

No. 44068-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

ROBERT UNDERWOOD
Appellant,

v.

KARA UNDERWOOD
Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 10-3-01083-1

Emily J. Tsai, Esq.
Marcia L. Fischer, Esq.
Attorneys for Appellant
2101 Fourth Ave., Ste.1560
Seattle, WA 98121

FILED
COURT OF APPEALS
DIVISION II
2013 APR 15 PM 2:43
STATE OF WASHINGTON
BY [Signature] DEPUTY

i. TABLE OF CONTENTS

A. Assignments of Error.....	iv
B. Statement of the Case.....	1
C. Argument.....	12
E. Conclusion.....	49

ii TABLE OF AUTHORITIES

<u>Table of Cases:</u>	<u>Page</u>
<i>Custody of Shields</i> , 157 Wn. 2d 126 (2006).....	19
<i>Davenport v Richards</i> , 206 U.S. Dist. LEXIS 100445 (W.D. Wash., Dec. 21, 2006).....	18
<i>In re Estate of Kordon</i> , 157 Wn. 2d 206 (2006).....	13
<i>In re the Marriage of Akins</i> , 932 P. 2d 863 (1997).....	14
<i>In the Matter of the Marriage of Richard L. Booker</i> , 833 P. 2d 734 (1992).....	13, 14
<i>In re Parentage of J.H.</i> , 112 Wn. App. 486 (2002).....	36
<i>Kirshenbaum v. Kirshenbaum</i> , 84 Wn. App. 798, 929 P.2d 1204 (1997).....	19
<i>Marriage of Angelo</i> , 142 Wn. App. 622, 175 P. 3d 1096 (2008).....	36
<i>Marriage of Brewer</i> , 137 Wn. 2d 756, 976 P.2d 102 (1999).....	32
<i>Marriage of Coy</i> , 160 Wn. App. 797 (2011).....	21
<i>Marriage of Donovan</i> , 25 Wn. App. 691 (1980).....	42
<i>Marriage of Drlik</i> , 121 Wn. App. 269, 87 P. 3d 1192 (2004).....	44

<i>Marriage of Elam</i> , 97 Wn. 2d 811, 650 P. 2d 213 (1982).....	38
<i>Marriage of Johnson</i> , 28 Wn. App. 574, 625 P. 2d 720 (1981).....	39
<i>Marriage of Kasesurg</i> , 126 Wn. App. 546, 108 P. 3d 1278 (2001).....	32, 34, 35, 36
<i>Marriage of Knight</i> , 75 Wn. App. 721 (1994).....	47
<i>Marriage of Mathews</i> , 70 Wn. App. 116, 853 P. 2d 462, rev. denied 122 Wn. 2d 1021 (1993).....	46
<i>Marriage of McDole</i> , 122 Wn. 2d 604, 859 P. 2d 1239 (1993).....	21
<i>Marriage of Miracle</i> , 101 Wn. 2d 137 (1984).....	40
<i>Marriage of Pearson-Maines</i> , 70 Wn. App. 860, 855 P. 2d 1210.....	39
<i>Marriage of Ricketts</i> , 111 Wn. App. 168, 43 P. 3d 1258 (2002).....	36
<i>Marriage of Robinson</i> , 159 Wn. App. 162 (2011).....	13
<i>Marriage of Rockwell</i> , 141 Wn. App 235, 170 P. 3d 572 (2007).....	32
<i>Marriage of Rouleau</i> , 36 Wn. App. 129, 672 P. 2d 756 (1983).....	44
<i>Marriage of Sievers</i> , 78 Wn. App. 287 (1995).....	42
<i>Marriage of Stewart</i> , 133 Wn. App. 545, 137 P.3d 25 (2006).....	23, 29
<i>Marriage of Tower</i> , 55 Wn. App. 697, 780 P.2d 863 (1989).....	32
<i>Marriage of Watson</i> , 132 Wn. App. 222 (2006).....	24
<i>Marriage of White</i> , 105 Wn. App. 545 (2001).....	38
<i>Neilson ex rel Crump v. Blanchette</i> , 149 Wn. App. 111, 201 P. 3d 1089 (2009).....	22
<i>Scott v. Goldman</i> , 82 Wn. App. 1, 917 P.2d 131 (1996).....	26
<i>State v Sieyes</i> , 168 Wn. 2d 276 (2010).....	28
<i>Wagner v Wagner</i> , 564 Pa 448, 768 A. 2d 1112 (2001).....	13, 14

Constitutional Provisions

U.S. const. ar. VI, cl. 2.....14

Statutes

50 U.S.C. App §52217

10 U.S.C. §1408(c)(1), (4) (1994)13, 14, 15

RCW 9.41.040.....29

RCW 9.41.800.....29, 30

RCW 26.09.002.....21

RCW 26.09.004.....24

RCW 26.09.080.....32

RCW 26.09.090.....44

RCW 26.09.140.....47

RCW 26.09.191(1), (2),.....22

RCW 26.09.191(3).....24

RCW 26.09.430-460.....28

RCW 26.09.520.....28

RCW 26.50.010 (1), (2).....22

RCW 26.50.050.....29

Court rules

ER 801.....33

ER 803(a)(15).....34

CR 12 (b).....15

A. Assignments of Error

1. The trial court erred in finding the court had subject matter jurisdiction over Robert's military pension where he raised an objection to the court's general jurisdiction while he was residing in Italy pursuant to the Uniform Services Former Spouse's Protection Act, *10 U.S. C. §1408(c)(1)* (1994) (USFSPA).

2. The court denied Robert due process of law when the court allowed Kara to obtain ex parte relief restricting Robert's parental rights during a stay of proceedings pursuant to Servicemembers Civil Relief Act.

3. The court erred by depriving Robert of any parenting rights to see his children in the final parenting plan and to make the children the arbiters of determining such contact, allowing them to relocate to an undisclosed location and citing restrictions in the parenting plan under RCW 26.09.191(1) and (2) by defining domestic violence as "financial and emotional exploitation".

4. The trial court erred in entering a restraining order against Robert restricting his constitutionally protected rights to possess a firearm his right of travel, and to see his children when there was not clear and convincing evidence that he had ever brandished a firearm or threatened his family with a firearm or committing any act or threat of physical violence against his family.

5. The court erred its asset distribution by imposing a \$112,000 community lien in favor of the wife based upon hearsay testimony of a previously lost investment to the community that went through litigation ten years earlier and reducing the lien to a judgment at 12% per annum, securing the lien with virtually all the equity in husband's separate property and failing to consider that the costs of obtaining liquidity would eat up all separate and community property before the court.

-The court further erred in its debt distribution by imposing both community and separate debts on the husband when the wife received all the equity in the property before the court.

-The court further erred in requiring husband to pay for a Survivor Benefit Plan to secure wife's retirement on husband's death without properly allocating the cost of the same.

6. The court erred in awarding Kara lifetime spousal maintenance that survives her remarriage based upon a marriage less than 19 years from date of marriage to date of separation.

7. The court's award of attorney's fees to Kara following dissolution of marriage was excessive under RCW 26.09.140

Issues Pertaining to Assignments of Error

1) Whether the court must vacate the Military Qualifying Court Order due to lack of subject matter jurisdiction under the provisions of the Uniform Services Former Spouse's Protection Act where the provisions of that act conflict with the State's Long Arm Statute.

2) Whether the court should vacate all the orders and give Robert a new trial before a different trial judge on the remaining issues other than the division of the military retirement due to the violations of due process that occurred during the pendency of this case before the trial court, which began with ex parte contact and a violation of the stay ordered under the Servicemembers Civil Relief Act which resulted in increasing prejudice to Robert later in the case.

3) Whether the court should vacate the final parenting plan adopted by the court and remand with instructions that the father should be allowed reunification with his children and set forth specific visitation times.

- Whether a court can restrict a parent's visitation with a child under RCW 26.09.191(1) by defining domestic violence as "financial and emotional exploitation."

4. Whether the court violated the husband's constitutional rights by entering a permanent restraining order with a restriction against possession or ownership of a firearm when the sole definition of domestic violence was via "financial and emotional exploitation" and there was not clear and convincing evidence that husband ever made threats with a gun, or other physical threats or committed any other unlawful acts of violence.

5) Whether the court erred in its distribution of assets by giving the wife a \$112,000 lien against the husband's separate property after considering testimony that the parties lost an investment ten years earlier that would have been profitable if not lost where the investment was fully resolved through litigation and the parties did not have \$112,000 liquidity, the court entered a judgment bearing statutory interest and to obtain that liquidity would result in significant tax liability that would eat up all property before the court.

-Whether the court's debt distribution was unfair and inequitable in light of awarding all the equity in all property before the court to the wife.

-Whether the court has the authority to require the husband to carry life insurance in excess of any future support for the children and additionally insure the wife's portion of the military retirement through a Survivor Benefit Plan without allocating the costs of maintaining such policies.

6) Whether the court can award non-modifiable lifetime spousal maintenance that survives wife's remarriage of unspecified duration tied the amount to husband's retirement and not wife's need, where the parties are in their 40s, the wife is capable of working and holds a college degree and was working towards a master's degree said maintenance award is being used to retain jurisdiction in anticipation of misconduct of the husband.

7) Whether the court's attorney's fee award was unreasonable based upon the property distribution, the award of spousal maintenance and where the decree was leaving the parties financially.

B. STATEMENT OF THE CASE

A. Robert Underwood is a Lieutenant Colonel in the Army with a declared residence in the state of Montana, neither party resided in the State of Washington during the twenty-two months preceding filing of the dissolution of marriage, the parties resided with their children in Naples, Italy and appellant continued to reside in Italy, until he was deployed to Afghanistan, November 12, 2010.

This is dissolution of marriage where the parties were married for eighteen and a half years from the date of marriage to the date of separation and there are two dependent teenage children.¹ (RP 29, 30, 34) The parties married on July 6, 1991 in Condon, Montana and initially lived in Missoula, Montana. (RP 28) Robert's declared residence is the state of Montana. (CP 107-108) The parties separated previously in 2005 while Robert was stationed in Washington, but the parties reconciled shortly thereafter. (RP 33-34, 693) In June 2008, the parties relocated to Naples, Italy. (RP 34)

The parties have two teenage children between them. Robert has an adult son from a prior relationship. (RP 520) Kara has an adult daughter from a prior relationship. (RP 258) On February 12, 2010, Kara left Naples, Italy, with the children. (RP 34, 39) Kara initiated this dissolution action in Pierce County, Washington on March 25, 2010. (CP

¹ The parties will be referred to by their first names for the purpose of clarity. No disrespect is intended.

1) When the dissolution was filed, Robert continued to reside in Naples, Italy. (CP 1)

Kara moved for entry of temporary orders while Robert resides in Naples, Italy, and orders are entered on June 15, 2010. (CP 92-104)

Robert was deployed from Naples, Italy, to Afghanistan pursuant to a military order dated November 12, 2010. (CP 124) Robert testified he had to serve in Afghanistan in order to obtain orders sending him to Fort Lewis so he could be near his children. (RP 453,471, 719-720) Robert was subsequently stationed in Washington State on January 8, 2012. (RP 349)

B. Robert asks the court to dismiss the case for lack of jurisdiction, which is denied without findings, by the court.

On September 10, 2010, Robert, acting *pro se* filed a motion and declaration for order to show cause to vacate temporary orders dated June 15, 2010. (CP105) Robert objected to Washington State's jurisdiction. (CP 107) Robert asserted he was a resident of the state of Montana since birth. (CP 108) Robert requested the court vacate all orders involving his property. (CP 108) Following a hearing, the court entered an order denying Robert's request to vacate orders and decreed Washington State had jurisdiction over the action. (CP 121) The Court did not include any statements supporting its findings on the issue of jurisdiction. (CP 121) The court denies the motion to vacate. (CP 121)

C. Robert is deployed to Afghanistan and requests a stay of the proceeding in January 2011; the court orders a stay but, during the stay, the court modifies the temporary parenting plan dated March 30, 2011 restricting Robert's parenting time pending further order.

On January 6, 2011, based on Robert's motion and deployment to Afghanistan, an order to stay the proceeding is entered pursuant to the Servicemembers Civil Relief Act. (CP 128) Under the temporary parenting plan, Robert was scheduled to have residential time with the children during the summer of 2011. (CP 95) On March 30, 2011, while the order staying proceedings is in place, Kara files a motion requesting a mental health evaluation based on the Guardian ad litem report issued in October, 2010 and requests the temporary parenting plan be modified to suspend Robert's visit during military leave from his deployment in Afghanistan. (CP 129) On April 15, 2011, without lifting the stay or appointing counsel to represent Robert *in absentia*, the court modified the temporary parenting plan and prevented Robert from having residential time with the children until Kara's motion for a mental health evaluation was heard. (CP 150, RP 72) Robert testified that he had to hire an attorney while in Afghanistan because the court did not honor the stay. (RP 385) Robert complied with the request that he receive a psychological evaluation prior to exercising visitation with his children. (RP 421-422) The results of the psychological evaluation provided no basis for any restrictions against Robert. (RP 423)

D. Following Robert's deployment, Kara makes allegations against Robert resulting in a criminal investigation of Robert in March, 2012, which allegations receive nation-wide media attention- and result in Robert being confined to base until twenty days before the divorce trial begins-his parenting time is again suspended.

In March 2012, Kara is contacted by an acquaintance of Robert's named Serena Kiptoo, who makes serious allegations against Robert. Kara then brings Kiptoo to various police stations and the police interview Kiptoo at Kara's home. (RP 333-335) Kara also had Kiptoo tell the parties' eldest daughter about some of the allegations, which include an allegation that there are naked pictures of the child in Robert's computer. (RP 337) The daughter denies this and the Guardian Ad Litem has no evidence to support any such allegation. (RP 418, 442) The police seize Robert's computer and hard drives. (RP 642-643) In fact, Kiptoo is an illegal alien from Kenya who tries to make Robert appear to be a perpetrator of domestic violence and enlists Kara in this cause. (RP 327) Kiptoo is also jealous that Robert is dating other women, which she discovers when she steals his computer and threatens to kill herself only days before contacting Kara, if Robert doesn't date her. (RP 324-325) Based upon Kara and Kiptoo's allegations, criminal charges are brought against Robert and the ensuing charges attract nation-wide media attention. (RP 212, 216-219) Robert was incarcerated and on bail confined to base pending the charge. (RP 598) Robert remained

incarcerated/confined to Fort Lewis until June 9, 2012. (RP 522-523, 597-598) He was able to leave the base with an escort to see his criminal defense attorney. (RP 667) The Prosecutor ultimately dropped the criminal charges against Robert. (RP 219) All computers were returned to Robert.

F. Robert's parenting rights are severely curtailed during the proceeding as a result of Kara's allegations.

At trial, after her collusion with Kiptoo, Kara requested restrictions in the parenting plan under Section 2.1 alleging Robert committed domestic violence through financial manipulation and control. (RP 222) The parenting plan proposed by Kara when she filed the action did not request restrictions. (CP PPP 3/25/10) Kara maintains Robert physically and sexually abused the children but under simple questions could not articulate any instance of physical or sexual abuse. (RP 247-250) The children denied any such abuse to the Guardian Ad Litem and others. (RP 418, 442) Ultimately, Kara asserts her claim of physical and sexual abuse is based on a picture she heard about (from Kiptoo) but had never seen. (RP 249-250) Kara states that even if the alleged picture did not exist, Robert's contact with the children should be restricted. (RP 250-251) Kara testified Robert's emotional abuse stemmed from control of money and not returning phone calls fast enough. (RP 250) Robert testified Kara had multiple infidelities and Kara admits to an affair. (RP 279)

Kara did not testify concerning any act of domestic violence against her or the children other than to state that grievous bodily harm includes harm to your mind. (RP 251) When directly asked what grievous bodily harm was done to the children, Kara responded, “we will never know.” (RP 252)

Robert acknowledges the lack of contact with his daughters, the criminal charges and nation-wide media attention have impacted the children and that reintegration counseling is needed. (RP 373-374) Robert wants to see his children and engage in counseling. (RP 379-381) Robert often felt he had to defend himself to his children based upon the untruthful allegations being made against him. (RP 613)

Kara requested restrictions in the parenting plan under Section 2.2 based on the stress the dissolution had on the children. (RP 223) Kara asserts that Robert is emotionally impaired as a parent because he was a victim of domestic violence as a child. (RP 253) Kara testified if Robert was in a healthy state and being a good father the children could visit with their father but she did not know if that would ever exist again. (RP 221-222) Kara asserts she should decide if Robert was in a healthy state before any visits would occur. (RP 243-245)

F. The guardian ad litem finds both parents engaged in abusive use of conflict, but only the father’s time with the children is restricted.

James Cathcart, the court appointed Guardian ad litem, testified that after investigation he found no evidence of domestic violence. (RP 442) The Guardian ad litem testified that both parties had involved the children in the dissolution litigation. (RP 405, 424- 425) In the fall of 2010, Kara called the GAL indicating she had received a text from the children that they were scared and she was on the way to the hotel where they were visiting with their father. (RP 395) The incident blew over and the children remained with him. (RP 396) In the summer of 2010, when the children were with Robert in Montana, the GAL reported the children bolted from a restaurant table, madly texting with Kara and accused Robert of violating a restraining order for meeting with their paternal aunt. (RP 398) The GAL testified there was no such restraining order and that it was not Robert's fault that the children were upset. (RP 398) The GAL stated the children had been recruited by both sides, given information by both sides, heard too much, seen too much and been involved too much and wanted control over the residential schedule. (RP 402, 405) In regards to restrictions in the parenting plan, the GAL could support emotional abuse but not physical or sexual abuse after his investigation. (RP 416, 419-420) The GAL testified Robert had submitted to two psychological evaluations by two different physicians and saw no need for additional evaluations. (RP 421-423) The GAL testified that prior to the dissolution Robert was a good dad and that Robert had a strong desire to be a good father. (RP 425 -426)

G. The court does not define or differentiate separate and community property and does not accurately value and allocate separate and community property.

At trial, there are two parcels of real property: a parcel located at 4616 Taylor Road in Cheney, Washington known as “Parcel B” during trial and a parcel located in Anaconda, Montana, also known as “the log cabin.” (RP 47, 54, 56, 58) The Cheney property was purchased for \$160,000, and its value at trial is \$112,000. (RP 60, 78) It has no mortgage and never had a mortgage. (EX 21, RP 60, 78) The tax-assessed value at the time of trial was \$92,100. (EX 23, RP 62) At trial, Anaconda property is valued at \$224,100 and has an outstanding mortgage of \$140,000. (CP 78) Both Robert and Kara trace the acquisition of the real estate to Robert’s separate funds as the beneficiary of a trust, the Underwood Ranch Land Trust, which he inherited through his father. (RP 45, 54, 58, 550-551)

Robert also received other funds from the trust settlement including \$22,000 that, along with rental income, was spent maintaining the properties. (RP 551) Additionally, Robert received \$20,000 from his mother as his separate property between 2005-2008. (RP 560) Kara acknowledges Robert received these funds during the marriage. (RP 277)

In addition to the real property, the parties had horses and tack which Robert testified were acquired with sales proceeds of the parties’ Steilacoom property and the repayment of funds from a failed real estate

transaction in 2005. (RP 485, 561) Kara confirms Robert's testimony concerning the acquisition of horses, tack and other personal property. (RP 694) Kara acknowledged horses are an expensive hobby. (RP 229)

The parties also owned a Hilton Grand Vacation timeshare purchased for \$14,000 in 2008 upon which they were making monthly payments and still owed \$8,115. (EX 55, RP147) Finally, Robert accumulated a military pension, as well as some other military benefits, partly during marriage and partly prior to marriage and during separation. (RP 657)

H. The court recognizes property the parties do not own and determines a value for the non-existent property in its division of assets and liabilities.

Ten years before the dissolution of marriage is filed, there is litigation surrounding management of the Underwood Ranch trust and ultimately a settlement is reached wherein Robert receives his portion of the trust. (RP 69-72, 501-504) One aspect of the litigation involved a failed real estate transaction wherein Robert's grandparents agreed to sell Robert and Kara 10 acres of land in Condon, Montana in 1995. (RP 66, 269) Robert and Kara agreed to pay \$27,000 for 10 acres and made monthly payments to the grandparents at the equivalent cost of the grandmother's monthly diabetes medication. (RP 65-66, 68) Kara and Robert testify they executed a buy-sell agreement with the grandparents without a legal description and never received a deed of trust for the

property. (RP 73, 501-504) Kara knew from the inception of the marriage that the grandparents had established a trust for the Condon property. (RP 28) The parties and the grandparents mistakenly thought the 10 acres was excluded from the trust. (RP 67-70, 501-504, 542-550) Robert and Kara paid the monthly sum for several years totaling \$14,300 in payments and stop paying when the grandmother dies. (RP 69, 504, 546) Robert and Kara knew the 10 acres was part of the trust before the grandparents' death. (RP 67- 68, 70, 503) After the grandparents died, the trust asserted the grandparents could not have sold it to Robert and Kara, as it was trust property. (RP 547-548) Robert files a lawsuit against the trust in 2001 involving the 10 acres. (RP 70, 548-549) As part of the lawsuit settlement, all the money the parties paid for the purchase of the 10 acres was returned to them. (RP 272-273) According to Robert the community applied the returned proceeds towards the purchase of horses, tack and a horse trailer. (RP 485, 561)

The community never received title to the 10-acre parcel in Montana and no monies from reimbursement existed at the time of the dissolution in 2012. (RP 74) The court accepted testimony from Kara as to the value of the 10 acres that she and Robert never purchased or acquired title to. (EX 44, RP 74)

During trial, in addition to the parties, the court considered evidence from Matthew Cooper, Robert's estranged cousin, regarding the 10 acres in Montana and the litigation surrounding the trust. (RP 104)

Cooper testified that the refund of monies paid out of the trust for the 10 acres of land was less than the market value of the property. (RP 108) Cooper testified he was not directly involved with the litigation and that his knowledge was based on conversations with his mother. (RP 104, 108-109) The court settlement was not admitted at trial.

The court assessed a value to the failed real estate transaction based on when Robert received proceeds from the trust in 2005 and considered the failed transaction part of the community's property at the time of trial reasoning that the community lost the value of the asset. (CP 20, 71) The court concluded Robert received the value of the 10 acres as his separate property rather than the community. (CP 20, 71)

The court also considers testimony surrounding profit made by Robert off the sale of Parcel A in Cheney, Washington, in 2008, which profits were used to purchase the Anaconda property in Montana. (RP 53-54, 483) However, the value of the Anaconda property in Montana depreciates between the purchase date in 2008 and trial in 2012, such that all gains are lost. (RP 77, 79)

I. The trial court does not differentiate separate and community debt.

At the time the parties separated, the parties had debt on an American Express credit card in Kara's name of \$8,908.60. (RP 149-150) Kara had sole control of the credit card following separation and the debt increased between the date of separation and the date of the dissolution to

\$22,465. (RP 85) The court attributed the entire credit card debt to the community. (CP 69) The husband was not a signatory or user of that credit card, although the overdraft protection on the parties' joint credit cards during marriage and prior to separation was automatically charged to that account. (RP 86) The parties owed money for their daughters' braces in the amount of \$8,300 which was being paid monthly by Robert through a debit to his monthly paycheck. (RP 589-590) There was also a debt of \$140,000 against the log cabin property and a debt against the Hilton Grand Vacation timeshare of \$8,115. (CP 76-88, RP 494) Kara alleged she incurred \$46,000 in attorney's fees in her pretrial information form and testified to incurring approximately \$12,000 on credit cards but offered no proof of the actual attorney fees she incurred. (RP 152-155) It is not clear whether this included amounts that had been assessed against Robert during temporary order hearings as amounts charged to the American Express card. The husband incurred \$17,900 in attorney's fees for his dissolution proceeding prior to trial and an additional \$35,000 for his criminal defense attorney's fees, bail, and other legal expenses to disprove the allegations made by the wife, which resulted in the prosecutor dismissing charges against the husband. (RP 219)

III. ARGUMENT

1. The trial court erred in finding the court had subject matter jurisdiction over Robert's military pension where he raised an objection to the court's general jurisdiction while he was residing

**in Italy pursuant to the Uniform Services Former Spouse's
Protection Act, 10 U.S. C. §1408(c)(1) (1994) (USFSPA).**

Robert objected to the court's jurisdiction over him, a declared resident of the State of Montana, stationed in Italy at the beginning of the dissolution of marriage proceeding. (CP 105) A trial court's decision as to personal jurisdiction is a question of law that is reviewed de novo. *In re the Estate of Kordon*, 157 Wn. 2d 206 (2006) Likewise, a trial court's assertion of subject matter jurisdiction is reviewed de novo. *In re the Marriage of Robinson*, 159 Wn. App. 162 (2011)

The state's laws concerning subject matter and personal jurisdiction, including the state's long arm statute, do not supersede the statutory requirements of Uniform Services Former Spouse's Protection Act [hereafter USFSPA]. Unless the court has personal jurisdiction of the member as specified in 10 U.S.C. §1408(c)(4) the state court does not have subject matter jurisdiction of the member's military pension. *In the Matter of the Marriage of Richard L. Booker*, 833 P.2d 734, 738 (1992) citing *Steel v. United States*, 813 F. 2d 1545 (9th Cir. 1987); *Lewis v. Lewis*, 695 F. Supp. 1089 (D. Nev. 1988); *Allen v. Allen*, 484 So. 2d 269 (La. App 1986); *Seeley v. Seeley*, 690 S.W.2d 626 (Tex. App. 1985) See, *Wagner v. Wagner* 564 Pa 448; 768 A. 2d 1112 (2001).

By virtue of the Supremacy Clause of the United States Constitution, state rules of procedure concerning personal and subject matter jurisdiction to treat a military member's pension as property are

preempted and governed by the specific terms of the USFSPA. *U.S. Const. ar. VI, cl. 2.* Most authorities view the language of 10 U.S.C. §1408(c)(1) as constituting an absolute bar to the exercise of any jurisdiction by state courts for any purpose over military pension absent compliance with the personal jurisdiction requirements established by §1408 (c)(4). *In the Matter of the Marriage of Richard L. Booker*, 833 P.2d 734, 738 (1992) Citing *In re the Marriage of Tucker*, 226 Cal. App. 3d, 1249, 277 Cal. Rptr. 403 (1991); *Allen v. Allen*, 484 So. 2d 269 (La. App. 1986); *Seeley v. Seeley*, 690 S.W.2d 626 (Tex. App. 1985). See also, *In re the Marriage of Akins*, 932 P.2d 863 (Colo. Ct. App. 1997); *Wagner v Wagner*, 564 Pa. 448, 768 A. 2d 1112 (2001)

Section 1408(c)(4) states as follows:

A court may not treat the disposable retired pay of a member ... unless the court has jurisdiction over the member by reason of

- A) His residence, other than because of military assignment, in the territorial jurisdiction of the court,
- B) His domicile in the territorial jurisdiction of the court, or
- C) His consent to the jurisdiction of the court.

Congress did not choose to use state law to determine jurisdiction, thus courts are precluded from applying their respective long-arm statutes to assert jurisdiction over the military member's pension. In order for the state court to have jurisdiction over the military member's pension, the conditions of §1408(c)(4) must be met at the commencement of the action. See, *In re the Marriage of Akins*, 932 P.2d 863, 867 (1997).

It is uncontroverted that Robert was not a resident nor domiciled in Washington State at the commencement of the action. (CP 1) When the

dissolution action commenced on March 25, 2010, Robert was an active duty member of the military stationed at NATO Command in Italy. (CP 1) He was not physically present in the state nor is there evidence that he manifested intent to make Washington his home at the time the action commenced. Robert is an active duty service member and declared his residence in the State of Montana. (CP 107) Robert specifically denied the court had jurisdiction in this matter by filing a motion to vacate orders asserting the affirmative defense of lack of jurisdiction. (CP 107)

Robert asserted the court lack jurisdiction over the subject matter and his person in conformity with CR 12(b). In paragraph 5, subsection A, entitled "Jurisdiction" Robert states, in part:

Firstly, I am stationed in Naples, Italy and was not able to attend the hearing on 15 June 2010. My attorney, Bruce Clement, was to file a demurrer regarding my objection to the Washington State jurisdiction in this mater, based on the Service members Civil Relief Act (SCRA). ... I am currently on active duty and a resident of the state of Montana since birth. I am at a great disadvantage due to being stationed overseas. The Army only allows limited time off, making it impossible to travel the 3,000 plus miles to meet with attorneys and find out one that will represent me to my satisfaction. Thus my protection under SCRA was not given or just overlooked by the court. In fact, the United States Supreme Court has declared that the Act must be read with "an eye friendly to those who dropped their affairs to answer their country's call. I ask the court vacate all orders involving my property and income except those allows under the SCRA related to the Child Support, Parenting and dissolution of the marriage and grant me my rights under Service members Civil Relief Act. (CP 107-108)

Robert clearly objected to the jurisdiction of the court over his property, which includes his military pension, and thus did not grant consent as required in §1408(c)(4)(C). The Pierce County Superior Court

entered an order dated October 25, 2010, that Washington had jurisdiction over this action without making specific findings. (CP 121)

The trial court had no authority to divide Robert's military pension as property based on lack of subject matter and personal jurisdiction. He asks that any award and order entered by the court regarding the military pension must be reversed and an order dividing the Robert's military pension must be vacated nunc pro tunc.

Additionally, the court failed to recognize in dividing the military retirement that Robert was a reservist for 12 months of his marriage, which time is significantly discounted by the military, but did not pass this discount on to Kara. (RP 454-456, 657-659) The court could have used the same fraction as the military does (50% of 1/15 of 12 months/total months) in drafting its military qualifying order to fairly divide the marital portion of the retirement pay. Instead Kara will receive a portion of Robert's separate property benefits that Robert didn't accumulate during marriage.

2. Robert was denied due process of law when the court allowed Kara to obtain ex parte relief restricting Robert's parental rights during a stay of proceedings pursuant to Servicemembers Civil Relief Act.

Robert is an active duty service member who was stationed overseas when this action started and who was deployed to Afghanistan during the majority of the court proceedings in the case. (CP 105) Prior to

his deployment to Afghanistan and consistent with the provisions of the Servicemembers Civil Relief Act 50 U.S.C. App. §522, Robert requested and received a stay of proceedings from the trial court on January 6, 2011. (CP 128) “Stay” is defined as “the postponement or halting of a proceeding, judgment or the like” Blacks’ Law Dictionary, 1425 (7th Edition, 1999)

Temporary orders in this matter had already been entered 6 months prior to the stay, including a temporary parenting plan. (CP 92) Robert was awarded unrestricted residential rights with his children in that plan. (CP 92-104) When Robert was granted leave from deployment and sought to exercise his visitation, Kara filed a motion in violation of the stay requesting Robert’s residential time be restricted pending completion of a mental health evaluation. (CP150) Kara’s motion to restrict Robert’s contact with his children violated the stay. (CP 129-141) On April 15, 2011, a hearing occurred without Robert where the court granted Kara’s motion to restrict Robert’s parenting time until further hearing. (CP 150-152)

The court’s modification of the temporary parenting plan in contravention of the stay became the law in the case and prejudiced Robert’s future rights at a time when he was unable to appear and defend himself.

The Servicemember’s Civil Relief Act suspends enforcement of civil liberties of persons in military service of the United States in order to

enable such persons to devote their entire energy to the defense of the Nation. *Davenport v Richards*, 206 U.S. Dist. LEXIS 100445 (W.D. Wash., Dec. 21, 2006) citing *Engstrom v. First National bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995). The public policy behind the Act is to allow military personnel to fulfill their duties unhampered by obligations incurred prior to their call. *Id. Davenport citing Omega Industries Inc. v. Raffaele*, 894 F. Supp 1425, 1434 (D. Nev. 1995)

Robert was actively engaged in the defense of the Nation in a war zone. Kara's disregard of the stay denied Robert due process of law by interfering with his legal right to parent his children as well as his right to be heard. The court's acquiescence in disregarding Robert's rights while he was in a war zone was in contravention of the Act. At a minimum, the court should have appointed counsel to represent Robert's rights if the court determined there were exigent circumstances that warranted modification of existing temporary orders in his absence.

Once Robert's rights were prejudiced while he was on deployment, it became extremely difficult for him to redirect the wheels of justice which had begun to grind in a direction against him. His lack of physical presence, his deployment and his lack of representation at this time were all issues that worked to his detriment. The continuation of the case while Robert was on active duty worked a substantial prejudice against Robert and in favor of Kara.

Once the stay was lifted, a series of motions ensued to re-determine temporary orders, to compel discovery (Robert's documents were all located in Naples, Italy, while he was deployed in Afghanistan) and to gain access to property. (RP 513, 519, 597) Robert had extreme difficulty keeping up with the case while on deployment because he was in a war zone and his personal papers were in storage in Italy. (RP 513, 519, 597) This violation of his due process rights can only be remedied by a new trial before a new judge.

3. It was reversible error for the court to deprive Robert of any parenting rights to see his children in the final parenting plan and to make the children the arbiters of determining such contact with the recent pall of criminal charges having just been dismissed. It was further not in the children's best interests to allow them to relocate to an undisclosed location.

The court ordered that any residential time Robert has with his children is to be determined by the children. (CP 35, 37-38) The court does not delegate such authority to arbitrators or Guardians ad Litem and should not as a matter of law abrogate such authority to children. *Custody of Shields*, 157 Wn. 2d 126 (2006); *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 929 P.2d 1204 (1997).

At the time the divorce trial began Robert had not seen his children for several months due to false accusations being brought

against Robert by Kara and a disgruntled friend named Serena Kiptoo. (RP 372, 376, 418, 529, 537, 647) The allegations made against Robert by Ms. Kiptoo were ultimately discredited and the prosecutor voluntarily dismissed the criminal matter. (RP 315-319) The police seized Mr. Underwood's computers and hard drives, fully investigated the claims made, and the case was dismissed. (RP 642-643)

Throughout the 18 months the divorce case had been pending, there were no such allegations by Kara regarding pornography or inappropriateness of a sexual nature between Robert and his children, or threats of violence made by Robert. Kara's initial proposed parenting plan filed with the court did not propose restrictions against Robert. (CP PPP 3/25/10) Kara's complaints were predominantly financial, and that Robert was having psychological problems stemming from his victimization as a child. (RP 250, 253-254) She also complained that Robert wrote crude things about her because she was unfaithful to him. (RP 206-207)

After Ms. Kiptoo made allegations against Robert, there had been a media blitz painting him as a criminal and the children received negative attention from some of their peers and were interviewed in the criminal proceeding with respect to the allegations. (RP 213, 216-219, 407)

Prior to this long gap in visitation, the children had wanted time with their father, but they wanted some control over the time. (RP 402) Kara wanted the children and herself to be the sole arbiters of time spent with Robert (RP 243-245) It is a clear conflict of interest for an ex spouse to determine the time the children are to spend with the other spouse. *Marriage of Coy*, 160 Wn. App. 797, 806 (2011) This becomes even more problematic when one spouse has a history of abusing conflict as in this case. (RP 405, 423) Yet, essentially, because Mr. Underwood cannot contact the children according to the final plan unless they contact him first, and he has no residential time, nor any means of obtaining residential time, that is exactly what has occurred here. (CP 37)

It is the clear policy of the Washington Legislature to foster post-dissolution relationships between a child and each parent. *RCW 26.09.002*. The permanent parenting plan entered by the court prevents Robert from maintaining any contact or relationship. (CP 35) There is no provision in the parenting plan to provide evidence that the children are aware of or understand the court's order. (CP 37-38) The court's decision was not in the children's best interest, discourages any future relationship and deprives Robert of his constitutional right to parent his children. The court abused its discretion in an untenable unreasonable way and must be reversed. *Marriage of McDole*, 122 Wn. 2d 604, 859 P. 2d 1239 (1993)

a) There was no evidence of domestic violence supporting
RCW 26.09.191(1)(2) restrictions

The court concluded Robert engaged in acts of domestic violence as a basis for imposing restrictions under RCW 26.09.191(1) “by financial and emotional exploitation.” (CP 19) The court’s written basis for a finding of domestic violence is not supported by the statute or case law. To enter restrictions under RCW 26.09.191 based upon domestic violence requires that such violence be defined under the domestic violence statute. RCW 26.50.010 (1) and (2) are not ambiguous and thus the meaning of the statute must be derived from the plain language. *Neilson ex rel Crump v. Blanchette*, 149 Wn. App. 111, 201 P. 3d 1089 (2009)

“Domestic violence” is defined, in relevant part, as “physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members” and also “sexual assault of one family or household member by another. *RCW 26.50.010(1)(a)-(b)*

The domestic violence prevention act does not define domestic violence as including “financial and emotional exploitation” as found by the court. There was no evidence presented that Robert had ever committed acts of domestic violence as defined by statute, and quite to the contrary, Kara never articulated at trial any acts of physical violence, physical harm,

bodily injury, assault or the threat of physical violence. (RP 251, 252) Domestic violence can be psychological if the fear evoked is that of physical harm; however, that wasn't the evidence presented in this case. *In re Marriage of Stewart*, 133 Wn. App. 545, 137 P.3d 25 (2006) The guardian ad litem, after investigation, found no basis to believe that Robert had ever committed acts of violence against the children or Kara. (RP 418) The GAL further stated that he had no concern, nor did the children, that they would ever be physically abused by their father. (RP 442)

The court's improper finding of domestic violence permeated throughout the parenting plan resulting in a parenting plan that is extremely restrictive and not in the children's best interests.

b. The GAL report indicated both parents abused conflict during the divorce process, but the court only restricted the father.

The evidence at trial indicated both parents had involved the children in the dissolution litigation yet the court concluded Robert was solely responsible for the strained relationship with his children. (CP 34, RP 405, 425) The GAL testified the children loved their father but were frustrated with his behavior during the divorce process. The GAL stated he thought the relationship could be repaired and that Robert should have an opportunity to do so. (RP 410-411) The GAL did not support Kara's request for no

contact between Robert and the children. (RP 410-411) The GAL supported reunification. (RP 436-437)

c) It was error to restrict the father's visitation with the children based upon RCW 26.09.191(3).

Finding restrictions pursuant to the provisions outlined in RCW 26.09.191(3) must be more than the normal distress suffered by children resulting from dissolution and must be supported by substantial evidence that the parent's involvement or conduct caused the restricting factor. *In re Marriage of Watson*, 132 Wn. App. 222, 232 (2006) The court's findings under section 2.2 of the parenting plan that are not substantiated by the evidence. The court concluded Robert had a long-term emotional or physical impairment which interfered with the performance of parenting function as defined in RCW 26.09.004. (CP 34) This was the same allegation made by Kara at such time as she obtained ex parte restrictions against Robert during a time there was supposed to be a Servicemember's stay. (RP 420-421) Kara testified that Robert must be impaired because he was once the victim of a serious incident of domestic violence that occurred when he was a small child. (RP 253) After review of two psychological evaluations of Robert, the GAL testified there was no evidence to conclude the incident impaired Robert and the GAL did not recommend further psychological evaluation of Robert. (RP 420)

The overwhelming evidence was that Robert was a dedicated parent bonded to both of his teenage daughters before the dissolution of marriage case was filed. (RP 425)

Much of the evidence that Robert abused conflict stemmed from his frustration at Kara that the children were taken from Italy where he was stationed to the State of Washington, immediately restricting his ability to see them. (CP 129) In order to be stationed near his children, Robert deployed to Afghanistan and returned to the United States after a two-year separation. (RP 453, 471, 719-722) When he was stationed in Washington, Kara contacted the authorities and assisted Serena Kiptoo in making complaints that led to Robert being charged, incarcerated and confined to base until twenty days prior to the dissolution trial. (RP 317-318) The charges stemming from Kara's information were all dismissed but during the investigation, Robert was unable to see or have contact with his children. The incident attracted nation-wide media attention but Robert did not instigate it.

Ultimately, Robert and the children were victims of the machinations of Serena Kiptoo and to some extent Kara, but the court blamed Robert for exposing the children to conflict, when he actually had little or no control over the situation. (RP 667) Kara told the court that even with a lack of any evidence of abuse by Robert, Robert was somehow abusive. (RP 249-251)

d. It was error for the court to restrict Robert's children from contact with any of Robert's family members.

The court restrained either party from allowing the children to have contact with Robert's sister, cousin, or grandmother, even though these individuals were not made party to the litigation and there was no evidence that any members of the father's family had caused the children harm. (RP 399) The court states that the basis for restricting contact with the paternal aunt and cousin is the girls' reaction to these family members. (CP 34) However, the only evidence of a negative reaction by the children to these family members stems from the mother's misinforming the children that the court entered a restraining order preventing contact with them and their mistaken belief that their father was violating that order, when that was not true. (RP 398-399, 416) The paternal relatives were not parties to the action and had no opportunity to defend themselves.²

The court restricted contact between virtually every member of Robert's family and the children, essentially alienating Robert from any relationship with these teenage children. (CP 38)

² It is unclear whether this is a judgment against Robert's sister, nephew and mother. Clearly the court did not have jurisdiction over the relatives named in the order and therefore such judgment should not bind those individuals; but they are specifically named in the court's orders and it seems to be beyond the authority of the court to restrain them from contacting the children in the parenting plan. Normally, when a court lacks personal jurisdiction over a party, any judgment obtained is void. *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131 (1996)

The GAL did not recommend it, except for Robert's mother, but it appears the court ignored the evidence before it regarding members of Robert's family and entered restrictions which were unwarranted given the lack of evidence. (CP 38, RP 416)

In section 3.13, the court included restrictions against Robert viewing pornographic material when the children were with him. (CP 38) Yet there was no evidence or testimony that Robert had ever exposed the children to any sort of pornographic materials. (RP 249) There were discussions between the GAL and Kara about Robert viewing pornographic material, but never in front of the children. The GAL noted he received this information from Kara well after his initial interviews. (RP 414) The GAL did not find the allegations of Serena Kiptoo credible and acknowledged Kara introduced Kiptoo to one of the children. (RP 418-419, 445) The court's entry of this restraint despite the lack of credible evidence is disparaging to Robert's character.

e. The court erred in allowing the children to relocate to an undisclosed location, given the issues and evidence presented in this case.

The court further allowed Kara to relocate the children to another state without disclosing location of the children. (CP 21, RP 702-703) There were no findings made by the court consistent with the relocation factors and no findings indicating why Kara did

not have to comply with the notice of relocation statutes and inform Robert of where his children were to be attending school and living. RCW 26.09.430-460 and 26.09. 520. The court abused its discretion in allowing Kara to leave the state with the children and give Robert no guarantee or right of contact with his children. (CP 95) The court should remand the parenting plan with instructions that allow for reunification of the father with his children.

4. The trial court erred in entering a restraining order against Robert restricting his constitutionally protected rights to possess a firearm his right of travel, and to see his children.

The court held that Robert committed acts of domestic violence by way of “financial and emotional intimidation.” The court decision grants Kara a restraining order against Robert “in the form she requested” based upon “Kara’s very real fear of him.” (CP 21) The form of restraining order requested by Kara included most restraints consistent with RCW 26.50 (domestic violence protections), including a provision against stalking, physical abuse and violence, and included a restriction on the right to own or possess a gun.

The trial court violated Robert’s Second Amendment constitutional rights to keep and bear arms when it restricted Robert from possessing a firearm. *State v. Sieyes*, 168 Wn. 2d 276 (2010) Substantial evidence does not support the court’s finding of legally

actionable domestic violence to support restraints against constitutionally protected rights as defined by statute. A court may restrict a party's right to own a weapon when the court finds they have committed acts of domestic violence under RCW 26.50.010. However, there are no findings in this case which would support entry of a domestic violence protection order under the definitions listed in that statute. Domestic violence can be psychological if the fear evoked is that of physical harm; however, that wasn't the evidence presented in this case. *In re Marriage of Stewart*, 133 Wn. App. 545, 137 P.3d 25 (2006)

Under RCW 26.09.050 a trial court can restrict a party's use and possession of firearms and other dangerous weapons in accordance with RCW 9.41.800. That statute allows such restriction only on a showing of clear and convincing evidence that a party has:

“Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under RCW 9.41.040.”

There was no evidence presented at trial that Robert unlawfully used, displayed or threatened to use a firearm or other dangerous weapon against Kara or that he committed any offense making him ineligible to possess a firearm.

In fact, the court restrained Robert from all sorts of conduct which he never engaged in. There was no allegation he ever stalked Kara, there was no allegation he ever harassed her or committed any physical act or threat of violence against her.

The court should have excluded the testimony of Serena Kiptoo. The testimony of Serena Kiptoo was extremely suspect, such that prosecutors dismissed all charges against Robert after a full investigation. (RP 219) Ms. Kiptoo would not even physically appear in the courtroom at trial, appearing only by telephone, and she was repeatedly inconsistent in her allegations. (RP 324-325) It is highly doubtful that Robert threatened her with a gun in front of a Pierce County Sheriff, and she appeared to be making this allegation against him for the first time, off the cuff. (RP 331, 336) Although Kara expressed being afraid of Robert, her fear was not tied to anything Robert actually did.

The statute allowing a court to restrict the right to own or possess a firearm, let alone surrender a firearm, requires clear and convincing evidence that a person has brandished the firearm in a threatening manner, has committed a felony involving a dangerous weapon or committed any other act that makes the person ineligible to possess a firearm or other dangerous weapon. RCW 9.41.800. None of these facts apply to Robert.

The restraining order issued in the form provided is not sustained by substantial evidence. Restraints on a person's freedoms and contact with their children should be narrowly tailored so as not to infringe on constitutional rights to parent, to travel, to speak or to bear arms. The court's entry of a permanent restraining order given the evidence presented to the court was a manifest abuse of discretion.

5. The court erred in its asset distribution by imposing a \$112,000 community lien in favor of the wife based upon a previously lost investment and securing the lien with the husband's separate property.

In this case, the court imposed a community lien in favor of the wife secured against the husband's separate property in the amount of \$112,000. (CP 20) The only dollar value that could have formed a basis for this lien was the court's speculation about the value of Montana acreage the parties attempted to purchase in 1995, but which purchase failed and settled after litigation in Montana in 2005. (CP 20) The court did not assign a dollar value to the sweat equity invested by the parties in the separate properties of Robert. (CP 20) Additionally, the court erred in finding that the community invested monies into separate properties of Robert where separate funds were available to maintain and improve those separate properties. (CP 20, RP 560)

A trial court has broad discretion under RCW 26.09.080 to evaluate and distribute the parties' property and liabilities. *In re Marriage of Brewer*, 137 Wn. 2d 756, 769, 976 P.2d 102 (1999) The appellant is charged with the burden of proving a manifest abuse of discretion by the trial court's dissolution rulings. *Id* at 769. Cited by *Marriage of Kasesurg*, 126 Wn. App. 546, 556 (2005) While the trial court “is not required to divide community property equally,” if its dissolution “decree results in a patent disparity in the parties' economic circumstances,” the court will reverse its decision because the trial court will have committed a manifest abuse of discretion. *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007) According to the court in *Kasesurg*, the trial court manifestly abuses its discretion if it makes an untenable or unreasonable decision. 126 Wn. App. 546, 556 (2005). See also, *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989).

In the case before the court, the trial court decision states:

This dissolution has some unique property issues. The Underwood's believed they were purchasing ten acres from his grandparents in Montana. This was believed to be part of the Underwood Ranch property. They executed an agreement to buy the property at a price of \$275/per month which was roughly the amount of the grandmother's medication costs. They paid on it for a number of years and when they attempted to get deeds to the property from the trustees, they discovered no deed existed. They initiated litigation and the case settled with the trust dissolving Robert received a 1/6 interest of \$2,100,000 or close to \$350,000.00. *They also were compensated over \$14,000.00 for payments made and they recovered some attorneys' fees.* Kara testified that the ten acres would have been worth \$85,000.00 to \$130,000.00 had the transaction been completed. Instead of the community recovering the

value of the property it lost, Robert received the \$350,000.00 as his separate property. [Emphasis added]

The court then imposed a \$112,000 community lien in favor of Kara against Robert's separate property. The only identifiable basis for such a significant lien was the court's speculation as to the increase in value the parties might have received on a failed real estate investment ten years prior to the dissolution which asset was never realized by the parties and did not exist at the time of trial. (RP 66, 269) It is important to note that the litigation involving the failed real estate investment was filed in Montana in 2001 and settled in 2005, more than five years prior to commencement of this action. (RP 69,546-547) The court found a community lien for an unspecified amount, asserted Kara's portion of the community interest in Robert's separate property was \$112,000 and secured the lien against Parcel B, Cheney, Washington which was indisputably Robert's separate property. (CP 78, 79)

a) The court erred in admitting hearsay testimony about the value of a lost investment made by the parties a decade earlier.

A substantial amount of testimony offered by Kara during trial concerned the failed real estate investment for 10 acres the parties tried to buy from Robert's grandparents, which was ultimately legally unenforceable, the terms of the Underwood Ranch trust, the litigation surrounding the trust and the trust and land settlement. (RP 67-71, 106-111) Most of this testimony was hearsay. ER 801 Robert made numerous objections for lack of foundation, relevance and hearsay

regarding the property, the litigation, and the trust. (RP 71, 104- 111) The court overruled many of the objections and determined testimony would be received based on a hearsay exception – specifically ER 803(a)(15) “Statements in Documents Affecting an Interest in Land.” (RP 106) However, neither the trust nor the litigation settlement documents were offered into evidence.

The testimony and documents concerning the value of land in Montana at the time the litigation settled in 2005 were irrelevant and lacking in foundation. (RP 70, 73, 111) At the time of trial, the parties had been completely repaid for the monies they paid to Robert’s grandparents, the land claim would have failed in court, there was no land asset for disposition by the court and there was no appeal or other further legal pursuit of the litigation in Montana. (RP 69, 550) It is clear from the court’s statements that the court blamed Robert for the investment failing and intimated that Robert somehow benefited from the lost investment.

This case has many elements similar to *Marriage of Kasesurg*, 126 Wn. App. 546 (2005). In that case, the parties sold a home in Normandy Park to purchase a vacant lot on Snag Island and to build their dream home; they borrowed heavily from the husband’s parents. *Id* at 549. The loans were secured by a promissory note and deed of trust against the home. *Id*. When the wife filed for divorce, the husband’s parents called the note and foreclosed on the home. The wife alleged that the husband

mismanaged the parties' finances and defrauded her with his parents to take the home. *Id.*

The parents followed the procedures required by the deed of trust and foreclosed on the home just before trial. *Id.* at 551. The wife never challenged the foreclosure proceedings. The trial court noted that it could not collaterally attack the foreclosure, but, agreed with the wife as to the issue of fraud, waste and mismanagement, and awarded the wife a judgment of \$150,000 identifying it as one-half of the court's calculation of what would have been the net community interest in the Snag Island home. *Id.* at 555.

This court reversed and held the trial court manifestly abused its discretion when it allowed the wife to collaterally attack the foreclosure by asserting that the debt was inflated and by asking that the trial court award her a money judgment as her interest in property. *Id.* at 559. The court stated it was a further abuse of discretion to recalculate and hear extensive witness testimony about the extinguished debt, to determine the value of the real property based on appraisals done after the foreclosure, and to award the wife a \$150,000 judgment as her portion of the community's former interest in that real property. *Id.* at 559. The court also held there was no evidence of husband's waste or mismanagement of the parties' assets. *Id.*

Like the court in *Kasesurg*, this court should find that it was improper to allow evidence regarding the value of acreage in Montana at

the time the litigation settled, placing values on the parties' lost investments from 2005 and awarding a community lien and judgment against Robert's separate property. Although admissibility of evidence is within the broad discretion of the trial court, it must be reversed when a manifest abuse of discretion is established. *In re Parentage of J.H.*, 112 Wn. App. 486, 494 (2002) Discretion is abused if it is based on untenable grounds or for untenable reasons. *In re Marriage of Ricketts*, 111 Wn. App. 168, 171, 43 P. 3d 1258, 1259 (2002).

b. There is no evidence that Robert's actions in pursuing the community claims and investing the community property were wasteful.

The court's assertion that Robert gained the value of the land as his separate property instead of the community recovering the value of the property it lost implies Robert wasted or dissipated a community asset. Both parties testified at trial that all the parties to the land transaction were under the mistaken belief that the land was excluded from the trust. (RP 70, 547) A mutual mistake is neither a fraudulent act nor evidence of intent to waste or dissipate an asset. *In re Marriage of Angelo*, 142 Wn. App. 622, 646, 175 P 3d 1096 (2008); *In re Marriage of Kasesurg*, 126 Wn. App. 546, 556, 108 P 3d 1278 (2005)

The parties hired counsel and attempted to obtain ownership of the property. (RP 547) Both parties participated in the real estate transaction and both parties failed to protect their interest properly by securing a deed for the property. (RP 273) It is untenable for the trial court to determine a

better value of damages to a case long settled, cast aspersions on Robert and use its equitable powers to revive a settled claim as a basis to award Kara property in the dissolution.

c. Robert has sufficient separate funds and separate credit to improve separate property.

The court further erred in finding that the community improved Robert's separate property. First, the value of the separate property received by Robert from the Underwood Trust as found by the court in 2005 was \$350,000. (CP 20) At trial, the value of real property owned by Robert in Cheney and in Anaconda was less than that: \$112,000 for Cheney plus \$221,000 for Anaconda is a gross value of \$333,000, and Anaconda was subject to a mortgage of \$140,000 for a net value of only \$193,000. These sums amount to far less value than Robert actually inherited in 2005. (RP 20) There was no tenable basis to assert that the community efforts increased the value of Robert's separate property when the separate property in fact, decreased in value.

Evidence presented by Kara may have confused the court into believing that the property appreciated in value because during the marriage, one of the 1031 property exchanges resulted in a \$100,000 profit (Cheney Parcel A was purchased for \$260,000 and sold for \$360,000)- in large part due to the increase in size because Parcel A received 5 acres from Parcel B in a lot line adjustment. However, ultimately, \$305,000 from the sale of Cheney, Parcel A was rolled into Anaconda which

depreciated in value by the day of trial to \$224,100. This is less than the initial investment of trust monies of \$260,000 spent by Robert to purchase Parcel A. (RP 54, 58)

Additionally, Robert acquired the Cheney property and the Anaconda property during the marriage from proceeds traceable to his separate interest in the Underwood Ranch Trust via 1031 exchanges. (RP 45, 272-273, 548 -550) Property acquired during marriage with traceable proceeds of separate funds is separate property. *In re Marriage of White*, 105 Wn. App. 545, 550, 20 P. 3d 481 (2001) Had an increase in value been established, an increase in the value of separate property is also presumed to be separate. *In re Marriage of Elam*, 97 Wn. 2d 811, 816-817, 650 P. 2d 213 (1982) The presumption may be rebutted by evidence that the increase was attributable to community effort. *Id.* The community only receives that portion of the increase attributable to community contributions. *Id.*

The court held the community contributed funds and sweat equity to acquire or improve Robert's separate property, but, there is no evidence that the community actually paid for any of the improvements or paid in excess of the benefit it was receiving to live in the separate property. In fact, Kara's only testimony on this issue was that she thought the remodel of the Cheney property Parcel A was paid for from a community line of credit (RP 52). The only line of credit in evidence listed Robert as the sole borrower, and the line of credit was secured against his separate property.

(EX 27, RP 52) Robert asserts that the line of credit was not the source of the cost of materials or improvements, but that his separately inherited monies of over \$42,000 were the source of the cost of the improvements. (RP 484, 560) Kara acknowledged these additional receipts of separate monies (RP 277).

Where there are sufficient separate funds available to improve separate property, there is a presumption that those funds are the source of improvements to separate property. *Marriage of Pearson-Maines*, 70 Wn. App. 860, (1993) It is implicit in a decision to award an equitable lien that the improvements on the separate property of the spouse can only be based on community funds that are invested. *In re Marriage of Johnson*, 28 Wn. App. 574, 625 P 2d 720 (1981)

Both parties affirmed Kara painted the structure on Parcel A and for a period of time managed the rental of Parcel B. (RP 51, 486) The valuation of the community services invested in separate property may be approached either by determining the equivalent of a reasonable wage or by fixing the resulting increase in value. *In re Marriage of Pearson-Maines* 70 Wn. App. 860, 855 P 2d 1210 citing Cross, *The Community Property Law in Washington* (Revised 1985) 61 Wash. L. Rev. 17, 71(1986) No testimony or evidence was offered at trial as to the value of Kara's work or the increased value of Robert's separate property due to Kara's work. Additionally, Robert testified that the community received a reciprocal benefit for any money or labor spent on the property. (RP 486-

487) There is no community interest created in separate property by a community funded enhancement of the separate property if the community receives a corresponding benefit from using the property. *Marriage of Miracle*, 101 Wn. 2d 137, 138 (1984), citing from *Merkel v. Merkel*, 39 Wn.2d 102 (1951)

d. The distribution by the court is untenable and inequitable in light of all property before the court, both separate and community.

Due to the tax laws involved in a 1031 exchange, Robert is able to defer payment of taxes on the properties until they sell. (CP 56) However, at such time as he is forced to sell one or both properties, he will incur significant tax liability.

Although the court valued the lien at \$112,000, the court failed to consider how Robert could possibly obtain this sum without selling the property or refinancing, and the court further failed to consider the costs involved in trying to obtain such a large sum of money. The parties did not have this sum available to them in any cash form. Yet, \$112,000 was entered as a judgment against Robert subject to immediate interest at 12% per annum. (CP 77) Robert was also ordered to sign a promissory note and deed of trust in that sum. The court awarded Robert no portion of this community lien.

Robert testified that the tax consequences of selling the property acquired by him through the trust was over \$80,000-\$90,000 in 2005 on value of \$350,000. (RP 557) The costs of selling either property were

never considered in the court's award, although there was no other source from which Robert could obtain \$112,000 other than a sale or refinance of the separate properties. Refinance is unlikely give Robert's other obligations. Thus, Robert essentially received neither the value of his separate property, nor any portion of community property. This was manifestly unreasonable, and therefore the distribution of assets was an abuse of discretion.

e. *It was an abuse of discretion to award Robert 100% of the community debt, 100% of his separate debt and a portion of Kara's separate debt when she was working and receiving spousal maintenance.*

The court does not differentiate between separate and community debt of the parties in its findings or decree; however, the debt awarded to Robert includes a significant portion of separate debt incurred by Kara. (CP 79-80) At the time of separation, the parties had an American Express card with a balance of \$8,908.60. (RP 149-150) The card was used by the parties for community purposes prior to separation. (RP 149) The card was in Kara's name and she acknowledged removing Robert from the card after separation. (RP 149) At the time of trial, the credit card balance had increase to \$22,465 without any explanation for the increase following separation. (RP 149) Robert was ordered to pay the entire balance on the credit card which included separate debts of Kara of \$13,557. (CP 79)

The court's division of liabilities is unfair and inequitable on its face. Despite being awarded a community lien worth twice the value of Robert's separate property, Robert was ordered to pay 100% of the community debt, the debts he incurred after separation, and 100% of the American Express credit card debt, solely in Kara's name, with both community and post separation debt incurred by Kara. Additionally, he was ordered to pay 100% of his own separate debt, which was substantial after defending the allegations Kara raised against him which were ultimately without merit. (CP 79-80)

f. The court erred in requiring Robert to maintain a Survivor Benefit Plan in addition to a life insurance policy.

It was unnecessary for the court to impose duplicate insurance policy requirements to secure spousal maintenance and child support and the court should have considered the cost of maintaining such insurance against support and maintenance and limited the amount to only the unpaid past child support and present value of the unpaid future support. *Marriage of Sievers*, 78 Wn. App. 287 (1995); *Marriage of Donovan*, 25 Wn. App. 691 (1980) Robert is in the military and has certain benefits which cover his dependents. Kara is capable of full time employment and is employed full time. The court's initial decision was silent as to any requirement to maintain life insurance or elect the Survivor Benefit Plan. (CP 19-21) However, the final documents require Robert to maintain both the Survivor Benefit Plan, which is essentially an annuity payable on death

insuring the retirement benefits to Kara, as well as life insurance of \$400,000 securing the payment of child support and spousal maintenance. (CP 79) To order Robert to secure child support with a policy valued at \$400,000 for one child who emancipates in one year and a second child who emancipates in two and a half years is excessive.

The court orders Robert maintain a Survivor Benefit Policy against the retirement for his ex-wife tantamount to requiring an ex husband to insure his ex-wife's car for the rest of his life. There is no authority for such an award. Additionally, the court does not address the allocation of cost in maintaining this policy. These costs should have been considered and addressed in the court's final orders and born by Kara if ordered. Additionally, it does not make sense for Robert to insure a property distribution awarded to his wife (her half of the retirement) after divorce. There is nothing in the statute that would authorize such a requirement unless it was called spousal maintenance and allocated and taxed as such.

6. The court erred in awarding Kara lifetime spousal maintenance that survives her remarriage based upon a marriage less than 19 years from date of marriage to date of separation.

In this matter, Kara was awarded spousal maintenance in the amount of \$1,500 per month and then the maintenance increased to \$2,400 when his eldest daughter reached age 18 years. (CP 81) The increased maintenance was ordered to continue until "husband retires and the wife begins to receive her share of military retirement." (CP 81) The wife

here is 46 years old and the husband is 47 years old. (CP 28)

Additionally, the court ordered that even after Robert's retirement, spousal maintenance would continue at the rate of \$1.00 per month "for life," even if the wife remarries. (CP 81) The court ordered that spousal maintenance would be "NON-MODIFIABLE" except "if Mr. Underwood does anything resulting in the loss of Ms. Underwood's retirement benefits outlined above at any time after maintenance is reduced to \$1.00 per month. Wife waives the collection of the sum of \$1.00 per month. The amount is intended to allow the court to reserve jurisdiction in the future." (CP 81) This provision is in derogation of the statute and case law of Washington.

The court's statutory authority is to order maintenance in such amounts and for such periods of time as the court deems just, "without regard to misconduct" and must take into consideration the relevant factors set forth in RCW 26.09.090. *In re the Marriage of Drlik*, 121 Wn. App. 269, 87 P. 3d 1192, (2004) There must be substantial evidence to support the court's factual determination which persuades a fair-minded, rational person of the truth of the determination. *Id.* Any award of maintenance must be based on present identifiable needs, not conjecture or speculation. *In re Marriage of Rouleau*, 36 Wn. App. 129, 672 P. 2d 756 (1983)

Kara is only 43 years old and the parties were married 18 ½ years. (RP 28, 128) She is certified as an x-ray technician and has

a bachelor's degree in physical education. (RP 235, 238) She started a master's degree course of study in guidance and counseling while in Italy. (RP 238) After the parties separated and Kara returned to the United States she enrolled at St. Martins and continued her studies. (RP 239) At trial Kara's indicated obtaining her master's degree is a goal but she has no plan to completing the degree. (RP 239) Following separation, Kara held a job at Fort Lewis as an education counselor earning \$20.00 per hour. (RP 95)

The court determined Robert had the ability to pay spousal maintenance. (CP 21) The court concluded that because Kara had followed Robert to various bases during his military career and had interrupted work experience, she was unlikely to match Robert's earning potential. (CP 21)

The court's conclusions as to Kara's future earning capacity and Robert's employment following the military are purely speculative. The court received no evidence regarding Robert's job prospects. Likewise, the court received no evidence concerning Kara's job prospect based on her bachelor's degree and the court seemed unconcerned that Kara had no plans to complete her master's degree. No evidence was offered regarding Kara's age or any physical or emotional condition that would inhibit Kara from pursuing and maintaining gainful employment. In fact, the court tied the duration of the maintenance award not to Kara's needs, but

to Robert's retirement. (CP 81) Robert could be paying Kara spousal maintenance longer than the duration of his entire marriage should he remain in the military. Additionally, the award "for life" was clearly based upon anticipation that Robert may engage in some misconduct and directly ties the lifetime duration to this anticipated misconduct. The statute clearly prohibits such a consideration by the court. Awarding maintenance for an indefinite duration is reversible error without a finding that the recipient is incapable of earning an adequate income. *In re the Marriage of Mathews*, 70 Wn. App. 116, 853 P. 2d 462, rev. denied 122 Wn. 2d 1021 (1993) The court's attempt to retain jurisdiction over Robert for an indefinite period of time undermines the legislative intent for awarding spousal maintenance. Moreover, the Military Qualifying Court Order entered by the court has a provision that states as follows:

"The court shall retain jurisdiction to enter further orders as are necessary to enforce the award to Spouse of the military retirement benefits awarded herein..." (CP 32) Thus there was no reason to continue spousal support for life to secure the retirement payments to Kara as the military order already did this.

Additionally, the court should have identified a clear end point for spousal maintenance given the parties' ages, education, health and the duration of the marriage. *Marriage of Matthews*, 70 Wn.

App.116 (1993) The court's allowance for maintenance to survive the wife's remarriage also appears to be specifically tied to the allegation that Robert may undertake some action regarding the retirement. Not only is this speculative, but such speculation is prohibited by the statute as a basis for awarding maintenance.

7. The court's award of attorney's fees to Kara following dissolution of marriage was excessive.

The court's decision to award Kara \$30,000 in attorney fees was untenable and manifestly unreasonable based on Robert's ability to pay and Kara's need following the dissolution. *In re the Marriage of Knight*, 75 Wn. App. 721 (1994) RCW 26.09.140 requires that the court consider the financial resources of each party when making a determination of whether to award attorney's fees. The court's disposition of property and liabilities in the decree and findings awarded the vast majority of the community debt as well as a portion of Kara's separate debt to Robert. (CP 78-79) The court also encumbered the majority of Robert's separate property with an equitable lien in Kara's favor. (CP 79) The court failed to determine the financial resources of each party when deciding to impose a substantial fee award against Robert.

Robert was assigned marital and separate debts of Kara in the total amount of \$155,476 (\$112,000 cash award to Kara for community lien; \$22,465 for the American Express Card in Kara's name, of which \$8,908.60 was community debt and the balance was debt incurred by

Kara; \$2,286 of American Express debt payments previously made by Kara; \$3,100 representing ½ of the tax return received by Robert in 2010; \$1,510 of delinquent spousal maintenance; \$6,000 of temporary attorney's fees awarded on a previously temporary basis which were not merged into the additional attorney's fees award; \$8,115 for the timeshare. (CP 79)

Robert was also ordered to pay the following total separate debts of \$240,501 incurred separately or against separate property comprised of the following: \$140,000 mortgage against Montana log cabin property (remaining balance from the purchase); \$35,350 in debt to Casey Jenkins (used for attorney's fees); \$8,300 for government advance (for the children's braces); Chase Bank \$8,000; undisclosed debt to his sister; vehicle debt of approximately \$48,851. (CP 79)

By contrast, Kara was not ordered to pay any community debts and was ordered to pay only the following total separate debts of \$42,819 comprised of the following: vehicle debt of \$27,000; USAA MasterCard of \$5684; Citibank Credit Card of \$6,605; Student loans in the wife's name \$3,530. (CP 79)

Kara testified that the credit card debt she incurred above was used to pay attorney's fees. Thus, even though Kara's remaining credit card debt for attorney's fees amounts to less than \$15,000, she was awarded an additional \$30,000 in fees, over and above the \$6,000 of temporary attorney's fees already awarded which remained unpaid. The court's order essentially results in a fee award that is twice as much as anything

Kara still owed for fees. The court did not describe from what source Robert could possibly have paid such a large fee award and it is therefore clear that the court did not consider the resources of the parties in making this award. Additionally, the debt ordered to be paid by Robert represents a portion of the fees Kara allegedly incurred.

Cumulatively, Robert was awarded real property and bank accounts valued at \$355,175 and debts of \$395,977. This was the cumulative effect of the award prior to any obligation for further attorney's fees. (CP 77, 78, 79, 80)

Cumulatively, Kara was awarded property of \$112,000, plus earlier temporary attorney's fee awards of \$2,500, as well as an additional temporary fee award of \$6,000, is excused of separate debt of \$13,091 worth of credit card purchases to be paid for by Robert, and pays only debts of \$15,819. (CP 77, 78, 79, 80)

Contrary to the court's assertion, Robert does not have the ability to pay \$30,000 to Kara in attorney fees. The court made no ruling that Robert was intransigent. In fact, Robert was not even present in the State throughout the majority of the proceeding. The court's fee award was untenable and manifestly unreasonable considering the relative post decree financial positions of the parties.

IV. CONCLUSION

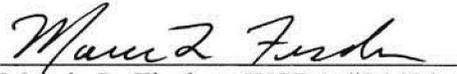
For the foregoing reasons, Robert requests that the court vacate all orders remand the case to a judge who did not violate Robert's rights

under the SCRA. He asks that division of his retirement be heard in the State of Montana in accordance with the USFSPA. He further requests on remand, the court be instructed that he is to be given means of reunification with his remaining minor daughter. He asks that the restraining order be mutual against both parties disturbing the peace of the other party and not contain any restraints against him owing or possessing a firearm, against stalking, or against physical abuse or domestic violence as substantial evidence does not support such an order. He requests that on remand, the court divide the community assets and liabilities equally and each party keep their own separate debts and separate property entirely. The judgment and interest based upon the equitable lien should be vacated. He further requests that spousal maintenance terminate on remand, as his wife has received maintenance for a period of over 3 years.

Respectfully submitted this 15th day of April, 2013.



Emily J. Tsai, WSBA #21180
Attorney for Appellant
TSAI LAW COMPANY, PLLC
2101 Fourth Avenue, Suite 1560
Seattle, WA 98121



Marcia L. Fischer, WSBA #24421
Attorney for Appellant
TSAI LAW COMPANY, PLLC
2101 Fourth Avenue, Suite 1560
Seattle, WA 98121

DECLARATION OF SERVICE

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

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

Office of Clerk Court of Appeals-Division II 950 Broadway, Suite 300 M/S TB-06 Tacoma, WA 98402-4454	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> E-Filing
Ms. Rebecca Reeder Faubion, Reeder, Fraley and Cook 5920 100 Street SW, Suite 25 Lakewood, WA 98499-2751	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mr. James Cathcart P.O. Box 64697 University Place, WA 98464-0697	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

Dated at Seattle, Washington this 15th day of April, 2013.

Melissa F. Perez
Melissa F. Perez

BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II
2013 APR 15 PM 2:45
STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
2013 APR 16 PM 1:05
STATE OF WASHINGTON
BY
DEPUTY

No. 44068-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In re the Marriage of
ROBERT UNDERWOOD,

Appellant,

and

KARA UNDERWOOD,

Respondent.

AMENDED
DECLARATION OF
SERVICE

AMENDED DECLARATION OF SERVICE

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

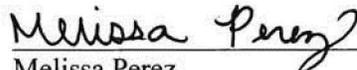
That on April 15, 2013, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

 ORIGINAL

Office of Clerk Court of Appeals-Division II 950 Broadway, Suite 300 M/S TB-06 Tacoma, WA 98402-4454	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> via efileing
Ms. Rebecca Reeder Faubion, Reeder, Fraley and Cook 5920 100 th St. SW. Ste. 25 Lakewood, WA 98499-2751	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mr. James Cathcart P.O. Box 64697 University Place, WA 98464-0697	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

I am amending this declaration of service because I could not efile the original Brief of Appellant

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


Melissa Perez