

No. 44068-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

ROBERT UNDERWOOD
Appellant

v.

KARA UNDERWOOD (nka CUTLER)
Respondent

REPLY BRIEF OF RESPONDENT

Appeal from Pierce County Superior Court
Judge James R. Orlando

No. 10-3-01083-1

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STATEMENT OF THE CASE

The parties met and began dating in 1989. (RP 27-28)

Robert Underwood moved in with Kara Underwood in August of 1989. (RP 28) They married in Condon, Montana on July 6, 1991. (RP28). Robert worked at varying branches of the military before the parties married and during their marriage. (National Guard and Army) (RP 28-29) The parties had a number of different duty stations including the following (RP 29-34, 448):

- Fort Benning, Georgia (6/92-11/92)
- Vicenza, Italy (11/92-6/95)*
- Fort Benning, Georgia (6/95-2/96) for schooling
- Fort Drum, New York (2/96-3/99)**
- Fort Lewis, Washington (3/99-6/02)**
- Dahlonaga, Georgia (7/02-7/04)
- Fairchild Air Force Base, Washington (7/04-6/08)*****
- Naples, Italy (6/08-2/12/10)
- **JBLM / Fort Lewis, Washington - 2/12/12** Kara and the parties' children relocated back to Washington Robert followed in December 2011

*Mikaela was born in April 1995. (RP 29) (Note: Mikaela has recently turned 18 and is no longer covered by the terms of the Parenting Plan.)

**Bailey was born in August 1997 (RP 30)

***Kara filed for dissolution in Spokane County Superior Court on 2/28/06. (RP 33). The case was dismissed in approximately June 2006. (RP 34)

The parties purchased real property located at 903 Union Avenue in Steilacoom, Pierce County, Washington in March 1999.

(RP 30, 45) The title was held in both parties' names. (RP 50) It was sold to Robert's sister (Jeannette) on or about April 19, 2005 over Kara's objections. (RP 46). The parties received \$41,569.00 in proceeds from the sale. (RP 47, CP 40)

At the same time the parties received the proceeds from the sale of the Steilacoom property, the parties purchased real property in Cheney, Spokane County, Washington on or about April 15, 2005. (RP 47-49) This consisted of a 10 acre parcel with a home on it (commonly known as "4728" W Taylor Road, Cheney – initially referred to as "4628" in testimony) and a 15 acre parcel (commonly known as "4616" W Taylor Road, Cheney.) (RP 47-48) "4728" was purchased for \$260,000. (RP 50, 53) "4616" was purchased for \$160,000. (RP 58) This purchase was made with the funds from the sale of the Steilacoom home, from funds paid into and later returned from a family trust and from trust funds of Mr. Underwood's. (RP 47-50) Robert told Kara that the property needed to be purchased in Robert's sole name for the purpose of saving capital gains taxes and Robert assured Kara that her name would be placed on the titles to both properties within the next fiscal year. (RP 50) Their financial advisor, Tana Doyle, was having an affair with Robert throughout the marriage while advising the parties. (RP 41) Tana advised the parties about a

number of their financial decisions to include proceeding with a 1031 exchange in Robert's name alone in order to save on taxes, which was contrary to Kara's best interest. (RP 41, 50-51, 59) "4728" was secured by an outstanding mortgage. (RP 48-49) The mortgage was paid with joint earnings during the marriage. (RP 51-52, 56-57) The monthly payment on the mortgage was \$1,681.43 per month. (RP 56-57) The parties did an extensive remodel on the home after gutting the residence. (RP 51) The remodel was paid for through a home equity line of credit that was in both names and payments for this were paid for out of joint earnings. (RP 52, 57, 62-64) They spent \$27,000 on the remodel to include the installation of wood floors, painting, new appliances, etc. (RP 483) Robert claims to have kept a sheet on his desk to record every dollar spent on the remodel for every nail, tack, piece of rental equipment, etc, which was never provided. (RP 483)

4616 was rented out for much of the time. (RP 89). The rental income did not cover the expenses of the property. (RP 89, 491-492, CP Exhibit 3–Schedule E, CP 20) The community paid the expenses not covered by the rental income with earnings. (RP 494) Kara was responsible for a great amount of work performed at 4616 including physical labor, property management, etc. (RP

58-59). This property was appraised on 2/7/12 for \$112,000.(RP 59-60)

4728 was sold in the Spring of 2008 for \$360,000, which occurred after the extensive remodel was performed by the parties, to include hours of time put into the project by Kara. (RP 51, 53) The money from the sale of 4728 went into a cabin the parties purchased in Anaconda, Montana in June or July 2008 for \$305,000. (RP 54, 77). Again, this property was just put into Robert's name as a 1031 exchange with the promise that it would be put into both names within the next fiscal year. (RP 55) A mortgage of \$160,000 was taken out on the property and joint earnings were used to make the mortgage payment of either \$1,540 or \$1,600 based on the varying testimony. (RP 78, 494-495) No rental income was ever claimed on the parties' taxes for this property and the community paid all expenses of the cabin with joint earnings. (RP 78, 492, 494-496, CP 20) Alterations and repairs were made to this property. (RP 79) The parties paid the Talon Group \$19,250 from the joint account on December 9, 2009 for projects at the cabin, to include the roof. (RP 82-83) The parties 2009 income tax returns show on Schedule E that the parties' total expenses *for tax purposes* for the cabin were

\$14,924.00 with no corresponding income. (RP 90, CP Exhibit 3)

The cabin appraised for \$224,100 on January 30, 2012. (RP 79).

In 1995 the parties purchased 10 acres of raw land located in Condon, Montana on contract for \$27,000 from Robert's grandparents, Ed and June Underwood. (RP 66-69) The parties made monthly payments on the property to the grandparents. (RP 66) Thereafter in 2001 after the grandparents passed away, Robert and Jeannette initiated litigation related to the way the trustees (relatives) were managing Ed and June's trust. (RP 69-72) The parties spent their own joint funds financing the litigation with Robert's extended family, specifically \$36,000. (RP 72, 76) They only received a portion of these funds back for attorney's fees through the litigation. (RP 273)

Ultimately Robert settled the claim by returning the property jointly owned by he and Kara to the family trust in exchange for payment through the litigation of \$14,350 as a global settlement on all issues without the consent of Kara. (RP 72-73, 272-273) As a result, all equity earned by the community based on the increase in the market value of the property between the date of purchase and the date of settlement was simply handed back to the family trust in exchange for a lump sum payment to Robert for the amount of the payments made only. (RP 73-74) Robert's first

cousin and JAG attorney, Matt Cooper, testified that the property was returned for the amounts paid without regard to the market value. (RP 108). The market value of the property was substantially more than was received by Robert. (RP 108) These funds received were used to purchase the property in Cheney, Washington in 2005. (RP 47-49)

After consulting with Realtors in Condon, Montana, Kara estimated that conservatively on its own the property would have been worth between \$85,000 to \$130,000 in 2005 when it was "returned" to the trust in the settlement. (RP 74, CP 20) In actuality, the trust property was sold for \$16,000 per acre in June 2005. (RP 74) Kara and Robert's property was included in that parcel for which the trust received an additional \$160,000 for the sale. (RP 75)

The parties owned horses awarded to Robert as follows: Mack (a registered quarter horse) purchased for \$6,000-\$6,500 and now worth approximately \$4,000, Sadie purchased for \$1,000 and Rain purchased for \$1,200. (RP 228-229) Robert sold their horse trailer to his sister during the action for \$7,000. (RP 680)

The parties owned significant equipment to include a horse trailer, tack, bridles, saddles, wheelbarrows, etc worth \$20,000. (RP 229-230) They also own a riding pen. (RP 463) In Robert's

Response to Petition, he indicates that the parties had a large amount of personal property stored in Montana. (RP 464) They had \$15,000 worth of personal property in Montana alone based on "Craigslist" value per Robert, the majority of which he was awarded. (RP 464) The parties own generators, table saws, pressure washers, various saws, ladders, routers, woodworking tools valued at \$10,000-\$15,000. (RP 230-231) Finally, the parties owned guns worth a couple thousand dollars, which Robert was also awarded. (RP 231)

Kara worked when the parties were first married, but found it difficult to continue working after their second child was born. (RP 92) When they were first married, Kara was working as an X-Ray technician earning an estimated \$10 per hour. (RP 92-93). Robert was deployed generally half of the year and Kara had responsibilities as a mother and with the military as his spouse. (RP 92). Kara worked part-time for an orthopedic surgeon in Gig Harbor earning approximately \$12.00 per hour. (RP 94) Kara worked part-time at a winery in Spokane making \$9.50 per hour. (RP 93). Kara worked as a substitute teacher in Italy earning \$95 per day. (RP 93) Kara is not a certified teacher and is generally only eligible to work as a teacher with local school districts in an emergency situation. (RP 94) Kara has a bachelor's degree in

physical education and has taken a couple courses toward her master's degree. (RP 235, 238-240)

Robert's jobs in the military have changed over time. Robert has worked as an airborne infantry man, a scout squad leader, tanker jobs to include working in a tank platoon, infantry rifle platoon leader, company commander, staff officer and head of public service cell. (RP 450-451)

The parties had planned to return to Pierce County Washington to live as Mikaela had applied at the Tacoma School of the Arts. (RP 34-35) Once the marriage was ending, the parties agreed that Kara would return to Pierce County with the girls in the summer of 2010. (RP 35) Kara moved back earlier than originally planned in February 2010 after Robert's emotional abuse and control became unbearable. (RP 35) Robert would keep Kara up all night long interrogating her. (RP 37) Kara was concerned after she found pornography on his computer depicting teenage girls in January 2010. (RP 35) After deciding to leave, Robert removed their passports and he moved all money out of the joint accounts. (RP 35-37, 42) Robert drained every last cent from the parties' accounts AND the girls' accounts to restrict Kara's access to money to flee, to include a mere \$.80 that was held in one account. (RP 137-143) Robert even got USAA to remove \$1,700

in Kara's sole account and placed it into his account without her authorization. (RP 293-294) Robert called in all of her credit cards stolen. (RP 44) Robert acknowledges removing all funds from the joint accounts and taking Kara off all of his credit cards as soon as his commander informed him that Kara and the girls were returning to the States and that he had to temporarily stay on post. (RP 473-74) Kara was basically being held prisoner there. (RP 36-37)

Upon her return to Pierce County in 2010, Kara was able to gain employment as an education counselor with Axiom Solutions earning \$20 per hour at JBLM. (RP 95) In August 2011 Kara asked Robert for a copy of his orders showing his return to JBLM which would have given her preferential treatment (known as spousal preference) for jobs on base in order to obtain a better job, but Robert refused to give her the orders. (RP 521) In fact Robert emailed her "See you in court in December. As for the military orders and a job that benefit is for good, supportive military wives, not separated divorcing ones." (RP 521-522)

Axiom lost their contract at JBLM on 9/30/11, at which time Kara was laid off. (RP 96). MES then obtained the contract and Kara was offered her position back earning \$12.75 per hour as of 10/1/11. (RP 96) This was more than she would have received from unemployment, so she accepted the position. (RP 96) In the

Spring of 2012 Kara's work building went into lock down after Robert was released from jail and was confined to JBLM after being charged with Felony Harassment as MES was worried about Kara's safety and that of her fellow employees. (RP 97, 234) Kara was later laid off as of March 23, 2012 in a letter stating that MES received credible information that her life and the lives of her children were in immediate danger. (RP 97CP Exhibit 11) Kara then went on unemployment, which she was collecting at the time of trial, at the rate of \$406 per week gross or \$360 net despite her efforts to find alternate employment. (RP 98-100)

In regards to parenting, Kara has been the girls' primary parent since their birth by agreement. (RP 157) Kara is extremely close with the girls. (RP 158) Kara filed this dissolution action on March 25, 2010. (CP 1) A Temporary Parenting Plan was entered on June 15, 2010 after a contested hearing where both parties were represented by attorneys. (CP 92-104) Robert immediately made his displeasure known publically to the ruling of the judge in his Facebook posting that provided in part as follows:

"You know the country has gone to s*** when a cheating wife can just move the kids away from their father and the G** D** court system only gives the father 3 weeks in the summer, even when he lives far way (sic). I don't know what I am fighting for? To have some liberal judge screw me over. Way to go KARA, you are a b****."

(CP Cover Sheet for Facebook Posting by Mr. Underwood filed. 6/18/2010) The Temporary Parenting Plan indicated there was to be no contact with Jonathan Collins or Sharlene Morehouse. (CP 100)

There was difficulty with both of Robert's visits in the summer of 2010. (RP 169-175) During his first visit, Robert was posting things on Facebook indicating his focus was on partying and playing beer darts while in Montana with the girls. (RP 171, 179, CP Exhibit 98, pages 19-23) Robert did not follow the no contact order related to his mother (Sharlene) and nephew (Jonathan) during that visit. (RP 171-172) During a later visit in the summer, the girls called their mother and the Guardian ad Litem, James Cathcart, to help them after they locked themselves in a car after Robert was ranting and raving at them. (RP 173-175) The girls were very upset during the call to their mother, they were crying and did not want to stay with Robert. (RP 174) The GAL went to the hotel on a Saturday to help the girls. (RP 427-431)

During the girls' summer visit with Robert in 2011 they were very concerned about setting up an emergency plan if something happened while with their father. (RP 177, 202) By the time Robert relocated to Pierce County, Washington in December 2011, his relationship with the girls was strained. (RP 180) Because of the things Robert was saying and doing, the girls were

tired, emotional and confused. (RP 180) The girls were nervous and concerned that their father would forcibly drag them from their mother's home and demand residential time. (RP 180-182)

By trial, Kara and the girls had been in counseling for 2 ½ years to deal with Robert's onslaught of harassment and emotional abuse via Facebook, text, phone, email and in person. (RP 159) The girls' counselor, Dr. Anderson, worked with the girls and Kara on an alternating basis. (RP 185-188) The girls showed Dr. Anderson many of the inappropriate communication they received from their father. (RP 185-188)

Robert engages in mind games with the girls and attempts to manipulate them. (RP 159-161) The girls were humiliated by their father's behavior and they firmly asked Robert to discontinue his character assassination of all involved, much of which Robert and his sister have publically waged in open forums such as Facebook. (RP 162, CP Exhibit 99) The girls blocked their father from their Facebook accounts at varying times. (RP 163, 181-182) They asked Robert to stop his inappropriate behavior. (CP 133)

It was apparent to Kara due to Robert's actions that he is not capable of being a good, healthy father. (RP 159) Robert's drama for the 2 ½ years prior to trial have cause serious emotional

damage to the girls. (RP 159-163) Kara requested that the girls be allowed to determine if and when they saw their father. (RP 221)

Kara requested 2.1 and 2.2 factors in the Final Parenting Plan at trial. (RP 222, 247-255) Kara believes that Robert physically, emotionally and possibly sexually abused the children. (RP 247-255) The GAL supported the 2.1 finding that Robert emotionally abused the girls and all three 2.2 findings that Kara requested at trial. (RP 417-421) The GAL would only support reconciliation counseling if Dr. Anderson or their therapist felt that it would be safe for the girls and the girls were not open to that during trial. (RP 436-437)

Further, when Kara filed her Proposed Parenting Plan when the case was filed, she requested restrictions regarding Robert's access to pornography while the girls were in his care. (RP 190, CP Proposed Parenting Plan filed 3/25/10) Part of the reason for this is that Kara found pornography on Robert's computer on 1/5/10 involving teenage girls depicting abuse. (RP 190-191) Kara downloaded the images on a memory card and conveyed the materials to the GAL early in the case. (RP 414) Robert had these types of materials on his computer historically. (RP 190-191)

ARGUMENT

Trial court decisions in a dissolution action will seldom be changed upon appeal- the spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. In re Marriage of Landry, 103 Wash.2d 807, 809-10, 699 P.2d 214 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Id* at 47.

ISSUE #1: *The court did not err in finding that they had subject matter jurisdiction over Robert's military pension.*

Robert wants the court to rule that the Pierce County Superior Court lacked subject matter jurisdiction over him necessary before awarding a portion of his military retirement to Kara. His request should be denied as it directly contradicts his own pleadings.

Robert's Response to Petition was filed on June 9, 2010. (CP 7-10) Said Response was signed by both Robert Underwood and his first attorney, Bruce Clement, WSBA #2169. (CP 7-10, RP 464) Paragraph 1.7 of the Petition for Dissolution states that the court has jurisdiction over the marriage and over the respondent as the parties had resided in Washington during their marriage and the Petitioner continues to reside in the State of Washington. (CP 1-6) In the Response to this Petition, both Robert and Bruce Clements indicated that paragraph 1.7 was **ADMITTED**. (CP 7-10) This same Response to Petition indicates that Robert owned real property in the State of Washington and he kept 3 horses and riding equipment in the State of Washington. (CP 7-10) Robert, through this Response, asks the court for affirmative relief to include entering a decree, disposing of property and liabilities, entering into a parenting plan, order the payment of attorney fees, other professional fees and costs and for all other relief that the Court deems just and equitable. (CP 7-10) Robert consented to jurisdiction, thereby satisfying the requirements of USFSPA 10 USC 1408(c)(4)(C)

Robert admitted that the court had jurisdiction over this marriage which was done with the assistance of experienced counsel. (CP 7-10) Robert now wants the court to contradict this

admission after he is unhappy with the court's ruling. This should be denied. The court later ruled on Robert's motion regarding Jurisdiction and they found "Washington has Jurisdiction over this action". (CP 121) That ruling was not appealed nor did Robert move to revise.

Further, Robert's position that the court does not have jurisdiction over him is contrary to the statute on the topic. Specifically - RCW 4.28.185--Personal service out-of-state--Acts submitting person to jurisdiction of courts -- provides in part as follows:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(c) The ownership, use, or possession of any property whether real or personal situated in this state

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

Robert stated in his Response that he owned BOTH real and personal property situated in the State of Washington. (CP 7-

10) The record reflects that the parties resided in the State of

Washington during their marriage, both in Pierce County and Spokane County. (RP 482-483, 485) Further, there was a manifest intent to make Pierce County his home at the time the case commenced as Robert went to Afghanistan in order to get assigned to JBLM. (RP 453)

In fact, when the case went to trial, arguably no other state had jurisdiction as Robert was residing in Steilacoom, WA. (RP 349) Based on RCW 4.28.185, the State of Washington had jurisdiction over both the marriage AND Robert Underwood.

Further, the applicable cases support the notion that the State of Washington has jurisdiction over Robert. Extending the jurisdiction of Washington courts to persons outside its borders is chiefly accomplished under the long-arm statute, RCW 4.28.185, which was previously cited. The statute is intended to operate to the fullest extent permitted by due process. In re Marriage of Yocum, 73 Wash.App. 699, 703, 870 P.2d 1033 (1994). Both the statutory requirements of RCW 4.28.185 and due process must be satisfied. Id at 702. The party asserting jurisdiction under the long-arm statute has the burden of establishing its requirements "by prima facie evidence." John Does v. CompCare, Inc., 52 Wash.App. 688, 693, 763 P.2d 1237 (1988); Yocum, 73 Wash.App. at 703, 870 P.2d 1033. Dissolution actions in

Washington courts proceed under RCW 26.09. Our long-arm statute, RCW 4.28.185(1)(f) specifically, extends Washington jurisdiction to: Any person who meet certain criteria, *whether or not a citizen or resident of this state.*

Marriage of Oytan, 288 P.3d 57, 66-67, (Wash.App Div 1, 2012) discusses this statute extensively and states as follows:

Where there has been a marital relationship within the State, the petitioning party must be a resident, whereas the respondent must merely have been previously living here in a marital relationship. The legislature thus drew a distinction between residency and the act of living in a marital relationship. There are many varieties of marital relationships, and long-distance arrangements are common. The legislature did not define "living in a marital relationship," but clearly viewed it as distinct from residency—a feature of the statute Kudret would like us to ignore. What constitutes living in a marital relationship is thus a question to be answered by the facts in the case. Certainly, past full-time residency satisfies the statute. But the statute does not require it.

Long-arm jurisdiction is a question of the particular individual's contacts with the forum state and depends upon the "quality and nature" of those activities. Does, 52 Wash.App. 688 at 697, 763 P.2d 1237 (1988) (citing Nixon v. Cohn, 62 Wash.2d 987, 994, 385 P.2d 305 (1963)).

Given all of this information, the State of Washington unquestionably had jurisdiction over the marriage and BOTH parties at the time the case commenced throughout finalization. Robert and Kara lived in Pierce County and Spokane County in

Washington, owned real property in both counties and Robert even kept personal property in Spokane County, namely horses, thereby satisfying the statutory requirements.

ISSUE #2: Robert was not denied Due Process of law when the court allowed ex parte relief altering Robert's parental rights during a stay proceeding.

In Robert's motion for a stay, he advised the court that he would be in Afghanistan for 290 days beginning November 22, 2010 during which period of time leave is not authorized as a basis for his stay. (CP 126) The stay was granted for Robert without a hearing. (CP 128) The information regarding Robert's leave turned out NOT to be accurate as later Robert obtained leave and was demanding time with the girls. (CP 135) Further, the court **did not rule** on Kara's Motion for a Mental Health Evaluation and Restricted Residential Time Pending the Evaluation filed and instead continued Kara's motion until Robert was available or the stay was lifted, whichever occurred sooner. (CP 150-152)

Robert returned to Pierce County and was afforded a hearing with the trial judge on a special set. (CP Order Re: Respondent's 2011 Summer Residential Time and Other Relief filed 6/23/11, RP 175-179) The matter was heard at which time Robert received residential time with the girls and no psychological evaluation was ever ordered in this dissolution action. (CP Order

Re: Residential Time filed 6/23/2011) Robert was afforded all rights with the girls when he arrived in Pierce County pursuant to the court order and thus his due process rights were not denied.

In retrospect, granting of the stay was inappropriate. Specifically, Robert stated in his motion for the stay that he was actively engaged in the defense of the Nation in a war zone, but that did not stop Robert from sending threatening correspondence to Kara repeatedly. (RP 185, CP 132-135, CP 138-141) This did not stop Robert from completing his Master's Degree in Business Administration from the University of Phoenix while in Afghanistan. (RP 448-449) This education is in addition to the Bachelors degree in Business that Robert earned in June 1992 from the University of Montana, a degree that he earned one year after the parties were married. (RP 449) Additionally Robert advised Kara that as of February 2011 he had 7 lawyers in his office helping him plan for the betterment of all soldiers getting divorced. (CP Exhibit 100, page 16) Robert claimed to have access to counsel.

Robert filed a Motion to Terminate the Stay with his second attorney. (CP Motion to Terminate Stay of Proceedings filed on 6/27/2011) An agreed order was then entered to lift the stay. (CP Order Terminating Stay of Proceedings filed on 8/25/2011) Trial did not start until June 2012. (RP 1)

There was no prejudicial effect as again Robert received residential time over Kara's strong objections based on his erratic behavior and to this day the only psychological evaluations that were ordered were in the criminal matter.

ISSUE #3: The parenting plan entered is in the children's best interest and should remain in full force and effect.

(As previously referenced, Mikaela turned 18 in April 2013. (RP 29) Therefore, the parenting plan only deals with Bailey. Mikaela and Bailey will generally be referred to as "the girls".)

A trial court wields broad discretion when fashioning a permanent parenting plan. In re Marriage of Kovacs, 121 Wash.2d 795, 801, 854 P.2d 629 (1993). The court's discretion must be guided by several provisions of the Parenting Act of 1987, namely RCW 26.09.187(3) (enumerating factors to be considered when constructing a parenting plan), RCW 26.09.184 (setting forth the objectives of the permanent parenting plan and the required provisions), RCW 26.09.002 (declaring the policy of the Parenting Act of 1987), and RCW 26.09.191 (setting forth factors which require or permit limitations upon a parent's involvement with the child). Id. RCW 26.09.191 sets forth both mandatory and discretionary restrictions on parenting plans. Id. RCW 26.09.191(1) and (2) require the court to restrict a parent's contact and involvement with the child if the court finds that a parent has

abandoned, neglected, or abused a child, or if the parent has a history of domestic violence, violent assault, or is an adjudicated sex offender. In re the Marriage of Watson, 132 Wn.App. 222, 231, 130 P.3d 915. (Div II, 2006) In contrast, RCW 26.09.191(3)(d) confers discretion on the court to limit any provision of the parenting plan if the court finds that the parent's involvement or conduct may have an adverse effect on the child's best interests and if any of several enumerated factors exist, including "[t]he absence or substantial impairment of emotional ties between the parent and the child." Id.

a) There was substantial evidence to support a domestic violence finding under RCW 26.09.191(1)(2); b) The restrictions in place were not merely due to the father's abusive use of conflict; & c) The evidence supported restricted visitation under RCW 26.09.191(3)

In the Parenting Plan entered in this case, the court made specific findings that both 2.1 and 2.2 restrictions apply. (CP 34-35) The findings were based on the testimony from Kara and the GAL as well as documentation in evidence. (CP 34) In essence, the court ordered no residential time for Robert, but left the door open if in fact the girls wish to have residential time with Robert. (CP 34, 36, 37) The decision was not deferred to a GAL or an arbitrator. The order was based on the requirements of RCW 26.09.191.

RCW 26.09.002 provides, in part as follows:

[T]he best interests of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as *required to protect the child from physical, mental, or emotional harm.*

The restrictions in paragraph 2.1 and 2.2 as well as the ruling which ordered no residential time were supported by the vast majority of the evidence. Specifically, the girls' relationship with their father was very strained. (RP 159-163) The last time Robert had residential time with the girls in February or March 2012, he told Bailey that he was done with visitation with her. (RP 365-366) Bailey's response was "Dad, I am done with you." (RP 366, 404) Robert referred to her as a "spoiled brat". (RP 366-367) Bailey was told she had 5 days to return to Robert the money from her savings account or he would be done with her. (RP 367, 404) In March 2012 the girls told Robert that they wanted nothing to do with him. (RP 404)

At the time of trial, there was a no contact order in place restricting Robert's contact with the girls. (RP 353) At trial it had been about 130 days since Robert spoke to the girls. (RP 376)

The girls expressed their displeasure to Robert about calling their mother "colorful" names publically. (RP 355-356, CP Exhibit 99) Robert acknowledged that the girls were able to view

many of the Facebook postings where Robert made derogatory statements regarding Kara. (RP 356) Robert acknowledges lashing out directly at the girls on Facebook postings. (RP 356) Robert admits that it was not a good idea to talk about Kara in a derogatory manner, but did it because he had been frustrated by the way the system was working and that he is a very vocal person. (RP 358, CP Cover Sheet for Facebook Posting Made by Mr. Underwood filed 6/18/2010, CP Exhibit 98) Despite his comments at trial in June and July 2012, as late as June 2012 Robert posted comments on Facebook that Kara behavior was right out of the evil woman's divorce handbook. (RP 359-60) Robert acknowledged that emails he sent to Kara admitted at trial contained threatening emails. (RP 535, CP Exhibit 100)

The trial judge also heard from James Cathcart, the court appointed Guardian ad Litem (GAL) that was specifically selected for this case in June 2010. (RP 389-447) James Cathcart is an attorney, he was employed as a marine officer for 27 years and later as a family law attorney from 1993 until retiring in 2007. (CP 390) He has been involved in approximately 250 GAL cases since he was trained as a GAL in 2007. (CP 390-391) James described both girls as being remarkable young woman, mature beyond their years, self assured and confident. (CP 391) James indicated that

he talked to these girls probably more than he has talked to any other kids in his guardian ad litem history so he has gotten to know them reasonably well. (RP 391) James recommended that the girls should be allowed to spend as much or as little time with their father as they desire. (RP 392) He recommended that Robert be allowed to email them and that they would then choose whether or not they want to read the email. (RP 392-393)

James does not believe that the girls' request to have no contact with their father as an opinion of the moment, was not out of childish spite or out of momentary teenage hysteria, but comes from a very experienced opinion. (RP 405-406) James indicates that the girls have heard too much, seen too much, been involved too much and he thinks they have earned the right to make their own decisions regarding contact. (RP 405) James describes Robert is an aggressive negotiator generally and with the girls. (RP 410)

The GAL's recommendation allows the girls to make decisions in favor of their own emotional safety where their father is involved. (RP 406) Dr. Anderson supports the notion that the girls should be able to control when they see their father. (RP 409) James recommends before the girls are comfortable spending time with Robert that he will need to convince them that his obsession

with this divorce is over. (RP 411) Robert can do this by not talking about the family court system, not talking about resigning his commission, not talking about the unfair things Kara did, not talking about the girls' lack of gratitude for the things he has done for them and just be a father. (RP 411)

James describes Robert as being obsessed with this divorce action which has caused the girls to become very frustrated with Robert because he would not stop attempting to enlist them as a team member, would not stop denigrating their mother in emails, Facebook, phone calls, face to face, and they thought that Robert became a different person, one that they were apprehensive about. (RP 394) James described being called out to a hotel to visit the girls in September 2010 after Robert frightened them by crying, pounding on the dashboard, and ranting about their mother trying to take them away from him. (RP 396) The girls were frightened and wanted to end the visit. (RP 396)

By trial the girls were requesting a break from Robert, from his drama, his harassment, his threats, his continued bullying and manipulation. (RP 702)

Kara believes that Robert physically and emotionally abused the children. (RP 247-248) (See Issue #4 below for further

discussion.) Robert's girlfriend advised Kara that Robert had a photo of his daughter that was highly inappropriate. (RP 247-248)

Kara believes that Robert has an emotional impairment that interferes with his ability to parent which stems from his history of trauma as a child, his behavior against her, his behavior with others, his behavior with his former girlfriend, and his history of behavior with every woman he comes into contact with. (RP 253)

There was an absence of emotional ties between Robert and the girls before he was charged in March. (RP 254) This has been exacerbated by treating the girls very poorly in telephone, emails and other forms of communication. (RP 255)

d) The evidenced supported restrictions on family members

Restrictions indicating that neither parent shall allow the girls to have contact with 3 of Robert's family members were very appropriate. The paternal grandmother, Sharlene Morehouse, shot all four of her children to include Robert, killing two of them in 1974. (RP 191-195) The parties had little to no relationship with her throughout their marriage and when they were together the girls were never left alone with her. (RP 191-195)

Jeannette Hallam is addicted to drugs and drinks alcohol in lethal amounts combined. (RP 195-197) She has attempted suicide in the past and has threatened others, to include Kara and

her cousin, Matt Cooper, with bodily harm. (RP 195-197) Even Robert cut her out of his life for years. (RP 196) Jeannette regularly posted derogatory comments about Kara on Facebook during this action, which Robert indicates he asked her to stop more than once. (RP 526-527) Jeannette was present for much of trial and the court had to ask Ms. Hallam not to shake her head, make facial gestures, etc. as she had been while Kara testified. (RP 224) She had to be spoken to again on 7/5/2012 for her head shaking, noises and disrespectful behavior. (RP 477-478)

Nephew Jonathan Collins is a mentally disturbed young man that recently threatened his mother with a knife and is involved in the criminal justice system in his home state. (RP 197-202) Jonathan had just recently been expelled from school for fighting. (RP 525) Several of Jonathan's friends stole personal property while with Jonathan. (RP 525) Jonathan had threatened his mother with a knife and counselors needed to become involved to help the family. (RP 400)

The GAL confirmed that the girls spent time with Jonathan while in their father's care contrary to the orders. (RP 399) Robert confirmed that he knowingly violated the order in place regarding Jonathan which occurred just days after the judge looked Robert squarely in the eyes in court and told Robert that the restraining

order was to be followed. (RP 677-678) Robert testified that he purposefully violated the order, that he did it very methodically and he thought it through before he violated it. (RP 678-679)

There is no reason for the girls to have contact with these family members. Further, given that Robert's relationship with the girls is so strained, it makes the most sense for Robert to focus on repairing his relationship with the girls before worrying about whether or not family members that were cut out of his life for extended periods of time are allowed to see the girls.

e) The record supported allowing the children to relocate to an undisclosed location

We cannot forget that Robert was charged in Pierce County Superior Court with felony harassment in March 2012. (RP 712) The same day that Robert was charged, life for the girls forever changed as Fox News, Good Morning America, ABC, KIRO, CNN, Inside Edition, etc. were camped outside Kara's door wanting an interview. (RP 216-218) Robert said the story ran on national TV for two days and was talked about much longer. (RP 684) Kara was so fearful that after the arrest that she and the girls left town. (RP 215-216)

The girls were mortified, embarrassed and depressed as a result of their father being charged to the point where they were

physically sick. (RP 218-219) Their grades suffered and they became more recluse. (RP 220) The girls were normally straight "A" students and suddenly found themselves with lower grades: Mikaela had to drop a class second semester and got two C's. Bailey got five B's and a D in Geometry. (RP 220)

As a result of this infamous charge, Kara wanted to leave Pierce County so the girls would have a normal life where teenagers don't have to go to school and face their friends and teachers and wonder what everyone is thinking about their father. (RP 219) Letting the girls leave and start a new life was in their best interest. (RP 219) Eventually, Kara received a job offer outside the state of Washington as an office manager. (RP 688) She did not want to disclose where the job was located to Robert out of fear for her safety. (RP 702) She looked for jobs in areas where she had family support as she felt extremely alone in Pierce County and unsafe. (RP 704)

ISSUE 4: The court did not err when it entered the permanent restraining order protecting Kara and it should remain in full force and effect.

Whether to grant, modify, or terminate a protection order is a matter of judicial discretion. The statute authorizing permanent protection orders provides: "[I]f ... the court finds that the respondent is likely to resume acts of violence[,] ...the court *may*

either grant relief for a fixed period or enter a permanent order of protection." RCW 26.50.060(2) In the Matter of the Marriage of Robin M. Freeman, 169 Wn.2d 664, 671, 239 P.3d 557 (2010).

Washington's Domestic Violence Prevention Act (DVPA) defines domestic violence as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members...." RCW 26.50.010(1). The legislature has articulated a clear public policy to protect domestic violence victims. See ch. 26.50 RCW; see also ch. 10.99 RCW (domestic violence official response act); RCW 10.99.010. The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. Freeman at 671-72

The legislature has authorized courts to make protection orders permanent in some circumstances: [I]f ... the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection. Freeman at 672.

Permanent protection orders can be permanent based on "past abuse and present fear" alone. Barber v. Barber, 136 Wash.App. 512, 150 P.3d 124 (2007), and Spence v. Kaminski, 103 Wash.App. 325, 12 P.3d 1030 (2000).

There was an ample material for the court to enter into a permanent restraining order in this instance. Communication with Robert to Kara varied from being aggressive and threatening to apologetic. (RP 184) Kara and the girls were in counseling for 2 ½ years to deal with Robert's onslaught of harassment and emotional abuse via Facebook, text, phone, email and in person. (RP 159, 162) Kara was getting several threatening emails or contacts from Robert on a daily basis, and eventually had to stop responding. (RP 184-185) By way of example, Robert sent Kara an email dated December 20, 2010 which included the following statements (CP 100, page 18):

- You should be afraid, as you are and as you have the DuPont, Tacoma folks believing you are.
- You might even be afraid I will snap and come after you.
- There is no rock big enough for you to hide under when I get there.
- You can run but you can't hide
- You will then pay the price you deserve.

The frequency of the correspondence did not lessen when Robert was in Afghanistan. (RP 185) Kara would get text, emails and phone calls from Robert frequently, even in the middle of the

night. (RP 190, CP 132-141, CP Exhibit 100) Robert made threats about what he was going to do when he arrived in Pierce County, that Kara would pay, the gloves were coming off, that he would air her dirty laundry by contact local news media, among other things. (RP 203, 206-207, CP Exhibit 100, page 6, 12-19)

Kara describes Robert as a threatening person as during the marriage he would posture over her, spit in her face, keep her up all night, throw things out the window, he kept her in a home in the country that was isolated, he had weapons, was a ranger trained in the military and was an intimidating person. (RP 208) Further, during the marriage her email accounts, phone, bank accounts, everything, was monitored by Robert. (RP 208-210) Kara detailed when Robert would go into a rage it involved yelling, screaming, cussing and stomping around, at times with the girls present. (RP 210-211) The girls were present for approximately 50% of these rage filled tantrums. (RP 211)

Robert was known to keep Kara up all night and interrogate her. (RP 208-209) One time prior to the filing of the dissolution Robert read Kara's journals and proceeded to berate her and called her a number of highly inappropriate names while interrogating her. (RP 209) At this time they were living in an isolated area and Kara was forced to seek aid by running to the

neighbor's house. (RP 209) Robert monitored Kara's every move; her email accounts, her phones, every dollar she spent, every moment of her day was controlled by Robert. (RP 208) Robert even received email notifications when she spent money. (RP 208)

Kara relayed to the GAL early in the case that she was a victim of domestic violence in the marriage as it related to issues involving anger, manipulation, control, and rage, as well as some physical violence. (RP 442) While the dissolution was pending, Robert posted on his Facebook page a strange yet threatening article about a man that got 30 years in prison for killing his child and strangling his wife. (CP Exhibit 98, page 10)

In relation to Robert's charges for felony harassment in March 2012, Robert's commanding officer, Colonel Reed, provided information in a police report that indicated he was concerned that Robert was about ready to snap. (RP 674-675) Colonel Reed also included in the report that he "believes that Underwood very well may lash out against the courts and anyone in authority in this situation." (RP 674-675)

Even back in 2006 when Kara filed for divorce the first time, Robert broke into her house and he ran his truck into the moving van that she had hired to move her from the family home. (RP

207) Robert threatened to kill a mutual friend involved and ended up having a restraining order obtained against him. (RP 207)

There was ample evidence to support the entry of a permanent restraining order in this case as outlined by the statute.

ISSUE #5: The court did not err when it imposed a \$112,000 lien payable to the wife.

The trial court has broad discretion in distributing property in a dissolution action. In re Marriage of Gillespie, 89 Wash.App. 390, 398, 948 P.2d 1338 (1997). The statute controlling the disposition of assets and debts is RCW 26.09.080 which provides in part as follows:

The court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership;
and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

The court found that there was a community interest in two pieces of real property. (CP 66-67) Said lien was necessary to secure the wife's share of the community interest in the real property which must be determined on a whole in light of the total disposition of all assets and debts. (CP 77-80) There WAS a showing that community funds went into the Cheney and Montana properties owned by the parties at the trial. The funds received from the return of the trust land in Montana went into the properties. (RP 47-49) The funds received from the sale of the Steilacoom house went into the properties. (RP 47-50, CP 40) Community funds paid for the remodels of both properties. (RP 51-52, 56-57, 62-64, 79, 82-83) Community funds paid the mortgages for both properties. (RP 51-52, 56-57, 494) There was minimal rental income for the Cheney property and no rental income for the Montana property. (RP 79, 89-90, 491-492, 494-496, CP 20, CP Exhibit 3) Physical work of the parties during the marriage improved the value of the properties. (RP 51-53, 58-59) The parties spent their joint funds financing the litigation with Robert's extended family, specifically \$36,000. (RP 72, 76) They only received a portion of these funds back for attorney's fees through the litigation. (RP 273) There was no showing that separate funds were available and used to pay the mortgage

payments or to pay for the improvements. Nor were there any documents introduced into evidence to prove any such assertion. There were documents introduced into evidence to demonstrate that many items for the Cheney and Montana properties were in fact paid for with community funds.

Property acquired by purchase during marriage is presumed to be community property. *Estate of Madsen v. Commissioner of Internal Revenue*, 97 Wash.2d 792, 796, 650 P.2d 196 (1982). The party asserting that an asset purchased during marriage is separate property can overcome this presumption only with clear and convincing proof. *Madsen* at 796. Evidence that a spouse had adequate separate funds available to purchase property is insufficient to overcome the presumption that an asset acquired during marriage is community property, unless separate assets are the only assets available. *In re Janovich*, 30 Wash.App. 169, 171, 632 P.2d 889, review den'd, 95 Wash.2d 1028 (1981) (quoting *Berol*, 37 Wash.2d 380, 382, 223 P.2d 1055); *Fite v. Fite*, 3 Wash.App. 726, 732, 479 P.2d 560 (1970), review den'd, 78 Wash.2d 997 (1971). In this case, Robert's trust fund proceeds were not the only funds available to the parties to use to initially purchase the two parcels in Cheney. They had the proceeds from the sale of the Steilacoom home and the funds related to the

return of the family trust real property in Montana along with some fees paid by the community. (RP 47-50, CP 3)

Although all property before the court is capable of division to reach a just and equitable result, where there is mischaracterization, the trial court will not be affirmed unless the reasoning of the court clearly indicates that the court would have divided the property in the same way in the absence of the mischaracterization. In re Marriage of Shannon, 55 Wn.App. 137, 142, 777 P.2d 8 (1989). It is unlikely this court would have divided the property in any other way regardless of the characterization because the court can take a global view of the property evidence to reach an equitable distribution of assets and liabilities.

Robert wishes to spend much time arguing over the characterization of the property owned at the time of the dissolution. However, characterization of the property is not necessarily controlling; the ultimate question being whether the final division of the property is fair, just and equitable under all the circumstances. Baker v. Baker, 80 Wash.2d 736, 745, 498 P.2d at 321 (1972). The trial court has the duty to make final disposition of all of the property of the parties that is brought before the court. DeRevere v. DeRevere, 5 Wash.App. 741, 743, 491 P.2d 249 (1971). All property, both separate and community, is before the

court. *Friedlander v. Friedlander*, 80 Wash.2d 293, 303, 494 P.2d 208 (1972).

Under appropriate circumstances, it need not divide community property equally. RCW 26.09.080; *In re Marriage of Hadley*, 88 Wash.2d 649, 656, 565 P.2d 790 (1977); *Friedlander v. Friedlander*, 80 Wash.2d 293, 305, 494 P.2d 208 (1972); *Worthington v. Worthington*, 73 Wash.2d 759, 768-69, 440 P.2d 478 (1968) (quoting *Webster v. Webster*, 2 Wash. 417, 419, 26 P. 864 (1891)); *In re Marriage of Leland*, 69 Wash.App. 57, 74 n. 14, 847 P.2d 518, *review denied*, 121 Wash.2d 1033, 856 P.2d 383 (1993). It need not award separate property to its owner. RCW 26.09.080; *Konzen v. Konzen*, 103 Wash.2d 470, 477-78, 693 P.2d 97 (1985); *Baker v. Baker*, 80 Wash.2d 736, 746-47, 498 P.2d 315 (1972); *Blood v. Blood*, 69 Wash.2d 680, 682, 419 P.2d 1006 (1966); *see also Brewer*, 137 Wash.2d 756, 766, 976 P.2d 102 (1999) ("Characterization of property as community separate is not controlling in division of property between the parties in a dissolution proceeding[.]"); *Stachofsky*, 90 Wash.App. 135, 147-48, 951 P.2d 346 (1998) (upholding a decision to award wife a portion of husband's separate property). According to RCW 26.09.080, the court need only "make such disposition of the property and the liabilities of the parties, either community or

separate, as shall appear just and equitable after considering all relevant factors."

In light of the circumstances, the award was just and equitable. Although in actuality, Kara has no ability to obtain most of the items the court awarded her. It will be difficult at best to collect on the lien in the amount of \$112,000, to obtain 50% of the accrued leave through the US Army, to obtain the retirement through the US Army if Robert elects to abandon that entitlement, to get Robert to pay the debts that he was awarded, to obtain the return of all items of personal property. Kara has in her possession her vehicle and that may likely be the only asset she will retain at the conclusion of a marriage that spanned over 20 years. Robert has already shown through his actions that he will not pay debts or attorney's fees that he is ordered to pay, he will not provide all of the personal property awarded to Kara, he will not pay the child support and maintenance that he is ordered to pay, which will be particularly hard to collect after he is released from the military.

Further, the court cannot ignore the property that Robert is being awarded. Robert was awarded appreciating assets to include the cabin and property in Cheney, both of which can either produce significant income or be sold. Robert is also expecting a \$57,000 settlement for legal malpractice concerning land

purchases for his family in Montana. (RP 530-531) The dissolution had been pending for at least two years, but Robert failed to disclose this until his psychological evaluation was received on the first day of trial which contained the information. (RP 530-531)

Finally, the court was correct in not considering the separate debts of Robert that were voluntarily incurred AFTER the date of separation in fashioning an award of assets and debts. If he is unable to pay these debts, he has the right to return assets and/or file for bankruptcy. Nor did it err when it awarded a credit card debt to Robert that was used to pay for Kara's fees. The other option would have been simply to award more fees to Kara. It has the same effect.

ISSUE #6: The court did not err in awarding Kara "lifetime" spousal maintenance.

RCW 26.09.090 - Maintenance orders for either spouse or domestic partner - Factors, controls the issue at hand and provides as follows:

(1) In a proceeding for dissolution of marriage....the court may grant a maintenance order for either spouse..... The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned, and his or her ability to meet his or her needs independently....

- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage or domestic partnership;
- (e) The age, physical and emotional condition, and financial obligations of the spouse ...seeking maintenance; and
- (f) The ability of the spouse....from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouseseeking maintenance.

The Maintenance language in the Decree of Dissolution is at CP 81. The spousal maintenance will be reduced to \$1.00 per month once Robert retires from the military and Kara begins to receive her share of the military retirement. The rationale is that once she receives this entitlement, then her need for maintenance would be reduced and/or eliminated. Robert testified that he had already filed the paperwork so that he could retire from the military forthwith. (RP 584-585) Therefore, the actual time period in which Robert would be court ordered to pay spousal maintenance could in fact be very small in light of the length of the marriage.

The court ordered that Robert would have the obligation to pay \$1.00 per month, the collection of said sum was waived by the wife. The stated intent of that award was to protect Kara from

Robert's repeated threats to walk away from his military retirement, thereby leaving Kara with nothing. Robert acknowledges threatening to walk away from his Army retirement, revoking his citizenship so that Kara could get no benefits. (RP 528) He also stated that he was using this threat as a bargaining chip in the custody matter. (RP 528) Robert posted messages on Facebook to include (CP Exhibit 98, page 2-3):

- I firmly believe serving my country is no longer an option for me after having my right (sic) violated by the institution that was design (sic) to protect.
- I plan to resign my commission and my citizenship, preventing me from receiving retirement from the Army and go my own way. The great American dream is now just a nightmare because the system is corrupted!

Robert fought the idea of giving Kara a portion of his military retirement. His rationale was that in order to maintain retirement benefits or retainer pay, the retired soldier falls under the Uniform Code of Military Justice. (RP 457- 459) That includes requiring law abiding behavior, no extramarital affairs, maintain US citizenship, you may be called back in order to fight in military conflicts/wars, etc. (RP 457-459) As Kara was exempt from following these requirements and therefore she should not receive even an equal portion of the retirement. (RP 457-459) Given the evidence before the court, the court wished to protect Kara from the potential loss of the biggest marital asset that existed due to actions of Robert.

In *Marriage of Jennings*, the Supreme Court affirmed a ruling of the lower court to award "non-modifiable compensatory spousal maintenance" equal to one-half of husband's total monthly compensation for disability and retirement after the member converted most of the retirement or retainer pay to disability pay, to the disadvantage of his wife that was to receive 50% of the retirement pay. *Marriage of Jennings*, 138 Wn.2d 612, 980 P.2d 1248 (1999). In *Jennings*, the court found that the post-dissolution reduction in retirement benefits constituted "extraordinary circumstances" not contemplated in the original decree under CR 60(b)(11) and vacated the decree. *Id.* at 625. It held "that there were extraordinary circumstances...which justified remedial action by the trial court to overcome a manifest injustice which was not contemplated by the parties at the time of the 1992 decree". *Id.* at 625. However, in this case, the court is contemplating what would occur if the retirement benefits are lost. Robert's spousal maintenance would be reviewed and the court could at that time consider if compensatory spousal maintenance would be appropriate for Kara. The Decree is clear that the court entered the order regarding maintenance at the rate of \$1.00 per month to preserve jurisdiction specifically versus filing a CR 60 motion as they did in *Jennings*.

ISSUE 7: The court's award of \$30,000 in attorney's fees to Kara was not excessive.

The award of a mere \$30,000 to Kara in light of the litigation that occurred between the date of filing this action on March 25, 2010 (CP 1) and the finalization of this matter on September 14, 2012 (CP 76) was not excessive. RCW 26.09.140 provides in pertinent part:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

We review an award of attorney fees for abuse of discretion, whether the award is under a statute or for intransigence. *In re Marriage of Bobbitt*, 135 Wash.App. 8, 29-30, 144 P.3d 306 (2006). The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner. *In re Marriage of Mattson*, 95 Wash.App. 592, 604, 976 P.2d 157 (1999).

The trial court may also award attorney fees under RCW 26.09.140 after considering the financial resources of both parties. When considering an award of attorney fees under this statute, the

trial court generally must balance the needs of the party requesting the fees against the ability of the opposing party to pay the fees. *Mattson*, at 604. But the court may also award attorney fees based on a party's intransigence. *Id.* Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's actions *Bobbitt* at 30.

In this case the court was justified in awarding fees under a number of theories. At one point Robert claimed that attorney's fees in the case have topped \$130,000. (RP 537) He later broke down his charges for his own attorneys by indicating he paid Mr. Clements \$14,566.60 (other fees were waived), National Brotherhood of Father's Rights \$3,000, McKinley Irvin \$225.00, Ms. Donovan \$17,900 and Mr. Thornton \$30,000 with more owing (totaling \$65,691.60). (RP 538-540)

Prior to trial, Kara had paid \$47,000 in attorney's fees, expert fees, GAL fees and mediator fees and still owed \$3,000 ***prior to trial.*** (RP 232)

Kara definitely satisfied the need vs. ability to pay test. For child support purposes the court imputed Kara's income based on her historical earnings plus maintenance that was ordered at \$3,284.05 per month net. (CP 45, 55) Whereas the court found

Robert's income to be \$7,016.95 per month net after the payment of maintenance. (CP 44, 55) This did not include any rental income from Cheney. (CP 55)

Further, there was certainly intransigence. Robert's actions increased Kara's attorney's fees substantially. (RP 153-155) Between June 2010 and the trial in July 2012, Mr. Underwood failed to comply with the Temporary Order entered in June 2010 which required him to make the minimum payment on the American Express bill. (RP 85-86, RP 149-152, CP Order on Show Cause re: Contempt/Judgment filed on 11/17/2011) Robert failed to honor the court order that awarded 50% of their total tax refund for 2009 to Kara, her half being \$3,114, after he signed the return to allow for this 50/50 division. (RP 87-89, 384-385, CP Order filed 11/17/2011)

Robert, a soldier in the armed forces planning a deployment to Afghanistan, removed Kara as a beneficiary in his life insurance and refused to return her as the beneficiary in the plan by the deadline imposed by the court. (RP 144-147, 511-512, 518-519) On 11/17/2011 the court ordered that Robert had until February 5, 2012 to put Kara on as his life insurance beneficiary, but Robert did not complete this task until May 2, 2012. (RP 518-519, CP Order filed 11/17/2011)

Robert failed to follow the restraints in the Temporary Parenting Plan restricting contact with the girls and his family members. (RP 677-678) After Robert was arrested and charged with Felony Harassment, Kara had to go into court and get orders restricting all contact with the girls. (RP 712) Kara's fees skyrocketed after this arrest until trial with over \$20,000 to \$25,000 being incurred between March and June 2012. (RP 155)

Robert acknowledged that he does not always follow many court orders. (RP 382) Robert failed to follow the court order that required him to pay court ordered attorney's fees. (RP 382) Robert did not follow the order regarding payment of child support. (RP 382) Robert did not follow the order regarding payment of maintenance. (RP 382)

Further, Robert's pay went up while in Afghanistan to \$16,093.13 per month and the financial orders regarding spousal maintenance and child support were not adjusted accordingly and he got to keep all of this extra money for his own use. (RP 663-664)

Robert was able to contribute over \$800 per month in his TSP account while this matter was pending. (RP 383, 469) Robert had the financial means to purchase and finance \$50,209 for a truck during this proceeding with a monthly payment of \$977.84

originally, later lowered to \$866 per month. (RP 383-384, 470, 508) Robert had access to money to pay for these items in part as he was able to borrow \$20,000 from a friend (Casey Jeszenka) in March 2012 so he could post bail, with the total amount borrowed equaling \$43,000. (RP 523, 539)

Given all factors discussed, the award of fees was not excessive.

REQUEST FOR FEES ON APPEAL. Kara requests an award of attorney's fees under RAP 18.1(a) and RCW 26.09.140 for the necessity of defending this appeal.

Kara is requesting fees under RCW 26.09.140 cited above and RAP 18.1(a). In this case we believe that Robert's appeal is frivolous, particularly in light of his intransigence while the matter was pending in Superior Court. Robert had the funds available to hire experienced appellate counsel. Kara did not. She is requesting an award of fees.

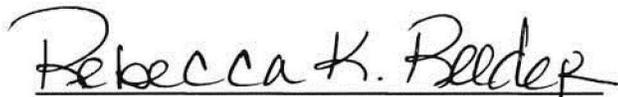
If attorney fees are allowable at trial, the prevailing party may recover fees on appeal. *Landberg v. Carlson*, 108 Wn.App. 749, 758, 33 P.3d 406 (2001) (citing RAP 18.1). RAP 18.1(a) authorizes the appellate court to order a party who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." Appropriate sanctions may include, as

compensatory damages, an award of attorney fees and costs to the opposing party. *Yurtis v. Phipps*, 143 Wn.App. 680, 696, 181 P.3d 849 (2008).

CONCLUSION

The court should deny Robert Underwood's appeal in its entirety. The court should also award all fees and costs that Kara Underwood incurred for the necessity of defending this appeal.

RESPECTFULLY SUBMITTED this 10TH day of May, 2013



REBECCA K. REEDER, WSBA #25079
Of Attorneys for Respondent
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5920 100TH Street SW #25
Lakewood, WA 98499

DECLARATION OF SERVICE

THE UNDERSIGNED, hereby declares:

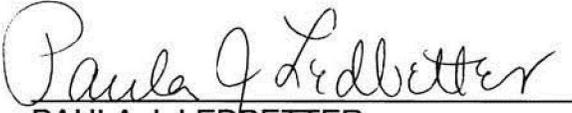
That I am a citizen of the United States, over the age of 18 years, not a party to the above-entitled action, competent to be a witness therein and was at all times herein mentioned.

That on May 10th, 2013, I arranged for service of the foregoing Brief of Respondent to the court and to the parties of 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 checked="" type="checkbox"/> Messenger <input type="checkbox"/> US Mail <input type="checkbox"/> Overnight mail
Emily J. Tsai Attorney for Appellant 2101 4TH Avenue, Suite 1560 Seattle, WA 98121	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> US Mail <input type="checkbox"/> Overnight mail
James Cathcart PO Box 64697 University Place, WA 98464-0697	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Overnight mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Lakewood, Washington this 10th day of May, 2013.


PAULA J. LEDBETTER