Supreme Court No. 90640-8

Court of Appeals No. 43633-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

PAUL SHOEMAKER,

Plaintiff-Petitioner,

v.

DAWN SHOEMAKER (NOW KNOWN AS DAWN HARRIS)

Respondent-Respondent

PETITION FOR REVIEW

ERIN SPERGER, PLLC
Erin C. Sperger, WSBA #45931
1617 Boylston Ave.
Seattle, WA 98122
Phone: (206) 504-2655
Fax: (866) 480-5066
Email: Erin@LegalWellspring.com

Attorney for Petitioner-Petitioner

I. IDENTITY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

A. Whether the Superior Courts and the Court of Appeals erroneously interpreted the Servicemembers Civil Relief Act when the lower courts did not stay the proceedings and did not appoint an attorney in Shoemaker's absence. 1

1. Whether the stay provisions of §521 are mandatory when a service member unrepresented and unable to appear, regardless of whether that service member complied with the requirement for a stay under §522.. 1

2. Whether the 2003 amendments to the SCRA require strict or substantial compliance and whether the only Washington case on point should be upheld by this court when it is inconsistent with well-established case law, the federal legislative intent, and other states' interpretation of the federal law. 2

B. Whether the court of appeals erred when it held that Shoemaker was not entitled to the SCRA protections because he was sick and not on active duty. 2

C. Whether the trial court's reliance on five factors to restrict Shoemaker's residential time under 26.10.191 demonstrates its, and other Washington state courts', misinterpretation of the federal law. 2

D. Whether the court's decision to continue the trial from March 7 to March 14 constituted a stay was therefore an abuse of discretion to set the rest of the trial for less than the statutory 90 days. 2

IV. STATEMENT OF CASE 2

A. Factual background. 2

B. Procedural Background. 9

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 9

A. It is of great public interest that this Court reverses the Court of Appeals' decision on the SCRA because hundreds of Washington's military residents are denied the protection afforded them under SCRA. 10

1. When a service member does not appear and is unrepresented, the stay provisions of 50 U.S.C. §521 place the burden on the court to appoint an attorney and grant a stay if necessary. This section is more specific than §522, so it controls 11

2. To require strict compliance with the application for stay provisions of the SCRA is inconsistent with well-established case law, the federal legislative intent, and other states' interpretation of the Act. 15

3. The five factors the trial court relied on to restrict Shoemaker's residential time under 26.10.191 demonstrates its, and other Washington state courts', misunderstanding of the federal law. 17

B. The trial court, in its discretion, granted a continuance after obtaining confirmation from Shoemaker's commanding officer. This was not a continuance, but a stay. Therefore, it should have been issued for not less than 90 days. 19

VI. CONCLUSION 19

VII. APPENDIX 20

I.

TABLE OF AUTHORITIES

Cases

Boone v. Lightner, 319 U.S. 561, 575 (1943) 13, 17
Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459, 1462 (5th Cir.1995) 13
In re Marriage of Herridge, 169 Wn. App. 290, 279 P.3d 956 (Ct. App. 2012) 13, 14
In re Marriage of Olsen, 24 Wn. App. 292, 295, 600 P.2d 690 (1979).... 16
Mason v. Georgia-Pacific Corp., 166 Wn. App. 859, 868, 271 P.3d 381 (2012) 12
Pace v. Pace, 67 Wn.2d 640, 409 P.2d 172 (1965) 16
Sorenson v. Dahlen, 136 Wn. App. 844, 855 149 P.3d 394 (2006)..... 12
Soundgarden v. Eikenberry, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994) 11
Spokane County v. Glover, 2 Wn.2d 162, 169, 97 P.2d 628 (1940)..... 12
State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196, (2005) 12
Tunstall v. Bergeson, 141 Wn.2d 201, 211 5 P.3d 691 (2000)..... 12
Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 140, 814 P.2d 629 (1991)..... 12

Statutes

50 U.S.C. App. § 521 (1940) 17
50, App. U.S.C. § 501-597b..... 13
50, App. U.S.C. §502..... 11, 13
50, App. U.S.C. §511(2)(c)..... 11
50, App. U.S.C. §521 (b)(2)..... 14
50, App. U.S.C. §521-22..... 11
50, App. U.S.C. §522 (a) 13
RCW 26.09.060 (5)..... 19
RCW 2610.191 20

Court Rules

RAP 13.4 (b) (3) 10, 20
RAP 13.4(b)(4) 10, 20

Regulations

AR 600-18 4-7a..... 19
DoDi 6400.06 6.1.2.1-.2 19

Constitutional Provisions

U.S. Const. Amend. 5 and Amend. 14 §1..... 11
Wash. Const. Art. 1, § 3..... 11

Secondary Authority

Mark E. Sullivan, A Judge's Guide to the Servicemembers Civil Relief Act, 1, available at http://apps.americanbar.org/family/military/scrajudgesguidecklist.pdf 11

Out of State Authority

Coburn v. Coburn, 412 So.2d 947, 949, (Fla. 3d DCA 1982) 15
Dugan v. Dep't of Pub. Safety, No. 09-605 JP/KBM (D.N.M. 2010) 17
Harris v. Harris, 922 N.E.2d 626, 639 (Ind. Ct. App. 2010) 15
In re Amber M., 110 Cal. Rptr. 3d 25, 30 (Cal. Ct. App. 2010) 15, 17
In re H. S. J., 03-10-00007-CV (Tex. App. 2010) 18
Olsen v. Olsen, 621 N.E.2d 830 (Ohio 1993) 15
Price v. McBeath, 989 So.2d 444, 448, 460 (Miss. Ct. App. 2008) 15
Womack v. Berry, 291 S.W.2d 677, 682 (Tex.1956) 17

I. IDENTITY OF PETITIONER

The petitioner, Paul Shoemaker ("Shoemaker"), is a party to the dissolution. Shoemaker was the petitioner in the Superior Court and the appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

Shoemaker seeks to review the unpublished decision of the court of appeals' that was filed on July 15, 2014, a copy of which is attached in the appendix. The portion of the decision he seeks to have reviewed is the Court of Appeals' analysis and interpretation of the SCRA set forth in the decision at A-12-15, and its determination that the record was insufficient to review whether the trial court abused its discretion by restricting Shoemaker's residential time to monitored written communication only. A-9-12.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Superior Courts and the Court of Appeals erroneously interpreted the Servicemembers Civil Relief Act when the lower courts did not stay the proceedings and did not appoint an attorney in Shoemaker's absence.

> 1. Whether the stay provisions of §521 are mandatory when a service member unrepresented and unable to appear, regardless of whether that service member complied with the requirement for a stay under §522.

2. Whether the 2003 amendments to the SCRA require strict or substantial compliance and whether the only Washington case on point should be upheld by this court when it is inconsistent with well-established case law, the federal legislative intent, and other states' interpretation of the federal law.

B. Whether the court of appeals erred when it held that Shoemaker was not entitled to the SCRA protections because he was sick and not on active duty.

C. Whether the trial court's reliance on five factors to restrict Shoemaker's residential time under 26.10.191 demonstrates its, and other Washington state courts', misinterpretation of the federal law.

D. Whether the court's decision to continue the trial from March 7 to March 14 constituted a stay was therefore an abuse of discretion to set the rest of the trial for less than the statutory 90 days.

IV. STATEMENT OF CASE

A. Factual background.

The parties married in Tacoma in 2004, shortly after the birth of their son, E.S. During the proceedings, Shoemaker was a member of the United States Air Force (USAF) until medically discharged on June 3, 2013. On March 16, 2006, Shoemaker filed a petition for legal separation in Kitsap County and obtained an ex parte order and temporary parenting plan in granting him temporary custody of E.S. CP at 704. Harris subsequently filed a dissolution petition in Pierce County. In June 2006, the parties signed an agreed order dismissing Harris's Pierce County dissolution petition, continuing Shoemaker's legal separation action filed

in Kitsap County, and reaffirming the temporary parenting plan. The order further stated that the parties were moving Utah to attempt reconciliation. The parties then moved together to Utah and Shoemaker was deployed overseas shortly thereafter. Ct. App. Opinion at A-2.

In February 2008, the Kitsap County court dismissed the case for want of prosecution. In 2009, the parties and their son moved to Japan where Shoemaker was stationed. After approximately a year, Harris wanted to end the marriage and tried to file the necessary paperwork to return to the United States with E.S. On August 2, 2010, Harris made allegations of abuse while Shoemaker was deployed to Kyrgyzstan and when Shoemaker returned to Japan, both parties attended counseling sessions with Family Advocacy Center (FAC) while they investigated. Ct. App. Opinion at A-2-3.

On September 10, 2010, Shoemaker obtained an ex parte order reinstating the dissolution case and the temporary parenting plan. CP at 705. Harris was free to leave Japan, but could not take E.S. with her. When Shoemaker was deployed to Kyrgyzstan, the child resided in Japan with Harris. On October 14, 2010 Harris filed a motion to vacate the ex parte order reinstating the 5/19/2006 temporary parenting plan, to continue the child's placement with Harris, and attempted to obtain an ex parte restraining order against Shoemaker, but it was denied. On October 20,

2010 Judge Spearman granted a temporary restraining order based on an affidavit from Harris' supervisor explaining that an early release of dependent was initiated and she would have to leave Japan without their son. Ct. App. Opinion at A-3.The order prohibited both parties from harassing each other, or disturbing the peace of one another or the child. It also prohibited Shoemaker from entering his home in Japan. On October 25, 2010, the court granted Shoemaker's restraining order request stating both parties were restrained and enjoined from removing E.S. from Okinawa Japan until further order of the court. At the show cause hearing October 29, 2010, the court granted the restraining/enjoining order and the motion to vacate the reinstatement order, and issued a temporary parenting plan in favor of Harris. Ct. App. Opinion at A-3.This parenting plan was granted, at least in part, due to Shoemaker's deployment. Because E.S. lived with Harris while Shoemaker was deployed it was considered the status quo despite the court's September 10, 2010 reinstatement order giving primary placement of E.S. to Shoemaker. Child support and maintenance were reserved.

Shoemaker's visitation consisted of alternate weekends and split holidays. Shoemaker appealed this order, but the court of appeals denied discretionary review of the order denying Shoemaker's motion for

reconsideration. By this time, Shoemaker represented himself. Ct. App. Opinion at A-3.

On November 2, 2010 the Air Force's Central Review Board (CRB) finished investigating Harris's allegations of abuse. The CRB determined Shoemaker had not abused Harris or E.S. and that Harris's allegations "did not meet criteria." CP at 419-20.

In January 2011, Shoemaker failed to return the child after a weekend visit. The amount of time is disputed, but the trial court found it was nearly two weeks. This single event was the catalyst for most of the future rulings in this case. On January 20, 2011, Harris served Shoemaker with a motion for contempt and notified his commanding officer. In response, the commander issued a Military Protective Order (MPO), also known as a no contact order, forbidding Shoemaker from contacting Harris or their son because this case was affecting his duties. Ct. App. Opinion at A-3.

A contempt hearing was scheduled for February 11, 2011, in Kitsap County court. Shoemaker's response stated that he was an active duty service member in the USAF and could not take leave to be physically present as required but would try to be telephonically present. Ct. App. Opinion at A-3-4

On February 10, 2011, Shoemaker faxed a letter from his commanding officer, confirming that he could not obtain leave, to Harris' attorney. The letter was filed with the court the next morning, February 11, 2011 at 10:47am. The court, however, proceeded with the contempt hearing and entered default judgments against Shoemaker including a $5,000 award of attorney fees, an order of child support, and gave Harris permission to take E.S. out of Japan. CP at 592-96, 608-609.

Following the contempt hearing, the Air Force's Central Review Board (CRB) finished their second investigation that began in January. It found Shoemaker's behavior met the criteria for "adult emotional maltreatment" and "child emotional maltreatment." CP at 706, Ct. App. Opinion at A-4. On March 10, 2011, Shoemaker was arrested for contempt of court. After posting bail, he was booked and released.

Shoemaker believed that under the UCCJEA Washington was not the child's home state and had therefore lost jurisdiction over the case. Acting on this belief, he filed for divorce in Utah on March 31, 2011. The Utah court dismissed the action and agreed that Washington State had exclusive and continuing jurisdiction and it was upheld on appeal. *Shoemaker v. Shoemaker*, 265 P.3d 850 (Utah Ct. App. 2011). Petitioner also filed two lawsuits in federal district court. One was filed against Harris, several Kitsap County judges, multiple Kitsap County employees,

and several other parties based on his belief that he was being treated prejudicially and one based on repeated violations of the SCRA. The court subsequently dismissed both lawsuits. Ct. App. Opinion at A-4.

On August 19, 2011, the Kitsap County court granted default order compelling Shoemaker to respond to Harris's interrogatories and request for production of documents, and also awarded terms. Shoemaker was on active duty at the time of the show cause hearing on the motion to compel and could not obtain leave. Shoemaker managed to get his mother (Maria-Janet) appointed as a Special power of attorney to appear on his behalf. At the hearing, Maria-Janet attempted to inform the court that Shoemaker was unable to obtain leave, but she was silenced. The order was issued in Shoemaker's absence, and Shoemaker never complied with this order. Shoemaker appeared telephonically at the December 7, 2011 settlement conference and notice of the trial date was sent to Shoemaker's last three known addresses. Ct. App. Opinion at A-4.

When the trial began on Monday, March 5, 2012, Shoemaker did not appear. His mother again informed the court he was currently at the McChord Clinic for heart tests and was not allowed to leave. Ct. App. Opinion at A-5. The trial court noted it could not verify his whereabouts, so the court allowed the case to proceed by default, and Harris testified and presented exhibits. Before adjourning for the day, the court informed

Shoemaker's mother trial would resume the next morning and Shoemaker could either appear or provide verification from military personnel that a medical condition had prevented his appearance on the first day of trial. Shoemaker did not appear for court the next morning, but his mother told the court he was confined to quarters for 48 hours due to "severe medical stress." The trial judge confirmed this with Shoemaker's commander. Ct. App. Opinion at A-5.

After speaking with the commander, the trial judge allowed Harris to complete her testimony and to admit more exhibits for a total of 47. When her testimony concluded, the court continued the trial to March 14 in order for Shoemaker to follow his military orders and ruled that Harris could return to New York and appear telephonically. Ct. App. Opinion at A-5, CP-696.

Shoemaker appeared on March 14 and testified on his own behalf. The trial court issued a memorandum decision restricting Shoemaker's residential time with E.S. to monitored written communication only. The court left the restraining order in place because it found Shoemaker had withheld E.S. from Harris in violation of court orders and had stalked, intimidated, and harassed Harris. These facts were based on Harris's testimony, military no contact orders, and a military investigation. Ct. App. Opinion at A-5-6.

B. Procedural Background.

Shoemaker appealed the trial court's decision. The Court of Appeals issued an opinion on July 15, 2014 and affirmed the trial court's rulings. It held that Shoemaker's absence was due to illness rather than active duty and that he did not file the application necessary to trigger relief under the SCRA, so it treated the trial court's ruling as a refusal to continue the trial.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review pursuant to RAP 13.4 (b) (3) and RAP 13.4(b)(4) because the Court of Appeals' decision involves a "significant question of law under the Constitution of the State of Washington and of the United States is involved" and there is a "substantial public interest that should be determined by the Supreme Court."

No citizen shall be deprived of life, liberty, or property without due process of the law. U.S. Const. Amend. 5 and Amend. 14 §1; Wash. Const. Art. 1, § 3. At a bare minimum, procedural due process "requires notice and an opportunity to be heard." *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). Congress enacted the Servicemembers Civil Relief Act (2003) ("SCRA") and its predecessor the Soldiers and Sailors Relief Act (1943) to ensure service members' were

not deprived of the opportunity to be heard while serving active duty. 50, App. U.S.C. §502. To safeguard service members' rights, the SCRA contains provisions for a stay of the proceedings under certain circumstances. 50, App. U.S.C. §521-22. When those stay procedures are violated, a service member is deprived of their due process.

A. It is of great public interest that this Court reverses the Court of Appeals' decision on the SCRA because hundreds of Washington's military residents are denied the protection afforded them under SCRA.

The SCRA applies to any service member on active duty or who is absent from active duty because of sickness or a wound. 50, App. U.S.C. §511(2)(c); Mark E. Sullivan, A Judge's Guide to the Servicemembers Civil Relief Act, 1, available at http://apps.americanbar.org/family/military/scrajudgesguidecklist.pdf. The lower courts erroneously interpreted who is even covered by the act. Ct. App. Opinion at A-13-14. Washington is home to thousands of service members stationed among seven military bases. This state has a duty to ensure those service members' due process is protected during judicial proceedings in Washington. This case demonstrates how service members are being systematically denied those protections and, in turn, denied due process. This court should accept review because Washington State courts

need guidance from this court on when and how to apply those protections.

> 1. When a service member does not appear and is unrepresented, the stay provisions of 50 U.S.C. §521 place the burden on the court to appoint an attorney and grant a stay if necessary. This section is more specific than §522, so it controls.

Questions of statutory construction are reviewed de novo. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196, (2005). The court must interpret legislation consistently with its stated goals. *Tunstall v. Bergeson*, 141 Wn.2d 201, 211 5 P.3d 691 (2000) citing *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 140, 814 P.2d 629 (1991). The main goal is to ascertain the legislative intent. *Sorenson v. Dahlen*, 136 Wn. App. 844, 855 149 P.3d 394 (2006) citing *Spokane County v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940). When statutes conflict, specific statutes control over general ones. *Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 868, 271 P.3d 381 (2012).

The Servicemembers Civil Relief Act, codified at 50, App. U.S.C. § 501-597b serves two purposes: (1) to expedite national defense by protecting servicemembers so they could devote their entire energy to the defense needs of the nation and (2) to provide a temporary suspension of proceedings that may have an adverse effect on a servicemember's civil rights during their military service. 50, App. U.S.C. §502; *In re Marriage*

of Herridge, 169 Wn. App. 290, 279 P.3d 956 (Ct. App. 2012) citing *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir.1995). The provisions of the Act are "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (interpreting the SCRA's predecessor, the Soldiers and Sailors Civil Relief Act).

50, App. U.S.C. §522 (a) provides in part that when one party is a service member, a 90 day stay is mandatory upon application by the service member. The application should consist of a letter or other communication showing their current military duty requirements materially affect their ability to appear and when the servicemember will be available to appear. It should also include a letter or other communication from the service member's commanding officer which confirms the statement.

This provision places at least some burden on the service member to apply for a stay. But, §521 places the burden on the plaintiff and on the court before issuing a default. A plaintiff must file an affidavit stating that either the defendant is not in the military or they were unable to determine the defendant's military status. If the defendant is in the military, no default judgment can be entered against him in his absence without

appointing an attorney. 50, App. U.S.C. §521 (b)(2). Even if an attorney is appointed, the court must grant a stay of proceedings for a minimum period of 90 days if: (1) the court determines there may be a defense that cannot be presented in the defendant's absence or (2) defendant's appointed counsel has been unable to contact the defendant or determine if a meritorious defense exists. *Id.*

If a stay, under §522, is denied, §521 will still prevent a default under certain circumstances. Because §521 is more specific, it controls. This is an issue of first impression and this court should accept review to resolve the conflict.

When courts have denied an application for a stay under §522, the service member is usually represented or their presence does not affect the outcome. *Herridge*, 169 Wn. App. 290 (no abuse of discretion in denying a stay of a modification of support hearing because it required no testimony). Some courts have held that section 521 applies even when a service member had actual notice. *See Harris v. Harris*, 922 N.E.2d 626, 639 (Ind. Ct. App. 2010); *Price v. McBeath*, 989 So.2d 444, 448, 460 (Miss. Ct. App. 2008).

It is of no moment that a service member can appear telephonically because nothing in the SCRA that indicates a telephonic appearance is sufficient to protect a service member's rights. Rather, the SCRA

contemplates a physical appearance at the proceedings. *In re Amber M.*, 110 Cal. Rptr. 3d 25, 30 (Cal. Ct. App. 2010). In addition, a stay is mandatory unless the court makes written findings that the service member is not hampered by his absence. *Coburn v. Coburn*, 412 So.2d 947, 949, (Fla. 3d DCA 1982) (delay in concluding litigation resulting from absence in military service does not justify denial of the statutory stay so long as there is the likelihood of injury to the civil rights of one in the armed services); *Olsen v. Olsen*, 621 N.E.2d 830 (Ohio 1993) (A motion to stay should not be denied without either requisite findings of fact or sufficient evidence in the record to warrant denial).

During this six year dissolution, a default judgment was entered against Shoemaker in two separate proceedings when he was not present due to military service, there was no affidavit filed with the court and no attorney was appointed to represent him. To compound those violations, the trial court cited determinations from those proceedings to restrict Shoemaker's residential time with his son. CP at 708.

In Shoemaker's absence from the contempt hearing, the court also granted retroactive child support payments in contrast to well established Washington law. CP at 307 (child support order 2.20, 1.1 C incorporated by reference); *In re Marriage of Olsen*, 24 Wn. App. 292, 295, 600 P.2d 690 (1979) (citing *Pace v. Pace*, 67 Wn.2d 640, 409 P.2d 172 (1965)).

Most egregious, Shoemaker was jailed as a result of this default judgment without a chance to cross-examine any witnesses.

At trial, when Shoemaker was absent the first day, the trial court failed to require Harris to file an affidavit and once again no attorney was appointed. Three separate lower court orders violated the SCRA . This is evidence the lowers courts need guidance on how and when to apply the protections afforded by the SCRA.

2. To require strict compliance with the application for stay provisions of the SCRA is inconsistent with well-established case law, the federal legislative intent, and other states' interpretation of the Act.

In this case the court of appeals, in reliance on *Herridge*, held that Shoemaker's application for a stay was insufficient because it lacked specific information. See Appendix. The Herridge court held that, "a servicemember must fully comply with the express language of the SCRA before a stay of proceedings is mandated." Herridge 169 Wn. App. 290. That court further held that to overlook deficiencies in the application does not honor the plain words of the statute or recognize congress's purpose in amending the act. According to the court of appeals, congress was concerned for opposing parties and efficient administration of judicial

proceedings. As a result, the 2003 amendments clearly burden servicemembers. *Herridge*, 169 Wn. App. 290.

To interpret the SCRA this way is inconsistent with *Boone v. Lightner*, 319 U.S. 561, 575 (1943) and subsequent decisions. The court of appeals' analysis of the 2003 amendments is incorrect. The amendments do not make it more burdensome, but restrict the court's discretion. Under the Soldier's and Sailor's Act, the court had discretion to grant or deny it. Former 50 U.S.C. App. § 521 (1940); *Herridge*, 169 Wn. App. 290; *Womack v. Berry*, 291 S.W.2d 677, 682 (Tex.1956).

Section 522(b) now "sharply restricts the court's discretion with respect to granting or denying the initial 90-day stay." *Dugan v. Dep't of Pub. Safety*, No. 09-605 JP/KBM (D.N.M. 2010). The 2003 amendments make a stay mandatory upon application by the servicemember and discretionary only when there is no application or when the application does not comply with §522. Since the amendments, several courts have continued to overlook small deficiencies in the application. *In re Amber M.*, 110 Cal. Rptr.3d at 30. (trial court abused its discretion when servicemember substantially complied with the Act.); *In re H. S. J.*, 03-10-00007-CV (Tex. App. 2010)(trial court erred when it denied a stay because service member did not include date of her return).

The letter from Shoemaker's commanding officer stated he could not appear because of his USAF obligations and because he was "currently processing through every base agency because of a Permanent Change of Station." The letter also stated that he was not authorized to take leave. To hold that this, or similar letters, do not strictly comply with the statute will result in very few servicemembers successfully invoking the Act. Because the act is liberally construed, there should be no magic language.

3. The five factors the trial court relied on to restrict Shoemaker's residential time under 26.10.191 demonstrates its, and other Washington state courts', misunderstanding of the federal law.

In the trial judge's memorandum decision, she points to the following five factors to justify a near total restriction of Shoemaker's residential time with his son: (1) A military no contact; (2) The default order on contempt; (3) A temporary restraining order entered in default; (4) The military Central Review Board's report (5) Shoemaker's overall behavior and personal interactions with Harris during the course of the case.

First, military no contact orders, more appropriately called military protective orders, have no definitive legal standard, but are issued by a commander who has authority through his "broad disciplinary powers" to invoke discretion, fairness, and sound judgment. AR 600-18 4-7a. It may be issued to simply "quell a disturbance." DoDi 6400.06 6.1.2.1-.2. It requires

no investigation, court order, findings of fact or proof of any wrongdoing. It is simply to keep the servicemember from being distracted from his duties.

This is very different from a civil restraining order which requires a finding that there is an imminent risk of irreparable harm. RCW 26.09.060 (5). The MPO cited by the trial court was issued because the parties' marital difficulties were having a negative impact on Shoemaker's ability to perform his duties and resulted in a negative impact on his son, but cited no supporting facts. Ct. App. Opinion at A-3.

Second, the order on contempt and the temporary restraining order were issued in violation of the SCRA as discussed at length above. Third, the two military reports generated by the Central Registry Board (CRB) and cited by the trial judge were issued by the FAC, a military counseling agency, which is not equivalent to a CASA, a GAL or CPS.

Lastly, the trial court cited Shoemaker's overall behavior and personal interactions with Harris during the course of the case as a factor to restrict his residential time. These findings were based on Harris' testimony and evidence alone with no objections or cross-examination. Because a stay was mandatory under section 521, Shoemaker did not waive his right to cross-examine Harris and to review her exhibits.

The trial court restricted Shoemaker's residential time with his son based on orders issued in violation of the SCRA and military orders that

Shoemaker would have been objected to if present. Therefore, all the factors cited by the trial court as justification to restrict Shoemaker's residential time with his son under RCW 2610.191 were inappropriate and the trial court abused its discretion in doing so.

B. The trial court, in its discretion, granted a continuance after obtaining confirmation from Shoemaker's commanding officer. This was not a continuance, but a stay. Therefore, it should have been issued for not less than 90 days.

The court may on its own motion .... stay the action for a period of not less than 90 days. The meaning of this statute is plain. There is no discretion in how long the stay lasts. 50, App. U.S.C. § 522 (b).

The court continued the trial after confirming Shoemaker was unavailable due to his military service. Even though the order was labeled a continuance, this was a stay. Because there is no discretion in how long the stay lasts, it should have been not less than 90 days.

VI. CONCLUSION

Pursuant to RAP 13.4 (b) (3) and RAP 13.4(b)(4), this Court should accept review to provide guidance to the lower courts on how to enforce the protections to a class of both Washington citizens and transient servicemembers afforded them by federal law.

I. APPENDIX

App. 1-19	Court of Appeals Opinion Decided July 15, 2014
App. 20-22	Coburn v. Coburn, 412 So.2d 947, 949, (Fla. 3d DCA 1982)
App. 23-27	Dugan v. Dep't of Pub. Safety, No. 09-605 JP/KBM (D.N.M. 2010)
App. 28-40	Harris v. Harris, 922 N.E.2d 626, 639 (Ind. Ct. App. 2010)
App. 41-46	In re Amber M., 110 Cal. Rptr. 3d 25, 30 (Cal. Ct. App. 2010)
App. 47-51	In re H. S. J., 03-10-00007-CV (Tex. App. 2010)
App. 52-54	Olsen v. Olsen, 621 N.E.2d 830 (Ohio 1993)
App. 55-70	Price v. McBeath, 989 So.2d 444, 448, 460 (Miss. Ct. App. 2008)
App. 71-82	Womack v. Berry, 291 S.W.2d 677, 682 (Tex.1956).

Dated this 14th day of August 2014

ERIN SPERGER, PLLC

By _____
Erin C. Sperger, WSBA #45931
Attorney for Petitioner Paul Shoemaker

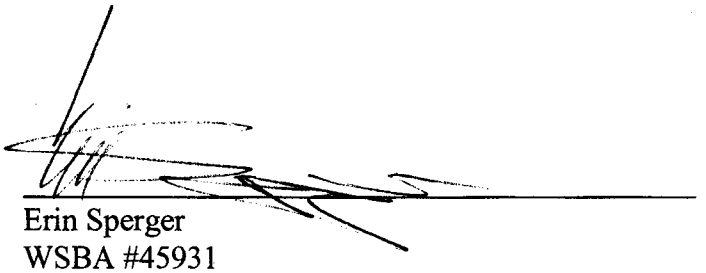
/Paul Shoemaker/
Paul Shoemaker

CERTIFICATE OF SERVICE

I certify that I mailed or caused to be mailed a copy of Paul Shoemaker's PETITION FOR REVIEW postage prepaid, via U.S. mail on the day of August, 2014, to the following counsel of record at the following addresses:

Cameron J. Fleury McGavick Graves 1102 Broadway, Ste 500 Tacoma, WA 98402	Attorney for	Dawn Harris

SIGNED at Tacoma, Washington, this 14th day of August, 2014.



Erin Sperger
WSBA #45931
1617 Boylston Avenue
Seattle, WA 98122
Phone: (206) 504-2655
Fax: (866) 480-5043
Email: Erin@LegalWellspring.com

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of:	No. 43633-7-II
PAUL DAVID SHOEMAKER, Appellant,	
and	UNPUBLISHED OPINION
DAWN MARIE SHOEMAKER, Respondent.	

MELNICK, J. — Paul David Shoemaker appeals the orders filed in this dissolution proceeding, arguing that the trial court (1) lacked the personal and subject matter jurisdiction necessary to enter the orders, (2) lacked sufficient evidence to impose the parenting plan restrictions against him, and (3) violated his due process right to a fair trial. Shoemaker also seeks to supplement the record on appeal, and in his reply brief requests an award of fees, costs, and sanctions against his former wife, now known as Dawn Marie Harris. Harris requests fees and costs on appeal. Because Shoemaker sought relief from the Kitsap County Superior Court and is a resident of Washington as well as a member of the armed forces stationed in Washington, the superior court had personal and subject matter jurisdiction in this case. We see no violation of Shoemaker's right to a fair trial on this record. We deny his motion to supplement the record as well as his untimely request for fees, costs, and sanctions, and we grant Harris's request for fees based on Shoemaker's intransigence. Affirmed.

A-1

FACTS

The parties married in Tacoma in 2004, shortly after the birth of their son, E.S. During the proceedings at issue, Shoemaker was a member of the United States Air Force.[1] On March 16, 2006, Shoemaker filed a petition for legal separation in Kitsap County, stating that "this court has jurisdiction over [Harris] because [Harris and Shoemaker's] home state of record is Washington." Clerk's Papers (CP) at 704. Harris subsequently filed a dissolution petition in Pierce County, and Shoemaker obtained an ex parte order and temporary parenting plan in Kitsap County that granted him temporary custody of E.S.

In June 2006, the parties signed an agreed order that dismissed Harris's Pierce County dissolution petition, continued Shoemaker's legal separation action filed in Kitsap County, and reaffirmed the temporary parenting plan. The order further stated that the parties were moving to Utah and were attempting to reconcile. The parties then moved together to Utah.

In February 2008, the Kitsap County court dismissed the case for want of prosecution. In 2009, the parties and their son moved to Japan where Shoemaker was deployed. After approximately a year, Harris wanted to end the marriage and tried to file the necessary paperwork to return to the United States with E.S. On September 10, 2010, Shoemaker obtained an ex parte order reinstating the dissolution case and again declaring that the Kitsap County court had jurisdiction because Kitsap County was his "designated home even though he is assigned out of state and out of the country by the military." CP at 705. In an attached declaration, Shoemaker stated that his "home address of record" was in Bremerton. CP at 355.

[1] In a recent affidavit, Shoemaker states that he was medically discharged on June 3, 2013.

A-2

Unbeknownst to Harris, the ex parte order also reactivated the temporary parenting plan. Based on this ex parte order, Shoemaker attempted to have Harris removed from the house and took custody of their son.

On October 20, 2010, Harris obtained an ex parte restraining order placing E.S. in her custody and authorizing her to take E.S. if she had to leave Japan. On October 25, 2010, a temporary restraining order issued prohibiting either party from taking E.S. out of Japan without further court order. On October 29, 2010, an agreed parenting plan was signed granting Harris custody and giving Shoemaker alternate weekends and splitting holidays. The order stipulated that E.S. could not leave Japan without further order. The court issued a contemporaneous restraining order enjoining each party from disturbing the peace of the other party or any child. This court denied discretionary review of the order denying Shoemaker's motion for reconsideration. By this time, Shoemaker had fired two attorneys and represented himself.

In January 2011, Shoemaker began harassing Harris and refusing to return E.S. after weekend visits. On one occasion he failed to return E.S. for over two weeks. Shoemaker threatened to move back into Harris's house and several times came over and refused to leave. Shoemaker cancelled Harris's cell phone and internet service. The trial court described his behavior as "increasingly odd, hostile, and bizarre." CP at 705. On January 20, 2011, the Air Force issued a no contact order forbidding Shoemaker from having any contact with Harris or their son.

On February 11, 2011, the Kitsap County court held Shoemaker in contempt for violating the 2010 parenting plan and restraint provisions but provided purge provisions. With court permission, Harris took E.S. out of Japan. The court further ordered Shoemaker to give Harris the child's passport and any other documents necessary to remove him from Japan. The court

A-3

also issued a warrant for Shoemaker's arrest and ordered him to pay child support and maintenance.

Despite the court orders and orders from his commanding officer, Shoemaker failed to cooperate and did not provide Harris with E.S.'s passport. Harris, stranded in Japan, left only after Shoemaker's commanding officer personally gave her the child's passport. Shoemaker also refused to comply with the orders to pay Harris child support, maintenance, and attorney fees.

Following an investigation of two separate incidents, an Air Force commander issued reports finding that Shoemaker's behavior met the criteria for "child emotional maltreatment" and "adult emotional maltreatment." CP at 706. On March 10, 2011, Shoemaker was arrested after failing to appear to show cause why he should not be held in contempt of court. After posting bail, he was booked and released.

On March 31, 2011, Shoemaker filed for divorce in Utah. The Utah court dismissed the action and stated in its order that Washington State had exclusive and continuing jurisdiction. This order was upheld on appeal. *Shoemaker v. Shoemaker*, 265 P.3d 850 (Utah Ct. App. 2011). A federal district court subsequently dismissed two lawsuits Shoemaker filed against Harris, several Kitsap County judges, multiple Kitsap County employees, and several other parties.

On August 19, 2011, the Kitsap County court granted an order compelling Shoemaker to respond to Harris's interrogatories and request for production of documents, and also awarded terms. Shoemaker never complied with this order. At a settlement conference on December 7, 2011, Harris and her attorney appeared in person and Shoemaker appeared telephonically. Notice of the trial date was sent to Shoemaker's last three known addresses.

A-4

Shoemaker did not appear when the trial began on Monday, March 5, 2012. His mother informed the court that Shoemaker had been denied permission to leave Fort Lewis for any court hearings during the past year and that he was being taken to the Fort Lewis Clinic for heart tests. The court observed that Shoemaker had received notice of the trial date and had appeared at prior hearings within the past year. The court also noted that there was no verification of his whereabouts. The court allowed the case to proceed by default, and Harris testified. Before adjourning for the day, the court informed Shoemaker's mother that trial would resume the next morning and that Shoemaker could either appear or provide verification from military personnel that a medical condition had prevented his appearance on the first day of trial. When Harris's attorney explained that his client would be returning to New York on Thursday and asked for completion of the trial by then, the court reconfirmed that the trial would resume the following morning.

Shoemaker did not appear for court the next morning. When his mother asserted that he had been confined to quarters for 48 hours due to "severe medical stress," Harris's attorney responded that Shoemaker had not sought medical treatment until 5:00 P.M. the previous day. CP at 695. The trial judge spoke with a military officer who confirmed that Shoemaker had been confined to quarters for 48 hours.[2] After Harris completed her testimony, the court continued the trial to March 14 and ruled that Harris would be allowed to appear telephonically due to Shoemaker's unexcused absence the previous day.

[2] The order showed that Shoemaker was confined to quarters from 7:00 A.M. on March 6 through 7:00 A.M. on March 8.

A-5

Shoemaker appeared on March 14 and testified on his own behalf. Although he challenged the court's jurisdiction, he admitted during cross examination that he had a current Washington driver's license and that he had signed court filings stating that his home of record was Kitsap County. Shoemaker's mother also testified.

The trial court subsequently issued a lengthy memorandum decision setting forth the above facts and ruling that it had jurisdiction over Shoemaker because of his efforts to seek Washington jurisdiction. The court also ruled that Shoemaker's residential time with E.S. would be restricted to allow only written communication monitored by Harris. The court left the restraining order in place because Shoemaker had withheld E.S. from Harris in violation of court orders and had stalked, intimidated, and harassed Harris.

The court found no evidence that either party's income had changed since entry of the temporary decree of dissolution and noted that Shoemaker had refused to comply with repeated discovery requests seeking current financial information. The court ordered Shoemaker to pay approximately $25,000 in unpaid child support and maintenance, and it based his ongoing child support obligation on the 2010 information he had provided earlier. The court awarded Harris $45,000 in attorney fees based on Shoemaker's intransigence and bad faith, and it imposed sanctions of $9,250 for Shoemaker's failure to provide discovery.

Shoemaker now appeals.

ANALYSIS

I. JURISDICTION

Shoemaker argues that the Kitsap County court lacked both personal and subject matter jurisdiction because neither the parties nor their son have lived in Washington since 2006.

Jurisdiction is an issue of law that we review de novo. *Worden v. Smith*, 178 Wn. App. 309, 328, 314 P.3d 1125 (2013); *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011). Jurisdiction is the power of a court to hear and determine a case and consists of personal and subject matter jurisdiction. *In re Marriage of Buecking*, 179 Wn.2d 438, 447, 316 P.2d 999 (2013).

Shoemaker possesses a Washington driver's license and has alleged that Washington is his home state in his petition and subsequent pleadings. Moreover, when the Kitsap County court dismissed the dissolution proceeding in 2008 for want of prosecution, Shoemaker moved to have the petition reinstated. Because Shoemaker sought its jurisdiction on multiple occasions, the Kitsap County court had personal jurisdiction over him. *See Worden*, 178 Wn. App. at 328 (party can consent to personal jurisdiction in an action by taking action that fairly invites the court to resolve a dispute between it and another party).

The trial court found that it had personal jurisdiction over Harris because (1) the parties lived in Washington during their marriage; (2) Shoemaker continues to reside, or be a member of the armed forces stationed, in this state; and (3) the parties may have conceived a child while in Washington. As the long-arm statute provides, such contacts submit a nonresident to the jurisdiction of Washington courts. RCW 4.28.185(1)(e), (f). The court had personal jurisdiction over both parties.

A court has subject matter jurisdiction if it can hear a particular class of case. *Buecking*, 179 Wn.2d at 448. The Washington Constitution grants superior courts original jurisdiction in divorce matters. WASH. CONST. article IV, § 6; *Buecking*, 179 Wn.2d at 449-50. RCW 26.09.030 adds a residency requirement to this exercise of jurisdiction by requiring a party who files a dissolution petition to be (1) a resident of this state, (2) a member of the armed forces who

A-7

is stationed in this state, or (3) married to a party who is a resident of this state or a member of the armed forces and stationed in this state. *In re Marriage of Robinson*, 159 Wn. App. 162, 168, 248 P.3d 532 (2010) (quoting RCW 26.09.030); *see Buecking*, 179 Wn.2d at 452 (residency requirement of RCW 26.09.030 must be met for court to exercise jurisdiction over dissolution proceeding). Shoemaker is a resident of this state as well as a member of the armed forces stationed in Washington. The court had subject matter jurisdiction over these proceedings.

Shoemaker makes several references to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in challenging the court's jurisdiction. As the Supreme Court has explained,

> The UCCJEA arose out of a conference of states in an attempt to deal with the problems of competing jurisdictions entering conflicting interstate child custody orders, forum shopping, and the drawn out and complex child custody legal proceedings often encountered by parties where multiple states are involved. It is, in a sense, a pact among states limiting the circumstances under which one court may modify the orders of another.

In re Custody of A.C., 165 Wn.2d 568, 574, 200 P.3d 689 (2009) (footnote omitted) (internal citations omitted). The UCCJEA is not at issue because no other state is attempting to modify the orders issued in this case.

Shoemaker also refers to the divisible divorce doctrine, which recognizes that divorce proceedings typically contain two components: the dissolution of the marital status and the adjudication of the "incidences" of the marriage. *Kelly v. Kelly*, 759 N.W.2d 721, 723 (N.D. 2009); 20 KENNETH WEBER, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW, § 30.4, at 16 (1997). Each component has a separate jurisdictional foundation. *Kelly*, 759 N.W.2d at 723. While a court need not have personal jurisdiction over both parties to dissolve the marriage, it must have personal jurisdiction over both parties to adjudicate matters of

A-8

alimony or spousal support, the division of property, the right to child custody, and an award of child support. *Kelly*, 759 N.W.2d at 723; 20 WASH. PRAC., § 30.4, at 16. Other states need not recognize orders adjudicating the latter matters where the entering court lacked personal jurisdiction over one of the parties. *Conlon v. Schweiker*, 537 F. Supp. 158, 162 (N.D. Tex. 1982). The divisible divorce doctrine is not relevant here because the trial court had personal jurisdiction over both parties.

II. PARENTING PLAN AND CHILD SUPPORT

Shoemaker next challenges the sufficiency of the evidence supporting the parenting plan restrictions as well as the award of child support.

We begin our review by observing that trial court decisions in dissolution proceedings will seldom be changed on appeal. *In re Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). Such decisions will be upheld unless they demonstrate a manifest abuse of discretion. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).

In fashioning a parenting plan, the court's discretion must be guided by several provisions of the Parenting Act of 1987 (ch. 26.09 RCW), including RCW 26.09.191. *In re Marriage of Katare*, 175 Wn.2d 23, 35-36, 283 P.3d 546 (2012), *cert. denied*, 133 S. Ct. 889 (2013). This statute requires a court to limit a parent's residential time with the child if that parent has engaged in physical, sexual, or emotional abuse of the child or if that parent's conduct may have an adverse effect on the child's best interests. RCW 26.09.191(1), (2), (3).

The trial court found that restrictions on Shoemaker's residential time with his son were required because Shoemaker had engaged in the following conduct:

> Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions[.]
>
> Physical, sexual or a pattern of emotional abuse of a child.
>
> A history of acts of domestic violence . . . or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

CP at 713 (paragraph 2.1). The court also found that Shoemaker's conduct might adversely affect the child's best interests because the following factors existed:

> Neglect or substantial nonperformance of parenting functions.
>
> A long-term emotional or physical impairment which interferes with the performance of parenting functions[.]
>
> The absence or substantial impairment of emotional ties between the parent and child.
>
> The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.

CP at 713 (paragraph 2.2). Based on these findings, the trial court ruled that it would allow Shoemaker only written communication with E.S., subject to Harris's monitoring.

In its memorandum decision, the court stated that the testimony and record provided ample evidence to support its findings in paragraphs 2.1 and 2.2 of the parenting plan. The court then described some of the evidence demonstrating why Shoemaker's residential time with his son would be completely restrained:

> On October 29, 2010, a temporary parenting plan was issued, establishing [Harris] as the primary residential parent for the minor child. On January 20, 2011, [Shoemaker's] Air Force Commander issued him a no contact order, forbidding him from contacting either [Harris] or the minor child. On February 11, 2011, [Shoemaker] was held in contempt of court after he violated the visitation provisions of the temporary parenting plan in effect at that time and withheld the minor child from [Harris]. Because of this violation, a temporary restraining order also was entered against him, proscribing any contact between [Shoemaker] and his child and between [Shoemaker] and [Harris]. On February 15, 2011, a second of [Shoemaker's] Air Force Commanders issued a determination finding

> that an investigation of [Shoemaker's] conduct met the criteria for both "child emotional maltreatment" and "adult emotional maltreatment." [Shoemaker's] behavior, exhibited during the course of this case and in his personal interactions with [Harris] and minor child, reflects a pattern of harmful, malicious, and abusive decisions.

CP at 708.

Shoemaker now argues that the evidence is insufficient to support the court's restrictions on his contact with E.S. We cannot review this argument, however, because Shoemaker has not provided a transcript of Harris's testimony. A party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue. *Dash Point Village Assoc. v. Exxon Corp.*, 86 Wn. App. 596, 612, 937 P.2d 1148 (1997). Even though the entire record is not required, "those portions of the verbatim report of proceedings necessary to present the issues presented on review" must be provided to the court. *Dash Point Village Assoc.*, 86 Wn. App. at 612 (quoting RAP 9.2(b)). Harris's testimony is essential to any review of the trial court's residential restrictions. Because Shoemaker has not met his burden of perfecting the record so that we may review his argument, we will not consider it further.

Shoemaker also challenges the competency of the evidence supporting the child support order. In its memorandum decision, the trial court noted that the proposed child support order mirrored the temporary child support order. There was no evidence that either party's income had changed; Shoemaker had refused to comply with repeated discovery requests, as well as an order to compel, that sought required financial information. The court therefore listed Shoemaker's income according to the 2010 information he had provided for purposes of the temporary child support order.

A-11

RCW 26.19.071(1) provides that "[a]ll income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent." If a parent fails to supply this information, the court must impute income to that parent. RCW 26.19.071(6). Given Shoemaker's refusal to meet his statutory obligation and to comply with related discovery requests and court orders, we see no abuse of discretion in the trial court's decision to calculate child support based on the initial income information he provided.

III. DUE PROCESS

Shoemaker argues further that he was denied his due process right to a fair trial for several reasons. Here again, the lack of a complete record hampers our analysis.

Several of Shoemaker's complaints stem from the trial court's decision to proceed with Harris's testimony in his absence. As the clerk's minutes illustrate, Shoemaker did not notify the court that he would be absent on March 5, the first day of trial. His mother informed the court after the hearing began that Shoemaker did not have permission to leave his base for court hearings. When Harris's attorney responded that Shoemaker had been returned from Japan so that he could appear at trial, his mother told the court that he was being taken to a clinic for heart tests. Because Shoemaker had provided no verification that a medical condition prevented his appearance, the court allowed Harris to testify.

The clerk's minutes reveal that the following day, Shoemaker's mother informed the court that Shoemaker was under medical stress and confined to quarters for 48 hours. The court eventually spoke to a sergeant who confirmed that Shoemaker had been confined to quarters for 48 hours. The court allowed Harris to complete her testimony but continued further trial proceedings to March 14.

When Shoemaker appeared on March 14, he complained that he had not had a chance to review Harris's exhibits. The court responded that a copy of her exhibits had been left for Shoemaker in court; Shoemaker's mother apparently had refused to take them. Harris's attorney added that Shoemaker could have attended trial on March 5 because he went to the clinic that evening and was not quarantined until the following morning. The court declined to continue the trial so that Shoemaker could review Harris's exhibits. When Shoemaker later complained that he had no opportunity to cross examine Harris, the court responded that he had waived that right by failing to appear at trial on March 5. The court refused to continue the trial a second time so that Shoemaker could obtain a transcript of Harris's testimony.

Shoemaker appears to argue that the trial court's refusal to stay the proceedings violated his rights under the Servicemembers Civil Relief Act (SCRA), 50 App. U.S.C.A. §§ 501-597(b). The SCRA entitles a member of the United States armed services to a mandatory stay of court proceedings when the servicemember is precluded from participating in such proceedings due to active military duty. *In re Marriage of Herridge*, 169 Wn. App. 290, 292, 279 P.3d 956 (2012); 50 App. U.S.C.A. § 522; *see also* RCW 38.42.060 (providing similar relief under the Washington Service Members' Civil Relief Act). Where a servicemember has received notice of an action or proceeding, a stay may be obtained at "any stage before final judgment," either "upon application by the servicemember" or by the court "on its own motion." *Herridge*, 169 Wn. App. at 297-98 (quoting 50 App. USCA § 522(b)(1)). Here, Shoemaker's absence was due to illness rather than active duty. Moreover, he never filed the application necessary to trigger

A-13

relief under the SCRA.[3] *See Herridge*, 169 Wn. App. at 299 (application for stay must contain specific information, and servicemember must comply expressly with the statute to be entitled to stay).

Instead of applying the SCRA, we review the trial court's refusal to continue the trial for abuse of discretion. *See In re Welfare of R.H.*, 176 Wn. App. 419, 424, 309 P.3d 620 (2013) (we review denial of continuance for abuse of discretion). We see no abuse of discretion in the court's decision to allow the trial to proceed on March 5 in the wake of Shoemaker's unexcused absence. Nor do we see any abuse of discretion in the trial court's refusal to continue trial beyond the initial continuance to March 14. Shoemaker never sought to review Harris's exhibits before trial resumed on March 14, and he never sought to obtain a transcript of her testimony. *See In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (pro se litigants are held to same standards and rules of procedure as attorneys).

Shoemaker also claims that he was denied the right to present evidence of Harris's wrongdoing during trial. The trial court sustained most of Harris's objections to this evidence on the basis that it was either hearsay or irrelevant, but the court did allow Shoemaker and his mother to testify about some instances of Harris's alleged misconduct. We see no abuse of discretion in the court's limitation of this evidence. *See Cole*, 163 Wn. App. at 213 (we review evidentiary rulings for abuse of discretion).

---

[3] Shoemaker also appears to challenge entry of the 2011 contempt order and the 2010 parenting plan as violations of his SCRA rights. Shoemaker filed a letter from his commanding officer on February 11, 2011, stating that Shoemaker's military service precluded his appearance at the contempt hearing scheduled that day. When Shoemaker did not call in to court as promised, the court issued the pending contempt order and warrant. The record does not show that Shoemaker sought relief under the SCRA in 2010. His attempts to seek relief under the SCRA from the 2010 and 2011 orders are untimely as well as lacking in merit.

Shoemaker also alleges that the trial court was biased against him. The court is biased against a person's case if it has a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge. *In re Borchert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961). We presume that the trial court performed its functions without bias or prejudice. *Borchert*, 57 Wn.2d at 722; *In re Welfare of R.S.G.*, 174 Wn. App. 410, 430, 299 P.3d 26 (2013). The fact that the trial judge ruled adversely does not demonstrate prejudice. *See Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 579-80, 754 P.2d 1243 (1998) (judge's prior adverse rulings did not demonstrate necessary prejudice for recusal of judge). We see no evidence of bias or prejudice on the record before us.

Finally, Shoemaker complains that he did not have a jury trial and that his mother was not allowed to help him present his case. Trial by jury is dispensed with in dissolution proceedings. RCW 26.09.010(1). And, while Shoemaker has the right to practice law on his own behalf, he may not transfer this right to be a self-represented litigant to another person who is not a lawyer. *State v. Hunt*, 75 Wn. App. 795, 807, 880 P.2d 96 (1994). We see no error in this regard and no violation of Shoemaker's right to a fair trial.

IV. MOTION TO SUPPLEMENT RECORD

Shoemaker seeks to supplement the record with the following materials: handwritten statements from Harris regarding crimes she has committed; affidavits from witnesses at the hearing of August 19, 2011, concerning the trial court's prejudice and conflict of interest; affidavits from a witness who attended trial on March 5 and 6 concerning judicial bad faith, bias and denial of due process; documents erroneously shredded by the superior court clerks; and trial

court records inadvertently omitted from the original designation of clerk's papers due to "extreme confusion."[4] Appellant's Br. at 49.

We may direct that additional evidence on the merits of the case be taken before deciding a case on review if all of the following factors are satisfied:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a); *Mission Ins. Co.* v. *Guarantee Ins. Co.*, 37 Wn. App. 695, 702, 683 P.2d 215 (1984). We reject Shoemaker's contention that the documents he seeks to admit satisfy these factors, and we deny his motion to supplement the record.

V. FEES, COSTS, AND SANCTIONS

Harris argues that she is entitled to an award of fees, costs, and sanctions on appeal. She describes the behavior that justifies such an award as including Shoemaker's filing of a series of "incomprehensible and perjurious documents" that has greatly increased her attorney fees and resulted in this matter still being active almost 24 months from the filing of the notice of appeal. Resp't's Br. at 3.

Harris contends that she is entitled to fees on appeal on several grounds, including CR 11 and RAP 18.7. CR 11 sanctions are awarded by the superior court and not the appellate court. *Bldg Industry Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 750, 218 P.3d 196 (2009). While CR 11 sanctions were formerly available on appeal under RAP 18.7, a 1994 amendment

[4] This court accepted two supplemental designations of clerk's papers from Shoemaker.

A-16

eliminated the reference to CR 11 in RAP 18.7 and provided for sanctions on appeal only under RAP 18.9. *Bldg Industry Ass'n*, 152 Wn. App. at 750.

RAP 18.9 allows an appellate court to impose sanctions against a party who uses the rules for the purposes of delay, files a frivolous appeal, or fails to comply with the rules. RAP 18.9(a); 3 K. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE, RAP 18.9, at 505 (7th ed. 2011). We have already denied Harris's motion for sanctions under RAP 18.9(a) and RAP 10.2 based on Shoemaker's delay in perfecting this appeal and filing his opening brief, and we decline to award sanctions on this basis now. We also decline to award sanctions based on a frivolous appeal, which is an appeal that presents no debatable issues on which reasonable minds might differ and which is so totally devoid of merit that there is no reasonable possibility of reversal. *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004). For the same reason, we decline to award fees under RCW 4.84.185, which provides for an award of fees and costs to the prevailing party when the action is frivolous. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 218, 304 P.3d 914, *review denied*, 178 Wn.2d 1022 (2013). Finally, we decline to award sanctions under RAP 18.9 based on Shoemaker's failure to comply with the appellate rules.

We also decline to sanction Shoemaker for contempt under RCW 7.21.020, and we deny Harris's request for fees based on financial need under RCW 26.09.140 because she has not filed the necessary affidavit. *See* RAP 18.1(c) (fees under RCW 26.09.140 are awarded only when the requesting party files an affidavit of financial need no later than 10 days before a case is considered).

Nonetheless, we may award Harris fees based on Shoemaker's intransigence. Intransigence includes obstruction and foot dragging, filing repeated unnecessary motions, or making a proceeding unduly difficult and costly. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). If one spouse's intransigence caused the spouse seeking a fee award to require additional legal fees, the financial resources of the spouse seeking fees are irrelevant. *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). The trial court awarded Harris fees based on Shoemaker's intransigence and bad faith and explained its award as follows:

> [Shoemaker] filed against [Harris] numerous idle claims in state and federal courts outside of Kitsap County; these claims all were dismissed as devoid of merit, but cost [Harris] an exorbitant amount of attorney fees far above and beyond what otherwise would have been accrued to resolve this dissolution action. Additionally, [Shoemaker] filed manifold irrelevant, nonsensical documents, motions, and discovery requests necessitating attention from and responses by [Harris's] attorney. This court finds that [Shoemaker's] behaviors reflected in the record doubtlessly constitute intransigence and an award of attorney fees to [Harris] as requested is appropriate.

CP at 709-10.

Shoemaker's intransigent behavior has continued in this court, as his actions in perfecting this appeal have caused Harris to incur substantial fees and costs. Before the briefing was completed, Shoemaker filed several nonmeritorious motions, including a motion for discretionary review in the Supreme Court, that required attention from Harris's attorney. This behavior is a basis for awarding fees on appeal separate from RAP 18.9 and RCW 26.09.140. *In re Marriage of Mattson*, 95 Wn. App. 592, 605, 976 P.2d 157 (1999). We award Harris fees on appeal based on Shoemaker's intransigence. Based on this ruling, we need not award statutory attorney fees under RCW 4.84.080.

Shoemaker requests an award of fees, costs, and sanctions for the first time in his reply brief. This request comes too late. *See Hawkins v. Diel*, 166 Wn. App. 1, 13 n.2, 269 P.3d 1049 (2011) (fee request must be raised in opening brief under RAP 18.1).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Johanson, C.J.

A-19

412 So.2d 947 (Fla.App. 3 Dist. 1982)

Sidney Francis COBURN, Appellant,

v.

Ruth Lindberg COBURN, Appellee.

No. 81-1932.

Florida Court of Appeals, Third District.

April 20, 1982

Page 948

David Paul Horan and Mark H. Kelly, Key West, for appellant.

Randy Ludacer, Key West, for appellee.

Before BARKDULL, NESBITT and FERGUSON, JJ.

FERGUSON, Judge.

The issue on appeal is whether the trial court abused its discretion in denying to appellant, a serviceman stationed outside the continental United States, a continuance of the final hearing on his wife's complaint for dissolution of a marriage. We affirm in part and reverse in part.

The parties were married in 1964 in the state of Connecticut and moved to Florida in March of 1976 with their two minor children when appellant-husband, a United States serviceman, was assigned to the Key West military base. They lived there continuously until appellant was transferred to Europe in March of 1979. Appellee-wife and children went with him to Germany to reside until his European tour was completed. In January, 1980 appellee-wife left appellant and the children in Germany and returned to Connecticut. She remained there until March, 1980. In March, 1980 she returned to Florida and filed this action for dissolution of the marriage seeking custody of the children, alimony, attorney's fees and costs. Appellant wrote a letter dated March 27, 1980 to his wife's attorney, filing a copy with the court, to the effect that the divorce was contested and that he wanted to be heard in defense of himself and the children. A letter from the Army's Staff Judge Advocate office addressed to the court dated March 27, 1980 and filed April 9, 1980, requested a stay of proceedings on behalf of appellant "pursuant to Section 201 of the Soldiers and Sailors Civil Relief Act of 1940 (50 U.S.C.App. 421)", (sic), for the reason that appellant was unable to afford round trip tickets to Key West for himself and the children, and that his military duties would not permit him to make the trip.

On motion of appellee, the court, on April 15, 1980, appointed William Kuypers guardian ad litem to represent appellant's interests. Months later Kuypers filed a motion to withdraw on conflict of interest grounds and was permitted to do so by court order dated November 18, 1980. Mark Kelly was appointed successor attorney ad litem the following day. Kelly filed a motion to stay proceedings until March, 1982, the month appellant would be returning to the United States. On March, 24, 1981 the court denied the motion to stay proceedings, without findings, and by the same order granted appellee leave to file an amended complaint. Final hearing was scheduled for the month of June, 1981. By stipulation the final hearing was rescheduled to July 23, 1981 and was heard without appellant's presence-though Kelly appeared as attorney ad litem.

By final judgment recorded July 24, 1981, the court ordered (1) award of permanent custody of the children to appellee and ordered appellant to return them to Key West, Florida no later than one week prior to the commencement of the fall school

year, (2) payment by appellant of attorney's fee to appellee's attorney and to the attorney ad litem, (3) payment by appellant of $200.00 per month as child support. Appeal is taken from that judgment.

The statute relied upon by Appellant, 50 U.S.C.A.App. § 521, provides:

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, ... unless in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

There is a dearth of Florida cases construing this federal act even though many cases are to be found from other jurisdictions, state and federal. The Florida cases are in accord that the act should be construed liberally in the soldier's favor. *DeLoach v. Calihan,* 158 Fla. 639, 30 So.2d 910 (1947); *Shayne v. Burke,* 158 Fla. 61, 27 So.2d 751 (1946); *Clements v. McLeod,* 155 Fla. 860, 22 So.2d 220 (1945); *Robbins v. Robbins,* 193 So.2d 471 (Fla. 2d DCA 1967). The overwhelming majority of the cases of other jurisdictions, particularly the more recent ones, hold that a court in denying a stay of proceedings under the Act should make findings that the soldier's ability to defend is not materially affected by military service, *Esposito v. Schille,* 131 Conn. 449, 40 A.2d 745 (1944), and that in the absence of such findings entry of judgment against the serviceman is improper. *Stringfellow v. Whichelo,* 102 R.I. 426, 230 A.2d 858 (1967); *Mays v. Tharpe & Brooks, Inc.,* 143 Ga.App. 815, 240 S.E.2d 159 (1977); *Mathis v. Mathis,* 236 So.2d 755 (Miss.1970). A Virginia court, applying the statute very rigidly, recently held that in a proceeding on a former wife's petition for custody of a son, the father, whose military service precluded him from being present, was entitled to a stay pursuant to the *Act. Lackey v. Lackey,* 222 Va. 49, 278 S.E.2d 811 (1981).

It is clear from a reading of the statute, and is supported by most of the cases, that the burden is on the party who opposes postponement of a trial because of military absence to show that the serviceman's ability to conduct a defense is not materially affected, and that unless the trial court expressly finds as a matter of discretion that the serviceman is not hampered by his absence, and such findings are supported by the record, then postponement is mandatory. *Pacific Greyhound Lines v. Superior Court of City and County of San Francisco,* 28 Cal.2d 61, 168 P.2d 665 (1946) (en banc).

It is clear from the record that appellant was not opposed to a dissolution, and in his behalf the attorney ad litem stipulated to bifurcation of that issue from the other issues of custody, support, fees, and costs. The record is devoid of any evidence tending to show that appellant would not be disadvantaged in the proceedings by his military absence, particularly on the issue of custody, which was the emotional subject of several letters to the court.

This section allows a postponement only until such time as a defendant is unhampered by his military service to defend the action, *Register v. Bourquin,* 203 La. 825, 14 So.2d 673 (1943); *Royster v. Lederle,* 128 F.2d 197 (6th Cir. 1942). In this case appellant requested that the hearing on child custody aspects of the proceedings be delayed for eight months until he could return to the country. The fact of a delay in concluding litigation resulting from absence in military service does not justify denial of the statutory stay so long as there is the likelihood of injury to the civil rights of one in the armed services. See, e.g., Esposito v. Schille, supra.

We affirm that part of the judgment dissolving the marriage but for the reasons stated herein hold that the court abused its discretion in denying postponement of the proceedings as to the award of

Page 950

permanent custody of the children to the wife, permanent support, attorney's fees and costs. We find the other issues raised to be without merit.

Affirmed in part, reversed in part and remanded for further consistent proceedings.

Dugan v. Department of Public Safety, 040910 NMDC, 09-605 JP/KBM

PATRICK O. DUGAN, Plaintiff,

v.

DEPARTMENT OF PUBLIC SAFETY of the State of New Mexico; AUBONY BURNS, an Agent with the Department of Public Safety/Special Investigations Division; and JOEL LUCHETTI, an Agent with the Department of Public Safety/Special Investigations Division, Defendants.

Civ. No. 09-605 JP/KBM

United States District Court, District of New Mexico

April 9, 2010

MEMORANDUM OPINION AND ORDER

On March 1, 2010, Plaintiff filed a Motion for Stay Pursuant to the Servicemembers Civil Relief Act (Doc. No. 30)(Motion for Stay).[1] Having reviewed the briefs and relevant law, the Court concludes that the Motion for Stay should be granted and that Plaintiff's in-person deposition and any other personal appearance in this lawsuit should be stayed until June 22, 2010.

A. Background

1. Procedural History

a. On April 7, 2009, Plaintiff filed a Complaint for Civil Rights Violations (Doc. No. 11)(Complaint) in state court.

b. Defendants subsequently removed the Complaint to federal district court on June 19, 2009. Notice of Removal to the United States District Court for the District of New Mexico (Doc. No. 1).

c. Plaintiff, a United States Air Force pilot, was deployed to Afghanistan on August 25, 2009 for a 108 day tour of duty. Ex. 2 (attached to Plaintiff's Reply to Defendants' Response (Doc 34) to Plaintiff's Motion for Stay Pursuant to the Servicemembers Civil Relief Act (Doc. 30), (Doc. No. 36)(Reply), filed April 1, 2010).

d. On September 4, 2009, the Honorable United States Magistrate Judge Karen B. Molzen held a Fed.R.Civ.P. 16 initial scheduling conference and entered a Scheduling Order (Doc. No. 15).

e. On October 27, 2009, Defendants' counsel asked Plaintiff's counsel via email "to take the plaintiff's deposition and that of his witnesses as soon as possible." Ex. A (attached to Defendants' Response to Plaintiff's Motion for Stay Pursuant to the Servicemembers' [sic] Civil Relief Act (Doc. No. 34) (Response), filed March 15, 2010).

f. On November 17, 2009, Judge Molzen held a telephonic status conference in which Plaintiff's counsel informed Judge Molzen that Plaintiff was in Afghanistan but would be back in the State of Georgia on December 11, 2009. Clerk's Minutes (Doc. No. 21), filed Nov. 19, 2009. Plaintiff's counsel also informed Judge Molzen that once Plaintiff was back in the United States she would report to Judge Molzen on whether Plaintiff wanted to continue to prosecute the lawsuit. *Id.* Judge Molzen indicated that she would set a follow-up status conference on December 15, 2009. *Id.* Judge Molzen later changed the date of the follow-up status conference to December 14, 2009. Docket Entry dated Dec. 2, 2009.

g. Although the Plaintiff was in Afghanistan in November 2009 and the beginning of

December 2009, Plaintiff nonetheless served Defendants on November 25, 2009 with his answers and responses to Defendants' first set of discovery; and on December 3, 2009, Plaintiff served Defendants his first set of written discovery. Certificate of Service (Doc. No. 23); Certificate of Service (Doc. No. 24).

h. Also, on December 3, 2009, Plaintiff's counsel stated to Defendants' counsel that she "hope[d] to set deposition dates for Defendants Burns and Luchetti sometime within the next 30 days...." Ex. 1 (attached to Reply). Plaintiff's counsel further noted that witness Luke Lefever was on leave and available for deposition. *Id.* Finally, Plaintiff's counsel stated that she would contact Defendants' counsel "soon after December 7, 2009 to confirm whether [her] client had indeed made it back to U.S. soil." *Id.*

i. On December 14, 2009, Judge Molzen held a follow-up telephonic status conference. Clerk's Minutes (Doc. No. 25), filed Dec. 14, 2009. Plaintiff's counsel indicated during the telephonic status conference that Plaintiff was back in Georgia, and that counsel would submit to Judge Molzen a second proposed scheduling order. *Id.* Judge Molzen set another telephonic status conference on January 20, 2010. *Id.*

j. On December 16, 2009, Defendants' counsel wrote a letter to Plaintiff's counsel requesting to depose Plaintiff. Ex. B (attached to Response).

k. In late December, Plaintiff's counsel attempted to coordinate a date for Plaintiff's deposition but was later informed by Defendants' counsel that previous available dates were "no longer good." Affidavit, Ex. 7 (attached to Reply).

l. The parties notified Judge Molzen at the January 20, 2010 telephonic status conference that they were "very close to reaching a negotiated resolution...." Clerk's Minutes (Doc. No. 28), filed Jan. 20, 2010.

m. On February 3, 2010, the parties informed Judge Molzen that they could not settle the case. Exs. D and E (attached to Response).

n. Also, on February 3, 2010, Defendants' counsel again asked Plaintiff's counsel via email when she could take Plaintiff's deposition. Ex. E (attached to Response).

o. On February 25, 2010, Defendants' counsel informed Judge Molzen that Plaintiff intended to pursue the litigation and that Plaintiff was once more deployed outside of the United States. Ex. F (attached to Response). Defendants' counsel then asked Judge Molzen to hold another Rule 16 initial scheduling conference. *Id.* Defendants' counsel further noted to Judge Molzen that had she "known [Plaintiff] intended to pursue the litigation [she] would have insisted on his appearance for deposition before he left." *Id.*

p. On March 1, 2010, the Plaintiff filed the Motion for a Stay.

q. The next day, on March 2, 2010, Judge Molzen held a second Rule 16 initial scheduling conference and entered another Scheduling Order (Doc. No. 32). The second Scheduling Order set forth the following deadlines: discovery is to be completed by July 2, 2010; discovery motions are to be filed by July 9, 2010; Plaintiff is to disclose expert witnesses by April 2, 2010; Defendants are to disclose expert witnesses by May 3, 2010; pretrial motions other than discovery motions are to be filed by August 13, 2010; and the final pretrial order is due to the Court on October 18, 2010. *Id.*

r. On March 15, 2010, Plaintiff's counsel asked Defendant's counsel to provide a list of dates and times for the depositions of the individual Defendants. Ex. 6 (attached to Reply).

s. On March 18, 2010, Plaintiff's counsel informed Defendants' counsel that Lt. Jeremy Powell will be available for a deposition in Washington, D.C. on several days in May 2010 and that she had cleared her schedule to be available for that deposition. Ex. 4 (attached to Reply).

t. On March 19, 2010, Plaintiff served Defendants with supplemental answers to their first set of interrogatories. Certification of Service (Doc. No. 35).

u. On April 1, 2010, Plaintiff served Defendants with supplemental Fed.R.Civ.P. 26 disclosures. Certificate of Service (Doc. No. 37).

2. Documentation in Support of the Motion for Stay

On February 18, 2010, the 23 Force Support Squadron of the Air Force, based in Georgia, issued Special Order TE-0324 which indicated that Plaintiff was to deploy to Iraq on February 27, 2010 for 101 days. Attached to Motion for Stay. On February 26, 2010, Plaintiff's Flight Commander wrote a letter to Plaintiff's counsel stating that Plaintiff would be unavailable for a deposition until June 22, 2010. Attached to Motion for Stay. Plaintiff's Flight Commander subsequently wrote another letter to Plaintiff's counsel on March 23, 2010 in which he stated that "[d]ue to seven day a week, 14 hour a day scheduling Captain Dugan will be unable to take leave or depart for any reason other than emergency family needs while deployed to the Iraqi area of operations within the above stated time period [February 23 to June 22, 2010]." Ex. 8 (attached to Reply).

B. Discussion

Plaintiff moves under the SCRA to stay the taking of Plaintiff's in-person deposition and any other personal appearance in this lawsuit for a total of 115 days. Specifically, Plaintiff seeks a 90 day stay under 50 App. U.S.C. §522(b) and an additional 25 day stay under §522(d)(1). Defendants oppose the Motion for Stay because Plaintiff has not submitted all of the supporting documentation required by §522(b)(2) and because they believe Plaintiff is manipulating the SCRA to gain a procedural advantage over them.

The purpose of the SCRA is to "strengthen[] and expedite the national defense" by enabling servicemembers "to devote their entire energy to the defense needs of the Nation...." 50 App. U.S.C. §502(1). To fulfill that purpose, the SCRA "provide[s] for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service." *Id.* at §502(2). Consequently, "the SCRA must be construed to prevent any disadvantage to a servicemember litigant resulting from his or her military service" and "must be 'liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.'" *George P. v. Superior Court*, 24 Cal.Rptr.3d 919, 924 (Cal.Ct.App. 2005)(quoting *Boone v. Lightner*, 319 U.S. 561, 575 (1943)). The SCRA, however, is not to be used as sword in order to give servicemembers "an unwarranted advantage over civilian litigants." *Id.* at 925.

Section 522(b)(1) states, in pertinent part, that the court "shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met." Paragraph (2) of §522(b) requires that an application for a stay include the following

documentation:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

Section 522(b) "sharply restricts the court's discretion with respect to granting or denying the initial 90-day stay. The stay is required whenever there is a showing of how military duty materially affects a servicemember's ability to appear in the action supported by a letter from the servicemember's commanding officer." *George P.*, 24 Cal.Rptr.3d at 924. A trial court, however, is not required to grant a request for stay if the servicemember has not met the documentary requirements set forth in §522(b)(2). *See, e.g., Teas v. Ferguson*, 2007 WL 4106290 *1 (W.D. Ark.); *Westfall v. Westfall*, 2008 WL 1747626 *2-3 (Minn. Ct. App.); *In re Walter*, 234 S.W.3d 836, 837 (Tex. App. 2007); *Jones v. Van Horn*, 640 S.E.2d 712, 715-16 (Ga.Ct.App. 2006).

Section 522(d)(1) provides that:

A servicemember who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear. Such an application may be made by the servicemember at the time of the initial application under subsection (b) or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required under subsection (b)(2) shall be included in an application under this subsection.

Unlike the mandatory nature of an initial 90 day stay under §522(b), an additional stay under §522(d)(1) is discretionary in nature. *George P.*, 24 Cal.Rptr.3d at 924.

The Defendants oppose the Motion for Stay for three reasons. First, Defendants observe that Plaintiff did not comply with §522(b)(2) because he did not produce a letter or other communication from his commanding officer stating "that military leave is not authorized for the servicemember at the time of the letter." Second, Defendants contend that Plaintiff did not show that he attempted to seek military leave in order to prosecute this lawsuit. Third, Defendants argue that Plaintiff is using the SCRA as a sword because Plaintiff's physical unavailability and general lack of diligence in pursuing this lawsuit constitute an effort by Plaintiff "to gain a tactical advantage over Defendants and to defeat an orderly and expeditious trial." Response at unnumbered pg. 6.

The Plaintiff attached to his Reply a letter from his Flight Commander indicating that while Plaintiff is deployed to Iraq, he cannot take military leave from February 23 to June 22, 2010 unless there is a family emergency. This letter along with the other documentation regarding Plaintiff's deployment to Iraq meet the documentation requirements of §522(b)(2). Consequently, the Court is obliged to grant the initial 90 day stay. Moreover, the Court, in its discretion, will grant an additional stay under §522(d)(1) due to the length of Plaintiff's deployment in a foreign country, thereby staying Plaintiff's in-person deposition and any personal appearance in this lawsuit until June 22, 2010.

The Court further rejects Defendants' argument that Plaintiff is using the SCRA as a sword. Although Plaintiff was physically unavailable from the latter part of August 2009 through mid-December 2009, and will be physically unavailable from late February 2010 until late June 22, 2010, Plaintiff, nonetheless, tried to coordinate a deposition date in late December 2009 and has been willing to be available for a deposition by teleconference. Plaintiff is also willing to be deposed by written questions. *See* Fed. R. Civ. P. 31. Furthermore, although the Plaintiff was slow to engage in discovery at the beginning of the litigation, he has engaged in discovery since late November 2009 until the present. In addition, Plaintiff participated in settle negotiations in an effort to amicably resolve the litigation. More importantly, though, Defendants have failed to show how they will be improperly prejudiced or harmed if the Motion for Stay is granted. Mere delay of litigation due to a stay under the SCRA is insufficient to demonstrate that the SCRA in being used as a "sword." "As courts have held, under the SCRA, '[t]he possibility of detriment to parties who are not in the military service is not a controlling factor to be considered in passing upon a motion for a stay of proceedings[.]'" *Keane v. McCullen*, F.Supp.2d, 2009 WL 331455 *3 (N.D. Cal.)(quoting *Cont'l Ill. Nat. Bank & Trust Co. v. Univ. of Notre Dame Du Lac*, 69 N.E.2d 301, 305 (1946)). Except for a delay in taking Plaintiff's in-person deposition, the parties can continue to engage in discovery as well as some motion practice prior to Plaintiff's return to the United States on June 22, 2010. Moreover, the parties should be able to comply with the July 2, 2010 discovery deadline by scheduling Plaintiff's in-person deposition after he returns to the United States on or about June 22, 2010. Of course, Defendants could expedite the litigation by agreeing to depose Plaintiff by teleconference or by written questions. Construing the SCRA liberally in favor of the Plaintiff as a servicemember serving in an active combat role in a foreign country, the Court concludes that the Motion for a Stay is well taken and should be granted.

IT IS ORDERED that Plaintiffs Motion for Stay Pursuant to the Servicemembers Civil Relief Act (Doc. No. 30) is granted in that the in-person deposition of Plaintiff as well as any personal appearance by the Plaintiff in this lawsuit are stayed until June 22, 2010.

Notes:

[1]The Servicemembers Civil Relief Act (SCRA) was previously known as the Soldiers' and Sailors' Civil Relief Act of 1940.

Page 626
922 N.E.2d 626 (Ind.App. 2010)
In re The Marriage of Anthony J. HARRIS, Appellant-Respondent,
v.
Teasha J. HARRIS, Appellee-Petitioner.
No. 49A04-0905-CV-256.
Court of Appeals of Indiana.
February 17, 2010
Page 627
[Copyrighted Material Omitted]
Page 628
[Copyrighted Material Omitted]
Page 629
[Copyrighted Material Omitted]
Page 630
Mark Small, Indianapolis, IN, Attorney for Appellant.
OPINION
BROWN, Judge.

Anthony Harris (" Husband") appeals the trial court's decree of dissolution of the marriage of Husband and Teasha Harris (" Wife"), in which the court awarded custody of the minor child of the parties to Wife, ordered that Husband pay child support and a spousal allowance to Wife, and ordered the distribution of the marital property of the parties. Husband raises four issues, which we revise and restate as follows:

I. Whether the trial court erred in denying Husband's motion to correct errors on the basis that Husband failed to properly preserve his claim that the court lacked personal jurisdiction over him;

II. Whether the trial court lacked personal jurisdiction over Husband to enter judgment as to child support, spousal allowance, and distribution of marital property; andIII. Whether the trial court erred in making a determination as to custody of the parties' minor child.

We affirm in part, reverse in part, and remand.

The relevant facts follow. Husband has been in the United States military since approximately 1990. Husband and Wife were married in December 1995 in Watertown, New York. Husband and Wife have one child, who was born on April 11, 1996. Husband and Wife met in Watertown, New York, where they married, and then " moved to Hinesville, Georgia, and Kansas, and then Germany." Transcript at 10. In late December 2005, Wife physically separated from Husband and moved to Indiana. Husband paid a financial allotment to Wife by sending a check to her or by depositing the allotment into an account. On September 12, 2008, Wife filed a petition for dissolution of marriage in Marion County, Indiana. In her petition, Wife stated that Husband was stationed in Germany and sought the dissolution of her marriage to Husband, primary custody of
Page 631
the Husband and Wife's daughter, and a distribution of the parties' property and liabilities. Wife

sought service upon Husband at the mailing address of " CMR 480 Box 1495/APO AE 09128." Appellant's Appendix at 12.

On October 3, 2008, Husband sent a notice letter to the Marion County Superior Court stating that he " decline[d] to accept voluntary service" under Section 516.12(c) of Title 32 of the Code of Federal Regulations[1] and returned by enclosure Wife's petition for dissolution, the appearance of Wife's attorney, and summons.[2] *Id.* at 16. On October 20, 2008, Husband filed a complaint for absolute divorce in New Hanover County, North Carolina. On December 1, 2008, Husband filed a claim for child custody and attorney fees in New Hanover County, North Carolina. Husband was in New Hanover County, North Carolina, on November 26, 2008, and Wife had Husband served by the sheriff in that county.

On November 25, 2008, Wife filed a motion for a hearing with the Marion County Superior Court, and the court set a hearing for December 4, 2008. On December 4, 2008, the trial court held a hearing, at which Wife was present and Husband did not appear. At the hearing, the trial court stated that it needed to confer with the court in North Carolina under the " Uniform Child Custody Act" regarding jurisdiction over the child custody issue in the case. Transcript at 4. Also at the hearing, Wife made statements regarding Husband's military base income and housing allowance, Wife's income, Wife's desire to have Husband continue to pay the car payment and insurance for the parties' vehicle in her possession, and Husband's military pension.

On December 8, 2008, the trial court contacted the North Carolina court and discussed the issue of jurisdiction regarding the complaint for child custody filed in North Carolina. The trial court found that the jurisdictional requirements of Ind.Code § 31-21-5-1 had been met and that the North Carolina court agreed that jurisdiction shall be with the court in Marion County, Indiana. Accordingly, the trial court ordered that " all issues regarding the minor child ... as well as the Petition for Dissolution of Marriage filed in Marion County, Indiana ... shall be heard in this Court," and set a final hearing for December 30, 2008. *Id.* at 26. On December 30, 2008, the trial court rescheduled the final hearing for February 2, 2009, because " copies of 12-8-09 order were not sent to parties." *Id.* at 4.

The trial court held a final hearing on February 2, 2009, at which Wife was present and Husband did not appear. The trial court noted that it agreed to take " jurisdiction over the children's issues and the Petition for Dissolution" and that " anything else" would need to be addressed in North Carolina. *See* Transcript at 12. Following the hearing, the trial court issued a decree for dissolution of marriage of Husband and Wife. The decree ordered the marriage of the parties dissolved; awarded custody of the parties' minor child to Wife; ordered Husband to pay $239 per week as child support, $500 per month to Wife as spousal allowance, delinquent automobile payments in the approximate amount of $1,050, and the balance owed on the vehicle of $14,216.70; ordered Husband to transfer title to the vehicle to

Wife; and awarded thirty-two percent of Husband's military retirement to Wife.

On March 2, 2009, Husband filed a motion to correct errors and an affidavit in support of the motion. Husband's motion argued that the trial court did not have personal jurisdiction over Husband, that a default judgment could not be rendered against Husband because he was a

member of the United States military stationed overseas, that Husband was not properly served as set forth in his original notice letter, and that Husband never received notice of the hearing on February 2, 2009. Husband filed an emergency motion to suspend support payments. On March 11, 2009, Wife filed a response to Husband's motion to correct errors and motion to strike Husband's affidavit in support of his motion to correct errors. Wife also filed an answer to Husband's emergency petition to suspend support payments and a motion for fees. On March 23, 2009, the trial court granted Wife's motion to strike Husband's affidavit in support of his motion to correct errors and denied Husband's motion to correct errors upon the grounds that " [t]here exists no error properly preserved by [Husband] in this case and the [motion to correct errors] was therefore improperly filed." Appellant's Appendix at 106.

Before addressing Husband's arguments, we note that Wife did not file an appellee's brief. [3] When an appellee fails to submit a brief, we do not undertake the burden of developing the appellee's arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes prima facie error. *Zoller v. Zoller,* 858 N.E.2d 124, 126 (Ind.Ct.App.2006). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *Wright v. Wright,* 782 N.E.2d 363, 366 (Ind.Ct.App.2002). However, we review de novo questions of law, regardless of the appellee's failure to submit a brief. *McClure v. Cooper,* 893 N.E.2d 337, 339 (Ind.Ct.App.2008).

I.

The first issue is whether the trial court erred in denying Husband's motion to correct errors upon the basis that Husband failed to properly preserve his claim that the court lacked personal jurisdiction over him. Husband argues that a motion to correct errors is " an appropriate procedural means for challenging either personal or subject matter jurisdiction." Appellant's Brief at 10. Husband also argues that " [a]s a general rule, new issues cannot be raised in a motion to correct error. However, ... exceptions to that general rule lie with challenges to personal and subject matter jurisdiction." *Id.* at 11. Husband further argues that a party is not required to raise a personal jurisdiction defense in a responsive pleading.

A judgment rendered without personal jurisdiction is void. *Hill v. Ramey,* 744 N.E.2d 509, 512 (Ind.Ct.App.2001) (citing *Stidham v. Whelchel* 698 N.E.2d 1152, 1156 (Ind.1998)). A defendant can waive the lack of personal jurisdiction and submit himself to the jurisdiction of the court if he responds or appears and does not contest the lack of jurisdiction. *Id.* at 512 n. 7 (citing *Stidham,* 698 N.E.2d at 1155). The Indiana Supreme Court has observed that a claim of lack of personal jurisdiction may be waived, but that waiver " must be by the person holding the rights."

Stidham, 698 N.E.2d at 1155-1156. The waiver doctrine does not mean that any party that has the power to waive a defense will be found to have done so. *Id.* at 1156. The fact that a defendant is served with a summons in another state does not demonstrate waiver. *See id.* at 1153-1156 (concluding that the defendant did not waive his defense of lack of personal jurisdiction where the defendant had received service of process in another state by certified mail). Indeed, the Court has recognized that " [i]t is a bold move, but an option available to a nonresident is to ignore a

pending proceeding and take the risk that a subsequent challenge to personal jurisdiction will prevail." *Id.* at 1156 (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 706, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) (" A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.")).

A judgment that is void for lack of personal jurisdiction may be collaterally attacked at any time. *Id.* A motion to correct errors is a permissible vehicle to obtain relief from a void judgment. *See Roberts v. Watson,* 172 Ind.App. 108, 114, 359 N.E.2d 615, 619 n. 1 (1977) (noting that although relief from a void judgment may be sought under Ind. Trial Rule 60(B)(6), a motion to correct errors was a permissible vehicle for the challenge as well).

Here, the chronological case summary shows that no attorney filed an appearance to represent Husband in the trial court proceedings. In addition, Husband sent a notice letter to the trial court dated October 3, 2008, which was file-stamped on October 7, 2008, informing the trial court that he " decline[d] to accept voluntary service" under " § 516.12(c) of 32 CFR 516." [4] *See* Appellant's Appendix at 16. Also, the record shows that Husband was served by a sheriff in New Hanover County, North Carolina, on November 26, 2008. On March 2, 2009, Husband filed a motion to correct errors, an affidavit in support of the motion, and an emergency motion to suspend support payments. Husband's motion argued that the trial court did not have personal jurisdiction over Husband, that a default judgment could not be rendered against him because he was a member of the United States military stationed overseas, and that he was not properly served. Neither Husband's letter nor the fact that he was served in North Carolina demonstrates a waiver. *See Stidham,* 698 N.E.2d at 1155-1156 (concluding that the trial court erred in finding the defendant's motion was barred and that the defendant did not waive his defense of lack of personal jurisdiction where the defendant had received service of process in another state by certified mail); *see also Laflamme v. Goodwin,* 911 N.E.2d 660, 666-667 (Ind.Ct.App.2009) (finding that the fact that the appellant did not contest personal jurisdiction when the Indiana court domesticated a divorce decree of another state did not serve as a valid waiver of the appellant's right to subsequently contest the Indiana court's exercise of personal jurisdiction over him); *Hill,* 744 N.E.2d at 512 (observing that the motion for continuance

Page 634

filed by an attorney on the defendant's behalf did not demonstrate a waiver as that attorney never entered an appearance for the defendant).

Therefore, the trial court erred in denying Husband's motion to correct errors upon the basis that Husband failed to properly preserve his claim that the court lacked personal jurisdiction to issue the decree.[5]

II.

The next issue is whether the trial court lacked personal jurisdiction over Husband to enter judgment as to child support, spousal allowance, and distribution of marital property. Husband argues that " [t]he trial court lacked jurisdiction to do anything except simply to dissolve the parties' marriage." Appellant's Brief at 14. Specifically, Husband argues that Ind. Trial Rule 4.4(A)(7) does not provide a basis for personal jurisdiction and that he " has insufficient contacts with Indiana for

the trial court to have exercised *in personam* jurisdiction over him for the incidences of marriage." *Id.* at 16.

We address separately the trial court's jurisdiction over Husband for the purposes of: (A) dissolving the marriage of the parties; and (B) adjudicating the incidences of the marriage and child support.

A. *Jurisdiction for the Purpose of Dissolving the Marriage*

We initially note that a dissolution of marriage proceeding has historically contained two principal elements: (1) the divorce, that is, the changing of the parties' status from married to unmarried, and (2) the adjudication of the incidences of marriage, that is, affecting a nonresident respondent's interest in property. *In re Marriage of Rinderknecht,* 174 Ind.App. 382, 388, 367 N.E.2d 1128, 1133 (1977). The changing of the parties' status from married to unmarried has been denominated as an *in rem* proceeding, and the trial court may, upon *ex parte* request of a resident party, dissolve a marriage without obtaining personal jurisdiction over the other party. *Id.* ; *Persinger v. Persinger,* 531 N.E.2d 502 (Ind.Ct.App.1987) (noting

Page 635

that *in personam* jurisdiction over one spouse is not a prerequisite to the entry of a dissolution decree). The residency of one party satisfies the minimum contact necessary for the exercise of such *in rem* jurisdiction. *Rinderknecht,* 174 Ind.App. at 391, 367 N.E.2d at 1133-1135; *Persinger,* 531 N.E.2d 502 (noting that *in rem* jurisdiction gives the court jurisdiction to dissolve a marriage). However, *in personam* jurisdiction over both parties is required to adjudicate the parties' property rights. *Rinderknecht,* 174 Ind.App. at 388, 367 N.E.2d at 1133.

Here, it is uncontested that Wife was a resident of Marion County, Indiana.[6] Thus, the Marion County Superior Court had *in rem* jurisdiction to dissolve the marriage and return the status of the parties from married to unmarried. *See id* .

B. *Jurisdiction for the Purpose of Adjudicating the Incidences of Marriage and Child Support*

In addition to dissolving the marriage of Husband and Wife, the trial court ordered Husband to pay $239 per week as child support, $500 per month to Wife as spousal allowance, delinquent automobile payments in the approximate amount of $1,050 and the balance owed on the vehicle of $14,216.70, to transfer title to the vehicle to Wife, and awarded thirty-two percent of Husband's military retirement to Wife.[7]

In order for a trial court to have jurisdiction over marital property, the court must have *in personam* jurisdiction over both parties. *Horlander v. Horlander,* 579 N.E.2d 91, 93 (Ind.Ct.App.1991) (citing *In re Marriage of Hudson,* 434 N.E.2d 107, 112 (Ind.Ct.App.1982), *cert. denied,* 459 U.S. 1202, 103 S.Ct. 1187, 75 L.Ed.2d 433 (1983)), *reh'g denied, trans. denied.* Additionally, a support order is incident to marriage and requires *in personam* jurisdiction of both parties. *Johnston v. Johnston,* 825 N.E.2d 958, 963 (Ind.Ct.App.2005). A court obtains such jurisdiction if " minimum contacts" exist between the state and the party over whom the state seeks to exercise control. *Horlander,* 579 N.E.2d 91; *see also Rinderknecht,* 174 Ind.App. at 393, 367 N.E.2d at 1135 n. 7 (citing *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), *reh'g denied* ; *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). The minimum contact requirement for obtaining *in personam* jurisdiction in a dissolution

proceeding is always satisfied if the defendant is a resident of Indiana. *Rinderknecht,* 174 Ind.App. at 393, 367 N.E.2d at 1135. If the defendant is a nonresident, " then the minimal contact requirement can be met if the requirements of Ind. Rules of Procedure, Trial Rule 4.4(A)(7) or some other constitutionally acceptable minimum contact are met." *Id.* Ind. Trial Rule 4.4(A) provides in part:

Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or her or his or her agent:

* * * * * *

Page 636

(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state; ....

* * * * * *

In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.

Thus, Ind. Trial Rule 4.4(A)(7) provides that any person who lived in a marital relationship in Indiana and subsequently has left the state, leaving behind a spouse who continues to reside in Indiana, submits to jurisdiction of this state. *See Horlander,* 579 N.E.2d at 93-94; *Rinderknecht,* 174 Ind.App. at 393, 367 N.E.2d at 1135.

Here, the record reveals that Wife testified at the court's proceeding on December 4, 2008, stating that she met Husband in Watertown, New York, and then she and Husband " moved to Hinesville, Georgia, and Kansas, and then Germany." Transcript at 10. In addition, Husband's affidavit in support of his motion to correct errors states that " [Wife] and myself [sic] never lived in the State of Indiana as Husband and Wife, and I have never even lived in the State of Indiana at any time I was married to [Wife]." Appellant's Appendix at 42. Wife's response to Husband's motion to correct errors and motion to strike Husband's affidavit in support of the motion to correct errors does not contradict her testimony at the December 4, 2008 hearing or Husband's affidavit with respect to Husband not having lived in Indiana at any time during the marriage of the parties. Under the facts of this case, we conclude that the personal jurisdiction of the Marion County Superior Court over Husband is not established under Ind. Trial Rule 4.4(A)(7). *See Rinderknecht,* 174 Ind.App. at 393, 367 N.E.2d at 1136 (holding that the court did not have personal jurisdiction over the defendant where the only evidence was that the defendant was a resident of another state and observing that " TR 4.4(A)(7) is not broad enough in its scope to encompass the situation which is present in the case at bar"); *see also In re Marriage of Hudson,* 434 N.E.2d at 112-114 (holding that the Indiana court lacked jurisdiction to distribute the marital property of the parties under Ind. T.R. 4.4(A)(7) because the court lacked personal jurisdiction over one of the spouses).

We next consider whether the trial court obtained personal jurisdiction over husband upon any other basis " not inconsistent with the Constitutions of this state or the United States." *See* Ind. Trial Rule 4.4(A); *see Rinderknecht,* 174 Ind.App. at 393, 367 N.E.2d at 1135. " The Due Process

Clause of the Fourteenth Amendment and article 1, section 12 of the Indiana Constitution require that before a court may exercise personal jurisdiction over a party, that person must have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Laflamme,* 911 N.E.2d at 666 (citing *Anthem Ins. Cos. v. Tenet Healthcare Corp.,* 730 N.E.2d 1227, 1237 (Ind.2000) (citing *Int'l Shoe Co.,* 326 U.S. at 316, 66 S.Ct. 154)) (internal quotation marks omitted). The contacts to be examined must be the purposeful acts of the defendant, not the acts of the plaintiff or any third parties. *Id.* Our analysis as to whether personal jurisdiction exists under the Due Process Clause is guided by a two-part test. *Id.* We first consider the contacts between the defendant and the forum state to determine if they are sufficient to establish that the defendant could

Page 637

reasonably anticipate being hauled into court there. *Id.* (citing *Anthem Ins. Cos.,* 730 N.E.2d at 1237 (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985))). " If the contacts are sufficient, then we must evaluate whether the exercise of personal jurisdiction offends traditional notions of fair play and substantial justice by weighing a variety of interests." *Id.* (citing *Anthem Ins. Cos.,* 730 N.E.2d at 1237 (citing *Burger King Corp.,* 471 U.S. at 476, 105 S.Ct. 2174)) (internal quotation marks omitted).

In this case, there are no contacts sufficient to establish personal jurisdiction over Husband. Husband's only contacts with Indiana are paying a financial allotment to Wife by sending a check to her or depositing it into an account. We cannot say that this limited contact constitutes " purposefully avail[ing himself] of the privilege of conducting activities within [Indiana], thus invoking the benefits and protections of [Indiana's] laws." *See Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). Further, Husband's contacts with Indiana were incidental to Wife's decision to move to this state with the parties' child and too attenuated to subject him to the jurisdiction of Indiana courts. *See Laflamme,* 911 N.E.2d at 665-666 (holding that the trial court did not have personal jurisdiction over the defendant under the Fourteenth Amendment or article 1, section 12 of the Indiana Constitution where the defendant never lived in Indiana and his daughter was not conceived in Indiana; the defendant's only contact with the state was sending letters and gifts to his daughter, responding to requests to continue paying child support and assist with the educational expenses of his daughter, and paying child support pursuant to another state's court order; and observing that the defendant's contacts with Indiana were incidental to the decision of his daughter's mother to move to the state). Accordingly, the trial court did not have personal jurisdiction over Husband under Ind. Trial Rule 4.4(A).

In addition, Indiana has adopted the Uniform Interstate Family Support Act (the " UIFSA"), which provides a mechanism for cooperation between state courts in enforcing duties of support. *Laflamme,* 911 N.E.2d at 664. The UIFSA provides that an Indiana court may exercise jurisdiction over nonresidents under the following circumstances:

In a proceeding to establish, enforce, or modify a support order or to determine paternity, an Indiana tribunal may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

* * * * * *

(2) the individual submits to the jurisdiction of Indiana by:(A) consent; (B) entering an appearance, except for the purpose of contesting jurisdiction; or(C) filing a responsive document having the effect of waiving contest to personal jurisdiction; [or]

* * * * * *

(8) there is any other basis consistent with the Constitution of the State of Indiana and the Constitution of the United States for the exercise of personal jurisdiction.

Ind.Code § 31-18-2-1.

Here, with respect to subsection 2(C), as previously mentioned, the record shows that no attorney filed an appearance to represent Husband in the trial court proceedings, Husband sent a notice letter to the trial court on October 3, 2008 stating that he declined to accept voluntary service, and Husband filed a motion to

Page 638

correct errors arguing that the trial court did not have personal jurisdiction over him. Given the content and timing of Husband's letter and his motion following the trial court's decree of dissolution, we conclude that Husband's filings with the trial court did not have the effect of waiving his right to contest personal jurisdiction under subsection 2(C). *See Laflamme,* 911 N.E.2d at 665 (concluding that the defendant's letters did not have the effect of waiving his right to contest jurisdiction under the UIFSA given the content of the defendant's first letter and the timing of the second letter).

Further, as previously concluded, the trial court here did not obtain personal jurisdiction over Husband based upon " any other basis consistent with the Constitution of the State of Indiana and the Constitution of the United States for the exercise of personal jurisdiction." As a result, the trial court did not have personal jurisdiction over Husband under subsection (8) of Ind.Code § 31-18-2-1 for the purpose of ordering child support.

Based upon the record, we conclude that the trial court's order as to child support, spousal allowance, payment for and transfer of title to the parties' vehicle in Wife's possession, Husband's military retirement, and any other incidences of marriage is void for lack of personal jurisdiction over Husband. [8]

III.

The next issue is whether the trial court erred in making a determination as to custody of the parties' minor child. Initially, we note that a trial court may adjudicate custody without acquiring personal jurisdiction over an absent parent given reasonable attempts to furnish notice of the proceedings. *In re Marriage of Hudson,* 434 N.E.2d at 117-119 (concluding that the trial court's jurisdiction over the custody proceeding without obtaining *in personam* jurisdiction over the father did not violate his due process rights and noting that the traditional *in rem* approach applies to custody cases).

A. *The Servicemembers Civil Relief Act*

Husband appears to argue that he " was entitled to set aside the trial court's judgment ... under the Servicemembers Civil Relief Act." Appellant's Brief at 16. The trial court is obligated to observe any applicable requirements of the Servicemembers Civil Relief Act, found at 50 App. U.S.C.A. §§ 501-596, in child custody proceedings.

Section 521(a) of the Servicemembers Civil Relief Act applies to any civil action or proceeding, including any child custody

Page 639

proceeding, in which the defendant does not make an appearance. *See* 50 App. U.S.C.A. § 521(a). Section 521(b)(1) of the Act provides that before entering judgment for a plaintiff, a court shall require the plaintiff to file with the court an affidavit stating whether or not the defendant is in military service and showing necessary facts to support the affidavit, or, if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service. *See* 50 App. U.S.C.A. § 521(b)(1). The Section also provides that the affidavit may be satisfied " by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury." *See* 50 App. U.S.C.A. § 521(b)(4). In addition, if the defendant is in military service, Section 521(b)(2) provides that the court may not enter a judgment until after the court appoints an attorney to represent the defendant. *See* 50 App. U.S.C.A. § 521(b)(2).

Here, the record does not show that the trial court required Wife to file an affidavit with the court as required by 50 App. U.S.C.A. § 521(b)(1). The record also shows that no attorney made an appearance on Husband's behalf in the trial court proceedings and that the trial court did not appoint an attorney to represent Husband. Therefore, the trial court erred in failing to comply with the provisions of the Servicemembers Civil Relief Act prior to entering the decree. *See Matter of Marriage of Thompson,* 17 Kan.App.2d 47, 832 P.2d 349 (1992) (holding that a judgment of divorce and child support violated the former version of the Servicemembers Civil Relief Act where no affidavit was filed showing that the father was in military service and no request was made and the trial court did not appoint an attorney to represent father and protect his interests). Accordingly, we reverse the trial court's order as to child custody on the basis that it did not comply with the provisions of the Servicemembers Civil Relief Act set forth above prior to entering judgment, and we remand with instruction that the trial court comply with the provisions of the Servicemembers Civil Relief Act, specifically 50 App. U.S.C.A. § 521, in the child custody proceedings.

B. *Indiana's Uniform Child Custody Jurisdiction and Enforcement Act*

Indiana has adopted provisions of the 1997 Uniform Child Custody Jurisdiction and Enforcement Act (Ind.Code § 31-21 herein referred to as the " Act"). [9] *See* Ind.Code § 31-21. The purpose of the Act is to avoid jurisdictional competition and conflict with courts of other states in matters of child custody. *See Counceller v. Counceller,* 810 N.E.2d 372, 376 (Ind.Ct.App.2004), *trans. denied* . The Act sets forth the circumstances under which Indiana courts have jurisdiction over a child custody matter. Ind.Code § 31-21-5 contains provisions regarding jurisdiction to make an initial child custody determination, exclusive and continuing jurisdiction, jurisdiction to make a custody modification, and temporary emergency jurisdiction. *See* Ind.Code §§ 31-21-5-1 through -4.

Page 640

In addition, Ind.Code § 31-21-4-1 provides that " [a]n Indiana court may communicate with a court in another state concerning a proceeding arising under [the UCCJA]." Ind.Code § 31-21-4-2 provides that " [t]he court may allow the parties to participate in the communication. If the parties

are not able to participate in the communication, the parties must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made." Husband specifically argues that " the trial court did not give [him] an opportunity to present facts and legal arguments, as required by I.C. § 31-21-4-2, before a decision on jurisdiction was made," and therefore that " [t]he trial court's exercise of jurisdiction was defective." Appellant's Brief at 25.

We observe that Ind.Code § 31-21-4-2 is identical to Section 110(b) of the 1997 Uniform Act. The drafter's comment to Section 110 of the 1997 Uniform Act provides in part:

The second sentence of subsection (b) protects the parties against unauthorized ex parte communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not to [sic] be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

1997 Uniform Act § 110, comment.[10]

Here, upon discovering at the December 4, 2008 hearing that a custody proceeding regarding the parties' child was also pending in a court in North Carolina, the trial court communicated with that court as permitted by Ind.Code § 31-21-4-1 in an effort to determine the appropriate forum. When engaging in such a communication, however, the court must either allow the parties to participate [11] or, if they do not participate, the parties " must be given the opportunity to present facts and legal arguments," and it is important that this opportunity be afforded the parties " *before* a decision on jurisdiction is made." *See* Ind.Code § 31-21-4-2 (emphasis added). The record reveals that the trial court here did not afford Husband such an opportunity to participate and made a decision on jurisdiction adverse to Husband without presenting him any opportunity to present facts or arguments. Under the circumstances, this was reversible error. *See*

Page 641

Cole v. Cushman, 946 A.2d 430, 435 (Me.2008) (reversing the trial court's determination of jurisdiction and holding that the court failed to allow the parties to submit facts and legal arguments before a decision on jurisdiction was made as required by the state's statutory provision which was identical to subsection 110(b) of the 1997 Uniform Act).[12]

We reverse the court's decree of dissolution as to its award of custody of the parties' minor child and remand with instructions to comply with the provisions of the Servicemembers Civil Relief Act, specifically 50 App. U.S.C.A. § 521, in the child custody proceedings, and to make a decision on jurisdiction in accordance with the requirements of Ind.Code § 31-21, including Ind.Code §§ 31-21-4-1 and -2.

For the foregoing reasons, we reverse the trial court's order denying Husband's motion to correct errors on the basis that Husband failed to properly preserve his claim that the court lacked personal jurisdiction, affirm the trial court's decree of dissolution as to the court's order dissolving

the marriage of the parties and changing the status of the parties from married to unmarried, reverse the trial court's decree as to those portions adjudicating the incidences of marriage as set forth herein, and reverse the trial court's decree as to its award of custody of the parties' minor child to Wife and remand with instructions to comply with the provisions of the Servicemembers Civil Relief Act in the child custody proceedings and to make a decision on jurisdiction in accordance with the requirements of Indiana's Uniform Child Custody Jurisdiction and Enforcement Act.

Affirmed in part, reversed in part, and remanded.

CRONE, J., and MAY, J., concur.

Notes:

[1] The federal regulations cited by Husband relate to service of civil process outside of the United States by an army official. *See* 32 CFR §§ 516.8-516.14.

[2] Husband's letter was file-stamped on October 7, 2008.

[3] On July 28, 2009, Wife filed a verified motion for extension of time in which to file an appellee's brief. On September 4, 2009, this court denied Wife's motion.

[4] 32 C.F.R. § 516.12(c) provides:

If a DA official receives a request to serve state court process on a person overseas, he will determine if the individual wishes to accept service voluntarily. Individuals will be permitted to seek counsel. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned. (See, for example, The Hague Convention, reprinted in 28 USCA Federal Rules of Civil Procedure, following Rule 4).

[5] Husband also argues that the trial court erred in granting Wife's motion to strike his affidavit in support of his motion to correct errors. Husband argues that his affidavit was " relevant to the issues of jurisdiction, notice, and award of his pension as a marital asset." Appellant's Brief at 13. Husband also argues that Wife's motion to strike " does not mention, or support through cogent reasoning or citation to authority, her motion to strike [Husband's] affidavit." *Id.*

Ind. Trial Rule 59(H)(1) provides that " [w]hen a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion." If a party opposes such a motion, that party may file opposing affidavits. *See* T.R. 59(H)(2). Husband's motion to correct errors argued that the trial court did not have personal jurisdiction over him because he and Wife " never resided in Indiana as ' husband and wife." Appellant's Appendix at 38-39. Husband's affidavit in support of his motion stated that he and Wife never lived in the State of Indiana as Husband and Wife and that he was not properly served. Wife's response to Husband's motion to correct errors and motion to strike Husband's affidavit argued that the trial court should deny Husband's motion to correct errors. It does not appear, however, that Wife's response contained any argument that Husband's affidavit in support of his motion failed to comply with Indiana's Trial Rules or was improper for any other reason. Further, while Wife's response included fourteen attached exhibits, she did not attach affidavits or exhibits in opposition to the statement in

Husband's affidavit that Husband never lived in Indiana with Wife as husband and wife. Under the circumstances, we conclude that the trial court erred in granting Wife's motion to strike Husband's affidavit.

[6] Wife testified at the February 2, 2009, hearing that she was a resident of Indiana for three and one half years and a resident of Marion County for three months at the time she filed her petition for dissolution of marriage.

[7] We observe that the trial court entered the decree of dissolution despite the fact that it had previously noted that it agreed to take " jurisdiction over the children's issues and the Petition for Dissolution" and that " anything else" would need to be addressed in North Carolina. *See* Transcript at 12.

[8] Husband appears to argue that he did not receive proper service. As previously mentioned, " [a] judgment entered where there has been no service of process is void for want of personal jurisdiction." *Stidham,* 698 N.E.2d at 1155. However, we observe that, having concluded that the trial court lacked personal jurisdiction over Husband for the purpose of entering judgment as to the incidences of marriage, we need not address whether service was defective.

Husband also argues that he " was entitled to set aside the trial court's judgment ... under the Servicemembers Civil Relief Act." Appellant's Brief at 16. Specifically, Husband argues that he has a meritorious defense to the trial court's decree because " [t]he trial court erroneously awarded part of [Husband's] unvested military pension to [Wife]" and because " [t]he trial court erroneously awarded spousal maintenance...." Appellant's Br. at 20, 22. We need not address Husband's arguments regarding the applicability of the Servicemembers Civil Relief Act to the extent that the decree awarded spousal maintenance and a percentage of Husband's military retirement because we reverse the trial court's decree of dissolution as to Husband's military retirement and award of spousal allowance on other grounds.

[9] Indiana previously adopted the 1968 Uniform Child Custody Jurisdiction Act, 9 U.L.A. 107 (Master ed. 1972) (the " 1968 Uniform Act"). *See In re Marriage of Hudson,* 434 N.E.2d at 114. In 1997, the 1968 Uniform Act was repealed and replaced by the Uniform Child Custody Jurisdiction and Enforcement Act (the " 1997 Uniform Act"). *See* Uniform Child Custody Jurisdiction and Enforcement Act (1997), 9(1A) U.L.A. 657 (1999). Effective July 1, 2008, Indiana adopted provisions of the 1997 Uniform Act. *See* Pub.L. No. 138-2007, § 45 (eff. July 1, 2008).

[10] This court has previously observed that the comments to the 1968 Uniform Act were helpful or applied equally to the provisions of the 1968 Uniform Act adopted by this state. *See Sudvary v. Mussard,* 804 N.E.2d 854, 857-858 (Ind.Ct.App.2004); *Horlander,* 579 N.E.2d at 96-98; *In re Marriage of Hudson,* 434 N.E.2d at 115 n. 7. Similarly, the drafter's comments to the 1997 Uniform Act are helpful in interpreting those Indiana Code provisions based upon sections of the 1997 Uniform Act.

[11] The drafter's comment to § 110 of the 1997 Uniform Act also provides in part:

Communication is authorized ... whenever the court finds it would be helpful. The court may authorize the parties to participate in the communication. However, the Act does not mandate participation. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls often have to be made after-hours or whenever the

schedules of judges allow.

[12] We also observe that Ind.Code § 31-21-4-4 requires the trial court to make a record of any communication with a court of another state, and that the parties be promptly informed of the communication and granted access to the record. The record of communications may include " notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication." *See* § 110 of the 1997 Uniform Act, comment. The drafter's comment to § 110 of the 1997 Uniform Act also states that " [t]he court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision."

---

184 Cal.App.4th 1223
__ Cal.Rptr.3d__
In re AMBER M. et al., Minors.
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent,
v.
IAN M., Defendant and Appellant.
D055539
California Court of Appeal, Fourth District, First Division
April 27, 2010

APPEAL from a judgment of the Superior Court of San Diego County No. J517-412A/B, Carol Isackson, Judge.

[Copyrighted Material Omitted]

COUNSEL

Suzanne M. Davidson, under appointment by the Court of Appeal, for Defendant and Appellant

John J. Sansone, County Counsel, John E. Philips, Chief Deputy County Counsel, and Katharine R. Bird, Deputy County Counsel, for Plaintiff and Respondent.

Robert W. Gehring, under appointment by the Court of Appeal, for Minors.

OPINION

NARES, J.

Ian M. (father), appeals the denial of his request for a stay of dependency proceedings involving his two children, Amber and Ian, under the Servicemembers Civil Relief Act (SCRA), title 50 United States Code Appendix sections 501 to 596.[1] The court denied the request for a stay, finding it did not comply with the requirements of section 522(b). Specifically, the court found the letter father submitted from his commanding officer did not demonstrate that his active military duty prevented his appearance at the proceedings. The court thereafter entered a voluntary plan and terminated jurisdiction.

Father appeals, asserting (1) the stay request met the SCRA's conditions; (2) his request substantially complied with the SCRA's conditions; and (3) the court erred in ordering a voluntary plan without notifying him and obtaining his consent, in violation of his due process rights and Welfare and Institutions Code section 301.

We conclude that (1) liberally construing father's application for a stay, it met the requirements of section 522(b) or at minimum substantially complied

with the requirements of section 522(b); and (2) assuming it did not meet the requirements of section 522(b), the court abused its discretion in denying a stay. Accordingly, we reverse the court's order terminating jurisdiction and remand this matter to the trial court for further

proceedings consistent with this opinion. We therefore need not address father's contention he did not receive adequate notice of the voluntary plan ordered by the court.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Background*

Lousha (mother) and father were in a relationship for almost six years. Although they never married, they had two children, two-year-old Amber and one-year-old Ian. Both children and mother are members of the Navajo Nation, while father is a member of the Hopi Tribe.

Father has been in the Navy for 13 years as an avionics technician. He was deployed to Iraq on February 19, 2009, with an expected return date of February 10, 2010.

Father's relationship with mother involved domestic violence, with father the victim in the relationship. The children came to the attention of the San Diego County Health & Human Services Agency (the Agency) after it received a referral stating that mother had assaulted father in front of the children. The incident occurred after father informed mother that he wanted to end their relationship. About a month later, an argument occurred over moving expenses, and mother poured coffee over father's head and hit him with a bowl, causing lacerations and contusions. Amber cried during and after the incident. Mother was arrested for spousal abuse. Father obtained a restraining order against mother.

B. *Dependency Proceedings*

Based upon mother's domestic violence, in February 2009[2] the Agency filed a dependency petition on behalf of both children under Welfare and Institutions Code section 300, subdivision (b). The petition alleged father and mother exposed the children to domestic violence and failed to adequately protect them from the risk of physical harm.

Mother attended the detention hearing held the next day. Father was not present as he was sequestered pending his deployment. Counsel for father gave father's address as father's parents' address in Arizona. Father would

Page 1227

not have a personal address until he reached Iraq. Father's counsel requested that the children be detained with father's parents in Arizona. Counsel for mother requested that they be detained with her, given there was little risk of continued domestic violence while father was deployed in Iraq, and given her agreement to participate in voluntary services.

The court found there was a prima facie showing the children were persons described in Welfare and Institutions Code section 300, subdivision (b). Because there was no allegation the children were neglected, the court ordered the children temporarily detained with mother. The court conditioned that detention on mother immediately participating in voluntary services.

In April a jurisdiction and disposition hearing was held. Representatives of both the Navajo and Hopi tribes were present. Both the Navajo and Hopi tribes requested leave to intervene. Father and mother each requested that the children be detained with them and that the case be transferred to their respective tribes. Both parents objected to the other's request that the case be transferred to his or her respective tribe.

Counsel for father informed the court father's only current address was in care of his parents. Counsel had been in contact with father by e-mail.

The court ordered the children remain detained with mother. A contested jurisdiction/disposition hearing was set for June 9.

C. Father's Request to Stay Proceedings

Father filed a request to stay the proceedings under the SCRA. The request for stay indicated that his deployment rendered him unable to appear at any court dates. He further argued that his year-long deployment would make it impossible for him to reunify during the statutory time and to participate in court-ordered services. Father argued that a denial of his request would prejudice him as a case closure before he returned from Iraq would cause him not to be able to request placement of the children with his parents or visitation consistent with his participation in his case plan.

In support of his request for a stay, father submitted a letter from his commanding officer. That letter confirmed that he was currently under orders to deploy to Iraq, with an estimated return date of February 2010. The letter also stated that father "will be unable to attend the current scheduled court date of 9 Jun[e] 2009" because of his deployment.

The Agency opposed the stay request, arguing that the request for a stay did not meet the requirements of section 522(b) because (1) it did not show

how father's deployment would materially affect his ability to appear at the June 9 hearing; (2) it did not indicate when father would be able to appear; (3) it did not specify how his military service prevented him from appearing on June 9; and (4) it did not show that father would not be entitled to military leave after his training and before his deployment to Iraq.

Prior to the June 9 hearing date, the court received the Agency's jurisdiction and disposition addendum report. The report indicated father was in town for one day on May 5. It also indicated he planned to be in town over the weekend on April 25 through 26 and had requested that mother allow him to visit.

The Navajo Nation opposed the request for stay, arguing father had not met the requirements of the SCRA because the letter from his commanding officer did not state whether he had requested leave or that leave was unauthorized.

On May 22 a hearing was held on father's request for stay. The court denied the request for stay, indicating the letter from father's commanding officer was insufficient to support the request under the SCRA. The court noted that while the letter stated that father could not attend the hearing on June 9, "[i]t does not tell us he could not appear at any time prior to that or after that, nor, most importantly, does it tell us that he cannot appear telephonically." The court also noted that father was in town on May 5 and wanted to visit the children April 26 and 27. The court was troubled by the fact that no request was made to schedule a hearing around a time he was in San Diego, and there was no information provided indicating his duty prevented his appearance and that he could not obtain leave.

Counsel for father indicated that father was considered deployed as of February 2009 and that he then attended training at various bases. Deployed soldiers such as father were not authorized to tell when they would be at various locations or for how long.

The court indicated that it would continue the matter to give father the opportunity to

supplement the letter from his commanding officer to provide more information on his inability to participate in the proceedings and whether he could appear telephonically. Counsel for father indicated she would contact father's commanding officer to obtain that information.

D. *Jurisdiction and Disposition Hearing*

The contested jurisdiction and disposition hearing went forward on June 9. With regard to the request for stay, the court indicated that it had received no further information in support of that request. Counsel for father indicated

Page 1229

that after the last hearing she had attempted to contact father's commanding officer to obtain a letter with the specific language needed under the SCRA. Counsel had received no response to her request. Counsel for father argued father was unavailable for this hearing as he was deployed to Iraq two to three weeks prior to the hearing, and she renewed the request for a stay. Counsel requested in the alternative a continuance to allow time to get more information from the Navy.

The social worker on the case testified that she had spoken with father on the phone two or three days prior to the last hearing, held on May 22, and he indicated he was on a ship either on his way to Iraq or that he was in Iraq. Mother testified that father left San Diego for New Jersey May 6, flew to Amsterdam on May 8, and arrived in Baghdad on May 29. She indicated that he had turned his cell phone off in May because of the cost, and she had been in touch with him by e-mail.

The court denied both the request for the stay and for a continuance.

The Agency requested that the court assume jurisdiction over Ian and Amber and minor's counsel joined. The court found by a preponderance of the evidence the children were persons described in Welfare and Institutions Code section 300, subdivision (b), but the court did not declare them dependents of the court. The children were to remain with mother. The court ordered a voluntary service plan under Welfare and Institutions Code section 360, subdivision (b). Mother's services were to be coordinated between the Agency and the Navajo Nation social services agency. The court retained father's right to unsupervised visitation.

The court terminated jurisdiction, with no further hearings scheduled. This timely appeal followed.

DISCUSSION

I. *STATUTORY SCHEME*

The SCRA applies to any judicial proceeding in state court, except criminal proceedings. (§ 512(a) & (b).) The purposes of the SCRA are "(1) to provide for, strengthen, and expedite the national defense through protection extended... to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and [¶] (2) to provide for the temporary suspension of judicial... proceedings... that may adversely affect the civil rights of servicemembers during their military service." (§ 502.) "[T]he SCRA must be construed to prevent any disadvantage to a servicemember litigant resulting from his or her military service"

Page 1230

and "must be 'liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.' " (*George P. v. Superior Court* (2005) 127 Cal.App.4th 216,

225 [24 Cal.Rptr.3d 919] (*George P.*).)

Upon application, a military servicemember who is a party to a civil action is entitled to a mandatory stay of the proceedings for 90 days. (§ 522(b)(1).) The application must set forth facts that show how "current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear" and "[a] letter... from the... commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized... at the time of the letter." (§ 522(b)(2)(A) & (B).) "The court *must* stay the proceeding for not less than 90 days" upon such an application. (*George P., supra,* 127 Cal.App.4th at pp. 223-224, italics added.) Additionally, a servicemember "may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear." (§ 522(d)(1).)

The SCRA applies to juvenile dependency proceedings. (*In re A.R.* (2009) 170 Cal.App.4th 733, 742 [88 Cal.Rptr.3d 448].)

II. *ANALYSIS*

Liberally construing father's application for a stay, as we must, we conclude it met the requirements of the SCRA. The letter from his commanding officer indicated that he was currently under orders to deploy to Iraq, and was not expected to return until February 2010. The letter stated that he was unable to attend the June 9 contested disposition/jurisdiction hearing. From these facts, we can infer that he was not authorized to take leave. Further, the evidence presented by the social worker and mother at the disposition/jurisdiction hearing confirmed the fact he had deployed to Iraq and arrived there on May 29, and thus was unable to attend the June 9 hearing.

Moreover, the application for a stay itself confirmed father's unavailability to participate in the proceedings. The request for a stay stated that his deployment rendered him unable to appear at any court dates. He further argued that his year-long deployment would make it impossible for him to reunify during the statutory time and to participate in court-ordered services. Counsel for father informed the court father had minimal phone access and could only be reached by e-mail. The fact he could only be reached by e-mail was confirmed by mother at the disposition/ jurisdiction hearing.

Page 1231

The court's belief that it was possible for father to appear telephonically is of no moment. There is nothing in the SCRA that indicates that a telephonic appearance is sufficient to protect a servicemember's rights. Rather, the SCRA's requirement that a servicemember demonstrate he or she cannot appear in the proceeding and cannot obtain leave to do so contemplates a physical appearance at the proceedings.

Further, even if the letter from father's commanding officer did not technically meet all requirements of the SCRA, we conclude that it substantially complied with the act. As stated above, "the SCRA must be construed to prevent any disadvantage to a servicemember litigant resulting from his or her military service" and "must be 'liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.' " (*George P., supra,* 127 Cal.App.4th at p. 225.) The purposes of the SCRA are "(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act [said sections] to

servicemembers of the United States *to enable such persons to devote their entire energy to the defense needs of the Nation*; and (2) *to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.* (§ 502, italics added.) As the United States Supreme Court has noted, "the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call." (*Le Maistre v. Leffers* (1948) 333 U.S. 1, 6 [92 L.Ed. 429, 68 S.Ct. 371] [interpreting the SCRA's predecessor].) An overly technical reading of the SCRA, in a manner that would disadvantage a servicemember on deployment overseas in defending his or her interests in pending litigation, would be contrary to its purpose. (5) Where, as here, a servicemember provides evidence sufficient to show that he or she is actually unavailable to appear in the proceedings, and the continuance of the proceedings would adversely affect his or her rights, a stay application should be granted.

Further, as the Agency acknowledges, there is out-of-state authority construing the SCRA that holds that if a servicemember's application under section 522(b) does not meet the statutory requirements, courts still have discretion to stay the proceedings. (*See In re Marriage of Bradley* (2006) 282 Kan. 1 [137 P.3d 1030, 1034].) We conclude that even if father's application was insufficient, the court abused its discretion in failing to grant a stay. It is undisputed that father was unavailable to appear at the June 9 jurisdiction/disposition hearing. The evidence showed that at that time he was in Iraq. There was no detriment to mother or the children as they remained detained with her. The court should have granted a stay at least until information could be received from father's commanding officer as to whether he would be available to appear prior to the end of his deployment.

Page 1232

DISPOSITION

The June 9, 2009 jurisdiction/disposition order is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Huffman, Acting P. J., and O'Rourke, J., concurred.

Notes:

[1] All further statutory references are to title 50 United States Code Appendix unless otherwise specified.

[2] All further date references are to the calendar year 2009 unless otherwise specified.

In re H. S. J., 111610 TXCA3, 03-10-00007-CV

In the Interest of H.S.J.

No. 03-10-00007-CV

Court of Appeals of Texas, Third District, Austin

November 16, 2010

FROM THE DISTRICT COURT OF BELL COUNTY, 264TH JUDICIAL DISTRICT NO. 216, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING.

Before Chief Justice Jones, Justices Patterson and Henson.

MEMORANDUM OPINION

Jan P. Patterson, Justice

Appellant Stephanie Cacilia Smith appeals the trial court's order, entered after a jury trial, denying her request for modification of a divorce decree that named appellee Deron Alan Jannicke the joint managing conservator with the exclusive right to designate the primary residence of the couple's child. In a single issue, Smith complains that the trial court erred in denying her request for a stay of the proceedings pursuant to the Servicemembers Civil Relief Act. See generally 50 U.S.C.A. app. §§ 501-596 (West Supp. 2010). For the reasons that follow, we reverse the trial court's order and remand this case for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Stephanie Smith and appellee Deron Jannicke, who both serve in the United States Army, were divorced in November 2006. In the divorce decree, Jannicke was named the joint managing conservator with the exclusive right to designate the primary residence of the couple's child, H.S.J., without regard to geographic location. Smith subsequently filed a petition to modify the parent-child relationship, and in July 2008, following Jannicke's April 2008 deployment to Afghanistan, Smith and Jannicke agreed to temporary orders granting Smith the right to designate the child's primary residence within Bell or Coryell County. In September 2008, while Jannicke was still serving in Afghanistan, Smith was deployed to Germany, and the couple agreed to further temporary orders granting Smith the right to designate the child's residence without regard to geographic location. The September 2008 agreed orders also provided that Smith was to "return the child to Bell County, Texas, within 30 days of... Jannicke's return from deployment... for the purpose of a final hearing" and that the matter was to be set for hearing within 30 days of Jannicke's return.

In June 2009, Jannicke filed a motion for further temporary orders, asking the trial court to order Smith to return the child to his primary care no later than August 15, 2009, following his anticipated return from deployment between July 15, 2009, and July 28, 2009. Jannicke set the motion for hearing on August 5, 2009. Smith obtained leave and made arrangements to return from Germany for the hearing. She returned on July 26, 2009, and remained in Texas through August 9, 2009. It is not clear from the record, but it appears that the trial court had a scheduling conflict and, during the time Smith was in Texas, the hearing was reset for August 19, 2009. On August 10, 2009, Smith filed a motion for continuance and a request for a stay of the proceedings pursuant to the Servicemembers Civil Relief Act. *See id.* § 522(b).

Smith's motion included a statement that she had been given leave to attend the hearing

scheduled for August 5, 2009, but was currently serving on active duty in Germany and was unable to return for the hearing on the rescheduled date of August 19, 2009. She requested that the court stay the proceedings until she was able to return from her deployment in Germany. She attached a copy of her orders of deployment and a letter from her commanding officer stating that, although she had been made available to attend the hearing on August 5, 2009, and had returned to Texas for that purpose, she was scheduled to return to duty on August 10, 2009, and was unable to return by August 19, 2009, due to mission requirements.

At the hearing on August 19, 2009, at which counsel—but not the parties—were present, the trial court did not expressly rule on Smith's request for a stay and her counsel's repeated requests for a ruling on the motion, but proceeded to address Jannicke's request for further temporary orders. The court then ordered that Smith return the child to Jannicke and that the child remain with him until trial. The case advanced to trial on September 21, 2009. Smith personally appeared and proceeded to trial. Following three days of testimony, the jury found that the order granting Jannicke the exclusive right to designate the child's primary residence should not be modified. This appeal followed.

ANALYSIS

In a single issue, Smith complains that the trial court erred in denying [1] her request for a stay of the proceedings pursuant to section 522(b) of the Servicemembers Civil Relief Act (Act). [2] *See id.* Because Smith complains that the trial court erred in applying the Act, her issue involves matters of statutory construction, which we review *de novo*. *See Texas Mun. Power Agency v. Public Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007). We look first to the plain language of the statute and apply its common meaning. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008); *Poder v. City of Austin*, -08-00226-CV, 2008 Tex. App. LEXIS 7916, at *15 (Tex. App.—Austin Oct. 16, 2008, no pet.) (mem. op.). Our primary goal is to give effect to the intent of the drafting body as expressed in the statute's language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009).

We begin by examining the relevant language of the Act. Section 522(b) of the Act provides as follows:

(b) Stay of proceedings(1) Authority for stayAt any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.(2) Conditions for stayAn application for a stay under paragraph (1) shall include the following:(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

50 U.S.C.A. app. § 522(b).

Under the clear language of the Act, the court "shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph

(2) are met." *Id.* § 522(b)(1). Thus, a stay is mandatory if the servicemember complies with the requirements of section 522(b)(2). *Id.*; *Pandolfo v. Labach*, No. CIV 08-0231 JB/RHS, 2010 U.S. Dist. LEXIS 41358, at *8-9 (D. N.M. Apr. 16, 2010). Moreover, the expressly stated purposes of the Act are "to provide for, strengthen, and expedite the national defense" by extending far-ranging protections to persons serving in the military so as "to enable [them] to devote their entire energy to the defense needs of the Nation" and "to provide for the temporary suspension of judicial... proceedings... that may adversely affect the civil rights of servicemembers during their military service." 50 U.S.C.A. app. § 502. The Supreme Court has held that the Act is to be construed liberally to prevent prejudice to the rights of servicemembers while serving in the military. *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial."); *see also Hawkins v. Hawkins*, 999 S.W.2d 171, 175 (Tex. App.—Austin 1999, no pet.) (concluding servicemember prejudiced by inability to obtain leave from military service and trial court erred in refusing to reopen default divorce case pursuant to the Act).

The record reflects that Smith's request for stay, filed prior to the hearing on August 19, 2009, substantially complied with the requirements of section 522(b)(2). She provided her orders establishing her deployment to Germany, a letter from her commanding officer stating that her mission requirements precluded her return to Texas by the date of the hearing, and a request that the proceedings be stayed until she was able to return from deployment in Germany. [3]

Jannicke contends that Smith's request failed to meet the statutory requirements of section 522(b)(2) in that it did not state a specific date on which she would be able to return. In support of this argument, Jannicke cites *In re Walter*, 234 S.W.3d 836 (Tex. App.—Waco 2007, no pet.). *In re Walter*, however, involved a servicemember's failure to even attempt to meet the second requirement of section 522(b)(2). *Id.* at 837. Suggesting possible other omissions, the *Walter* court noted, "At the very least, Walter's application did not contain the second condition, " a letter from the servicemember's commanding officer. *Id.* Here, while Smith did not state a specific date upon which she would return, she requested a stay until she could return from her deployment. Jannicke does not contend that Smith failed to meet any other requirement of the Act. Thus, Jannicke would have us strictly construe the requirements of section 522(b)(2) in contravention of the Supreme Court's imperative to construe the Act liberally to give effect to its underlying purposes. *See Boone* , 319 U.S. at 575. We decline to do so.

Rather, relying on the plain language of the Act and construing it liberally, and in light of Smith's appearance on the scheduled trial date, we conclude that Smith's request that the proceedings be stayed until she was able to return from deployment was sufficient to meet the requirements of section 522(b)(2). [4] *See id.*; *First Am. Title*, 258 S.W.3d at 631; *see also Mawer v. DaimlerChrysler Corp.*, C.A. No. C-06-154, 2006 U.S. Dist. LEXIS 54729, at *2-3 (S.D. Tex. Aug. 7, 2006) (letter stating servicemember unavailable until end of deployment, which would last at least a year, met requirements of section 522(b)(2)); *Hunt v. United Auto Workers Local 1762*, No. 4:04CV2304 GH, 2006 U.S. Dist. LEXIS 12673, at *2-4 (E.D. Ark. Mar. 7, 2006) (stay granted despite request's failure to state date servicemember able to proceed or establish that military duty would prevent participation and leave would be denied); *Jean-Batiste v. Lafayette City-Parish*

Consol. Gov't, Civil Action No. 08-1985, 2009 U.S. Dist. LEXIS 29621, at *2, 11 (W.D. La. Apr. 7, 2009) (stay granted after court found motion incomplete and required additional information, including a project date of termination of deployment, to be provided). [5] Because Smith's request met the requirements of section 522(b)(2), we further conclude that a stay was mandatory and the trial court erred in failing to grant Smith's request for a stay of the proceedings. *See Pandolfo*, 2010 U.S. Dist LEXIS 41358, at *8; *see also* Mawer, 2006 U.S. Dist. LEXIS 54729, at *2-3; *Hunt*, 2006 U.S. Dist. LEXIS 12673, at *2-4.

Because we conclude that the trial court erred in declining to follow the mandatory provisions of the Act, we sustain Smith's issue.

CONCLUSION

Having sustained Smith's single issue, we reverse the trial court's order and remand this case to the trial court for further proceedings consistent with this opinion.

Notes:

[1]Although the trial court did not expressly rule on Smith's request, the parties agree that by proceeding to address Jannicke's request for further temporary orders, the trial court implicitly denied Smith's request for a stay. An implicit ruling is sufficient to preserve an issue for appellate review. *See* Tex.R.Civ.P. 33.1; *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003).

[2]As an initial matter, Jannicke asserts that Smith waived her right to complain of the trial court's denial of her request for stay by appearing for her own jury trial setting and proceeding to trial. We disagree. First, we note that although Smith set the case for trial, she did so in accordance with the agreed temporary orders of September 2008. Further, because Smith obtained a ruling on her request for a stay, she did not waive the right to complain on appeal by proceeding to trial. *See* Tex.R.Civ.P. 33.1; *see also State of Texas v. Capitol Feed and Milling Co.*, -02-00749-CV, 2003 Tex. App. LEXIS 8029, at *5-6 (Tex. App.—Austin Sept. 11, 2003, no pet.) (mem. op.) (announcement of ready after denial of motion for continuance not waiver of right to complain of denial on appeal).

[3]Although there is no good faith requirement in section 522(b)(2), *see* 50 U.S.C.A. app. § 522(b)(2) (West Supp. 2010), we note that Smith's request also showed that she had obtained leave and returned to Texas for the hearing prior to its being reset to a time when she could not return.

[4]We note that although there is no requirement in section 522(b) that the military service materially affect the ability of the servicemember to prosecute or defend the action, *see id.* § 522(b), in this case, there was substantial testimony regarding the life of the child in Killeen in the weeks prior to trial which would not have been in evidence had the trial court not failed to stay the proceeding. We also note that, although Jannicke contends that the trial court's order on August 19, 2009, merely required Smith to comply with agreed orders already in place, the two orders were substantially different. The prior agreed orders required Smith to return the child to Bell County for purposes of a final hearing. At the hearing on August 19, 2009, Jannicke requested and the trial court ordered that the child be returned to Jannicke's primary care prior to the final hearing, a change affecting Smith's rights made in her absence, which was *prima facie* prejudicial

. *See Boone* v. Lightner, 319 U.S. 561, 575 (1943).

[5]Even if we were persuaded by Jannicke's argument that the request failed to meet the statutory requirements by failing to state a precise date on which Smith would be available, we would conclude that the trial court nevertheless abused its discretion in failing to grant the stay. If the statutory requirements are not met, the granting of a stay is discretionary with the court. 50 U.S.C.A. app. § 522(b)(1); *Campos v. Steen*, 2:08-cv-00748-LRH-PAL, 2010 U.S. Dist. LEXIS 56306, at *4 (D. Nev. May 11, 2010); *Bailey v. Robinson*, No. C08-1020RSL, 2009 U.S. Dist. LEXIS 47315, at *1 (W.D. Wash. May 20, 2009). A court's discretion to grant a stay under the Act should not be withheld based on rigid rules and procedures. *Campos*, 2010 U.S. Dist. LEXIS 56306, at *4 (citing *Boone*, 319 U.S. at 575). Courts have consistently followed the *Boone* rule of construing the Act liberally and granted stays despite a lack of strict compliance with section 552(b)(2). *See, e.g., Bailey*, 2009 U.S. Dist. LEXIS 47315, at *1-3 (granting stay despite failure to meet one of conditions of section 522(b)(2)); *Johnson v. City of Philadelphia*, Civil Action No. 07-2966, 2007 U.S. Dist. LEXIS 82563, at *5-6 (E.D. Pa. Nov. 5, 2007) (granting 30-day stay to allow defendant to obtain letter from commanding officer); *Campos*, 2010 U.S. Dist. LEXIS 56306, at *4 (granting stay without letter from commanding officer); *see also Black v. Camon*, Civil Action No. 7:06-cv-75 (HL), at *4 (M.D. Ga. May 19, 2008) (denying stay for lack of any effort to meet showing required by Act but expressly granting leave to refile with appropriate evidence). On the record before us, we would conclude that the trial court abused its discretion in not doing so here.

---

87 Ohio App.3d 12 (Ohio App. 8 Dist. 1993)
621 N.E.2d 830
OLSEN, Appellee,
v.
OLSEN et al., Appellants.
No. 62211.
Court of Appeals of Ohio, Eighth District, Cuyahoga.
April 5, 1993
Page 13
Armstrong, Gordon, Mitchell & Damiani, Louis C. Damiani and Bruce A. Zaccagnini, Cleveland, for appellee.

Koblentz & Koblentz, Richard S. Koblentz, Tina E. Wecksler and Rachel Mayer Harley, Cleveland, for appellants.

SPELLACY, Judge.

Defendant-appellant Rynn Barrington Olsen ("appellant") appeals the trial court's judgment entry that he pay $1,144 per month as alimony and the trial court's ruling vacating a stay of proceedings granted pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.

Appellant raises the following assignment of error on appeal:

"The trial court erred and abused its discretion in vacating the stay of all proceedings granted pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940."

Finding the assignment of error to have merit, we reverse.

[621 N.E.2d 831] I

Appellant and Ashley Welles Olsen were married on November 5, 1977 in North Carolina. The couple separated in 1980. Ashley Welles Olsen alleges that appellant erroneously led her to believe he obtained a divorce in 1981, and, in reliance on this belief, she remarried in 1985. Ashley Welles Olsen filed for divorce from appellant in Ohio on June 5, 1990, two months after learning she was not divorced from appellant.

At the time Ashley Welles Olsen filed her suit in Ohio, appellant, a Lieutenant Commander in the United States Navy, was en route to Australia where he was stationed during the pendency and determination of the action. The Ohio court entered a default judgment in favor of Ashley Welles Olsen on August 29, 1990, awarding her $1,144 per month as alimony and a portion of appellant's retirement benefits.

Page 14

Appellant had applied for a dissolution in Australia. The Family Court of Australia granted the dissolution on August 31, 1990.

On April 15, 1991, appellant filed several motions with the Ohio trial court asking for relief from judgment, a stay of execution and restraining orders, and to add the Cuyahoga Support Enforcement Agency ("the agency") as a new party defendant. The trial court granted the stay and added the agency as a defendant. Ashley Welles Olsen appealed these orders to this court in

case No. 61687. The appeal was dismissed for lack of a final appealable order.

Appellant filed a motion to stay all proceedings pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 after his attorney was served with a notice of deposition duces tecum requiring his attendance at a deposition and to produce documents in Cleveland at a time appellant was stationed in the Persian Gulf. The motion was granted on June 21, 1991.

On July 9, 1991, the trial court ordered appellant to pay $1,144 to the agency which was to hold the money until a final determination was made on the motion to vacate. On July 11, 1991, the trial court vacated the stay of proceedings instituted on June 21. Appellant filed a notice of appeal on August 2, 1991.

II

In his assignment of error, appellant contends that the trial court abused its discretion by vacating the stay of all proceedings granted pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 ("the Act").

Section 510, Title 50 App., U.S. Code states:

"In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act [sections 501 to 591 of this Appendix] remains in force."

Proceedings may be stayed under Section 521, which provides:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court

Page 15

in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

In *Boone v. Lightner (*1943), 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587, the Supreme Court held that a stay of proceedings under the Act is not a matter of absolute **[621 N.E.2d 832]** right but lies within the discretion of the court. The court further stated:

"The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudiced is usually prima facie prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in

the court to see that the immunities of the Act are not put to such unworthy use." Id. at 575, 63 S.Ct. at 1231, 87 L.Ed. at 1596.

Ohio courts have recognized that the stay is not automatic but is within the trial court's discretion to grant or deny. *Nurse v. Portis* (1987), 36 Ohio App.3d 60, 520 N.E.2d 1372, paragraph one of the syllabus. This court has held that Ohio courts must enforce the Act to provide service personnel with its safeguards. *Urbana College v. Conway* (1985), 29 Ohio App.3d 13, 29 OBR 14, 502 N.E.2d 675, paragraph one of the syllabus.

In *Coburn v. Coburn (Fla.*1982), 412 So.2d 947, the court held that it was improper to deny a motion to stay proceedings without findings by the court that the soldier's ability to defend is not materially affected by military duties. A court should be "reasonably certain that the rights of the absent soldier are not prejudiced by the fact of his absence. The discretion of the trial court is great, but his opinion must be based upon some character of showing made to him." *Esposito v. Schille* (1944), 131 Conn. 449, 40 A.2d 745. The refusal of a stay of proceedings pursuant to the Act, in essence, denies the movant his day in court. *Semler v. Oertwig* (1943), 234 Iowa 233, 12 N.W.2d 265.

"A substantial right of a party to litigation is to be present at the trial and render assistance to his counsel as the developments unfold. Consequently, unless it is a situation in which no harm could accrue by reason of his absence, generally recognized as an exception in the statute, a member of the military service is entitled as of right to the stay. A person in the military service is entitled as a matter of law to a stay of a proceeding against him in any case to

which that statute (50 U.S.C.App. section 521) is applicable, upon his bare application stating that he is at the time actively in the military service; and unless something appears sufficient to show that his rights, as a litigant, will not be materially affected by a determination of the pending litigation, it is mandatory that the application be granted." *Mays v. Tharpe & Brooks, Inc.* (1977), 143 Ga.App. 815, 240 S.E.2d 159.

In the instant case, the trial court vacated the earlier stay of the proceedings without making any findings as to why the action should not be stayed under the Act. The trial court was aware that appellant was stationed in the Persian Gulf and unable to obtain leave to attend any proceedings. It may well be that the trial court had valid reasons for finding that either the appellant's rights would not be materially affected or that appellant's actions had not been in good faith. However, it is impossible to determine from the record without findings of fact from the trial court. Keeping in mind that the Act must be enforced to provide service personnel with its safeguards, the motion to stay should not be denied without either requisite findings of fact or sufficient evidence in the record to warrant denial.

The judgment of the trial court is reversed and the cause is remanded.

Judgment reversed and cause remanded.

DYKE, C.J., and BLACKMON, J., concur.

989 So.2d 444 (Miss.App. 2008)
Candace D. PRICE, Appellant
v.
Jason Lagarret McBEATH, Jr., Appellee.
No. 2007-CA-00880-COA.
Court of Appeals of Mississippi.
August 19, 2008

[Copyrighted Material Omitted]

[Copyrighted Material Omitted]

Darnell L. Nicovich, attorney for appellant.

Lowe Arthur Hewitt, attorney for appellee.

Before LEE, P.J., IRVING and ROBERTS, JJ.

ROBERTS, J.

¶ 1. Jason Lagarret McBeath, Jr., and Candace D. Price had a child, Jason Latrell McBeath (Jay). Candace enlisted in the United States Army, and while she was in basic training, Jason petitioned for custody of Jay. The Harrison County Chancery Court conducted a hearing on Jason's petition, but Candace did not appear at the hearing. Ultimately, the chancellor awarded Jason custody of Jay.

¶ 2. Subsequently, Candace filed a motion to reconsider or, alternatively, a motion to set aside the judgment in which she claimed Jason did not properly serve her with process. Candace also requested that the chancellor sanction Jason. The chancellor entered a temporary order, returned Jay to Candace's custody, and reserved ruling on all other matters.

¶ 3. Nearly two years later, the chancellor finally conducted a hearing. The record contains no notice regarding the subject of that hearing. In any event, that hearing turned out to be on the subject of custody. Candace represented herself. She cross-examined witnesses, presented evidence, and called one witness to testify during her case-in-chief.

¶ 4. The chancellor later entered a final judgment, awarding Jason custody of Jay. Candace appeals and claims that the chancery court lacked personal jurisdiction over her, because Jason never completed personal service of process. Candace also claims she had improper notice of the initial custody hearing. Finally, Candace asserts that the chancellor erred when she awarded Jason custody of Jay. Finding no error, we affirm the chancellor's judgment.

FACTS AND PROCEDURAL HISTORY

¶ 5. Jason was adjudicated to be Jay's father incident to a paternity action initiated by the Mississippi Department of Human Services. The chancellor ordered Jason to pay Candace child support. Candace later enlisted in the United States Army and named her mother, Tonya Price, as

Jay's temporary guardian. While Candace was in basic training, Jason filed a petition for custody of Jay. By way of his petition, Jason contended that Candace would be temporarily returning to Mississippi, where she could be served with personal service of process at her home in Biloxi.

¶ 6. On December 28, 2004, the chancery clerk issued summonses pursuant to Mississippi Rules of Civil Procedure 4 and 81. The Rule 81 summons directed Candace to appear to defend the petition on January 20, 2005. The record contains a copy of a notarized return in which process server Marie Singleton indicated that she personally served Candace with the Rule 4 and Rule 81 summonses on December 28, 2004.

¶ 7. On January 20, 2005, Jason appeared at the hearing. Candace did not appear. There is no transcript of that hearing. The chancellor later entered a judgment and awarded Jason custody of Jay. The chancellor did not order Candace to pay child support at that time. Instead, the chancellor reserved the issue of child support for a determination of Candace's income. Additionally, the chancellor reserved the issue of Candace's visitation rights.

¶ 8. Approximately one month after the hearing, Candace filed a motion to reconsider or, alternatively, to set aside the chancellor's judgment pursuant to Mississippi Rule of Civil Procedure 60(b). Candace also requested sanctions pursuant to Mississippi Rule of Civil Procedure 11. Candace asserted that she had not been personally served with process. According to Candace, the summonses had been left with her sister, and the summonses were not left at her home.

¶ 9. Jason responded by filing a petition for citation of contempt. Jason claimed Candace was in contempt of the chancellor's judgment because Candace refused to turn over Jay to his custody. Jason requested that Candace be incarcerated and that the chancellor enter another order granting him custody of Jay. Based on the record currently before us, the chancellor never resolved Jason's petition for contempt.

¶ 10. On May 31, 2005, the chancellor entered a temporary judgment on Candace's motions. The chancellor reserved the decision regarding whether to set aside her previous judgment. However, the chancellor later temporarily returned Jay to Candace's custody, ordered Jason to pay Candace child support, and awarded Jason visitation with Jay. The chancellor also ordered Jason and Candace to file affidavits that conformed to the Uniform Child Custody Jurisdictional Act (UCCJA). The chancellor further ordered " that a final hearing [would] be held in this matter on August 10, 2005."

¶ 11. The hearing did not take place on that date, and the record does not indicate why the hearing did not occur.[1] However, Jason and Candace filed their UCCJA affidavits on that date. The chancery court administrator reset the hearing for September 9, 2005. For whatever reason, the hearing did not take place on that date

either. A copy of the chancery clerk's docket is included with Candace's record excerpts. The docket shows multiple notices of trial, but there is absolutely no explanation as to why they did not occur.

¶ 12. The matter was eventually noticed for hearing on March 26, 2007. Because the record does not contain the corresponding notice of hearing, the intended subject of that hearing is entirely unclear. At that time, five distinctly separate matters were before the chancellor: (1)

Candace's motion for reconsideration, (2) Candace's alternative motion to set aside the judgment granting Jason custody of Jay, (3) Candace's motion for sanctions, (4) Jason's petition for contempt, and (5) Jason's second request of custody. Additionally, Jason had tendered discovery to Candace. Candace did not answer Jason's requests for admission, so Jason requested that the chancellor find that Candace was deemed to have admitted his requests for admission. Based on the current state of the record, we have no way of knowing what the hearing intended to resolve.

¶ 13. Regardless, one week before the scheduled hearing, Candace's attorney, LaQuetta Golden, filed a motion to withdraw. The chancellor entered an order on March 21, 2007, and allowed Golden to withdraw. The March 21st order allowed Candace an unspecified amount of time to secure new counsel.

¶ 14. On Monday, March 26, 2007, the hearing finally took place as scheduled. At the beginning of the hearing, attorney Fred Lusk addressed the chancellor and stated that Candace contacted him the previous Friday and requested that he represent her at the hearing. Lusk related to the chancellor that he told Candace he could not be prepared for a hearing on Monday, because he was not familiar with the issues and did not have Candace's file. The chancellor mentioned that Golden said Candace had not stayed in contact with her. Candace disputed that. According to Candace, she asked Golden to withdraw because Golden was not prepared to represent her. Candace claimed she contacted Golden " plenty of times," that she left messages with Golden, and that no one returned her calls. Tameka Brown-Morris, apparently with Golden's office, presented the chancellor with an order nearly identical to the March 21st order. However, in the order Brown-Morris presented to the chancellor, the provision allowing Candace time to secure new counsel was struck through. Brown-Morris then left the courtroom.

¶ 15. At that point, Lusk again told the chancellor that he was not prepared to represent Candace that day, because he was not familiar with the issues and did not have Candace's file. According to Lusk, Candace tried to retrieve her file from Golden, but Golden told Candace that her file " had been lost in the hurricane." The chancellor then stated, " [j]ust have a seat, Mr. Lusk, and let me go over where we are with this to see what we are going to do." The chancellor was not apprised of the purpose of the hearing, so she asked Jason's attorney, " [w]hat are the pleadings that are before the court today?" Jason's attorney, Jay Foster, stated that the hearing was on Jason's petition for custody of Jay.

¶ 16. Foster told the chancellor about her June 2, 2005, temporary order in which the chancellor returned custody of Jay to Candace. After some discussion in which all parties agreed that they could not remember why the hearing did not take place on August 10, 2005, the chancellor said, " I'm going to take a brief recess and talk to Mr. Lusk and Mr. Foster. I will be out in about 10 minutes."

¶ 17. The record is silent as to what transpired during that recess. However,

it must have been of some significance because the next notation in the transcript is the statement " Mr. Lusk did not return." In any event, the chancellor next stated to Candace, " It's my understanding that Mr. Lusk talked to you-we are on the record, Ms. Price-and that you desire to go forward without representation; is that correct?" Candace answered, " Yes, Your Honor." [2]

A-57

¶ 18. The chancellor then conducted a hearing on Jason's original petition for custody of Jay. The chancellor did not first resolve whether the chancery court had jurisdiction over Candace, presumably because Candace did not request such a resolution, and because Candace answered that she was ready to proceed. Jason called Sylvia Thigpen, who testified, in large part, regarding a confrontation between Jason and Candace that occurred outside Thigpen's daycare. Jason also called his mother, Connie McBeath. After Jason testified, he called Candace as an adverse witness. Candace personally cross-examined Jason's witnesses. After Jason rested, Candace called her mother, Tonya Price, to testify on her behalf. After Tonya testified, Candace took the stand.

¶ 19. On April 18, 2007, the chancellor entered her final judgment. The chancellor awarded Jason custody of Jay. Additionally, the chancellor found that Candace had abandoned her jurisdictional challenge regarding improper service of process. Candace appeals.

ANALYSIS

I. WHETHER CANDACE WAS PROPERLY SERVED WITH PROCESS.

¶ 20. Candace claims the chancery court did not have jurisdiction to award Jason custody of Jay. Whether a trial court had jurisdiction is a question of law. *Trustmark Nat'l Bank v. Johnson,* 865 So.2d 1148, 1150(¶ 8) (Miss.2004) (citations omitted). We conduct a de novo review of jurisdictional questions on appeal. *Id.*

¶ 21. " The existence of personal jurisdiction depends upon reasonable notice to the defendant." *Mansour v. Charmax Indus.,* 680 So.2d 852, 854 (Miss.1996) (citing *Noble v. Noble,* 502 So.2d 317, 320 (Miss.1987)). " A trial court can acquire jurisdiction over an individual through service of process." *Id.* (citing *Aldridge v. First Nat'l Bank,* 165 Miss. 1, 14, 144 So. 469, 470 (1932)). In Mississippi, one way to accomplish service of process upon a resident individual " other than an unmarried infant or a mentally incompetent person" is by personally delivering a copy of the summons and complaint to the person. M.R.C.P. 4(d)(1)(A).

¶ 22. Candace has consistently maintained that she was never personally served with process. Jason filed his petition for custody on October 26, 2004. Summonses pursuant to Mississippi Rules of Civil Procedure 4 and 81 were issued on December 28, 2004. The same day, professional process server Singleton personally served *someone* at the address listed on the summons, 330 Benachi Avenue, Apartment 118, Biloxi, Mississippi. Singleton filed the returns the next day. On one line, Singleton indicated that she personally served " Candace D. Price." On a separate line, Singleton indicated that she personally served " Candace Donella Price."

¶ 23. Candace claims Singleton did not serve her, and this is not a mere case of a litigant maintaining that she was not served. There are three reasons to suspect

whether Singleton actually served Candace. First, Candace claims she was scheduled to return to her military post prior to December 28, 2004. The record contains a letter from Candace's mother, Tonya, dated January 7, 2004.[3] That letter was filed on January 10, 2005. According to Tonya's letter, Singleton left the summonses with her other daughter, Donella Price, and Singleton could not have left the summonses with Candace, because Candace, who was on leave from the Army, returned to her post prior to December 28, 2004.[4]

¶ 24. Second, on one blank line in the return, Singleton listed the name of the person she served as " Candace Donella Price." Candace's middle initial is " D," but her middle name is not Donella. Candace's middle name is Deon. However, Candace's sister's name is Donella.

¶ 25. Finally, in Jason's petition for custody of Jay, Jason listed Candace's street address as Bayview Avenue. Singleton claimed she served Candace at Benachi Avenue. Candace did not live at Benachi Avenue, but her sister, Donella, did.

¶ 26. In any event, on January 19, 2005, Singleton executed an affidavit and swore that she personally served " Candace D. Price" and that the person who answered the door at Apartment 118 at 330 Benachi Avenue identified herself as " Candace D. Price" before she served her. Obviously, there was a factual dispute whether Singleton successfully served Candace. It would not be unreasonable to conclude that Singleton mistakenly served Candace's sister, Donella. However, whether Singleton actually served Candace is not the outcome determinative question that resolves this issue.

¶ 27. Proper service of process is not the only means by which a trial court may acquire jurisdiction over a person. " [A] trial court can acquire jurisdiction over the person through his appearance." *Mansour,* 680 So.2d at 854 (citing *State ex rel. Moak v. Moore,* 373 So.2d 1011, 1012 (Miss.1979)). " [W]hether a person may attack jurisdiction on appeal depends entirely upon when the objection is raised." *Mitchell v. Mitchell,* 767 So.2d 1078, 1085(¶ 24) (Miss.Ct.App.2000). " If it was raised before or simultaneously with an answer or other responsive pleading, the objection is not waived by filing other pleadings, or even by participating in a trial on the merits." *Id.* " If, however, the objection is not raised until after an answer or other pleadings are filed (other than motions for continuance not considered to be a general appearance), the objection is waived per Rule 12(h)." *Id.*

¶ 28. Candace, who was represented by counsel at the time, did not file a motion to dismiss pursuant to Rule 12. Candace filed a motion to reconsider. Motions to reconsider are governed by Mississippi Rule of Civil Procedure 59(e). *See Brame v. Brame,* 796 So.2d 970, 972 n. 1 (Miss.2001). Candace also filed a motion to set aside the chancellor's judgment. A motion to set aside a judgment falls under the provisions of Mississippi Rule of Civil Procedure 60. Pursuant to Rule 60(b)(4), a motion to set aside a judgment may be made on the basis that a judgment is void. Arguably, it could be said that Candace

preserved the jurisdictional question through her motion to set aside the judgment. However, Candace also requested sanctions. It is inconsistent to argue that a court lacks jurisdiction to award custody yet simultaneously submit that a court has sufficient jurisdiction to award sanctions. Inconsistent argument notwithstanding, precedent dictates that a party may raise a jurisdictional question simultaneously with other pleadings.

¶ 29. For discussion's sake alone, as we do not expressly find or decline to find that Candace properly preserved the jurisdictional issue when she filed her motion to reconsider or to set aside the judgment and for sanctions, we must find that Candace waived this issue for two reasons. First, Candace did not advance the issue or timely seek resolution of it. This Court considered a similar issue in *Schustz v. Buccaneer, Inc.,* 850 So.2d 209 (Miss.Ct.App.2003). In

Schustz, this Court found that a " delay in contesting the court's *in personam* jurisdiction over it for a period in excess of twelve months after having appeared in the action through counsel was untimely." *Id.* at 214(¶ 20). *Schustz* went on to find that " the appearance and lengthy ensuing period of inactivity, acting in conjunction, constituted a waiver of any defects in the form or manner of service." *Id.* at 214-15(¶ 20).

¶ 30. Candace filed her motions to reconsider, set aside, and for sanctions on February 23, 2005. Candace did not request a ruling on her motions during the two years that preceded the March 26, 2007, hearing. If a delay of twelve months was untimely in *Schustz,* then a delay of twenty-five months is likewise untimely here.

¶ 31. Second, Candace did not seek a ruling on the jurisdictional question at the hearing. She then proceeded to represent herself. Where one participates in a matter, presents evidence, calls witnesses, and cross-examines witnesses, she subjects herself to the court's jurisdiction and waives all objections based on improper or insufficient service of process. *Isom v. Jernigan,* 840 So.2d 104, 107(¶ 9) (Miss.2003). Candace is not entitled to leniency simply because she proceeded pro se. *See Chasez v. Chasez,* 935 So.2d 1058, 1062(¶ 3) (Miss.2005). Accordingly, we must find that Candace waived the jurisdictional issue: (a) when she failed to timely seek resolution of the issue and (b) when she participated in the hearing without first seeking an adjudication of the jurisdictional issue. This issue is without merit.

II. WHETHER CANDACE WAS PROPERLY SERVED WITH A SUMMONS PURSUANT TO RULE 81 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

¶ 32. Candace's second issue is somewhat similar to her first. Candace argues that the chancery court had no jurisdiction over her on March 26, 2007. Candace's position on this issue tracks back to what she finds to be procedural defects that were initiated when Singleton purportedly served her in late 2004. On December 28, 2004, Singleton purportedly served Candace with a summons pursuant to Mississippi Rule of Civil Procedure 81. That summons instructed Candace to appear at a hearing on Jason's petition for custody on January 20, 2005.

¶ 33. Candace notes that pursuant to Mississippi Rule of Civil Procedure 81(d)(2), Jason should have provided her with thirty days notice in advance of the hearing. Notwithstanding Candace's claim that she never received service of process, Candace submits that the notice in the summons violated her right to due process. Any defect regarding notice of

the March 26, 2007, hearing was waived when Candace failed to raise it before the chancellor. *Isom,* 840 So.2d at 107(¶ 9). Accordingly, we find no merit to this issue.

III. WHETHER THE CHANCELLOR ERRED WHEN SHE AWARDED JASON PRIMARY PHYSICAL CUSTODY OF JAY.

¶ 34. In her final judgment, the chancellor addressed the familiar factors detailed in *Albright v. Albright,* 437 So.2d 1003, 1004 (Miss.1983). The chancellor found that four factors did not particularly favor either Jason or Candace. Those factors were: (1) the employment of each parent; (2) the physical and mental health of each parent; (3) emotional ties between each parent and the child; and (4) the catch-all factor titled, " any other relevant factors." Additionally, the chancellor found that one factor, the child's preference, was irrelevant, as Jay was not old enough

to state a preference. The chancellor found that only one factor, continuity of care, slightly favored placing Jay in Candace's custody.

¶ 35. However, the chancellor found that four factors slightly favored placing Jay in Jason's custody: (1) age, health, and sex of the child; (2) moral fitness of each parent; (3) home, school, and community record of the child; and (4) stability of the home and employment of each parent. The chancellor also found that one factor, parenting skills and willingness and capacity to provide primary care, *heavily* favored placing custody of Jay with Jason. The chancellor ultimately concluded that it was in Jay's best interests that Jason should have custody.

¶ 36. On appeal, Candace claims the chancellor erred when she awarded Jason custody of Jay. " [A]bsent an abuse of discretion, we will uphold the decision of the chancellor." *Hollon v. Hollon,* 784 So.2d 943, 946(¶ 11) (Miss.2001) (citation omitted). To disturb the factual findings of the chancellor, this Court must determine that the factual findings are manifestly wrong, clearly erroneous, or the chancellor abused his discretion. *Id.* However, where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error. *Id.* (citations omitted).

¶ 37. Candace concedes that the chancellor properly found that the physical and mental health and age of the parents factor was equally weighted between her and Jason. Candace also concedes that Jay is too young to state a custody preference. However, Candace argues that the chancellor erred when she reviewed the following factors: (1) age, health, and sex of the child; (2) continuity of care; (3) parenting skills and willingness and capacity to provide primary child care; (4) emotional ties of the parent and the child; (5) moral fitness of the parents; (6) the home, school, and community record of the child; (7) stability of home and employment of each parent; and (8) " any other relevant factors." We will review each of the factors that Candace addresses on appeal. However, we are mindful that " the polestar consideration in child custody cases is the best interest and welfare of the child." *Albright,* 437 So.2d at 1005.

1. Age, Health, and Sex of the Child

¶ 38. Candace argues that the chancellor erred when she found that the first factor-age, health, and sex of the child-favored Jason. According to Candace, the chancellor should have found that this factor favored her. Candace relies on the proposition that she has access to medical care because she is in the Army. Candace also submits that the presumption commonly known as the tender years doctrine favors placing Jay in her custody.

Page 454

¶ 39. The tender years doctrine has been weakened in recent years, but there is still a presumption that a mother is generally better suited to raise a young child. *Hollon,* 784 So.2d at 947(¶ 14). In *Hollon,* the Mississippi Supreme Court found that because the child was barely three years old at the time the trial ended, this factor favored the mother, despite the weakened legal presumption. *Id.* However, children who are at least four years old may not be subject to the tender years doctrine. *Lee v. Lee,* 798 So.2d 1284, 1289(¶ 18) (Miss.2001). Jay was five at the time of the hearing. We cannot conclude that the chancellor's findings as related to this issue are clearly erroneous or manifestly wrong.

2. Continuity of Care

¶ 40. Next, Candace claims the chancellor erred when she found that continuity of care was slightly in Candace's favor. Candace argues that the chancellor should have found that factor heavily favored her because she provided the majority of care prior to the March 26, 2007, hearing. Jason and his mother had some visitation with Jay. When Candace went to boot camp, she appointed her mother as Jay's guardian. Jay stayed with Jason for a couple of weeks, after the subsequently revoked final judgment. Jason also had make-up visitation with Jay between March 27, 2007, and April 18, 2007. After that time, he received primary physical custody of Jay. We certainly agree with the chancellor's conclusion that this factor favors placing Jay in Candace's custody, but we cannot conclude that the chancellor was manifestly wrong or clearly in error when she found this factor slightly favored Candace rather than heavily favored Candace.

3. Parenting Skills and Willingness and Capacity to Provide Primary Care

¶ 41. Candace claims this factor heavily favors placing Jay in her custody. Candace notes that she and her husband have a daughter and that her daughter lives with her all the time. Candace further notes that she provides primary care of her daughter. Candace points out that Jason has a child from another relationship; he does not have a relationship with that child, and he has no plans to seek a relationship with that child other than paying court-ordered child support.[5] According to Candace, before Jason filed his initial complaint for custody of Jay, he did not participate in Jay's life. Candace's arguments thus far are relevant to whether Jason is willing to provide primary care. However, by asserting that he is the proper parent to have custody of Jay, Jason has clearly indicated that he is willing to provide primary care. If Candace's allegations are true, it is disheartening that Jason does not intend to have a relationship with his other child, as that child needs a father as much as any other child, but it is not demonstrative that Jason is unwilling to provide primary care of Jay other than by way of conjecture.

¶ 42. Candace's arguments and points thus far may also be relevant toward capacity to provide primary care. That is,

by providing primary care of her daughter, Candace may be a more suitable person to have custody of Jay as opposed to Jason, who had comparatively little experience providing primary care of a child. However, that is not the sole consideration under this factor.

¶ 43. The chancellor's findings in regard to this factor contained some discussion of Jay's medical history. The chancellor noted that Candace failed to seek medical attention for Jay on more than one occasion. One time when Jay was in Jason's custody, Jason had to seek medical care for a second degree burn on Jay's foot. Jay sustained that injury while he was in Candace's custody. A similar situation arose when Jason had to seek treatment for Jay when Jay acquired athlete's foot while in Candace's custody. Additionally, there was testimony that Jason discovered that Jay had severe ringworms and had sustained black eyes while in Candace's custody. Considering those events, the chancellor could have reasonably concluded that Jason possessed better parenting skills than Candace-not in that those medical events transpired when Jay was in Candace's custody, but that Jason, rather than Candace, sought medical attention for Jay.

¶ 44. An additional matter under this heading bears discussion. One of the chancellor's considerations under this factor was the fact that Candace refused to allow Jason to have any

visitation with Jay for approximately eighteen months at the time of the March 26, 2007, hearing. On appeal, Candace claims she allowed Jason to have liberal visitation with Jay, but Jason was not available to spend time with Jay, so Jason's mother spent that time with Jay. Candace also claims that Jason has not provided support other than a car seat and a stroller. Candace disputes Jason's assertion that he paid child support via a withholding order. Candace notes that Jason never presented any proof of such a withholding order. Be that as it may, the chancellor was concerned that if Candace received custody of Jay, Candace might impede Jason's relationship with Jay. The chancellor could have reasonably concluded that a parent who would impede the child's relationship with the other parent had poor parenting skills as opposed to a parent who fostered a child's relationship with the other parent. Accordingly, we cannot find that the chancellor was manifestly wrong or clearly erroneous when she concluded that this factor favored placing Jay in Jason's custody.

4. The Employment of the Parent and Responsibilities of That Employment

¶ 45. At the time of the hearing, Candace was on active duty in the United States Army. Her obligation to the Army extends until 2011. Jason was a firefighter. The chancellor found that this factor favors neither party. Candace argues that this factor favors placing Jay in her custody, because her employment provides stability and benefits that are not available to Jason. Candace further argues that this factor favors her because her working hours are more regular and better suited to providing care than Jason's employment, which requires that he be away from home for long periods during his shifts.

¶ 46. Both parents are commendably employed. It is very likely that Jay will one day be inspired by both of his parents' service to their country and their community. Candace's argument regarding benefits has some merit, but it is lessened in that the benefits, assuming that those benefits are insurance and medical care, are available to Jay regardless of whether Jason is in Candace's custody. Candace does not specify exactly what

benefits she references. Additionally, though Jason may have occasional irregular hours in his capacity as a firefighter, his family is available to help provide child care. Jason is married. His extended family is nearby. Further, there was no evidence that in the event that Jason should have irregular hours one shift, he would not, in turn, offset that time so that he would have more time to spend with Jay. That is, there was no evidence that Jason worked significantly more hours than any other employed person. Accordingly, we cannot find that the chancellor was manifestly wrong or clearly erroneous when she found that this factor did not favor either party.

5. Emotional Ties of the Parent and the Child

¶ 47. The chancellor found that this factor did not favor either party. Under this heading, Candace's brief contains the following statement, " [b]oth Candace and Jason claim to be closely bonded to the child." The chancellor's findings include a similarly brief statement. Though Candace may dispute the chancellor's conclusion, she does not expressly do so in her brief.

¶ 48. Candace could have argued that based on Jay's relative lack of familiarity with Jason, she was more closely bonded to Jay. However, such an argument could be refuted by the fact that Candace arguably prevented Jason from having a significant relationship with Jay during the

earliest part of Jay's life. It is clear from the other arguments that Candace makes that she would dispute such a conclusion. In an earlier argument, Candace claims that she offered Jason liberal visitation with Jay, and Jason did not take advantage of that time. However, resolution of that factual dispute is beyond our mandate as a reviewing court. The preceding discussion is for illustrative purposes only and is relevant merely to point out that had the chancellor considered these matters, she would not be manifestly wrong or clearly erroneous in finding that this factor favored neither party.

6. Moral Fitness of the Parents

¶ 49. The chancellor concluded that this factor slightly favored placing Jay in Jason's custody. The principal consideration that led the chancellor to her conclusion involved an altercation at Jay's daycare during October 2004. Candace wanted to take Jay with her, but Jason refused. Jason claimed he refused because he smelled marijuana in Candace's car. Law enforcement responded and concurred with Jason that Candace's car smelled like marijuana. No one was arrested as a result of that altercation-for marijuana possession or otherwise. It bears emphasizing that as far as the record indicates, Candace has never been accused of or found guilty of involvement with any illegal substances.

¶ 50. Candace claims that she is more morally suited to have custody of Jay because Jason fathered another child out of wedlock approximately the same time he fathered Jay out of wedlock, and he has not sought a relationship with that child. As stated above, if Jason is the father of the other child, it is unfortunate for the child that Jason has not sought a relationship with his child. One could logically conclude that a father who refused to participate in a child's life is less morally suited to have custody of a child as opposed to a father who participated in his child's life. However, one could also logically conclude that based on all relevant consideration, the fact that Jason has neglected to participate in his alleged child's life, in and of itself, is not sufficient to find Jason morally unfit to have custody of Jay.

Page 457

The chancellor could have found that even though Candace herself has not been found to have used illegal substances, at worst, she condoned marijuana use or transportation in her car at approximately the same time she intended to take custody of Jay. The chancellor could have reasonably concluded that someone who would expose their child to illegal substances was less morally suited to have custody of a child as opposed to someone who did not have a relationship with another one of his children. Though we might not reach the same result, based on the foregoing discussion, we cannot find that the chancellor was manifestly wrong when she reached that conclusion.

7. The Home, School, and Community Record of the Child

¶ 51. The chancellor found that this factor slightly favored placing Jay in Jason's custody. The chancellor reached her decision, in large part, after discussing the fact that while in Jason's custody, Jay would have access to Jason's extended family. Candace claims the chancellor erred in her findings. According to Candace, this factor favors placing Jay in her custody. Candace bases her position on the fact that Jay attended Head Start near her home in South Carolina.

¶ 52. The chancellor could have considered the presence of Jason's extended family under

the " stability of home and employment of each parent" heading, but it is not unprecedented to consider the presence of extended family under this factor. *E.g., Mixon v. Sharp,* 853 So.2d 834, 840(¶ 28) (Miss.Ct.App.2003). In any event, Jay was five years old at the time of the hearing, so he had a limited school and community record. A reasonable fact-finder could have concluded that this factor favored Candace because Jay attended Head Start when he was in her custody. At the same time, a reasonable fact-finder could have concluded that Jay's attendance of Head Start was not outcome determinative because, at five years old, Jay would have stopped attending Head Start in May 2007, slightly less than two months from the time of the March 26, 2007, hearing. Consequently, we cannot find that the chancellor abused her discretion when she found that this factor favored placing Jay in Jason's custody.

8. Stability of Home and Employment of Each Parent

¶ 53. The chancellor found that this factor slightly favored placing Jay in Jason's custody. Candace claims the chancellor erred. According to Candace, the chancellor should have weighed this factor in her favor.

¶ 54. The chancellor mentioned many facts related to this factor, but the chancellor did not exactly state why she found that this factor slightly favored placing Jay in Jason's custody. In any event, the chancellor mentioned: (1) both parties live in homes suitable for raising children; (2) many of Jason's relatives, including his mother, live near Jason; (3) Jason's mother is willing to help care for Jay; (4) Jason's wife is an X-ray technician; (5) Candace's husband is a sous-chef and was taking online courses in real estate and business; (6) Jason was raising his wife's son as his own, because his stepson had no relationship with his biological father; (7) Candace's husband had a suspended driver's license for reasons not identified in the record; (8) Candace's husband treated Jay as though Jay was his own child; and (9) Jason had been employed as a firefighter since June 2006, but he was considering a career in education once he completes his bachelor's degree.

¶ 55. Candace takes issue with that part of the chancellor's reasoning which

involved Jason's proximity to his mother and other extended family members. According to Candace, " [w]hile having an extended family in close proximity is favorable, and arguably beneficial for a child, [she] does not feel that it should be a major determinative factor in custody matters." Candace submits that she was penalized for her ability to live independently and to take care of Jay without the assistance of other family members. Candace argues " that her ability to raise Jay and provide a stable home for him while stationed away from her extended family should have been weighted positively in her favor, rather than negatively."

¶ 56. The chancellor did not expressly state why Candace's home or her employment was inferior as it pertains to custody of Jay as compared to Jason's home or employment. The chancellor mentioned that Jason's extended family lived near him. Presence of extended family is certainly a reasonable consideration under this factor. *Neville v. Neville,* 734 So.2d 352, 355(¶ 10) (Miss.Ct.App.1999). We can find no indication that the chancellor found that Candace's military career rendered her less-suited to have custody of Jay.

¶ 57. Reasonable minds could differ regarding the effect military service has on the stability

of a home. Those who serve in the military are very often subject to being transferred. Candace notes that though she is subject to being transferred, even in the event she is transferred, she would have the benefit of military base housing, security, and organized children's activities for Jay. A reasonable fact-finder could conclude that while the location of a soldier or sailor's home might change, the potential of a military transfer does not render a soldier or sailor's home any less stable than a civilian's. Alternatively, a reasonable fact-finder could conclude that frequent moves, school changes, and displacement from friends and familiar places are not in a child's best interest. From another perspective, some could conclude that the children of soldiers and sailors benefit when their parents are transferred in that the children are exposed to places, cultures, and opportunities that are not available to others.

¶ 58. Because there are so many variables regarding military service, its effect on the home and the interplay among the many other considerations under *Albright,* it is impossible to reach a bright-line rule regarding a parent's military service. Accordingly, such a determination, properly supported by substantial evidence, must be left to chancellors due to their proximity to the parties, as opposed to the relatively cold record we have on appeal. That is precisely why our review is limited to the familiar abuse of discretion standard. However, we can say in all confidence that military service, in and of itself, should not weigh negatively against the stability of a parent's home or employment.

¶ 59. In the present matter, a reasonable fact-finder could have found that the possibility of transfer does not weigh against Candace. A fact-finder could have concluded that because there was no testimony regarding the likelihood of Candace being transferred and no testimony regarding where Candace could be transferred other than her statement that she would *like* to be transferred to Florida, Candace's home was just as stable as Jason's. Still, that would only place Candace on equal footing with Jason, and the chancellor was not unreasonable in finding that the presence of extended family made Jason more suitable to have custody of Jay. Accordingly, we cannot find that the chancellor abused her discretion.

Page 459

9. Other Factors

¶ 60. The chancellor found that no other factors would weigh in either Jason or Candace's favor. However, the chancellor mentioned other matters that she considered. The chancellor noted " the possibility that [Jason] has fathered another child and is not seeking a relationship with that child." The chancellor mentioned that there had yet to be an adjudication whether Jason fathered another child. Again, we note that Candace presented a document from Reliagene in which it was found that Jason was not excluded as the father of the child. The chancellor also noted that Jason was, at that time, paying child support to the mother of that child. At that point, the chancellor found that the catch-all factor did not favor either parent.

¶ 61. Candace claims the chancellor erred. According to Candace, the chancellor should have weighed this factor in her favor. Candace submits that the chancellor should have considered that Jay had a relationship with her daughter-Jay's half-sister. Chancellors certainly have factored in any potential negative effects of splitting up siblings, including half-siblings, when determining custody. *McWhirter v. McWhirter,* 811 So.2d 397, 399(¶ 7) (Miss.Ct.App.2001).

However, " [t]here is no ' hard and fast' rule that the best interest of siblings will be served by keeping them together." *Copeland v. Copeland,* 904 So.2d 1066, 1076(¶ 43) (Miss.2004). Accordingly, we cannot conclude that the chancellor abused her discretion when she weighed this factor.

CONCLUSION

¶ 62. In conclusion, it is possible that there was not substantial evidence for the chancellor's conclusion that the factor " stability of home and employment of each parent" favored placing Jay in Jason's custody. A reasonable fact-finder could conclude that Candace should have custody of Jay. However, this Court is not allowed to reweigh the facts, and " [w]hile the *Albright* factors are extremely helpful in navigating what is usually a labyrinth of interests and emotions, they are certainly not the equivalent of a mathematical formula." *Lee,* 798 So.2d at 1288(¶ 15). " Determining custody of a child is not an exact science." *Id.* The fact remains that there was substantial evidence for the chancellor's decision. The chancellor was not manifestly wrong or clearly erroneous when she concluded that multiple factors supported placing Jay in Jason's custody. Based on the applicable standard of review, this Court is required to affirm the chancellor's judgment.

¶ 63. **THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR. CARLTON, J., SPECIALLY CONCURS WITH SEPARATE OPINION, JOINED BY LEE, P.J., AND GRIFFIS, J., AND JOINED IN PART BY ISHEE, J. CARLTON, J., Special Concurring.

¶ 64. I am writing to express my concern over the disregard for the servicemember defendant's rights, which are set forth in the Servicemembers Civil Relief Act. 50 Appendix U.S.C. § 521 (2006) (SCRA). The purpose of the SCRA is to protect persons in military service from having default judgments entered against them without their knowledge. *Wilson v. Butler,* 584 So.2d 414, 416 (Miss.1991). In this case, the chancellor did not even consider whether Candace was privy to the statutory protections of the SCRA when it

was evident she was serving in the military. While I do not find that this failure requires reversal, I do find that it likely had a detrimental effect on Candace's defense and illustrates the necessity for the court to uphold the legal rights of our nation's servicemembers.

I. The Servicemembers Civil Relief Act.

¶ 65. First, it appears that a judgment was initially entered against Candace even though Jason failed to file the precedent affidavit required by the SCRA. *Id.* Title 50 Appendix of the United States Code section 521(b)(1)(A)-(B) provides as follows:

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

¶ 66. Second, the court failed to appoint an attorney to represent Candace when it was apparent from Jason's petition for custody and a written statement submitted by Candace's mother before trial that she was in military service. The SCRA prohibits entry of judgment against such a defendant until she is appointed counsel by the court. *Wilson,* 584 So.2d at 417.Title 50 Appendix, section 521(b)(2) of the United States Code provides:

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

¶ 67. Third, the court failed to stay the proceedings on its own motion or find that a stay was not warranted. The SCRA mandates that after a proper determination, a stay shall be granted upon application of counsel or on the court's own motion. *Wilson,* 584 So.2d at 416; *Roberts v. Fuhr,* 523 So.2d 20, 28 (Miss.1987); *Mathis v. Mathis,* 236 So.2d 755, 756 (Miss.1970). As discussed above, the court failed to properly appoint counsel; thus, it should have moved on its own to determine whether a stay was proper. Title 50 Appendix, section 521(d) of the United States Code provides:

In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

¶ 68. If the court denies a stay, the trial judge must first make a specific finding that the serviceman's ability to conduct his defense is not materially affected by reason of his military service. *Wilson,* 584 So.2d at 416; *Roberts,* 523 So.2d at 28; *Mathis,* 236 So.2d at 756. The record indicates that the court in this case failed to determine whether Candace's military duty materially affected her ability to obtain

competent counsel and effectively defend herself.

¶ 69. A review of the complete record indicates it is likely that Candace's defense was materially and detrimentally affected by her military service. Rather than having the advantage of defending against Jason's petition for custody at the outset, Candace was forced to contest an improper entry of default judgment. Additionally, Candace was forced to challenge improper service of process post-judgment, which led to an eventual procedural waiver of this defense when the court entered a temporary order reserving determination of the issue for a final hearing. Then Hurricane Katrina and other unknown reasons delayed the final hearing for nineteen months, and Candace's counsel withdrew three business days before the hearing. Candace obtained new counsel less than one business day before the hearing. At the beginning of the hearing, the new counsel stated he needed more time to prepare, but he failed to enter a motion for a continuance. During a ten minute recess, the chancellor had a discussion with the new counsel, who apparently

decided not to return to court after the recess. At this point, Candace proceeded pro se without re-asserting that service was improper. Candace's lack of counsel appears to be the result of an unfortunate sequence of events set in motion only after she was deprived of her SCRA rights.

¶ 70. Further, the record reflects that Candace, in her initial response to the action, raised objections to personal jurisdiction based upon improper service by stating that she was away at basic training when the alleged service took place. It is evident from Jason's petition for custody, a statement on file from Candace's mother, and Candace's initial response that the court was well aware of her military service. However, nowhere does the record reflect that Candace's rights as a servicemember were even noted by the court or that Candace knew she had such rights. In this case, Candace represented herself and should be commended for having the fortitude to conduct her own witness examinations when she ultimately was not able to secure competent counsel for her custody hearing. However, previous decisions by the Mississippi Supreme Court and this Court support a finding that Candace's decision to defend herself pro se on the merits at the final hearing waived her challenge to defective service of process. *See Isom v. Jernigan,* 840 So.2d 104, 107 (¶ ¶ 9-11) (Miss.2003); *Brown v. Brown,* 493 So.2d 961, 963 (Miss.1986); *Schustz v. Buccaneer, Inc.,* 850 So.2d 209, 213 (¶ ¶ 13-16) (Miss.Ct.App.2003).

¶ 71. Despite the injustice resulting from the court's disregard of the SCRA, Candace may have unknowingly waived her right to relief provided by the act. Judgments entered in noncompliance with the SCRA are not void but are merely voidable and considered valid until properly attacked. *Courtney v. Warner,* 290 So.2d 101, 103 (Fla.App.1974) and *Allen v. Allen,* 30 Cal.2d 433, 182 P.2d 551, 553 (1947). Title 50 Appendix, section 521(g)(1)(A)-(B) and (2) of the United States Code provides:

(1) If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that (A) the servicemember was materially affected by reason of that military service in making a defense to the action;

Page 462

and (B) the servicemember has a meritorious or legal defense to the action or some part of it. (2) An application under this subsection must be filed not later than 90 days after the date of termination of or release from military service.

¶ 72. Candace never specifically challenged the chancellor's failure to apply the SCRA and did not request a continuance to obtain new counsel or otherwise prepare. Thus, she waived her statutory rights. However, it is likely that Candace was completely unaware of her SCRA rights or her ability to request a continuance.

II. Future Relief for Servicemembers in Child Custody Proceedings.

¶ 73. During the 2008 legislative session, the Mississippi Legislature enacted section 93-5-34 of the Mississippi Code Annotated to address child custody proceedings involving parents in military service. Parents receiving military orders, upon motion to the court, with reasonable advance notice, and for good cause shown, are allowed to present testimony and evidence by

affidavit or electronic means in custody and visitation matters. The statute allows such relief when military duties have a material affect on the parent's ability to appear at a regularly scheduled teleconference or access the internet. Miss.Code Ann. § 93-5-34(6) (Supp.2008).

¶ 74. Moreover, the statute provides that temporary duty, mobilization, or deployment of the servicemember and the temporary disruption to the child's schedule should not be factors in a determination of change of circumstances if a motion is filed to transfer custody. Miss.Code Ann. § 93-5-34(3)(b) (Supp.2008).

¶ 75. These provisions became effective on July 1, 2008.

LEE, P.J., AND GRIFFIS, J., JOIN THIS SEPARATE OPINION. ISHEE, J., JOINS THIS SEPARATE OPINION IN PART.

Notes:

[1] Even on the date the final hearing actually occurred, no one could recall why the hearing did not take place as scheduled.

[2] In the chancellor's final judgment, the chancellor stated, in a footnote, that she would have granted a continuance had someone requested one.

[3] Presumably, the year in Tonya's letter is misdated.

[4] We note that Candace did not present any documentary evidence from the United States Army. Candace could have bolstered her position with documentation that set forth the leave she had at that time, including when she was expected to return. Likewise, Candace could have bolstered her position with documentation confirming that she returned to duty as scheduled.

[5] Based on the record presently before us, Jason has not been adjudicated to be the father of the child whom Candace references. We note that Candace presented DNA test results from Reliagene Technologies, Inc., and that those DNA test results purportedly do not exclude Jason as the child's father. Rather, according to Reliagene's test, there is a 99.999% probability that Jason is the child's father. According to Candace, Jason takes issue with the manner in which the DNA test was conducted. We mention this for discussion's sake only, and this discussion is in no way to be construed as an adjudication of the child's paternity.

---

291 S.W.2d 677 (Tex. 1956)
156 Tex. 44
David R. WOMACK, Relator,
v.
Charles D. BERRY et al., Respondents.
No. A-5517.
Supreme Court of Texas.
June 6, 1956

Rehearing Denied July 18, 1956.

[156 Tex. 45]

Taylor & Chandler, Austin, for relator.

Ramey & Ramey, Howard S. Smith, Sulphur Springs, Woodrow H. Edwards, Mount Vernon, for respondents.

WALKER, Justice.

This is an original proceeding in which relator, David R. Womack, seeks a writ of mandamus directing Honorable Charles D. Berry, Judge of the 8th District Court of Hopkins County, to set aside an order granting, pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, [1] a stay of proceedings pending in said court. Since the cause of action asserted by relator does not affect the defendant who is in military service and can be tried separately without prejudice to any of the parties, we have concluded that the court should order a separate trial of such cause of action and proceed to trial thereon.

R. M. Womack died testate in 1948, survived by two sons, W. B. Womack and relator, and by three grandchildren, Michael A. Patton, Kathleen E. Patton and Robert M. Patton, who are the children of the testator's deceased daughter, Mrs. Edna Womack Patton. After directing that the testator's estate be divided into three equal parts and that the two sons should each take one of such parts, the will provides that the remaining one-third be held in trust by W. B. Womack for the three grandchildren[156 Tex. 46] equally; that the trustee shall have complete control of the trust property to handle as he might deem best, but shall hand the same over as the grandchildren, respectively, reach the age of twenty-one; that if any grandchild interferes with W. B. Womack, such grandchild shall take only $1 from the estate; that the testator, his associates in the City National Bank of Sulphur Springs, and W. B. Womack have handled the affairs of Mrs. Edna Womack Patton since her death; that if any grandchild attempts to make claims against the bank or other parties arising out of the handling and management of Mrs. Patton's estate, such grandchild shall take only $1 from the testator's estate;

that as each grandchild reaches the age of twenty-one years and is about to receive a portion of the testator's estate under the will, such grandchild shall release the bank, its officers and W. B.

Womack from all claims arising out of the handling of Mrs. Patton's estate; and that in the event W. B. Womack predeceases relator, the latter shall carry out the terms of the will as trustee with all the benefits, terms and instructions as set out therein.

W. B. Womack died in 1952. On October 8, 1953, relator instituted suit to recover possession of the property left in trust for the three Patton children, asserting that he is entitled to hold and manage the same as the successor trustee named in the will. Michael became twenty-one years of age on the day the suit was filed, and is the defendant whose military service is the basis of the stay order entered by the trial court. Kathleen and Robert are minors, and their father, M. L. Patton, is guardian of their estates.

The original petition named M. L. Patton, guardian of the estates of Kathleen and Robert, John H. Stegner, executor of the estate of Louise S. Womack, and Michael A. Patton as defendants. It is there alleged that the will of R. M. Womack was admitted to probate and W. B. Womack qualified as executor of the estate; that W. B. Womack took possession of and commingled the trust estate with his individual property; that W. B. Womack left a will in which Louise S. Womack is named as principal beneficiary and independent executrix without bond; that Louise S. Womack came into possession of part of the trust estate after the death of W. B. Womack; that Louise S. Womack died in May, 1953, and John H. Stegner was appointed and qualified as executor of her estate; that the inventory of M. L. Patton, guardian, includes property which was listed in the inventory of the estate of R. M. Womack; that if any of the property in the guardian's hands is part of the trust estate, [156 Tex. 47] relator is entitled to possession thereof; that W. B. Womack did not file income tax returns for the trust estate; that Michael should not receive his share of the trust estate, because relator expects to file proper income tax returns and Michael should be required to pay his share of the taxes and other expenses, including those incurred by relator in filing and prosecuting the suit. Relator prayed for judgment against each defendant for possession of any of the trust property held by the latter and for the value of the property of the trust that each defendant, being liable therefor, failed to deliver, that the defendants be enjoined from delivering any of the trust estate to Michael, and that Michael be enjoined from receiving or disposing of any of the trust property.

It is necessary to set out in some detail the subsequent pleadings and proceedings in the trial court. Defendants first answered with a general denial. Thereafter, in compliance with an order of court directing that they file statements under oath showing the location and disposition of the trust property, the defendants filed separate verified reports. M. L. Patton, guardian, stated that after the death of R. M. Womack there was delivered to him as the property of his three children certain stocks, proceeds of insurance policies, and cash, a list of which is set out in the report, aggregating approximately $74,000; that such property represents one-third of all property owned by R. M. Womack at the time of his death; and that the guardian delivered to Michael the latter's share on October 8, 1953. Michael stated that he has in his possession, subject to such limitation as exists by reason of the suit, all property belonging to his estate theretofore handled by his father, which includes one-third of all property shown in the statement of M. L. Patton. Stegner stated that he does not have possession of any trust property.

Michael then applied for and was granted, over the protest of relator, leave to implead and file

a cross-action against the City National Bank of Sulphur Springs. On December 29, 1954, he filed his first amended original answer and cross-action, alleging that W. B. Womack as executor of the estate of R. M. Womack administered such estate and after paying the

Page 681

claims distributed the estate one-third each to W. B. Womack and relator and one-ninth each to Michael and his brother and sister; that Michael's share has been handled by his father in a satisfactory manner; that relator is not entitled to possession thereof and should be removed as trustee; that the bank is a depository of a substantial amount of his estate and is demanding[156 Tex. 48] a release from all the beneficiaries under the will, which constitutes a cloud on his property. He prayed that relator be denied possession of, and that the bank be required to relinquish any control which it might be asserting over, any of Michael's property. In a separate pleading, filed on January 18, 1955, and denominated a supplemental petition, Michael alleged that as a result of the bringing of the suit and relator's communications with companies in which Michael owns stock, the latter has incurred attorney's fees and has been prevented from selling his stocks or receiving the dividends thereon, and prayed for judgment against relator for damages in the amount of $12,500.

Several days prior to the filing of such supplemental petition, Michael and his father filed a joint motion to stay the proceedings in the case, alleging that the former had been inducted as a Naval Aviation Cadet to serve for a period of four years ending on August 17, 1958, and praying that the proceedings be stayed until that date.

On January 21, 1955, relator filed his first amended original petition complaining of M. L. Patton, guardian, and John H. Stegner, executor, and seeking to recover only the property left in trust for Kathleen and Robert; no relief is sought against Michael or his property, and the suit against him is expressly dismissed with prejudice.

Three days later the bank filed its original answer and cross-action, alleging that it has money on deposit in Michael's account, some of which is part of his inheritance under the R. M. Womack will; that some of the property originally owned by the estate of R. M. Womack is on deposit in the bank to the account of various parties to the case; that various parties have made demands on the bank for the delivery of its deposits and funds; and that the bank is unable to determine its liability, if any, created by the will of R. M. Womack when considered in connection with the estates of the three Patton children. It prayed for a declaratory judgment construing the will to determine whether a valid trust was created in W. B. Womack as trustee and relator as successor trustee, whether the original trustee was authorized to deliver the trust property to the beneficiaries, and whether each child is now entitled to receive his or her inheritance. It also requested the court to determine and adjudicate the property controlled by the will, and to enter judgment releasing the bank from all liability by virtue of its [156 Tex. 49] having been depository of funds belonging to the estate of R. M. Womack and by virtue of any connection it might have had with funds belonging to any of the parties to the suit.

Relator answered the motion to stay the proceedings, praying that the same be denied, or in the alternative that the court grant a separate trial of all claims and issues relating to Michael and stay only the trial of such claims and issues. After a hearing on January 25, 1955, the trial court

overruled relator's motion for a separate trial and granted Michael's motion for a stay of the proceedings. Relator's subsequent motion to set aside such order was overruled, and his application to the Court of Civil Appeals for a writ of mandamus was denied in an unpublished opinion.

The federal statute provides that any action in which a person in military service is involved, either as plaintiff or defendant, shall on application by such person be stayed as provided in the Act unless in the opinion of the court the ability of such person to prosecute the action or conduct his defense is not materially affected by reason of his military service. Its obvious purpose being to prevent prejudice to the rights of a litigant in military service because of inability to prosecute his claim or conduct his defense, the statute should be liberally construed and applied to accomplish that purpose. It should not, however,

Page 682

be used as a device to delay the proper and expeditious determination of legal proceedings when the rights of the party in military service will not be materially affected thereby. The trial court is given a wide discretion in determining whether a stay should be granted under the circumstances of a particular case and in deciding which party should carry the burden of proof on the issue of prejudice. See *Boone v. Lightner,* 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587.

Relator's amended petition asserts only the right to take possession of and manage the property left in trust for Kathleen and Robert. His right to prevail depends upon whether he, as the successor trustee named in the will, is entitled to possession of such property during the minority of the beneficiaries. Michael is twenty-one years of age, and under the provisions of the will is now entitled to his property even though it might be determined that during his minority the same should have been held by the trustee. It clearly appears from the pleadings and verified reports that Michael has received all property to which he is entitled under the will, that he is satisfied with his father's management thereof during his minority, and that the guardian [156 Tex. 50] and possibly the two minor children and the bank have possession of the property devised in trust for Kathleen and Robert. We are unable to perceive, therefore, how Michael could be affected in any way by a determination of the claims of the other parties with reference to the property of the minors. Assuming that the cause of action which relator originally alleged against Michael and his property is effectively dismissed with prejudice, which will be discussed later, no one with the possible exception of the bank is questioning Michael's right to the possession, management and control of his property.

Michael is interested, however, in his cross-action against relator for damages, in his action against the bank to obtain a release of his property, and in any claims or questions which the bank might raise affecting his property. If these actions and issues are to be determined in connection with and as a part of the trial of the main suit, then it cannot be said, on the record in this case, that the trial court abused its discretion in staying the entire proceedings. If, on the other hand, a separate trial of such actions and issues had been granted, the federal statute would afford no basis for staying the trial of the main case. We must determine, therefore, whether mandamus should issue to compel the trial court to order a severance.

The Rules of Civil Procedure bestow upon trial courts broad discretion in the matter of

consolidation and severance of causes, and the trial court's action in such procedural matters will not be disturbed on appeal except for abuse of discretion. See *Hamilton v. Hamilton, Tex.,* 280 S.W.2d 588. This brings us to the most serious question in the case. It is well settled that mandamus lies to enforce the performance of a ministerial act or duty, or to require the exercise of discretion. Many of our decisions declare, without qualification or exception, that the writ will not issue to review or control the action of an inferior court or public officer in a matter involving discretion. *Lauraine v. Ashe,* 109 Tex. 69, 191 S.W. 563, 196 S.W. 501; *McDowell v. Hightower,* 111 Tex. 585, 242 S.W. 753; *Anchor v. Martin,* 116 Tex. 409, 292 S.W. 877; *Morton's Estate v. Chapman,* 124 Tex. 42, 75 S.W.2d 876; 28 Tex.Jur. 574, Sec. 33. And it has been held that the determination of the issues of severance invokes the discretionary or judicial powers of the trial court and is not subject to control by mandamus. *Baten v. Campbell, Tex.Civ.App.,* 62 S.W.2d 1010 (no writ).

The rule denying mandamus with respect to matters of a discretionary character is not without limitation, however, and [156 Tex. 51] the writ may issue in a proper case to correct a clear abuse of discretion. See *City of Houston v. Adams, Tex.,* 279 S.W.2d 308; *Stakes v. Rogers,* 139 Tex. 650, 165 S.W.2d 81; *City of San Antonio v. Zogheib,* 129 Tex. 141, 101 S.W.2d 539; *Arberry v. Beavers,* 6 Tex. 457, 55 Am.Dec. 791; *King v. Guerra, Tex.Civ.App.,*
Page 683
1 S.W.2d 373 (writ ref.); 55 C.J.S., Mandamus, §§ 63 and 73, pp. 100, 126; 34 Am.Jur. 858, Sec. 69; 35 Am.Jur. 31, Sec. 259. While no Texas case has been found in which the writ issued to correct the action of an officer or tribunal in a matter of discretion, the cited cases recognize the exception to the general rule.

Rule 174(b), Texas Rules of Civil Procedure, provides that the court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third party claim, or of any separate issue, or of any number of such claims or issues. The use of the permissive word 'may' imports the exercise of discretion in such matters. But the court is not vested with unlimited discretion, and is required to exercise a sound and legal discretion within limits created by the circumstances of the particular case. The express purpose of the rule is to further convenience and avoid prejudice, and thus promote the ends of justice. When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion. The rule then is peremptory in operation and imposes upon the court a duty to order a separate trial. While the refusal to grant a separate trial under such circumstances is usually termed a clear abuse of discretion, it is nevertheless a violation of a plain legal duty. If it also appears that the injustice resulting from such refusal cannot later be remedied on appeal, the action of the court is subject to control by mandamus.

A granting of relator's motion for a separate trial of his suit might be contrary to the personal wishes of the other parties, but in a legal sense would not prejudice the latter in any way. Relator's claim as stated in his amended petition is a distinct and severable part of the entire controversy. The dismissal of his suit against Michael does not affect the latter's right to be heard on his claims

for affirmative relief. But the determination of Michael's actions for damages and to recover his property, as well as any questions raised by the bank regarding [156 Tex. 52] such property, involves no issue which has any bearing on relator's right to possession of the property of the minors. Michael has no pecuniary interest in and will not be affected by a separate trial of the main suit, and the bank's interests can be as fully protected in separate trials as in a single trial.

The court overruled the motion for a separate trial and granted Michael's motion that the proceedings be stayed until August 17, 1958. On that date Kathleen will be over twenty-one years of age, and Robert will be almost twenty years old. The latter will probably reach his majority before the case can be tried and appealed. In practical effect, therefore, the action of the trial court denied relator a judicial determination of his right and duty to administer the property left in trust for the minors. By simply granting relator's motion for a separate trial, the court would have been in position to hear relator's suit promptly and stay only the proceedings relating to Michael and his property. Under these circumstances we think it was clearly the duty of the court to order a separate trial.

The record does not disclose whether the court has entered an order dismissing relator's suit as to Michael. The question of whether a plaintiff may, without permission of the court, discontinue his suit as to one or more of several defendants who have been served with process, or who have answered, has not been decided. See Rule 163, Texas Rules of Civil Procedure; *Ridley v. McCallum,* 139 Tex. 540, 163 S.W.2d 833. Nor is it necessary for us to decide the question here. Relator's amended petition expressly dismisses his suit as to Michael with prejudice. Michael will be fully protected, and the parties other than relator will not be adversely affected by such dismissal. Under these circumstances the trial court is under a duty to order the dismissal. Since relator's ultimate right to a writ of mandamus will not

depend upon whether the court grants or refuses permission to dismiss, no useful purpose would be served by requiring relator to obtain action by the court on that matter before we consider his petition for mandamus.

It is our opinion that the trial court should: (1) order a dismissal of relator's suit against Michael A. Patton with prejudice as to relator, but without prejudice to the rights of Michael A. Patton and the bank to be heard on their cross-actions; (2) order a separate trial of relator's suit to recover the property devised by the will of R. M. Womack in trust for Kathleen E. Patton and Robert M. Patton, and certain related issues raised by the bank's cross-action as set our below; and [156 Tex. 53] (3) set aside the order staying proceedings entered on January 25, 1955, in so far as such order is applicable to the trial of relator's suit and the issues to be determined in connection therewith.

There are a number of questions raised by the bank's cross-action which are closely related to, and should be disposed of in connection with relator's suit. At the time such suit is tried, therefore, the court should decide whether the well of R. M. Womack created in W. B. Womack as trustee, and relator as successor trustee, a valid trust in the property bequeathed to the minors, whether the original trustee was entitled to deliver such property to the minors, and whether each minor is now entitled to receive his or her inheritance. The court will also be authorized to and should discharge the bank from liability with respect to any property of the minors which the bank

is required to and does surrender upon final determination of relator's suit. This affords the bank ample protection on that phase of the case, and renders it unnecessary to hold relator's suit in abeyance until the remaining issues raised by the bank's cross-action are decided.

Relator, Michael, M. L. Patton, guardian, and John H. Stegner, executor, are made cross-defendants in the bank's cross-action. The dismissal of relator's suit as to Michael does not eliminate the latter as a party defendant to such cross-action, and hence does not deprive the court of jurisdiction to determine, in connection with relator's suit, the related questions raised by the bank. But, as pointed out above, the decision of these matters cannot affect Michael or his property, and should not be stayed on his account.

The bank also asserts the right to a judicial determination of the property controlled by the will and to a general release from all liability by virtue of having been depository of funds belonging to the estate of R. M. Womack and by virtue of any connection it might have had with funds belonging to any of the parties to the suit. If the bank is entitled to such relief, it will be necessary for the court to ascertain and trace the property owned by R. M. Womack at the time of his death, and determine whether the bank has incurred any liability to his estate or to any of the parties to the suit. Michael is interested in these matters, as well as the question of his present right to possession of his inheritance, and the same should not be tried in connection with relator's suit.

[156 Tex. 54] We assume that the trial court will enter proper orders in accordance with this opinion, but in the event such orders are not entered, the clerk will be instructed to issue the appropriate writ.

References have been made in this opinion to the provisions of the will of R. M. Womack, the property devised thereby in trust for various persons, and the pleadings and positions of the parties. We are not to be understood as expressing an opinion with respect to the meaning and effect of the will, the sufficiency of the pleadings, the propriety of permitting Michael to file a cross-action against the bank, or the bank's right to the relief which it seeks.

GARWOOD and GRIFFIN, JJ., dissenting.

GRIFFIN, Justice (dissenting).

The majority opinion recognizes that if the action of the trial judge, first, in entering the stay order and, secondly, in refusing to grant a severance as requested by relator is discretionary then the mandamus should not be granted except for a clear abuse of discretion by the trial court. In this case we are overturning actions of the trial court on matters which are wholly discretionary and not contended to be ministerial, and holding, as a matter of law, that the facts before the trial judge could lead to no other conclusion than that the stay should not have been granted, and also that the cause of action should have been severed.

Regarding the stay under 50 U.S.C.A.Appendix, § 521, Mr. Justice Jackson discusses this Soldiers' and Sailors' Relief Act in the case of *Boone v. Lightner,* 1943, 319 U.S. 561, 63 S.Ct. 1223, 1226, 87 L.Ed. 1587. In that case, a stay had been refused by the trial judge. In discussing whether or not the Act conferred discretion on the trial judge, the Court said: '* * * The legislative history of its antecedent (Act of 1918) shows that this clause was deliberately chosen and that judicial discretion thereby conferred on the trial court instead of rigid and undiscriminating suspension of civil proceedings was the very heart of the policy of the Act. * * *' (Emphases

added.) In a footnote of the opinion, Mr. Justice Jackson quotes from committee hearings and floor discussions at the time of the passage of the Act to sustain his contention that the trial court has a wide discretion. Portions of such record are as follows: [156 Tex. 55] '* * * Most of the actions sought to be brought against soldiers will be for small amounts and will thus be in a local court where the judge, if he does not already know, will be in a favorable position to learn whether or
Page 685
not the defendant who seeks the benefit of the statute has really been prejudiced by his military service. * * *' 319 U.S. 566, 63 S.Ct. 1227, 87 L.Ed.2nd. col., bottom at page 1591. Again, '* * * the next material difference between this law and the various State laws is this, and in this I think you will find the chief excellence of the bill which we propose: Instead of the bill we are now considering being arbitrary, inelastic, inflexible, the discretion as to dealing out even-handed justice between the creditor and the soldier, taking into consideration the fact that the soldier has been called to his country's cause, rests largely, and in some cases entirely, in the breast of the judge who tries the case.' I believe the above authorities are sufficient to show whether or not a stay should be granted is within the discretion of the trial judge and the granting or refusing of a stay is not merely a ministerial act.

I think the law is well settled that for an action of a trial judge in a matter of this character to be 'a clear abuse of discretion', such action must amount to action wholly through fraud, caprice, or by a purely arbitrary decision, and without reason. *King v. Guerra, Tex.Civ.App.*1928, 1 S.W.2d 373(8), 376, wr. ref. However, the same authority says:

'But this exception is restricted in its application to cases in which the offending board acts in the absence of any fact or condition supporting or tending to support its conclusion in the matter acted upon. The judicial function in the excepted cases is limited to the inquiry as to whether there can be any controversy over the facts or conditions upon which the board acted, or which it could properly take into consideration in its deliberations. If such controversy is possible, if there can be any reasonable doubt concerning the existence or nonexistence of those facts or conditions or their effect upon the public good, then the courts are quite powerless to revise or disturb the action of the board. *Sansom v. Mercer,* 68 Tex., (488), 492, 5 S.W. 62, 2 Am.St.Rep. 505; Riggins v. Richards (Tex.Civ.App.), supra. (79 S.W. 84.) To paraphrase the language of Judge Gaines in the Sansom Case:

"If there is any controversy as to the existence of the facts upon which the board denied the requested permit,
Page 686
the function of the board was discretionary, and it cannot be compelled to grant the permit.' [156 Tex. 56] 'Judge Key said in the Riggins Case that: 'Human wisdom has never devised a system of government that did not vest final authority in one or more persons; and when that authority involves discretion, and has been exercised, the courts are powerless to grant relief, however unwisely or unjustly it may have been done.' 79 S.W. 86.'

The same law applies to court action as to action by a board.

I am convinced that this Court cannot say, under the facts of this case, that the trial judge, in his rulings acted 'wholly through fraud, caprice, or by a purely arbitrary decision, and without

reason.' King v. Guerra has an excellent discussion of the right to a mandamus in causes such as this.

I shall next discuss the matter of a severance. The majority opinion recognizes that the granting of a severance is discretionary with the trial court. In addition to the authorities there cited, I would add:

'The trial court has great discretion upon questions of joinder of parties and causes of action, and of consolidation or separation of causes, more especially under Rules 37 to 43, 97, and 174. *Wilson v. Ammann & Jordan, Tex.Civ.App.*1942, 163 S.W.2d 660, error dismissed; *Simmons v. Wilson, Tex.Civ.App.*1949, 216 S.W.2d 847; *Waller Peanut Co. v. Lee County Peanut Co., Tex.Civ.App.*1949, 217 S.W.2d 183; *Gowan v. Reimers, Tex.Civ.App.*1949, 220 S.W.2d 331, ref. n. r. e.; *McGee v. McGee, Tex.Civ.App.*1951, 237 S.W.2d 778, ref. n. r. e.; *Utilities Natural Gas Corp. v. Hill, Tex.Civ.App.*1951, 239 S.W.2d 431, ref. n. r. e.; *Associated Growers v. Smith, Tex.Civ.App.*1952, 244 S.W.2d 348; *Barbee v. Buckner, Tex.Civ.App.*1954, 265 S.W.2d 869, ref. n. r. e. * * *' Footnote 10, Rule 174, Vernon's Annotated Texas Rules of Civil Procedure.

Now let us examine the situation of the case before the court at the time he made his rulings which are sought to be over-thrown by mandamus. Relator had filed a suit on the day Michael became 21 years of age against Michael and others alleging, among other things, that '* * * Michael should not receive his share of the trust estate, because relator expects to file proper income tax returns and Michael should pay his share of the taxes and expenses, including those incurred by relator in filing and prosecuting the suit. Relator prayed for judgment against each defendant for possession of any of the trust property held by the latter and for the value of the property of the trust that each defendant, being liable therefor, failed to deliver, that the [156 Tex. 57] defendants be enjoined from delivering any of the trust estate to Michael, and that Michael be enjoined from receiving or disposing of any of the trust property.' To this Michael answered that 'he has in his possession, subject to such limitation as exists by reason of the suit,' (emphasis added) all of his estate theretofore handled by his father. Michael thereafter filed a cross-action against the Bank. This cross-action was filed only after Michael had filed a request to be permitted to bring in the Bank, only after an answer by relator opposing such request had been filed and only after a hearing was had before the court and the entry of an order permitting Michael to bring in the Bank. This answer and cross-action was amended on December 29, 1954, and Michael alleged that relator is not entitled to possession of Michael's estate, and asked that relator be removed as trustee over the estate; that the depository Bank has possession of a substantial amount of Michael's estate and is demanding a release from all of the beneficiaries under the will before it will deliver to Michael his estate, and that such action on the part of the Bank constitutes a cloud on Michael's property, and prayed that relator be denied possession of, and the Bank be required to relinquish control over Michael's property. Apparently the next pleading filed was Michael's request for a stay under the Soldiers' and Sailors' Relief Act. Michael's father joined in such request. On January

18, 1955, Michael further supplemented his cross-action by alleging a cross-action against relator for $12,500 damages by virtue of certain actions of relator. Michael alleged relator had caused

certain companies in which Michael had stock to withhold dividends from Michael on the stock Michael owned and that relator's suit had prevented Michael from selling and disposing of certain stocks he desired to sell. On January 21, 1955, relator amended his petition in which he dismissed his suit against Michael with prejudice, and sought no relief of any character against Michael.

The will of R. M. Womack, under which relator claimed the rights asserted in his original and amended petition, provided that W. B. Womack hold in trust for Michael and his brother and sister one-third of R. M. Womack's estate. It also provides that in the event W. B. Womack 'predeceases me and/or if he predeceases my said son David R. Womack, then, and in that event' David R. Womack shall carry out the terms of the will, as trustee. It also provides, in the case of Michael and the other two children of the testator's deceased daughter, Edna Patton, that testator, the City National Bank of Sulphur Springs and W. B. Womack had handled the Edna Patton estate to the best of their ability and with no profit to any one of them; that [156 Tex. 58] if any of the Patton children attempt to make any claim against the Bank, or testator, or W. B. Womack, then such child or children shall receive from testator's estate the sum of $1 each. It further provides that as each Patton child reaches the age of 21 years, and is 'about to receive a portion of my estate under this will such child shall execute a valid release to said City National Bank of Sulphur Springs and my son, and to any officer of said Bank arising out of the handling of the estate of my deceased daughter (Edna Patton).' Three days later on January 24, 1955, the Bank filed its original answer and cross-action to Michael's cross-action against it and made all parties to the suit cross-defendants. In its pleading, the Bank asked that the will of R. M. Womack be construed; that various parties have made demands on the Bank for delivery of its deposits and fund of the R. M. Womack estate; that the Bank is unable to determine its liability under the R. M. Womack will when considered in connection with the estates of the three Patton children of whom Michael is one.

Among other things the Bank alleged that this cross-plaintiff has participated in the affairs of Rufus Marvin Womack's estate and that this cross-plaintiff should receive certain releases at certain times during the administration of the estate of Rufus Marvin Womack, and the nature of the releases, and of the demands which have been made on this bank are not clear. This cross-plaintiff is unable to make construction of the will of Rufus Marvin Womack, deceased, and is unwilling to determine the extent of its liability, if any, created by said will, when considered in connection with the estates of Michael Alfred Patton, Kathleen E. Patton and Robert M. Patton. This cross-plaintiff, therefore, invokes the 'Provisions of the Declaratory Judgment Act of Texas', as to contruction of wills, and therefore, requests this court to construe said will of Rufus Marvin Womack, deceased, and answer the following questions: (1) Did the will of the said Rufus Marvin Womack pass to the three Patton Children, to wit, Michael Alfred Patton, Kathleen E. Patton and Robert M. Patton, jointly a 1/3rd in his estate? (2) Did the will of Rufus Marvin Womack create and set up a valid trust in W. B. Womack over the property bequeathed therein unto Michael Alfred Patton, Kathleen E. Patton and Robert M. Patton? (3) If the will set up a valid trust of said property In W. E. Womack, did W. B. Womack have the authority to deliver unto the Patton children their interest therein? (4) Did the will of Rufus Marvin Womack create and set up a valid trust in David R. Womack over the property bequeathed therein unto Michael Alfred Patton, Kathleen E.

Patton[156 Tex. 59] and Robert M. Patton, at the death of W. B. Womack? (5), (6) and (7) inquires whether each of the Patton children now is entitled to receive its inheritance under the R. M. Womack will. The Bank further asks the court to determine

Page 688

and adjudicate the property of the R. M. Womack estate, if any, controlled thereby. The Bank asks that after the will has been construed, the Court enter proper orders and judgments releasing the Bank from liability as to the depositor of funds of the R. M. Womack estate; and 'by virtue of any connection which it might have had regarding the funds belonging to any one of the original parties to this law suit, including the cross defendants herein.'

This is clearly a suit to construe the will of R. M. Womack brought by a party named in the will as having been interested in handling a part of the estate. Further, the Bank is a beneficiary under the will in that the will requires a release from the Patton children as a condition precedent to each child receiving its estate. Further, the will sought to protect the Bank against litigation in providing that if any of the Patton children should make a claim against the Bank, such child should receive only $1 from the R. M. Womack estate. Surely it cannot be contended that a pleading of this nature involves only matters between Michael and the Bank. Nor can it be contended that relator, as trustee and as beneficiary, and Michael as beneficiary, and all other beneficiaries are not only proper parties but necessary parties to the Bank's cross-action. In view of all the complications of the facts in this case, surely this pleading on the part of the Bank was a very wise and necessary one, and the Bank is entitled to make its proof in order to obtain a judgment fixing its rights and liabilities, not only to Michael, but also to all trustees, estates and beneficiaries. The Bank, as beneficiary under the R. M. Womack will, had a right to bring the suit for construction of the will. 44 Tex.Jur. 76, Sec. 197. I think this is a fundamental proposition requiring no further authority. The order of the court permitting Michael to bring in the Bank on his cross-action was an interlocutory order, and can be reviewed only by an appeal in the main case after a final judgment has been entered in the trial court. Mandamus cannot be used in lieu of an appeal. 28 Tex.Jur. 530, Sec. 10. For the purposes of this mandamus proceeding such order permitting Michael to bring in the Bank is valid, subsisting, and not subject to attack. The Bank, being properly made a party to the suit, and being a beneficiary under the will, could [156 Tex. 60] legally bring the suit for construction, and for release from its liabilities under the will, and to secure its right to a release from other beneficiaries under the will, as therein provided.

In suits for the construction of a will all those who have an interest in the estate and who are named in the will as beneficiaries of substantial parts of the estate are necessary parties. '* * * This is because the necessary parties must be joined in a suit to construe a will, in order to give the court jurisdiction to enter a final judgment. 44 Tex.Jur. 766, Sec. 197; *Hay v. Hay, Tex.Civ.App.,* 120 S.W. 1044, (no writ history); *Goldsmith v. Mitchell, Tex.Civ.App.*1933, 57 S.W.2d 188, (dism. w. o. j.).' (Emphasis added.) *Miller v. Davis,* 1941, 136 Tex. 299, 150 S.W.2d 973, 977, 136 A.L.R. 177. See also *Sharpe v. Landowners Oil Ass'n,* 1936, 127 Tex. 147, 92 S.W.2d 435.

Miller v. Davis, 150 S.W.2d 979(18, 19), supra, says:

'Since we hold that the trustees * * * are necessary parties to this action in order for the court to

have jurisdiction to enter final judgment construing this will, it must follow that no final judgment has been entered in this case in the district court. * * *' (Emphasis added.)

Although that suit was by an executor under a will, what was said in the case of *Alexander v. Berkman, Tex.Civ.App.* 1928, 3 S.W.2d 864, wr. ref., is particularly applicable to the necessity for all parties to be joined in one and the same suit.

'* * * He (the executor) is not required to decide conflicting claims at his peril, but has a right to have such claims adjudicated in an action to which all claimants are made parties,

Page 689

so that all of them may be bound by such adjudication. He is not required, and should not be required to litigate such issues with a granishing creditor in one suit, and with the legatees and other claimants of the funds in his hands in another suit. He has a right to have all parties interested bound by a common finding of fact.'

The majority opinion indicates that it has only 'sliced out' Michael and his interest from the will construction suit, and that no harm can come to the Bank by such slicing. The answer to that argument is found in the above cases wherein it is said that the court has no jurisdiction to render a final judgment unless all necessary parties are present. Any judgment rendered in either of the two suits into which the majority has sliced the Bank's cross-action for construction would not be a final [156 Tex. 61] judgment. Not being a final judgment it could bind none of the litigants. Thus the Bank would not be protected by either one or both of the judgment entered in the severed suits. If Michael and his property can be 'sliced out' for a separate suit, so could each other party's interest be made the subject of a separate suit. This is clearly contrary to what has been the law for a long time in suits for construction of wills.

We cannot say that the tril court, under the above pleadings before him on January 25, 1955, acted in fraud, arbitrarily, through caprice, or without reason or some basis of fact, when he refused to sever the cause and also when he granted the stay order. I do not see how Michael's rights can be severed from his cross-action against the Bank and relator, or from the cross-action of the Bank against him, relator and others so as to be tried in a separate suit between the Bank and Michael.

I am sure it is not necessary to cite authority for the proposition that relator in a mandamus proceeding must show a clear, legal right to have it issued. 28 Tex.Jur. 533, Sec. 11. Neither can we say that the trial court acted in the absence of any fact or condition supporting, or tending to support, the action taken. King v. Guerra, supra.

I would refuse the mandamus.

GARWOOD, J., joins in this opinion.

Notes:

[1] 50 U.S.C.A.Appendix, § 521.

A-82