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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 DEC 16 AM 10:53

No. 66525-1

COURT OF APPEALS WASHINGTON STATE  
DIVISION ONE

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CECIL T. HERRIDGE, Appellant,

v.

STACEY A. HERRIDGE, Respondent.

---

BRIEF OF APPELLANT

---

APPEAL FROM ISLAND COUNTY SUPERIOR COURT  
HONORABLE VICKIE CHURCHILL  
SUPERIOR COURT CAUSE # 03-3-00010-6

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- need  
COPY

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ORIGINAL

Table of Contents	Page number
A. Table of authorities	2
B. Statement of the case	4
C. Assignments of error	7

1. Did the mother's attorney have a conflict of interest?
2. Did the trial court err by only vacating the parenting plan modification and partial attorney fees and not the child support modification under the Servicemembers' Civil Relief Act (SCRA) ?
3. Did the trial Court err by denying the appellant's wife, who had his power of attorney, the right to appear and argue his case pro se?
4. Should the father be awarded attorney fees for the SCRA violation of failure to order a stay of proceedings during his deployment?

D. Issues related to assignments of error

1. Was it a conflict for the attorney to take a consultation fee and consult with the client (appellant) and then represent the opposing party?
2. Should a stay have been granted for the entire proceeding in Nov. 2009?

3. Should the service member's power of attorney (his current wife) have been permitted to argue on his behalf at all stages of the trial court proceedings?
4. Was the father prejudiced by entry of the child support modification in his absence?
5. Is there authority for an award of fees against the father or the mother?

E. Argument

1. The mother's attorney had a conflict of interest because he previously was paid a consultation fee by the father on the same matter. \_\_\_\_\_ 8
2. A stay of the entire proceedings should have been granted \_ 9
3. The father's power of attorney should have been permitted to argue on his behalf at all stages of the trial court proceedings in the absence of a stay. \_\_\_\_\_ 15
4. Attorney fees should be awarded to the father under the SCRA. \_\_\_\_\_ 16

F. Conclusion \_\_\_\_\_ 17

A. Table of authorities	Page number
1. Federal statute	
a. <u>50 U.S.C. App. §§ 501 et seq.</u> , the	
Servicemembers Civil Relief Act, sec. 502 Purpose_	9,10
512 Jurisdiction_____	9, 10
519 Legal representatives; _____	11,15,16
521 Protection of servicemembers against default__	10
522 Stay; _____	10,11,12
597 Fees and sanctions_____	16
2. Washington law – no cases on point	
a. RCW 73.16.070 _____	9
3. Rules	
a. Rules of Professional Conduct 1.9 _____	8

## B. Statement of the case

This case involves the application of the Servicemembers' Civil Relief Act (SCRA) in a family law matter. The trial court entered final orders on a petition to modify a parenting plan and child support, over the deployed service member's objection.

The appellant is the father of two children and a service member stationed out of Washington state. The mother lives in Tennessee with the parties' two minor children. The father is on active military duty, is deployed periodically, and has also remarried. His new wife held his power of attorney during the deployment when the pertinent hearings were held.

The father was pro se during the majority of the trial court proceedings, including when the pertinent hearings were held.

The mother's petition to modify was filed in April, 2008. (CP 293-299). The underlying orders were entered in 2004. (CP 316-323, Parenting Plan, and CP 303-309, Order of Child Support). Temporary orders were entered in June, 2008. (RP 8 pages; CP 248-254 Child Support Order; CP 255-260 worksheets; CP 261-267 Parenting Plan.)

There are other docket entries in 2008, the last being on Nov. 4, 2008. Then, over a year later, the mother's attorney filed a Motion for Order on Final Hearing on Nov. 5, 2009. (CP 237-38), a Calendar Note (CP 150-151); Declarations, financial documents and proposed final orders (CP150-238) and her financial declaration and attachments (CP152-157, 158-183, 192-207 and 208-236). [She filed another declaration on Nov. 13, 2009 (CP 144-146)]

The day after the attorney noted the motion for entry of final orders, Nov. 6, 2009, the father filed a Declaration and letter from his Commanding Officer, dated Oct. 30, 2009, verifying that he was deployed from Nov. 2009 to June, 2010. (CP 147-149)

The Court (Judge Churchill) held the hearing on Nov. 16, 2009, entered a final parenting plan, a child support order and an order of attorney fees against the father. (CP 94; 95-143; RP 11/16/09) The father's case and argument were not presented to the court.

While still deployed, the father filed another letter from a commanding officer and a motion for reconsideration. (CP 93. Mistakenly, the cover says Sealed Financial Source Documents, but it contained another letter from his Commanding Officer.)

At the hearing on reconsideration, on Dec. 28, 2009, father was still deployed. His wife appeared in court in front of Judge Hancock and attempted to represent his interests, but the judge would not let her present

argument because she was not a lawyer. (CP 86, clerk's minutes, RP 12/28/09, page 2.) Judge Hancock denied the motion for reconsideration, assessed attorney fees against the father, holding that the motion for a stay under the SCRA was frivolous. (CP 87-88; RP 12/28/09, page 4-5.)

After that hearing, a different commanding officer wrote another letter to the court, again requesting a stay of proceedings under the SCRA. (CP 69) Judge Hancock sent a letter decision to the parties that a motion for reconsideration was the proper procedure to address the court. (CP - Designated by appellant but not transmitted by clerk, this is trial court docket # 264 and attached.)

The father obtained counsel, the undersigned, who filed a motion to vacate, and that relief was partially granted and partially denied under the interpretation of the SCRA by Judge Churchill. (Decision dated Dec. 10, 2010.) The support orders were upheld, but the court vacated the parenting plan and part of the attorney fee award. This appeal followed.

The primary issue is whether the SCRA requires that a stay should have been entered.

An underlying, prior issue is whether the mother's counsel had a conflict of interest and should have withdrawn from the case because the father had consulted with and paid him a consultation fee in the same matter, prior to the attorney representing the mother. (Her current counsel.)

The trial court denied his motion in May, 2008. (Father's declaration, CP 290-291 "I paid Mr. Lyons a fee and he calculated support"; counsel's declaration, CP 282-285; Order, CP 268- 270; Order; minute sheet CP 271.)

C. Assignments of error

1. Did the mother's attorney have a conflict of interest?
2. Did the trial court err by only vacating the parenting plan modification and partial attorney fees and not the child support modification under the Servicemembers' Civil Relief Act (SCRA) ?
3. Did the trial Court err by denying the appellant's wife, who had his power of attorney, the right to appear and argue his case pro se?
4. Should the father be awarded attorney fees for the SCRA violation of failure to order a stay of proceedings during his deployment?

D. Issues related to assignments of error

1. Was it a conflict for the attorney to take a consultation fee and consult with the client (appellant) and then represent the opposing party?
2. Was the father's notice adequate to obtain a stay of the entire proceeding in Nov. 2009?

3. Should the service member's power of attorney (his current wife) have been permitted to argue on his behalf at all stages of the trial court proceedings?
4. Was the father prejudiced by entry of the child support modification in his absence?
5. Is there authority for an award of fees against the father or the mother?

E. Argument

1. The mother's attorney has a conflict of interest because he previously was paid a consultation fee by the father on the same matter.

The father and Respondent's counsel's declarations show that the attorney first consulted with the father regarding child support calculations, and then appeared in this matter representing the mother, the directly adverse party. (CP 290-291; CP 282-285) The Court erred when it found there was no conflict of interest. (Order, CP 268- 270.)

The father was counsel's former client because he paid the attorney a fee to calculate support. RPC 1.9, Duties to Former Clients, prohibits knowing representation of a directly adverse party if the lawyer represented the other party first. An exception

is made only when there is a written waiver of the conflict by the client.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.  
Washington RPC 1.9

No waiver was obtained, and the father formally objected.

The Court should have granted the father's motion regarding the conflict when it was raised.

2. A stay of the entire proceedings should have been granted.

The father's notice and letter from his Commanding Officer on Nov. 6, 2009, was adequate to stay the entry of the final orders at least until inquiry as to his availability could be established. The trial court's decision on the motion to vacate erroneously concluded at #13 and 15 (p. 10 of decision) that his deployment verification was inadequate. Concluding that he was required to request leave to attend the hearing or delay joining the [Navy] cruise, and that the CO's letter did not contain the requisite SCRA information was erroneous because the act does not require that level of inquiry.

Washington adopted the federal Servicemembers' Civil Relief Act by RCW 73.16.070, which simply states: "The federal soldiers' and sailors' civil relief act of 1940, Public Act

No. 861, is hereby specifically declared to apply in proper cases in all the courts of this state.”

This Act applies to— (a) (1) the United States; and (2) each of the States, including the political subdivisions thereof.

(b) Applicability to proceedings

This Act applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act. This Act does not apply to criminal proceedings.

§ 512. Jurisdiction and applicability of Act [*Sec. 102*]

The purposes of this [Servicemembers Civil Relief] Act are—

(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

§50 U.S.C. App. § 502. Purpose [*Sec. 2*]

The request for a stay is not permissive, it is mandatory.

50 U.S.C. App. § 522 states that the court may upon its own motion and shall, upon the application of a service member, enter a stay of proceedings for at least 90 days if the motion includes the information required by the statute for the court to determine whether a stay is needed.

The purposes of the SCRA are to protect the legal rights of active servicemembers, see above. Plaintiffs cannot file a child

custody case without a sworn statement regarding the military status of a defendant. § 521. Protection of servicemembers against default judgments [*Sec. 201*] a) Applicability, (P.L. 110-181, effective January 28, 2008 extended to child custody proceedings) [*Sec. 201*] b).

When notice of a proceeding is given to a service member who is defaulted in an action, they have a right to a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists. § 519 (d).

If a service member who is a defendant in an action covered by this section receives actual notice of the action, the service member may request a stay of proceeding under section §522, which specifically applies to child custody proceedings. The phrase “including any child custody proceeding” was added by P.L. 110-181, effective January 28, 2008.

The father’s notice was adequate.

If the service member receives notice at any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for

a period of not less than 90 days, if the conditions in paragraph (2) are met. §522 1)

An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

**§ 522. Stay of proceedings when servicemember has notice**  
**[Sec. 202]**

There is no dispute that the father was deployed on active duty and that he requested a stay, that he verified his deployment with a letter from his commanding officer, and that he was deployed overseas until June, 2010. The declaration of father and CO Fowler, (CP147-149) were filed before the hearing. To conclude that the letter was insufficient was error. (Order on Motion to Vacate, COL #14, 21 and 24.)

Further, the court received additional letters from CO Fowler, dated Dec. 1, 2009 and from C.F. Mays, dated Dec. 27, 2009, attached to the father's motion for reconsideration that contained more specificity. (CP 93; 69 and 1-21)

The court, in its decision to partially vacate the final orders, concluded he waived reliance on the SCRA when he filed the motion for reconsideration. (Decision COL #14, p.11)

This is not consistent with the Act, which permits a service member to request a stay without waiving defenses.

An application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).  
522 (c) Application not a waiver of defenses

The mother's rights would not have been prejudiced by the stay. Her Petition for Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule was filed in April, 2008. (CP 293-299.) She was receiving support under a temporary order and the father's deployment did not interfere with her receipt of support.

On the other hand, the father's rights to a trial on the merits were prejudiced when the case was litigated without his input, contrary to FF #4. (Decision, p. 8.)

In the decision on his motion to vacate, the judge concluded that he had not defaulted, (COL #1, Decision at p.8.), and that the final support order could be entered on declarations only, (COL #4, Decision at p.8.), but he was unable to present evidence at the hearing or file any declarations.

In June 2008, at the hearing on temporary orders, the Court advised him that he could give testimony at trial if he filed a motion to present testimony at trial. (RP 6/9/08, p.5) But he could not testify if he could not appear at the hearing.

The relief granted to the mother in the final orders resulted in prejudice to the father because it was beyond the scope of what was requested in the petition, and a separate Petition to Modify Child Support was not filed. (CP 293-299). The box on the parenting plan modification petition was checked, requesting that support should be modified consistent with the modified parenting plan, which was to reduce the father's time with the children and to require him to buy them clothes before they could visit during the summer. (Id.) That is not a basis to modify the entire child support order, but entirely new prospective support orders were entered on that petition only.

If the scope of the modification of child support was permissible, it was error to deny the father's deviation for his other minor child.

When temporary orders were entered on June 16, 2008, after a contested hearing in which both parties appeared, a deviation was ordered based on the father's child from the subsequent marriage. (CP 248-254 Order; CP 255-260 worksheets; CP 261-267 parenting plan.) That deviation was

not proposed or granted in the final order. (CP 95-104) or in the decision not to vacate the support order. ( Further, the final orders entered in Nov., 2009 modified the transfer payment based on changes in both parties' incomes and in daycare expenses and added expenses that were not even plead, including extracurricular costs for football. (CP 129-136)

The father was prejudiced by the argument and facts presented by the mother's attorney at the final hearing. Findings of Fact # 9 and 10 in the decision on the motion to vacate related to his failure to conduct discovery or notify the mother of a previous return from deployment, but no written notice of those alleged facts were presented in writing prior to the hearing. (RP 11/16/09, p. 3-4) The only sponsor of those factual statements was the mother's attorney at the hearing, and without notice, the father had no opportunity to respond.

3. In the alternative, the father's power of attorney should have been permitted to argue on his behalf at all stages of the trial court proceedings in the absence of a stay.

At the hearing on Dec. 28, 2009, reconsideration on the father's motion, his current wife had power of attorney and was advised by the judge that she could not speak or argue on his behalf. (CP 87-88, RP 12/28/09, p2-3.)

It was error to conclude that his wife was not allowed to present pro se argument on his behalf. (Decision, at #18, p. 12.)

The service member's spouse possesses the same authority and rights as a service member under the act.

(a) Representative. A legal representative of a servicemember for purposes of this Act is either of the following:

(1) An attorney acting on the behalf of a servicemember.

(2) An individual possessing a power of attorney.

(b) Application. Whenever the term "servicemember" is used in this Act, such term shall be treated as including a reference to a legal representative of the servicemember. § 519. Legal representatives [*former Sec. 109*]

Yet another remedy is to appoint counsel. It is mandatory to appoint counsel when an additional stay is refused.

If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding. Sec. 522 d) 2)

4. Attorney fees should be awarded to the father under the SCRA.

(a) In general. Any person aggrieved by a violation of this Act [50 U.S.C. App. §§501 *et seq.*] may in a civil action –  
(1) obtain any appropriate equitable or declaratory relief with respect to the violation; and

(2) recover all other appropriate relief, including monetary damages.

(b) Costs and attorneys fees. The court may award to a person aggrieved by a violation of this Act who prevails in an action brought under subsection (a) the costs of the action, including a reasonable attorney fee.

Sec. 597a. Private right of action [*Section 802*]

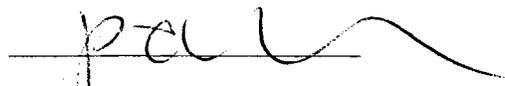
Nothing in Section 801 or 802 [50 U.S.C. App. §§597 or 597a] shall be construed to preclude or limit any remedy otherwise available under other law, including consequential and punitive damages. Sec. 597b. Preservation of remedies [Section 803]

The father has incurred fees by attempting to exercise his right to a stay. He was unable to obtain relief pro se, and prevailed in part after retaining an attorney to represent him in the motion to vacate the orders entered in his absence and when a stay should have been granted. He has incurred fees in this appeal. It was error to merely vacate a portion of the fees owing to opposing counsel, the father should have been awarded fees from the mother.

#### Conclusion

After ruling on the conflict of interest, the Court should vacate all the orders entered in Nov., 2009 when a stay should have been granted, remand for a trial, and award attorney fees to the father as a prevailing party and pursuant to the SCRA.

Dated: 12/15/11

  
PAULA PLUMER #21497

Attorney for Appellant



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF ISLAND

In re the Marriage of:

CECIL T. HERRIDGE,  
Petitioner,

and

STACEY A. HERRIDGE,  
Respondent.

NO. 03-3-00010-6

ORDER

Re: Motion to Vacate Final Orders  
Entered Nov. 2009

THIS MATTER came before the court on Petitioner's Motion and Declaration to Vacate Orders, and the court having entered Findings of Fact and Conclusions of Law herein, now, hereby, orders as follows:

1. The Plaintiff's Motion to Vacate the Order on Modification of the Parenting Plan is hereby GRANTED, and the parties are directed to note the same for trial;
2. The Plaintiff's Motion to Vacate the Order on Modification of Child Support is DENIED;  
and
3. The Plaintiff shall pay attorney fees to the respondent in the amount of \$750.00 under CR 11.

DATED this 10<sup>th</sup> day of December, 2010.

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VICKIE I. CHURCHILL, JUDGE

PAULA PLUMER

ORDER, Re: Motion to Vacate Orders Entered Nov. 2009  
Page 1 of 1

**ISLAND COUNTY SUPERIOR COURT**

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF ISLAND**

8 In re the Marriage of:

9 CECIL T. HERRIDGE,

10 Petitioner,

11 and

12 STACEY A. HERRIDGE,

13 Respondent.

NO. 03-3-00010-6

FINDINGS OF FACT and  
CONCLUSIONS OF LAW

Re: Motion to Vacate Orders Entered  
Nov. 2009

14  
15 THIS MATTER came before the court on Petitioner's Motion and Declaration to Vacate  
16 Orders. After reviewing the pleadings filed in this matter after the Decree of Dissolution, Final  
17 Parenting Plan and Order of Support were filed on December 21, 2004; having considered the  
18 pleadings filed by both parties in support and in opposition of the Petitioner's Motion and  
19 Declaration to Vacate Orders; and having considered the arguments of counsel, the court finds as  
20 follows:

21 **FINDINGS OF FACT**

22 1. Both parties filed petitions to modify the parenting plan and the child support orders. The  
23 Petitioner, Cecil Herridge, filed a petition for minor modification on January 20, 2006, and a  
24 petition to modify the child support on April 10, 2006. The Respondent, Stacey Herridge,  
25 filed her petition for modification of the parenting plan and child support on April 25, 2008.

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**FINDINGS OF FACT and CONCLUSION OF LAW**  
Re: Motion to Vacate Orders Entered Nov. 2009  
Page 1 of 13

**ISLAND COUNTY SUPERIOR COURT**  
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- 1 2. In his petition to modify child support, Mr. Herridge asked the court for a deviation; for a  
2 determination of child support arrearages or overpayments, if any; for a determination of long  
3 distance transportation expenses; and for a determination of tax exemptions for the children.
- 4 3. On April 26, 2006, the Respondent filed responses to Mr. Herridge's petition for  
5 modification of the child support and petition for modification/adjustment of the custody  
6 decree/parenting plan/residential schedule.
- 7 4. In her response, Ms. Herridge asked the court to deny Mr. Herridge's request for a deviation,  
8 to use Mr. Herridge's new income in determining child support, and to determine how  
9 reimbursements for day care should be paid.
- 10 5. Mr. Herridge never filed a response to Ms. Herridge's petition for modification of the  
11 parenting plan and child support.
- 12 6. Mr. Herridge was represented by attorney Paula L. McCandlis during a motion brought by  
13 the Respondent (a) for temporary child support, (b) for a temporary parenting plan, (c) for  
14 adequate cause to proceed on the Respondent's petition to modify the parenting plan and  
15 child support, (d) and for the father to change airplane tickets purchased for the minor  
16 children's visitation. Mr. Herridge filed declarations in response to the Respondent's  
17 motions.
- 18 7. The court heard the Respondent's motions on May 27, 2008, found adequate cause, and  
19 orally ruled on the motions for temporary child support, temporary parenting plan, and  
20 transportation issues. Orders were entered on June 16, 2008, pursuant to the court's oral  
21 ruling.
- 22 8. While Mr. Herridge was still represented by Ms. McCandlis, he noted a motion for  
23 temporary orders for a hearing June 9, 2008. Ms. McCandlis then filed a Notice of  
24  
25  
26  
27

1 Withdrawal on June 1, 2008. Mr. Herridge represented himself at the June 9, 2008, hearing  
2 and temporary orders were entered on June 16, 2008.

3 9. From 2006 when Mr. Herridge brought his petitions until final orders were entered on  
4 November 16, 2009, Mr. Herridge never conducted any discovery.

5  
6 10. The Respondent's attorney, Chris Lyons, brought a motion to compel Mr. Herridge to  
7 produce documents and answers to interrogatories to be heard on October 13, 2008. Mr.  
8 Lyons voluntarily struck his motion after learning that Mr. Herridge was on deployment. Mr.  
9 Herridge returned from that deployment on March 14, 2009, but never notified anyone of his  
10 return, never produced any documents as requested and never answered interrogatories that  
11 had been served on him.

12  
13 11. On November 5, 2009, the Respondent's attorney filed a motion for final hearing on both the  
14 child support modification and the modification of the parenting plan. The hearings were  
15 noted for November 16, 2009, on the Monday motion calendar.

16 12. Mr. Herridge received notice of the final hearings on the child support modification and the  
17 modification of the parenting plan on November 3, 2009.

18 13. Mr. Herridge's response to the final hearing was due no later than 4 p.m. on November 10,  
19 2009, pursuant to Island County's Local Court Rule 6(d).

20  
21 14. On November 6, 2009, Mr. Herridge filed a declaration indicating that he would not be able  
22 to attend the November 16, 2009, hearing because of active duty. Attached to Mr. Herridge's  
23 declaration was a note from a person named C.R. Fowler, which note was dated October 30,  
24 2009, stating that Mr. Herridge was on active military duty and that he would be deployed  
25 from November 2009 to March 2010. No other information was provided.

1 15. At the November 16, 2009, hearing, the Respondent's attorney advised the court that Mr.  
2 Herridge was on active military duty, but argued that Mr. Herridge had not complied with  
3 Sec. 6 of the Servicemembers Civil Relief Act<sup>1</sup>, and urged the court to enter the final orders.

4 16. After reviewing the notice of military status provided by Mr. Herridge, the court found that  
5 the communication from C. R. Fowler did not set forth facts stating (a) the manner in which  
6 Mr. Herridge's current military duty requirements materially affected his ability to appear,  
7 (b) a date when Mr. Herridge would be available to appear, (c) that Mr. Herridge's current  
8 military duty prevented Mr. Herridge's appearance, and (d) that military leave was not  
9 authorized for Mr. Herridge at the time of the letter. Judge Churchill found that Mr. Herridge  
10 did not comply with Sec. 6 of the Servicemembers Civil Relief Act.  
11

12 17. On November 16, 2009, the final orders were entered on the modification of child support.  
13

14 This judge entered the order of child support based on the following information:

- 15 a. The father's gross monthly income was \$5,209.37 and his net monthly income was  
16 \$4,830.20. This included base pay of \$3,322.50, and a combination of BAH and BAS  
17 of \$1,636.87. The court included \$250 as an average monthly, non-taxable amount of  
18 deployment/detachment income for Mr. Herridge.  
19  
20 b. The mother's gross monthly income was \$1,821.00 and her net monthly income was  
21 \$1,568.76.  
22  
23 c. The court included daycare expenses in the child support worksheets because of  
24 ongoing conflict between the parties. The court denied Mr. Herridge's motion  
25 regarding daycare expenses which he brought in May 2005 and in April 2008. The  
26

27 <sup>1</sup> 50. U.S.C.A. §522 (as amended December 19, 2003) (providing for stays of civil proceedings when  
servicemember has notice of the proceeding), hereinafter referred to as Servicemembers Civil Relief Act.

*Was it for award?*

1 court assessed \$500 attorney fees in 2008 because it found that Mr. Herridge's motion  
2 was frivolous.

3 d. To reduce the conflict over the day care receipts and payments, the court averaged the  
4 mother's daycare expenses for eleven months over a twelve-month period. This  
5 average takes into consideration the one month when the children are expected to be  
6 with the father even though the father is not expected to exercise summer residential  
7 time with the children in 2010.

8 e. The court took into account the father's previous declarations regarding daycare  
9 expenses and found that the mother's information as to current daycare expenses was  
10 credible and included an averaged amount in the child support order entered  
11 November 16, 2009.

12 f. The court declined to order a whole family deviation in the final child support order  
13 entered on November 16, 2009, because the court found that Mr. Herridge had been  
14 evasive and intransigent:

15 i. Mr. Herridge submitted an income tax return showing that his family's total  
16 income for 2007 was \$88, 852, which would indicate that his household had  
17 approximately \$7,404 gross income available in 2007. The court based Mr.  
18 Herridge's child support in the order entered November 16, 2009, on  
19 \$5,209.37 gross per month.

20 ii. Mr. Herridge never provided a complete financial declaration showing his  
21 spouse's personal income or income she receives for child support for the  
22 children living in her household.

- 1           iii. Mr. Herridge never answered the interrogatories or requests for production  
2           that he had been served on July 16, 2008, that would have provided  
3           information to the court about the wife's income so the court could consider a  
4           deviation.  
5           iv. Mr. Herridge never paid the \$500 attorney fees ordered for bringing a  
6           frivolous motion for reimbursement of daycare expenses.  
7           v. Mr. Herridge never updated his financial information or provided updated  
8           Leave and Earnings Statements, even though he had received cost of living  
9           increases. The last Leave and Earnings Statement provided by Mr. Herridge  
10           was for July 2008.  
11

12 18. On December 11, 2009, while still on deployment, Mr. Herridge noted a motion to stay and  
13           to vacate final orders. Mr. Herridge noted this motion for a hearing on December 28, 2009.  
14

15 19. Under sealed financial source documents, Mr. Herridge filed a letter dated December 1,  
16           2009, from his commanding officer, C. R. Fowler, that Mr. Herridge was on active duty with  
17           the U. S. Navy, that Mr. Herridge would be deployed November 2009 to June 2010, and that  
18           Mr. Herridge was not authorized leave.  
19

20 20. There was no indication in the transcript of the hearing on December 28, 2009, that the  
21           document filed under the sealed financial source documents was brought to Judge Hancock's  
22           attention.  
23

24 21. Mr. Herridge provided no reason why the December 1, 2009, information from C. R. Fowler  
25           could not with reasonable diligence have been discovered and produced for the November  
26           16, 2009, hearing, pursuant to CR 59(a)(4).  
27

1 22. Mr. Herridge's wife, Barbara Herridge, appeared on behalf of her husband at the December  
2 28, 2009, hearing. Judge Hancock advised Ms. Herridge that she could not give oral  
3 testimony on behalf of Mr. Herridge. Judge Hancock found that Mr. Herridge had not  
4 properly invoked the Servicemembers Civil Relief Act, denied the motion to vacate and  
5 awarded \$500 attorney fees to the non-moving party pursuant to CR 11.  
6

7 23. On January 4, 2010, Judge Hancock received *ex parte* communication from Lt. Jeff  
8 Alexander, VAQ-133 Legal Officer, on behalf of Mr. Herridge, attaching a communication  
9 from C. R. Fowler dated December 1, 2009, which stated that Mr. Herridge was on active  
10 duty with the military, was deployed from November 2009 to June 2010, and was not  
11 authorized leave. No action was pending at this time.  
12

13 24. The *ex parte* communication from Lt. Jeff Alexander indicated that Mr. Herridge deployed  
14 on November 13, 2009. This is the first indication the court had of Mr. Herridge's  
15 deployment date.  
16

17 25. Mr. Herridge returned from deployment on June 30, 2010. Mr. Herridge did not take any  
18 action in the court file until September 8, 2010, when Paula Plumer filed a notice of  
19 appearance on behalf of Mr. Herridge.  
20

21 26. On September 27, 2010, Ms. Plumer filed a motion and declaration on behalf of Mr.  
22 Herridge to vacate orders. The motion was originally noted for October 11, 2010, and finally  
23 re-noted for November 8, 2010. The court took the matter under advisement in order to  
24 review the entire court file from December 21, 2004, to the present.  
25

26 27. In support of the Petitioner's motion to vacate the final orders, Ms. Plumer submitted a  
27 communication from C.F. Mays, Jr., dated December 27, 2009. This communication stated  
that Mr. Herridge had deployed on November 13, 2009, that he was not authorized leave, and

1 that he would be available for any legal hearings after June 30, 2010. This deployment letter  
2 was filed October 13, 2010.

3  
4 **CONCLUSIONS OF LAW**

- 5  
6 1. This was not a default action. Mr. Herridge was the moving party in two petitions, one to  
7 modify the parenting plan and the other to modify the child support. Mr. Herridge responded  
8 to motions and filed motions and declarations in the case.
- 9 2. Even though Mr. Herridge did not respond to Ms. Herridge's petition to modify the parenting  
10 plan and to modify child support, the hearing for modification of the child support was  
11 properly decided under Mr. Herridge's petition to modify child support filed on April 10,  
12 2006, and answered by Ms. Herridge on April 26, 2006.
- 13 3. Mr. Herridge properly and timely received notice of the hearing for modification of the child  
14 support, pursuant to Island County Local Court Rule 6(d).
- 15 4. There was no prejudice to Mr. Herridge by the court deciding the final hearing for  
16 modification for child support on declarations only.
- 17  
18 a. The modification of child support was properly heard on affidavits only, pursuant to  
19 RCW 26.09.175(5). Mr. Herridge had the opportunity to request an evidentiary  
20 hearing on the modification of child support and failed to do so.
- 21  
22 b. Mr. Herridge had adequate time to file declarations to be considered by the court in  
23 the modification for child support. The last date for Mr. Herridge to file declarations  
24 was 4 p.m. November 10, 2010, three days before his deployment date. He did not  
25 file any declarations for the final hearing on the modification of child support.
- 26  
27

1 c. Mr. Herridge affirmed his ability to file declarations for the modification of child  
2 support before he was deployed by filing a declaration on November 6, 2009, a full  
3 week before he was deployed.

4 5. Mr. Herridge was not prejudiced by the court entering the final order of child support on  
5 November 16, 2009, on the basis of information known to the court because the court  
6 considered prior information and declarations filed by Mr. Herridge, even though the court  
7 did not include such thought processes on the record. The court does so now.

8 6. Mr. Herridge was intransigent by failing to provide updated Leave and Earnings Statements  
9 to the court. His income information was within his control and he was able to provide it  
10 before his deployment.

11 7. Mr. Herridge was intransigent by failing to provide a financial declaration as required by  
12 Island County Local Rules for Special Proceedings 94.08.1(c).

13 8. The court did not err by denying Mr. Herridge a whole family deviation on child support.  
14 Mr. Herridge was intransigent by failing to provide financial information concerning his  
15 wife's income or the child support she receives. Mr. Herridge was not entitled to a deviation  
16 because he had failed to provide such financial information.

17 9. To the extent that the court failed to include a statement in the final orders entered on  
18 November 16, 2009, that Mr. Herridge was on active duty with the military or that Mr.  
19 Herridge had failed to properly invoke the Servicemembers Civil Relief Act, the court can do  
20 so *nunc pro tunc*.

21 10. The remedy for failing to include findings of fact at the November 19, 2009, hearing is not to  
22 vacate the order. Rather, under CR 52, a judgment entered in a case tried to the court where  
23  
24  
25  
26  
27

1 findings are required but have not been made is subject to a motion to vacate within the time  
2 for taking an appeal. CR 51(d). Mr. Herridge made no such motion as required.

3 11. Subsection (2) of Section 6 of the Servicemembers Civil Relief Act provides for a stay of  
4 proceedings when a service member has notice of any civil action or proceeding, if the  
5 conditions in subsection (3) of this section are met. (court's emphasis).  
6

7 12. Subsection (3) (a) – (b) of the Servicemembers Civil Relief Act, which is a prerequisite for  
8 requesting a stay of proceedings when the service member has notice of the proceeding,  
9 which Mr. Herridge had, requires the following:

10 a. A letter or communication setting forth facts stating the manner in which current  
11 military duty requirements materially affect the service member's or dependent's  
12 ability to appear and stating a date when the service member or dependent will be  
13 available to appear; and  
14

15 b. A letter or other communication from the service member's commanding officer  
16 stating that the service member's current military duty prevents either the service  
17 member's or dependent's appearance and that military leave is not authorized for the  
18 service member at the time of the letter. (court's emphasis)

19 13. Mr. Herridge did not comply with Sec. 6 of the Servicemembers Civil Relief Act and was not  
20 entitled to a stay of the November 16, 2009, proceedings.

21 a. Mr. Herridge's deployment date was November 13, 2009, and the hearing for  
22 modification of child support was noted for November 16, 2009. Mr. Herridge  
23 provided no information that he had requested three days' leave so he could attend the  
24 hearing and join the cruise thereafter or that such a request, if made, had been denied.  
25  
26  
27

1           b. The information provided by Mr. Herridge on November 6, 2009, from C. F. Fowler  
2           did not contain the requisite information under the Servicemembers Civil Relief Act.

3 14. Any reliance by Mr. Herridge on the Servicemembers Civil Relief Act was waived by Mr.  
4           Herridge when he filed a motion on December 11, 2009, and noted it for hearing on  
5           December 28, 2009, while he was on deployment.

6  
7 15. The only information of Mr. Herridge's military status properly before Judge Hancock on  
8           December 28, 2009, when he heard Mr. Herridge's motion for a stay and to vacate the final  
9           orders, was the information from C. R. Fowler dated October 30, 2009. This notice did not  
10          contain the requisite information under the Servicemembers Civil Relief Act, and, thus, Mr.  
11          Herridge was not entitled to a stay or for the orders to be vacated.

12 16. There is no indication that the December 1, 2009, notice from C. R. Fowler, which was filed  
13          by Mr. Herridge in the sealed financial source documents, was called to Judge Hancock's  
14          attention. However, even if the document had been called to Judge Hancock's attention,  
15          Judge Hancock did not err when he denied Mr. Herridge's motion to stay and to vacate final  
16          orders because Mr. Herridge did not comply with CR 59(a)(4). Mr. Herridge provided no  
17          reason why the December 1, 2009, information from C. R. Fowler could not with reasonable  
18          diligence have been discovered and produced for the November 16, 2009, hearing, pursuant  
19          to CR 59(a)(4).

20  
21  
22 17. Judge Hancock did not err by not allowing Ms. Herridge, on behalf of Mr. Herridge, to file  
23          declarations or supporting documents on the day of the hearing, December 28, 2009. Island  
24          County's Local Court Rule 6(d) requires that any affidavit or documents supporting a motion  
25          shall be served with the motion no later than twelve (12) days before the time specified for  
26  
27

1 the hearing. LCR 6(d) further states that no additional responses or replies shall be permitted  
2 from either party without permission of the court.

3 18. Judge Hancock did not err by not allowing Ms. Herridge to represent Mr. Herridge on  
4 December 28, 2009, under the power of attorney that Mr. Herridge gave Ms. Herridge. It is  
5 well-established under Washington law that a person may practice law on his own behalf but  
6 “cannot transfer his *pro se* right to practice law to any other person.” *State v. Hunt*, 75  
7 Wn.App. 795, 805, 880 P.2d 96 (1994). A power of attorney does not authorize the practice  
8 of law. *Id.*

9  
10 19. Judge Hancock did not abuse his discretion by awarding attorney fees to Ms. Herridge under  
11 CR 11 for the motion brought on December 28, 2009, by Mr. Herridge.

12 a. Mr. Herridge did not provide any new information to the court, and there was no  
13 basis in law or fact to grant Mr. Herridge’s motion.

14 b. The time for a motion for reconsideration had elapsed.

15 c. Mr. Herridge did not follow the proper procedure under Civil Rule 60 to vacate  
16 orders.

17 d. Mr. Herridge is held to the same standard as an attorney. *Westberg v. All-Purpose*  
18 *Structures, Inc.*, 86 Wn.App. 405, 411, 936 P.2d 1175 (1997) (a *pro se* litigant is held  
19 to the same standard as an attorney).

20 e. There is no basis to vacate the December 28, 2009, order or to strike the award of  
21 attorney fees since Mr. Herridge brought the motion under the Servicemembers Civil  
22 Relief Act and he did not comply with the Act.  
23  
24  
25  
26  
27

1 20. The subsequent information from Lt. Jeff Alexander on January 4, 2010, attaching a  
2 communication dated December 1, 2009, from C. R. Fowler was not timely. There was no  
3 proceeding pending before the court.

4 21. The subsequent information from C. F. Mays, Jr., dated December 27, 2009, and filed by Mr.  
5 Herridge's attorney on October 13, 2010, was not timely to stay the November 16, 2009,  
6 hearing.

7  
8 22. The child support order on November 16, 2009, did not exceed the scope of the requests in  
9 the petition for modification of child support brought by Mr. Herridge.

10 23. Mr. Herridge is not entitled to have the orders on child support vacated.

11 24. Mr. Herridge was entitled to an evidentiary hearing on the modification of the parenting plan.  
12 The court grants Mr. Herridge's motion to vacate the parenting plan.

13 25. Because Mr. Herridge was granted partial relief, the court will not order attorney fees as  
14 requested by the Respondent, but will order \$750.00. Attorney fees are based on CR 11.

15  
16 DATED this 10<sup>th</sup> day of December, 2010.

17  
18   
19 VICKIE I. CHURCHILL, JUDGE