No. 100327-7

THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 373231

Spokane Superior Court No. 17-3-007721

In re:

MIRANDA DETORE,

Petitioner,

vs.

TAMMY VANDERZANDEN,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

JULIE C. WATTS/WSBA #43729
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I. IDENTITY OF PETITIONER

The petitioner is MIRANDA DETORE.

II. DECISION BELOW

Petitioner seeks review of the *Opinion,* entered by Division III on August 24, 2021,[1] and the *Order Denying Motion for Reconsideration* entered on September 23, 2021.[2]

III. ISSUE FOR REVIEW

A. Whether the *Opinion* addressed a significant question of law under the Constitution of the State of Washington or of the United States pursuant to RAP 13.4(b)(3), when it concluded that no due process violation occurred when a trial court denied litigants *any* opportunity to make requests 'at trial' and subsequently denied requests without consideration for not having been made 'at trial.'

IV. STATEMENT OF THE CASE

The parties, Miranda Detore and Tammy Vanderzanden, met in 2010.[3] In 2012, the parties were engaged in a committed intimate relationship.[4] On March 9, 2013, the parties signed a

[1] Appendix A.
[2] Appendix B.
[3] RP 1381.
[4] RP 1381.

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domestic partnership agreement in Oregon.[5] The domestic partnership ended in April of 2017 when the parties separated.[6]

Trial in this case took place over six (6) days.[7] The trial court in this case was asked to divide the property between the parties, divide debts between the parties, establish a parenting plan for the parties' child, and establish child support.[8]

At trial, counsel for Ms. Detore repeatedly requested the opportunity to engage in closing arguments over several days.

> *MR. CROUSE: So maybe we will need to summarize that for you in closing at least and give you a roadmap.*
>
> *THE COURT: I'm not sure you're going to get to closing. You're running out of time because this witness still needs to be cross-examined, and you've got Dr. Brown in the morning, and I'm guessing you're just not going to have a closing, but we will see."*[9]

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[5] *Id.*
[6] RP 1381-82.
[7] RP 1360.
[8] RP 1360-61.
[9] RP 1151.

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MR CROUSE: *What's your thoughts on closing while we have a few minutes?*

THE COURT: *We're probably not getting to closing. I will be using what I have. You've briefed this, so I'm not sure that there's anything more you need to tell me.*

MR. CROUSE: *Are you going to indulge written closings from us then?*

THE COURT: *No. The vast amount of things that I have to read, I don't really need to add that, because as you can see, you've handed me these agreed binders. While you've referred to some of them, I do have to go through those. So, I would rather spend my time going through your exhibits, so I know what the evidence is versus what the argument is, and then the briefing with regard to the legal issues, which is, at least I'm hoping you have them.*

MR. CROUSE: *Okay. You know, I understand you don't want to hear a long closing. There was a couple of points I had wanted to draw out. If we run where we have some time, can we allocate 15 minutes to make a couple of points for counsel?*

THE COURT: *We will see how we do. I'm not going to promise anything.*[10]

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[10] RP 1158-59.

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****

MR. CROUSE: Can I ask you this: I'm really hoping to reserve, whether I have to cut my cross short or what – or my redirect, a few minutes for a closing argument. Are you going to entertain that as long as cut that short?

THE COURT: It depends upon where we are in the day.[11]

****

MR. CROUSE: Can I inquire, if I keep my redirect to five minutes for closing, can I have five minutes for closing?

THE COURT: There will be no close with regards to this. I just need you to ask your questions.

MR. CROUSE: We're not going to do a closing then?

THE COURT: We're not.[12]

****

MR. CROUSE: Can I make one request? I know you've told me no on a written closing and I'm not going to ask to drop a lot of stuff on you and I respect your ruling on the closing argument, too. Can I produce a bullet point that would be less than two pages? No reading, just a few bullet points that I would ask the court to consider, no argument.

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[11] RP 1251.
[12] RP 1338.

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THE COURT: If you can do a bullet point in two pages, I will accept that. Mr. Cronin, you may also do a bullet point in two pages.

MR. CROUSE: I won't exceed that.

THE COURT: I have your trial briefs, so I'm assuming most of what I need position-wise is going to be in the trial briefs, and then the joint trial management with the outlines of costs.

MR. CROUSE: It would just be a few bullet points for the Court's consideration and no argument.

THE COURT: The other thing that I would ask you to put in that bullet point, perhaps in the bottom, is a specific as to what the vast number of exhibits that I have might be most important to you, not that they're all not important, but there may be some that you want to direct me to more than others.

MR. CROUSE: Understand. Thank you.

THE COURT: Any questions, Mr. Cronin?

MR. CRONIN: When should I shoot bullets at Mr. Crouse?[13]

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THE COURT: I will give you both until the 18th for the bullet points if necessary.

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[13] RP 1356-58.

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MR. CROUSE: Okay.

THE COURT: So, I'm going to set the presentment November 1st at 2:00 PM, which is a Friday.

MR. CRONN: Two pages of bullet points.

THE COURT: Two pages bullet points with any reference to specific exhibits. Granted, I realize they are all admitted.

MR. CRONIN: Can I ask one last question?

THE COURT: Certainly.

MR. CRONIN: Bullet points means no argument.

THE COURT: No argument, just bullet points.[14]

On November 1, 2019, the court delivered its oral ruling.[15]

On November 3, 2019, Mr. Crouse sent a letter requesting clarification as to whether the court intended to grant residential credit in its child support calculation since it had ordered a parenting plan where Ms. Detore received six out of every fourteen days ("substantially shared" schedule).[16]

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[14] *Id.*
[15] Appendix A.
[16] CP 175.

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The trial court signed the proposed final documents presented by Ms. Vanderzanden and noted in the child support worksheet under a section labeled "Other Factors for Consideration" that: "The court has not ordered a deviation as no deviation was requested at the time of trial."[17]

Ms. Detore appealed.

On August 24, 2021, the Court of Appeals denied Ms. Detore's appeal, saying:

> We disagree that Detore was deprived of a meaningful opportunity to be heard. The trial lasted six days, several witnesses testified, and **Detore was able to emphasize whatever points she wished through these witnesses. Also, Detore was afforded the opportunity to raise issues in her presentation papers and in fact she did.** This appeal provided her an additional ability to raise these issues.[18]
>
> ***
>
> With respect to the child support deviation, Detore argued this issue in her presentation papers. The trial court ruled that it would not consider a deviation because it was not earlier requested. **But given that neither party requested a shared residential schedule, the trial court probably should have allowed the issue to be raised late.** Nevertheless, a trial court has discretion to deny a

[17] CP 52.
[18] Appendix A, pg. 15.

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> deviation and this one surely would have. If the trial court had any interest in granting a deviation, it would have asked Vanderzanden to address the issue. **Its decision not to ask for a response signals that it would have denied a deviation anyway**, likely because Detore had $2.2 million of separate property. **Allowing closing arguments would not have changed this fact**. We conclude that there was no due process violation.[19]

Ms. Detore filed a *Motion for Reconsideration* on September 10, 2021.[20] She argued that simply because a trial court has discretion to grant or deny a request on the merits does not mean that it has discretion to dismiss a request without consideration.[21]

Ms. Detore asserted that parties are entitled to receive a ruling on the record, after which, parties are entitled to appeal as a matter of right and have the trial court's findings reviewed for substantial evidence and its conclusions reviewed for compliance with the standards of Washington law.[22]

Even if one could assume that the court's decision not to ask for a response was a signal indicating that it likely would have

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[19] Appendix A, pgs. 15-16.
[20] Appendix C.
[21] *Id.*
[22] *Id.*

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denied the deviation, Ms. Detore argued that an appellate court cannot simply *assume* that the trial court would have denied the request properly without abusing its discretion; it would defeat the purpose of review if the appellate courts were permitted to simply *assume* that a decision *would have been* made properly had the trial court not declined to make it at all.[23] Ms. Detore argued that Washington law does not assume that decisions are correct just because they are discretionary, which is why such decisions are reviewable by appellate courts pursuant to the abuse of discretion standard; she noted that, otherwise, such an assumption would obviate the need for any review with respect to discretionary decisions, no matter how unjust the outcome.

V. ARGUMENT

The *Opinion* in this case involved a significant question of law under the constitution of the State of Washington or of the United States pursuant to RAP 13.4(b)(3). The *Opinion*

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[23] *Id.*

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concluded that no due process violation occurred when a trial court denied litigants *any* opportunity to make requests 'at trial,' after which it subsequently denied requests without consideration for not having been made 'at trial.'

"The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law."[24] "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[25] "'Liberty' and 'property' are broad and majestic terms," that require some definition.[26] Property interests protected by procedural due process extend "well beyond actual ownership of real estate, chattels, or money," and "by the same token, the Court has required due

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[24] *Goss v. Lopez*, 419 U.S. 565, 572, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975).
[25] *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).
[26] *Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

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process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process."[27] "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."[28]

> *To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.*[29]

Property interests are not created by the Constitution; rather, "they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain

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[27] Roth, 408 U.S. at 571-572 (additional citations omitted).
[28] Roth, 408 U.S. at 576.
[29] Roth, 408 U.S. at 577.

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benefits that support claims of entitlement to those benefits."[30] Here, Ms. Detore's property interests were implicated in this action and, as a result, she was entitled to due process protection.

"Once it is determined that due process applies, the question remains what process is due."[31] The Due Process Clause requires "at a minimum," "that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[32]

"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[33] "[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important."[34]

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[30] *Id.*
[31] *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972).
[32] *Goss*, 419 U.S. at 579.
[33] *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970).
[34] *Id*.

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Here, Ms. Detore was given *no* opportunity to argue the evidence in her case, much less a meaningful one.

Absolute Right to Oral Argument vs. Protections Suited for Each Particular Situation: The *Opinion* observes that "[n]o categorical due process right to oral argument exists in civil or domestic relations cases," and asserts that "[u]nlike many other legal rules, due process is flexible, calling for protections suited for each particular situation."[35] Ms. Detore does not assert otherwise; rather, her argument is that it is violative of due process for a court to deny a substantive request solely by reason of the fact that it had not been made "at trial" when the court itself categorically denied litigants *any* opportunity to make *any* request at trial. The protections suited for this particular situation require that a trial court provide litigants with *some* method –

[35] *Opinion,* pg. 14.

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any method – for making requests "at trial" if it intends to later deny requests without consideration based solely on the fact that they were not made "at trial."

Emphasized Testimony vs. Requests: Contrary to the *Opinion's* assertions, the opportunity to "emphasize whatever points she wished" through witness testimony does not overcome the problem in this case. The request for a residential deviation in child support is a highly technical statutory request, and no witness that was called by either party could have provided factual testimony based on their own personal knowledge that could have substituted for an attorney's technical legal request for statutory relief. Further, a request for a deviation of child support is a derivative request that does not arise until *after* a trial court has made multiple discretionary decisions, which no lay person is able to anticipate.

In a case establishing a parenting plan, the trial court can arrive at five broad categories of potential arrangements: (1) primary placement with petitioner, (2) primary placement with

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respondent, (3) substantially shared schedule favoring petitioner, (4) substantially shared schedule favoring respondent, and (5) a 50/50 parenting plan.

Within those five categories, there are three *typical* outcomes for determining which parent is the obligor for child support purposes:[36] Options 1 and 3, above, generally entitle the petitioner to receive support. Options 2 and 4, above, generally entitle the respondent to receive support. Option 5 generally requires the court to nominate an obligor and an obligee.[37]

Once the obligor/obligee status has been determined, the trial court will have identified which parent shall provide a transfer payment and which parent shall receive a transfer payment, but

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[36] "Nowhere does the statutory scheme or supporting case law state the parent receiving the support transfer payment must be the parent with whom the child resides a majority of the time. There is also no statutory provision, or case law, that prohibits a transfer payment from the advantaged parent to the disadvantaged parent in an equally shared residential arrangement." *In re Parentage of A.L.*, 185 Wn.App. 226, 242, 340 P.3d 260 (2014).

[37] *Id.*

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the *amount* of that transfer payment remains undetermined. The analysis contained in the child support worksheet required to arrive at the 'the standard calculation' requires at least forty-four (44) discrete findings of fact, each involving varying evidentiary standards and each governed by varying latitude for discretion.[38]

Once the standard calculation is set, parties may seek a deviation from the standard calculation, which requires additional independent discretionary analysis specific to the deviation requested.

When a litigant requests to be designated as the primary parent and her request is granted, she likely becomes the recipient of child support and has no basis to request a residential credit deviation. The issue would have been resolved by the trial court's first discretionary decision. If, however, the trial court did not grant the request, it may still enter one of any four of the

[38] There may be more if there are issues related to imputation of income, disputed normal business expenses, or non-recurring or overtime income.

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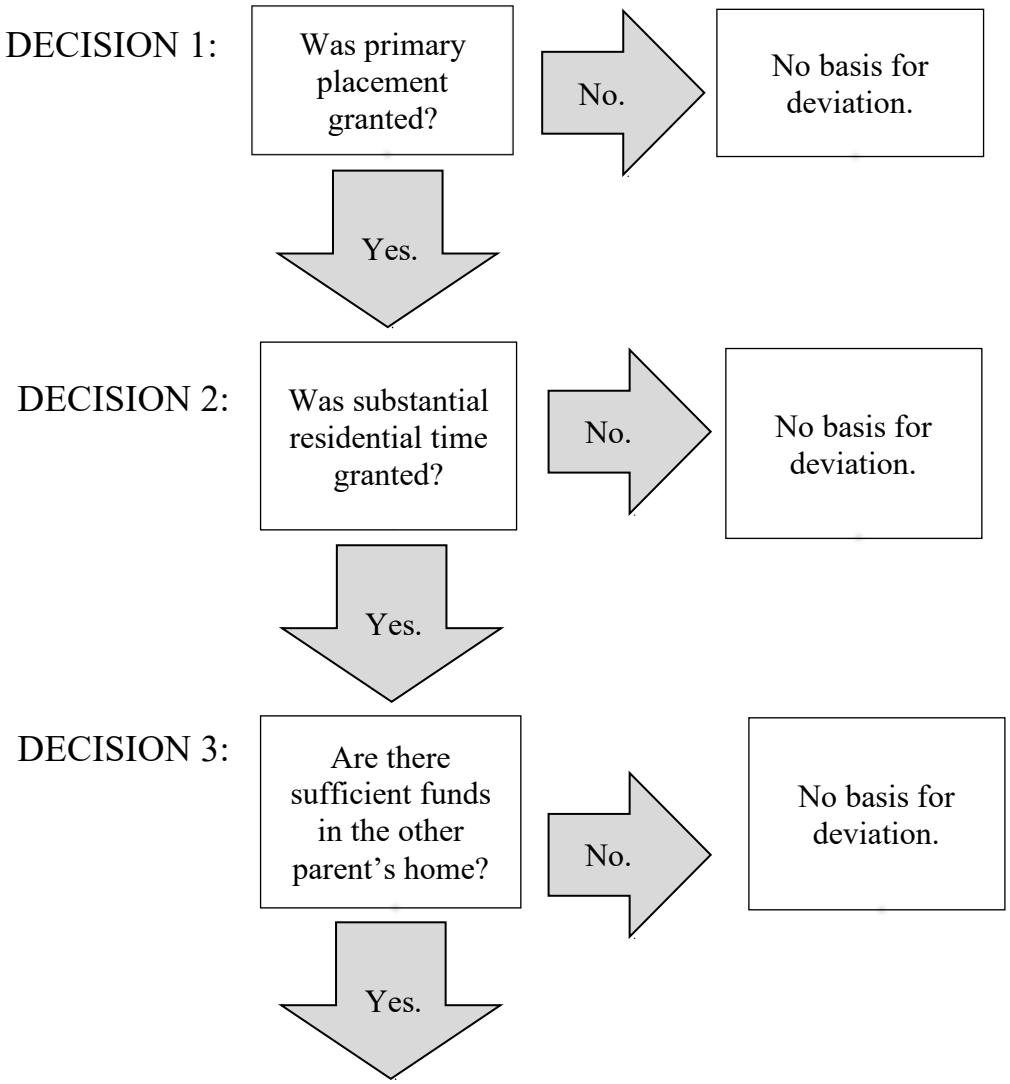
remaining residential schedules, each of which generates different opportunities for derivative requests. Prior to trial, a litigant has little ability to ascertain which, among the vast possible combination of variables involved, will govern the available relief.

With respect to residential credit, the analysis looks like this:



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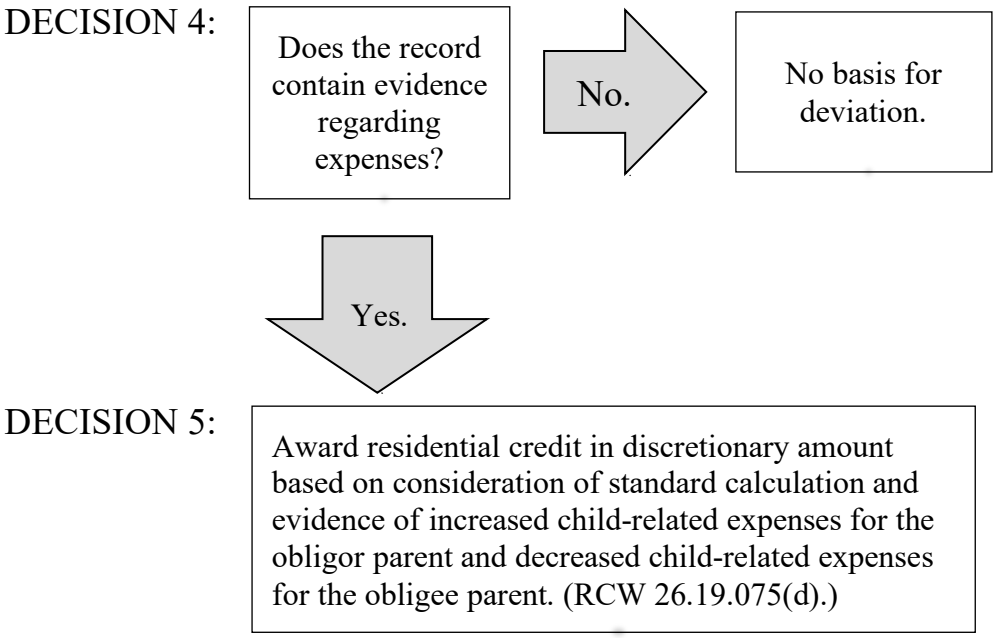

Where primary placement is at issue, as here, the analysis related to a deviation for residential credit arises after the determination of five discretionary decisions, and the analysis related to how the residential credit should be *calculated* once it is awarded depends on dozens of preceding findings of fact contributing to the standard calculation.

The complexity, therefore, of arguing all possible outcomes in the alternative *prior* to trial often represents an impossible task. That litigants are not expected to do this in order to preserve alternative and derivative requests is confirmed by the fact that

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the Washington state mandatory forms do not accommodate multiple requests in the alternative. Further, the *Joint Trial Management Report* used by Spokane County does not provide opportunity to make complex child support-related requests beyond the proposed child support worksheet.

This apparent difficulty is exacerbated even further in family law where the relevant facts that govern the parties' requests continue to evolve right up through the date of trial. As occurred in this case, a party who has been gainfully employed for years could become unemployed mere days before trial. This adds significant complexity because the trial court must then determine whether income must be imputed (based on whether the party is voluntarily unemployed or underemployed), and if so, the court must conduct an analysis to determine the amount of income to impute. The outcome depends largely on why the party became unemployed, and this evidence may not be known by all parties until the unemployed party testifies at trial.

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No party can reasonably articulate all potential alternative/derivative requests prior to trial. Further, no litigant can reasonably articulate complex alternative requests solely through their own testimony, especially when relevant evidence is contained in testimony that is ultimately presented after the party's own testimony.

The only method by which family law cases are routinely resolved at trial both fairly and efficiently is through permitting parties to argue the evidence in closing statements at the end of trial. This allows the parties to streamline the relevant requests in light of the evidence that was ultimately admitted and to explain which requests are primarily requested, and which alternative requests are made in the event that primary requests are denied, including any derivative requests. In argument, a party is able to quickly and succinctly sum up the evidence and requests in a manner that would be unacceptably burdensome or even impossible prior to trial.

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In this case, however, the court repeatedly denied the parties any opportunity to argue the evidence or make requests *in any way*. They were not permitted one minute of oral argument or one word of written argument.

Opportunity to Raise Issues in Presentation Papers: The *Opinion* says Ms. Detore had the opportunity to raise issues in her presentment papers, but such an opportunity is meaningless unless the court considers the request, which it explicitly did not.

Prejudice: As a result, Ms. Detore had no meaningful opportunity to request a residential credit deviation. Had the trial court actually considered the request, however, it is likely that some deviation for residential credit would have been granted.

The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment.[39] Ms. Detore

[39] RCW 26.19.075(d).

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exercises more than 45% of the residential time with the child, which is a significant amount.

The statute notes that a court may not deviate on the basis of residential credit if the deviation would result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families.[40] Ms. Vanderzanden was not receiving assistance, and, pursuant to the trial court's distribution of property, she received a $150,000 transfer payment from Ms. Detore and had $450,000 of her own separate property, in addition to her monthly income.[41]

"When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the

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[40] *Id.*
[41] RP 1388.

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support resulting from the significant amount of time the child spends with the parent making the support transfer payment."[42] The record was replete with evidence to confirm the expenses assumed by Ms. Detore. In addition to providing food, clothing, and shelter for the child 45% of the time, Ms. Detore testified to having to replace the child's clothing.[43] For the last four years, she scheduled, coordinated, and paid for birthday parties.[44] She pays for the child to engage in a wide variety of activities including hockey, skiing, swimming lessons, roller skating.[45]

The trial record supports a residential credit deviation. If her attorney had been permitted to argue at trial, Ms. Detore would likely have received residential credit.

VI. CONCLUSION

The *Opinion* of the Court of Appeals addressed a significant question of law under the Constitution of the State of Washington

[42] RCW 26.19.075(d).
[43] RP 1115-16.
[44] RP 1039-40.
[45] E.g., RP 1055-56, 1080, 1098.

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or of the United States pursuant to RAP 13.4(b)(3), when it concluded that no due process violation occurred when a trial court denied litigants *any* opportunity to provide oral argument or to make requests 'at trial' and subsequently denied requests without consideration for not having been made 'at trial.'

Petitioner therefore respectfully requests that this Court accept discretionary review of this matter.

The undersigned certifies that the foregoing brief contains 3,708 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

RESPECTFULLY submitted this 25th day of October, 2021:

s/Julie C. Watts
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CERTIFICATE OF ATTORNEY

I certify that on October 25, 2021, I arranged for delivery of a copy of the foregoing PETITION FOR REVIEW to the following:

Kenneth H. Kato Attorney at Law 1020 N. Washington St. Spokane, WA 99201	X Via Hand Delivery X Via Email

s/Julie C. Watts
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Appendix A

FILED
AUGUST 24, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re the Domestic Partnership of:	)	No. 37323-1-III
	)	
TAMMY VANDERZANDEN,	)	
	)	
Respondent,	)	
	)	UNPUBLISHED OPINION
and	)	
	)	
MIRANDA DETORE,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Miranda Detore appeals the trial court's property division and child support orders following the termination of her domestic partnership with Tammy Vanderzanden. We affirm.

FACTS

Miranda Detore and Tammy Vanderzanden met in 2010 and in 2012 entered into a committed intimate relationship. In March 2013, they registered as domestic partners in Oregon and had a child together that year. The relationship ended in April 2017.

Their dissolution trial lasted six days. Eleven witnesses were called in addition to the parties. On direct examination, Detore explained that she and Vanderzanden had one

joint bank account together, but otherwise did not add one another to their separate accounts. The following exchange took place:

> [DETORE'S COUNSEL:] From the time you got together in 2010 through . . . April of 2017, did you generally keep separate accounts?
> [DETORE:] Yes.
> [DETORE'S COUNSEL:] Okay. And why? I mean, how did you guys end up working that out?
> [DETORE:] We just agreed to keep our finances separate.

Report of Proceedings (RP) at 1017.

Throughout trial, Detore's counsel repeatedly requested to engage in closing arguments. On the fifth day of trial, after discussing the parties' 401(k)s, the following exchange took place:

> [DETORE'S COUNSEL]: So maybe we will need to summarize that for you in closing at least and give you a roadmap.
> THE COURT: I'm not sure you're going to get to closing. You're running out of time . . . and I'm guessing you're just not going to have a closing, but we will see.

RP at 1151. Shortly thereafter, counsel again brought up closing:

> [DETORE'S COUNSEL]: What's your thoughts on closing while we have a few minutes?
> THE COURT: We're probably not getting to closing. I will be using what I have. You've briefed this, so I'm not sure there's anything more you need to tell me.
> [DETORE'S COUNSEL]: Are you going to indulge written closings from us then?
> THE COURT: No. The vast amount of things that I have to read, I don't really need to add that, because as you can see, you've handed me

> these agreed binders. While you've referred to some of them, I do have to go through those. So I would rather spend my time going through your exhibits so I can know what the evidence is versus what argument is, and then the briefing with regard to the legal issues, which is, at least I'm hoping you have them.
>
> [DETORE'S COUNSEL]: Okay. You know, I understand you don't want to hear a long closing. There was a couple of points I wanted to draw out. If we run where we have some time, can we allocate 15 minutes to make a couple of points for counsel?
>
> THE COURT: We will see how we do. I'm not going to promise anything. . . .

RP at 1158-59. Later that day, prior to the lunch recess, counsel again raised the issue:

> [DETORE'S COUNSEL]: Can I ask you this: I'm really hoping to reserve, whether I have to cut my cross short or what—or my redirect, a few minutes for a closing argument. Are you going to entertain that as long as we cut that short?
>
> THE COURT: It depends upon where we are in the day.

RP at 1251. The following day, counsel asked:

> [DETORE'S COUNSEL]: Can inquire, if I keep my redirect to five minutes, can I have five minutes for closing?
>
> THE COURT: There will be no close with regards to this. I just need you to ask your questions.
>
> [DETORE'S COUNSEL]: We're not going to do a closing then?
>
> THE COURT: We're not.

RP at 1338.

At the close of testimony, while the parties discussed presentation, the following exchange took place:

> [DETORE'S COUNSEL]: Can I make one request? I know you've told me no on a written closing and I'm not going to ask to drop a lot of stuff on you and I respect your ruling on the closing argument, too. Can I produce a bullet point that would be less than two pages? No reading, just a few bullet points that I would ask the court to consider, no argument.
>
> THE COURT: If you can do a bullet point in two pages, I will accept that. Mr. Cronin, you may also do a bullet point in two pages.
>
> . . . .
>
> . . . I have your trial briefs, so I'm assuming most of what I need from [you] position-wise is going to be in the trial briefs, and then the joint trial management with the outlines of costs.
>
> [DETORE'S COUNSEL]: It would be just a few bullet points for the Court's consideration and no argument.
>
> THE COURT: The other thing that I would ask you to put in that bullet point . . . is a specific as to what the vast number of exhibits that I have might be most important to you . . . .
>
> [DETORE'S COUNSEL]: Understand. Thank you.

RP at 1356-57. The court asked that the bullet points be submitted by October 18 and scheduled November 1, 2019, for its oral ruling.

On November 3, 2019, Detore's counsel sent a letter to the court asking for clarification on the final child support order. The letter, which Vanderzanden's counsel also received, stated in part:

> During your oral ruling on November 1, 2019, you provided us with each party's income determinations and instructed that we are to calculate the transfer payment. A question has arisen as I have started the process of making these calculations. I am raising this issue in advance of presentment given your instructions at the oral ruling that presentment is to occur without oral argument.

> You have ordered a 8/6 parenting plan with all school breaks shared equally. . . . Ms. Vanderzanden will have only approximately 18 days more days of residential time per year than Ms. Detore. . . . Under this scenario are you granting a residential credit to Ms. Detore, and if so, how much?
>
> Thank you for your consideration of this question. I have tried to present it in a non-argumentative manner.

Clerk's Papers (CP) at 175.

On November 21, 2019, Detore hired Julie C. Watts as new counsel. On November 27, Detore's trial counsel withdrew and Ms. Watts substituted as counsel of record. Vanderzanden's counsel sent Ms. Watts the proposed orders on December 2, with a presentation date of December 6. On December 3, Ms. Watts called Vanderzanden's counsel to discuss a continuance of the presentation, but opposing counsel would not agree. Ms. Watts received the transcript of the oral ruling on December 3 and received former counsel's client file on December 4.

On December 5, 2019, Ms. Watts moved for a continuance of the December 6 presentation. In her motion, she argued that CR 52 required a party to be served with copies of the proposed findings, conclusions and order at least five days before presentment pursuant to CR 52.

On December 6, 2019, the court granted Detore's request to continue presentation to December 9. The order stated Detore must submit her proposed orders by 8:30 a.m. on

December 9. The court already had Vanderzanden's proposed orders and noted it would elect which set to sign.

On December 9, 2019, Detore submitted objections to Vanderzanden's proposed orders. She argued that the residential schedule provided Vanderzanden 54 to 55 percent of the parenting time and Detore 45 to 46 percent of the parenting time, which was a "substantially shared residential schedule" by statute.[1] *See* RCW 26.09.525. She requested the court clarify its finding that Vanderzanden is the "primary parent" in light of the statutory definition. CP at 77. She also requested the court address a deviation in child support considering the substantially shared schedule and proposed Detore pay $390 per month to Vanderzanden instead of the standard calculation.

On December 23, 2019, the court entered its findings and conclusions. The parenting plan granted joint decision-making authority and scheduled residential time primarily with Vanderzanden. After analyzing the statutory criteria and entering thorough written findings, the court determined that Vanderzanden was the "primary parent." CP at 77.

Using the standard child support calculation, the court determined that Detore's support obligation would be $985.80, and Vanderzanden's would be $339.20. Under

[1] CP at 162.

"Other Factors For Consideration" in the child support worksheets, the court noted: "The court has not ordered a deviation as no deviation was requested at the time of trial." CP at 52. The final child support order provided: "The monthly child support amount ordered . . . is the same as the standard calculation listed . . . because no one asked for a deviation from the standard calculation, at the time of trial. No evidence presented to make required findings." CP at 56. The last sentence was handwritten and initialed by the court. The court ordered Detore to pay $985.00 per month in child support.

Property division

The parties stipulated to all property values. The court awarded each party her own separate assets and liabilities. Detore's separate property was valued at $2.2 million and Vanderzanden's separate property was valued at $450,000. The court found the only community-like assets and liabilities were related to the parties' Montana property. That property was purchased by Detore during the relationship, who later quit claimed it to Vanderzanden. The court explained:

> I do believe there is an equalization payment owed by Ms. Detore to Ms. Vanderzanden because I'm awarding the Montana property to Ms. Detore. I am making the equalization payment based on the value of the Montana property, the mortgage on the Montana property, the student loan payments, as well as payments to the property by Ms. Vanderzanden's parents. And the equalization payment, in essence, is more equitable than equal. The payment is a $150,000 dollar equalization payment plus interest at 12%.

CP at 81.

> Regarding Vanderzanden's 401(k), the court found:
>
> The value at the time of trial was $251,944. This is an asset owned by Ms. Vanderzanden prior to any relationship with Ms. Detore. There is certainly separate property interest in the 401(k). There also may be a community or community-like interest from March 9, 2013 through December 31, 2014 when Ms. Vanderzanden made no further contributions.
>
> However, the Court has no evidence of a community or community like portion of this 401(k) if any. There was nothing offered to the Court to distinguish what such a portion would comprise. The Court lacks any ability to split out a community or community like portion. The Court awards the Stimson 401(k) to Ms. Vanderzanden with no ability to assess what a community and/or community-like portion, if any, might be.

CP at 80. In its incorporated oral ruling, the court noted:

> I can make a finding that it is both a separate and a community asset to a certain extent, and what the total value is, I'm awarding that to Ms. Vanderzanden on her side of the equation, but don't have to ability to assess what the community-like portion might be, although, I do have that in mind when we get to the bottom line.

RP at 1386.

> The court then addressed Detore's student loans:
>
> What was not referenced is the student loans of Ms. Detore. It's possible that some of Ms. Detore's student loans are a community or community like debt based upon when the loan(s) was/were incurred. However, the Court lacks any of [sic] information. The loan(s) potentially could be mixed separate and community. Again, the loan(s) could be all or both. The balances on the student loan(s), whatever the balance(s) are Ms. Detore's debt.

CP at 81. Vanderzanden's parents were owed debts including approximately $23,000 in Detore's student loans, which they paid directly to the creditor.

Finally, the court addressed attorney fees:

> At this point in time, these parties have spent an extraordinary amount in attorney's fees. However, each party shall pay her own attorney's fees and costs. The court is well aware of the financial standings in making this decision.

CP at 83. The court denied any maintenance.

Detore appeals.

ANALYSIS

DISTRIBUTION OF 401(k) AND STUDENT LOANS

In a heading in her opening brief, Detore contends the trial court erred in failing to equitably distribute Vanderzanden's 401(k) and her own student loans. We address each issue in turn.

Vanderzanden's 401(k)

Detore first argues the trial court erred in failing to determine the community-like interest in Vanderzanden's 401(k). She then argues that because Vanderzanden had access to those records and failed to provide sufficient information to make a valuation, the court should have resolved the issue against Vanderzanden. We disagree.

We first address Vanderzanden's argument that Detore failed to preserve this error. We review only those findings of fact that the appellant assigns error to and unchallenged findings are verities on appeal. *In re Marriage of Drlik*, 121 Wn. App. 269, 275, 87 P.3d 1192 (2004). Here, the trial court found that (1) the 401(k)'s value is $251,944, (2) it was owned by Vanderzanden prior to the relationship, (3) there is a separate property interest in it, and (4) "[t]here also may be a community or community-like interest." CP at 80. However, the parties failed to provide enough information to distinguish the community portion, so the court awarded the full value to Vanderzanden because it had "no ability to assess what a community and/or community-like portion, if any, might be." CP at 80.

Detore assigned error to the trial court's failure to determine the value of the community-like interest. She also assigned error to the trial court's failure to construe the uncertainty against the party who had access to the record. Because she did assign error to these findings, we proceed to address the merits of her argument.

In dissolution proceedings, a trial court must make a just and equitable distribution of the parties' assets and liabilities based on factors provided by RCW 26.09.080. *In re Marriage of Larson*, 178 Wn. App. 133, 137, 313 P.3d 1228 (2013). We review the distribution and valuation of property for abuse of discretion. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). A court abuses its discretion if its decision is

manifestly unreasonable or based on untenable grounds. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014).

In distributing property at the end of an equity relationship, courts may characterize the property as community or separate by analogy to marital property. *In re Meretricious Relationship of Long & Fregeau*, 158 Wn. App. 919, 929, 244 P.3d 26 (2010) (citing *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995)). Separate property is that which was owned prior to marriage or acquired afterward by gift, bequest, devise, descent, or inheritance. RCW 26.16.010. Community property is all nonseparate property acquired after marriage by either spouse. RCW 26.16.030.

Here, the trial court determined Vanderzanden's 401(k) was worth $251,944, it was separate property because it was owned prior to the relationship, and noted there may be a community-like interest between March 2013 and December 2014, at which time Vanderzanden stopped making contributions.

The right of domestic partners in their separate property is "'as sacred as is the right in their community property'" and we presume it maintains that character "'until some direct and positive evidence to the contrary is made to appear.'" *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009) (quoting *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911)). We presume any increase in value of separate property is

likewise separate in nature. *Meretricious Relationship of Long*, 158 Wn. App. at 929. That presumption may be overcome with "'direct and positive evidence that the increase in value of separate property is attributable to community labor or funds,'" in which case "'the community may be equitably entitled to reimbursement for [those] contributions.'" *Id.* (quoting *In re Marriage of Lindemann*, 92 Wn. App. 64, 70, 960 P.2d 966 (1998)).

Detore failed to provide any evidence of community contributions between March 2013 and December 2014. This prevented the trial court from determining what increase in Vanderzanden's 401(k) was attributable to community contributions. In essence, Detore's failure to provide evidence amounted to a failure to rebut the presumption that an increase in separate property value is separate property.

Detore argues that Vanderzanden, as the owner of the 401(k), was in the best position to present evidence of what contributions were made between March 2013 and December 2014 and any failure of proof should be resolved against Vanderzanden. We disagree for two reasons.

First, the presumption that an increase in separate property value is separate property derives itself from Washington Supreme Court authority. *See In re Marriage of Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982). We have no authority to set aside Supreme Court authority. Second, Vanderzanden's 401(k) records were available to

Detore through discovery, so we see no reason to resolve this failure of proof against Vanderzanden.

Detore's student loans

Although the heading in Detore's opening brief mentions her student loans, nowhere in her argument section does she discuss this issue. An appellant's opening brief must contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Because Detore failed to adequately argue this issue, she waived this claim. *See Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845, 347 P.3d 487 (2015).

DUE PROCESS VIOLATION

Detore next contends the trial court's refusal to permit closing argument denied her due process. Specifically, she argues she would have requested a residential credit deviation in child support that would have likely been granted had she been permitted to present closing argument. We disagree.

The Fourteenth Amendment to the United States Constitution prohibits states from depriving any person of life, liberty, or property without due process of law. *Goss v. Lopez*, 419 U.S. 565, 572, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). "The essence of due

process is that a party in jeopardy of losing a constitutionally protected interest be given a meaningful opportunity to be heard." *Gourley v. Gourley*, 158 Wn.2d 460, 474, 145 P.3d 1185 (2006) (Quinn-Brintnall, J., concurring). The hearing required must be one that is "'appropriate to the nature of the case.'" *Id.* (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 848, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977)). Unlike many other legal rules, due process is flexible, calling for protections suited for each particular situation. *Id.* at 474-75.

The property interests protected by procedural due process are created and defined by independent sources, such as state law. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). We review alleged constitutional errors de novo. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

The Sixth Amendment protects a criminal defendant's right to present a closing argument to the jury, although the trial court has broad discretion to limit its duration. *Herring v. New York*, 422 U.S. 853, 856-58, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). But this was not a criminal trial. No categorical due process right to oral argument exists in civil or domestic relations cases. *See In re Dependency of R.L.*, 123 Wn. App. 215, 222, 98 P.3d 75 (2004). And Detore cites no general or local rule that would have required the trial court to allow closing arguments.

We disagree that Detore was deprived of a meaningful opportunity to be heard. The trial lasted six days, several witnesses testified, and Detore was able to emphasize whatever points she wished through these witnesses. Also, Detore was afforded the opportunity to raise issues in her presentation papers and in fact she did. This appeal provided her an additional ability to raise these issues.

Moreover, the issues she raises on appeal would not have been mitigated by allowing closing arguments. With respect to Vanderzanden's 401(k), the issue was decided against Detore because she failed to present evidence. One may not present evidence in closing arguments.

With respect to the child support deviation, Detore argued this issue in her presentation papers. The trial court ruled that it would not consider a deviation because it was not earlier requested. But given that neither party requested a shared residential schedule, the trial court probably should have allowed the issue to be raised late. Nevertheless, a trial court has discretion to deny a deviation and this one surely would have. If the trial court had any interest in granting a deviation, it would have asked Vanderzanden to address the issue. Its decision not to ask for a response signals that it would have denied a deviation anyway, likely because Detore had $2.2 million of separate

property. Allowing closing arguments would not have changed this fact. We conclude there was no due process violation.

CONTINUANCE FOR PRESENTATION

Detore contends the trial court's judgment is invalid because her counsel was not afforded five days' notice of the findings and conclusions before presentation, as required by CR 52 and CR 54. We disagree.

CR 52(c) (findings and conclusions) and CR 54(f)(2) (orders and judgments) generally prohibit final pleadings from being signed or entered unless opposing counsel is served with a copy of the proposed pleadings at least five days before presentation. Failure to comply with CR 54(f)(2)'s notice requirement renders the judgment invalid unless no prejudice resulted. *See Burton v. Ascol*, 105 Wn.2d 344, 352, 715 P.2d 110 (1986) (where a party was allowed to appeal issues it wished to raise, no prejudice resulted from defective notice); *City of Spokane v. Landgren*, noted at 127 Wn. App. 1001 (2005) (where city received copies of the first orders, had adequate time to plan and file notice for review, and knew judge's practices, no prejudice resulted).

Detore received proposed orders from opposing counsel on December 2, 2019. The trial court granted Detore's requested continuance of the December 6 presentation to

December 9. This provided Detore adequate notice under the rule. The judgment therefore is not invalid.

Detore also argues she was prejudiced by the court's failure to grant a longer continuance because her new counsel had insufficient time to grapple with the finer property distribution issues. But it was Detore's decision to change counsel after trial and before presentation, which caused this problem. Our review of the record shows that her new counsel performed very well, despite significant time constraints. We doubt the results would have been different had a longer continuance been granted.

ATTORNEY FEES

Vanderzanden asks this court to award her attorney fees on appeal. We decline.

RCW 26.09.140 provides: "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." In determining whether a fee award is appropriate, we consider the financial resources of the parties and the merits of the issues raised on appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 670, 50 P.3d 298 (2002).

The trial court ordered each party to pay her own fees. Its refusal to order payment of fees was based on each party's financial strength. For the same reason and because the appeal has sufficient merit, we decline to award attorney fees.[2]

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Staab, J.

[2] Detore filed a financial declaration two months after the case was considered on the merits. We do not consider this declaration to be a request for an award of attorney fees on appeal. Such a request must be explicit in the opening brief and timely. RAP 18.1(b), (c). Detore did not comply with either requirement.

Appendix B

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division III

Court of Appeals No. **373231**

In re:

MIRANDA DETORE,

Petitioner,

and

TAMMY VANDERZANDEN,

Respondent.

MOTION FOR RECONSIDERATION

JULIE C. WATTS/WSBA #43729
Attorney for Respondent
The Law Office of Julie C. Watts, PLLC
505 W. Riverside Ave., Suite 210
Spokane, WA 99201
(509) 207-7615

I. IDENTITY OF MOVING PARTY:

Appellant, Miranda Detore, is the moving party.

II. STATEMENT OF RELIEF SOUGHT:

Appellant respectfully requests reconsideration of this Court's opinion filed on August 24, 2021.

III. FACTS RELEVANT TO MOTION

In its opinion this Court ruled:

> With respect to the child support deviation, Detore argued this issue in her presentation papers. The trial court ruled that it would not consider a deviation because it was not earlier requested. But given that neither party requested a shared residential schedule, the trial court probably should have allowed the issue to be raised late. Nevertheless, a trial court has discretion to deny a deviation and this one surely would have. If the trial court had any interest in granting a deviation, it would have asked Vanderzanden to address the issue. Its decision not to ask for a response signals that it would have denied a deviation anyway, likely because Detore had $2.2 million of separate property. Allowing closing arguments would not have changed this fact. We conclude that there was no due process violation.

IV. GROUNDS FOR RELIEF AND ARGUMENT

While a trial court may have discretion to grant or deny a request on the merits, it does not have the same discretion to refuse to consider a request. There is an important difference between a substantive decision on the merits of a request and a procedural decision to refuse consideration of a request.

This Court is correct that the decision to grant or deny a request for the deviation of child support on the merits is subject to an abuse of discretion standard and that a trial court is entitled to exercise discretion in *making its decision*; however, the issue that is being raised on appeal is that the trial court did not exercise any discretion on the merits of the request because it refused to even consider it.

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This Court cannot review a decision for abuse of discretion when the underlying court has categorically declined to make any decision. The fact that a decision is subject to an abuse of discretion standard does not entitle courts to refuse to *hear* requests simply because they may be free to deny them. Parties are entitled to have proper requests considered and to receive a ruling on the record, and parties are entitled to appeal as a matter of right and have the trial court's findings reviewed for substantial evidence and its conclusions reviewed for compliance with the standards of Washington law. This Court cannot review the trial court's findings or conclusions with respect to Ms. Detore's request for a residential credit deviation because no decision was ever made on her request.

While it may be reasonable to assume that the court's decision not to ask for a response signals that it would have denied the deviation on the merits anyway, it *cannot* be assumed that it would have denied the request *properly* without abusing its discretion. It would defeat the purpose of having review as a matter of right if, when a party complains that a request was unlawfully dismissed without consideration, this Court simply *assumes* that the decision would have been made properly had it been considered. Washington law does not assume that trial court decisions are correct just because they are discretionary, which is why such decisions are reviewable by this Court for abuse of discretion. If such an assumption were available, it would obviate the need for any appellate review at all with respect to *any* discretionary decisions, no matter how unjust the outcome.

While this Court can and frequently does affirm a trial court's substantive decision on any basis that exists in the record, there is no Washington law to support the conclusion that it can *assume* a decision *would have been* made properly when the decision undisputedly never occurred. Here, the trial court did not make any decision on the merits,

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so this court cannot review its decision on the merits. It is an oft-repeated tenet of appellate jurisprudence that a reviewing court will not substitute its judgment for that of the trial court, particularly when it comes to discretionary matters; therefore, if this Court decides that the request ought to have been considered, then it is the trial court that must be directed to consider it. The exercise of the trial court's discretion cannot be assumed by this Court on appeal.

As the opinion confirms, this Court *did* conclude that the request ought to have considered when it said: "given that neither party requested a shared residential schedule, the trial court probably should have allowed the issue to be raised late." This is correct. There is no basis in Washington law that authorizes a trial court to actively prevent a party from making *any* request at trial and then to subsequently deny a request for not having been made at trial; therefore, the appropriate remedy is to remand the request back to the trial court to exercise its discretion and grant or deny the request on the merits.

RESPECTFULLY SUBMITTED this 10th day of September, 2021.

s/Julie C. Watts
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CERTIFICATE OF ATTORNEY

I certify that on September 10, 2021, I arranged for delivery of a copy of the foregoing MOTION FOR RECONSIDERATION to the following:

Kenneth H. Kato Attorney at Law 1020 N. Washington St. Spokane, WA 99201	__X__ Via US Mail __X__ Via Email

s/Julie C. Watts
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THE LAW OFFICE OF JULIE C. WATTS, PLLC

September 10, 2021 - 1:27 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37323-1
Appellate Court Case Title:	In re: Tammy Vanderzanden and Miranda Detore
Superior Court Case Number:	17-3-00772-1

The following documents have been uploaded:

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Appendix C

FILED
SEPTEMBER 23, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re the Domestic Partnership of:	)	**No. 37323-1-III**
	)	
TAMMY VANDERZANDEN,	)	
	)	
Respondent,	)	**ORDER DENYING**
	)	**MOTION FOR**
and	)	**RECONSIDERATION**
	)	
MIRANDA DETORE,	)	
	)	
Appellant.	)	

Having considered appellant's motion for reconsideration of this court's opinion filed on August 24, 2021,

IT IS ORDERED the motion for reconsideration is denied.

PANEL: Judges Lawrence-Berrey, Pennell, and Staab

FOR THE COURT:

REBECCA PENNELL
Chief Judge

THE LAW OFFICE OF JULIE C. WATTS, PLLC

October 25, 2021 - 3:46 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	In re: Tammy Vanderzanden and Miranda Detore (373231)

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