

COURT OF APPEALS
DIVISION II
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In re the Marriage of
ROBERT UNDERWOOD,

Appellant,

and

KARA UNDERWOOD,

Respondent.

No. 44068-7-II

APPELLANT'S REPLY
BRIEF

TSAI LAW COMPANY, PLLC



Emily J. Tsai, WSBA #21180
Attorney for Appellant

2101-4th Avenue, Suite 1560
Seattle, WA 98121
(206)728-8000
emily@tlclawco.com

ORIGINAL

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ARGUMENT IN REPLY

I. Kara asks the court to determine the appropriate jurisdiction of the court at the time of trial: but the law requires that jurisdiction exist at the time of filing.

Kara entered the state of Washington with the determined purpose to file for divorce. (RP 34) She was not a resident of Washington, the children had not resided in Washington State for six months and Robert did not reside in Washington state. (RP 34) Upon obtaining her decree of dissolution of marriage, she promptly left Washington State. (RP 702) Kara has not established ongoing residency pursuant to RCW 4.28.185(c) as she had not “continued to reside” in Washington State as of the date of filing. In fact, she came to Washington State and filed less than six months after arriving. Thus the facts of this case are distinguishable from *Marriage of Oytan*, 288 P.3d 57 (2012). The Petitioner in *Oytan* had resided in Washington State for the six months preceding filing, and she had continued to reside in Washington State even after the husband left Washington state. In our case, the husband and wife both left Washington state, the husband remained outside the state and the wife returned solely for the purpose of filing a dissolution action, then left after receiving it.

Kara asserts that Robert waived his right to contest jurisdiction because he filed an answer. Robert contested jurisdiction and promptly filed a motion to vacate any orders obtained on the basis that Washington did not have jurisdiction over him.¹ Even if a party joins in the petition, that is not sufficient to establish jurisdiction. *Marriage of Robinson*, 159 Wn. App. 162 (2011). Where a party raises a motion asserting the affirmative defense prior to trial, he should have preserved the issue of contesting jurisdiction. *Roth v. Drainage Imp. Dist. No. 5*, 64 Wn.2d 586, 392 P.2d 1012 (1964). Robert's only purpose in coming to Washington State was to see his children and not to permanently reside here. (RP 453)

Kara asserts that by trial, the court had jurisdiction over both parties by virtue of their presence in the state; however, in order for the state court to have jurisdiction over the military member's pension, the conditions of 10 U.S.C. §1408(c)(4) must be met at the commencement of the action. See, *In re the Marriage of Akins*, 932 P.2d 863, 867 (1997). The court should vacate its decision based upon a lack of jurisdiction. The court should reverse the other decisions requested below.

2. While deployed to a war zone, Robert obtained a stay of proceedings pursuant to the Soldier's and Sailor's Relief Act which stay was violated by Kara, depriving Robert of due process.

The court ruled on Kara's motion for mental health evaluation by limiting Robert's contact with his children in violation of the Stay issued

¹ He stated in his motion that his attorney was to file a demurrer but failed to follow his instruction. The attorney was promptly dismissed. (CP 120-122)

under the Soldier's and Sailor's Relief Act. (CP 150-152) The court did not appoint counsel for him at the hearing. Kara argues that Robert should not have been granted a stay because he was later granted leave from deployment. However, she never attacked the basis for stay when it was entered. She cites no authority for the assertion that a soldier's leave from deployment voids a validly ordered stay. In fact, the statute states:

b) Stay of proceedings

* * *

(2) Conditions for stay

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. [stress mine]

50 U.S.C. Section 522

The statute anticipates that leave may be granted during a period of stay; however, if, *at the time of the letter*, leave is not authorized, then the requirements for a stay are met. The stay was properly granted. (CP123-128) The protections afforded a soldier during deployment are require that if a soldier is denied stay, the court is to appoint counsel to represent the absent soldier. 50 U.S.C. Section 522(d)(2). That did not happen.

Because the court was asked to undertake action against him and did so in violation of the stay, this forced Robert to prematurely request a lift of stay and to try to defend the action from Afghanistan. (CP 163-167) He was prejudiced by not having access to local counsel during the

proceeding and by trying to handle litigation from Afghanistan. (RP 513, 594) Testimony at trial supported the way in which his due process rights were violated because he could not access documents after the stay was lifted. (RP 513, 594) It cost him significant attorney's fees later to redress this wrong, and limited his available financial resources, for which he was penalized because he often could not meet financial obligations that were ordered. Even the Guardian Ad Litem recognized that he could not meet the financial burdens placed upon him by the court. (RP 444)

Kara argues that because he engaged in a correspondence course and sent a few emails from Afghanistan that this equates to having the ability to defend a superior court dissolution of marriage action involving children, property, his basic constitutional freedoms and claims for spousal maintenance and attorney's fees. Such a position is ridiculous. Kara's additional allegations against Robert are simply intended to flame the passions of the court without any applicability in determining what constitutes a violation of the stay and the right to a stay and therefore are without merit. There is no question but that Robert was deployed in a war zone in Afghanistan and while in a war zone in Afghanistan he could not assist an attorney in defending a case in Pierce County, Washington. To draw an analogy between taking an online class or posting a comment on Facebook with defending a domestic case diminishes the seriousness of the court actions.

Kara benefited from the presence of counsel in the jurisdiction where she brought suit. Robert was disadvantaged by not having access to counsel. She glosses over the harm done by lodging inflammatory allegations against Robert. Congress recognized to divert a soldier's attention in a war zone could result in dire consequences for the nation. To ignore the stay was damaging to both the soldier and the country.

Robert had to ask to terminate the stay to reinstate parenting rights taken in violation of the stay, even though he remained deployed in Afghanistan. After termination of the stay, Kara brought multiple financial motions against him demanding he comply with court orders, including making amendments to paperwork for which he had no access. (RP 597-98) Military service may be compulsory but it should not be punitive. Congress recognized that soldiers should not be penalized in service of their country by enacting the Soldier's and Sailor's Act. It is the court's obligation to follow the provisions of the act, or to redress the wrongs that occur when they are not followed. Robert should be awarded attorney's fees for violations of due process and be afforded a new trial.

3) The parenting plan is not in the children's best interests because it completely alienates the father.

The children's relationship with their father became estranged due to circumstances over which the father had little or no control including deployment to Afghanistan to serve our country, and false accusations of felony harassment made against him by the mother and a third party. (RP

445) The credibility of the allegations was so poor that the county dismissed the case after a thorough investigation. (RP 452) Prior to the father's deployment there was ample evidence that Robert had a close bonded relationship with his children. (RP 394, 397-98, 425). The mother was largely responsible for alienation of the children from their father and yet she is the only conduit between the father and the children. (CP 33-42)

Kara makes much of a Facebook posting she alleges her daughters viewed in which she is referred to as a "cheating c---." Kara repeatedly attributes this post to the father. (RP 162, 256) Kara fails to tell the court that the posting was done by a third party on a private page which post was then shown to the children *by Kara*. (CP 190-191) The children did not otherwise have access. Kara then solicited the children to defend her honor to their father. The children defended their mother's honor. (Exhibit 99) In reference to Kara's action in showing her minor children this comment, the guardian ad litem reported as follows:

"While I do not sign on to LTC Underwood's belief that Kara is conducting full time campaign to alienate the girls from him in my opinion this was a terrible decision and the cause of two very emotional and unfortunate letters sent by 13 and 15 year old girls to their father. If he was responsible for the crude characterization there should be a response but it should not involve the children." (CP 190)

The "unfortunate letters" referred to above have been submitted to the court as evidence that the girls do not want contact with their father. (Ex 99) The entire scenario was contrived by Kara to enlist the children against their father, as team members. (CP 206) Later these sentiments

were used as evidence that they didn't want further contact with their father. (RP 405) This is abusive use of conflict. RCW 26.09.191(3)(e).

In addition, emails presented at trial had been edited and changed by Kara, sometimes changing both the content and context. The father's conduct was exaggerated and misrepresented to others and even to the court. (RP 445) There were periods of time when Robert and the girls would have disagreements, and some occurred via email, which were then culled out by Kara presented as the only relationship he had. (RP 652) In fact he had a very close relationship to both the children. (RP 653-655)

Kara engaged in a campaign to alienate the children by telling them that Robert wouldn't pay for the younger daughter's braces (RP 620), by telling them that Robert wasn't financially supporting them (RP 611-613), by falsely telling them that Robert's sister could not be around them or it would be breaking a restraining order, which was untrue as there was no such order (RP 622, see also CP 206). Kara fueled conflict between Robert and his daughters telling them that he doesn't pay child support and therefore they didn't have to listen to him. (RP 611-613)

Robert was openly accused by Kara who had no evidence and had never seen any evidence of having inappropriate sexual pictures of one of the girls on his computer. (RP 249) This allegation was made public across America, and was never substantiated by the girls. (RP 249-250). The police seized Robert's computers, thumb drives and hard drives and found no such evidence, returning everything back to Robert. (RP 643).

The girls were subjected to public scrutiny when major news stations and studios broadcast these scurrilous, specious allegations. (RP 418-419) These children were unquestionably embarrassed by these false allegations advertised across the nation. (RP 418-419, 217-218). How were these teenage girls to respond to questions about visits with their father when their mother and third parties were alleging that there was inappropriate sexual contact, even though that was false? The court should have protected the girls' relationship with their father, especially once it was determined that the allegations against him were unfounded. (RP 249-250) Reunification therapy was surely appropriate in such a situation, where they could openly discuss, what was referred to by the Guardian Ad Litem as "the five hundred pound gorilla in the room." (Evaluation May 16, 2012) Kara's actions unquestionably and horrifically alienated the children from Robert, yet this alienation went unchecked.

Kara's accusations against Robert were battering and continuous. She accused him of mental instability and demanded to restrict him from the children because *he* was the *victim* of domestic violence *as a child*. (RP 251-253) The ongoing onslaught of allegations made against him were often without merit, and were horrific. (RP 249-250). Despite Kara's ceaseless barrage of accusations, and her active recruiting of the children to her cause, it was Robert whose time was curtailed. (RP 405-406) Her parenting plan proposing restrictions was not presented until just before trial, and differed from the one filed at the outset of the case. (CP

230) It was unfair to impose restrictions without warning or findings that Robert's involvement was or would be detrimental. *In re Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006). Even the guardian ad litem had not seen the plan proposing restrictions. (RP 392) The court used a creative application of "abuse" in the parenting plan that doesn't support restrictions. (CP 34)The allegations that Robert's visits with his children hadn't gone well were exaggerated and when given the option to leave, the children elected to remain with their father.(RP 394, 397-98,430).

Following his deployment, the father had been in the State of Washington for two months with near daily contact between him and his children without incident. (RP 622-624) Then, Kara started new horrific allegations which would lead to a complete no contact order between Robert and his children for the three months preceding trial. Kara, again, was the driving force behind what turned out to be unproven allegations against him. (RP 317, 651) There is no evidence that the children were even advised post trial they could have contact with their father. Per the court orders, the only person to advise them of anything was Kara. (CP 33-42) The parenting plan should be remanded to allow reunification therapy between Bailey and her father, and regular parenting time, including vacation visits.

Additionally, there was simply no evidence that Robert's extended family members, including his sister, Jeanette Hallam and her son

Jonathan, were ever harmful to Robert's children. (RP 431-432) There is no evidence that Jonathan is mentally disturbed or behaved criminally. (RP 197-202) In Kara's brief she cites to portions of the record where the court excluded such unreliable accusations made again, by Kara. In fact, the evidence offered by Kara regarding her concerns about the aunt were all more than twenty years old, and the children had had contact with Jeanette and Jonathan for years without incident. (RP 286) The restriction against them simply further alienates Robert. It was clear he was from a large family, and that there were various alliances that Kara exploited.² (RP 103-104) Jeanette Hallam's, conduct in the courtroom was no different than Kara's own behavior during Robert's testimony. (RP 477)

4) There was insufficient evidence to support issuance of a permanent restraining order where the court cites as a basis domestic violence via "financial and emotional intimidation."

Protection orders are to protect against *threats of violence* [stress mine]. RCW 26.50.010. The court did not find *acts of or threats of violence* from Robert towards Kara. Kara quotes selectively from a single email during the dissolution process, changing both the content and the context to defend the restraining order. Exhibit 100(18) states:

"You took the one thing I thought the most of, my girls, and destroyed that relationship The one thing! And as you continue on and continue to do so you only harden my position to expose your lies to everyone. You should be afraid as you are and you have the DuPont Tacoma folks believing you are. You know what you are doing and

² Matthew Cooper, Kara's witness was the son of the parties sued by Robert and his sister (and their cousin) to dissolve the Underwood Family Trust.

you know it is wrong and it pisses me off every day. You might even be afraid I will snap and come after you[.] **but in reality you are afraid of me setting the record straight when I come to Fort Lewis.** There is no rock big enough for you to hide under when I get there. **Just like last time, you were so afraid of everyone knowing what type of person you are and what you have done. You know I would never hurt you or come after you but you know I will set the record straight.** Keep doing what you are doing Kara. Keep thinking people owe you and your bad behavior. You can run but you can't hide **from the shame** you have brought on yourself and the girls. Again, there was a easier way but you decided to go after the one thing I care d about the most, my girls and my relationship with them. Now that my relationship with my girls is severed I have nothing else to lose but time The girls will come around again once their hearts have been betrayed by someone they love for real (not the fake BS you tell them) Their light bulbs will just turn on and they will see you and what you did Just like you did with your mother but what you have done is 100 times worse You used them and lied to them Don't think your mother's tact will work on them for much longer. Believe me, when the tables are turned and the girls realize what you have done, you will then pay the price you deserve."

Kara's edited version is left in regular font above. The bolded portions were deleted in Kara's argument. (Respondent's Brief Page 32) Kara even added her own punctuation italicized in brackets, by adding a period where none appeared in the original text. (CP 100(18)) Robert's only "threats", were to bring the light of truth down on Kara to illuminate her infidelity, or to inform the court that she was deliberately alienating him. The revelation of true facts is not domestic violence or the basis for a physical restraining order. If the threat of truth is an offense that requires protection, then as a legal profession we would all be in jeopardy.

Kara's "fear" reported by the Guardian ad Litem was generated by her own speculation about Robert's emotional stability. (CP 191) However, Robert was proven via several psychological evaluations reviewed by the Guardian ad Litem to be both stable and functional. (RP 421-423, 642) Allegations by Kara that Robert engaged in criminal behavior were without merit and Robert was exonerated. (RP 643)

At times Robert used coarse language and vocally criticized the family court system, perhaps making him unappealing. Robert was extremely frustrated by his inability to be heard by the court and such criticisms, which do not incite violence nor threaten violence, are protected expressions of speech. They are not grounds to enter a permanent restraining order depriving him of basic constitutional freedoms. Kara alleged that Robert was an intimidating person because he was an Army Ranger, but nowhere did he ever threaten her, or others, with physical harm or violence. (RP 208)

Robert did not monitor Kara's email accounts, phone or bank accounts. (RP 290) She admitted that her assertions regarding financial monitoring were speculative. (RP 290) He testified that Kara threatened to commit suicide and in those instances, he did not want her locking the bathroom door. (RP 600) Otherwise he did not seek to control her behavior.

Her allegations of financial intimidation are unsupported, given she had her own job, control of her own financial resources, she has a

college degree and credits towards a master's and she had separate credit cards in her own name. (RP 260) His threats to quit his job or revoke his citizenship are not domestic violence. Even if he did quit his job resulting in the loss of his own army benefits, such an action on his part cannot be the basis for a permanent restraining order. To hold otherwise would be to impose a form of indentured servitude on working spouses. Even if Robert were viewed as financially controlling during the marriage, which he disputes, this is not a basis for a permanent restraining order.

Kara enlisted Robert's commanding officer to make statements about Robert's emotional stability. (RP 674-675) However, all charges of harassment were dismissed and Robert was exonerated. (RP 643)

Allegations that Robert tried to run his truck into a moving van from the 2005 divorce action were unsubstantiated. (RP 577) In fact, Kara is the one who hit Robert's truck with a moving van while she was trying to hurry away after cleaning out their home in violation of a restraining order. (RP 577). Robert remained on the phone with the police during this incident and he was not the instigator. (RP 577).

Kara cites *Barber v. Barber* 136 Wash App. 512 (1997) in support of her contention that a prior act of violence that supports a present fear is sufficient to support a permanent protection order. However, Kara does not allege, and the court made no findings, consistent with violence contemplated by the statute. (CP 20)

The court did not find any acts of physical abuse or threats of physical harm. Specifically the court found “domestic violence” by way of “financial and emotional exploitation.” (CP 20) These are not findings that support a permanent restraining order that deprives a citizen of this country of his constitutionally protected rights.

Emotional abuse alleged to support a restraining order or a domestic violence protection order requires a threat and fear of violence. *Marriage of Stewart*, 133 Wn.App. 545, 554 (2007) At trial Robert’s attorney asked Kara repeatedly what conduct supported restrictions against Robert and she simply could not articulate any basis. (RP 247-252).

Robert did have various contacts with Kara by email, and by text message. At no point did she request that this contact stop until she lodged accusations against him in collusion with Serena Kiptoo, which allegations were all ultimately discredited. (RP 643) Robert’s email messages may have come at times that were in a completely different time zone since he spent nearly a year in Afghanistan.

Allegations that she was “kept a virtual prisoner” in Italy is belied by the fact that on January 10, 2010, she was in Rome alone with her adult daughter Ashley (RP 259). Allegations that he controlled her with money are undermined by the fact that she had separate bank accounts in which she held more in savings from her job (\$1100) than the couple held in any joint accounts together (\$300). (RP260, 575) In response to questions about what the guardian ad litem thought about allegations of domestic

violence, he testified specifically, that he does “**not** have any concern, nor do the children that they ever have been or are going to be physically abused by their father.” [stress mine] (RP 442)

5) Substantial evidence did not support imposing a \$112,000.00 community interest against property Robert inherited during marriage.

Kara continues to assert that the 2005 property settlement wherein the parties received a refund of the money they paid should form the basis of a community lien against Robert’s separate property. She asserts in her argument that property was “returned” to the trust which is completely inaccurate. The community tried to purchase property from the grandparents that the grandparents didn’t own. There was no property outside the trust. (RP 67) Suing the estate of the grandparents, given that there was nothing in the estate, would have netted the community nothing. The parties held no claim against beneficiaries of the trust, as the beneficiaries were not responsible for the actions of the grandparents. (RP 568-570) That Robert was able to get a full refund along with attorney’s fees given the facts was an exceptional settlement. Kara’s collaterally attacking the settlement of the community claim made in 2005 to support a lien is improper as outlined in *Marriage of Kasesurg, 126 Wn. App. 546, (2001)*

Kara attempts to argue that the court mischaracterized the existing property at trial, though she appealed none of the findings. The court properly characterized the real property. There is no disputing that Robert

acquired property in Cheney, Washington, and in Anaconda, Montana via 1031 exchange with properties inherited by Robert from the trust. (RP 550) Property acquired by inheritance is separate property, even if it is acquired during marriage. RCW 26.16.010. Robert's inheritance never went through the hands of the community-it went directly from the trust into a separate parcel in Robert's name under a 1031 exchange. (RP 550)

The issue on appeal is how the court formed the basis for such a *significant* community lien and awarding 100% of that lien to Kara? There simply was not proper evidence supporting a \$112,000.00 community lien.

Kara asserts that the monies from the sale of the Steilacoom house in 2005 went into the properties; however, she admits that those monies were not received until after the Cheney and Montana properties were already purchased and had closed. (RP 47-49) Therefore this could not be the source of a lien.

Kara argues that community funds paid for the remodels of both properties, but, this is not supported by her testimony at trial. Roof repairs made to the Cheney house were paid from insurance proceeds acquired when the home was purchased and not from community funds. (RP 282) Although Kara alleges the home equity line of credit was in both their names, the evidence submitted at trial shows the home equity line of credit was only in Robert's name. (Ex. 27). Moreover, Robert asserts the home equity line of credit was used to pay off the attorney's

fees incurred by the parties in 2006. (RP 692-693) There is no evidence or testimony that the painting done by Kara or the yard upkeep done by the parties improved the value of the properties. (RP 51-53, RP 58) In fact, the testimony was that the increase in value of the Cheney lot sold in 2008 in which Kara did some painting, was more likely the result of a simple lot line adjustment increasing the size of the property and decreasing the size of Robert's other Cheney lot. (RP 53) Additionally, rental income was collected on this property for which there was no mortgage, covering any other expenses. Rents, issues and profits on separate property remain separate property. *Marriage of Elam*, 97 Wn.2d 811, 816 (1982).

The only remodel done on the Montana property in Anaconda was that Kara helped remove some carpeting that had gotten destroyed from flooding. (RP 286) Other than that, her father did some work while he lived there rent free for which she makes no claim. (RP 281) For the remodel of the Cheney house, specifically the portion that the parties lived in, there was a mortgage, and she claimed she painted the house. (RP 51) She does not assert a dollar value for these services, nor does she demonstrate that the mortgage paid by the community outweighed the community benefit of living in the homes. (RP 52) In fact, Robert clearly testified that the community received a benefit by being able to reside in his separate property at a cost considerably less than the market value. (RP 486-487) *Marriage of Miracle*, 101 Wn.2d 137, 139 (1984).

There is no mortgage and there never has been a mortgage on the Cheney property. ((EX 21. RP 58-60.78) Kara's allegation in her brief that the community "paid the mortgages for both properties" is misleading as only one Cheney lot, where the parties resided, held a mortgage and the other lot never had a mortgage. The annual losses declared on the tax returns are not sufficient to form the basis for a \$112,000.00 community lien. The "services" outlined above in conjunction with the losses are nowhere near sufficient to support a \$112,000.00 lien.

Proceeds from the sale of Steilacoom and monies reimbursed for the failed land purchase were spent for personal items including horses, tools, horse tack, horse items and a new horse trailer upon moving to Cheney. (RP 485, 561) Robert's testimony concerning the acquisition of horses, tack and other personal property is confirmed by Kara. (RP 694) Kara acknowledged horses are an expensive hobby. (RP 229)

Robert received significant other separate property funds (\$22,000.00) which, along with rental income, was spent maintaining the properties. (RP 551). Additionally, Robert received a \$20,000 gift from his mother as his separate property between 2005-2008. (RP 560) Kara acknowledges Robert received these separate source funds during the marriage. (RP 277) Robert's separate property resources were sufficient to support and maintain his separate property.

No monies from settlement of the community lawsuit against Robert's family existed at the time of the dissolution in 2012. (RP 74)

The court accepted testimony from Kara as to the value of 10 acres that she and Robert never purchased or acquired title to. (EX 44, RP 74) The only dollar value that could have formed a basis for the lien imposed by the court was to collaterally attack the earlier settlement and speculating that, had the community prevailed in a lawsuit, it could have profited. (CP 20). This was improper. The court did not assign any dollar value to the sweat equity invested by the parties in the separate properties of Robert. (CP 20)

Kara states the court should look at the property award and lien from a global perspective. Even if the court were to take a “global view,” the court should consider that in 2006, Robert received an inheritance of over \$360,000.00 which he invested in land. Shortly thereafter, the community sold a home which netted them \$41,000.00 and received community settlement proceeds of approximately \$14,000.00. This was the ratio of separate property to community property in 2006. The parties lived a lavish lifestyle, including purchasing horses and tack, taking vacations, traveling around Europe. (RP 229, 259) In the interim years, the value of real estate severely plummeted. At trial, the only assets remaining were lands with a gross real estate value of \$333,000.00 [\$112,000.00 (Cheney) and \$221,000.00 (Montana)] less the mortgage on the Montana property of \$140,000.00 for an overall value of \$193,000.00 before capital gain. (RP 566) Capital gain consequences could be as high as \$80,000.00-\$90,000.00. (RP 557) From a global perspective, the net

value of property depreciated from \$415,000.00 in 2006 to \$193,000.00 in 2012. Given that the community had no greater than a 15% interest in the combined value of property owned by the parties in 2006 ($\$55,000.00 / \$360,000.00 = 15\%$), and the value of real property depreciating, how could the community portion have appreciated to represent 58% of the total ($\$112,000.00 / \$193,000.00$)? Take into account capital gain cost of \$80,000.00 to liquidate, and Robert has nothing but debt, and Kara has everything. How could efforts of the community have increased the value of Robert's separate property when the overall value depreciated over 40% in the years between 2005 and 2012? Even if community property acquired in 2005 was invested rather than spent, why wouldn't that value also have depreciated? Why does Robert get none of the community?

The appellate court should remand this case with instructions to fairly and equitably apportion community property. Like the parties in *Kasesurg* who lived beyond their means, this family lived lavishly, a lifestyle which Kara enjoyed during marriage. It is unfair to place all the burdens of that lifestyle on Robert. Given the facts and background of this case, the court should not invade the proportionate separate interest of Robert's inherited monies, which actually depreciated in value.

Kara's speculation about Robert's compliance with court orders is unfair. There have been no findings of contempt of court or intransigence against Robert. Robert has no ability to pay a \$112,000.00 judgment accruing interest at 12% when the value of the property is \$112,000.00.

Even if he sold it, there are costs of sale. Kara grossly increased the attorney fee burdens on Robert by filing actions while he was deployed in a war zone, by making unfounded criminal accusations against him, which criminal charges were ultimately dismissed but only after he'd had to pay over \$30,000.00 in attorney's fees. (RP 532) In fact, the court failed to recognize that he spent this money to preserve the community asset of his retirement through the military, which Kara nearly caused to be lost.

Kara fails to address the fact that Robert was assessed both a fee award against him and separate debts of Kara that she used to pay attorney's fees. This was a double award of fees essentially, in violation of the statute. Additionally, the court did not consider that Robert had no ability to pay the fee award or the debt he was assigned. RCW 26.09.140.

Kara improperly asserts that Robert may receive funds in a lawsuit, but this is at most a speculative expectancy and should not an asset to be considered by the court. (RP 531, 568) *Freeburn v. Freeburn*, 107 Wash. 646, 182 P. 620 (1919).

The division of assets and liabilities is not supported by substantial evidence. The court should remand this case with instructions to divide the community property and debts fairly and equitably based upon proper evidence. There should be no community lien as the value of Robert's separate property did not appreciate based upon community efforts.

6) The award of lifetime spousal maintenance in this case is completely unnecessary and is contrary to the statutory requirements.

Kara completely ignores the statutory framework in trying to justify the court's award of lifetime spousal maintenance, and seemingly ignores the court's actual orders in trying to defend an unsupportable maintenance award. RCW 26.09.080 clearly states:

“The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors...”

The award of lifetime spousal maintenance made here was in contemplation of some “misconduct” which Kara basically admits in her response brief to this court. Such an award therefore is a violation of the statutory law. With no termination date, Robert could be paying spousal maintenance for the next 40 years, which is illogical for a former spouse 42 years old, with both certification in radiology and credits towards her master's degree. (RP 242) Kara has no incentive to improve her own financial position by finishing her Master's Degree and becoming self sufficient. Any award of maintenance must be based on present identifiable needs, not conjecture or speculation. *In re Marriage of Rouleau*, 36 Wn. App. 129; 672 P. 2d 756 (1983). Kara basically concedes the award of lifetime spousal maintenance is based on the speculation of Robert's future misconduct. This is error.

There was no evidence that Robert would become more employable than Kara once he left the military. This was a military family. There was no evidence that Kara's employment prospects were more

limited by her having supported Robert's career. In fact, Kara was able to complete her education while working part time on base. (RP235, 239).

Finally, Kara ignores language in the Military Award Order which reserved jurisdiction in the Superior Court to enforce its provisions. (CP 31) The lifetime maintenance is unnecessary and the court should remand this portion of the order with instructions that maintenance should end unless Kara can show that she has tried to find viable employment and that she has insufficient resources to support herself.

7. In light of the court's lopsided property award, excessive award of spousal maintenance and debt distribution, Robert is not able to pay the fee award.

The court is to consider a party's need, as well as their ability to pay a fee award. RCW 26.09.140. After the property and debt distribution, it was impossible for Robert to pay the fees he was ordered to pay. On any balance sheet, he didn't have it. (CP 78-80) Additionally, the court ordered him to double pay Kara's fees in assigning to him her debt incurred for fees, then making a fee award. (RP 150,154) The court was aware that Robert had to borrow \$30,000.00 to pay for criminal defense counsel as well as \$20,000.00 for a non-refundable bail bond. (RP 592-593, CP 79-80). Robert borrowed an additional \$8,000.00 for divorce attorney's fees. (CP 79-80) Robert did not have the money to pay his own attorney's fees, let alone Kara's fees and debts. The court should reverse the fee award.

8. This is not a frivolous appeal

The court made no findings that any of Robert's actions were frivolous or intransigent. (CP 19-21, 69) Robert is pursuing legitimate concerns regarding the court's application of the law to the facts of this case. The trial court's discretion in determining whether an action is frivolous will not be disturbed on appeal absent a showing of abuse of discretion. *Clark v. Equinox Holdings, Ltd.*, 56 Wn.App.125, 132, review denied 113 Wn.2d 1001 (1989). Unlike the appellant in *Yurtis v. Phipps*, it is not Robert who has continually made allegations against Kara which were determined to be unfounded. 143 Wn.App. 680 (2008). In this case, it was always Kara that instigated baseless allegations against Robert. This appeal is not frivolous based upon the court's application of the law to the facts as outlined above. The court erred in entering a nonmodifiable permanent spousal maintenance award anticipating misconduct. The court erred in entering a permanent restraining order based upon financial and emotional intimidation where there was no threat of physical violence or domestic violence. The court erred in awarding a community property lien of \$112,000.00 based upon collateral attack of a lawsuit that was settled six years earlier.

III. CONCLUSION

The court of appeals should vacate all judgments for lack of jurisdiction and allow the case to be pursued in Montana, Robert's state of residence. In the alternative, the court should remand the case with

specific instructions as follows: 1) Robert should be granted set visitation dates and times with his remaining minor daughter and be allowed to pursue reunification therapy in part at Kara's expense 2) Robert should be awarded attorney's fees for violations of his due process rights, 3) the court does not have a basis for a \$112,000.00 community lien and community property should be equitably divided keeping in mind the characterization of community and separate property; community debts should be divided equitably and each party awarded their own separate debts 4) the permanent restraining order should be vacated as without any rational basis in law 5) spousal maintenance should be terminated unless Kara can show after diligent effort that she is not gainfully employed 6) the award of attorney's fees to Kara should be vacated pending resolution of the division of property and keeping in mind need and ability to pay.

Respectfully submitted this 15th day of July, 2013.



Emily J. Tsai, WSBA #21180
Attorney for Appellant

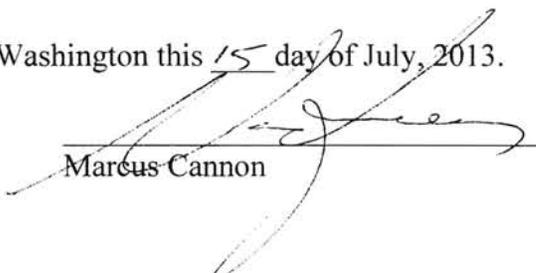
DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on July 15, 2013, I arranged for service of the foregoing Appellant Reply Brief, to the court and to the parties to this action as follows:

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Mr. James Cathcart P.O. Box 64697 University Place, WA 98464-0697	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

Dated at Seattle, Washington this 15 day of July, 2013.



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