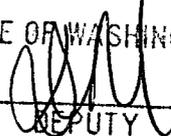


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY   
DEPUTY

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

No. 46142-1-II

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In re:

DESTRY LOREN EDWARDS,  
Respondent,  
vs  
REBECCA ELIZABETH EDWARDS,  
APPELLANT.

---

BRIEF OF RESPONDENT

---

Respectfully submitted:

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P.M. 9-30-2014

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## I. INTRODUCTION

This case originated from the Appellant relocating back to Washington State with agreement of the Respondent, an agreed change in the parenting plan (agreed between the parties but not formalize with the court), and then an objection by the Respondent to the Appellant's attempted relocation out of Washington State without giving statutorily required notice. Additional issues were consolidated with the trial on the objection for relocation by agreement of the parties and for judicial economy and a trial held over two (2) days. This case proceeded in different stages, but culminated in the trial court's written decision on January 10, 2014, (*CP pages 194-202*), Findings of Fact and Conclusions of Law on Petitioner for Modification of Child Support on January 31, 2014, (*CP page 203-2-5*), Order for Support entered on March 18, 2014, (*CP 209-222*), and Findings of Fact and Conclusions of Law and Order re: various financial issues on March 18, 2014, (*CP 223-230*). From the multitude of issues and decisions made by the trial court, there are only a few narrow issues raised for this appeal.

A Guardian ad Litem was appointed in this case regarding the objection to relocation and a new parenting plan. The Guardian ad Litem failed to provide monthly billing statements and failed to obtain court approval prior to exceeding the amount allowed in the order appointing

Guardian ad Litem. It is asserted that the trial court erred in interpreting the order appointing the Guardian ad Litem, relevant statutes, and due process rights of the parties when it allowed and ordered payment to the Guardian ad Litem above the amount stated in the order appointing the Guardian ad Litem. It is requested that this Appellate Court determine the Guardian ad Litem fees are limited to those indicated in the order appointing the Guardian ad Litem because no prior approval after notice and opportunity to be heard was given by the court.

The trial court did not err in determining that the child primarily resided with the Respondent from July 2012 through November 2012 and the Respondent should be awarded child support for those months. There was disputed testimony at trial on whether there were agreements between the parties on where the child would primarily reside and the trial court determined that the Appellant in fact did not incur any child related expenses during that time and the Respondent should be awarded child support. However, the trial court erred in reading the Order Re Adequate Cause (Modification of Parenting Plan) entered on November 21, 2012, wherein on page two (2) lines 16-17 the order reads, "The court also heard argument on the mother's Motion for Back Support. The court finds that no past due child support is due the mother, and the father's child support obligation is suspended." The trial judge interpreted this order and the

intent of the parties “to stay any obligations pending hearing on the underlying petition to modify the parenting plan.” (*CP 196, lines 18-26*)

The wording of the order clearly indicates the Appellant is not entitled to child support and the Respondent’s obligation to pay child support was suspended, but not the Appellant’s obligation should a motion be made or the trial court determine otherwise after trial. Because the Respondent was the actual primary parent incurring all expenses for the child from December 2012 through July 2013, he should also be awarded child support for those months. Lastly, a new order of child support was not filed until March 18, 2014, and the Respondent’s child support obligation should resume at that time.

The Decree of Dissolution of Marriage entered on February 26, 2008, was after a settlement conference and negotiations between the parties acting pro se. The decree was prepared by the Respondent identifying the issues in agreement and indicating the issues in disagreement, specifically whether the Appellant should be awarded any portion of the Respondent’s retirement. The box next to whether the Appellant should be awarded any part of the Respondent’s retirement was left unchecked going into the settlement negotiations and upon final entry. This standard form had many, many sections with boxes next to them that were left unchecked indicating they did not apply. The trial court

interpreted the decree as awarding no portion of the retirement to the Appellant and thus by default 100% of the Respondent's retirement remained with him. (*CP 228, section 2.5, lines 1-13*) The trial court heard detailed testimony from the Respondent specifically on this issue about the day that the decree was negotiated and entered with the result that the Appellant would be able to relocate outside of Washington State with the child but because of the significant increase in travel costs and the Respondent assuming most of the liabilities, by negotiation the Appellant would get no portion of the Respondent's military retirement. The trial court heard testimony from the Appellant on the same issue and that testimony did not controvert or deny the veracity of the Respondent's testimony. The trial court heard the testimony first hand, made credibility determinations of the witnesses, and made a reasonable determination on the interpretation of the Decree of Dissolution of Marriage and the issue of the Respondent's military retirement. The trial court did not abuse its considerable discretion in denying the Appellant's request to modify the Decree of Dissolution of Marriage and change the division of military retirement. It is requested that this decision be affirmed.

## **II. ASSIGNMENTS OF ERROR**

1. Assignment of error number one (1): The trial court erred by allowing fees for the Guardian ad Litem above the amount listed in the

order appointing Guardian ad Litem without prior notice and opportunity to be heard. *CP page 228-229 section 2.7, lines 22-25 and 1-5.*

2. Assignment of error number two (2): The trial court erred by determining the Respondent owed child support prior to a new order of child support being entered and not entitled to child support from December 2012, through July 2013. *CP page 224-225 section 2.2, lines 23-25 and 1-25.*

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Assignment error one (1) issue one (1): Did the trial court err when ruling that the Guardian ad Litem fees were not limited to the deposit amount in the order appointing Guardian ad Litem? Yes.

2. Assignment error two (2) issue one (1): Did the trial court err when awarding child support to the Respondent from July 2012 through November 2012? No.

3. Assignment error two (2) issue two (2): Did the trial court err when denying child support from December 2012 through July 2013 to the Respondent? Yes.

4. Assignment error two (2) issue three (3): Did the trial court err when imposing a child support obligation on the Respondent prior to the new order of child support being entered March 18, 2014? Yes.

#### **IV. STATEMENT OF THE CASE**

The parties acted pro se when dissolving their marriage and creating the legal paperwork. There has been much frustration with the Appellant not fulfilling her legal obligations, misstating financial obligations for pecuniary gain, acting without following proper legal procedures, and agreeing to certain issues regarding the child of the marriage and then changing her statement of recollection. After much pro se and then attorney representation the full issues between the parties were identified and by agreement confirmed by court order, all issues were consolidated for trial in December 2013. After two (2) days of trial, the trial court heard testimony on the various issues, reviewed ample documentary evidence, and made a detailed written opinion decision filed on January 10, 2014. Almost all the decisions required the trial court to make credibility determinations of the witnesses and reconcile some opposing statements. However, on the material facts relevant to this appeal, there was little contradictory testimony as indicated in the trial court's written opinion and court record. After consideration of the appropriate legal standards and review of the trial court's factual determinations, the Appellant's requests should be denied. On cross appeal, the Respondent raises whether the trial judge made an error of law allowing and ordering the Guardian ad Litem to receive fees and costs

above the maximum amount in the order appointing the guardian ad litem. This decision should be reversed such that the Guardian ad Litem fees are limited to those allowed in the order appointing the guardian ad litem. The child support determinations are more complicated as a mixture of statutory constructions, court order interpretation, equity, and factual determinations by the trial court.

#### **V. SUMMARY OF THE ARGUMENT**

The trial court erred by allowing the Guardian ad Litem to charge and be awarded fees and costs in excess of the amount specifically detailed in the order appointing Guardian ad Litem. The court order appointing the Guardian ad Litem was very specific on the maximum allowed to be charged by the Guardian ad Litem without notice and prior court order. By approving and ordering payment in excess of the amount in the order post hoc, the trial court erred as to the maximum payment to the Guardian ad Litem. The Appellate Court should require this Guardian ad Litem – all all Guardian ad Litem – to follow the court order, statutes, and due process requirements prior to exceeding the scope allowed in the order appointing them.

The trial court did not err in determining that the child primarily resided with the Respondent from July 2012 through November 2012 and the Respondent should be awarded child support for those months. The

trial court heard disputed testimony and made a credibility determination as to the parties' agreements. However, as a matter of law interpreting a court order, the trial court erred in reading the Order Re Adequate Cause (Modification of Parenting Plan) entered on November 21, 2012, wherein on page two (2) lines 16-17 the order reads, "The court also heard argument on the mother's Motion for Back Support. The court finds that no past due child support is due the mother, and the father's child support obligation is suspended." The clear result is that the Appellant should not be entitled to child support until a new order of child support, but should be obligated to pay child support for the time the child was primarily with the Respondent since only his obligation was suspended by the court order entered on November 21, 2012.

The trial court did not error when denying the Appellant's request to modify the Decree of Dissolution of Marriage to alter the award of the Respondent's military retirement. The trial court made many detailed findings of fact and credibility determinations about the witnesses and their testimony directly relevant to the issues in this appeal. Based on a full review of the trial evidence, credibility determinations, and the trial court's findings of fact the trial court's decisions regarding the military retirement issue should be sustained as within her sound discretion. The trial court treated the issue as one of interpreting the decree and a request

for modification, but even if the issue were one of clarification of the decree, there was substantial un rebutted testimonial evidence by the Respondent as to the reason the retirement was listed but not checked as awarded to the Appellant. The trial court's decision should be affirmed.

## **VI. ARGUMENT**

1. The trial court erred when ruling that the Guardian ad Litem fees were not limited to the deposit amount in the order appointing Guardian ad Litem.

The trial court made an error of law when determining the Guardian ad Litem did not have a limit on the fees and costs as stated in the order appointing the guardian ad litem. The guardian ad litem was appointed by the court on December 21, 2012, and the first bill (or any accounting of her time, costs, or activities) was provided by the Guardian ad Litem on May 08, 2013. The guardian ad litem is appointed by the Court and has limited authority as contained within the order appointing the guardian ad litem and the applicable statutes. In the order appointing the guardian ad litem under section 3.5 the limitations on what the guardian ad litem may charge and thus time spent on the case are clearly indicated with a maximum she can charge without first getting court review and approval. This Guardian ad Litem was specifically limited to \$100.00 per hour up to \$2,200.00 unless she sought court review and

approval to go over this amount. This limitation is necessary because the parties do not hire the guardian ad litem and cannot control the expenses incurred like they can when they hire an attorney or expert. Therefore, the Court sets the maximum allowed to be charged without first having a court review where all parties are given adequate notice and an opportunity to be heard about whether the guardian ad litem should be allowed to exceed this maximum amount and whether the guardian ad litem services are compliant with the court order. Further the order appointing the guardian ad litem in section 3.5 it clearly indicates, “The total amount awarded shall be at the discretion of the court up to the maximum amount allowed after the Guardian ad Litem files an itemized statement of time with the court...” (emphasis added) Another obligation in the court order that the current Guardian ad Litem failed to follow and comply was providing monthly billing statements to allow the parties to review the work and time spent and if necessary seek court review of the work and time being spent. The last sentence of section 3.5 reads, “Guardians at Litem who are not volunteers shall provide the parties with an itemized accounting of their time and billing for services each month.” (emphasis added). This obligation is also stated in RCW 26.12.175(1)(d) that is referenced in RCW 26.09.220. This guardian ad litem failed to follow the court order and desired to have the trial court change the court order to read that there

is a “blank check” to allow the court appointed guardian ad litem unlimited authority to charge whatever she wants with no fair warning to the parties and no opportunity to be heard prior to incurring three (3) times the maximum fees allowed by the court order. This should not be allowed by the Court. Any guardian ad litem could very easily avoid any issues of providing work without payment by keeping contemporaneous time records, providing the required monthly billing statements, and if the time looks like it will exceed the maximum allowed under the court order, then file a motion with the court for the required review, notice, and opportunity to be heard on the issue prior to incurring those fees/costs. This would also assure that parties’ constitutional rights are protected. Article I, section 3 of the Washington State Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” Funds paid to a guardian ad litem are property and there was no due process notice and right to be heard prior to exceeding the amount allowed in the order appointing the Guardian ad Litem. This Court should not ignore an unambiguous court order, statutory framework, and constitutional relevance by allowing a court appointed guardian ad litem to exceed the fees limitation and due process requirements to exceed those fees. Once the Court determines that there is no authority to allow fees and costs above the court order maximum of \$2,200.00, the Appellate Court

should order this amount the maximum allowable to the Guardian ad Litem. The trial court's discretionary determination of the division of the allowable guardian ad litem fees should be affirmed.

2. The trial court did not err when awarding child support to the Respondent from July 2012 through November 2012, but erred when denying child support from December 2012 through July 2013.

The trial court did not err in determining that the child primarily resided with the Respondent from July 2012 through November 2012 and the Respondent should be awarded child support for those months. There was disputed testimony at trial on whether there were agreements between the parties on where the child would primarily reside and the trial court determined that the Appellant in fact did not incur any child related expenses during that time and the Respondent should be awarded child support. However, the trial court erred in reading the Order Re Adequate Cause (Modification of Parenting Plan) entered on November 21, 2012, wherein on page two (2) lines 16-17 the order reads, "The court also heard argument on the mother's Motion for Back Support. The court finds that no past due child support is due the mother, and the father's child support obligation is suspended." The trial judge interpreted this order and the intent of the parties "to stay any obligations pending hearing on the

underlying petition to modify the parenting plan.” (CP 196, lines 18-26)

The wording of the order clearly indicates the Appellant is not entitled to child support and the Respondent’s obligation to pay child support was suspended, but not the Appellant’s obligation should a motion be made or the trial court determine otherwise after trial. Because the Respondent was the actual primary parent incurring all expenses for the child from December 2012 through July 2013, he should also be awarded child support for those months. Lastly, a new order of child support was not filed until March 18, 2014, and the Respondent’s child support obligation should resume at that time.

3. The trial court did not error when interpreting the Decree of Dissolution of Marriage and denying the Appellant’s request to modify the decree.

The trial court made many detailed findings of fact and credibility determinations about the witnesses and their testimony directly relevant to the issues in this appeal. The Court of Appeals reviews findings of fact for substantial evidence, which is evidence sufficient to persuade a fair-minded person of the finding's truth. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *cert. denied* 133 S.Ct. 889 (2013). The reviewing court does not retry the facts on appeal. *In re Marriage of*

*Thomas*, 63 Wn.App. 658, 660, 821 P.2d 1227 (1991). Therefore, the reviewing court does not review the trial court's credibility determinations or weigh evidence. *In re Marriage of Meredith*, 148 Wn.App. 887, 891 n.l, 201 P.3d 1056 (2009). Unchallenged findings of fact are verities on appeal. *In re Marriage of Fiorito*, 112 Wn.App. 657, 665, 50 P.3d 298 (2002). Based on a full review of the trial evidence, credibility determinations, and the trial court's findings of fact the trial court's decisions regarding clarification of the military retirement issue should be sustained as within her sound discretion.

The Decree of Dissolution of Marriage entered on February 26, 2008, was a standard court form with many, many sections with boxes next to them that were left unchecked indicating they did not apply. The relevant section regarding whether the Appellant was entitled to any of the Respondent's military retirement had a section listing a potential award of military retirement but was unchecked, as were many other sections, indicating she was not entitled to a division of his retirement. (*CP 43, section 3.3*) The trial court interpreted the decree as awarding no portion of the retirement to the Appellant and thus by default 100% of the Respondent's retirement remained with him. (*CP 228, section 2.5, lines 1-13*) This was based on a reading of the Decree of Dissolution of Marriage and testimony by the parties at trial. The Appellants request to modify the

Decree of Dissolution of Marriage was denied by the trial court and was not an abuse of her discretion. Yet, even if the issue was seen as a clarification of the Decree of Dissolution of Marriage, there was substantial evidence at trial to sustain this same result.

Washington courts review a clarification of a dissolution decree de novo, but review a modification of the decree for abuse of discretion. *See Stokes v. Polley*, 145 Wn.2d 341, 346, 37 P.3d 1211 (2001); *In re Marriage of Holmes*, 128 Wn.App. 727, 734-36, 117 P.3d 370 (2005); *In re Marriage of Spreen*, 107 Wn.App. 341, 346, 28 P.3d 769 (2001). A clarification merely defines the rights and obligations the court already gave to the parties in their dissolution decree. *In re Marriage of Christel and Blanchard*, 101 Wn.App. 13, 22, 1 P.3d 600 (2000). In contrast, a modification extends or reduces those rights and responsibilities. *Christel*, 101 Wn.App. at 22 (citing *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969)). Under either scenario, the result reached by the trial judge was amply justified by the court record. As indicated in the trial judge's written decision and final order:

The Court finds that there is insufficient basis for modifying the Decree of Dissolution which does not award a portion of the Petitioner's retirement to Respondent. Noteworthy, the Court heard very specific testimony from Petitioner about the reason that

provision was unchecked in the final Decree. This testimony was not controverted. Respondent provided no testimony or evidence to indicate that this was not a provision under negotiation up until the final day, and that the parties had agreed that Respondent would not receive a portion of Petitioner's retirement in light of the final assignment of debt, assets, and maintenance. (*CP 200, lines 1-12*)

The Appellant ignores the testimony referred to by the trial judge and misstates the evidence by drawing attention to the Decree of Dissolution of Marriage attachment A listing assets since the main asset listed for the Respondent was \$20,000.00 valued property that was disposed of at no net gain to the Respondent many years prior to their divorce, testimony the trial court found credible and uncontroverted when deciding as aforementioned. Additionally the Appellant misstates the trial testimony of the Respondent, "Mr. Edwards agreed that the parties failed to award the retirement to any party in the decree under cross examination." (*Appellant's brief page 2*). In fact, the Respondent testified that the retirement was not listed on attachment A, but then testified that the expectation of both parties after the negotiation was that since she was not awarded any of his retirement, then he would retain 100% of this retirement. Additionally, by including the military retirement in the draft decree the trial court determine that the retirement was obviously

considered by the parties, but by not checking the box to award a portion to the Appellant the parties agreed the Respondent retains his retirement; there is no property not disposed of requiring tenants in common. Therefore, the trial court's decision regarding the military retirement pay should be affirmed.

## **VII. CONCLUSION**

The trial court was in error to allow and order fees and costs for the Guardian ad Litem above the amount listed in the order appointing Guardian ad Litem. The Respondent requests the Appellate Court to determine the Guardian ad Litem fees are limited to those indicated in the order appointing the Guardian ad Litem because no prior approval after notice and opportunity to be heard was given by the court.

The trial court did not err when awarding child support to the Respondent from July 2012 through November 2012, but erred when denying child support from December 2012 through July 2013. The Respondent was the actual primary parent incurring all the child rearing expenses during this time. The Respondent's child support obligation was suspended by the November 21, 2012, court order and thus until the new order of child support was entered on March 18, 2014, he should not have been assessed child support.

The trial court was correct when interpreting the Decree of Dissolution of Marriage and denying the Appellant's request to modify the decree to now award her a portion of the Respondent's military retirement. The trial court's decision was based on a sound reading of the decree, listening to testimony of the parties, credibility determinations of the witnesses, and substantial evidence. The trial court's decision regarding the military retirement pay should be affirmed.

Dated this 30<sup>th</sup> day of September 2014. Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Philip B. Wade', written over a horizontal line.

Philip B. Wade, WSBA#37570  
Attorney for Respondent Mr. Edwards

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3  
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5  
6 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
7 DIVISION TWO

8 In re the Marriage of:

Case No.: **46142-1-II**

9 DESTRY EDWARDS,  
Respondent/Cross-Appellant,  
10 and

**Notice of Service**

11 REBECCA EDWARDS,  
Appellant/Cross-Respondent.  
12

***I Declare:***

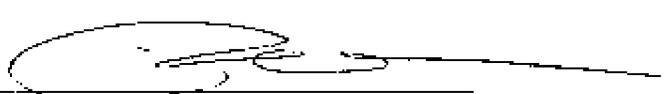
13 I am over the age of 18 years and I am not a party to this action. I served Mr. Steven  
14 Tyner, attorney for Ms. Rebecca Edwards the following documents:

- 15  
16 1. Brief of Respondent. (total of 22 pages)

17 Served on September 30, 2014 Time: 4:05 PM  
18

19 Service was made by mailing postage paid USPS to Mr. Steven Tyner's office of  
20 business 921 Austin Avenue, Port Orchard, WA 98366.

21 I declare under penalty of perjury under the laws of the state of Washington that the  
22 foregoing is true and correct. Signed at Bremerton, WA on September 30, 2014.

23  
24   
25 Phillip Wade, JD, GM