada and were

¹ Citations to the record and additional factual detail may be found in the briefs filed by the Father.

present in Washington for a family vacation over the Christmas holidays in late 2009. Will returned to Nevada for a day in January to take care of some business when Marie-Claire filed in Washington—reacting to news that Will had lost some money gambling while in Nevada. The Petition for DVPO² did not disclose to the Washington court the child’s residential history—having lived his entire life in Nevada—and falsely asserted that both parents resided in King County, Washington. In granting the Temporary DVPO based on this faulty and incomplete information, the Washington court made an “initial custody determination” as defined by the UCCJEA.

When told that Marie-Claire was withholding his son from him, Will filed a custody action in Nevada before he was served with the Washington pleadings—that service occurred on January 29,

² Marie-Claire’s assertions in alleging domestic violence were “all over the map” and changed with each re-telling. Dates, details, circumstances—none lined up consistently, between Declarations, deposition testimony and trial testimony. Will denied these claims. Marie-Claire’s history of bringing DVPO actions and subsequently dismissing them (voluntarily) led to Will’s one criminal conviction—allowing Marie-Claire, after she had told him she had dismissed a DVPO, but in fact had not, to live with him. They were driving together, were struck by a drunk driver, but the police officer on the scene ran a background check and the un-dismissed DVPO came up. Despite irrefutable legal history, Marie-Claire persisted in representing to the court that Will had a lengthy “criminal history.”

2010, while in court on Nevada case. There is nothing in the Washington trial court record documenting the UCCJEA communication between Washington and Nevada courts. In supplemental records submitted in response to the Father's CR 60 motion, minute entries out of Nevada show that discussions did occur between Judge Doerty in Washington and Judge Giuliani in Nevada, and the outcome of same. The content of these conversations was not recorded. Jurisdictional briefing was submitted in Nevada, but not to Judge Doerty in Washington (in fact, Washington counsel for Will requested a UCCJEA conference *after* Will's Response was filed; he was given no notice in advance of the conference). The outcome of these unrecorded conversations was that Nevada, correctly finding itself to be the "home state" of the child, was declining to exercise its jurisdiction over the child. The facts relied upon in determining that Nevada was an inconvenient forum are nowhere recorded, making review impossible. These UCCJEA conferences and determinations occurred within Will's 60-day response period (served out of state).

The case went to trial before Judge Doerty in February 2011. Judge Doerty's Orders were reversed in part below—the 100-year

DVPO was reduced to the one-year maximum duration allowed by statute. The judgment of attorney's fees against Will was vacated/remanded for lack of sufficient findings. The remainder of the Orders (upheld on appeal) granted sole care and custody of the child to the Mother, and required Will to complete DV treatment classes before seeking review to reinstate contact with the child. The child, then two, is now four and will turn five in June 2013.

E. WHY THIS COURT SHOULD GRANT REVIEW

The court's decision in this matter is inconsistent with the appellate decision out of Division Two— *Ruff v Knickerbocker* 168 Wash. App. 109, 275 P.3d 1175 (2012). RAP 13.4(b)(2). In that case, the court emphasized the requirement of "strict compliance" with the terms of the UCCJEA—even going so far as to disregard an agreement by the parties to transfer a Montana case to Washington where there were various reasons for the case to proceed in Washington. But because a conference between states had not occurred, the court found noncompliance and thus reversed the trial court when it asserted jurisdiction. In the present case, the failure by Judge Doerty to make a record of the conference(s) with the Nevada judge leading to the jurisdiction decision is a clear violation of the requirement that

such conversations (on matters other than scheduling) be recorded for the express purpose of allowing the parties to review the basis for the decision. While the statute seems clear enough, no published Washington case squarely addresses what “recording” means within this statute. Given the increasing mobility of our society, the accessibility of electronic means of communication across such distances, the frequency of interstate jurisdictional questions will continue to rise, and how and on what bases these questions are to be resolved is an issue of substantial public interest. RAP 13.4(b)(4). The Court of Appeals decision also conflicts with cases that declare that the words of a statute be given their plain and ordinary meaning. RAP 13.4(b)(1)(2). Due process is also implicated in the timing of these decisions, made before the statutory notice and response period had run. RAP 13.4(b)(3). This and related substantive errors are outlined further below:

1. Under the plain language of the statute, the conversation between the courts was not recorded, thus the court failed to strictly comply with the UCCJEA.

Two sub-issues are present here—(a) what is to be recorded and (b) what is an appropriate means of recording. The statute says “a

communication” must be recorded. The Court of Appeals relied upon a Comment to the Uniform Act as published in the Family Law Quarterly, a record of the 1997 conference when changes to the UCCJA were made in establishing the UCCJEA (Slip Op., page 23). The court’s analysis, however, ignores the opening line: “This section does require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation.” Full text of these comments provided at **A62-A64**. There is no record of the conversation between the courts. Such a record should relate who said what, either in transcript form or in a form from which a transcript could be made. The court relied upon this Comment in addressing the second part of this inquiry: (b) what is an appropriate means of recording. It was satisfied that a minute entry that says what issues were discussed and what was decided was sufficient. But this conclusory “record” sheds no light on the basis for the decision, the facts considered, the arguments weighed—nothing shows *why* the decision turned out the way it did.

In determining one court to be an inconvenient forum in favor of another court, there is a list of factors to consider under the UCCJEA—

NRS 125A.365(2), identical to RCW 26.27.261(2). Even if such a cursory “Memorandum” is a sufficient “record,” it reveals nothing about the content of the conversation—who said what, what evidence or facts were relied upon, etc. Thus application of the law in this case should be the same as that in *In re Joseph V.D.*, 373 Ill.App.3d, 868 N.E.2d. 1076 (2007), despite the attempt to distinguish on this basis (footnote 25, Op., pg 25). There is a public interest in consistency of application of what is intended to be a “uniformity” of laws between states. In that Illinois case, the court ruled that the absence of a record was fatal to the assertion of jurisdiction under the UCCJEA. For all the parties know, the “inconvenience” of forum might have been a result of one of the judges wanting to lighten his or her docket load. Whether all of the statutory factors were analyzed and discussed, or just one or two, is something a true record of the conversation would show. The Court of Appeals said a “verbatim” record was not required, relying on the Comment from the conference, but did not otherwise address the lack of “content.” This court should define what the statute means, on its face.

2. Failure to produce a reviewable recording is a violation of due process.

Review is appropriate under RAP 13.4(b)(3) because this decision implicates the Constitutional right to due process. Other jurisdictions identified the problem under the former UCCJA—which did not require a record—finding that ex parte communication with a judge was not a proper basis for a substantive determination.³ According to

³ The following cases were decided prior to the changes made between the UCCJA, which did not have a communication provision, and the UCCJEA, which included these requirements to address the due process concern. It remains a concern if it is not followed:

“We find that the Family Court committed legal error, and violated Yost’s due process rights when it ruled, on the basis of an ex parte communication with a Virginia court, that it had subject matter jurisdiction to decide this case under the UCCJA as enacted in Delaware.” In Yost, there was no other record but a written recollection from the judge (which provides more detail than the minute entry out of Nevada in this case), and no written decision to memorialize the judge’s conclusions.

“. . . even in emergency situations, the trial Judge must at least maintain a proper written record of the ex parte communication and thereafter provide the parties the opportunity to be heard on the issues relating to, or arising from, the communication. . . . the Judge had a fundamental duty to notify the parties of the intended communication in advance and to permit them to meaningfully participate in the discussion. Anything less does not comport with basic principles of due process.”

Yost v Johnson, 591 A.2d 178 (Del. 1991), cited favorably within **State Ex Rel. Grape v Zach**, 524 N.W.2d 788 (Nebraska, 1994).

In Texas, where a judge conferred with an Oklahoma judge and on the basis of that conversation the Oklahoma judge decided to decline Oklahoma’s jurisdiction, the court rejected that decision:

“The Oklahoma judge dictated over the telephone to the court reporter of the trial court an “order” to accomplish the declination of jurisdiction. As the reader may easily observe, the “order” dictated by the Oklahoma court and introduced by the trial judge, is unsigned and uncertified. . . . It is apparent that the so-called findings made by the Oklahoma judge were based solely on his telephone conversations

the Comment cited, the minute entry was like a “memorandum,” and thus a sufficient “record” to satisfy the statute. This court is asked to find that to be erroneous. The statute requires a recording of “the conversation,” its “content,” not just the decision. Even if a minute entry is within the “memorandum” example in the Comment, the minute entry (provided in the CR 60 Response, not prior to trial) does not divulge a conversation, only the outcome:

“The judges discussed the jurisdictional issues and the TRO case in Washington. . . Both judges agreed that Nevada is an inconvenient forum . . .” CP 1031

with the trial judge to which neither appellant nor appellee was privy. . . . his “findings” amount to nothing more than an agreement between judges, unsupported by any real evidence submitted during the course of a custody proceeding in the Oklahoma court . . . the trial judge’s actions in modifying the Oklahoma decree, based on the Oklahoma “order,” violated the plain language of section 11.54 that “reasonable notice an opportunity to be heard must be given to the contestants” as well as state and federal due process rights.”

Interest of Wilson, 799 S.W.2d 773 (Tx Ct of App, 1990).

Also out of Texas is a case where the “record” of conversations between two courts (Texas and Arkansas) was made up of letters that included the same kind of language found here in the Nevada minute entry: “spoke with Judge . . . we decided” and “after further discussion . . . we have agreed and decided” and “after having consulted with Judge . . . in the child’s home state, the court finds . . .”

In this case, ***Aberholden v Morizot***, 856 S.W.2d 773 (Tx Ct of App, 1990), relying on the ***Wilson*** holding, faulted the communication between courts finding that agreement between judges was not enough, and in particular found “nor is there any record that the Arkansas court considered the statutory factors it is required to consider in making such a determination.” Texas thus rejected the assumption of jurisdiction on the basis of Arkansas’ decision to decline jurisdiction. Arkansas had not followed the then-UCCJA. End of story.

It remains that there is no record of the content of communication between the courts, the facts and arguments relied upon in reaching their agreement. (The court says the briefing provided to the Nevada judge is a sufficient record, Slip Op., footnote 25, pg 26; however, there only speculation about what Judge Doerty was thinking or communicating.) A record of a conversation would show who said what, not just the conclusions drawn as a result. Without a record of the conversation (“Judge Doerty said — Judge Giuliani said —”), the parties are unable to seek review or to participate as anticipated by the next Comment, which says:

The second sentence of subsection (b) protects the parties against unauthorized ex parte communications. The parties’ participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made.[fn60] This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

Footnote 60 to this Comment says:

It is necessary to make a record and allow the parties to have access to the record in order to satisfy due process concerns. If a

court, after communication with a court in another state, makes a decision **without** either **allowing the parties** the right to participate in the communication or **to examine the record** of the conversation **in order to make arguments**, the court is essentially **deciding the case on the basis of an *ex parte* communication.** This results in a due process violation. [Citing cases included above in footnote 3]

Emphasis added.

The court should define with no uncertain terms what is sufficient compliance with the UCCJEA in regard to the recording requirement—at the very least it should find that a minute entry of the decision made is *not* a recording of the communication (“conversation”) sufficient to provide a record useful for review, nor simply a statement of the legal theory (“inconvenient forum”/Op., pg 25). The appropriate weight to be given these Comments and/or footnotes should be addressed to provide guidance, or the court should provide clarity such that parties need not look to these secondary sources.

3. UCCJEA requirements are rendered meaningless if not enforced.

The court should provide guidance where the required UCCJEA disclosures on mandatory forms are left blank. What is the purpose of “requiring” parties to disclose a five-year residential history of a child if, when left blank, a judge or commissioner can still sign an Order

that makes jurisdictional findings without ensuring that such information has been reviewed for completeness? The purpose of the rule is not met if an Order can enter without those disclosures. At its outset, then, Washington had no proper basis upon which to exercise jurisdiction. Ensuring that judges and commissioners comply with the UCCJEA disclosures at every level is the only way to accomplish its intended purposes. Without compliance, all orders should be void.

4. Absence of limitations on temporary jurisdiction made its exercise improper.

Even if the court acted properly in exercising temporary emergency jurisdiction under the facts before the initial Ex Parte Commissioner (relying on allegations of domestic violence toward the Mother alone), said jurisdiction was to be temporary only, with a limited time period in which to seek relief in the correct jurisdiction—in this case, Nevada. This circles back to strict compliance with the UCCJEA and should be an independent basis to find that Washington's assertion of jurisdiction was improper *ab initio*.

The Court of Appeals "let slide" that Judge Doerty's initial determination of jurisdiction on March 11, 2010, included "no written order for the temporary order decision." Footnote 16, Slip

Op., pg 16. Yet on page 20, it cites from RCW 26.27.231 the requirement: “any order issued by a court of this state **must specify in the order** a period that the court considers adequate . . .” Emphasis added. There is no way to read this requirement as applicable to a verbal decision not reduced to a written order.

5. Determinations made before Response period runs violate due process.

The pinnacles of our justice system are notice and the opportunity to be heard. U.S. Constitution, Fourteenth Amendment. RCW 4.28.180 and CR 12(a)(3) give a party who is served out of state a period of 60 days in which to respond to the action. Will Gibson was served in Nevada with the Mother’s Washington pleadings on January 29, 2010. Thus he had until March 29, 2010, to respond. Before his response period had run, the court in Washington had participated in two UCCJEA conferences with the Nevada court. On March 11, 2010, Judge Doerty found emergency jurisdiction since the Mother’s assertions were “unrebutted”—but made no note of the fact that the Father’s Response was not yet due. The Court of Appeals likewise cited to “the undisputed record in March 2010” to affirm Judge

Doerty's finding. Slip Op., pg 15.⁴ The appellate opinion says the Father "had the opportunity to challenge Pagh's abuse allegations at the March 11, 2010 hearing and failed to do so." Slip Op., pg 16. Thus from the outset, the Father was deprived of his right to the 60-day notice period granted to him by statute. His "opportunity to be heard" before Washington courts acted came and went (under the Court of Appeals' theory) before he was even required to respond. Decisions were made before his statutory "notice period" had run. The court should have taken no action prior to the 60-day mark, or the date of filing of the Father's Response. (It was filed on March 29, 2010, the 60th day. CP 142-144. In it, he denied jurisdiction and set out the bases for his objection under the UCCJEA.)

6. Notice and opportunity to be heard regarding jurisdiction is within the statute, the court's opinion notwithstanding.

In its Slip Opinion, the court says: "Notice and participation are not required before courts communicate regarding jurisdiction." Slip Op., pg 21. While direct participation in the conversation is a "may," the court ignores the following "must" if the parties are not included:

⁴ Curiously, on the next page, the Court of Appeals incongruously calls Nevada "undisputedly" the child's home state—something the Mother's submissions through March 2010 failed to assert.

“they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.” RCW 26.27.101. This occurred on the Nevada side of the conversation, but not on the Washington side. Nowhere in the Washington record is there any briefing to inform Judge Doerty, who is fully one-half of the judicial conversation. Yet the day before the first conference, he communicated on the record to the parties and their counsel in Washington that he knew what was required—notice and a recording of the hearing if there was to be one: “You’ll get notice of any proposed communication between this court and Nevada because we do that in open court on the record and you—all sides are entitled to notice.” RP 3/11/2010, pg 20, CP 885. The statute says “a record must be made” and “the parties must be informed promptly of the communication and granted access to the record.” It does not say the decision can be made before or without this occurring. The Court of Appeals said there is no notice requirement—contrary to the language “must be given the opportunity . . . before a decision” is made. They simply got this wrong.

7. Proposed “Findings of Fact” were improperly given evidentiary weight

The court erred in relying in any degree on a “proposed Finding” submitted by counsel as if it had any evidentiary weight whatsoever (footnote 11 to Slip Op., pages 8-9). The proposed Finding referred to was not part of the record at trial. It was added as an Exhibit within the Mother’s Response to the Father’s CR 60 motion (CP 1058-1061), with no evidence to verify when it was produced or whether it was considered or relied upon by the trial court. A proposed Finding after hearing the court’s decision is an attempt to reflect in writing the mindset of the court, not an assertion/admission by a party. There is no evidence that this was submitted as evidence at trial. Nor is the copy referred to by the Mother in these proceeding signed by either the Father or his counsel. There is no legal or factual way to find that this type of document can be a reliable basis for any finding of fact. That the Court relied upon this in any fashion is an error that must be corrected—or the public put on notice that even unsigned proposed Orders or Findings might be seen as evidence or admissions.

8. Participation in trial process while maintaining objection to jurisdiction is not a waiver to said objection.

The Court of Appeals faulted Will for having an attorney represent

him at trial, submit a brief on the issues, and propose relief opposing the Mother's requests, while still objecting to jurisdiction.

"Gibson consented to personal jurisdiction by submitting briefs and other documents and appearing throughout the proceedings through counsel." Slip Op., page 35.

The logical result of this approach is to require a party who opposes jurisdiction to *do nothing at all* in the trial process in order to preserve that objection. That is not what the law requires. The law states that a party objecting to jurisdiction waives that objection if it is not plead in a responsive pleading. CR 12(h). Will's Response does object to jurisdiction, as did several subsequent pleadings. At no time did he amend his position on jurisdiction, but nevertheless was forced to present his case on parenting matters at trial, since the court was exercising jurisdiction and intended to decide the matter. This would also fly in the face of the principle that jurisdictional challenges can be raised "at any time"—even for the first time on appeal. There is inconsistency if the law penalizes a party who has clearly objected to jurisdiction all along, yet continues to litigate in good faith—"in the alternative," as it were, per CR 8(e)(2)—while understanding that jurisdiction can still be raised on appeal. If this were the legal

standard, no litigant who participated in any legal process would ever prevail in challenging jurisdiction on appeal.

F. CONCLUSION

The law is of no value if it is not followed. In this case, it was not. Not by the Mother in her initial filing, hiding the child's residential history and misstating the parties' residence; nor by the Commissioner in granting her the *ex parte* relief requested without first requiring those disclosures. Not by the Judge who first promised notice and a record should there be a UCCJEA conference with another court and then failed to follow through. Not by the Court of Appeals when these errors were brought up on appeal. This court is asked to follow and apply the law, and to find that these earlier failures are a basis to vacate all orders as a result.

For these reasons, the Father respectfully requests this court to accept review and ultimately, to find there was no jurisdiction and thus all orders entered in this matter are void.

RESPECTFULLY SUBMITTED this 28 day of February, 2013.

Laura Christensen Colberg
Laura Christensen Colberg, WSBA #26434
Attorney for Appellant
Michael W. Bugni & Associates, PLLC
11300 Roosevelt Way NE, Suite 300
Seattle, WA 98125

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2013, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by Messenger, and that copies were sent as follows:

Attorney for Respondent via E-Mail and Messenger

Mark Rising
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154—1154



Dona Harris

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Parenting and Support of)	NO. 66833-1-I
BRITTON LAWRENCE HARPER GIBSON)	DIVISION ONE
Child,)	
MARIE-CLAIRE HARPER PAGH,)	
Respondent,)	UNPUBLISHED OPINION
and)	FILED: December 3, 2012
WILLARD GIBSON,)	
Appellant.)	

2012 DEC 3 11:00 AM
CLERK OF COURT
STATE OF WASHINGTON

LAU, J. —Washington's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), chapter 26.27 RCW, confers subject matter jurisdiction on superior courts to determine child custody when the child's home state declines jurisdiction on inconvenient forum grounds, the child and at least one parent have a significant connection to Washington, and substantial evidence concerning the child's care is available in Washington. RCW 26.27.201(1)(b). Because Britton Harper Gibson's home state of Nevada declined jurisdiction on inconvenient forum grounds, the trial court properly assumed jurisdiction over this action. And, finding no error in Willard

Gibson's numerous claims, we affirm. But because the court made no factual findings to support its intransigence conclusion and the amount of the fees and costs, we vacate the award and remand for entry of findings consistent with this opinion.¹

FACTS

Parties' Relationship and Domestic Violence History

Marie-Claire Pagh and Willard Gibson started dating in Seattle in 2004 when Pagh was 18 years old and Gibson was 27. They moved in together in December 2004 and lived in Seattle until 2008. They moved briefly to San Diego, California and then to Las Vegas, Nevada, less than a month before the birth of their son, Britton, on June 23, 2008. Pagh and Gibson never married. When the parties lived in Nevada, Gibson controlled Pagh's access to financial resources.

Gibson's history of domestic violence against Pagh is well documented. Pagh first petitioned for a domestic violence protection order (DVPO) against Gibson in November 2005, claiming that Gibson hit and slapped her and threatened to kill her. She also petitioned for a DVPO in June 2006, alleging multiple instances of domestic violence. Gibson has an extensive criminal record of violating the DVPOs.² Each time, Gibson persuaded or threatened Pagh to terminate the DVPOs and resume their relationship.

¹ The trial court on remand is in the best position to consider Gibson's claim that he had no opportunity to respond to Marie-Claire Pagh's fees and costs documentation before the court ruled on the award.

² Gibson's criminal convictions include: domestic violence order/stalking (Seattle Municipal Court # 490351); assault 4 domestic violence/stalking (King County # 05-1-120241); domestic violence order violation (Seattle Municipal Court # 504944); 6 counts domestic violence order violation (Seattle Municipal Court # 494966); and domestic violence order/phone harassment (Seattle Municipal Court # 490351).

According to Pagh, Gibson engaged in acts of domestic violence against Britton when he was less than three months old. Pagh testified that Gibson had a short temper and spanked and/or banished Britton to his crib for lengthy periods of time. Pagh described an incident where Gibson pinched Britton while boarding a flight so that Britton would cry and dissuade others from sitting next to them. Pagh also described occasions when Gibson became angry while driving with her and Britton in the car. She claimed that Gibson drove fast and threatened to drive the car off the road and kill them all. Gibson has repeatedly threatened to take Britton away from Pagh and to kill Pagh.

On December 15, 2009, Pagh, Gibson, and Britton returned to Seattle to visit family. They stayed with Gibson's mother in Redmond, Washington, during this trip. Although they had booked return tickets, Pagh testified multiple times that the December 2009 trip's purpose was not only to spend the holidays, but to prepare to move back to Seattle.³ While in the Seattle area, the couple looked at apartments.

January 2010 Petitions, Jurisdictional Decisions, and Trial

Pagh petitioned for the DVPO at issue here after an incident that occurred in late December 2009 at the home of Gibson's mother in Redmond. Pagh claimed that Gibson was angry when she returned home late from shopping. He yelled at her, accused her of cheating, and shoved her against the wall and the guest room bed. On

³ Pagh's entire family, as well as Gibson's mother and brother, live in the Seattle area. Pagh and Gibson's "entire support system is . . . in the Seattle area." Pagh stated, "Will and I decided in December of 2009 that we would be moving back to Seattle." She claimed their lease in Nevada was set to expire at the end of February 2010 and the parties "were planning on having our move [to Seattle] complete by then." In her February 2010 reply to Gibson's response to her DVPO petition, Pagh stated that the couple had insufficient income in Nevada and depended on Gibson's mother for financial support.

January 2, 2010, Gibson flew to Las Vegas for 24 hours to finalize a real estate deal and pick up clothes for job interviews in Seattle. Gibson called Pagh that night and told her he was gambling and that he had lost all their money. Pagh decided to leave Gibson. She claimed this was the first opportunity for her and Britton to safely escape Gibson's violence and anger. Pagh took Britton to her sister's house in Edmonds, Washington. Pagh told Gibson over the phone that he could not see Britton until he obtained domestic violence and anger management treatment. When Gibson returned to Seattle on January 3, Pagh cut off contact with him.

Pagh filed a pro se DVPO petition⁴ on January 14, 2010, under RCW 26.50.070.⁵ She alleged that Gibson "becomes extremely angry and violent and I fear for our son's

⁴ Pagh later retained counsel in the DVPO and parenting plan/child support matters.

⁵ RCW 26.50.070(1) provides:

"Where an application under this section alleges that irreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the respondent, the court may grant an ex parte temporary order for protection, pending a full hearing, and grant relief as the court deems proper, including an order:

"(a) Restraining any party from committing acts of domestic violence;

"(b) Restraining any party from going onto the grounds of or entering the dwelling that the parties share, from the residence, workplace, or school of the other, or from the day care or school of a child until further order of the court;

"(c) Prohibiting any party from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

"(d) Restraining any party from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court;

"(e) Restraining any party from having any contact with the victim of domestic violence or the victim's children or members of the victim's household;

"(f) Considering the provisions of RCW 9.41.800; and

"(g) Restraining the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the

and my safety and well being.” In her supporting declaration, she described Gibson’s prior acts of domestic violence against her and disclosed the December 2009 incident described above. King County Superior Court issued a temporary emergency DVPO finding: “For good cause shown, the court finds that an emergency exists and that a Temporary Protection Order should be issued without notice to the respondent to avoid irreparable harm.” The order also granted Pagh temporary custody of Britton and set a January 28 hearing date.

On January 20, after service of the temporary DVPO, Gibson filed an “emergency motion to establish jurisdiction; compel the return of the minor child to the state of Nevada and for a pick up order; for primary physical custody; supervised visitation; for an award of child support; for plaintiff’s attorney’s fees and costs incurred herein; and related matters” in Clark County, Nevada. (Formatting and boldface omitted.) Gibson’s relief included a request to remove Britton from Pagh’s custody and return him to Gibson in Nevada. On January 26, in a separate proceeding (No. 10-3-00907-1 SEA), Pagh petitioned King County Superior Court to determine a residential schedule, parenting plan, and child support. In the petition’s “jurisdiction” section, Pagh marked the boxes stating, “The child resides in this state as a result of the acts or directives of the respondent” and that both the mother and father “are presently residing in the state of Washington.” In the petition’s “jurisdiction over the child” section, Pagh marked the box stating,

This court has temporary emergency jurisdiction over this proceeding because the child is present in this state and the child has been abandoned or it is

victim's household. For the purposes of this subsection, 'communication' includes both 'wire communication' and 'electronic communication' as defined in RCW 9.73.260.”

necessary in an emergency to protect the child because the child, or a sibling or parent of the child is subjected to or threatened with abuse.

In response, Gibson argued Nevada had jurisdiction under the UCCJEA.

Meanwhile, the temporary DVPO was reissued on January 28, February 12, February 19, and March 2 to accommodate rescheduled hearing dates. At the March 11 hearing, King County Superior Court Judge James Doerty assigned both the DVPO and the parenting plan/child support actions to himself. After argument from the parties' counsel, Judge Doerty noted that Gibson never submitted a factual declaration rebutting Pagh's assertion in the DVPO matter. Judge Doerty found Pagh's unrebutted factual account adequate to establish jurisdiction for the DVPO and emergency jurisdiction under the UCCJEA. "I think that the facts that are asserted here and are essentially unrebutted because there's no responsive declaration from Mr. Gibson on the facts are sufficient to constitute an emergency and jurisdiction." Report of Proceedings (RP) (Mar. 11, 2010) at 21. He reissued the DVPO pending the outcome of the UCCJEA matter.

Also on March 12, Judge Doerty and Nevada District Court Judge Cynthia Giuliani held an initial UCCJEA telephone conference.⁶ The judges agreed that Nevada, as the child's home state, would retain jurisdiction without prejudice pending a March 18 return hearing. At that telephonic hearing—Pagh and her counsel and Gibson's counsel appeared, but Gibson did not—the Nevada court "advised counsel it had spoken with the Washington Court regarding the jurisdiction and Temporary

⁶ The UCCJEA as adopted in Washington requires courts to communicate in situations involving the exercise of temporary emergency jurisdiction when another state is involved, RCW 26.27.231(4), and when there are simultaneous proceedings. RCW 26.27.251(2), .461.

Protective Order (TPO) issues.” The court informed the parties that “Nevada will retain jurisdiction, however, Washington will issue temporary emergency custody orders.” The court ordered the parties to confer regarding the jurisdictional issues and to brief the issues for the court.

The parties’ counsel each submitted comprehensive briefing and other documents regarding UCCJEA jurisdictional issues. On April 7, 2010, after reviewing the parties’ UCCJEA submissions and participating in a second telephone conference with Judge Doerty pursuant to the UCCJEA, Judge Giuliani declined jurisdiction in favor of Washington state based on inconvenient forum and dismissed the Nevada proceedings. The Nevada court’s minute order stated:

Upon receiving the briefs from counsel in this matter, Court conducted another UCCJEA telephone conference with Judge James Doerty in the Superior Court, Family Division in King County, Washington.

The Judges discussed the jurisdictional issues and the [DVPO] case in Washington.

Both Judges agreed that Nevada is an inconvenient forum and Nevada should relinquish jurisdiction in this matter to the State of Washington. COURT ORDERED, Washington will assume JURISDICTION in this matter and the Nevada case is hereby DISMISSED. All future Court dates are hereby vacated.

Gibson filed no motions or appeal challenging the Nevada court’s order declining jurisdiction and dismissing the Nevada action.⁷

In May 2010, Judge Doerty granted Pagh’s motion to consolidate the DVPO and parenting plan/child support actions. Also in May 2010, Pagh petitioned for reissuance of the protective order and requested it be made permanent. In support, she submitted

⁷ Gibson’s trial brief for the DVPO and parenting plan/child support cases in King County Superior Court acknowledges: “Ultimately, the court in Washington and the Court in Nevada held a conference call where it appears that Nevada declined to asse[r]t [its] jurisdictional authority under the UCCJEA.”

a new declaration describing, “[Gibson’s] violence has extended to our son, Britton.”⁸ She described the pinching incident discussed above and another incident in late December 2009 when the parties were staying with Gibson’s mother. During that incident, Pagh and Gibson were eating dinner when Britton started crying. According to Pagh, Gibson picked Britton up, walked into the back bedroom, and aggressively threw him down on the bed. When Pagh asked what happened, Gibson said he threw Britton on the bed to startle him and stop him from crying.⁹ Gibson failed to timely respond to Pagh’s May 2010 petition. The court temporarily extended the DVPO.

The court granted Gibson trial continuances in June and November 2010 to allow him to conduct discovery. Gibson’s counsel deposed Pagh in December 2010. Trial proceeded on February 1, 2011. Gibson failed to appear.¹⁰ Gibson’s counsel appeared and requested another continuance, which the court denied. Pagh was the only witness to testify at trial.¹¹

⁸ Pagh did not mention any specific acts of domestic violence against Britton in her initial petition for a DVPO or her initial supporting declaration filed in January 2010.

⁹ Pagh later testified about this incident in her deposition and at trial.

¹⁰ Gibson was arrested on a 2007 warrant on September 10, 2010, for violating the 2005 protection order. He remained in jail from November 27, 2010, until December 16, 2010. A Seattle Municipal Court jury convicted Gibson on January 12, 2011. He left the courtroom before signing a no-contact order. The municipal court judge ordered him to appear the next day to sign it. Because he failed to appear, the court issued a \$10,000 bench warrant. The record indicates Gibson made no efforts to clear warrants he claimed prevented participation in discovery and parenting evaluation.

¹¹ Gibson’s proposed findings of fact and conclusions of law submitted at trial for the parenting plan/child support action state in paragraph 2.1:

All parties necessary to adjudicate the issues were served with a copy of the summons and petition and are subject to the jurisdiction of this court. The facts below establish personal jurisdiction over the parties:

Pagh moved for an award of attorney fees and costs based on Gibson's intransigence, arguing that Gibson made no effort to clear warrants that were preventing his participation in discovery or a parenting evaluation.¹² She explained:

[Gibson] has demonstrated a complete disregard for court orders, has refused to take even the simplest steps to participate in discovery, and has needlessly increased the costs of litigation. He has had a string of attorneys on this matter, and has failed to comply with a single case scheduling deadline. [Pagh] had to incur attorneys fees to file a motion in limine due to [Gibson's] failure to timely disclose witnesses, and served his answers to interrogatories four days after the discovery cutoff. At the time of trial, Mr. Gibson had a bench warrant out for his arrest based on his failure to appear. Presumably for that reason, he even failed to appear for the trial.

Pagh requested a total of \$45,876.48 in fees and costs. Gibson responded, alleging that Pagh failed to establish intransigency and failed to itemize the fees and costs. He also filed a declaration opposing Pagh's motion for attorney fees and costs. In reply, Pagh attached an itemized list of fees and costs.

On February 15, 2011, the court issued (1) a final DVPO, (2) a corrected parenting plan final order, and (3) amended/corrected findings of fact and conclusions of law on petition for residential schedule/parenting plan. The DVPO barred Gibson from contacting Pagh or Britton. The order stated, "The terms of this order shall be effective immediately and for one year from today's date, unless stated otherwise here (date):

The mother and acknowledged father engaged in sexual intercourse in the state of Washington as a result of which the child was conceived.
(Emphasis added.) Paragraph 2.4 of Gibson's proposed findings of fact and conclusions of law states:

This court has jurisdiction over the child for the reasons set forth below:

All courts in the child's home state 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 under RCW 26.27.261 or .271.

(Emphasis added.)

¹² Gibson's failure to clear his criminal warrants explains his absence at trial.

February 1, 2111.” The order provided Gibson would have “no access to [Britton], subject to compliance with the Final Parenting Plan filed under this cause number.”

The court’s corrected parenting plan final order” expressly stated that the parenting plan/residential schedule could be revised and Gibson could visit the child when he “demonstrate[s] to the Court that he has successfully completed a Domestic Violence Perpetrator’s Program as certified by RCW 26.50.150, including collateral contact with the Mother, and in full compliance with any and all probation and/or conviction requirements stemming from any criminal matters.” Paragraph 3.13 stated in part, “The Father’s successful completion of the [Domestic Violence Perpetrator’s Program] will be considered as adequate cause for modification of this parenting plan.”

In its amended/corrected findings of fact and conclusions of law on petition for residential schedule/parenting plan, the court found in relevant part:

2.1 Notice and Basis of Personal Jurisdiction Over the Parties

All parties necessary to adjudicate the issues were served with a copy of the summons and petition and are subject to the jurisdiction of this court. The facts below establish personal jurisdiction over the parties:

Respondent appeared and submits to jurisdiction of this court by consent.
The child resides in this state as a result of the acts or directives of [Gibson].

.....
2.4 Basis for Jurisdiction Over the Child

This court has jurisdiction over the child for the reasons set forth below:

This state is the home state of the child because:

All courts in the child’s home state have declined to exercise jurisdiction on the ground that a court of this state is the appropriate forum to determine the custody of the child.

.....
2.9 Protection Order

A Domestic Violence Protection Order protecting Marie-Claire Pagh and Britton Lawrence Harper Gibson from Willard L. Gibson is necessary based upon the evidence presented at trial showing a history of past acts of domestic violence, and Ms. Pagh’s fear of imminent harm, and the likelihood of Mr. Gibson committing further acts of violence.

The court also found that Gibson's "intransigence throughout these proceedings warrants an award of attorneys fees and costs in favor of [Pagh]." The court's amended judgment and order establishing residential schedule/parenting plan awarded Pagh a \$45,876.48 money judgment against Gibson, constituting all of her attorney fees and costs.

Pagh's Posttrial Move

Pagh and Britton lived with Pagh's sister in Edmonds, Washington, from January 2010 to April 2011. Pagh worked as a file clerk at the law offices of William D. Hochberg in Edmonds from January 25, 2010, through April 7, 2011. She testified at her deposition on December 31, 2010, that she was dating Naji Mehanna. Pagh's declaration testimony established that she met Mehanna in Nevada in 2008 but was not romantically involved with him until late 2010. Mehanna proposed to Pagh on January 21, 2011. Pagh and Britton moved to Nevada to live with Mehanna in April 2011—two months after trial. Pagh and Mehanna married in June 2011. Pagh currently works for a law firm in Nevada.

CR 60 Motion

In December 2011, Gibson filed a CR 60 "motion/memorandum for order to show cause and related relief." (Boldface and formatting omitted.) He requested relief on several grounds, including (1) Pagh "committed fraud on the court (or misrepresentation) in asserting inaccurate and incomplete testimony about her residence and the child's (and the Father's) in providing a basis for the court to exercise jurisdiction," (2) "[t]he court exceeded the basis plead[ed] for jurisdiction in finding emergency jurisdiction over [Britton]," (3) the court failed to follow the UCCJEA "where

an Interstate conference was held on a date prior to the Father's Response to Petition being filed, with no record made available to the Father upon which to review the bases and facts considered by either court," (4) Pagh "engaged in forum-shopping, having lived in Nevada immediately prior to this action and returning to Nevada shortly afterward," and (5) the "judgments and orders are void for lack of jurisdiction and should be vacated."

After a show cause hearing on February 10, 2012, the court denied Gibson's CR 60 motion. The court's oral ruling stated in relevant part:

On the facts of this case that have been presented, I do not find a basis to grant your CR 60 motion. . . . And whether it's on my analysis of his various opportunities to pursue, to start with, for example, the DVPO bases, the distinctions that you have made are not sufficient in my mind to warrant a -- essentially a finding that the mother, at a minimum, made incomplete assertions and therefore the Washington court was misled or did not have sufficient basis to obtain jurisdiction.

I think the Washington court did have a basis to obtain jurisdiction. And as I think both experienced counsel know, distinctions between factual matters -- "Did I come here for a vacation," "Did I have in my mind that I was going to stay here," "Did I change my mind from vacation to I'm going to stay here because I'm afraid," or whatever, it -- the kinds of distinctions that your client is making are not sufficient in my mind to -- for me to make a credibility determination that the mother was . . . making misrepresentations to the Court.

RP (Feb. 10, 2012) at 56-57. The court continued:

When [Gibson] had representation [in Nevada], he could have sought some other -- he could have taken some additional action, whether it was to -- through both of his attorneys to ask for the courts to do it right and go on the record and let him be present and so on, and -- and/or he could have appealed that determination. I do think that was a final determination under the UCCJEA . . . but at a minimum he could have sought some relief in the Nevada court because he . . . was represented by counsel.

And then there was a whole additional year, essentially, when this was all pending when he could have pursued at least discovery further than he did in order to address the issues that you are now raising, as at least his -- Ms. Willits calls it speculation, but his belief that there was something that wasn't correctly

or fully represented to the court at trial. And this is just not a fact pattern that I think CR 60 is – that I think a CR 60 motion should be granted in.

RP (Feb. 10, 2012) at 61-62. The court's written findings established:

The court does not find the bases/distinctions in the Mother's pleadings as briefed by the Father in his CR 60 motion (as to jurisdiction) sufficient to warrant a finding that the Mother made incomplete assertions to mislead the court. Nor does the court find a basis under newly discovered evidence/forum shopping, or that the judgment is void. The father had ample opportunity during the pendency of the actions in Nevada and Washington to appeal or seek reconsideration of UCCJEA decisions, to conduct discovery and to raise issues at trial; and the father was almost continuously represented during the relevant periods in both states.

ANALYSIS

Standard of Review

The determination of subject matter jurisdiction is a question of law reviewed de novo. In re Marriage of Kastanas, 78 Wn. App. 193, 197, 896 P.2d 726 (1995). Subject matter jurisdiction is "the authority of the court to hear and determine the class of actions to which the case belongs." In re Adoption of Buehl, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). A superior court always has jurisdiction to determine whether it has subject matter jurisdiction and whether it should exercise its jurisdiction. Kastanas, 78 Wn. App. at 201.

Parenting Plan/Child Support Action

As discussed above, Washington assumed initial jurisdiction under its temporary emergency jurisdiction powers and later assumed final jurisdiction when Nevada declined on inconvenient forum grounds under the UCCJEA. Gibson argues the Washington trial court erroneously assumed both temporary and final jurisdiction in the parenting plan/child support matter. He claims (1) Pagh failed to state an adequate

basis for jurisdiction in her initial parenting plan/child support request, (2) Pagh misled the court regarding the parties' residential history, (3) the Washington and Nevada courts failed to follow UCCJEA procedures and the evidence did not support inconvenient forum as a basis for the Nevada court to relinquish jurisdiction,¹³ and (4) new evidence shows Pagh was forum shopping.¹⁴ Pagh responds that Washington properly assumed both initial and final jurisdiction.

Basis for Initial Jurisdiction

Pagh invoked the court's temporary emergency jurisdiction, RCW 26.27.231, as a basis for the Washington court to assume initial jurisdiction in the parenting plan/child support matter. This statute provides in relevant part:

A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with abuse.

RCW 26.27.231(1) (emphasis added). At a March 11, 2010 hearing, the Washington court found emergency jurisdiction existed: "I think jurisdiction has been established for purposes of the domestic violence protection order statute and also for emergency purposes under the UCCJEA." RP (Mar. 11, 2010) at 21.

Gibson argues that Pagh "did not select any of the available options as a basis," referring to the two boxes listed under the petition's "temporary emergency jurisdiction"

¹³ We note and the record shows that Gibson never raised the courts' alleged failure to follow UCCJEA procedures. The omission deprived the courts of any opportunity to cure the perceived deficiencies.

¹⁴ Because Gibson's fourth argument is more properly addressed as part of his challenge to the court's CR 60 ruling, we address it below.

section. Appellant's Br. at 12. But review of the petition indicates that Pagh checked the box marked "other," explained the DVPO's grant of temporary custody to her, and noted Gibson's pending action in Nevada.¹⁵ Nothing in our record indicates that Pagh deliberately omitted material information. Pagh's alleged failure to properly fill out the form is irrelevant. The trial court's jurisdiction derives from a constitutional or statutory provision and "[e]levating procedural requirements to the level of jurisdictional imperative has little practical value and encourages trivial procedural errors to interfere with the court's ability to do substantive justice." Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 319, 76 P.3d 1183 (2003) (quoting Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 791, 947 P.2d 732 (1997) (Durham, C.J., concurring)). The undisputed record in March 2010 indicated that Gibson committed acts of domestic violence against Pagh in December 2009 immediately before Pagh left Gibson. The court properly assumed temporary emergency jurisdiction under the UCCJEA based on Britton's presence in Washington and Gibson's documented abuse and threats against Pagh.¹⁶ RCW 26.27.231(1).

¹⁵ Specifically, Pagh wrote, "Upon learning of the issuance of a temporary protection order granting me custody under KCSC # 05-2-31430-3 SEA, the Respondent filed an action to establish parenting plan in Clark County, Nevada # D-10-423976-C. No order has yet been entered in the Nevada case."

¹⁶ Gibson acknowledged as much in his March 31, 2010 "Motion and Declaration Requesting UCCJEA Conference Between Washington and Nevada Courts and for Modification of Protection Order to Permit Transfer." His attorney, Ronald C. Mattson, stated in the declaration, "Based on the allegations made in the initial pleadings herein, it is understandable why this court may have felt compelled to act." He went on to argue that "this temporary exercise of jurisdiction over the Parentage action should be terminated."

Gibson makes much of the fact that Pagh had not described any specific acts of violence toward Britton as of March 2010. But for purposes of temporary emergency

UCCJEA and Final Jurisdiction

Gibson also challenges the Washington court's final determination assuming jurisdiction in the parenting plan/child support matter after Nevada—undisputedly Britton's "home state"¹⁷ under the UCCJEA—declined jurisdiction on inconvenient forum grounds.¹⁸ Washington's superior courts have broad constitutionally based jurisdictional

jurisdiction under the UCCJEA, acts of violence or threats against the child's parent are sufficient. See RCW 26.27.231(1). In his reply, Gibson claims that nothing in the record suggests an emergency existed and there was no basis on which to find "abuse." He cites Ruff v. Knickerbocker, 168 Wn. App. 109, 275 P.3d 1175 (2012), for the proposition that one parent's fear that the other parent will take the child without permission does not constitute abuse of the child or provide a basis for finding an emergency. But as discussed above, under RCW 26.27.231(1), abuse against the child's parent suffices for temporary emergency jurisdiction under the UCCJEA. Ruff did not involve allegations of abuse against a parent. Gibson had the opportunity to challenge Pagh's abuse allegations at the March 11, 2010 hearing and failed to do so. The court based its decision partly on the parties' "huge history" of domestic violence, including Gibson's prior DVPO violations. RP (Mar. 11, 2010) at 23. The March 11, 2010 record overwhelmingly establishes a basis for the court's emergency jurisdiction.

Finally, Gibson contends the court's exercise of temporary emergency jurisdiction violated the UCCJEA because the court failed to state an expiration date. The record on appeal contains no written order for the temporary jurisdiction decision. But the court made clear at the hearing that its jurisdictional decision was based both on the domestic violence statute and the UCCJEA. It clearly extended the domestic violence protection order—which granted temporary custody to Pagh—until "June 11, 2010 pending outcome of UCCJEA matter."

¹⁷ The UCCJEA defines "home state" as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding." RCW 26.27.021(7). Temporary absences are included within this six-month period. RCW 26.27.021(7).

¹⁸ Gibson challenges the trial court's finding that "[Washington] is the home state of the child because: All courts in the child's home state have declined to exercise jurisdiction on the ground that a [Washington court] is the appropriate forum to determine the custody of the child." He argues that under the UCCJEA, Nevada is the home state of the child. He is correct, but the Washington court's mistake in calling Washington the home state due to Nevada's declination of jurisdiction is immaterial. The Washington court was clearly assuming jurisdiction based on RCW 26.27.201(1)(b)

authority. Orwick v. City of Seattle, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). We strictly and narrowly read efforts by the legislature to limit that jurisdiction. Here the court assumed jurisdiction under the UCCJEA,¹⁹ which authorizes Washington courts to exercise jurisdiction over custody determinations only if:

or (c) (providing that a Washington court may assume jurisdiction over a child custody action if

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 under RCW 26.27.261 or 26.27.271, and:

(i) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships [or if]

(c) [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 under RCW 26.27.261 or 26.27.271).

As discussed below, that assumption of jurisdiction was proper.

Gibson also assigns error to the court's finding that the parties signed an acknowledgment of paternity and that this affidavit was filed in Nevada. But he devotes no argument to this issue in his brief. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996). Further, Pagh testified at trial that Gibson's name was on the birth certificate. In his reply, Gibson contends "it is not correct [for the court] to find that any such record was filed in Washington." Appellant's Reply Br. at 6. The court made no such finding. The court found that the acknowledgement of paternity was filed in Nevada.

¹⁹ The UCCJEA provides the basis for initial subject matter jurisdiction over a child custody dispute in Washington. "Laws governing the existence and exercise of jurisdiction in child custody cases, and regulating the interstate enforcement of child custody determinations, spring from Congress as well as the state legislatures. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is the source of the [Uniform Child Custody Jurisdiction Act] UCCJA, the state law that has dominated the field since its approval in 1968. . . .

"NCCUSL has been in existence for over 100 years to promote uniformity in state law and interstate cooperation by developing uniform acts and endeavoring to secure their enactment by voluntary action of each state government." Patricia M. Hoff, The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act, 32 FAM.

(a) [Washington] 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;

(b) A court of another state does not have jurisdiction under (a) of this subsection, or a court of the home state of the child [Nevada] has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under RCW 26.27.261 or 26.27.271, and:

(i) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) All 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 under RCW 26.27.261 or 26.27.271; or

(d) No court of any other state would have jurisdiction under the criteria specified in (a), (b), or (c) of this subsection.

RCW 26.27.201(1) (emphasis added).²⁰

Nevada has also adopted the UCCJEA and its law closely tracks Washington law regarding initial child custody jurisdiction. See NRS 125A.305 (describing Nevada's initial child custody jurisdiction rules). A Nevada court can decline jurisdiction based on inconvenient forum if certain requirements are met:

L.Q., 267, 269 (Summer 1998). In July 1997, an updated and enhanced version of the UCCJA, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), was unanimously adopted by the NCCUSL. "The Act was approved in February 1998 by the American Bar Association House of Delegates." Hoff, supra, at 267-68. And the Act was subsequently made available for state adoption. Most states have now adopted the UCCJEA, and in 2001, Washington replaced the UCCJA by adopting the UCCJEA. Chapter 26.27 RCW.

²⁰ The UCCJEA makes clear that these jurisdictional rules are the exclusive basis for assuming jurisdiction over a custody determination matter and that the UCCJEA is not merely an alternative jurisdictional scheme to assume jurisdiction. RCW 26.27.201(2). The UCCJEA, in conformity with the Federal Parental Kidnapping Prevention Act, makes the home state basis of jurisdiction within the UCCJEA the preferred basis for assuming jurisdiction under the UCCJEA. RCW 26.27.201(1)(a), (b).

1. A court of this state which has jurisdiction pursuant to the provisions of this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.

2. Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) The length of time the child has resided outside this state;
- (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (d) The relative financial circumstances of the parties;
- (e) Any agreement of the parties as to which state should assume jurisdiction;
- (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

3. If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

NRS 125A.365(1)-(3) (emphasis added); see also Friedman v. Eighth Judicial Dist.

Court of State, ex rel. County of Clark, 264 P.3d 1161, 1167-68 (Nev. 2011).²¹ The

²¹ Washington has a substantially similar rule permitting declination of jurisdiction on inconvenient forum grounds:

"(1) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

"(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise

Nevada Supreme Court has held, "The decision to decline jurisdiction on inconvenient/more appropriate forum grounds is for the court of the state that has UCCJEA jurisdiction to make, not the state to which deferral is pressed." Friedman, 264 P.3d at 1167-68.

As discussed above, Washington properly assumed temporary emergency jurisdiction in this case. The UCCJEA requires the court assuming temporary emergency jurisdiction to communicate and coordinate with any other court in which related child custody proceedings are pending:

(3) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under RCW 26.27.201

jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

"(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

"(b) The length of time the child has resided outside this state;

"(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

"(d) The relative financial circumstances of the parties;

"(e) Any agreement of the parties as to which state should assume jurisdiction;

"(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

"(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

"(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper." RCW 26.27.261 (emphasis added).

through 26.27.221. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(4). . . [U]pon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, shall immediately communicate with the other court. 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. A state with jurisdiction over a pending child custody determination may decline to exercise its jurisdiction in favor of a court with a more convenient forum.

RCW 26.27.261; NRS 125A.365. Once that state declines jurisdiction, the state with temporary emergency jurisdiction then exercises general jurisdiction over the matter.

See RCW 26.27.231(3).

Gibson first claims that both UCCJEA conferences between the Washington and Nevada courts failed to follow statutory requirements regarding notice, participation, and provision of a record.²² Notice and participation are not required before courts communicate regarding jurisdiction. RCW 26.27.101 provides for discretionary communication between courts regarding UCCJEA matters:

(1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

²² We question whether these claims are properly raised in this appeal. Gibson relies on inapposite case authority to overcome his failure to appeal Nevada's order declining jurisdiction on inconvenient forum grounds and dismissing his action. The order affected a substantial right and discontinued his Nevada action.

(3) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(4) Except as otherwise provided in subsection (3) of this section, a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(Emphasis added.) Nevada's corresponding statute is nearly identical to Washington's. See NRS 125A.275. Neither statute contains a notice requirement, and in both statutes, the decision whether to allow the parties to participate is discretionary. Here, both parties were represented by counsel in Nevada and in Washington. Both parties submitted briefing on jurisdiction before the April 7, 2010 telephone conference and jurisdictional decision. Gibson's arguments regarding notice and participation fail.²³

Gibson also argues that the Washington and Nevada courts failed to provide the parties an adequate record of their communications. We disagree. The Uniform Act (UCCJEA § 110), RCW 26.27.101(5), and NRS 125A.275(5) define "record" identically: "[R]ecord' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Nowhere does the Uniform Act or either state statute require that the communication be recorded or

²³ Gibson argues that his "Washington counsel knew nothing of [the March 12] UCCJEA conference when he filed, on 3/31/2010, a request that UCCJEA conference occur in the paternity action." Appellant's Br. at 24. Even if that is true, both parties and their Nevada counsel were aware of the March 12 conference and received the court's minute order regarding that conference as discussed above. That is all the statute requires. See RCW 26.27.101(4); NRS 125A.275(4) ("The parties must be informed promptly of the communication . . ."). Any lapse in notifying Washington counsel about the March 12 conference rests with Gibson's Nevada counsel, not the court.

transcribed verbatim. Comments to the Uniform Act further explain the "record" requirement:

This section does require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation. The only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Included within this latter type of communication would be matters of cooperation between courts under Section 112. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

. . . . The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not to be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997) § 110 cmt.

Here, the Nevada court issued a minute order after the March 12, 2010 telephone conference describing the communication between the courts and the jurisdictional decisions made:

Court conducted a UCCJEA telephone conference with Judge James Doerty in the Superior Court, Family Division in King County, Washington.

The Judges discussed the jurisdictional issues and the [Temporary Protective Order] case in Washington.

Both Judges agreed that Nevada will retain jurisdiction in this matter without prejudice given that Nevada is the home state of the child and both parties have been represented on record in Nevada.

COURT ORDERED, Nevada will assume JURISDICTION in this matter WITHOUT PREJUDICE. The March 18, 2010 return hearing shall remain on calendar.

(Emphasis added.) Both parties' counsel appeared and participated in the March 18 return hearing. Pagh appeared by telephone, and Gibson did not appear. On April 1, 2010, the Nevada court issued an order—drafted by Gibson's counsel and signed by counsel for both parties—indicating in part the following:

On March 18, 2010, this matter having come before this Honorable Court

Court reviewed the issues. Court advised counsel it had spoken with the Washington Court regarding the jurisdiction and Temporary Protective Order (TPO) issues. Court stated Nevada will retain jurisdiction, however, Washington will issue temporary emergency custody orders.

(Emphasis added.) The April 1 order stated, “[B]ased upon [the Nevada court’s] discussion with the Washington Court, jurisdiction remains in NEVADA at this time.” It further ordered the parties to confer regarding the jurisdictional issues and to brief the court on those issues, “or, Plaintiff shall RESPOND to Defendant’s OPPOSITION pleadings.” The order also provided, “The COURT shall ISSUE a MINUTE ORDER upon RECEIPT of counsel’s BRIEFS.

Both parties thoroughly briefed the jurisdiction issue as ordered by the court. In accordance with the April 1 order, the court considered their submissions and the parties were informed of the final jurisdictional decision via the April 7, 2010 minute order.²⁴ That order stated:

²⁴ Regarding the second UCCJEA conference on April 7, Gibson argues, “While the Nevada court instructed the parties’ counsel appearing in that action to provide briefing to the Nevada court about the UCCJEA issues, there was no such communication or expectation on the part of Washington. Nowhere on the Washington docket is there even any record of any UCCJEA conference. Nowhere is there any evidence that Judge Doerty received or reviewed any briefing before this conference took place.” Appellant’s Br. at 25-26. He speculates in his reply that both UCCJEA conferences were improper because “Judge Doerty had no briefing from Washington counsel for either party, nor access to the briefing submitted in Nevada. . . . [Gibson’s]

Upon receiving the briefs from counsel in this matter, Court conducted another UCCJEA telephone conference with Judge James Doerty in the Superior Court, Family Division in King County, Washington.

The Judges discussed the jurisdictional issues and the TRO case in Washington.

Both Judges agreed that Nevada is an inconvenient forum and Nevada should relinquish jurisdiction in this matter to the State of Washington. COURT ORDERED, Washington will assume JURISDICTION in this matter and the Nevada case is hereby DISMISSED. All future Court dates are hereby vacated.

The minute orders and the court's April 1 order are part of the court record. They constitute "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form" within the meaning of RCW 26.27.101(5). They amply convey to the parties the basis of the jurisdictional decision (inconvenient forum) and describe the communications between the courts. Gibson's assignments of error regarding these communications lack merit.²⁵

Washington counsel was given no . . . notice or opportunity to present information analyzing the issues based on Washington law." Appellant's Reply Br. at 8-9. He claims, "A UCCJEA conference that occurs without both judges being fully informed and briefed from both sides should not be considered valid." Appellant's Reply Br. at 8 (boldface omitted). He cites no authority requiring both courts in a UCCJEA conference to receive briefing. See State v. Logan, 102 Wn. App. 907, 911 n. 1, 10 P.3d 504 (2000) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.") (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). The Nevada court received and reviewed extensive briefing from both parties on the issue and the courts conferred before the jurisdictional decision, which is all the statute requires.

²⁵ Gibson cites In re Joseph V.D., 373 Ill. App. 3d 559, 868 N.E.2d 1076 (2007), for the proposition that failure to provide a record of communication is grounds for dismissal. But in Joseph V.D., there was "no record of the communication between the [Illinois] court and the Nevada court, either in the form of a transcript of an open-court description of the communication or in the form of some separate document or other medium retrievable in perceivable form." Joseph V.D., 373 Ill. App. 3d at 562. Here, a record of the communication exists as discussed above.

Regarding provision of a record, Gibson contends "[t]here is no record to support on what factual bases the court(s) found Nevada to be an inconvenient forum or what

RCW 26.27.201(1)(b) expressly conferred jurisdiction on the Washington court after Nevada decided to decline jurisdiction under its own UCCJEA provisions.

Gibson makes several related arguments contesting the Washington court's jurisdiction. He contends that Pagh misled the court regarding the parties' residential history and failed to disclose Britton's history of living in Nevada. The record shows that Pagh disclosed to both the Washington and Nevada courts that Britton lived in Nevada from the time he was born until the December 2009 trip to Seattle. To the extent Gibson argues Pagh misrepresented residence information, the record demonstrates that Pagh correctly reported she lived with her sister's family in Washington starting in January 2010, before she filed her DVPO and parenting plan/child support petitions.²⁶ Nothing in this record indicates that Pagh misled the Nevada court when she stated, "Except for [Gibson] being [in Nevada], all the necessary witnesses and evidence are in the state of Washington."

other considerations went into the decision to decline jurisdiction." Appellant's Reply Br. at 8. Gibson cites no authority requiring courts to publish or provide factual findings supporting a jurisdictional decision under the UCCJEA. And the parties' briefing in the Nevada court provides ample evidence of the arguments and facts the court considered.

²⁶ Gibson argues in his reply brief that he submitted proof that Pagh was a resident of Nevada at the time she filed her January 2010 DVPO and parenting plan/child custody petitions. He cites evidence showing that the parties' Nevada lease did not expire until February 2010 and claims the parties' December 2009 trip to Washington was only a vacation because they had round trip tickets. He mischaracterizes the requirements for "residence." Residence, or domicile, requires physical presence and intent to make a home in the future. In re Marriage of Robinson, 159 Wn. App. 162, 168, 248 P.3d 532 (2010). Pagh's declarations state that in January 2010 when she filed the DVPO and parenting plan/child custody petitions in Washington, Pagh was physically present in Washington and intended to reside here. Gibson's arguments lack merit.

Even if we assume Pagh misled the court, jurisdiction was still proper. RCW 26.27.271 provides that Washington should not assert jurisdiction if the person attempting to invoke jurisdiction has engaged in unjustifiable conduct. Gibson argues that Pagh's wrongful retention of Britton, erroneous or incomplete statements on her petitions, and other acts constitute unjustifiable conduct. But RCW 26.27.271(1)(b) establishes an exception to the unjustifiable conduct rule when "[a] court of the state otherwise having jurisdiction under RCW 26.27.201 through 26.27.221 determines that this state is a more appropriate forum under RCW 26.27.261." That is exactly what happened here. Even if Pagh engaged in wrongful conduct, the conduct cannot deprive the trial court of jurisdiction.

Gibson also contends that the "[e]vidence does not support inconvenient forum as basis for relinquishment." Appellant's Br. at 27 (boldface and formatting omitted). This contention challenges the Nevada court's decision to decline jurisdiction under the UCCJEA's inconvenient forum provisions, not the Washington court's assumption of jurisdiction when Nevada declined. See Friedman, 264 P.3d at 1167-68 (decision to decline jurisdiction on inconvenient/more appropriate forum grounds is for the court of the state that has UCCJEA jurisdiction to make, not the state to which deferral is pressed).²⁷ We decline to review the Nevada court's determination to decline jurisdiction.

²⁷ Gibson cites In re Marriage of Verbin, 92 Wn.2d 171, 595 P.2d 905 (1979) for the proposition that "Washington is not bound to an out-of-state decision that is not supported by the record." Appellant's Br. at 30. Verbin is inapposite. There, a father actively participating in Washington dissolution and child custody proceedings filed another divorce and custody action in Maryland, seeking custody of his two children. Verbin, 92 Wn.2d at 174. The record indicated that the father told "patent falsehood[s]"

Finally, Gibson challenges the court's findings that (1) he "appeared and submits to the jurisdiction of this court by consent" and (2) "[t]he child resides in [Washington] as a result of the acts or directives of [Gibson]." He first claims, "At no time did he consent or submit himself to Washington's jurisdiction." Appellant's Br. at 20. Gibson confuses personal and subject matter jurisdiction. The court's finding referred to personal

to the Maryland court regarding his knowledge of proceedings in other jurisdictions. Verbin, 92 Wn.2d at 174. Both actions went to trial. The Maryland court issued a decree of divorce granting custody to the father, and the Washington court issued a decree of dissolution awarding custody of one child to the mother and one child to the father. Verbin, 92 Wn.2d at 176-78.

On appeal, the father assigned error to the Washington court's refusal to decline jurisdiction and enforce the Maryland decree. Verbin, 92 Wn.2d at 178. Our Supreme Court noted that the father "was apparently intent on concealing the fact that he had fraudulently invoked the jurisdiction of the Maryland court" and explained that "[a] court may refuse to give full faith and credit if the decree was fraudulently obtained." Verbin, 92 Wn.2d at 176, 182. The court refused to enforce the Maryland decree under the full faith and credit clause, U.S. Constitution, article IV, section 1:

Here, even though appellant was actively involved in litigation over the custody of both his daughters, he falsely attested to the Maryland court that he was not involved in such litigation at the time he filed his divorce complaint. Although he later admitted the fact of the Washington proceedings, it appears from the record that he never fully apprised the Maryland court of their nature and extent. The Maryland court thus had no reason to believe Washington could or would adequately protect the best interests of the children involved. In view of respondent's inability to present evidence in her favor, it is not surprising that the court awarded appellant custody of both children. Yet, had it been fully aware of the nature and extent of the Washington proceedings, it may well have declined jurisdiction, or at least required more evidence regarding Aimee's welfare.

Appellant, having perpetrated this fraud on the Maryland court, may not now require a Washington court to enforce his Maryland decree.

Verbin, 92 Wn.2d at 182-83.

In contrast, here, nothing in the record indicates the Nevada court was not fully apprised of the nature and extent of the Washington proceedings. Both parties were represented in Nevada and briefed the court regarding jurisdictional issues. The Nevada and Washington courts conferred. No evidence shows either party fraudulently misled the courts. The record shows that at the time the Nevada action was filed, Pagh and Britton lived in Washington and intended to stay here. We need not analyze Britton's connections with Nevada because Nevada declined jurisdiction. Nevada is not required to retain jurisdiction and may decline it if another state appears to be a more appropriate or convenient forum. See NRS 125A.365.

jurisdiction. Unlike subject matter jurisdiction, a party may consent to personal jurisdiction by appearing in the proceedings and arguing the case on its merits or seeking affirmative relief. In re Estate of Little, 127 Wn. App. 915, 922, 113 P.3d 505 (2005); In re Support of Livingston, 43 Wn. App. 669, 671-72, 719 P.2d 166 (1986).

Here, Gibson submitted a trial brief and his attorney appeared for him at trial. Gibson's trial brief indicates he "submitted a proposed final parenting plan asking that he be designated as the child's primary custodial parent based upon [Washington law]." He consented to personal jurisdiction by requesting affirmative relief and making an argument on the merits. See In re Marriage of Maddix, 41 Wn. App. 248, 251-52, 703 P.2d 1062 (1985).

Regarding the court's "acts or directives of [Gibson]" finding, Gibson argues that "[a]cts and directives' of a parent is not a basis for jurisdiction under the UCCJEA." Appellant's Br. at 28 (boldface and formatting omitted). Even assuming that is true, later in the findings, the court made clear that its basis for jurisdiction was the UCCJEA: "All courts in the child's home state have declined to exercise jurisdiction on the ground that a court of this state is the appropriate forum to determine the custody of the child." As discussed above, the court properly based its assumption of UCCJEA jurisdiction on Nevada's determination to decline jurisdiction. The extraneous "acts and directives" statement is irrelevant.

We conclude that (1) Nevada declined jurisdiction on inconvenient forum grounds, (2) the Washington trial court properly assumed jurisdiction under the UCCJEA, and (3) sufficient evidence established that "the child and at least one parent . . . have a significant connection with [Washington] other than mere physical

presence” and “[s]ubstantial evidence is available in [Washington] concerning the child’s care, protection, training, and personal relationships” under RCW 26.27.201(b). The parties met and lived in Washington for several years before moving to Nevada, both parties’ families reside in Washington, and the parties depended on Gibson’s mother (a Washington resident) for financial support while living in Nevada. See In re Marriage of Steadman, 36 Wn. App. 77, 79-80, 671 P.2d 808 (1983) (presence of supportive family members can establish a significant connection). Pagh and Britton lived with Pagh’s sister in Washington at the time she filed the petitions at issue, Pagh intended to reside in Washington, and she lived and worked in Washington until two months after trial. Jurisdiction was proper.

Scope of Relief

Gibson argues that even if we deny relief on jurisdictional grounds, the residential schedule should be vacated because it exceeds the relief Pagh requested in her initial parenting plan/child support petition.²⁸ He cites In re Marriage of Leslie, 112 Wn.2d 612, 772 P.2d 1013 (1989) for the proposition that “[t]o the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void.” Appellant’s Br. at 43. He claims—without argument or citation to authority—that because he failed to appear at trial, the court’s judgment was entered by default.

This claim fails. Under CR 55(a)(1), a party is subject to default if the party “has failed to appear, plead, or otherwise defend” Gibson participated in this case.

²⁸ In her initial parenting plan/child support petition filed in January 2010, Pagh indicated that Gibson “may exercise up to 2 hours per week professionally supervised visitation pending completion of a year-long domestic violence perpetrator’s treatment program.” Pagh argued at trial—and the court agreed in its final parenting plan order—that Gibson should have no contact with Britton until he completed such a program.

Counsel appeared for him, filed briefs and responses to Pagh's petitions, and participated in discovery. Gibson's voluntary absence from the trial was not the equivalent of failing to appear and prosecute the action. See Tacoma Recycling, Inc. v. Capitol Material Handling Co., 34 Wn. App. 392, 394-95, 661 P.2d 609 (1983) (although defendant failed to attend bench trial, judgment did not qualify as default judgment because defendant had previously appeared and filed pleadings). The trial was a hearing on the merits. Although Gibson failed to appear, his counsel appeared and cross-examined Pagh. The court considered the parties' trial briefs. "When a tribunal considers evidence, the resulting judgment is not a default judgment even if one party is absent." Stanley v. Cole, 157 Wn. App. 873, 880, 239 P.3d 611 (2010); see also In re Marriage of Daley, 77 Wn. App. 29, 32, 888 P.2d 1194 (1994). The final parenting plan order was not equivalent to a default judgment.

Instead, the rule for nondefault judgments applies. CR 54(c) provides, "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."²⁹ Thus, if the trial court finds merit in a claim, the court is obligated by CR 54(c) to grant that relief, even though the claim has not been included in the original pleadings. State ex rel. A.N.C. v. Grenley, 91 Wn. App. 919, 930, 959 P.2d 1130 (1998). Additionally, if a party argued a claim to the trial court that was not included in the original pleadings, the court may treat that claim as if

²⁹ See also Allstot v. Edwards, 114 Wn. App. 625, 632, 60 P.3d 601 (2002) (under CR 54(c), claim for special damages that was argued and ruled on in trial court is treated as if it had been pleaded even though claim was not included in original pleadings).

it had been pleaded. Grenley, 91 Wn. App. at 931. Pagh argued in her trial brief and at trial that Gibson should have no contact with Britton until completing a domestic violence perpetrator's treatment program. Evidence showed that Gibson committed acts of domestic violence against Pagh and Britton as late as December 2009, immediately before Pagh left Gibson. The record demonstrates that the trial court found merit in Pagh's claim. It therefore properly granted that relief under CR 54(c).

DVPO

Gibson assigns error to the court's DVPO regarding Britton. He makes both factual (sufficiency of the evidence) and jurisdictional arguments.

Factual Issues³⁰

Gibson first alleges that the initial temporary DVPO "simply states: 'the court has jurisdiction,'" and that we should therefore infer that it based its jurisdictional decision on Pagh's "false and incomplete assertions."³¹ Appellant's Br. at 22. We construe this as a sufficiency of the evidence argument. Gibson omits most of the court's jurisdictional statement. The complete statement states:

The court has jurisdiction over the parties, the minors, and the subject matter. The respondent will be served notice of his or her opportunity to be heard at the scheduled hearing. RCW 26.50.070. For good cause shown, the court finds that an emergency exists and that a Temporary Protection Order should be issued without notice to the respondent to avoid irreparable harm.

RCW 26.50.070(1)(a)-(e) gives the court authority to enter an ex parte temporary DVPO:

³⁰ To the extent Gibson here repeats his arguments asserting that Pagh lied to the court regarding the parties' residency, we address that claim above.

³¹ To the extent Gibson complains that Pagh incorrectly or inaccurately filled out the DVPO petition form, we address that claim above.

(1) Where an application under this section alleges that irreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the respondent, the court may grant an ex parte temporary order for protection, pending a full hearing, and grant relief as the court deems proper, including an order:

(a) Restraining any party from committing acts of domestic violence;

...;

(d) Restraining any party from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court;

(e) Restraining any party from having any contact with the victim of domestic violence or the victim's children or members of the victim's household.

(Emphasis added). The statute provides, "Irreparable injury . . . includes but is not limited to situations in which the respondent has recently threatened petitioner with bodily injury or has engaged in acts of domestic violence against the petitioner."

RCW 26.50.070(2). A hearing must be held within two weeks of the ex parte temporary DVPO's issuance. RCW 26.50.050. At the hearing, the court has authority to issue a permanent order or reissue the temporary order. RCW 26.50.050, .060. Absent a clear abuse of discretion, we will not disturb a trial court's decision to grant or deny a DVPO. Hecker v. Cortinas, 110 Wn. App. 865, 869, 43 P.3d 50 (2002).

As discussed above, Pagh asserted in her DVPO petition and attached declaration that "[Gibson] becomes extremely angry and violent and I fear for our son's and my safety," that Gibson had a history of domestic violence against her, and that Gibson recently hit and shoved her. (Emphasis added.) These grounds support the court's grant of a temporary DVPO and temporary custody to Pagh.³² Gibson makes much of the fact that Pagh initially described acts of violence toward herself and not toward Britton. But Pagh later supplemented her declaration to allege acts of violence

³² Regarding the initial custody determination, the court also had UCCJEA temporary emergency jurisdiction under RCW 26.27.231 when Pagh filed her request for a parenting plan and order of child support as discussed above.

toward Britton as discussed above. Gibson speculates that Pagh made up these allegations to ensure that the court renewed the DVPO. We conclude that Pagh stated a sufficient basis for the initial DVPO, and the court properly reissued it several times on the same grounds to accommodate rescheduled hearing dates.

At the March 11, 2010 hearing, the court noted that the evidence concerning violence against Britton was scant and informed Pagh that she needed more evidence to support extensions of the DVPO. Pagh later submitted declarations detailing Gibson's acts of violence against Britton. When the court made its final order protecting both Pagh and Britton, the record showed Gibson had committed acts of violence against both. We decline to disturb the trial court's decision to grant the temporary and final DVPOs.

Jurisdictional Issues

Gibson claims the court lacked jurisdiction because Pagh improperly filed her DVPO petition under an old cause number in the wrong county. This claim fails.

A domestic violence protection order, regardless of whether it stands alone or is incorporated within another court order, is an order under the Domestic Violence Prevention Act, chapter 26.50 RCW. The Act establishes that Washington's "superior, district, and municipal courts" have jurisdiction over domestic violence matters. RCW 26.50.020(5). Here the court had jurisdiction "to issue the type of order," Mead School District No. 354 v. Mead Education Ass'n, 85 Wn.2d 278, 284, 534 P.2d 561 (1975), that is, to issue a temporary and then a permanent DVPO. Gibson does not dispute that all Washington superior courts have subject matter jurisdiction to hear domestic violence cases under RCW 26.50.020(5). "If the type of controversy is within the

subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.” Dougherty v. Dep’t of Labor & Indus., 150 Wn.2d 310, 316, 76 P.3d 1183 (2003) (quoting Marley v. Dep’t of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994)).

While jurisdiction refers to the power of a particular court to hear and decide cases, venue concerns only the place where the suit may be brought within the state. Dougherty, 150 Wn.2d at 316. “A court may acquire jurisdiction even though it is not the court of proper venue.” Dougherty, 150 Wn.2d at 315. The remedy for filing in the wrong county under the venue statutes is a change of venue, not dismissal for lack of subject matter jurisdiction. J.A. v. Dep’t of Soc. & Health Serv., 120 Wn. App. 654, 659, 86 P.3d 202 (2004). Gibson never moved for a change in venue below and does not argue on appeal that venue was improper. This argument is waived. RAP 2.5(a); 10.3(a)(6).

Gibson also contends the court lacked jurisdiction over him regarding the DVPO. We assume he means personal jurisdiction. A party waives the claim of lack of personal jurisdiction by “consent[ing], expressly or impliedly, to the court’s exercising jurisdiction.” In re Marriage of Steele, 90 Wn. App. 992, 997-98, 957 P.2d 247 (1998). Consent may be established by proceeding and arguing the case on its merits. In re Marriage of Markowski, 50 Wn. App. 633, 637, 749 P.2d 754 (1988). The court acquires personal jurisdiction when a party appears in the proceedings. In re Estate of Little, 127 Wn. App. 915, 922, 113 P.3d 505 (2005). As discussed above, Gibson consented to personal jurisdiction by submitting briefs and other documents and appearing throughout the proceedings through his counsel.

Duration of DVPO With Respect to Britton

Gibson argues that even if we deny relief on jurisdictional grounds, the DVPO should be deemed to have expired one year after issuance with regard to Britton because it improperly purports to extend the order beyond one year. Gibson correctly notes that under RCW 26.50.060(2), a protection order may not restrain a respondent's contact with his or her own minor children unless it is entered for a fixed period of one year or less. The protection order here is purportedly effective until February 1, 2111, and, thus, clearly exceeds the one year requirement. We conclude the order involving Britton was valid pursuant to RCW 26.50.060(2) until it expired on February 15, 2012. Muma v. Muma, 115 Wn. App. 1, 7, 60 P.3d 592 (2002) (protection order purporting to extend for 49 years was valid and effective only for one year after issuance).

CR 60 Motion³³

Gibson argues the trial court improperly denied CR 60 relief on the ground that he failed to seek review of the Nevada court's jurisdictional decision. Pagh responds that no substantial evidence shows the trial court abused its discretion or based its decision on untenable grounds.

In his CR 60 motion, Gibson requested vacation of the court's February 15, 2011 orders under CR 60(b)(1), (3), (4), and (5). Those provisions state that the court may vacate an order or judgment for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

³³ To the extent Gibson repeats his jurisdictional arguments regarding UCCJEA procedure and his allegations regarding Pagh's incomplete or erroneous statements on the DVPO and parenting plan/child support petitions, we address those arguments above. The judgment is not void for lack of jurisdiction.

- ...
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
 - (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
 - (5) The judgment is void.

CR 60(b)(1), (3), (4), (5). We review denial of a motion to vacate for abuse of discretion. In re Welfare of M.G., 148 Wn. App. 781, 792, 201 P.3d 354 (2009). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. M.G., 148 Wn. App. at 792.

Gibson argues the trial court based its decision on an improper ground, namely that he could and should have sought review in the Nevada court.³⁴ His argument is based on the premise that the order declining jurisdiction and dismissing the case in Nevada was only an interlocutory order, not a final order for purposes of appealability. But regardless of whether Gibson should have taken action in the Nevada court after its ruling, we may affirm on any basis the record supports. Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 766, 58 P.3d 276 (2002). On this record, the trial court's denial of Gibson's CR 60 motion was not unreasonable or untenable.

As discussed above, Washington based its jurisdiction on the UCCJEA—Nevada declined jurisdiction and RCW 26.27.201(b) expressly conferred jurisdiction on the Washington court. Gibson now argues that new evidence shows that Pagh did not have a significant connection with Washington sufficient to establish subject matter

³⁴ We note that the trial court did not base its CR 60 decision solely on this ground as Gibson seems to argue. The court reviewed the parties' CR 60 briefing and stated, "The court does not find the bases/distinctions in the Mother's pleadings as briefed by the Father in his CR 60 motion (as to jurisdiction) sufficient to warrant a finding that the Mother made incomplete assertions to mislead the court.

jurisdiction. He relies on (1) evidence of Pagh's engagement to Naji Mehanna shortly before trial, (2) evidence that Pagh moved back to Nevada two months after trial to live with Mehanna, and (3) evidence that Pagh married Mehanna in Nevada in June 2011 and continues to live there with him and Britton. Gibson argues this new evidence shows Pagh knew at the time of trial that she intended to return to Nevada and "points to forum shopping by [Pagh]." Appellant's Br. at 30 (boldface omitted).

Gibson's assertion is entirely speculative. Pagh's CR 60 submissions show she lived and worked in Washington from January 2010 until April 2011, when she moved to Nevada. The evidence does not support Gibson's claim that Pagh, at the time of trial, "had no present intent to make Washington her home" and intended to move back to Nevada. Appellant's Br. at 36. The record only indicates she was engaged at that time and that she and Mehanna "made plans to marry in June 2011." As discussed above, Pagh established a significant connection with Washington. The record before the CR 60 court indicated that Pagh was raised in Washington, the parties met and lived in Washington before moving to Nevada, both parties' families reside in Washington, Britton was conceived in Washington, and the parties depended on Gibson's mother (a Washington resident) for financial support while living in Nevada. At the time of trial, Pagh had lived and worked in Washington for over a year. Gibson's speculative and conclusory allegations regarding forum shopping lack merit.

Gibson also claims that Pagh committed fraud on the court. He repeats the above arguments and claims Pagh falsely informed the trial court of her residence and failed to inform the trial court of her intention "to reside in Nevada with her soon-to-be husband." Appellant's Br. at 39. Gibson correctly notes that domicile requires physical

presence and intent to reside. In re Marriage of Robinson, 159 Wn. App. 162, 168, 248 P.3d 532 (2010). Pagh returned to Washington in December 2009 and lived and worked in Washington from January 2010 until April 2011. She stated in her DVPO petition that she “live[s] in this county” and on her parenting plan/child support petition that she was “presently residing in the state of Washington.” Nothing in the record shows that at the time she filed those documents, she intended to later marry and move back to Nevada. And as discussed above, no evidence indicates that at the time of trial Pagh intended to move to Nevada. The trial court did not abuse its discretion when it stated:

The court does not find the bases/distinctions in the Mother’s pleadings as briefed by the Father in his CR 60 motion (as to jurisdiction) sufficient to warrant a finding that the Mother made incomplete assertions to mislead the court. Nor does the court find a basis under newly discovered evidence/forum shopping, or that the judgment is void.

Regardless of Gibson’s repeated claims regarding Pagh’s actions, Washington properly assumed subject matter jurisdiction based on Nevada’s determination to decline jurisdiction on inconvenient forum grounds. As discussed above, even alleged “wrongful conduct” cannot deprive the trial court of jurisdiction in such a case. RCW 26.27.271(1)(b). The trial court properly denied the CR 60 motion to vacate.

Attorney Fees and Costs

Gibson argues that the trial court erred in awarding Pagh \$45,876.48 in attorney fees because of his intransigence. He argues that (1) the fee award exceeded the scope of relief Pagh pleaded in her original petitions, (2) Pagh presented no factual basis for the court to find intransigence, (3) no findings relate his behavior to Pagh’s fees, (4) he had no opportunity to address the basis for the fee amount because Pagh

submitted billing statements for the first time in reply to his objection, and (5) the court made no findings supporting the calculation of the fee amount.

A court may award attorney fees if one party's intransigence caused the other party to incur additional legal fees. In re Marriage of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Attorney fees based on intransigence have been awarded where a party engaged in obstruction and foot-dragging or made the proceeding unduly difficult and costly. Bobbitt, 135 Wn. App. at 30. When awarding attorney fees on the basis of intransigence, a trial court must make findings sufficient to allow appellate review. Bobbitt, 135 Wn. App. at 30; In re Marriage of Greenlee, 65 Wn. App. 703, 708-09, 829 P.2d 1120 (1992). Where a party's misconduct "permeate[s] the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not." In re Marriage of Burrill, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). We review a trial court's award of attorney fees for abuse of discretion. In re Marriage of Mattson, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

Here the trial court awarded Pagh the entire amount of fees and costs she requested—\$45,876.48—because Gibson's misconduct "permeated the entire proceedings" Burrill, 113 Wn. App. at 873. It explained, "The Court finds that [Gibson's] intransigence throughout these proceedings warrants an award of attorneys fees and costs in favor of [Pagh]." (Emphasis added.) Because the court made no factual findings to support its award amount and "intransigence throughout these proceedings" conclusion, we remand for entry of appropriate findings of fact. Under Burrill, fee segregation is not required where the findings support the court's determination that a party's wrongful conduct permeated the entire proceedings.

Attorney Fees on Appeal

Gibson requests an award of attorney fees on appeal. Because Gibson is not the prevailing party on appeal, none of the authorities he cites entitles him to an award of fees and costs. Pagh also requests appellate attorney fees and costs but cites no authority for her request and devotes no argument to it. We deny her request. See RAP 18.1; Bay v. Jensen, 147 Wn. App. 641, 661, 196 P.3d 753 (2008) ("RAP 18.1(b) requires more than [a] bald request for attorney fees on appeal.").

CONCLUSION

For the reasons discussed above, we affirm the trial court's order denying CR 60 relief and orders related to the DVPO and parenting plan/child support actions. We deny fees on appeal. We also vacate the fees and costs awarded by the trial court and remand for entry of appropriate findings of fact consistent with this opinion.

WE CONCUR:



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Parenting and Support of)	NO. 66833-1-1
BRITTON LAWRENCE HARPER GIBSON)	DIVISION ONE
Child,)	
MARIE-CLAIRE HARPER PAGH,)	
Respondent,)	ORDER AMENDING OPINION
and)	AND DENYING RECONSIDERATION
WILLARD GIBSON,)	
Appellant.)	

Appellant Willard Gibson moved this court for reconsideration of its opinion filed December 3, 2012. The panel having determined that the opinion filed should be amended, it is hereby

ORDERED that the opinion shall be amended as follows:

DELETE the last two sentences and associated footnote on page 2 which read as follows:

Gibson has an extensive criminal record of violating the DVPOs.¹ Each time, Gibson persuaded or threatened Pagh to terminate the DVPOs and resume their relationship.

¹ Gibson's criminal convictions include: domestic violence order/stalking (Seattle Municipal Court # 490351); assault 4 domestic violence/stalking (King County # 05-1-120241); domestic violence order violation (Seattle Municipal Court # 504944); 6 counts domestic violence order violation (Seattle Municipal Court # 494966); and domestic violence order/phone harassment (Seattle Municipal Court # 490351).

REPLACE those sentences with the following text and footnotes:

Gibson has a lengthy record of violating the DVPOs entered against him.¹ Each time, Gibson persuaded or threatened Pagh to terminate the DVPOs and resume their relationship.²

¹ At various times, Gibson was charged with: domestic violence order/stalking (Seattle Municipal Court # 490351); assault 4 domestic violence/harassment (King County # 05-1-130241); domestic violence order violation (Seattle Municipal Court # 504944); 6 counts domestic violence order violation (Seattle Municipal Court # 494966); and domestic violence order/phone harassment (Seattle Municipal Court # 490351).

² Thus, many of the charges were dismissed. Gibson's criminal record shows convictions for misdemeanor assault 4/harassment (King County # 05-1-130241).

DELETE the following sentence from the first full paragraph on page 5:

On January 20, after service of the temporary DVPO, Gibson filed an "emergency motion to establish jurisdiction; compel the return of the minor child to the state of Nevada and for a pick up order; for primary physical custody; supervised visitation; for an award of child support; for plaintiff's attorney's fees and costs incurred herein; and related matters" in Clark County, Nevada. (Formatting and boldface omitted.)

REPLACE that sentence with the following sentence:

On January 20, Gibson filed an "emergency motion to establish jurisdiction; compel the return of the minor child to the state of Nevada and for a pick up order; for primary physical custody; supervised visitation; for an award of child support; for plaintiff's attorney's fees and costs incurred herein; and related matters" in Clark County, Nevada. (Formatting and boldface omitted.)

IT IS FURTHER ORDERED that the motion for reconsideration is denied.

Done this 29th day of January 2013.

Jen, J
Appelwhite, J
Leach, C. J

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RCW 26.27.021 Definitions.

The definitions in this section apply throughout this chapter, unless the context clearly requires otherwise.

- (1) "Abandoned" means left without provision for reasonable and necessary care or supervision.
- (2) "Child" means an individual who has not attained eighteen years of age.
- (3) "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.
- (4) "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.
- (5) "Commencement" means the filing of the first pleading in a proceeding.
- (6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.
- (7) "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. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a child, parent, or person acting as a parent is part of the period.
- (8) "Initial determination" means the first child custody determination concerning a particular child.
- (9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this chapter.
- (10) "Issuing state" means the state in which a child custody determination is made.
- (11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same

child, whether or not it is made by the court that made the previous determination.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(a) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe or band, or Alaskan Native village, that is recognized by federal law or formally acknowledged by a state.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

[2001 c 65 § 102.]

RCW 26.27.101 Communication between courts.

(1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(3) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(4) Except as otherwise provided in subsection (3) of this section, a record must be made of a communication under this section. The parties must be informed promptly of the

communication and granted access to the record.

(5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

RCW 26.27.201 Initial child custody jurisdiction.

(1) Except as otherwise provided in RCW 26.27.231, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) This 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;

(b) 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 under RCW 26.27.261 or 26.27.271, and:

(i) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) All 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 under RCW 26.27.261 or 26.27.271; or

(d) No court of any other state would have jurisdiction under the criteria specified in (a), (b), or (c) of this subsection.

(2) Subsection (1) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

RCW 26.27.211 Exclusive, continuing jurisdiction.

(1) Except as otherwise provided in RCW 26.27.231, a court of this state that has made a child custody determination consistent with RCW 26.27.201 or 26.27.221 has exclusive,

continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

(2) A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under RCW 26.27.201.

RCW 26.27.221 Jurisdiction to modify determination.

Except as otherwise provided in RCW 26.27.231, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under RCW 26.27.201(1) (a) or (b) and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under RCW 26.27.211 or that a court of this state would be a more convenient forum under RCW 26.27.261; or

(2) A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

RCW 26.27.231 Temporary emergency jurisdiction.

(1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with abuse.

(2) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(3) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state

having jurisdiction under RCW 26.27.201 through 26.27.221, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under RCW 26.27.201 through 26.27.221. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(4) A court of this state that has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under RCW 26.27.201 through 26.27.221, shall immediately communicate with the other court. 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 26.27.251 Simultaneous proceedings.

(1) Except as otherwise provided in RCW 26.27.231, a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under RCW 26.27.261.

(2) Except as otherwise provided in RCW 26.27.231, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to RCW 26.27.281. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(a) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(b) Enjoin the parties from continuing with the proceeding for enforcement; or

(c) Proceed with the modification under conditions it considers appropriate.

RCW 26.27.261 Inconvenient forum.

(1) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for dissolution or another proceeding while still retaining jurisdiction over the dissolution or other proceeding.

RCW 26.27.271 Jurisdiction declined by reason of conduct.

(1) Except as otherwise provided in RCW 26.27.231 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) A court of the state otherwise having jurisdiction under RCW 26.27.201 through 26.27.221 determines that this state is a more appropriate forum under RCW 26.27.261; or

(c) No court of any other state would have jurisdiction under the criteria specified in RCW 26.27.201 through 26.27.221.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under RCW 26.27.201 through 26.27.221.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (1) of this section, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this chapter.

RCW 26.27.281 Information to be submitted to court.

(1) Subject to laws providing for the confidentiality of procedures, addresses, and other identifying information, in a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(a) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination, if any;

(b) Knows of any proceeding that could affect the current proceeding, including

proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and

(c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(2) If the information required by subsection (1) of this section is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(3) If the declaration as to any of the items described in subsection (1)(a) through (c) of this section is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(5) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

RCW 26.27.461 Simultaneous proceedings.

If a proceeding for enforcement under this article is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Article 2, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

RCW 26.50.020 Commencement of action — Jurisdiction — Venue.

(1)(a) Any person may seek relief under this chapter by filing a petition with a court alleging that the person has been the victim of domestic violence committed by the respondent. The person may petition for relief on behalf of himself or herself and on behalf of minor family or household members.

(b) Any person thirteen years of age or older may seek relief under this chapter by filing a petition with a court alleging that he or she has been the victim of violence in a dating relationship and the respondent is sixteen years of age or older.

(2)(a) A person under eighteen years of age who is sixteen years of age or older may seek relief under this chapter and is not required to seek relief by a guardian or next friend.

(b) A person under sixteen years of age who is seeking relief under subsection (1)(b) of this section is required to seek relief by a parent, guardian, guardian ad litem, or next friend.

(3) No guardian or guardian ad litem need be appointed on behalf of a respondent to an action under this chapter who is under eighteen years of age if such respondent is sixteen years of age or older.

(4) The court may, if it deems necessary, appoint a guardian ad litem for a petitioner or respondent who is a party to an action under this chapter.

(5) The courts defined in RCW 26.50.010(4) have jurisdiction over proceedings under this chapter. The jurisdiction of district and municipal courts under this chapter shall be limited to enforcement of RCW 26.50.110(1), or the equivalent municipal ordinance, and the issuance and enforcement of temporary orders for protection provided for in RCW 26.50.070 if: (a) A superior court has exercised or is exercising jurisdiction over a proceeding under this title or chapter 13.34 RCW involving the parties; (b) the petition for relief under this chapter presents issues of residential schedule of and contact with children of the parties; or (c) the petition for relief under this chapter requests the court to exclude a party from the dwelling which the parties share. When the jurisdiction of a district or municipal court is limited to the issuance and enforcement of a temporary order, the district or municipal court shall set the full hearing provided for in RCW 26.50.050 in superior court and transfer the case. If the notice and order are not served on the respondent in time for the full hearing, the issuing court shall have concurrent jurisdiction with the superior court to extend the order for protection.

(6) An action under this chapter shall be filed in the county or the municipality where the petitioner resides, unless the petitioner has left the residence or household to avoid abuse. In that case, the petitioner may bring an action in the county or municipality of the previous or the new household or residence.

(7) A person's right to petition for relief under this chapter is not affected by the person

leaving the residence or household to avoid abuse.

(8) For the purposes of this section "next friend" means any competent individual, over eighteen years of age, chosen by the minor and who is capable of pursuing the minor's stated interest in the action.

[2010 c 274 § 302; 1992 c 111 § 8; 1989 c 375 § 28; 1987 c 71 § 1; 1985 c 303 § 1; 1984 c 263 § 3.]

RCW 26.50.060 Relief — Duration — Realignment of designation of parties — Award of costs, service fees, and attorneys' fees.

- (1) Upon notice and after hearing, the court may provide relief as follows:
- (a) Restrain the respondent from committing acts of domestic violence;
 - (b) Exclude the respondent from the dwelling that the parties share, from the residence, workplace, or school of the petitioner, or from the day care or school of a child;
 - (c) Prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;
 - (d) On the same basis as is provided in chapter 26.09 RCW, the court shall make residential provision with regard to minor children of the parties. However, parenting plans as specified in chapter 26.09 RCW shall not be required under this chapter;
 - (e) Order the respondent to participate in a domestic violence perpetrator treatment program approved under RCW 26.50.150;
 - (f) Order other relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected, including orders or directives to a peace officer, as allowed under this chapter;
 - (g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees;
 - (h) Restrain the respondent from having any contact with the victim of domestic violence or the victim's children or members of the victim's household;
 - (i) Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household. For the purposes of this subsection, "communication" includes both "wire communication" and "electronic communication" as defined in RCW 9.73.260;

(j) Require the respondent to submit to electronic monitoring. The order shall specify who shall provide the electronic monitoring services and the terms under which the monitoring must be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the respondent to pay for electronic monitoring;

(k) Consider the provisions of RCW 9.41.800;

(l) Order possession and use of essential personal effects. The court shall list the essential personal effects with sufficient specificity to make it clear which property is included. Personal effects may include pets. The court may order that a petitioner be granted the exclusive custody or control of any pet owned, possessed, leased, kept, or held by the petitioner, respondent, or minor child residing with either the petitioner or respondent and may prohibit the respondent from interfering with the petitioner's efforts to remove the pet. The court may also prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance of specified locations where the pet is regularly found; and

(m) Order use of a vehicle.

(2) If a protection order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year. This limitation is not applicable to orders for protection issued under chapter 26.09, 26.10, or 26.26 RCW. With regard to other relief, if the petitioner has petitioned for relief on his or her own behalf or on behalf of the petitioner's family or household members or minor children, and the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.

If the petitioner has petitioned for relief on behalf of the respondent's minor children, the court shall advise the petitioner that if the petitioner wants to continue protection for a period beyond one year the petitioner may either petition for renewal pursuant to the provisions of this chapter or may seek relief pursuant to the provisions of chapter 26.09 or 26.26 RCW.

(3) If the court grants an order for a fixed time period, the petitioner may apply for renewal of the order by filing a petition for renewal at any time within the three months before the order expires. The petition for renewal shall state the reasons why the petitioner seeks to renew the protection order. Upon receipt of the petition for renewal the court shall order a hearing which shall be not later than fourteen days from the date of the order. Except as provided in RCW 26.50.085, personal service shall be made on the respondent not less than five days before the hearing. If timely service cannot be made the court shall set a new hearing date and shall either require additional attempts at obtaining personal service or permit service by publication as provided in RCW

26.50.085 or by mail as provided in RCW 26.50.123. If the court permits service by publication or mail, the court shall set the new hearing date not later than twenty-four days from the date of the order. If the order expires because timely service cannot be made the court shall grant an ex parte order of protection as provided in RCW 26.50.070. The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires. The court may renew the protection order for another fixed time period or may enter a permanent order as provided in this section. The court may award court costs, service fees, and reasonable attorneys' fees as provided in subsection (1)(g) of this section.

(4) In providing relief under this chapter, the court may realign the designation of the parties as "petitioner" and "respondent" where the court finds that the original petitioner is the abuser and the original respondent is the victim of domestic violence and may issue an ex parte temporary order for protection in accordance with RCW 26.50.070 on behalf of the victim until the victim is able to prepare a petition for an order for protection in accordance with RCW 26.50.030.

(5) Except as provided in subsection (4) of this section, no order for protection shall grant relief to any party except upon notice to the respondent and hearing pursuant to a petition or counter-petition filed and served by the party seeking relief in accordance with RCW 26.50.050.

(6) The court order shall specify the date the order expires if any. The court order shall also state whether the court issued the protection order following personal service, service by publication, or service by mail and whether the court has approved service by publication or mail of an order issued under this section.

(7) If the court declines to issue an order for protection or declines to renew an order for protection, the court shall state in writing on the order the particular reasons for the court's denial.

[2010 c 274 § 304; 2009 c 439 § 2; 2000 c 119 § 15; 1999 c 147 § 2; 1996 c 248 § 13; 1995 c 246 § 7; 1994 sp.s. c 7 § 457. Prior: 1992 c 143 § 2; 1992 c 111 § 4; 1992 c 86 § 4; 1989 c 411 § 1; 1987 c 460 § 55; 1985 c 303 § 5; 1984 c 263 § 7.]

RCW 26.50.070 Ex parte temporary order for protection.

(1) Where an application under this section alleges that irreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the respondent, the court may grant an ex parte temporary order for protection, pending a full hearing, and grant relief as the court deems proper, including an order:

(a) Restraining any party from committing acts of domestic violence;

(b) Restraining any party from going onto the grounds of or entering the dwelling that the parties share, from the residence, workplace, or school of the other, or from the day care or school of a child until further order of the court;

(c) Prohibiting any party from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

(d) Restraining any party from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court;

(e) Restraining any party from having any contact with the victim of domestic violence or the victim's children or members of the victim's household;

(f) Considering the provisions of RCW 9.41.800; and

(g) Restraining the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household. For the purposes of this subsection, "communication" includes both "wire communication" and "electronic communication" as defined in RCW 9.73.260.

(2) Irreparable injury under this section includes but is not limited to situations in which the respondent has recently threatened petitioner with bodily injury or has engaged in acts of domestic violence against the petitioner.

(3) The court shall hold an ex parte hearing in person or by telephone on the day the petition is filed or on the following judicial day.

(4) An ex parte temporary order for protection shall be effective for a fixed period not to exceed fourteen days or twenty-four days if the court has permitted service by publication under RCW 26.50.085 or by mail under RCW 26.50.123. The ex parte order may be reissued. A full hearing, as provided in this chapter, shall be set for not later than fourteen days from the issuance of the temporary order or not later than twenty-four days if service by publication or by mail is permitted. Except as provided in RCW 26.50.050, 26.50.085, and 26.50.123, the respondent shall be personally served with a copy of the ex parte order along with a copy of the petition and notice of the date set for the hearing.

(5) Any order issued under this section shall contain the date and time of issuance and the expiration date and shall be entered into a statewide judicial information system by the clerk of the court within one judicial day after issuance.

(6) If the court declines to issue an ex parte temporary order for protection the court shall state the particular reasons for the court's denial. The court's denial of a motion for an ex parte order of protection shall be filed with the court.

[2010 c 274 § 305; 2000 c 119 § 16; 1996 c 248 § 14; 1995 c 246 § 8; 1994 sp.s. c 7 § 458; 1992 c 143 § 3; 1989 c 411 § 2; 1984 c 263 § 8.]

RCW 26.50.150 Domestic violence perpetrator programs.

Any program that provides domestic violence treatment to perpetrators of domestic violence must be certified by the department of social and health services and meet minimum standards for domestic violence treatment purposes. The department of social and health services shall adopt rules for standards of approval of domestic violence perpetrator programs. The treatment must meet the following minimum qualifications:

(1) All treatment must be based upon a full, complete clinical intake including but not limited to: Current and past violence history; a lethality risk assessment; history of treatment from past domestic violence perpetrator treatment programs; a complete diagnostic evaluation; a substance abuse assessment; criminal history; assessment of cultural issues, learning disabilities, literacy, and special language needs; and a treatment plan that adequately and appropriately addresses the treatment needs of the individual.

(2) To facilitate communication necessary for periodic safety checks and case monitoring, the program must require the perpetrator to sign the following releases:

(a) A release for the program to inform the victim and victim's community and legal advocates that the perpetrator is in treatment with the program, and to provide information, for safety purposes, to the victim and victim's community and legal advocates;

(b) A release to prior and current treatment agencies to provide information on the perpetrator to the program; and

(c) A release for the program to provide information on the perpetrator to relevant legal entities including: Lawyers, courts, parole, probation, child protective services, and child welfare services.

(3) Treatment must be for a minimum treatment period defined by the secretary of the department by rule. The weekly treatment sessions must be in a group unless there is a documented, clinical reason for another modality. Any other therapies, such as individual, marital, or family therapy, substance abuse evaluations or therapy, medication reviews, or psychiatric interviews, may be concomitant with the weekly group treatment sessions described in this section but not a substitute for it.

(4) The treatment must focus primarily on ending the violence, holding the perpetrator accountable for his or her violence, and changing his or her behavior. The treatment must be based on nonvictim-blaming strategies and philosophies and shall include education about the individual, family, and cultural dynamics of domestic violence. If the perpetrator or the victim has a minor child, treatment must specifically include education regarding the effects of domestic violence on children, such as the emotional impacts of

domestic violence on children and the long-term consequences that exposure to incidents of domestic violence may have on children.

(5) Satisfactory completion of treatment must be contingent upon the perpetrator meeting specific criteria, defined by rule by the secretary of the department, and not just upon the end of a certain period of time or a certain number of sessions.

(6) The program must have policies and procedures for dealing with reoffenses and noncompliance.

(7) All evaluation and treatment services must be provided by, or under the supervision of, qualified personnel.

(8) The secretary of the department may adopt rules and establish fees as necessary to implement this section.

(9) The department may conduct on-site monitoring visits as part of its plan for certifying domestic violence perpetrator programs and monitoring implementation of the rules adopted by the secretary of the department to determine compliance with the minimum qualifications for domestic violence perpetrator programs. The applicant or certified domestic violence perpetrator program shall cooperate fully with the department in the monitoring visit and provide all program and management records requested by the department to determine the program's compliance with the minimum certification qualifications and rules adopted by the department.

[2010 c 274 § 501; 1999 c 147 § 1; 1991 c 301 § 7.]

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE UCCJA DOES NOT CONTAIN A PROVISION COMPARABLE TO UCCJEA SEC. 109. MUCH OF UCCJEA SECTION 109 DERIVES FROM UIFSA SEC. 314. ABSENCE OF LIMITED IMMUNITY HAS BEEN DIFFICULT PROBLEM IN PAST UCCJA CASES. THE EXPLICIT GRANT OF IMMUNITY WHEN ASSERTING A CHALLENGE TO CHILD CUSTODY JURISDICTION CLARIFIES THE LAW.

UCCJEA SEC. 110 IS AN EXPANSION OF UCCJA SEC. 6(c). THE UCCJEA ADDS LANGUAGE TO EMPHASIZE THE ROLE OF THE PARTIES IN THE COMMUNICATION PROCESS.

{ UCCJA SEC. 6(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Secs. 19 to 22, inclusive. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum. }

THE UCCJA DOES NOT CONTAIN A PROVISION COMPARABLE TO UCCJEA SEC. 110(b). THE UCCJA DID NOT GRANT THE PARTIES ANY RIGHT TO PARTICIPATE IN COMMUNICATIONS

LIMITED IMMUNITY.

(a) A party to a child-custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child-custody determination, is not subject to personal jurisdiction in this State for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(b) A person who is subject to personal jurisdiction in this State on a basis other than physical presence is not immune from service of process in this State. A party present in this State who is subject to the jurisdiction of another State is not immune from service of process allowable under the laws of that State.

(c) The immunity granted subsection (a) does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this [Act] committed by an individual while present in this State.

UCCJEA SECTION 110. COMMUNICATION BETWEEN COURTS.

(a) A court of this State may communicate with a court in another State concerning a proceeding arising under this [Act].

(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, the parties shall be given the opportunity to present facts and legal arguments before

<p>BETWEEN COURTS REGARDING THEIR CASE. UCCJEA SEC. 110(b) INDICATES RIGHT OF PARTIES TO PARTICIPATE IN COURT COMMUNICATIONS. THIS ADDRESSES DUE PROCESS CONCERNS.</p> <p>THE UCCJA DID NOT INCLUDE ANY PROVISION COMPARABLE TO UCCJEA SEC. 110(c). UCCJEA SECTION 110(c) MAKES CLEAR THAT NON-SUBSTANTIVE COMMUNICATIONS NEED NOT INVOLVE THE PARTIES.</p> <p>THE UCCJA DID NOT CONTAIN ANY PROVISION COMPARABLE TO UCCJEA SEC. 110(d). UCCJEA SECTION 110(d) IS INCLUDED TO ASSURE PRESERVATION OF AN APPROPRIATE RECORD. THIS IS A PROCEDURAL PROTECTION AND PROTECTS DUE PROCESS CONCERNS OF THE PARTIES.</p> <p>DEFINITION OF "RECORD" FOUND IN UCCJEA SEC. 110(e) IS NECESSARY TO INDICATE THAT INFORMATION REGARDING THE PROCEEDING IS TO BE IN TANGIBLE FORM RATHER THAN MERELY RECOLLECTION.</p> <p>UCCJEA SEC. 111 IS COMPARABLE TO UCCJA SEC. 18. NO SUBSTANTIVE CHANGES ARE MADE. SUBSECTIONS (b) AND (c) OF THE UCCJEA SECTION MERELY PROVIDE THAT MODERN MODES OF COMMUNICATION ARE PERMISSIBLE.</p> <p><i>UCCJA SECTION 18 TAKING TESTIMONY IN ANOTHER STATE.</i> <i>In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a</i></p>	<p>a decision on jurisdiction is made.</p> <p>(c) A communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of that communication.</p> <p>(d) Except as provided in subsection (c), a record must be made of the communication. The parties must be informed promptly of the communication and granted access to the record.</p> <p>(e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that which is stored in an electronic or other medium and is retrievable in perceivable form. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.</p> <p>UCCJEA SECTION 111. TAKING TESTIMONY IN ANOTHER STATE.</p> <p>(a) In addition to other procedures available to a party, a party to a child- custody proceeding may offer testimony of witnesses who are located in another State, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another State. The court on its own motion may order that the testimony of a person be taken in another State and may prescribe the manner in which and the terms upon which the testimony is taken.</p> <p>(b) A court of this State may permit an individual</p>
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**UNIFORM CHILD-CUSTODY
JURISDICTION AND
ENFORCEMENT ACT**

Drafted by

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

and by it

**APPROVED AND RECOMMENDED FOR
ENACTMENT IN ALL THE STATES**

at its

**ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SIXTH YEAR
IN SACRAMENTO, CALIFORNIA
JULY 25-AUGUST 1, 1997**

WITH PREFATORY NOTE AND COMMENTS

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ON UNIFORM STATE LAWS

Communication between courts is required under Sections 204, 206 and 306 and strongly suggested in applying Section 207.⁵⁶ Apart from those sections, there may be less need under this Act for courts to communicate concerning jurisdiction due to the prioritization of home state jurisdiction. Communication is authorized, however, whenever the court finds it would be helpful. The court may authorize the parties to participate in the communication.⁵⁷ However, the Act does not mandate participation. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls often have to be made after-hours or whenever the schedules of judges allow.

This section does require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation. The only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Included within this latter type of communication would be matters of cooperation between courts under Section 112.⁵⁸ A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.⁵⁹

The second sentence of subsection (b) protects the parties against unauthorized *ex parte* communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and

56. A failure to communicate under these sections does not deprive the court of jurisdiction. Therefore, a custody determination, made by a court whose jurisdiction is proper under §§ 201-203 cannot be collaterally attacked in another state for failure to communicate. *Sawle v. Nicholson*, 408 N.W.2d 173 (Minn. Ct. App. 1987); *Lofts v. Superior Court*, 682 P.2d 412 (Ariz. 1984).

57. This section consumed more time on the floor at the 1997 Annual Meeting than any other topic. The Drafting Committee was required to redraft this section several times and it was amended from the floor. NCCUSL, 1997 Annual Meeting Transcript at 48-84, 244-74. The original draft required that communications between courts that affect the substantive rights of a party must be made in a manner that allowed the parties to participate, or allowed the parties to present jurisdictional facts and legal arguments to the courts, before a final determination as to which forum would be appropriate. Many of the commissioners thought that this did not provide sufficient protection for the parties who would be affected by the substance of the telephone calls and wanted to provide for mandatory participation. Ultimately, the Conference settled on the position that parties must be allowed to participate or present facts and arguments prior to a decision on jurisdiction. Minor matters such as scheduling do not require the parties to be informed of the communication nor need a record be made.

58. *In re Simons*, 693 N.E.2d 1111 (Ohio Ct. App. 1997). The court noted that communications between states that concern the status of the proceedings do not require notification to the parties nor that a record be made.

59. This language was originally included in the text of the statute. It was removed by the Committee on Style who objected to any variation from the definition of "record" as it is to appear in all the Conference's acts.

jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made.⁶⁰ This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

SECTION 111. TAKING TESTIMONY IN ANOTHER STATE.

(a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another State, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another State. The court on its own motion may order that the testimony of a person be taken in another State and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this State may permit an individual residing in another State to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that State. A court of this State shall cooperate with courts of other States in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another State to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

COMMENT

No substantive changes have been made to subsection (a) which was Section 18 of the UCCJA.⁶¹

60. It is necessary to make a record and allow the parties to have access to the record in order to satisfy due process concerns. If a court, after communication with a court in another state, makes a decision without either allowing the parties the right to participate in the communication or to examine the record of the conversation in order to make arguments, the court is essentially deciding the case on the basis of an *ex parte* communication. This results in a due process violation. See *State ex rel. Grape v. Zach*, 524 N.W.2d 788 (Neb. 1994); *Yost v. Johnson*, 591 A.2d 178 (Del. 1991); *Aberholden v. Morizot*, 856 S.W.2d 829 (Tex. Ct. App. 1993); *Interest of Wilson*, 799 S.W.2d 773 (Tex. Ct. App. 1990).

61. The Drafting Committee did remove the reference to the guardian *ad litem* for the child contained in § 18, as well as other sections, of the UCCJA. Whether a guardian should be appointed for the child and the scope of the guardian's powers is a matter for individual state law. The Drafting Committee did not want to appear to be deciding that issue by the inclusion of a reference to a guardian for the child.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

MARIE-CLAIRE PAGH,

Respondent,

v.

WILLARD GIBSON,

Petitioner.

NO. 88562-1

ORDER

C/A NO. 66833-1-I

Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Fairhurst, Stephens and González, considered at its July 9, 2013, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 9th day of July, 2013.

For the Court


CHIEF JUSTICE