

66833-1

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No. 66833-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WILLARD GIBSON,

Appellant,

v.

MARIE-CLAIRE PAGH,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Gibson has improperly brought this appeal in Washington in an attempt to overturn a jurisdictional order entered by a Nevada court more than two years ago. The Court should reject appellant Gibson's appeal of jurisdictional issues, as well as his attempts, based on misleading facts and conjecture, to overturn the judgment of the trial court. The Court should affirm King County Superior Court Judge James Doerty's final parenting plan, domestic violence order for protection and award of attorney's fees and costs, and Judge Fleck's subsequent decision to deny appellant's CR 60 motion to vacate Judge Doerty's orders.

II. RESTATEMENT OF FACTS

Respondent Marie-Claire Pagh ("Pagh") grew up in Washington, and her relationship with appellant Willard Gibson ("Gibson") began in Washington. The parties met in September 2004 and began dating. Ms. Pagh was 18 years old and had just graduated from high school. Mr. Gibson was 27. RP 2/1/11 at 17.¹ The parties never married. They have one child, Britton Lawrence Harper Gibson, born June 23, 2008 in Nevada. The parties moved briefly to California in 2008 and then moved to Nevada less than a month before the birth of their son. Child Britton was conceived in Washington. CP 931.

¹ Reports of Proceedings are cited to by the hearing date followed by page number.

Gibson has an extensive history of domestic violence against Pagh. Pagh first requested a protection order against Gibson in November 2005. CP 17, 1010-1016, 1026-1029. Gibson also has a lengthy record of violating the protective orders entered against him to protect Pagh, including: Domestic Violence Order/Stalking (Seattle Municipal #490351); Assault 4 Domestic Violence/Stalking (#05-1-120241 King County); Domestic Violence Order/Violation (Seattle Municipal #504944); Domestic Violence Order [6 counts] (Seattle # 494966); and Domestic Violence Order/Phone Harassment (Seattle #490351). CP 17 at ¶ 11.

When baby Britton was less than three months old, Gibson began committing acts of domestic violence against Britton. CP 1026. Pagh testified that Gibson had an extremely short temper with Britton, and resorted to spanking Britton very quickly, sometimes simply for crying, and would banish Britton to his room for extended periods of time. RP 02/01/11 at 33-34. Gibson even thought it appropriate to pinch Britton so he would cry while boarding a flight so that no one would sit next to them. *Id.* at 29. While the parties lived in Nevada, Gibson held Pagh a financial prisoner, controlling access to all of her financial resources. CP 1046 Ln. 10-20. Gibson has repeatedly threatened to take Britton away from Pagh

and has threatened to kill Pagh. *Id.* at 35, 38. Pagh continues to live in fear of Gibson, both for herself and her child.

On December 15, 2009, the parties and Britton returned to Washington with the intent to live here. CP 36. Pagh had no intention of returning to Nevada, and her understanding was that Gibson also planned to relocate to the Seattle area. CP 35. In Nevada, Gibson had no real source of income, and the parties had been dependent on Gibson's mother, who lived in Redmond, Washington, for financial help. The parties had no family in Nevada; Pagh's mother and her seven brothers and sisters, and Gibson's mother and brother, were all living in the Seattle area. CP 36.

The incident that precipitated Pagh's filing the petition for a protection order in January 2010 occurred in Redmond, King County, Washington in December 2009. CP 9. Pagh left Gibson when the opportunity finally arose to get safely away from him and protect her child and herself from his violence. Prior to that date, she had been allowed to leave the home for work, but Gibson never allowed her to leave home with the child. RP 02/01/2011 at 35. Pagh and the parties' child took refuge with her sister in Edmonds, Snohomish County, Washington, whose home is approximately 100 feet from the King County line. RP 03/11/2010 at 8.

Pagh filed, *pro se*, an action for a Domestic Violence Protection

Order (“DVPO”) on January 14, 2010. CP 1. After Pagh filed the action, both parties hired lawyers. At the March 11, 2010 hearing in that matter, Judge James Doerty heard argument from counsel for both parties, but Gibson never submitted a sworn declaration as to the facts. RP 03/11/2010 at 18-19. Judge Doerty found sufficient Pagh’s recitation of the facts – *that Gibson did not rebut* – to establish jurisdiction for purposes of the DVPO as well as emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), Chapter 26.27 RCW. RP 03/11/2010 at 21.

Pagh was a resident of Washington at the time she filed the petitions for a protection order and the parenting plan at issue here. CP 21. She remained a resident of Washington throughout the trial in this action. CP 933. Pagh’s residential status in Washington throughout the pendency of the action is demonstrated by the fact that she was employed at the Law Offices of William D. Hochberg here in Washington from January 25, 2010 through April 7, 2011. CP 974. Pagh met her current husband in 2008 but did not become romantically involved with him until late 2010 – many months after the action was filed. CP 934. They married in June 2011 – four months after trial. CP 935.

On September 10, 2010, Gibson was arrested on a 2007 warrant for violating the 2005 protection order. CP 7, 305. He was jailed from

November 27, 2010 until December 16, 2010. CP 305. On January 12, 2011, Gibson was convicted by a jury in Seattle Municipal Court. RP 01/18/11 at 5. When Gibson “walked out of court before signing” the No Contact Order (*id.* at 6), Judge Donohue ordered him to appear the next day to sign it. *Id.* He failed to appear, and a \$10,000 bench warrant was issued. *Id.*; RP 02/01/11 at 5.

Current Procedural Posture: Throughout the course of proceedings in both Washington and Nevada, Gibson has been represented by counsel.

Pagh petitioned and was granted *pro se* an Emergency Protection Order on January 14, 2010 (King County # 05-2-314-30-3 SEA) (CP 23), which granted her temporary custody of Britton. Shortly thereafter, Gibson filed a Complaint to Establish Custody, Visitation, Child Support, and Attorney’s Fees and Costs in Nevada and served Pagh with the Nevada pleadings in the State of Washington. Pagh filed the current Petition to Establish a Parenting Plan in Washington, answered Gibson’s Nevada custody complaint, and asked the Nevada court to relinquish jurisdiction of the custody proceedings under the UCCJEA.

On March 11, 2010 King County Superior Court Judge J. Doerty consolidated the King County Order of Protection and the Parenting Plan actions and retained jurisdiction for all motions. CP 190.

On January 20, 2010, after being served with Pagh's Washington petition for an Emergency Protection Order, Gibson filed a petition and an emergency motion in Nevada to force Pagh to return child Britton to Nevada. CP 994-1009. Gibson's Nevada lawyer cited Nevada's version of the UCCJEA, requesting that the Nevada Court contact the Washington Court for a UCCJEA conference. Gibson cited NRS 125A.275:

"NRS 125A.275 Communication between courts.

1. A court of this state may communicate with a court in another state concerning a proceeding arising pursuant to the provisions of the chapter.
2. The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, the parties must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
3. Communication between courts concerning 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, a record must be made of a communication pursuant to this section. The parties must be informed promptly of the communication and granted access to their record.
5. For the purposes of this section, "record" means information that is inscribed in a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

CP 1000-1001. Pursuant to Gibson’s request, the Nevada court held its first UCCJEA conference with King County Superior Court Judge James Doerty on March 12, 2012. CP 987-988.

On March 18, 2010, the Nevada court held a hearing at which it informed the parties of the results of its conference with King County Superior Court Judge James Doerty. The Nevada court held “that based upon its discussion with the Washington Court, jurisdiction remains in NEVADA at this time.” CP 990. The Nevada court further ordered that, pursuant to NRS 125A.275 (quoted above):

“IT IS HEREBY FURTHER ORDERED
DEFENDANT [Pagh] shall have TEMPORARY
CUSTODY of the child;

IT IS HEREBY FURTHER ORDERED that
Counsel and the parties shall CONFER regarding
the JURISDICTIONAL ISSUES. Counsel shall
BRIEF the ISSUES for the Court WITHIN TEN
(10) DAYS, or, Plaintiff shall RESPOND to
Defendant’s OPPOSITION pleadings. The COURT
shall ISSUE a MINUTE ORDER upon RECEIPT
of counsel’s BRIEFS ...”

CP 991. Thereafter, pursuant to the above-quoted Nevada order and NRS 125A.275 (also quoted above), briefs were exchanged by counsel for the parties on the issue of whether Nevada should relinquish jurisdiction to the State of Washington. CP 1017-1029.

On April 7, 2010, the Nevada Court entered the following Minute

Order:

“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.”

CP 1031. Gibson did not appeal the Nevada court’s decision relinquishing jurisdiction and dismissing the Nevada custody action. Thereafter, Washington assumed jurisdiction over the child custody issues.

Gibson’s trial brief admits, on page 13, lines 1-3, that “Ultimately, the Court in Washington and the Court in Nevada held a conference call where it appears that Nevada declined to assert its jurisdictional authority under the UCCJEA.” CP 363.

Until his arrest in September, 2010, Gibson made no effort to clear warrants that he claims were preventing his participation in discovery or a parenting evaluation. RP 02/01/11 at 25. Although he was continuously represented by counsel, he did not appear before the Washington court for

any hearing on Temporary Orders. Despite the court being willing to consider supervised visitation when Gibson cleared his warrants, he made no effort to do so prior to his September arrest. RP 02/01/11 at 25. Gibson has had no contact with child Britton since January 2010, and has made no effort to do so.

On November 30, 2010, Gibson, through his counsel, asked for and was granted a continuance of the trial in this matter in order to obtain discovery from Respondent. CP 307. One month before trial, Gibson's counsel took the deposition of Pagh. The deposition occurred on December 31, 2010, and lasted four hours (not counting the lunch break). The deposition transcript is 118 pages long. CP 432-549. Gibson's counsel asked Pagh numerous questions regarding where she and the parties' son had been living.

At every stage of the trial court proceedings below and during this appeal: (a) Gibson has been represented by counsel (CP 305); and (b) the child at issue has been in the care, custody and control of Pagh. CP 23, 190-196, 749.

Gibson's Proposed Findings of Fact and Conclusions of Law submitted at trial 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:

The mother and acknowledged father engaged in sexual intercourse in the state of Washington as a result of which the child was conceived.

CP 1058. Likewise, paragraph 2.4 of Gibson's proposed Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan 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.

CP 1059.

The Amended/Corrected Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan entered after the February 1, 2011 trial states in Article II ("Findings of Fact"), in part:

Upon the basis of the court record, the court *finds*:

2.1 Notice and the 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 [Gibson] appeared and submits to jurisdiction of this state by consent.

The child resides in this state as a result of the acts or directives of the Respondent [Gibson].

2.4 Basis for Jurisdiction Over the Child

This court has jurisdiction over the child for 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.

CP 768-69 (emphasis in original). The Amended Judgment and Order Establishing Residential Schedule/Parenting Plan entered by Judge Doerty in this case awarded Pagh a money judgment against Gibson of \$45,876.48. CP 749.

The Corrected Parenting Plan Final Order entered after trial, in paragraph 3.13, expressly states that the Parenting Plan/Residential Schedule can be revised and Gibson can have visitation with the child as soon as he demonstrates "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.” CP 762-64. Paragraph 3.13 of the Corrected Parenting Plan Final Order states, in part:

The Father’s successful completion of the [Domestic Violence Perpetrator’s Program] program will be considered as adequate cause for modification of this parenting plan.

CP 762.

On December 16, 2011, Gibson filed a CR 60 Motion to vacate the final orders. Gibson’s CR 60 motion was denied by King County Superior Court Judge Fleck after hearing on February 10, 2012. CP 1129-30.

III. ARGUMENT

A. Standard of Review.

Appellant challenges Judge Doerty’s rulings in this case on one issue: whether the Washington Superior Court had subject matter jurisdiction. “Whether Washington courts have subject matter jurisdiction is a question of law that we will review de novo.” *In re Ruff*, 168 Wn. App. 109, 119, 275 P.3d 1175 (2012) (citing *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995)). This appeal admittedly requires interpretation of the UCCJEA (Ch. 26.27 RCW), a statutory scheme, and the “interpretation of a statutory scheme and application of that scheme also present questions of law that we review de novo.” *Id.*

(citing *In re Parentage of J.M.K.*, 155 Wn.2d 374, 386–87, 119 P.3d 840 (2005)).

As discussed in detail below, Nevada exercised its statutory right as the home state of child Britton to decline to exercise jurisdiction and confer jurisdiction on Washington, and Washington exercised its right to accept such jurisdiction, and so stated in its findings of fact and conclusions of law. CP 768-69. No further review of the facts (*e.g.*, assertions regarding consent of the parties, the veracity of testimony given below, whether Washington was the home state of the child on the date of the commencement of the proceeding, *etc.*) needs to be conducted.

Assuming for the sake of argument that factual issues raised by Gibson are relevant to the court’s inquiry, it is well settled that a trial court’s factual findings on jurisdictional issues must be accepted unless they are “clearly erroneous.” *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir. 1991); *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985). Furthermore, the party challenging a finding of fact (*i.e.*, Gibson) bears the burden of demonstrating the finding is not supported by substantial evidence. *Nordstrom Credit, Inc. v. Dep’t of Revenue*, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993).

B. Washington Had Jurisdiction in the Parenting Action After Nevada Found that Washington Was the More Convenient Forum for the Initial Custody Determination.

RCW 26.27.201 states, in part:

26.27.201. Initial child custody jurisdiction

(1) Except as otherwise provided in RCW 26.27.231 [concerning temporary emergency jurisdiction], 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 [defining when a court would decline to exercise jurisdiction] or 26.27.271 [see below], 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.

(Emphasis added.) Here, the Washington and Nevada courts agreed that Nevada was the “home state” of Britton, but Nevada declined to exercise jurisdiction on the basis of NRS 125A.365 (*i.e.*, that Nevada was “an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum”), Nevada’s version of RCW 26.27.261. Gibson does not and cannot dispute that the requirements of RCW 26.27.201(1)(b)(i) & (ii) were met. Thus, RCW 26.27.201(1)(b) expressly conferred jurisdiction on the Washington court.

Contrary to Gibson’s current claims, at no time was the Washington court’s jurisdiction based on a decision that Washington was the “home state” of child Britton. Rather, the Washington court’s decision was expressly based on the undisputed fact that Nevada, admittedly the home state of child Britton, declined to exercise jurisdiction and expressly ordered that “Washington will assume JURISDICTION in this matter . . .” CP 1031.

Gibson claims, based on speculation and conjecture, that Pagh engaged in wrongful conduct that somehow tricked Washington into assuming jurisdiction in this case. Gibson’s claim completely ignores the fact that Washington exercised jurisdiction under RCW 26.27.201(1)(b),

not a decision that Washington was the “home state” of child Britton under RCW 26.27.201(1)(a).

It is indisputable that Nevada, the home state of Britton, expressly declined to exercise jurisdiction. Gibson does not and cannot point to anything Pagh did in Nevada to “trick” Nevada into declining jurisdiction. In whatever case, such a claim would be the subject of an appeal of the Nevada decision, not Washington’s decision to assume jurisdiction because the home state (Nevada) declined jurisdiction. Even if such a claim were true, however, the UCCJEA expressly states that such alleged “wrongful conduct” has no effect on Washington jurisdiction assumed by virtue of the fact that the child’s “home state” declined to exercise jurisdiction. RCW 26.27.271(1) states:

26.27.271. Jurisdiction declined by reason of conduct

(1) Except as otherwise provided in RCW 26.27.231 [concerning emergency jurisdiction] 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.

(Emphasis added.) RCW 26.27.271(1)(b), therefore, states that, even if Pagh engaged in “wrongful conduct” that somehow tricked Washington into assuming jurisdiction, such “wrongful conduct” will not defeat Washington’s jurisdiction. Here, because Washington’s jurisdiction was based on RCW 26.27.201(1)(b) (*i.e.*, the fact that the home state of Nevada expressly declined to exercise jurisdiction and expressly ordered that “Washington will assume JURISDICTION in this matter . . .” (CP 1031)), Gibson’s allegations of “wrongful conduct” are irrelevant. Moreover, even if Washington’s jurisdiction were *not* based on Nevada declining to exercise jurisdiction, the trial court correctly found that Gibson “appeared and submits to jurisdiction of this state by consent.” CP 768-69; *see also*, CP 1058-1061 (Gibson’s proposed Findings of Fact and Conclusions of Law submitted for trial asserted that the Washington court had subject matter and personal jurisdiction). Thus, under RCW 26.27.271(1)(a), any allegation that Pagh engaged in “wrongful conduct” would not be a basis for asserting that the trial court improperly exercised jurisdiction.

Gibson completely ignores that fact that the issue of whether Nevada, admittedly the home state of child Britton, was going to exercise or decline jurisdiction was a question for the Nevada court, not the

Washington court. Under RCW 26.27.201(1)(b), Washington had the power to assume jurisdiction because Nevada declined jurisdiction and the Nevada court ordered that Washington would assume jurisdiction (which it did). Thus, Gibson's complaints regarding the UCCJEA conference should address whether the Nevada court complied with NRS 125A.275, the section of the UCCJEA that describes the opportunity to present facts and legal arguments regarding whether Nevada should retain jurisdiction. *Compare*, RCW 26.27.201(1)(b). It makes no sense for the parties to brief the Washington court on an issue that must be decided by the Nevada court. Here, the record is clear: the Nevada court fully complied with NRS 125A.275. In whatever case, *even if* the Nevada court had failed to comply with NRS 125A.275, that would be an issue for an appeal in Nevada. Gibson, however, declined to appeal the Nevada decision. This is not an appropriate forum to review the Nevada court's decision of April 7, 2010. Because the Washington court made a child custody determination consistent with RCW 26.27.201(1)(b), the Washington court had continuing, exclusive jurisdiction over this matter. RCW 26.27.211.

Gibson decided not to appeal dismissal of his action in Nevada. Nevada Rules of Appellate Procedure 4(a)(1) provides, in relevant part:

(a) Appeals in Civil Cases

(1) Time and Location for Filing a Notice of Appeal. In a civil case in which an appeal is permitted by law from a district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the district court clerk. Except as provided in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. . . .

NRAP 4(a)(1). Nevada courts have consistently held that an appeal from an order dismissing an action must be timely filed within thirty days of the order to dismiss. *Charmicor, Inc. v. Winder*, 90 Nev. 229, 229-30, 523 P.2d 840 (1974) (appeal taken from order denying motion to vacate order of dismissal was, in effect, request to review dismissal and was, therefore, untimely); *Alvis v. State*, 99 Nev. 184, 185, 660 P.2d 980 (1983) (appeal filed more than thirty days after notice of entry of order to dismiss was untimely). This Court should not assume the power to overturn a final decision of the Nevada court.

As we note above, Nevada has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) at NRS 125A.005 - 125A.605. NRS 125A.365, entitled “Inconvenient forum,” provides, in relevant part:

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.

* * *

(Emphasis added). As we note above, after Gibson filed his UCCJEA action in Nevada, both parties were represented by counsel.

Pagh appeared *pro se* at the time she filed her initial petitions for a protection order and a parenting plan. She substantially complied with the requirements for the petitions when she filled out those forms. Gibson argues that the Court does not have jurisdiction because Pagh did not check all of the right boxes on the forms. It is well settled, however, that “[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.” *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 791, 947 P.2d 732 (1997).

The trial court was not limited to finding jurisdiction based on what was or was not asserted by Pagh in her petitions. Jurisdiction derives from a constitutional or statutory provision. *Dougherty v. Dept. of Labor & Industries for State of Washington*, 150 Wn.2d 310, 319, 76 P.3d 1183 (2003). By analogy, this principle is similar to an appellate court’s authority to affirm a trial court’s ruling on any grounds supported by the

record, even if the basis for the appellate court's decision differs from that of the trial court. *See, e.g., Hendrickson v. King County*, 101 Wn. App. 258, 266, 2 P.3d 1006 (2000). The Washington court had the authority to find it had subject matter jurisdiction after Nevada declined to exercise it, and the authority to find personal jurisdiction on any legal grounds, which is what it did here. "Subject matter jurisdiction in dissolution proceedings exists if one of the parties is a resident of Washington during the proceedings. Residence is domicile in fact and intent to reside presently in Washington." *In re Marriage of Robinson*, 159 Wn. App. 162, 165, 248 P.3d 532 (2010). "Intent to reside presently" is the intent to reside in Washington at the filing or during the pendency of the case. Pagh was living with her sister in Washington at the time she filed, she intended to reside in Washington permanently, and she did in fact reside in Washington until several months after trial. CP 933-35. At all relevant times, Pagh resided in Washington. By his own admission, Gibson had been present in Washington just prior to and at several times during the pendency of the case. CP 204; 305-06.

C. At the Inception of the Case, Washington Had Jurisdiction to Enter a Domestic Violence Protection Order.

It is clear that the Washington court had jurisdiction to enter a judgment and orders after the trial in February 2011. The sources of its

jurisdiction include the UCCJEA (RCW 26.27.061, 26.27.201, 26.27.211, 26.27.231, 26.27.261); RCW 26.50.020(5) from the statutory chapter on domestic violence prevention; and the Washington Constitution.²

RCW 26.27.231(1) provides that Washington has temporary emergency jurisdiction if it is necessary to protect the child because the child or a parent of the child is subjected to or threatened with abuse. In addition to jurisdiction under the provisions of the UCCJEA, the court also had jurisdiction pursuant to RCW 26.50.020(5), which provides that superior courts have jurisdiction over proceedings under the “domestic violence prevention” chapter. Pagh properly commenced a proceeding under that chapter when she filed a petition alleging that she had been the victim of domestic violence in Redmond, Washington by Gibson.³

A child custody determination made under RCW 26.27.231 remains in effect “until an order is obtained from a court of a state having jurisdiction under RCW 26.27.201 . . .” In this action, the Washington court obtained continuing jurisdiction under RCW 26.27.201(1)(b) when the Nevada court entered an order finding that the Washington court was

² Wash. Const. art. 4, § 6 provides that superior courts have jurisdiction “in all cases ... in which jurisdiction shall not have been by law vested exclusively in some other court ...”

³ There were numerous incidents of abuse towards Pagh and the child prior to returning to Washington. When Britton was only three months old, Gibson assaulted Pagh while she was holding and nursing the baby. CP 175. From the time the child became mobile, Gibson would get angry and spank him and/or would leave him in his crib for extended periods of time. CP 176. On many occasions, Gibson would get angry while he was driving with Pagh and the child in the car and would drive up to 100 miles an hour and threaten to kill them all by driving off the road. *Id.*

the more appropriate forum (CP 1031), and because: (i) the child and at least one parent have a significant connection with this state; and (ii) substantial evidence is available in this state concerning the child's care, protection, training and personal relationships. RCW 26.27.201(1)(b); *see also* RCW 26.27.201(1)(c) (a Washington court has jurisdiction to make an initial child custody determination on the sole basis that all other states that would be considered "home states" have declined to exercise jurisdiction on the ground that Washington is the more appropriate forum). Further, the UCCJEA provides that physical presence of, or personal jurisdiction over, a party or child is not necessary to make a child custody determination. RCW 26.27.201(3).⁴

All elements necessary for jurisdiction to make an initial child custody determination are present here.⁵ First, Nevada declined to exercise jurisdiction on the ground that Washington is the more appropriate forum. In making that determination, the Nevada court followed proper procedure by immediately communicating about the jurisdiction issue. The issue was fully briefed in Nevada by attorneys for

⁴ In any event, unlike subject matter jurisdiction, a party can obtain personal jurisdiction over a party by consent. Gibson's implication that neither subject matter nor personal jurisdiction can be obtained by consent is incorrect. *See* CP 832 (Appellant's CR 60 Motion at 11). The court properly found that Gibson had consented to the court's personal jurisdiction over him. Thus its child custody determination is binding on him. RCW 26.27.061.

⁵ *See* Trial Court's FFCL, ¶ 2.4 (CP 1063-72).

both Pagh and Gibson, and the Nevada court held two conferences to resolve it. Gibson did not appeal the Nevada court's final ruling on jurisdiction and should not be allowed to take another "bite at the apple" now. Second, the parties have significant connections with Washington. These connections include the following: (i) both Gibson and Pagh have extensive family in Washington; (ii) Pagh grew up in Washington; (iii) Gibson and Pagh started their relationship in Washington; (iv) Britton was conceived in Washington; and (v) Pagh was working in Washington during the pendency of this action. CP 932-33, 974. Finally, substantial evidence was available in this state concerning Britton's care because the mother was present here and the toddler resided with her.

Gibson posits that Pagh, at the time of trial, intended to return to Nevada. He cites no evidence to support his contention, and improperly relies on *Marriage of Robinson* as support for his claim that, based on his conjecture, Washington has no subject matter jurisdiction in this case. Gibson's reliance on *Robinson* is misplaced. In that case, the parties had both already moved to Connecticut *before* the husband filed for dissolution in Washington. *Marriage of Robinson, supra*, 159 Wn. App. at 169. Here, Pagh and the child were present in Washington, she intended to stay in Washington, and she remained in Washington until several months after trial in February 2011.

D. Communication Between the Courts.

The UCCJEA communication between the Washington and Nevada courts was conducted in compliance with the relevant statutes in both states. NRS 125A.275, Communication between courts, states:

1. A court of this state *may* communicate with a court in another state concerning a proceeding arising pursuant to the provisions of 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, the parties must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
3. Communication between courts concerning 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, a record must be made of a communication pursuant to 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.

NRS 125A.275 (emphasis added). This statute is almost identical to RCW 26.27.101. In both statutes, the communication between the courts is discretionary, as is the decision whether to allow the parties to participate in the communication. Both parties were represented by counsel in

Nevada and in Washington, and had submitted declarations and affidavits to both courts prior to the April 7, 2010 telephone conference between Washington's Judge Doerty and Nevada's Judge Guiliani.

E. The Record of Communication Was Sufficient for Purposes of the UCCJEA.

NRS 125A.275(5) and RCW 26.27.101(5) both define "record" in an identical manner. There is no requirement in either statute that the communication be recorded or transcribed. The Nevada minute order issued by Judge Guiliani describes the communication by the courts and the determination that Washington is the more convenient forum. The minute order was immediately provided to counsel for both parties and was made part of the court record. Gibson's assignments of error regarding either communication are without merit.

Given that Gibson admitted in his trial brief that Nevada declined jurisdiction under the UCCJEA (CP 410), and expressly consented to the Washington trial court's jurisdiction over parenting of the parties' minor child in his proposed Findings (CP 1058), for him to now claim that the trial court had no jurisdiction is on its face specious. Likewise, Gibson offers not a single shred of evidence that Pagh was not a resident of Washington at the time the action was commenced, and at the time of trial.

Indeed, there can be no dispute as to this fact, and any claim to the contrary is demonstrably false. CP 932-934, 974, 1010.

F. The Trial Court's Finding that the Parties Signed an Acknowledgment of Paternity and/or that It Is on File in Nevada Is Not Appealable, as It Was Not Contested Below, and Is Harmless Error.

"The general rule prevailing in this state is to the effect that issues not raised in the trial court cannot be raised for the first time on appeal." *Peoples Nat. Bank of Washington v. Peterson*, 82 Wn.2d 822, 829, 514 P.2d 159 (1973). Gibson did not contest paternity, and counsel clearly asserted to the court that "paternity is not a contested issue." RP 02/10/12 at 24. Further, Pagh's testimony was consistent in both her deposition (CP 544, 548) and at trial (RP 02/01/11 at 16) that Gibson "signed the birth certificate." RP 02/01/11 at 17.

G. The Trial Court's Denial of Gibson's CR 60 Motion Should Be Upheld.

A trial court's denial of a motion to vacate under CR 60 is reviewed on a basis of manifest abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000); *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). A trial court has abused its discretion when the determination "is manifestly unreasonable or based upon untenable grounds." *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). Gibson argues that King County Superior Court

Judge Deborah Fleck abused her discretion by refusing to overturn Judge Doerty's final orders.

1. *There Is No New Evidence that Requires a Finding that the Trial Court's Determination Was Based on Untenable Grounds.*

Nevada declined to accept jurisdiction under the UCCJEA, and Washington properly accepted jurisdiction of the case. Washington based its determination of jurisdiction on the provisions of the UCCJEA: that the child and at least one parent had a significant connection with this state other than mere physical presence and substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships. Gibson argues that Pagh did not have a significant connection with Washington to establish subject matter jurisdiction.

The determination of whether there is a "significant connection" is a factual one that is made on a case-by-case basis. *Hudson v. Hudson*, 35 Wn. App. 822, 830, 670 P.2d 287 (1983). As stated in these proceedings and in Gibson's own brief, Pagh was raised in Washington, the parties met in Washington and resided here before moving to California and then Nevada for a short time; all the while both parties' families continued to reside in Washington. Furthermore, while the parties lived in Nevada, they were financially dependant on Gibson's mother. The presence of

supportive family members can establish a significant connection. *In re Marriage of Steadman*, 36 Wn. App. 77, 79-80, 671 P.2d 808 (1983).

Gibson relies on the fact that Pagh later moved back to Nevada after an engagement and marriage to a Nevada resident. Gibson argues that Pagh was forum shopping and had no ties to Washington other than a short vacation stop. It is not disputed that the parties' lease in Nevada was set to expire almost immediately after the alleged vacation. Gibson's reliance on *Wampler v. Wampler*, 25 Wn.2d 258, 170 P.2d 316 (1946) is misplaced; *Wampler* was based on a determination of jurisdiction for purposes of a divorce in 1946, and not based on a determination of subject matter jurisdiction in a case where jurisdiction was based on the UCCJEA. *Wampler* altogether fails to discuss "significant connections" where another state declines to exercise jurisdiction. Regardless, Gibson claims that the trial court could not rely on Pagh's statements made under penalty of perjury in her petition. Appellant's Br. ¶ 3.6.2. In fact, the trial court *did* find such jurisdiction, notwithstanding Pagh's petition. After extensive briefing by the parties, Nevada declined to exercise its "home state" jurisdiction and the Washington court (correctly) found that a significant connection existed in Washington.

The result of the foregoing is that there was no substantial evidence that leads to a conclusion that the trial court abused its discretion

or based its decision on untenable grounds; the trial court considered the motion to vacate and rendered a decision finding that Pagh did not mislead the court. On review this determination cannot be overturned without further evidence to the contrary. Gibson offers the same arguments that were made in his original CR 60 Motion to Vacate; nothing new has been presented.

2. *Appellant's Fraud Argument Has No Basis.*

On appeal, Gibson argues that Pagh committed fraud on the court. In order to prevail, Gibson must establish the alleged fraud or misrepresentation "by clear and convincing evidence." *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). There are two ways to prove fraud or misrepresentation, either by proving the nine elements of fraud or by showing that Pagh breached a duty to disclose a material fact. *Baddley v. Seek*, 138 Wn. App. 333, 338-39, 156 P.3d 959 (2007). Gibson argues that Pagh falsely informed the trial court of her residence and that in January 2010 she did not inform the trial court of her alleged intention to move to Nevada one and one-half years after filing the petition.

Gibson correctly points out that domicile requires physical presence and the intent to reside, citing *In re Marriage of Robinson, supra*, 159 Wn. App at 172. Pagh returned to Washington in December 2009 and

worked here from January 2010 until April 2011. She stated on her petition that she “lives in this county.” Pagh therefore was present and intended to live in Washington.

Gibson next argues that Pagh moved to Nevada a year and a half after filing the petition and therefore did not have the requisite intent to live in Washington. It would be error to require the trial court to foresee whether a litigant will remain in the jurisdiction a year and a half after the determination of jurisdiction by the trial court. There is nothing in the record that shows Pagh knew or intended to later marry someone with whom she had not seen for several years. There is simply no clear and convincing evidence that Pagh misled the trial court. Moreover, the trial court was presented with this very same argument and declined to find that Pagh “made incomplete assertions to mislead the Court.” CP 1130 (2/10/12 Trial Court Order).

Regardless of Gibson’s claims regarding Pagh’s intentions, as we note above, the trial court’s jurisdiction was based on the fact that the “home state” of Nevada declined to exercise jurisdiction, and even such “wrongful conduct” cannot deprive the trial court of jurisdiction.

H. Gibson's Appeal of the Trial Court's Decision Regarding Subject Matter Jurisdiction Is Inappropriately Filed in Washington, Rather Than Nevada.

Gibson's argument that the April 7, 2010 Nevada order was an interlocutory order is incorrect, and he provides no legal support for this assertion. Appellant's Br. at 31. The Nevada court dismissed Gibson's Nevada case, which under Nevada law is a final order starting the clock on the time limit to appeal its decision. *Charmicor, Inc. v. Winder, supra*, 90 Nev. at 229-30 (appeal taken from order denying motion to vacate order of dismissal was, in effect, request to review dismissal and was therefore untimely); *Alvis v. State, supra*, 99 Nev. at 185 (appeal filed more than thirty days after notice of entry of order to dismiss was untimely).

Washington law is similar, in that RAP 2.2(a)(3) provides that:

a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

...

(3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment *or discontinues the action*.

RAP 2.2(a)(3) (emphasis added); *see also, Munden v. Hazelrigg*, 105 Wn.2d 39, 711 P.2d 295 (1985) (dismissal without prejudice may be appealable where its effect is to discontinue the action); *Tjart v. Smith Barney*, 107 Wn. App. 885, 28 P.3d 823 (2001) (order of dismissal was appealable, regardless of whether dismissal was with or without prejudice,

since statute of limitations barred refiling of action). Because the Nevada court's minute order made final disposition of Gibson's parentage action in that jurisdiction, it was a final order subject to appeal in that state.

While there is no dispute that "no action of the parties can confer subject-matter jurisdiction" upon a court where the court has no constitutional or statutory authority to act (*see Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)), Washington's assertion of subject-matter jurisdiction was not based on the actions of the parties, but upon Nevada declining to exercise home state jurisdiction based upon *its* determination that Washington was the more convenient forum. CP 1031. Washington's exercise of jurisdiction was appropriate under these circumstances, and was consistent with the UCCJEA.

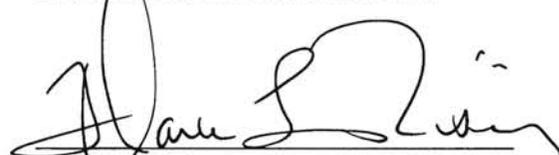
Subject matter jurisdiction was determined by the Nevada court on April 7, 2010 when it dismissed the matter and transferred jurisdiction over the case to Washington on the basis of Nevada being an inconvenient forum. CP 1031. Gibson's appeal, if any, should have been timely filed in Nevada following the dismissal of his case there. Jurisdiction was declined by Nevada, and its minute order dismissing the case was a dispositive order.

IV. CONCLUSION

Based upon the foregoing, Appellant Gibson's appeal regarding jurisdiction under UCCJEA should be denied, and his appeal from the court's denial of his CR 60 motion should likewise be denied. The trial court's final orders were well within its jurisdiction and discretion. This Court should affirm the trial court decisions below and award attorney fees and costs on appeal to Respondent Pagh.

RESPECTFULLY SUBMITTED this 10th day of August,
2012.

HELSELL FETTERMAN LLP

A handwritten signature in black ink, appearing to read "Mark F. Rising", written over a horizontal line.

Mark F. Rising, WSBA#14096
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2012, I caused to be sent via email and via U.S. Mail, first-class, postage prepaid, a true and correct copy of the Brief of Respondent in the above-captioned matter to:

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