

69442-1

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ORIGINAL

NO. 69442-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

SHUDAN ZHU ROHDE,

Appellant,

v.

JOSEPH THOMAS ROHDE,

Respondent.

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY,

The Honorable Sharon Armstrong

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The trial court's child support award was manifestly unreasonable and based on untenable grounds because it failed to include Mr. Rohde's fully documented annual bonus as gross income for purposes of calculating child support as required by RCW 26.19.071(1) and (3)(r).

The trial court's failure to designate Chinese New Year as a holiday in the parenting plan or to provide any way for these biracial Chinese-American children to consistently celebrate Chinese New Year with their Chinese mother, the majority parent, is contrary to the best interests of the children and manifestly unreasonable, based on untenable grounds, and made for untenable reasons.

The trial court abused its discretion when it conditioned Ms. Rohde's maintenance award upon maintaining full time enrollment in school while she is the majority caregiver for the parties' autistic child and 3 year old child.

B. ASSIGNMENTS OF ERROR

1. The trial court's child support award was manifestly unreasonable and based on untenable grounds because it failed to include Mr. Rohde's regular, documented annual bonus income as gross income for purposes of calculating child support.

2. The trial court's failure to designate Chinese New Year as a

New Year with their Chinese mother is contrary to the best interests of the children and therefore manifestly unreasonable, based on untenable grounds, and made for untenable reasons.

3. The trial court's conditioning of Ms. Rohde's maintenance upon her continued full time enrollment in school is an abuse of discretion given Ms. Rohde's majority caregiver role in the care of the parties' autistic son and the parties' preschool child.

4. The trial court's order that Ms. Rohde shall satisfy her attorney's lien by payment out of the proceeds of sale of her home violated Ms. Rohde's right to fundamental due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 26.19.071(1) requires that "all income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent." RCW 26.19.071(3)(r) requires that "monthly gross income shall include income from any source, including ... bonuses." In this case, two years of admitted tax returns show that the father typically receives annual bonuses of \$25,000-\$35,000. The parties' 2011 tax return, the most recent year available at trial, shows that the father received total income of \$220,679.00. Yet the trial court found that the father's gross income for purposes of child support was only \$185,000, excluding his bonus income.

Was the trial court's child support award manifestly unreasonable and based on untenable grounds because it failed to include Mr. Rohde's regular, documented annual bonus income as gross income for purposes of calculating child support, contrary to RCW 26.19.071(1) and (3)(r)? (Assignment of Error 1.)

2. RCW 26.09.187(3)(a) directs the court to make residential provisions for each child which are "consistent with the child's developmental level and the family's social and economic circumstances" and to consider the "emotional needs and developmental level of the child." RCW 26.09.184(3) specifically provides authority for the court to consider the cultural heritage of a child when fashioning a parenting plan. Here, the parenting evaluator agreed with the mother's request that the children, who are biracial Chinese-American, be allowed to celebrate Chinese New Year with her every year. Chinese New Year was not a subject of disagreement at trial. Yet the trial court explained that it deliberately "ignored" Chinese New Year, giving the reason that "it falls differently every year." Is the trial court's failure to allow the children to spend Chinese New Year with their Chinese mother contrary to the best interests of the children, manifestly unreasonable, and based on untenable grounds for untenable reasons? (Assignment of Error 2.)

3. RCW 26.09.090(1)(b) requires the trial court to consider "the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skills, interests, style of life, and other attendant circumstances." A maintenance award that does not evidence a fair consideration of these factors results from an abuse of discretion. Ms. Rohde is majority caregiver for the parties' autistic son and the 3 year old child, and she handles "the lion's share" of the extra tasks associated with the autistic son. Ms. Rohde told the court that she could only go to school part time and no evidence support the idea that she would have enough time to attend full time. The court did not indicate that it considered the statutory criteria of RCW 26.09.090(1)(b). Was it an abuse of discretion for the court to require that Ms. Rohde maintain full time enrollment in school as a condition of receiving maintenance? (Assignment of Error 3.)

4. The court violated Ms. Rohde's right to fundamental due process by ordering her attorney's lien to be paid from the home proceeds.

D. STATEMENT OF THE CASE

1. Procedural History. Mr. Rohde filed for dissolution in June 2011. CP 1. Temporary child support, maintenance, and parenting plans were entered in September, 2011. CP 9, 18, 31, 35. The matter went to trial from July 30-August 2, 2012, after which the court entered an Order

of Child Support and Parenting Plan on August 22, 2012 and a Decree of Dissolution on August 30, 2012. On September 4, Ms. Rohde filed a Motion for Reconsideration which was denied on September 13, 2012. CP 256, 260, 341, 344. This appeal timely followed on October 12, 2012. CP 433.

2. **Relevant Facts.** Facts related to each assignment of error are presented at the beginning of each argument section.

E. ARGUMENT

1. **THE TRIAL COURT'S CHILD SUPPORT AWARD WAS MANIFESTLY UNREASONABLE AND BASED ON UNTENABLE GROUNDS BECAUSE IT FAILED TO INCLUDE MR. ROHDE'S ANNUAL BONUS AS GROSS INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT AS REQUIRED BY RCW 26.19.071(1) AND (3)(R)**

a. **Relevant facts.** The trial court found on line 1a. of the Child Support Worksheet that the father's gross monthly income from salaries and wages is \$15,416.70. CP 224. Multiplied by twelve, that is an annual gross income of \$185,000.40. This was deliberately done; as the trial court explained in its comments when delivering its ruling,

Now the order of child support. Having set the mother's maintenance at \$4,500 and the father's total gross, mother is \$15,416.70. And that reflects a base salary of \$185,000. I included as a comment that the father has a variable annual bonus up to \$20,000 per year because that needs to be part of the decision making. That works out to a payment per month of

\$1,151 for Joseph, \$1,151 for Daniel, which is 65 and 35 percent respectively.

8/10/2012 RP 718.¹ The trial court's figure for gross annual income thus specifically and deliberately excludes the father's annual bonus. The father's annual bonus is not included anywhere in the Child Support Worksheet or the Order of Child Support.

At trial, the parties' most recent (2011) tax return, showed annual adjusted gross income of \$220,679.00. Exhibit 96. All of this income was from Mr. Rohde's earnings. Mr. Rohde's 2010 gross income was almost as much: \$215,525, demonstrating that his bonus and overall income level as of the date of trial were fairly consistent. Exhibit 97.

b. Standard of review. The appellate court will overturn an award of child support only when the party challenging the award demonstrates that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. In re Marriage of Stenshoel, 72 Wash.App. 800, 803, 866 P.2d 635 (1993).

c. Washington law mandates the inclusion of bonuses as part of gross income for child support purposes. RCW 26.19.071(1) requires that "[a]ll income and resources of each parent's household shall

¹ The Verbatim Report of Proceeding consists of five days and has been transcribed as one sequentially numbered document. This Report shall be referred to first by the date, then by "RP" followed by the page number.

be disclosed and considered by the court when the court determines the child support obligation of each parent." RCW 26.19.071(3)(r) requires that "monthly gross income shall include income from any source, including ... bonuses." These statutes are intended to benefit the children, as recognized by this Court in Stenshoel, 72 Wash.App. 806, ("[t]he legislative intent behind the child support schedule is to 'insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living.'" (citing RCW 26.19.001)").

The WSCSS-Schedule 06/2010 Instructions, page 7, Section 3 clearly reflect this:

Income sources included in gross monthly income:
Monthly gross income shall include income from any source, including: salaries; wages; commissions; deferred compensation; overtime, except as excluded from income in RCW 26.19.071(4)(h); contract-related benefits; income from second jobs except as excluded from income in RCW 26.19.071(4)(h); dividends; interest; trust income; severance pay; annuities; capital gains; pension retirement benefits; workers' compensation; unemployment benefits; maintenance actually received; **bonuses**; social security benefits; disability insurance benefits;

[Emphasis added.]

d. The trial court's failure to include Mr. Rohde's

bonus requires remand for entry of recalculated child support.

The court's finding that Mr. Rohde's gross annual income for child support purposes was \$185,000 -- that regular annual bonus income was excluded from gross income -- was directly contrary to the definitions and standards set forth in RCW 26.19.071 as embodied in section 3 of the WSCSS-Schedule Instructions. For this reason, the trial court's award, which is based on its calculation of the father's gross income as \$185,000 per year, is manifestly unreasonable, based on untenable grounds, and granted for untenable reasons. Ms. Rohde requests this court remand to the trial court for entry of a new Child Support Worksheet and Order of Child Support which retroactively includes as gross income the father's regular annual bonus as reflected in the 2011 tax return, and reimburses the mother accordingly.

2. **THE TRIAL COURT'S FAILURE TO DESIGNATE CHINESE NEW YEAR AS A HOLIDAY IN THE PARENTING PLAN OR TO PROVIDE A CONSISTENT WAY FOR THESE BIRACIAL CHINESE-AMERICAN CHILDREN TO SPEND CHINESE NEW YEAR WITH THEIR CHINESE MOTHER, THE MAJORITY PARENT, IS CONTRARY TO THE BEST INTERESTS OF THE CHILDREN AND THEREFORE MANIFESTLY UNREASONABLE, BASED ON UNTENABLE GROUNDS, AND MADE FOR UNTENABLE REASONS.**

a. Relevant facts. Ms. Rohde, while an American citizen, is originally from China, and the parties' children are biracial Chinese-American. 8/10/2012 RP 729. She requested that her children be allowed to celebrate Chinese New Year with her. 7/31/2012 RP 348. Pam Edgar, the parenting evaluator, recommended to the court that the children spend Chinese New Year with Ms. Rohde. Id. Mr. Rohde is not involved in Chinese related activities or traditions; he does not cook Chinese food or buy Chinese food at stores or restaurants. 8/2/2012 RP 617-18. "I just don't know how to shop there." Id. at 618. "Maybe it's a failing on my part, but I just couldn't make my around [sic] in there and know where anything was." Id.

There were scattered references to New Year's resolutions throughout the transcript, but there was no testimony by either party disputing who should receive which holidays. 7/31/2012 RP 242, 243; 8/1/2012 RP 392, 394, 454. American New Year was not raised as an issue during trial, apart from a brief exchange with Ms. Edgar and later with Dr. Daniel Rybicki regarding whether Ms. Rohde should be required to trade off every American New Year in order for the children to celebrate Chinese New Year with her. 7/31/2012 RP 348; 8/1/2012 RP 520-1. During these exchanges, Ms. Rohde's attorney was attempting to

make this point with Dr. Rybicki about cultural bias, and the following exchange occurred:

BY MR. GLASS:

Q: On the issue having to do with New Year's.

COURT: I think that's a matter for argument. I really do.

MR. GLASS: I think it as something very subtle but yet -

COURT: It's not methodology.

MR. GLASS: I think it shows bias.

COURT: You think it shows racial and cultural bias is what you think.

MR. GLASS: Yeah, I do.

COURT: I don't know that it does. It could.

MR. GLASS: Well, let me say I know her. It's not being --

COURT: I don't know if he's going to be able to say that shows racial and cultural bias to give the father New Year's on the 31st of December every year and to give the mother Chinese New Year's. She's an American citizen, she was here, she has American children. You know, is that racial and cultural bias? I think we all probably have our opinions about that.

MR. GLASS: I'll rephrase. I understand.

8/1/2012 RP 520-1. Ultimately, the court entered a parenting plan which included Christmas, Thanksgiving, Veterans' Day, Labor Day, July 4th, Memorial Day, Halloween, and New Year's Day (US), but not Chinese New Year. CP 232-3.

When presenting the court's ruling, the court explained its rationale for excluding Chinese New Year:

Then with respect to winter vacation, I dropped out the notion of Chinese New Year's because it is, it falls

differently every year. And so if it happens to fall when the kids are with the mom, they spend it with the mom; otherwise not. Because the mother was aggrieved about not having New Year's, so I did an odd-even with respect to the Christmas holiday and the New Year holiday. So I think that's a more appropriate way. It kind of splits up the Christmas vacation, but I ignored Chinese New Year.

* * * * *

And then the holidays, as I indicated, are pretty much as proposed by both parties except I did even-odd on the New Year's and just took out Chinese New Year's because I think it's a source of problems.

8/10/2012 RP at 704-5.

b. The trial court has a statutory obligation to fashion a parenting plan which is in the children's best interests and which, pursuant to RCW 26.09.187, makes residential provisions for each child which are "consistent with the child's developmental level and the family's social and economic circumstances" and consider the "emotional needs and developmental level of the child." RCW 26.09.184(3) specifically provides authority for the court to consider the cultural heritage of a child when fashioning a parenting plan. RCW 26.09.184(1)(b) and (g) state that the objectives of the permanent parenting plan include maintaining the child's emotional stability and "otherwise" protecting the best interests of the child. According to RCW

26.09.002, "the best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care." When allocating how children should spend holidays, the court is directed to do so consistent with the criteria in RCW 26.09.187, i.e consistent with "the child's developmental level and the family's social and economic circumstances" and the "emotional needs and developmental level of the child. RCW 26.09.184(6).

c. Preserving Chinese New Year for the children is important to the best interests of the children, addresses the emotional needs and developmental level of the children, and is consistent with the family's social circumstances. According to a respected survey of professional literature on this topic, "[i]t is well documented that racial and ethnic identity, and the concepts associated with racial and ethnic diversity, are developmental tasks that begin in early childhood (Derman-Sparks, 1989; Phinney, 1991; Poston, 1990). It has also been well documented that a central part of a child's sense of positive self-esteem is based upon a child's racial/ethnic identity; a child with high self-esteem does better in school (Matiella, 1991; Ogbu, 1987; Phinney, 1991)."²

² Derman-Sparks, L., and the ABC Task Force. (1989). *Anti-bias curriculum. Tools for empowering young children*. Washington, DC: NAEYC.; Phinney, J.S. (1991). Ethnic identity and self-esteem: A review and investigation. *Hispanic Journal of Behavioral Science*, 13 (2), 193-208. Poston, W. S.C. (1990). The biracial identity

Early Childhood Education Journal, Vol. 26, No. 1, p. 7, 1998, *Meeting the Needs of Multiracial and Multiethnic Children in Early Childhood Settings*, Francis Wardle Ph.D., director of the Center for the Study of Biracial Children in Denver and an adjunct professor at the University of Phoenix (Colorado).

Further, "[m]any psychologists believe multiracial and multiethnic children have a more difficult time determining racial identity in this society than children of single race heritage (Bowles, 1993; Gibbs, 1989; McRoy & Freeman, 1983). Because this society places such an emphasis on racial and ethnic identity and affiliation, children of mixed parentage often feel disloyal and confused; they have a sense of not knowing where they belong." ³ Wardle, *Id.*

Dr. Wardle continues: "[m]ore and more experts, along with many parents, believe that children who identify with both parents' heritages and

model: A needed addition. *Journal of Counseling and Development*, 69, 152-155. Matiella, C.A. (1991). *Positively different: Creating a bias-free environment for children*. Santa Cruz, CA: ETA Associates. Oghu, J.U. (1987). Variability in minority school performance: A problem in search of an explanation. *Anthropology and Education Quarterly*, 18, 312-334.

³ Bowles, D.D. (1993). Bi-racial identity: Children born to African American and white couples. *Clinical Social Work Journal*, 21 (4), 417-428.; Gibbs, J.T. (1989). Bi-racial adolescents. In J.T. Gibbs, L.N. Haug, and Associates. (Eds.) *Children of color: Psychological intervention and minority youth*. (322-359). San Francisco: Jossey-Boss. McRoy, R. and Freeman, E. (1986). Racial identity issues among mixed race children. *Social Work in Education*, 8, 164-174.

cultures from an early age will have fewer identity problems later on (Baptiste, 1985; Benjamin-Wardle, 1994; Bowles, 1993; Funderburg, 1994; Morrison & Rodgers, 1996). They suggest children who accept and embrace their total ethnic, racial, and cultural heritage will not succumb to the tug of racial loyalties and group affiliations."⁴

Dr. Wardle concludes that "[t]eachers, caregivers, and administrators must support multiracial and multiethnic children's total identity and heritage ... Serving the unique needs of multi-racial and multi-ethnic children and their families is a particular challenge because of past history in this country, the lack of information and materials, and the reality that most multi-cultural books and training programs are only just beginning to view the needs of these children." Earlychildhood News The Professional Resource for Teachers and Parents, 2008, Excellence Learning Corporation.

d. The trial court's parenting plan does not properly effectuate its statutory obligation to the children. David Schaberg, Professor of Chinese Thought and Literature at UCLA, has recently described Chinese New Year as "the most important Chinese holiday ...

⁴ Bowles, D.D. (1993). Bi-racial identity: Children born to African American and white couples. *Clinical Social Work Journal*, 21 (4), 417-428.; Funderburg, L. (1994). *Black, white, other biracial Americans talk about race and identity*. New York: William Morrow.; Morrison, J.W. and Rodgers, L.S. (1996). Being responsive to the needs of children from dual heritage backgrounds. *Young Children*, 52 (1), 29-33.

like Christmas and Thanksgiving." USA Today, February 8, 2013 (<http://www.usatoday.com/story/news/nation/2013/02/07/chinese-new-year-snake-sunday/1900015/>), *see also* Asia For Educators, Columbia University(http://afe.easia.columbia.edu/special/china_general_lunar.htm).

The trial court's failure to allow the children an opportunity to consistently celebrate Chinese New Year with their mother means that they will not consistently experience the most important holiday of the year relating to their Chinese heritage. Chinese New Year is a family-based activity involving traditional foods and activities in the home, and Mr. Rohde is not able to "support multiracial and multiethnic children's total identity and heritage" in this way during those years when the court has allocated to him the day on which Chinese New Year happens to fall. Accordingly, when the children are with him, they will not celebrate a traditional Chinese New Year.

As the psychological literature demonstrates, it is in the best interests of the children that they "embrace their total ethnic, racial, and cultural heritage." Disrupting the children's consistent connection with Chinese New Year unnecessarily risks creating identity problems in the children, as children "who identify with both parents' heritages and cultures from an early age will have fewer identity problems later on."

Such a disruption also places the children at risk of feeling "disloyal and confused" and having a "sense of not knowing where they belong."

While the trial court evidently understood the importance of participating in typical American cultural activities -- it added Halloween to the list of holidays at the father's request -- the court showed no awareness of the importance of Chinese New Year in maintaining the children's connection to their Chinese heritage. The trial court failed to act in the best interests of the children when it failed to protect the children's connection to this part of their biracial heritage. By carving out nine American holidays as special for the children, but not the one requested Chinese holiday, the trial court made it much more difficult for these children to "embrace their total ethnic, racial, and cultural heritage." And as research has shown, "a central part of a child's sense of positive self-esteem is based upon a child's racial/ethnic identity; a child with high self-esteem does better in school."

Carving out just one holiday a year to celebrate their biracial heritage is not, as the trial court called it, a "notion" that is easily "dropped out" because it happens to fall differently on the calendar each year; nor is arranging for the children to consistently celebrate it simply "a source of problems." 8/10/2012 RP at 704-5. By treating Chinese New Year in this way, the trial court has acted contrary to the best interests of the children

by placing them at risk of doing more poorly in school, experiencing lower self-esteem, and having greater difficulty integrating their biracial heritage.

The trial court's decision to disrupt the children's consistent connection to Chinese New Year was therefore manifestly unreasonable, based on untenable grounds, and made for untenable reasons. Accordingly, Ms. Rohde respectfully requests remand for entry of a new parenting plan which specifies that the children will celebrate Chinese New Year with their mother every year.

3. **THE COURT ABUSED ITS DISCRETION WHEN IT CONDITIONED MS. ROHDE'S MAINTENANCE UPON MAINTAINING FULL TIME ENROLLMENT IN SCHOOL WHILE BEING THE MAJORITY CAREGIVER FOR AN AUTISTIC CHILD AND A SMALL CHILD**

a. Standard of Review. The court reviews an award of maintenance for abuse of discretion. *In re Wright*, 78 Wn. App. 230, 237-38, 896 P.2d 735 (1995). The court will find an abuse of discretion if the trial court bases its award or denial of spousal maintenance on untenable grounds or for untenable reasons. *Id.*

b. Relevant Facts. The parties had been married for nine years at the time of trial. CP 1. During the marriage, they had two children, Joe, 6 years old and Nate, 2 years old. CP 229. Mr. Rohde

acknowledged at trial that, although he had at first disbelieved it, Joe had been diagnosed with autism. 7/30/2012 RP 28, 67-88. Ms. Rohde did not work during most of the marriage; it was what parenting evaluator Pam Edgar termed a "very traditional" marriage in which Ms. Rohde had total responsibility for the children and homemaking, while Mr. Rohde focused almost exclusively on his career. 7/31/3012 RP 320. At the time of trial Mr. Rohde, who had previously worked at Microsoft, provided all the family's income by working at Valve; in 2011 he earned \$220,679.00. Exhibit 96.

Ms. Rohde observed that it did not seem Joe was keeping pace with developmental milestones compared with his peers, so she pursued testing, without support from Mr. Rohde. 7/30/2012 RP 67. Before separation she was solely responsible for arranging Joe's testing and therapy sessions, arranging his IEPs, arranging his evaluations, taking him to medical appointments, and arranging appropriate play dates. 7/31/2012 RP 323, 354; 8/1/2012 RP 382. After separation, she remained responsible for virtually all of these tasks. 7/31/2012 RP 246.

At trial, Mr. Rohde admitted that he had only begun to develop communication with the professionals treating Joe within the past month; he could not remember the name of the childrens' pediatrician or dentist. 7/31/2012 RP 240-1; Id. at 301; 7/30/2012 RP 69, 172. As Pam Edgar

told the court, Ms. Rohde was definitely the "majority parent" who provided the parenting "infrastructure," and noted that after the dissolution "she may end up still doing the lion's share of that." 7/31/2012 RP 373. Dr. Daniel Rybicki, a clinical and forensic psychologist practicing largely in the area of family law, with expertise in raising autistic children, told the court that autistic children sometimes require 30 hours per week of intensive interventions. 8/1/2012 RP 483, 487-89, 508.

Ms. Rohde told the court that she wanted to finish her education and obtain her degree in accounting so that she could work in that field. 7/30/12 RP 41; 8/1/2012 RP 415. Ms. Rohde, who is not quite fluent in English, explained that she planned to apply to the University of Washington and that she intended to try to finish her degree in three years. 8/1/2012 RP 415. She specifically told the court that given her child rearing responsibilities, school would need to be part time: "I can't go to school -- I don't think it's practical to be full time, be part time." *Id.*

The trial court conditioned Ms. Rohde's maintenance upon full time enrollment:

With respect to maintenance, the period is 36 months and it is \$4,500 per month for 36 months in two payments per month because that's a pretty substantial payment. So it's due the 1st and 15th. And it is conditioned on the wife being enrolled full time to get her education. That is the reason for the maintenance, to help support her education.

8/10/2012 RP 708. The court did not explain how it arrived at the finding that Ms. Rohde could handle full time classes in addition to being the majority caregiver for an autistic child and a 3 year old.

In her motion to reconsider the full time enrollment condition on her maintenance, Ms. Rohde explained her request:

I am not physically and mentally ready go [sic] to school full time. There are no universities on the east side. There are UW, Seattle U and Pacific U which are all in Seattle. One way commute to those schools is about 50 minutes with no traffic. For me to get the two children to where they each need to be is about 40 minutes total, assuming they attend schools close to each other. That is one and half hour [sic] in the morning of travel ... Both the children will need to be in before and after school care which is not good for them and is not what they are ready for. Little Joe (the parties' autistic child) doesn't do well with downtime with no supervision. On top of autism, little Joe also has an ADHD [sic]. He absolutely can't finish homework on his own with no supervision. I have helped with his school work all year last year. Kindergarten and elementary school homework a lot are crafts related and I have to shop for the materials often. Joe also eats very slow (motor skill; food texture, temperature tolerance related)... Each hour of class time also requires equal number of study time [sic] after class. I am a very slower reader [sic]. Since Nate was born, every night around 8 or 9 pm, I have been "out." I have been physically exhausted and couldn't read fine prints that Mr. Rohde is well aware. I often had a fuzzy head and still do... When I told the court that my plan was to finish school, I meant to go to school part time, in three or four years' time while I can still take care of my children, or even online study... The school condition also puts a limit on my loan application for a new house, which might stop me from getting a loan as my real estate agent was telling me.

CP 269-69. The court denied Ms. Rohde's motion. CP 344.

c. This maintenance award does not evidence a fair consideration of the statutory factors and thus results from an abuse of discretion. Although a trial court need not make specific findings of fact for every statutory factor, some sort of oral or documentary evidence is required to show that the trial court considered all relevant factors under RCW 26.09.090. Murray v. Murray, 28 Wn.App. 187, 189-90, 622 P.2d 1288 (1981). As this Court explained in Murray, when written findings of fact do not clearly reflect a consideration of statutory factors, resort can be made to the court's oral opinion. Id. at 189. Any presumption that the trial court considered the statutory factors is rebutted by the failure of the written findings or oral opinion to reflect any application of the statutory factors. Id.

Here there is nothing to indicate that the court considered RCW §26.09.090, the statutory criteria for awarding maintenance. Particularly necessary in this case is consideration of subsection (1)(b), "the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skills, interests, style of life, and other attendant circumstances." In this case, the

"time necessary" mainly concerns the number of hours available in each day to fulfill required tasks, rather than the number of years needed.

Additionally, RCW §26.09.090 would require that the court consider that it is imposing upon Ms. Rohde a requirement that she pay for the cost of full time as opposed to part time school, a cost which amounts to almost half of her maintenance award. Neither the court's written nor oral opinion reflect consideration of the statutory criteria, and as this Court explained in Murray, such consideration may not be presumed in the absence of written or oral reference to consideration of the criteria.

The court's imposition of a full time enrollment condition indicates that RCW 26.09.090(1)(b) in particular was not fairly considered. There was no evidence presented at trial indicating that Ms. Rohde had enough hours in the day to maintain full time college enrollment while being the primary caregiver for her autistic child and her 3 year old. To the contrary, the only evidence taken on the issue of the feasibility of full time versus part time enrollment indicated that full time enrollment would not work and only part time was appropriate. 8/1/2012 RP 415. While Ms. Rohde did not place an hours-per-day figure on the extra time needed per day to care for Joe because of his autism, Dr. Rybicki explained to the court that autistic children sometimes require 30 hours per week of intensive interventions. 8/1/2012 RP 508. Because Joe is high

functioning, he may not need a full 30 extra hours per week, but the evidence about his autism, evaluations, therapy, Kindering, and eating difficulties provide ample support for the fact that Joe's autism requires Ms. Rohde to spend significantly more time supervising him on an everyday basis. Further, the burden is not necessarily shared between the parents in proportion to their parenting days; as parenting evaluator Pam Edgar noted was likely, Ms. Rohde is still responsible for handling "the lion's share" of Joe's appointments, therapy, and other special needs.

As this Court has noted, "what is a reasonable length of time for a divorced spouse to become employable and provide for his or her own support, so that maintenance can be terminated, depends on the particular facts and circumstances of each case." A maintenance award that is not based upon fair consideration of statutory factors constitutes an abuse of discretion. Spreen v. Spreen, 107 Wn.App. 341, 348, 28 P.3d 769 (2001).

d. Remand is required for entry of a maintenance order which reflects application of the statutory elements and reduces the requirement for full time enrollment to one of part time enrollment. Because the trial court did not fairly consider the statutory criteria of RCW 26.09.090 when it imposed the full time enrollment condition on Ms. Rohde's maintenance, the trial court's award constitutes an abuse of discretion.

This court has authority to remand the maintenance award for application of the statutory elements. Murray, 28 Wn.App. 187. Accordingly, Ms. Rohde respectfully requests this Court remand the case to the trial court for entry of findings which apply the statutory elements to the evidence adduced, and require no more than part time enrollment in school. In this way the intent of the trial court, to support Ms. Rohde's education, can be effectuated according to the criteria of RCW 26.09.090(1)(b).

4. MS. ROHDE IS ENTITLED TO FEES AND COSTS ON APPEAL

Pursuant to RAP 18.1, a party may recover attorney fees and costs at trial and on appeal when granted by applicable law. RCW 26.09.140 provides for an award of reasonable attorney's fees for maintaining or defending an action under RCW Chapter 26.09. Because of financial need stemming from the disparity in income and resources between Mr. and Ms. Rohde, Ms. Rohde requests this Court award her reasonable attorney's fees on appeal. See RAP 18.1.

Ms. Rohde will file an affidavit of need as required by RAP 18.1(c) more than ten days before oral argument. Under RAP 14.2, this Court should award these costs and fees if Ms. Rohde is the prevailing party in this action.

5. THE TRIAL COURT VIOLATED MS. ROHDE'S RIGHT TO FUNDAMENTAL DUE PROCESS WHEN IT ORDERED HER ATTORNEY'S LIEN TO BE SATISFIED FROM THE PROCEEDS OF THE SALE OF THE HOME

a. Standard of Review. This is a constitutional issue which this Court reviews *de novo*. State v. Iniguez, 217 P.3d 768, 167 Wn.2d 273 (2009).

b. Relevant Facts. At the court's ruling on 8/10/2012, Mr. Glass submitted a bill for attorney's fees that he had presented to Ms. Rohde a few days previously. 8/10/2012 RP 736-39. Ms. Rohde did not have an opportunity to respond to Mr. Glass' motion. Id. Mr. Glass informed the court at the beginning of proceedings that day that he had been fired by Ms. Rohde. Id. at 703. The court viewed Mr. Glass' bill and decided it was reasonable. Id. at 738. The court did not at any time allow Ms. Rohde to speak or to object to Mr. Glass' bill or to the order that it be paid from the proceeds of the sale. Id. at 736-9. The court instead consulted opposing counsel Id. at 738.

c. Due process requires that the court's order of payment be reversed. King County v. Seawest Investment Associates, LLC, 141 Wn.App. 304, 170 P.3d 53 (2007). Seawest acknowledged that summary

proceedings on attorney liens must afford the litigants due process. 141 Wn. App. at 316.

The historical justification for the use of summary procedures relative to attorney liens involves a "balancing of interests," *i.e.*, that "the client should have his property immediately" and that "the attorney might rest secure that he would obtain his reasonable fees." Krein v. Nordstrom, 80 Wn. App. 306, 309-310, 908 P.2d 889 (1995). However, as should be readily apparent, the courts can easily protect the attorney's interests through orders that maintain the status quo, without resorting to expanded summary proceedings. In contrast, forcing the former client into expanded summary proceedings with attendant *res judicata* effect but without guarantees of the constitutional and procedural protections that would otherwise apply, furthers no interest at all other than providing the attorney with significant strategic advantages. Thus, if the client objects to proceeding summarily, the trial courts should normally not proceed summarily beyond maintaining the *status quo* pending separate litigation. Here, the client was not even afforded the opportunity to object.

For example, normal procedure requires commencement of a lawsuit through service of a summons and Complaint. CR 3(a). See, *e.g.*, Powell v. Nolan, 27 Wash. 318, 345-346, 68 P. 389 (1902)(on rehearing)("Service of the summons...is necessary to complete

commencement of the action..."). The former client has at least twenty (20) days to answer the Complaint. CR 4. Washington Constitution Art. I §21 promises the client the fundamental right to request a jury trial relative to all claims and counterclaims (including the attorney's contractual claim for fees). See, Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 758-761, 162 P.3d 1153 (Div. I 2007). Furthermore, the attorney/plaintiff could not normally file a motion for summary judgment until after the due date for the former client's answer, or following appropriate discovery, after which the former client has at least 17 days in which to respond to the motion and 28 days prior to the hearing. CR 56(a), (c), and (f).

Here, the trial court deprived Ms. Rohde of the fundamental right to answer Mr. Glass' claim against her. The portion of the Decree requiring payment from the proceeds of her home should be reversed.

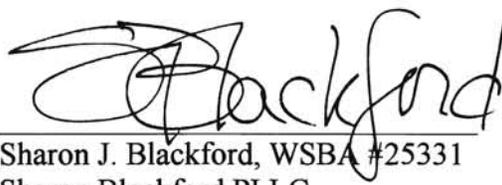
F. CONCLUSION

Ms. Rohde respectfully requests this court remand to the trial court for (1) entry of an Order Of Child Support that includes Mr. Rohde's annual bonus as gross income, (2) entry of an Amended Final Parenting Plan that provides for the children to celebrate Chinese New Year each year with Ms. Rohde, (3) entry of a new Decree which reduces the maintenance requirement of full time school enrollment to one of part time

school enrollment; (4) reversal of the order that her attorney's lien be satisfied from proceeds of her home, and grant her attorney's fees on appeal.

DATED this 15th day of April, 2013.

Respectfully submitted:

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

Sharon J. Blackford, WSBA #25331
Sharon Blackford PLLC
Attorney for Appellant Shudan Zhu Rohde

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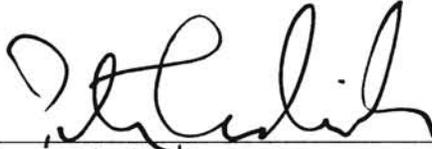
CERTIFICATION OF SERVICE

I, Peter Chadwick, certify that on the 15th day of April, 2013, I caused a true and correct copy of **Opening Brief Of Appellant** to be served on:

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VIA FIRST CLASS MAIL, POSTAGE PREPAID

SIGNED in Seattle, Washington, this 15th day of April, 2013.



Peter Chadwick

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