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COURT OF APPEALS  
DIVISION II

2016 MAR 11 PM 4:50

STATE OF WASHINGTON

BY DM  
DEPUTY

NO. 47832-3-II

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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KAIN K. KIRKENDOLL, Appellant

v.

KRISTIN A. KIRKENDOLL, Respondent

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REPLY BRIEF OF APPELLANT

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ORIGINAL

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In re Marriage of Watson, 132 Wn.App. 222, 130 P.3d 915, (2006)

Wold v. Wold, 7 Wn.App. 872, 878, 503 P.2d 118 (1972).

### **Statutes and Rules**

IRC §§ 212(1); Regs. §§ 1.262-1(b)(7)

RCW 26.09.020

RCW 26.09.080

RCW 26.09.187

RCW 26.09.191

### **Other Authorities**

Fishman, Pratt, Griffith, Wilson, et. al., Guide to Business Valuations, Vol. 1, page 2-5 (PPC Publishers, February, 1999).

Pratt, Reilly & Schweihs, Valuing Small Businesses and Professional Practices, 2d. ed., p. 410-411 (Irwin Professional Publishing 1993)

## I. INTRODUCTION

Throughout this case, Respondent, Kristin Peterson, has attempted to obfuscate the issues by making false and inflammatory claims about her former husband, Kain Kirkendoll. 1RP 103-105, 121-127, 168, 173, 179-182. These allegations have largely concerned whether Kain provided adequate discovery and whether he used the business account for personal use. Kristin sought to have Kain found in contempt on multiple issues related to these purported concerns. Appendix A<sup>1</sup>. She failed with the exception of one. Appendix B. After Kristin closed the business checking account, disrupting payroll, and withdrew \$6,500 from the business trust account - in violation of state law - Kain removed her name from the trust account. He was found in contempt when he failed to reinstate her name on the account. Appendix C at page 13-14.

Neither the court commissioner nor the trial court found that Kain had acted inappropriately with regard to discovery. Appendix B, CP 176-191. Kristin opted not to conduct any discovery because Kain voluntarily

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The Motion for Contempt, Order on Contempt and Responsive Declaration re: Contempt are attached as Appendices A-C, respectively. These orders have been designated through a supplemental designation filed on March 10, 2016, clerk's page numbers have not been issued. The Findings of Fact are also appended at Appendix D for convenience.

and repeatedly provided information when requested. Tellingly, she never filed a motion to compel disclosure of any information. IRP 101, 231-233.

Similarly, neither the court commissioner nor the trial court found that Kain had used the business account for personal use, nor did they find that any of the expenses he claimed were for anything other than normal business expenses commonly charged by small business owners. Appendix B, CP 176-191. The expenses were not excessive (IRP 54-59) and there was absolutely no evidence presented that he charged such things as meals and entertainment, as falsely claimed in the responsive brief (at page 23). The commissioner found that Kain received an additional benefit from the business in that he reimburses himself for his automobile mileage per the federal guideline every year. But there was no finding of wrongdoing or deception in this regard. Appendix B.

Kain paid the business valuation expert from the business account because the mediator suggested that he could. IRP 88-89. This is consistent with Dolese v. United States [79-2 USTC ¶9540], 605 F.2d 1146, 1152 (10thCir. 1979) and (IRC §§ 212(1); Regs. §§ 1.262-1(b)(7). The expert testified that all expenses were normal and appropriate. Other than the expert witness fee, the expenses were the same as those charged

throughout the marriage, when the parties ran the business together. IRP 58-59. The expenses were also approved by the parties' mutual accountant I RP 17-19.

None of these ancillary and unsubstantiated claims are germane to the issues presented. They did not impact or influence the trial court's division of assets, maintenance award or child support order. They certainly did not influence the parenting plan, and they are not mentioned in the Findings of Fact and Conclusions of Law (Appendix D).

The issues presented in this case arise from the court's failure to make requisite findings and its failure to consider and be guided by the factors required in relevant statutes. Thus, the court abused its discretion.

## **II. REPLY ARGUMENT - PARENTING ISSUES**

### **A. One 7.5 hour visit every other week, beginning at church, clearly constitutes a restrictive parenting plan.**

Kristin takes the remarkable position that Kain's visitation is "unrestricted" and he may enjoy "unlimited additional time" with his daughter (Respondent's Brief at pp. 12, 14.) In reality, Kain is allowed no greater visitation than 7.5 hours every other week unless his 14-year old daughter unilaterally decides to allow it. The trial court was clear.

[M]y order would be that there be a school schedule, and then it be essentially **what your daughter requested**, which is

that she go to her dad every other Sunday morning at St. Christopher's church, and she then go back to her mom's the same day at 6:00 o'clock. That she have the ability to talk to her dad and see if they can agree on something in addition to that, but, barring that, that would be the schedule ... (RP 329, emphasis added.)

Kristin argues that the best interests of the child are paramount, but there were no findings or evidence that visitation akin to that provided in the temporary plan was not in the child's best interests. To the contrary, fostering a strong parent-child relationship with both parents is in the best interests of the child. This is why the legislature affirmatively embraced the policy that "the relationship between the child and *each* parent should be fostered unless *inconsistent* with the child's best interests." RCW 26.09.020, emphasis added.

In fact, Kristin testified that she agreed that the then-existing (temporary) parenting plan should remain in place. This plan gave Kain three days and one overnight every week, in addition to vacations, holidays and two weeks during summer. 1RP 169-171. *Kristin further testified that this plan was in the best interest of her daughter.* 1RP 171. Nonetheless, the trial court, on its own initiative, severely reduced Kain's visitation, contrary to the wishes of both parents and the child's best interests, according to the testimony of both parents. 1RP 134-137, 171.

The parenting plan entered by the trial court requires Kain to start his visits at church every other Sunday and return her to Kristin by 6:00 pm the same day. He is afforded no additional time with his daughter for vacations, summer, or holidays, with the sole exception being Father's Day.

In the absence of limiting factors under RCW 26.09.191, this Court has found two eight-hour visits per month to be restrictive. In re Marriage of Watson, 132 Wn.App. 222, 130 P.3d 915 (2006) (“...the court continued to *restrict* Watson’s visitation to one eight-hour unsupervised visit every two weeks,” despite having no basis to do so. Id at 918, emphasis added.)

Kristin argues that Watson is not applicable because it involved a parenting plan modification. However, the type of petition is not the issue. The pertinent fact is that this Court found the eight-hour visit every other week to be restrictive. In Watson, allegations were made that the father had sexually abused the child. The court found that the allegations were unfounded, but left the eight-hour restriction in place. This Court reversed and remanded for reinstatement of the original parenting plan. In this case, as in Watson, the court was faced with facts that do not amount to a basis for restrictions under the statute. With absolutely no finding of wrongdoing or danger to the child, it ordered a plan even *more* restrictive than in Watson.

A parenting plan which provides only one 7.5 hour unsupervised visit

every two weeks is clearly restrictive and requires the court to make findings under RCW 26.09.191 as noted in Marriage of Littlefield, 133 Wn.2d 39, 55, 940 P.2d 1362 (1997) (ordering a restrictive parenting plan not permissible in the absence of express findings pursuant to RCW 26.09.191).

Kristin further argues that our statutes do not provide for a mandatory minimum amount of visitation, citing RCW 26.09.187(3)(b). She emphasizes that the court “*may*” order frequently alternating contact with both parents. But this provision provides authority to order substantially equal time with both parents, and has no bearing on this case. The relevant provision is RCW 26.09.187(3)(a) which states:

“The court *shall* make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances.” Emphasis added.

The ruling of the trial court drastically reduced Kain's time, decreasing it from three days and one overnight *every* week, to 7.5 hours every two weeks. This prohibits him from maintaining the loving, stable, and nurturing relationship with his child afforded to him under the law.

While there may not be a mandatory *minimum* amount of visitation, this Court recognized in Watson that there is a concept of *standard* visitation. “Watson received standard visitation rights, including alternating weekends,

Thursday evenings, and holiday and summer residential time.” Id at 916.

Kristin’s position, that restrictions must be overtly identified as such, suggests that it should be easier for trial courts to impose limitations on parents with no limiting factors than on those with limiting factors. If limiting factors exist, such as a history of abuse or domestic violence, then the court must make explicit findings under RCW 26.09.191. But if such limiting factors do not exist, the trial court, under Kristin’s theory, could limit visitation severely without making any relevant findings.

The Court of Appeals in Katare v. Katare, 125 Wn.App. 813, 105 P.3d 44 (2004), disagreed with Kristin’s position. There, the Court indicated, at footnote 11, the mother contends that “... the trial court was not required to enter RCW 26.09.191 findings because the limitations it imposed are not .191 restrictions. She relies on the boilerplate language from the parenting plan form to argue RCW 26.09.191 applies only where a court limits or prohibits a parent's contact with the children and the right to make decisions for the children. But RCW 26.09.191 is not so limited.”

One 7.5 hour visit every two weeks, where each visit must begin at church, is a restrictive parenting plan by any definition. To hold otherwise would permit courts to impose restrictions without a basis to do so, simply by excluding the word “restriction” from a clearly restrictive order in

violation of the ruling in Littlefield, supra.

**B. The trial court ceded its authority to determine the residential schedule, and to modify that schedule, to the child**

Kristin does not address the fact that the trial court erred in ordering a parenting plan in which the child's wishes control in the setting of the residential schedule. The trial court may have considered the child's opinion in setting the schedule as just one factor, but the day after the court signed the parenting plan, the child became the arbiter of the current and future plan.

Further, by putting visitation control in the child's hands one month after she turned 14, Kain has essentially been relegated to the role of friend. Kain testified that his daughter needed his guidance with regard to her schooling and that historically she needed her feet held to the fire to complete homework. She seemingly confirmed this, stating to the court that her father made her anxious when doing her homework. Parents often have to enforce rules, set limits, and take other action that makes their children unhappy, or "anxious." As a parent, Kain had this right; but the trial court took that away. His ability to parent his daughter with regard to homework, or any other issue, has been utterly destroyed under the parenting plan ordered by the court. If he attempts to actually parent his child, there is an exceedingly high likelihood she will simply refuse to see him.

The ruling in Kirshenbaum v. Kirshenbaum, 84 Wn.App. 798, 929 P.2d 1204, 1208 (1997), directly addresses parenting plans that grant “the power of alteration to private parties.” Id at 1207. The ruling permits such delegation of authority to an “arbitrator,” only where the court retains the ultimate authority to review the decision. Id at 1208. A 14-year-old child is certainly not an arbitrator, and the court did not retain the authority to review her decisions. Thus, the parenting plan as ordered constitutes a clear abuse of discretion.

### III. REPLY ARGUMENT - FINANCIAL ISSUES

**A. The trial court did not value the business at \$200,000, and its failure to set a value to resolve this material fact was error.**

Kristin does not dispute that the value of the business was a material fact about which the parties disagreed, and that it required resolution at trial. Nor does she dispute that it would be error if the trial court failed to decide the issue of value. Instead, Kristin summarily asserts that the trial court “adopted a valuation of the business of \$200,000” (Respondent’s Brief at 18).

1. The cited provision in the Findings of Fact and Conclusions of Law is a description of testimony, not a finding of value.

Kristin misrepresents the Findings of Fact in her claim that the trial court valued the business at \$200,000. The only reference to the \$200,000 figure in any of the final orders is the following sentence in the Findings:

“Ms. Brown testified that using the figures from 2014, and applying them to the worksheets she had prepared based on 2013, would support a valuation in the \$200,000 range.” CP 178.

This is clearly a description of the testimony, not a finding that the value is \$200,000. The same paragraph contains the following sentence:

“Mr. Kirkendoll presented testimony through his expert, Devon Brown, CPA CVA of the accounting firm of Dwyer Pemberton & Coulson, PC, who valued the business at \$100,000 net.” CP 178.

Again, this is a description of testimony, not a finding that the business value was \$100,000.

In its Letter Opinion, the court simply stated that the business was worth “significantly more than \$100,000,” and adopted Kristin’s Exhibit 22. CP 16.

2. The court expressly adopted Exhibit 22 which contains a value range for the business of \$100,000 to \$1.2 million

The Findings also contain this statement:

“The court will adopt Respondent’s Exhibit 22 with respect to the division of property and liabilities.” CP 179.

Exhibit 22 states that the business has a value of \$100,000 to \$1.2 million. The next statement in the Findings is the following:

“*Regardless of the valuation* placed on the parties’ business, the award results in significantly less in assets being awarded to Respondent Kristin Kirkendoll than are being awarded to the Petitioner, Kain Kirkendoll.” CP 179, emphasis added.

The phrase “regardless of the valuation” is consistent with the trial court’s actual finding: a value between \$100,000 and \$1.2 million. This language belies Kristin’s claim that the court explicitly valued the business at \$200,000 and, instead, evidences the court’s decision *not* to value the business. The court’s approach is in stark contrast with the requirements of existing case law. Marriage of Hall, 103 Wn.2d 236, 243, 692 P.2d 175 (1984), Wold v. Wold, 7 Wn.App. 872, 878, 503 P.2d 118 (1972).

3. The court specifically adopted the valuations in Exhibit 22

Kristin’s claim that the court adopted Exhibit 22 for division of property and liabilities but *not* for valuations, is both nonsensical and demonstrably false. The following is not a “vague oral statement” as claimed by Kristin, it is clear, unambiguous, directly relevant, and it was made *during the presentation hearing at which the trial court signed the final orders*.

“I thought by adopting the exhibit, the Court essentially took care of all valuations.” 2RP 25-27

The court also indicated, again referring to Exhibit 22, that it thought the respondent’s valuation of property was reasonable and that the “mathematical certainty of the values did not make a significant or substantial difference” and that “a disagreement as to specific values” would “not change the result.” (2RP 26-27) Again, these comments confirm that the trial court

adopted a range of more than a million dollars instead of an actual value. And this is the asset that the trial court deemed the largest in the estate. 2RP 25-26

In fact, both the Findings of Fact and the Decree of Dissolution contain a full list of all of the property and liabilities (without values), evidencing that the purpose in attaching Exhibit 22 to the Findings is *exclusively* to show the asset valuations. CP 176-191, 192-200.

4. The expert did not value the business at \$200,000, or change her testimony

Kristin's claim that the expert testified that the business would have a value going forward of "closer to \$200,000" is yet another blatant, easily refutable misrepresentation.

The expert, Ms. Brown, used a three year weighted average of income as part of the basis for valuation. 1RP 46. She was asked on cross-examination what would happen if, hypothetically, she only used one year instead of three, and she testified that the value might be \$78,000 higher, but not double (meaning, not \$200,000). 1RP 47. She further testified that using only one year *would not be the appropriate valuation method* (1RP 59-60) Her opinion remained that the value of the business was \$100,000. 1RP 61.

Kristin states that Kain argues the trial court based its finding on "inexpert testimony." Respondent's Brief at 18. To the contrary, Kain simply

pointed out that this case is more clearly an abuse of discretion than in Marriage of Hall, 103 Wn.2d 236, 256, 692 P.2d 175 (1984), where the wife testified in support of her valuation figure, and an expert testified in support of the husband's valuation. The trial court concluded that the wife's valuation was correct. The Supreme Court in Hall found that the wife's inexperienced testimony was insufficient to determine the value of the business. In this case, Kristin did *not* testify regarding the value of the business. In fact, the *only* evidence presented regarding business valuation was that of the expert witness, Devon Brown, and her testimony was that the business value was \$100,000.

5. The trial court related the maintenance award to property division

Remarkably, despite clear statements in the trial court's findings, Kristin describes Kain's argument in this regard as a "novel proposition." The trial court expressly stated in the Findings of Fact and in its Letter Opinion, that the maintenance award was to compensate the wife for her interest in the home and business. The following language is in both documents:

"The only way to realistically compensate the Respondent for her significant investment of time and energy in the business and family home is to award her substantial spousal maintenance." CP 16, 178.

Further, under the community property provision, the following

language is in the Findings:

“The division, [of property] however, is appropriate when taken into consideration with the award of maintenance as more specifically addressed in Paragraphs 2.12 below.” CP 179.

Finally, the court made the maintenance non-modifiable based on remarriage or cohabitation. The trial court expressly found:

“Maintenance should not terminate or be modified based on Respondent’s remarriage or co-habitation, because maintenance is also being utilized in this case to provide for a fair and equitable distribution of the assets and liabilities as well as meeting the needs of Respondent.” CP 184, emphasis added.

This is a common practice when setting maintenance as a property award, but not when setting maintenance based on need. “Our cases hold that the provisions of a divorce decree relative to alimony may be modified on a proper showing” ... “however, the disposition of property made either by a divorce decree or by agreement between the parties and approved by the court cannot be so modified.” Messersmith v. Messersmith, 68 Wn.2d 735, 415 P.2d 82 (1966).

Maintenance is an obligation paid out of earnings. A property division, on the other hand, disposes of the property of the parties, both community and separate, presumably upon an equitable basis. Such a division cannot always be conveniently effected by a present allocation of property to each party, and in a proper case, maintenance payments may be ordered in

lieu of a property award. In such a case, the award is non-modifiable. Thompson v. Thompson, 82 Wn.2d 352, 358, 510 P.2d 827 (1973), Marriage of Snyder, No. 37271-1-II (Wash. Ct. App. Mar. 10, 2009). The fact that the court made maintenance non-modifiable evidences the intent to award maintenance in lieu of property disbursement.

If the maintenance award is viewed as property disbursement, then that disbursement is so inequitable that Kristin received well over 100% of the assets while Kain received a negative percentage. If based on the statutory factors, it fails because the court ignored the fact that Kain cannot meet his own needs while paying the maintenance ordered, as will be discussed below in Section C.

#### 6. Conclusion

Valuation of the business is not simply a procedural hoop through which the trial court needed to jump, as implied in Kristin's responsive brief. It is an imperative step in any dissolution involving a business, and it is particularly important in the case at bar.

The failure of the court to value the business, listing a million dollar range instead, created irreparable confusion over whether the property award was equitable and created numerous issues related to the award of maintenance. Valuation of the business is, in fact, the starting point from

which a determination of the equities in this case must inevitably begin.

Without it, such a determination is simply impossible.

**B. The trial court double-dipped in two instances: first, when it awarded the 2014 undistributed business profit of \$72,000 to Kain in addition to the award of the business itself; and second, when it awarded maintenance based on the undistributed excess earnings from the business**

1. The Concept of Double-Dipping

One of the most prevalent problems in family law cases involving a business or professional practice valuation is “double-dipping.” Generally speaking, double-dipping can be understood as counting the same income stream twice – first as an asset for the division of property and then again for the determination of spousal support.

Among the leading cases addressing the concept of “double-dipping” is Grunfeld v. Grunfeld, 94 N.Y.2d 696 (2000). In Grunfeld, the New York Court of Appeals succinctly identified this concept by stating:

We agree with the defendant that the Supreme Court [trial court in New York] impermissibly engaged in the “double-counting” of income in valuing [the husband’s] business, which was equitably distributed as marital property, and in awarding maintenance to the [wife]. . . Here, the valuation of the [husband’s] business involved calculating the [husband’s] projected future excess earnings. Thus, in valuing and distributing the value of the [husband’s] business, the Supreme Court converted a certain amount of the [husband’s] projected future income stream into an asset. However, the Supreme Court also calculated the amount of maintenance to which the [wife] was entitled based on the [husband’s] total income, which must have

*included the excess earnings produced by his business. This was improper.* ‘Once a court converts a specific stream of income to an asset, that income may no longer be calculated into the maintenance formula and payout.’ Grunfeld, 94 N.Y.2d at 705, citing McSparron v. McSparron, 87 N.Y.2d 275 (1993). See also Rattee v. Rattee, 767 A.2d 415 (N.H. 2001) (business income exceeding “reasonable compensation” that was utilized to calculate value of business was properly disregarded for support calculation purposes, thus avoiding “double-dip”). Emphasis added.

Most jurisdictions which have addressed double-dipping distinguish between excess earnings attributable to the ownership of a business, and a reasonable salary based on management of the business. (see Grunfeld and Rattee, *supra*). The distinction is between a reasonable owner salary, which is frequently deducted from the income stream in determining value, and the excess earnings, which are clearly part of the asset being awarded to the owner. See Dalessio v. Dalessio, 409 Mass. 821 (1991) (Must identify separate portions of an asset separately for property and support obligation. Unless the separate components can be identified, quantified and separated, an impermissible double-dip has occurred). See also Adlakha v. Adlakha, 65 Mass. App. Ct. 860, 866-867 (2006) (no double-dip where alimony and property awards were based upon consideration of separate components of spouse’s income from medical practice).

## 2. Washington Law re: Double-Dipping

Washington courts have recognized and upheld the double-dip

concept. See Marriage of Porter, Wash: Court of Appeals, 1st Div. 2007 (consideration of a party's business income stream in both the property division and maintenance award would be "double-dipping") Marriage of Barnett, 63 Wn.App. 385, 388, 818 P.2d 1382 (1991) (Maintenance award was essentially a distribution of assets already effected by a lien to the wife, and thus impermissibly distributed same property twice).

In Marriage of Valente, 179 Wn.App. 817, 320 P.3d 115 (2014), a double-dip did not occur because the expert carved reasonable owner compensation "out of the income stream for valuation" and the maintenance award was based on that compensation (excluding excess earnings). It was thus permissible to use the reasonable compensation to determine maintenance. Id at 121. This is consistent with the above cited cases.

### 3. Double-Dipping in the Case at Bar

The expert in this case used the capitalization of earnings approach because she found it to be the most appropriate after considering all common approaches. 1RP 23-25. As part of her analysis, she normalized Kain's income to \$75,000 (a decrease of \$2,000 from his actual salary, indicating that Kain is not underpaid). 1RP 21. Kain's normalized income of \$75,000 was also deducted from annual income in the determination of value. Exhibit 9, at p.11). Her value using this approach was \$100,000. 1RP 13, 19, 27, 29, 61.

To calculate child support and spousal maintenance, the court used Kain's actual salary of \$78,000. But the court added to this figure the earnings above his actual salary (excess earnings) of \$72,000. CP 16, 178. *Even if these undistributed excess earnings were actually available to Kain for his personal use, the inclusion of this income for determining maintenance, together with the award of the value of the business, is an impermissible double-dip. Porter, Barnett, and Valente, supra.*

Without application of the double-dip concept, the maintenance award is still improper. The profits realized above Kain's normal salary were not distributed to him, but applied to mandatory capital contributions required to reduce debt due and owing, and business taxes. This is, in actual practice, a phantom income. The undistributed profits should not be considered for maintenance or child support. In re: Marriage of Mull, 61 Wn.App. 715, 722, 812 P.2d 125 (1991) (Mandatory capital contributions should not be considered as net income for support.)

#### 4. Awarding One Asset to a Party Twice

It is basic valuation theory and a fundamental principal of business valuation that the value of a business is equal to the past and future income of the business. Fishman, Pratt, Griffith, Wilson, et. al., Guide to Business Valuations, Vol. 1, page 2-5 (PPC Publishers, February, 1999).

Separate and distinct from the double-dip regarding maintenance, there can certainly be no debate that the award of a business, together with an award of the business income, *as an asset*, to one party is impermissible. See Barnett, supra. In reality, this is awarding one asset twice (three times, when considering the maintenance award).

The award of the 2014 undistributed excess earnings of \$72,000 to Kain, which was already included in the value of the business also awarded to him, is a far more obvious error than a traditional double-dip. Not only did the trial court award maintenance based on the income of the business already awarded to Kain, it awarded the undistributed excess earnings to him as a separate, additional asset, which contributed greatly to the wildly inequitable final orders in this matter.

Kristin argues that the goodwill of the business is separate and distinct from the business income. This argument is incorrect. As indicated above, in valuation theory, the goodwill *is* the benefits an owner receives in the form of net cash flow. Fishman, supra. See also Pratt, Reilly & Schweihs, Valuing Small Businesses and Professional Practices, 2d. ed., p. 410-411 (Irwin Professional Publishing 1993), (Goodwill is essentially the ability of an owner to enjoy benefits from the business.)

5. No Withdrawal and Mutual Use

The \$72,000, "Funds Taken from Washington Home Center," is the profit above Kain's salary from 2014, or "excess earnings." 1RP 216. The claim that Kain "withdrew \$72,000 from the business during the pendency of the dissolution" is misleading. Kain did not withdraw \$72,000 and squander it. He paid business debt. Specifically, the mandatory Note on the business for \$48,000 and taxes on business profit of \$24,000. None of these undistributed profits were available to Kain for discretionary spending. These facts are not in dispute and never were. 1RP 22-23, 27-28, 84-85.

Further, *the parties lived together as a married couple until May 2014* (CP 7). *From June through December 2014, Kain paid Kristin maintenance* (Appendix C at p. 6), *so both parties shared all funds that were available to the community during 2014.*

Finally, to the extent that any business income affected the value of the business, by paying down the principal on the Note, for example, Kristin also received the benefit of that income because it was included in the valuation - as, again, was the income itself.

6. Double Awards - Conclusion

The trial court's decision to base maintenance on Kain's income, including excess earnings, while also awarding Kain the value of the business, is an impermissible double-dip and should be reversed. In addition,

the excess earnings were undistributed and unavailable to Kain as they consisted of mandatory capital contributions and taxes which should have been excluded from net income for determining maintenance, Mull, supra.

The trial court's decision to award Kain the value of the business, which includes its income, while also awarding him \$72,000 of that income as a separate asset is also an impermissible double-dip. This abuse of discretion is especially poignant, as the 2014 business income was shared by the parties, and the excess earnings were undistributed and unavailable to Kain for discretionary spending.

**C. The excessive maintenance award was an abuse of the trial court's discretion**

Whether considered property disbursement, or based on the statutory factors, the award of maintenance in this matter creates a patent disparity in the economic circumstances of the parties. Thus, it is an abuse of discretion. Marriage of Rockwell, 141 Wn.App. 235, 243, 170 P.3d 572 (2007).

The trial court indicated that maintenance was related to the property distribution with this language: "The only way to realistically compensate the Respondent for her significant investment of time and energy in the business and family home is to award her substantial spousal maintenance." CP 16, 183. The court also made reference in the Findings that the maintenance

statute was a basis for the award. CP 183. Under either theory, the award creates a patent disparity in the parties' economic circumstances.

If the award is viewed as property, it skews the distribution to such an extent that Kristin is receiving more than 100% of the estate and Kain less than zero. This is the purpose of the chart on page 37 of Appellant's Opening Brief. Kristin argues that this chart should include the future income from the business (Respondent's Brief 26-28). But the future income of the business is included in the value of the business, which is already listed (See Fishman and Pratt, supra). Such a wildly inequitable disbursement is a clear abuse of discretion.

Alternatively, if the basis for the maintenance award is not property distribution, a review of the factors provided in RCW 26.09.080, reveals the award is still an abuse of discretion. This is because, after paying the amount of maintenance and child support awarded, Kristin enjoys nearly \$7,000 per month on which to live, while Kain is left with less than \$800 per month (an amount significantly below the federal poverty guideline).

Kain did not argue, as claimed in the responsive brief (at page 26), that the court failed to review the statutory factors. Kain pointed out that the trial court utterly ignored factor f) "the ability of the spouse from whom maintenance is sought to meet his or her needs." It is impossible for anyone

to meet their needs at \$800 per month, as evidenced by the federal poverty guideline..

There was no dispute that Kain must make the Note payments in order to retain ownership of the business. There was no dispute that the amount of principal on those payments is \$48,000. There was no dispute that Kain must pay taxes on the business income. Kristin points out in her responsive brief that the trial court is not obligated to accept Kain's statement that these payments were made in 2014 (Responsive Brief at 30). But the fact that the payments were made was well documented at trial (1RP 22-23, 27-28, 84-85, Exhibit 18) and Kristin never claimed they were not made. She is not, even to this date, claiming they were not made. This fact was *never* in dispute and the court did *not* make a contrary finding.

**D. The inclusion of taxes and mandatory capital contributions in the calculation of net income for child support is an abuse of the trial court's discretion**

Kain's argument, that mandatory capital contributions and taxes must be taken into account when an award of maintenance is made, applies equally to the issue of child support and, therefore, is not repeated here. Mull, supra.

**IV. ABANDONED CROSS-APPEAL**

In August, 2015, Kristin filed a Notice of Appeal regarding the decision of the trial court not to award additional attorney's fees but has

failed to brief the issue. Thus, she has abandoned her appeal.

#### **V. ATTORNEY'S FEES**

Kain is not an intransigent or litigious party. To the contrary, his appeal is necessary and it is the only available avenue to remedy the inequitable and onerous hardship imposed by the trial court's rulings. Kain's appeal is compelling and there is no reasonable basis to award fees to Kristin.

#### **VI. CONCLUSION**

The trial court abused its discretion by ordering an inappropriately restrictive Final Parenting Plan and a grossly inequitable division of assets. Additionally, the trial court's orders regarding child support and spousal maintenance create grave economic disparity, leaving Kain with insufficient funds to pay minimal living expenses. This Court should reverse the trial court's orders and remand with appropriate instructions, such that the final dissolution orders are consistent with the requirements of Chapter 26.09 RCW and the substantial evidence in the record.

Respectfully submitted this 11<sup>th</sup> day of March, 2016.



---

Randolph Finney  
WSBA No. 19893  
Attorneys for Appellant

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

In re the Marriage of:

KAIN KLAUDE KIRKENDOLL,

Appellant,

and

KRISTIN ALENE KIRKENDOLL,

Respondent.

NO. 47832-3-II

APPENDICES TO REPLY  
BRIEF OF APPELLANT

Pursuant to RAP 17.3(a)(3), attached copies of document from the court record for *In Re Marriage of Kirkendoll*, Thurston County Superior Court Case No. 14-3-00804-1, that were referenced in Appellant Kain Kirkendoll's Reply Brief of Appellant:

Appendix A Motion for Order to Show Cause re: Contempt, Motion for Amended Temporary Order of Child Support, Amended Temporary Order re: Maintenance and Restraints, Motion for the Appointment of a Receiver (Special Master), and Application for Fees filed 5/7/2015

Appendix B Order on Show Cause re: Contempt/Judgment filed 5/28/15

Appendix C Declaration of Kain Kirkendoll - Response filed 5/12/2015

Appendix D Findings of Fact and Conclusions of Law filed 7/24/2015

**ORIGINAL**

# Appendix A

Motion for Order to Show Cause re:  
Contempt, Motion for Amended  
Temporary Order of Child Support,  
Amended Temporary Order re:  
Maintenance and Restraints, Motion for  
the Appointment of a Receiver (Special  
Master), and Application for Fees filed  
5/7/2015



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2. The entry of an Amended Temporary Order and an Amended Order of Child Support amending the Temporary Order entered December 9, 2014, to increase the Petitioner's maintenance obligation to the Respondent to \$4,300 per month, and amending the Order of Child Support to increase Petitioner's child support obligation to \$1,000 a month commencing with the month of May 2015;

3. The entry of an order clarifying the Temporary Order to provide that both parties have access to any and all bank accounts in the name of Kirkendoll Homes, LLC dba Washington Home Center, or related to Kirkendoll Homes, LLC dba Washington Home Center, including all existing accounts and future accounts, together with full and unhampered access to all books and records of the business;

4. An order appointing a Receiver (Special Master) pursuant to RCW 7.60 to over see Kirkendoll Homes, LLC dba Washington Home Center to assure both parties are informed of any and all business transactions, any and all expenses, and any and all income, and provide further that monthly Profit & Loss statements are provided to both parties together with a full accounting of accounts receivables, retained earnings, accounts payable, expenses, etc. The receiver should further be authorized and directed to provide either party upon their request or the request of either party's retained expert or their account, forensic account, bookkeeper, or investigator, any and all financial information available in the books and records of Kirkendoll Homes, LLC dba Washington Home Center. Those records should include, but not be limited to any and

Mtn. For Order to Show Cause re Contempt,  
Mtn. For Amended Temp. Order of Child  
Support, Amended Temp. Order re Maint.  
and Restraints, Min. For Appointment of  
Receiver and Application for Fees - 2

POPE, HOUSER & BARNES  
ATTORNEYS AT LAW  
1605 COOPER POINT ROAD NORTHWEST  
OLYMPIA, WASHINGTON 98502-8325  
TELEPHONE (360) 866-4000

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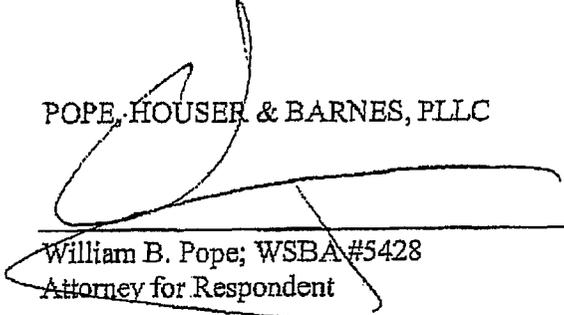
all bank accounts, bank statements, check registers, contract information, inventory information, current and prior Profit & Loss statements, balance statements, etc., and

5. For an award to the Respondent of her attorney's fees and costs incurred in bringing this matter to the court's attention and maintaining representation in this case.

This motion is based upon the files and records herein, and upon the declaration of the Respondent, Kristin Kirkendoll.

Dated: May 7, 2015.

POPE, HOUSER & BARNES, PLLC



William B. Pope, WSBA #5428  
Attorney for Respondent

*[Mirrored bleed-through text from the reverse side of the page]*

Mtn. For Order re Show Cause per Contempt,  
Mtn. For Amended Temp. Order of Child  
Support, Amended Temp. Order re Maint.  
and Restraints, Mtn. For Appointment of  
Receiver and Application for Fees - 3

POPE, HOUSER & BARNES  
ATTORNEYS AT LAW  
1605 COOPER POINT ROAD NORTHWEST  
OLYMPIA, WASHINGTON 98502-8326  
TELEPHONE (360) 866-4000

STATE OF WASHINGTON  
 County of Thurston  
 I, Linda Myhre Erlow, County Clerk and Ex-officio Clerk of  
 the Superior Court of the State of Washington, for  
 Thurston County, holding session at Olympia, do  
 hereby certify that the foregoing is a true and correct  
 copy of the original as the same appears on  
 file and of record in my office containing \_\_\_\_\_ pages.  
 IN WITNESS WHEREOF, I have hereunto set my hand and  
 affixed the seal of said court

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DATED: 5/11/02  
 Linda Myhre Erlow, Thurston County Clerk  
 State of Washington  
 by: [Signature]  
 Deputy Clerk

# **Appendix B**

Order on Show Cause re:  
Contempt/Judgment filed 5/28/15

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FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2015 MAY 28 PM 3:47

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Thurston County Clerk

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Superior Court of Washington  
County of Thurston  
Family & Juvenile Court

<p>In re:</p> <p><u>KAIN KLAUDE KIRKENDOLL,</u>    Petitioner,</p> <p>and</p> <p><u>KRISTIN ALENE KIRKENDOLL,</u>    Respondent.</p>	<p>No. 14-3-00804-1</p> <p>Order on Show Cause re:  Contempt/Judgment  (ORCN)</p> <p><input type="checkbox"/> Clerk's Action Required, ¶ 3.8</p>
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**I. Judgment Summary**

Does not apply. [See Paragraphs 2.8 and 3.7 below (Attorneys Fees and Costs) and the Order on Respondent's Motion.]

**II. Findings and Conclusions**

***This Court Finds:***

**2.1 Compliance With Court Order**

The Petitioner, Kain Klaude Kirkendoll, intentionally failed to comply with the lawful order of this court dated December 9, 2014.

**2.2 Nature of Order**

The order is related to a temporary order.

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**2.3 How the Order was Violated**

The order was violated by the Petitioner's failure to add Respondent Kristin Kirkendoll to the new bank accounts for the business. It was the court's clear intent that both parties shall have full access to any and all bank accounts, bank records, and other records related to or associated with Kirkendoll Homes, LLC dba Washington Home Center. The court shall not at this time find the Petitioner in contempt for the expenditure of funds other than his salary because of the Petitioner's explanations. The court is not ruling and this should not be interpreted as approval of the expenditures made or a finding that the expenditures made were for legitimate business purposes. The court shall reserve for final disposition of this case whether or not such expenditures shall be treated as advancements on a property award or otherwise treated as unauthorized expenditures of community funds; including the Petitioner reimbursing himself for gasoline and mileage expenses; the Petitioner paying experts of his choosing for business valuations and follow-up valuations and declarations; or the draw that was made from the business in addition to the Petitioner's salary that was taken.

**2.4 Past Ability to Comply With Order**

Petitioner Kain Klaude Kirkendoll had the ability to comply with the order of this court. He could have added the Respondent's name to any and all business accounts, which was clearly the court's intention. ~~He should have provided the Respondent with bank records and other requested information from the business.~~

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**2.5 Present Ability and Willingness to Comply With Order**

Petitioner Kain Klaude Kirkendoll has the present ability to comply with the order as follows:

Kain Klaude Kirkendoll shall immediately add the Respondent Kristin Kirkendoll's name to any and all business accounts (checking, savings, credit card, trust accounts, escrow accounts, etc.). The Petitioner shall assure that the Respondent Kristin Kirkendoll has access to any and all bank statements and records concerning the accounts standing in the name of the business, past or present.

**2.6 Back Support/Maintenance**

~~A Request for Document  
shall be made through  
eScribble~~

Does not apply.

**2.7 Compliance With Parenting Plan**

Does not apply.

**2.8 Attorney Fees and Costs**

The amount of attorney fees and costs incurred by the Respondent in bringing the action for contempt shall be specifically reserved.

**III. Order and Judgment**

***It is Ordered:***

**3.1 Contempt Ruling**

Petitioner Kain Klaude Kirkendoll is in contempt of court.

**3.2 Imprisonment**

Does not apply at this time.

**3.3 Additional Residential Time**

Does not apply.

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3.4 Judgment for Past Child Support

Does not apply.

3.5 Judgment for Past Maintenance

Does not apply.

3.6 Conditions for Purging the Contempt

Does not apply.

3.7 Attorney Fees and Costs

The amount of attorney fees and costs incurred in bringing the motion for contempt shall be specifically reserved.

3.8 Review Date

Does not apply. This matter may be brought back before the court at any time in the future if the Petitioner fails to comply with this or other court rulings.

3.9 Other

Does not apply.

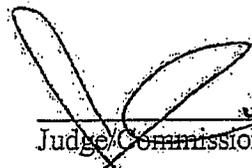
3.10 Summary of RCW 26.09.430 - .480, Regarding Relocation of a Child

Does not apply.

**Warning:** Violation of residential provisions of this order with actual knowledge of its terms is punishable by contempt of court and may be a criminal offense under RCW 9A.40.060(2) or 9A.40.070(2). Violation of this order may subject a violator to arrest.

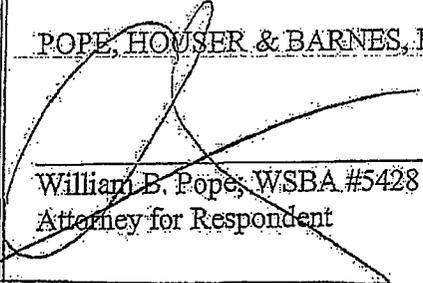
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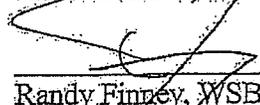
Dated: May 28 2015.

  
JONATHON LACK  
Judge/Commissioner

Presented by:  
POPE, HOUSER & BARNES, PLLC

Approved as to form and content;  
Notice of presentation waived;

  
William B. Pope, WSBA #5428  
Attorney for Respondent

BROST LAW, PC  
  
Randy Finney, WSBA # 19893  
Attorney for Petitioner

# Appendix C

## Declaration of Kain Kirkendoll - Response filed 5/12/2015

This Declaration is submitted without attachments. The Attachments will be included with the clerk's papers.

**EXPEDITE** (if filing within 5 court days of hearing)

Hearing is set:  
 Date: \_\_\_\_\_  
 Time: \_\_\_\_\_  
 Judge/Calendar: \_\_\_\_\_

No hearing set

*SUPERIOR COURT  
 STATE OF WASHINGTON  
 COUNTY OF THURSTON  
 FAMILY AND JUVENILE COURT*

In re the Marriage of:

KAIN KLAUDE KIRKENDOLL,  
 Petitioner,  
 and  
 KRISTIN ALENE KIRKENDOLL,  
 Respondent.

NO. 14-3-00804-1

DECLARATION OF KAIN KLAUDE  
 KIRKENDOLL - RESPONSE  
 (DCLR)

My name is KAIN KLAUDE KIRKENDOLL. I am the Petitioner in this action. I have personal knowledge of the facts contained in this Statement and would be willing to testify to them if called upon to do so.

**SUMMARY**

This case, my divorce, has been going on for almost a year now. Both my wife and I have paid tens of thousands of dollars in attorney's fees. We had a trial scheduled for May 4 but it was continued by court administration to the week of June 22.

The difficult issue in our case is the business, Kirkendoll Homes LLC, dba Washington Home Center Shelton. We had the business professionally valued and have

shared everything the valuator used for the valuation and all of their conclusions with Kristin and her attorney. We have received no other valuation, professional or otherwise from Kristin. We have received nothing disputing that value. The only formal discovery request was a subpoena to the expert which was received four days before the deposition was to occur and exactly five days before trial was to occur. Of course we did not object. We have also complied with many informal discovery requests including many from Kristin directly to me.

Through my attorney I submitted a very detailed settlement proposal in November of 2014. We had already provided the complete business valuation at that time. We did not receive a response or a counter proposal. At our settlement conference on November 21, 2014 Kristin stated that she did not have enough information to discuss settlement. We achieved nothing. Cary Deaton, the business valuator, offered to make himself available by telephone to both parties and attorneys to answer questions or provide any information. Kristin never contacted him and never requested information from him until shortly before trial when she had a subpoena issued for what could have been accomplished with a phone call at any time during the last 11 months.

The settlement conference judge suggested that I get an updated valuation including all of 2014 and said that it would be a business expense. I did that and I listed it as a business expense. Again, I directed the valuator to provide everything that they produced to both parties/attorneys.

Kristin has had access to the business records throughout this case. She took them herself, she demanded that I give copies to her which I have done on several

occasions and she has had access to the business accountant to the exact extent that I have. He has no exclusive agreement with me and would answer questions or provide information to Kristin exactly as he would for me. She knows this.

The first settlement offer I received from Kristin was dated April 28, 2015. We received it on the 29<sup>th</sup>, more than five months after I had offered to settle. Trial was scheduled for the week of May 4, three days later. The offer was not reasonable, but we responded to it as openly as possible in less than 24 hours.

The trial was continued by court administration and I then received this motion without a phone call or any other communication attempting to understand what is actually going on.

We, my wife and I, do not have the money to waste on this motion. It will no doubt cost thousands of dollars, it is addressing the issues that will be addressed at trial, it is based on a wild misunderstanding of the business and income and after it is over we are still facing the cost and emotional trauma of the trial where we will do this all over again.

#### **BUSINESS HISTORY OWNERSHIP / OPERATION**

We own a small business selling manufactured homes as Kirkendoll Homes LLC dba Washington Home Center Shelton (WHCS) located in Shelton, WA. The business was purchased from a former employer in September 2007 for \$1,206,247.16. In addition to purchasing the "business", we purchased the inventory (the manufactured homes available for sale that were sitting on the lot where the business operates). Without the

inventory (\$1,020,388.65) the cost of the business would have been a fraction of the purchase price at \$185,858.51.

Upon purchasing the business, Kristin continued her prior work as a Manufactured Home Salesperson and was very good at her job. As an owner she held the title of Manager but never assumed any management responsibilities. I worked diligently to learn how to run a Manufactured Home Dealership and handled all daily management responsibilities.

As early as 2008, Kristin had already distanced herself from the daily business operation, refusing to work consistently at the lot or find outside employment, but continuing to take home a salary of \$3,500 per month. Paying her a salary was worth it to keep the peace at home. For the next five years, she traveled extensively with friends, took jewelry making classes, went on jewelry making retreats, and basically enjoyed an extravagant life style that was beyond our means. During this period, her credit card debt increased substantially without my knowledge, until it reached the \$47,000 in consumer debt disclosed at separation.

In 2008 the economy began taking its toll on our business with fewer homes sales toward the end of the year. By March 2009, the three full-time salespeople, Kristin and I were forced to take 10% wage deductions. Kristin's salary was reduced to \$3,150.00 per month. She continued to refuse to return to work at our business on a consistent basis. By late 2010, all three employees had been laid off and I was running the

business by myself. Kristin continued to draw her salary. For the next two years I ran the daily business operation alone with no employees.

The economy continued to worsen and by 2012, we showed a negative \$73,028.00 on the Business Profit & Loss Statement. It was uncertain whether we would be able to continue to operate. I reduced overhead in every way possible. We survived by selling the inventory on the lot, not replacing it, and using the funds for working capital. We were basically robbing Peter to pay Paul. 2012 was the worst year we have had with the business. On top of everything else, our son was in his second year of college. The financial stress was unbearable.

By December 2012 the business simply could not afford to pay Kristin any longer. After 5 years of not working, she was very resentful over the fact that she had to seek outside employment in order to continue receiving a paycheck and to provide our family with health insurance, which the business could no longer afford to provide. She felt she was above working for an hourly rate of pay. To keep the peace, I agreed that she could use her entire income to service and pay down her personal credit card debt which had reached \$40,000 by that time, and to get her massive compulsive spending under control. This represented the third time during our marriage that she had accumulated enormous consumer debt without my knowledge due to compulsive spending. The first two times, I refinanced our home to help bail her out. Kristin went to work at the Valley Athletic Club in membership sales. She retained 100% of her earnings over the next 18 months but did not decrease her credit card debt. The business limped along during

2013 and 2014, and continues to do so. The profit and loss statements for each year show that the business could fail any day.

## **CONTEMPT**

### ***Late payment of extra-curricular activities***

I have paid for extra-curricular activities, I believe, within a reasonable time after receiving notice of them. Kristin does not provide anything specific in this regard.

### ***Payment of Maintenance and Support directly to mortgage***

I have been paying the mortgage directly in place of maintenance and child support by an informal agreement between Kristin and I. She has never said that she had changed her mind nor has she objected in any way. Her attorney has not objected or communicated that this was a problem. I had no idea it was a problem for her or anyone else until I received this motion.

### ***Use of business account to pay personal expenses***

I have not used the business account to pay any of my personal expenses. There were three events that are being deliberately misinterpreted by Kristin. I say deliberately because these events are known by Kristin and easily discoverable in the extensive records provided to her and her attorney.

In 2014/2015, three checks were written from the business account to reimburse me for business expenses. I issued the checks directly to the personal credit card that was used for the expense: On November 25, 2014, Check #CHS 809227 was issued for \$4,725.00 to my Cabela's Credit Card to reimburse me for the cost of the business evaluation performed by Mr. Deaton. At the November 21, 2014, Settlement Conference, the judge advised us that getting a business evaluation would be a Business Expense and Business Tax write off. I believed Kristin and her attorney had agreed to use the evaluation produced by Mr. Deaton. It was only after the evaluation was completed, and

Kristin was unhappy with the results, that Mr. Deaton became "my" expert and this has become an issue. (**Attachment A** is the documentation from our accountant showing this as part of our business records, as well as the invoice. There is a prior balance of \$3,000 (on the Cabela's card) for the original valuation completed in June, 2014, which was only later reimbursed after the settlement conference. (Prior to that I had a different attorney). Regardless, I told Mr. Deaton's office to send everything they did to both my attorney and Kristin's attorney which they have done faithfully. The nature of this expense and how it was paid has never been hidden in any way and if the Court at trial decides that it is a separate expense I will take it. There is no reason to address this issue in this unnecessary hearing a month before trial.

On December 3, 2014, Check #CHS 809417 was issued for \$6,350.96 to my Cabela's Credit Card to reimburse me for mileage. This is a legitimate, documented business expense that I claim every year. **ATTACHMENT B**. The amount this year is actually less than last year. Again, this was never hidden, it is a known expense that occurs every year, as Kristin well knows, and it is a legitimate reimbursement to me personally for actual, out of pocket expenses that I incur.

On April 21, 2015, Check # CHS215641 was issued for \$2,538.31 to my Alaska Air Credit Card to reimburse me for a concrete delivery charge to Reams & Rock for delivery to customer Kleutch. **ATTACHMENT C** includes the invoices and receipts from Reams & Rock. This was necessary due to the loss of our Washington Home Center company debit card and the lack of ability to write and issue checks on our business account after Kristin closed our business checking account on Friday, August 29, 2014 without telling me (discussed below under *Interference with Business Operation*)

I did use my personal credit card (Cabela's) to pay for my attorney. This is not a business card and it is not paid with business funds except as specifically noted above. These records are all available and have been provided.

With regard to these three payments, I assume that Kristin is seeking contempt

based on paragraph 3.4(a) of the Temporary Order dated December 9, 2014 which states in relevant part "Neither party shall expend any funds whatsoever from the business account for anything other than a legitimate business expense." As noted, *all* three expenses were business expenses with the possible exception of the business valuation. Two of the three payments, including the business valuation, occurred *before* the date of the temporary order so could not be contempt relating to that order, even if they were not business expenses - which of course they were.

#### **AMEND TEMPORARY MAINTENANCE AND CHILD SUPPORT**

These requests are based on the false assertion that I took a "draw of \$72,813" from this business. What Kristin is referring to, I assume, is the "profit" that shows up on my tax return of \$72,813.

The fact is that the profit is not cash accessible to me. The business has a note to the previous owner. We were supposed to pay \$15,383.72 per month toward the note and the lease of the lot, but have been paying \$10,000 per month since 2010 because the business was doing extremely poorly. The portion of the note that goes toward the equity (as opposed to the interest) on the note is about \$4,000 per month. Because it is not interest, it is not a business expense and counts as profit. This is despite the fact that it is *actually being paid out of pocket*. It is also subject to taxes. I did not take a dime out of profit for personal use. It went to pay the equity portion of the note. There is also \$24,000 in taxes due on that amount. The taxes have not been paid to date. The money that should have gone to pay the taxes was in part taken by Kristin when she took out \$9,200 and in part has been used for operating capital, I have taken none of it for my personal use.

These facts are evident from the balance sheets, by comparing 2013 to 2014. The note payable to WHCI has decreased from \$243,930 to \$195,486 a difference of \$48,444. The taxes added to the equity payments total the \$72,000 in question.

It is also clearly evident from the Quickbooks records which Kristin has now

received in several different formats including paper which she took in June 2014 as well as updated records updated after the end of the year.

Further, Kristin certainly knows full well that the business is making these payments. We have been making the \$10,000 per month payment since 2010.

Kristin claims to have managed the business. This claim is untrue, but if she had she would certainly be aware of the categorization of the equity payments as profit.

This is not a business in which money can be easily transferred or hidden. Every transaction involves loans and lines of credits held by major financial institutions. It is simply not possible for anyone, including myself, to be secreting money out of the business.

THE BOTTOM LINE IS THAT I AM TAKING ABSOLUTELY NOTHING OUT OF THE BUSINESS BEYOND THE \$6,500 GROSS PER MONTH THAT SHOWS UP ON MY W-2. It really isn't that complicated, but to the extent it is not understood, it will be made clear at trial by the expert who looked at the entire history of business records and analyzed the business.

This complete failure to understand that figure on my tax return could have been resolved by:

- 1) Calling me and asking;
- 2) Calling my attorney's office (or writing them) and asking;
- 3) Calling Cary Deaton's office;
- 4) Calling our business accountant;
- 5) Examining the extensive records, valuations and year end reports provided voluntarily in this case;
- 6) Conducting formal discovery at any point during the pendency of this case, (we

certainly haven't saved attorney's fees by avoiding discovery).

Regardless of whether Kristin or her attorney understood the various business reports in this case, the information is readily available. A failure to understand these records does not excuse rushing into court for a baseless motion and demanding, literally, more money than I make in maintenance and child support.

Kristen did not provide an updated financial declaration despite requesting a 330% increase in maintenance and a nearly 100% increase in child support. She did not even provide a child support worksheet.

### ***Access to business records***

On Friday, June 13, 2014, Kristin spent several hours copying all of the company business records. Every available document pertaining to the business from 2007 through June 13, 2014, was provided to her. Former employee Kelly Velasco was present and witnessed Kristin completing this task. **ATTACHMENT D.**

Per Kristin's request, duplicate hard copies of Profit & Loss statements, balance sheets, bank statements, tax returns, and other financial records were printed at the office and provided to her on *several occasions* after that visit.

At the November, 2014, Settlement Conference, Kristin and her attorney were provided a hard copy of Mr. Deaton's report. On March 20, 2015, Cary Deaton's office provided a copy of all documents used by Mr. Deaton in the evaluation directly to Kristin's attorney. After inexplicable, repeated demands by Kristin, Carey Deaton's office was instructed on April 11, 2015, to send another copy of all documents used by Mr. Deaton in the evaluation directly to Kristin's attorney.

On April 22, 2015, I emailed all bank statements to Kristin again. Her aggressive, accusatory, repeated demands for the May 2015 bank statement could not be met until the statement was received from the bank. Flash drives containing a complete download of our business QuickBooks were provided to her on April 11, 2015, and an updated

version one month later on May 8, 2015. Although she accused me of intentionally contaminating the flash drives with viruses, until I received her motion, I was unaware that she was still accusing me of not advising her of what version of QuickBooks was being used, password protecting the flash drive, and requiring a secret "code" to open the flash drive – all of which are untrue. Of course QuickBooks is required to open a QuickBooks file, there is a password, the same one that we have been using for 8 years, Kristin knows it.

On Tuesday, May 5, 2015, Kristin arrived at the office demanding another copy of QuickBooks (to be clear this information in hard copy had also been given to Mr. Deaton's office, who updated their evaluation in March 2015, and later emailed it - the evaluation and all supporting documents - directly to Kristin's attorney per my instructions discussed above). When I told her I didn't have another flash drive available she was furious and launched into her usual accusations of me not cooperating. On May 8, 2015, after obtaining another flash drive, a second download of QuickBooks was provided to her. Ultimately, after providing her with two flash drives, she said that she didn't want them because she thought that I would send a virus to her computer through the file.

***Attachment E.***

Ken Snider, our mutual accountant and our business accountant, made a copy of my 2014 1040 and all accompanying schedules to be picked up by Kristin, but spent several days trying to get a hold of her (she wouldn't return his calls). I had already provided information to her in mid-March. There was no delay in preparing the taxes, and no attempt to withhold tax information. She refused to give Ken her 2014 W-2 when he initially requested it, telling him that she had been "advised" to file married but separate. This childish maneuver resulted in a heightened tax liability for the company of over for 2014. Even after Kristin eventually allowed Ken to prepare her separate tax return, she would not allow him to release a copy to me (my attorney and I saw it for the first time attached to her May 7, 2015 motion).

Kristin could have contacted Ken Snider at any time directly and asked him for

whatever she wanted related to the business. On paper, digital, however she wants to receive it. She never did. Despite this I provided whatever she wanted.

The first time my attorney received any request for business records from Kristin's attorney was a letter dated March 3, 2015 in which he requested year end statements for the business. This was obviously not an issue for Kristin or she would have had her attorney pursue it at some earlier date.

In summary, Kristin has had access and has taken printed records with her own hands. She has demanded that I produce printed records for her several times and I have done so. Finally, more recently, she has demanded digital records which I have also provided. Then she said she did not want them from me.

### ***Supplemental Business Income***

Beginning in 2011, as one way to offset company overhead and expenses due to lack of home sells, we allowed Whitney's Auto Sales/Aberdeen Honda to lease a small portion of our business location fronting Highway 101 for a week. On August 9, 2011, we were paid \$3,000.00 by check from Whitney's for this purpose; on July 17, 2012, we were paid \$3,000.00; and on July 16, 2013, we were paid \$3,000.00. Whitney's did not lease from us in 2014. In 2015, (April 21-28) Whitney's again leased from us. **ATTACHMENT F.** I supplied a copy of the \$3,000.00 check and the 2015 contract to my attorney AND to Kristin. As with every previous year, the funds went directly into our business account to help with overhead. "A Plus Hearing", operated by Mark V. Adams, started renting office space as of May 4, 2015, for \$100.00 a month plus \$100 a day when here. He plans to meet with clients at the office a few days every six weeks beginning this month. **ATTACHMENT G.** I have not yet received any revenue from this agreement. When I do, I will provide all necessary documentation.

### **APPOINTMENT OF SPECIAL MASTER**

Kristin's request for the appointment of a special master for our business would be yet another extraordinary waste of money that we do not have. We will be in trial in

*DECLARATION OF KAIN KLAUDE KIRKENDOLL -  
RESPONSE (DCLR) - Page 12 of 16  
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BROST LAW, PC  
1800 COOPER POINT ROAD SW #18  
OLYMPIA, WASHINGTON 98502  
EMAIL@BROSTLAW.COM

a month!! What is the basis for the appointment under RCW 7.60.025? What could this person possibly accomplish in one month? Who is going to pay for it? I am already putting fees and costs for this litigation on credit. Kristin is apparently paying her attorney monthly payments on tens of thousands of dollars owing.

We have a respected expert who has reviewed all of the business records for the business and issued two separate reports. We have a business accountant who has handled our accounting for years. There is no reason to go to this additional expense and there is simply no point with trial a month away.

### **INTERFERENCE WITH BUSINESS OPERATIONS:**

I filed for divorce on June 10, 2014. Kristin received copies of the documents on that same date. On Friday, June 20, 2014, without notice to me, Kristin wrote a company check from the BUSINESS OPERATING ACCOUNT #62155-S-7 to her attorney Mr. Pope for \$2,500.00. On Saturday, June 21, 2014, without notice to me, Kristin wrote two additional company checks from the BUSINESS OPERATING ACCOUNT #62155-S-7 for \$1,385.56 to Costco and \$109.46 to Best Buy. **ATTACHMENT H**. On June 27, 2014, after realizing that Kristin was using the business operating account as her own personal piggy bank, and jeopardizing my ability to keep the business operational, I opened a separate operating account to protect the remaining funds. Kristin's reckless violation of our business account is directly responsible for our 2014 negative cash flow balance of -\$538.35.

On Friday, August 29, 2014, without notice to me, Kristin CLOSED the BUSINESS OPERATING ACCOUNT #62155-S-7. By Kristin closing the BUSINESS OPERATING ACCOUNT 62155-S-7, I was unable to use our established Wells Fargo Payroll Service and was unable to issue pay checks. Since that time I have been forced to use Bank Cashier's Checks to operate the business. This has been a very difficult and unnecessary hardship. On that same day, Friday, August 29, 2014, Kristin made three separate transfers from the BUSINESS TRUST ACCOUNT #62409 in the amounts of \$5,025.00;

\$1,000.00; and \$110.00 into her personal account #83017. **ATTACHMENT I.** The money taken by Kristin did not belong to us and had to be reimbursed by the business.

Kristin appears to believe she can behave in any way she wishes with impunity, and so far, she has been allowed to do so. I would also like to point out that in addition to creating a negative cash flow balance for 2014, the funds removed by Kristin from the business checking and trust account would have covered half of our 2014 tax liability.

In addition to Kristin's banking activities on Friday August 29, 2014, she came into WHCS during business hours and made a scene in front of customers by announcing that she was there to drop off a money order for my share of the sale of a community owned Quarter Horse valued at \$3,500.00. She then presented me with a money order for \$1.00. To this date, the ownership of the horse has not been disclosed to me. However, neighbors and others are now advising that the horse is once again stabled at our home. Kristin has made it difficult for me to conduct business on other occasions by showing up at the office and loudly making comments and demands while there are customers or staff nearby. In one such incident, she physically blocked me from leaving the room while being verbally abusive, demeaning, and demanding. During another incident, she came into the office while I was with a customer, loudly demanded the use of my truck, and angrily took the family dog, Maisy, that had been living with me for months. She held the dog hostage for a few days and finally gave her back after I refused to react and it was no longer fun for her.

Kristin has no regard for the impact her behavior has on the business and actually seems to want it to fail. It was for these reasons that a very appropriate request was made to restrain her from the premises in October 2014. There was never a request to restrain her from the business records.

#### **ATTORNEYS FEES:**

I have no ability to pay Kristin's attorney's fees. The reality is that she should be paying mine for driving this litigation to the point it has reached. Her abusive use of

conflict and vindictiveness has prolonged this for a year. She refused to respond to a settlement offer made last November, 2104. Until April 29, 2015, less than one week before our scheduled trial date, we had heard nothing from Kristin or her attorney regarding settlement. Every effort to communicate was rejected.

#### **OTHER ISSUES:**

I have been subjected to ongoing abusive use of conflict, manipulation, stalking, bullying, defamation, interference with visitation, and the intentional alienation of my daughter, including telling me our daughter is better off having Kristin's live-in boyfriend in her life, than me. She has refused to let our daughter attend counseling, falsely accused me of alcoholism. She accused me of theft for removing my clothing and personal belongings from the home after leaving a 27-year marriage with a duffel bag. Kristin has tried to increase my attorney's fees by emailing my attorney (stopping only after my attorney contacted her attorney and demanded it stop), and has repeatedly interrupted the routine operation of our small business with her behavior as described above.

Financially, I am driving a 2001 Buick and living at my sister's house. I pay child support, maintenance, and half of Kristin's consumer debt, in addition to a \$536 per month note on a community owned vacant lot, all from my net monthly earnings. I have minimal disposable income. Kristin is driving a new vehicle, has use of the family home, has her boyfriend living in the family home, has 100% of all household goods and furnishings, and is receiving child support and maintenance based upon my net earnings.

Finally, I receive incessant emails and text messages falsely accusing me of not cooperating with her requests for business records after I have turned over every business record on more than one occasion. She will not stop her constant barrage of accusatory emails and text messages, which she supplements with self-serving statements such as "Move on, Kain, and let our family heal", "Stop hating and please move on", "I'll pray for you", "I pray for you to find peace," "I am so happy in my new relationship. It's incredible. Send me your paystub," etc. She follows me, takes pictures

of me, and harasses me non-stop. It is apparent that Kristin believes if she makes her false accusations loudly enough and often enough, it will become the truth.

**CONCLUSION:**

It's a shame that a marriage as long as ours has come to an end. I have attempted at every turn to treat Kristin with the dignity and respect she is due as the mother of my children. I want this to end so all of us can begin to heal. I request that the court deny the Respondent's motions and allow this matter to proceed to trial as Kristin is apparently unwilling to settle without judicial intervention. I am requesting attorney's fees for being forced to respond to this frivolous action.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed At:

Olympia WA  
City and State

KAIN KLAUDE KIRKENDOLL

Print or Type Name

On:

5-12-15  
Date

Kristin Kirkendoll  
Signature

# **Appendix D**

Findings of Fact and Conclusions of Law  
filed 7/24/2015

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<input type="checkbox"/> EXPEDITE <input type="checkbox"/> Hearing is set: <input type="checkbox"/> None Date: <u>7/24/15</u> Time: <u>9:00</u> Judge/Calendar: _____
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**SUPERIOR COURT OF WASHINGTON  
COUNTY OF THURSTON  
FAMILY & JUVENILE COURT**

<p>In re the Marriage of:</p> <p>KAIN KLAUDE KIRKENDOLL,</p> <p style="text-align: right;">Petitioner,</p> <p>and</p> <p>KRISTIN ALENE KIRKENDOLL,</p> <p style="text-align: right;">Respondent.</p>	<p>NO. 14-3-00804-1</p> <p>FINDINGS OF FACT AND  CONCLUSIONS OF LAW  (FNFCL)</p>
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**I. BASIS FOR FINDINGS**

The Findings are based on the results of trial held June 22 and 23, 2015. The Petitioner, Kain Klaude Kirkendoll, appeared in person and with his attorney, Randolph L. Finney of BROST LAW, PC. The Respondent, Kristin Alene Kirkendoll, appeared in person and with her attorney, William B. Pope of POPE, HOUSER & BARNES, PLLC. The court heard testimony of the parties. The court also heard the testimony of the Petitioner's expert, Devon Brown of Dwyer, Pemberton & Coulson, PC, certified public accountants, Amber Macki, bookkeeper for Brost Law PC, and Malia Jones. The court also met *in camera* with the parties' daughter, Kaya Kirkendoll. Having heard the testimony of the parties and the witnesses, having reviewed the files and records herein, and in all things being fully advised, the court now makes and enters the following:

**II. FINDINGS OF FACT**

Upon the basis of the court record, the court FINDS:

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FNFCL)  
WPF DR 04.0300 Mandatory (6/2012) CR 52; RCW 26.09.030; .070 (3)  
Page 1

**COPY**

POPE, HOUSER & BARNES  
ATTORNEYS AT LAW  
1605 COOPER POINT ROAD NORTHWEST  
OLYMPIA, WASHINGTON 98502-8325  
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**2.1 RESIDENCY OF PETITIONER.**

The Petitioner is a resident of the state of Washington.

**2.2 NOTICE TO THE RESPONDENT.**

The Respondent appeared in person and with her attorney, William B. Pope of POPE, HOUSER & BARNES, PLLC.

**2.3 BASIS OF JURISDICTION.**

At all times material to this action, both the Petitioner and the Respondent have been residents of Thurston County, Washington.

**2.4 DATE AND PLACE OF MARRIAGE.**

The parties were married on June 27, 1987, in Lewis County, Washington. Their marriage followed two years of cohabitation in a committed intimate relationship.

**2.5 STATUS OF THE PARTIES.**

Husband and wife separated on or about May 2, 2014.

**2.6 STATUS OF THE MARRIAGE.**

The marriage is irretrievably broken and at least 90 days have elapsed since the date the petition was filed and the Respondent accepted service.

**2.7 SEPARATION CONTRACT OR PRENUPTIAL AGREEMENT.**

There is no written separation contract or prenuptial agreement.

**2.8 COMMUNITY PROPERTY.**

The single largest asset held by the parties is their business known as Kirkendoll Homes, LLC, doing business as Washington Home Center. The parties purchased the business in 2007 for \$1,206,947.01. Both parties were actively involved in the business until December 2012, when it was agreed that the Respondent, Kristin Kirkendoll, would obtain outside employment to provide a secure income stream and healthcare benefits for the parties and their children. Kain Kirkendoll has managed the business exclusively during the pendency of this action. Mr. Kirkendoll presented testimony through his expert, Devon Brown, CPA CVA

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2 of the accounting firm of Dwyer Pemberton & Coulson, PC, who valued the  
3 business at \$100,000 net. Ms. Brown based her opinion on the financial  
4 information provided to her by Kain Kirkendoll. Despite Ms. Kirkendoll's  
5 extensive experience in the business and in the industry, no information was  
6 sought from her and she was not invited to participate in the evaluation process.  
7 Ms. Brown testified that her valuation was based on the business's prior five  
8 years of profit and loss. Until 2013, the business was losing money, however, as  
9 pointed out by Ms. Brown, the five years were essentially the worst five years for  
10 home sales since the Great Depression. The current data nationally showed a  
11 significant improvement in the economy and in the business. The evidence  
12 presented by Ms. Brown showed a marked improvement for the business in 2013  
13 and again in 2014, with an increase in early 2015. In 2013, the business had gross  
14 sale of \$1,756,487. In 2014, it had gross sales of \$1,363,582. Although the gross  
15 sales were down some in 2014, profits were up 110% from the prior year. In  
16 2015, sales were lagging, but it was admitted that four sales were pending and the  
17 business appeared to be on target for generating profit as it had in the prior year.  
18 It was also noted that the turn-down in the housing economy and the significant  
19 hardship that it created took a toll on many of the competitors of the parties'  
20 business. Ms. Brown testified that using the figures from 2014, and applying  
21 them to the worksheets she had prepared based on 2013, would support a  
22 valuation in the \$200,000 range. In 2014, Kain Kirkendoll reported an adjusted  
23 gross income from the business of \$149,293. The testimony clearly reflected the  
24 growth of the business and the fact that the business is coming out successfully  
25 from the housing recession.

17 The parties have a home and real property commonly described as 50  
18 Windsorcrest Lane, Shelton, Washington. The home has been listed for sale. At  
19 the time of trial, it was on the market for \$299,000, and was subject to an  
20 indebtedness due and owing Citibank in the approximate amount of \$243,356.  
21 The parties also have undeveloped real property commonly described as 80 SE  
22 Windsorcrest Lane, Shelton, Washington, that was on the market for \$55,000 and  
23 is subject to an indebtedness due and owing Our Community Credit Union in the  
24 approximate amount of \$35,328. Kain Kirkendoll has requested that the  
25 Respondent assume responsibility for the home. She is currently living there with  
26 the parties' daughter. There was un rebutted evidence that Mr. Kirkendoll had  
27 been coming onto the property, despite Kristin Kirkendoll's request that he not do  
28 so and a court order prohibiting him from such actions. The property is located  
relatively close to the family business being awarded to the Petitioner. Kain  
Kirkendoll and his father made improvements to the property and therefore he is  
capable of maintaining it or preparing it for sale. Kristin Kirkendoll testified she  
does not want the property; that she does not want to be held responsible for the  
improvements done by her husband and father-in-law; and that she was anxious to  
move closer to Capitol High School where the parties' daughter will be attending  
as a freshman in the fall. The court finds that it would be appropriate to award the

1  
2 real property to the Petitioner, Kain Kirkendoll, and to require the Respondent  
3 and the parties' daughter to vacate the property on or before July 31, 2015.

4 The court will adopt Respondent's Exhibit 22 with respect to the division of  
5 property and liabilities. Regardless of the valuation placed on the parties'  
6 business, the award results in significantly less in assets being awarded to  
7 Respondent Kristin Kirkendoll than are being awarded to the Petitioner, Kain  
8 Kirkendoll. The division, however, is appropriate when taken into consideration  
9 with the award of maintenance as more specifically addressed in Paragraphs 2.12  
10 below.

11 The award of property should be as follows:

12 **TO THE PETITIONER, KAIN KLAUDE KIRKENDOLL:**

13 The home and real property commonly described as 50 Windsorcrest Lane,  
14 Shelton, Mason County, Washington, (tax parcel no. 32035-75-90013), which is  
15 more specifically described below, subject to the indebtedness due and owing  
16 Citibank in the approximate amount of \$243,356. The home and real property  
17 should be awarded to the Petitioner, Kain Klaude Kirkendoll, subject to the  
18 indebtedness due and owing thereon which the Petitioner should assume, satisfy,  
19 and hold the Respondent harmless therefrom:

20 Parcel 1:

21 Lot(s) C of Short Subdivision No. 2445, recorded June 15, 1994, under  
22 Auditor's File No. 589692, being a portion of the Northwest quarter of the  
23 Northeast quarter of Section 2, Township 19 North, Range 3 West, W.M.,  
24 Mason County.

25 Assessor's Property Tax Parcel or Account Number 32035 75-900013.

26 Parcel 2:

27 An easement for road, utility and drainage as described and delineated in  
28 Short Subdivision No. 2445, recorded June 15, 1994, under Auditor's File  
No. 589692, being a portion of the Northwest quarter of the Northeast  
quarter of Section 2, Township 19 North, Range 3 West, W.M., Mason  
County, Washington.

The undeveloped land commonly described as 80 SE Windsorcrest Lane, Shelton,  
Mason County, Washington (tax parcel no. 32035-75-90012), which is more  
specifically described below, subject to the indebtedness due and owing Our  
Community Credit Union in the approximate amount of \$35,328, which the

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Petitioner, Kain Klaude Kirkendoll, should assume and satisfy, and hold the Respondent, Kristin Kirkendoll, harmless therefrom:

Tract(s) B of Short Plat No. 2445, as recorded June 15, 1994, under Auditor's File No. 589692, and being a portion of northwest quarter of the northeast quarter in Section 2, Township 19 North, Range 3 West, W.M., in Mason County, Washington

Together with and subject to an easement for road, utility and drainage purposes, as shown on Short Plat No. 2445, recorded June 15, 1994, under Auditor's File No. 589692.

The miscellaneous household furniture, appliances, utensils, linens, furnishings and other personal property currently in the Petitioner's possession;

The 2001 Buick LeSabre automobile;

The 2002 Acura MDX;

The 2003 Kubota tractor along with attachments and accessories;

The 2013 Flat (car) trailer;

The Toro riding lawn mower;

Petitioner's baby book; copies of children's baby books (if located);

Misc. appliances and electronics;

The freezers and generator;

The custom built entertainment center and hutch, Tempurpedic bedroom set, living/dining furniture;

The table saw, power tools and hand tools;

The carpet cleaner;

The pressure washer;

The guns;

The gun safe and gun locker;

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The bike stand;

All rights and interest in Kirkendoll Homes, LLC, dba Washington Home Center, subject to any and all indebtedness due and owing thereon;

Any checking or savings accounts currently standing in the Petitioner's name;

Any life insurance policy currently insuring the life of the Petitioner;

The Petitioner's personal effects and belongings;

The Petitioner's Social Security rights and interests available to him pursuant to Federal Law.

**TO THE RESPONDENT, KRISTIN ALENE KIRKENDOLL:**

The miscellaneous household furniture, appliances, utensils, linens, furnishings and other personal property currently in the Respondent's possession;

The 2003 Dodge Ram Truck;

The 2007 Horse Trailer;

The Edward Jones Traditional IRA Account #xxxxx657-1-8;

The Edward Jones Traditional Ira Account #xxxxx473-1-8;

The Edward Jones ROTH IRA Account #xxxxx939-1-1;

The Edward Jones ROTH IRA Account #xxxxx940-1-8;

The Edward D. Jones Account #xxxxx058-1-9;

The Edward D. Jones Account #xxxxx097-1-5 (529 College Savings Plan FBO Kolton Kirkendoll);

The Barn contents (horse tack and sheep equipment);

Respondent's jewelry and jewelry making supplies and equipment;

Any life insurance policy currently insuring the life of the Respondent;

The Respondent's retirement rights and other employment benefits which she has acquired commensurate with her present or past employment;

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Any checking or savings accounts currently standing in the Respondent's name;  
The Respondent's personal effects and belongings;  
The personal effects and belongings of the parties' daughter, Kaya; and  
The Respondent's Social Security rights and interests available to her pursuant to Federal Law.

**2.9 SEPARATE PROPERTY.**

The separate property claims of the parties, if any, are extremely nominal and would not effect the award of the assets or any of the other issues considered herein.

Any and all property acquired by the Petitioner, Kain Klaude Kirkendoll, from or after the May 2, 2014 date of separation should be the sole and separate property of the Petitioner and should be awarded to him accordingly free of any interest in the Respondent.

Any and all property acquired by the Respondent, Kristin Alene Kirkendoll, from or after the May 2, 2014 date of separation should be the sole and separate property of the Respondent and should be awarded to her accordingly free of any interest in the Petitioner.

**2.10 COMMUNITY LIABILITIES.**

The parties have acquired the following community obligations which are set forth in Trial Exhibit No. 22. Those obligations should be assigned as set forth in that exhibit and satisfied as follows. The party to whom the obligation has been assigned should assume that indebtedness and hold the other party harmless therefrom and indemnify the other party from any responsibility arising from the debt.

**TO BE ASSUMED BY THE PETITIONER, KAIN KIRKENDOLL:**

Any and all indebtedness related to, arising from, or associated with the business known as Kirkendoll Homes, LLC, dba Washington Home Center;

The mortgage obligation due and owing Citibank in the approximate amount of \$243,356, together with any and all other debts associated with the home and real property located at 50 Windsorcrest Lane, Shelton, Mason County, Washington;

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The mortgage obligation due and owing Our Community Credit Union in the approximate amount of \$35,328, together with any and all other debts associated with the undeveloped real property located at 80 Windsorcrest Lane, Shelton, Mason County, Washington;

The debt due and owing on the credit card in the Petitioner's name with Bank of America under account number ending 2417;

The joint obligation due and owing Bank of America under account number ending 7245;

The debt due and owing on the Bank of America Alaska Airlines VISA standing in the Petitioner's name (account number ending 5674); and

The Petitioner's debt due and owing Cabela's (account ending 8314);

**TO BE ASSUMED BY THE RESPONDENT, KRISTIN KIRKENDOLL:**

The indebtedness due and owing Bank of America under account number ending 7181;

The indebtedness due and owing Chase under account number ending 0951; and

The indebtedness due and owing St. Peter's Hospital standing in the Respondent's name;

**2.11 SEPARATE LIABILITIES.**

Any and all indebtedness incurred by either party from and after the May 2, 2014, date of separation should be the sole and separate obligation of the party who incurred the indebtedness and that individual should be required to assume and satisfy those obligations and hold the other party harmless therefrom and indemnify the other party from any responsibility arising from the debt.

**2.12 MAINTENANCE.**

There is a need for maintenance. The Petitioner has the ability to pay, and the Respondent has that need. The court has reviewed and considered the statutory basis for award of maintenance set forth in RCW 26.09.090. The court has also reviewed the case law covering an award of maintenance, especially in cases involving long-term marriages such as this marriage. The court has also awarded to the Petitioner the business and the family home. The only way to realistically compensate the Respondent for her significant investment of time and energy in the business and family home is to award her substantial spousal maintenance.

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2 The Petitioner, Kain Klaude Kirkendoll, should be required to pay maintenance to  
3 Kristin Kirkendoll in the amount of \$3,000 per month, payable the 15<sup>th</sup> of each  
4 month, commencing with the month of August, 2015, and continuing each month  
5 thereafter through the month during which Kristin Kirkendoll reaches the age of  
6 59-1/2 years (November 2025). The award is high, however, it still leaves the  
7 Respondent with less income than the Petitioner generated in the calendar year of  
8 2014, pursuant to his tax return. Even though Kristin Kirkendoll's income with  
9 the maintenance award would still be less than what the Petitioner earned, the  
10 court still considers the maintenance award to Petitioner of \$3,000 per month and  
11 the duration to be fair and equitable considering the uncertain nature of the  
12 business and other economic factors. Maintenance should not terminate or be  
13 modified based on the Respondent's remarriage or cohabitation, because  
14 maintenance is also being utilized in this case to provide for a fair and equitable  
15 distribution of the assets and liabilities as well as to meet the needs of the  
16 Respondent. For that reason, Kristin Kirkendoll should not be penalized, nor  
17 should Kain Kirkendoll be financially rewarded, if the Respondent remarried or  
18 resided with another individual.

19 **2.13 CONTINUING RESTRAINING ORDER.**

20 A continuing restraining order has not been requested by either party. Either party  
21 may seek a Continuing Restraining Order together with an Order of Protection  
22 without prejudice from this ruling if events in the future dictate the  
23 appropriateness of such an order.

24 **2.14 PROTECTION ORDER**

25 An Order of Protection has not been requested by either party. Either party may  
26 seek an Order of Protection together with a Continuing Restraining Order without  
27 prejudice from this ruling if events in the future dictate the appropriateness of  
28 such an order.

**2.15 ATTORNEY'S FEES AND COSTS.**

Each party has received some limited community funds to assist with their  
respective attorney's fees and costs. The Respondent was awarded \$12,000 from  
the parties' business to assist with her fees and costs which were significantly  
greater at that time (in excess of \$30,000). The court commissioner awarded  
essentially one-half of the retained earnings held in the business at that time (or at  
the time of the most recent accounting), leaving a similar amount available to the  
Petitioner. The Petitioner had also been utilizing the business funds to pay a  
significant portion of his expert witness fees. Based on the parties' most recent  
tax filings, the Petitioner clearly had more funds available to him than the  
Respondent had available to her in 2014 and 2015. An award of fees, at least

*Revised*

*Respond*

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2 partial in nature, is appropriate. The \$12,000 previously awarded did not come  
3 from the Petitioner, but from the parties' business, and a similar amount was left  
4 for the Petitioner's use. In addition to the standard statutory basis for an award of  
5 need versus ability to pay, under RCW 26.09.140, the court also looks to the case  
6 law supporting an award of fees and costs when it appears that one party  
7 exhibited a recalcitrant, foot-dragging, obstructionist attitude. On May 28, 2015,  
8 the court found the Petitioner Kain Kirkendoll in willful contempt of a prior court  
9 order. The court awarded Respondent her fees and costs (in addition to the  
10 \$12,000 of business funds toward her fees and costs) related to the Petitioner's  
11 contemptuous actions. The nature and extent of that award, however, was  
12 reserved for the final disposition of the case. Kain Kirkendoll has already been  
13 found in contempt by the court for his failure to cooperate in providing the  
14 Respondent with business and bank records as previously ordered. It appears to  
15 the court from the testimony presented, that there were many other instances  
16 where the Petitioner did little to allow this case to move forward in a cost  
17 effective, much less cooperative manner.

*A*  
*WR*

The court finds that it would be appropriate to require the Petitioner to contribute  
\$ Reserve toward the Respondent's fees and costs, and judgment should  
be awarded in favor of the Respondent against the Petitioner in that amount.  
Each party should be responsible for the balance of his or her own attorney fees  
and costs incurred in this action.

16 **2.16 PREGNANCY.**

17 The wife is not pregnant.

18 **2.17 DEPENDENT CHILD.**

19 The child listed below is dependent upon the parties for her support and  
20 maintenance.

21 Name of Child: Kaya Emily Kirkendoll  
22 Age: 14  
23 Mother's Name: Kristin Alene Kirkendoll  
24 Father's Name: Kain Klaude Kirkendoll

24 **2.18 JURISDICTION OVER THE CHILD.**

25 This court has jurisdiction over Kaya Kirkendoll because Washington is her home  
26 state and she has lived here with her parents for at least six consecutive months  
27 immediately preceding the commencement of this case.  
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**2.19 PARENTING PLAN.**

The parenting plan signed by the court is approved and incorporated as part of these findings.

**2.20 CHILD SUPPORT.**

There is a child in need of support and child support should be set pursuant to the Washington State Child Support Schedule and Guidelines. The Order of Child Support signed by the court and the Child Support Worksheets which have been approved by the court are incorporated by reference in these findings.

**2.21 OTHER:**

**Tax Liabilities**

Each party should be required to file separate federal income tax returns for the calendar year of 2015. Each party should report their respective incomes for that year (as adjusted by maintenance paid and maintenance received) and assume the tax liability, if any, due and owing arising from their respective incomes and hold the other party harmless therefrom. The Respondent should be entitled to deduct the mortgage interest and property taxes she paid on the family home through July 2015.

**Written Opinion**

The court's letter of opinion dated June 30, 2015, should be incorporated herein as Supplemental Findings of Fact.

**Continuing Jurisdiction**

In the event it is reasonable, desirable, or necessary to execute any other documents or papers to transfer title or otherwise effectuate the terms of the Decree of Dissolution, each party should sign the same in a timely and cooperative manner. The court should retain jurisdiction over the parties and over the subject matter of this action for the purposes of enforcing the decree, including signing the deed and excise tax affidavits awarding the real property to the Petitioner and the entry of any Qualified Domestic Relations Orders that may be necessary to transfer the Edward Jones retirement accounts to the Respondent.

**Name Changes**

The wife's maiden name of Kristin Alene Peterson should be restored to her.

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### III. CONCLUSIONS OF LAW

The court makes the following Conclusions of Law from the foregoing Findings of Fact:

**3.1 JURISDICTION.**

The court has jurisdiction to enter a decree in this matter.

**3.2 GRANTING OF A DECREE.**

The parties should be granted a Decree of Dissolution dissolving the marital bonds and marital community existing between the parties and restoring to each his or her status as a single adult.

**3.3 PREGNANCY.**

Does not apply.

**3.4 DISPOSITION.**

The court should determine the marital status of the parties; make provision for a parenting plan for the minor daughter, Kaya; make provision for the support of the minor child; approve the provision for the maintenance of the Respondent as set forth in the Findings of Fact; make provision for the disposition of property and liabilities of the parties as set forth in the Findings of Fact; make provision for the allocation of Kaya as federal tax exemption; and make provision for the change of name of the Respondent. The distribution of property and liabilities as set forth in the Findings of Fact and the Decree is fair and equitable.

**3.5 CONTINUING RESTRAINING ORDER.**

Does not apply.

**3.6 PROTECTION ORDER**

Does not apply.

**3.7 ATTORNEY'S FEES AND COSTS.**

Attorney's fees; other professional fees and costs should be paid as set forth in the Findings of Fact.

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3.8 OTHER:

Tax Liabilities

Each party should be required to file separate federal income tax returns for the calendar year of 2015. Each party should report their respective incomes for that year (as adjusted by maintenance paid and maintenance received) and assume the tax liability; if any; due and owing arising from their respective incomes and hold the other party harmless therefrom. The Respondent should be entitled to deduct the mortgage interest and property taxes she paid on the family home through July 2015.

Written Opinion

The court's letter of opinion dated June 30, 2015; should be incorporated herein as Supplemental Conclusions of Law.

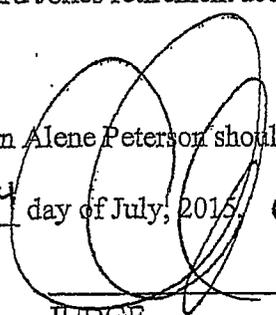
Continuing Jurisdiction

In the event it is reasonable; desirable; or necessary to execute any other documents or papers to transfer title or otherwise effectuate the terms of the Decree of Dissolution; each party should sign the same in a timely and cooperative manner. The court should retain jurisdiction over the parties and over the subject matter of this action for the purposes of enforcing the decree; including signing the deed and excise tax affidavits awarding the real property to the Petitioner and the entry of any Qualified Domestic Relations Orders that may be necessary to transfer the Edward Jones retirement accounts to the Respondent.

Name Changes

The wife's maiden name of Kristin Alene Peterson should be restored to her.

DONE IN OPEN COURT this 24 day of July, 2015. CHRIS WICKHAM



JUDGE

Presented by:

POPE; HOUSER & BARNES; PLLC

William B. Pope; WSBA #5428  
Attorney for the Respondent

Approved as to form and content;  
Notice of Presentation waived:

BROST LAW; PC

Randolph L. Finney; WSBA #19893  
Attorney for the Petitioner

Marriage of Kirkendoll  
Division of Assets and Liabilities

Respondents Exhibit  
# 22

Community Property Division:

14-300804-1

Asset	Market Value	Debt Owed	Net Value Awarded To:	
			Petitioner Husband	Respondent Wife
<b>Real Property</b>				
50 Windsorcrest Lane	\$299,000 (list price)	\$243,356.00	\$55,643.00	
80 SE Windsorcrest Lane	55,000 (or less)	\$35,328.00	\$19,672.00	
<b>Cars, truck and trailers</b>				
2001 Buck LeSabre	\$2,144.00		\$2,144.00	
2002 Acura MDX	\$2,500.00		\$2,500.00	
2003 Dodge Ram Truck	\$9,841.00			\$9,841.00
2007 Horse Trailer	\$12,000.00			\$12,000.00
2003 Kubota tractor	\$9,000.00		\$9,000.00	
Attachments and accessories (11)	\$9,044.00		\$9,044.00	
2013 Flat (car) trailer	\$3,000.00		\$3,000.00	
Toro riding lawn mower	\$2,000.00		\$2,000.00	
<i>Edward Jones Accounts (values a/o 3/31/2015)</i>				
Acct. 84192657-1-8 Kain Kirkendoll Traditional IRA	\$150,711.00			\$150,711.00
Acct. 84193473-1-8 Kristin Kirdendoll Traditional IRA	\$76,846.00			\$76,846.00
Acct. 84299939-1-1 Kain Kirkendoll ROTH IRA	\$6,850.00			\$6,850.00
Acct. 84299940-1-8	\$5,618.00			\$5,618.00

			Petitioner Husband	Respondent Wife
Acct. 84108058-1-9 JTWROS for Kain Kirkendall and Kristin Kirkendoll	\$4,294.00			\$4,294.00
Acct. 84115097-1-5 529 College Savings Plan FBO Kolton Kirkendoll (Kain Kirkendoll owner)	\$5,714.00			\$5,714.00
<b>Other Retirement</b>				
The Valley Athletic Club Kristin Kirkendoll 401K	\$730.00			\$730.00
<b>Household Goods, Furniture &amp; Art</b>				
Kain's baby book; copies of children's baby books (if located)	\$0.00		\$0.00	
Misc. appliances and electronics *	\$1,000.00		\$1,000.00	
Freezers, generator	\$250.00		\$250.00	
Custom built entertainment center and hutch, Tempurpedic bedroom set, living/dining furniture	\$5,850.00		\$5,850.00	
<b>Tools &amp; Equipment</b>				
Table saw, power tools and hand tools	\$1,500.00		\$1,500.00	
Carpet cleaner	\$50.00		\$50.00	
Pressure washer	\$100.00		\$100.00	
Barn (horse tack and sheep equipment)	\$1,000.00			\$1,000.00
<b>Recreation/Hobby</b>				
Guns	\$8,825.00		\$8,825.00	
Gun safe and gun locker	\$500.00		\$500.00	
Bike stand	\$75.00		\$75.00	

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II  
2016 MAR 11 PM 3:05  
STATE OF WASHINGTON  
BY DERILLY

KAIN KLAUDE KIRKENDOLL,  
Appellant,  
and  
KRISTIN ALENE KIRKENDOLL,  
Respondent.

NO. 47832-3-II  
RETURN OF SERVICE  
(OPTIONAL USE)  
(RTS)

I DECLARE:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to WILLIAM BURWELL POPE & SIDNEY TRIBE:  

Reply Brief of Appellant  
Appendices to Reply Brief of Appellant
3. The date, time and place of service were (if by mail refer to Paragraph 4 below):  

Does not apply.

ORIGINAL

4. Service was made:

By mailing a copy via first class mail on March 11, 2016.

By delivery through electronic mail to the person named in paragraph 2 above.

Email directed to: attorneys@wbpopelawfirm.com and sidney@tal-fitzlaw.com on March 11, 2016.

5. Service of Notice on Dependent of a Person in Military Service.

Does not apply.

6. Other:

Does not apply.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Olympia, WA

City and State

03/11/2016

Date

KRISTINA HAUGEN

Print or Type Name



Signature