Supreme Court No. _____
Court of Appeals No. 49229-6-II

Supreme Court
of the State of Washington

In re Marriage of Ingersoll,

John Patrick Ingersoll,

Petitioner,

v.

Tomi Lee Ingersoll,

Respondent.

Petition for Review

Kevin Hochhalter
Attorney for Petitioner

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com
WSBA # 43124

Table of Contents

Table of Authorities

Cases

Statutes

Rules

1. Identity of Petitioner

John Ingersoll, Appellant, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

In re Marriage of Ingersoll, No. 49229-6-II (October 17, 2017, reconsideration and publication denied December 5, 2017) (unpublished). A copy of the decision is included in the Appendix at pages 1-15.

3. Issues Presented for Review

1. A trial court may impose restrictions on a parent under RCW 26.09.191 only if the court makes specific findings of harm to the children. The trial court entered a generic finding that John had an alcohol problem "that gets in the way of his/her ability to parent." There was no evidence that John's pre-separation alcohol issues would resurface to cause any harm to the children. Did the trial court abuse its discretion in imposing restrictions under RCW 26.09.191 without specific findings of harm?

2. A trial court must limit a parent's residential time and decision making authority if the parent has a history of domestic violence. The trial court found that Tomi's past acts of domestic violence toward John did not constitute a "history" under RCW 26.09.191. Did the trial court err in this finding and abuse its discretion in designating Tomi the primary residential parent and not limiting her residential time and decision making authority?

4. Statement of the Case

John and Tomi Ingersoll were married in 2000.[1] 1 RP 27. They separated in May 2012.[2] The trial for their divorce was held four years later in May 2016.

4.1 There was no evidence that John's past drinking problems would be harmful to the children.

At trial, John freely admitted to having inappropriately used alcohol in the past, and particularly as an escape from work stressors and spousal conflicts with Tomi leading up to their separation. 1 RP 70-72. But John enrolled himself in a group alcohol treatment program at the VA in 2015. 1 RP 98-99, 3 RP 590. During the group treatment, John successfully reduced his alcohol consumption from 12 drinks per week to 0-2 drinks per week. 3 RP 448-49. John then completed a 12-week individual alcohol treatment program and moved on to individual, general counseling that helped him learn coping mechanisms other than drinking. 1 RP 100-02, 3 RP 592.

---

[1] For clarity, this brief will refer to the parties by their first names. No disrespect is intended.

[2] On May 25, 2012, without any notice or explanation to John, Tomi took the children, left the marital home, and moved into a shelter. 1 RP 54, 59-60, 118-24, 4 RP 696. Tomi petitioned for dissolution in June 2012. 1 RP 157. Then, without notice to John or to the court, Tomi moved with the children to Alaska. 1 RP 127-29, 3 RP 606, 4 RP 652. The recitation of facts in the Court of Appeals Opinion creates a false impression that Tomi was already in Alaska before she petitioned for divorce. *See* App. 2. This is incorrect.

At trial, the Guardian Ad Litem recommended ongoing alcohol treatment, based on three-year old reports that reflected John's **pre-separation** issues with alcohol abuse. 3 RP 446, 448, 450. However, witnesses to John's **post-separation** visits with the children testified that John was never intoxicated when the children were around. 4 RP 734, 736; 5 RP 870. The GAL even acknowledged that John had reduced his alcohol consumption since the separation. 3 RP 448-49. He further testified that the information he relied on did not support a finding that John's parenting would be harmful to the children. 3 RP 515-16.

4.2 There was undisputed evidence of Tomi's history of domestic violence toward John.

John and Tomi's testimony at trial about domestic violence incidents varied in many respects, but certain key facts were undisputed. First was an incident involving a kitchen knife. Both parties testified that during an argument, Tomi grabbed one or two kitchen knives and threatened to kill John while he was holding their infant child. 1 RP 210-11 (Tomi's testimony), 3 RP 573-74 (John's testimony). Tomi realized she was out of control and put the knives down and left the house. 1 RP 211 (Tomi), 3 RP 574 (John). The police were called. 1 RP 212 (Tomi), 3 RP 575 (John). Tomi was arrested. 1 RP 212 (Tomi), 3 RP 575-76 (John).

Next was an incident in the bathroom. Both parties testified that Tomi was angry that John was showering alone. 1 RP 206 (Tomi), 3 RP 577 (John). Tomi kicked in the bathroom door. *Id.* Tomi punched John's chest. 1 RP 207 (Tomi), 3 RP 577 (John). John grabbed Tomi's arms. *Id.*

The third was the strangling incident. Here, the accounts diverged, but Tomi did not have a credible explanation for how three of four witnesses saw her grab John's throat and strangle him for two or three seconds. *Compare* 1 RP 208 (Tomi's testimony) *with* 3 RP 579 (John's testimony), 5 RP 858 (Howard Ingersoll), 6 RP 942 (Louise Ingersoll). Tomi did not call the fifth eyewitness to the incident, her brother, to testify on her behalf.

4.3 The trial court placed conditions on John under RCW 26.09.191 and found Tomi did not have a history of domestic violence.

The trial court noted that it could not accept Tomi's testimony about domestic violence because "she's smiling and laughing while she's trying to tell me that she's afraid." 6 RP 1024. The trial court noted that the first guardian ad litem made a similar observation in 2013:

> In our first interview, when Tomi described John's behavior to me, she used the word "afraid," however her voice did not match her words; *i.e.,* I did not detect fear in her voice. When we spoke face to face concerning John, I did not see fear in her demeanor or verbiage when speaking of John. She

was very matter of fact in her descriptions and not at all like someone who is afraid.

6 RP 1035.

Nevertheless, the trial court entered the following findings regarding limitations under RCW 26.09.191:

> 3. **Reasons for putting limitations on a parent** (under RCW 26.09.191)
>
> a. **Abandonment, neglect, child abuse, domestic violence, assault, or sex offense.** …
>
> Neither parent has any of these problems requiring a limitation on parenting time.
>
> b. **Other problems** that may harm the children's best interests. …
>
> A parent has one or more of these problems as follows (check all that apply):
>
> **Substance Abuse** – (Parent's name): **John Ingersoll** has a long-term problem with drugs, alcohol, or other substances that gets in the way of his/her ability to parent.

CP 71-72 (bold and italic emphasis in original). The court also found, "John Ingersoll's long term problem with alcohol includes or influences behavior requiring psychological evaluation and treatment." CP 81-82.

In its oral ruling, the trial court stated, "Mr. Ingersoll, I think, clearly, by a preponderance of the evidence, if not by a greater burden, has an alcohol dependency issue, and we're going to impose a .191 factor and the recommendations with

respect to that." 6 RP 1036-37. The court did not say anything about how or whether it believed that John's alcohol use would interfere with John's parenting or cause likely harm to the children. The court noted that the testimony of Cathcart (GAL) and O'Connell (who supervised John's visits in the early stages) was all very positive about John's parenting. 6 RP 1038.

During a hearing on presentation of final orders, John objected to the court's finding in 3.b on the grounds that "the Court did not make a finding that any alcohol or drug use interfered with Mr. Ingersoll's parenting." RP, June 15, 2016, at 21. The trial court noted that it adopted the finding because it was the pattern language of the form used to justify the restrictions. RP, June 15, 2016, at 22.

4.4 The Court of Appeals affirmed the trial court.

On appeal, John argued that the trial court abused its discretion in imposing conditions on him under RCW 26.09.191(3)(c) without evidence or specific findings that his past alcohol issues would cause any future harm to the children. Br. of App. at 13-18. He argued that this Court's decision in *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014), required that a trial court must make specific findings of harm to a child before ordering restrictions on a parent under RCW 26.09.191(3). Br. of App. at 14-15; Reply Br. of App. at 2-6. The

trial court failed to make a specific finding, instead relying on vague boilerplate. Br. of App. at 16. John argued that even the boilerplate finding was not supported by substantial evidence where all of the evidence of alcohol problems was already years in the past by the time of trial and more current evidence showed that he had already received treatment, reformed, and did not drink around the children. Br. of App. at 17-18; Reply Br. of App. at 7-9; App. 21-23 (Motion for Reconsideration).

John also argued that the trial court abused its discretion when it failed to enter mandatory restrictions against Tomi under RCW 26.09.191(1) or (2)(a) for her undisputed history of domestic violence. Br. of App. at 20-22; Reply Br. of App. at 10-12. John emphasized that Tomi herself admitted to two incidents of domestic violence: 1) threatening to kill John with a kitchen knife during an argument and 2) pummeling John's chest after storming into the bathroom. Br. of App. at 21. Together, the two incidents (and a possible third: strangling John before fleeing a family gathering) constitute "a history of domestic violence" under the first prong of the statute. Individually, either of the two admitted incidents qualify as "assault … which causes grievous bodily harm or the fear of such harm," under the second prong of the statute. Br. of App. at 21. Where Tomi had admitted to these incidents, the trial court's finding of no domestic violence was not supported by substantial evidence.

In its Unpublished Opinion, the Court of Appeals affirmed the parenting plan entered by the trial court. App. 2. The court held that a restriction on parenting time under RCW 26.09.191(3)(c) does not need to be supported by a finding of specific harm to the children, reasoning that harm is inherent in "long-term alcohol abuse that interferes with parenting functions." App. 7. The court even stated that the language of this Court's opinion in *Chandola* was a mistake, concluding instead that specific findings of harm are only required under § 191(3)(g), not the other subsections of § 191(3). App. 6-7. The court found that evidence of John's pre-separation drinking problems supported a finding that John had a long-term problem with alcohol that interfered with parenting functions. App. 8-9.

The court found that unsubstantiated portions of Tomi's testimony were sufficient to convince a fair-minded person that her admitted acts did not constitute domestic violence or assault causing fear of grievous bodily harm. App. 11-12. Specifically, the court found that because Tomi testified that John laughed when she threatened him with the knife, John must not have been in fear of bodily harm. App. 11. And because Tomi testified that after she kicked in the bathroom door, John grabbed her and pushed her back to the bedroom, her punches were self-defense, not domestic violence. App. 11.

5. Argument

A petition for review should be accepted when the decision of the Court of Appeals is in conflict with a decision of this Court or when the case involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (4). First, the decision of the Court of Appeals on the alcohol issue conflicts with this Court's decision in *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014), in which this Court held that a trial court must make specific findings of harm to a child before ordering restrictions on a parent under RCW 26.09.191(3). Second, the decision of the Court of Appeals on the domestic violence issue reflects a systemic bias against men in family law matters, especially where allegations of domestic violence are involved. This is an issue of substantial public interest. This Court should accept review.

5.1 The Court of Appeals decision conflicts with this Court's decision in *Chandola*.

In *Chandola*, this Court stated, "we conclude that the legislature intended RCW 26.09.191(3) restrictions to apply only where necessary to 'protect the child from physical, mental, or emotional harm.'" *Chandola*, 180 Wn.2d at 648 (quoting RCW 26.09.002). "By requiring trial courts to identify specific harms to the *child* before ordering parenting plan restrictions, RCW 26.09.191(3) prevents arbitrary imposition of the court's

preferences." *Id.* at 655 (emphasis in original). Although the discussion in *Chandola* alternates between discussing subsection (3)(g) and the other subections of § 191(3), this Court's conclusions expressly referred to § 191(3) as a whole. This Court's holding in *Chandola* was straightforward: before imposing restrictions under any of the subsections of RCW 26.09.191(3), a trial court must find that the factor would cause specific harm to the child.

The Court of Appeals instead interpreted this Court's opinion in *Chandola* as "inadvertent[ly] omi[tting]" a reference to subsection (3)(g) in its conclusions. App. 7. However, where much of this Court's opinion **did** include the reference to (3)(g) when this Court was speaking specifically of that subsection, it is more reasonable to conclude that this Court knew what it was doing when it referred to § 191(3) as a whole, and not solely to (3)(g).

As this Court noted in *Chandola*, all of the subsections of RCW 26.09.191(3) are intended to protect children from harm. It is consistent with this legislative intent to require trial courts to make specific findings of harm when applying **any** of the § 191(3) factors. Surely this Court meant exactly what it said when it held that **all of § 191(3)**—not just § 191(3)(g)—requires trial courts to make findings of specific harm to a child before

imposing restrictions on a parent. The Court of Appeals' decision to the contrary conflicts with this Court's decision in *Chandola*.

In contrast, the Court of Appeals was more in line with this Court's reasoning when it decided *In re Marriage of Underwood*, 181 Wn. App. 608, 326 P.3d 793 (2014). In *Underwood*, the trial court had found that three of the statutory factors in § 191(3) were present. However, the Court of Appeals held that, due to legislative policy and constitutional interests in protecting a parent's residential time with children, a trial court cannot eliminate a parent's residential time without entering detailed findings articulating the specific reasons for the order. *Underwood*, 181 Wn. App. at 612-13. In other words, when applying **any of the § 191(3) factors,** the trial court must enter findings that specifically show how the order is tailored to prevent a specific harm to the child's physical, mental, or emotional health. The Court of Appeals' decision in this case backtracks from its earlier decision in *Underwood*, in conflict with this Court's decision in *Chandola*.

Even if the trial court's boilerplate finding could be sufficient to support imposition of restrictions, in this case it was not supported by substantial evidence. There was no evidence that, at the time of trial, John still had an impairment that interferes with the performance of parenting functions.

The testimony on which the Court of Appeals relied to find substantial evidence all related to alleged **pre-separation** behavior. The parties separated in 2012. The trial was four years later. John readily admitted at trial that his past behavior was unhealthy. 1 RP 70-72. But John had enrolled himself in a group alcohol treatment program in 2015. 1 RP 98-99, 3 RP 590. During the group treatment, John successfully reduced his alcohol consumption from 12 drinks per week to 0-2 drinks per week. 3 RP 448-49. John then completed a 12-week individual alcohol treatment program and moved on to individual, general counseling that helped him learn coping mechanisms other than drinking. 1 RP 100-02, 3 RP 592.

The Pierce County GAL, contrary to the Court of Appeals' characterization, did **not** testify that alcohol exacerbated problematic personality traits for John. That opinion came from a 2013 report by a Dr. Mays. 3 RP 447-48. The Mays report dealt primarily with alleged **pre-separation** conduct. *See, e.g.,* 3 RP 446. The Pierce County GAL testified at trial that alcohol can have that tendency for people in general, but did not appear to agree with Dr. Mays' assessment of John. 3 RP 447-48. The GAL acknowledged that John had received treatment and reduced his alcohol consumption since the time of the parties' separation four years earlier. 3 RP 448-49. Although he recommended that John complete his treatment and achieve zero consumption,

3 RP 450, he testified that any alcohol or psychological issues were "not serious enough to interfere with his unsupervised visitation with his children," 3 RP 453-54. That is, **he did not believe John had an alcohol problem that would interfere with his ability to parent.**

The GAL specifically testified that he did not believe that John's parenting would be harmful to the children. 3 RP 515-16. Witnesses to John's post-separation visits with the children were complimentary of his parenting and did not express any concern that alcohol would interfere with his ability to parent. 4 RP 734-37; 5 RP 870. **Not a single witness testified that as of the time of trial John had an alcohol problem that would interfere with his ability to parent.**

There was not sufficient evidence for a fair-minded person to conclude that John had an ongoing alcohol problem that would interfere with his ability to parent. Even if the trial court was not required to enter detailed findings of harm under *Chandola*, the boilerplate finding the trial court did enter was not supported by substantial evidence. The trial court's finding was in error. It abused its discretion in entering restrictions against John under RCW 26.09.191(3)(c). This Court should accept review to resolve the conflict and reverse the restrictions.

5.2 The trial court's failure to find a history of domestic violence despite Tomi's admissions is an issue of substantial public interest that should be addressed by this Court.

The trial court's failure to find a history of domestic violence (and the Court of Appeals' affirmation of that finding) reflects an impermissible, systemic bias against men when domestic violence is at issue. This systemic bias views men as natural aggressors and women as natural victims. The result is that men have a difficult time disproving allegations of domestic violence against themselves or proving their own allegations of domestic violence against a female spouse or partner. The same conduct that would be found as domestic violence if committed by a man is found not so when committed by a woman. The public has a substantial interest in eliminating this double standard from society and from the judicial system, in the interests of justice.

The double-standard can be illustrated by reversing the roles of the parties in this case. Imagine that John had been the one to threaten to kill Tomi with a kitchen knife while Tomi was holding the infant child. Surely any fair-minded person would conclude that this threat would inflict fear of imminent physical harm, bodily injury or assault on the victim. The conclusion should be no different just because the genders are reversed.

Even considering the unsubstantiated testimony relied on by the Court of Appeals, this thought experiment would result in

a finding of domestic violence if perpetrated by the man. Imagine that John had told Tomi that he was taking their daughter to visit relatives in California. Tomi then grabs the child and says that John cannot take her. John pulls a kitchen knife and threatens to kill Tomi. Tomi laughs.

Because of the double standard, we are inclined to see Tomi as seeking to protect her child in this reversed scenario. Counter to Tomi's protective role, John is seen as an unreasonable aggressor, threatening violence if he does not get what he wants. Tomi's laughter is interpreted as a fearful, nervous response (*e.g.,* "why are you doing this? I can't believe you would go this far. Please stop."). A fair-minded person would conclude that this was an act of domestic violence by John, if John had indeed been the perpetrator.

But John was not the perpetrator. Tomi was. Tomi threatened to kill John with a kitchen knife if she did not get her way. John sought to protect the infant child from Tomi's rage. John laughed nervously—fearful—when Tomi suddenly threatened such extreme violence. A fair-minded person—one free from the double standard—could only conclude that this was an act of domestic violence by Tomi.

Another thought exercise reaches the same result with the bathroom incident. This time, take gender out of the equation altogether. "A" initiates the violent encounter by

kicking in the bathroom door while "B" is taking a shower. "B" steps out of the shower. "A" punches "B" in the chest while "B" grabs "A"'s arms and pushes "A" out of the room.

Without any gender to bias our view, we easily see that "B" was acting in self-defense to "A"'s violent actions. It was "A" who initiated the violence by kicking in the door. It was "A" who punched. "B" was only trying to reduce the damage. A fair-minded person could only conclude that "A" committed an act of domestic violence against "B."

In this case, **Tomi** was "A." **Tomi** kicked in the door. **Tomi** threw the punches. John attempted to reduce the damage at Tomi's hands. A fair-minded person, free from the double-standard, could only conclude that Tomi was assaulting John, not the other way around.

Tomi admitted that she threatened to kill John with a kitchen knife. She admitted that she stormed into the bathroom to violently confront him and then "pummeled" his chest. There was no evidence from which a **fair-minded** person could conclude that Tomi did not have a history of domestic violence.

The fact that both the trial court and the Court of Appeals could not see Tomi as a perpetrator of domestic violence in these incidents is proof of the systemic double-standard. The way we view who is the aggressor and who is the victim in any domestic violence situation should not depend on the gender of the

parties. The public has a substantial interest in having this issue addressed by this Court. This Court should accept review and reverse the trial court's erroneous finding that Tomi did not have a history of domestic violence.

6. Conclusion

The decision of the Court of Appeals on the alcohol issue conflicts with this Court's decision in *Chandola*. The decision of the Court of Appeals on the domestic violence issue reveals a systemic double-standard that is a matter of substantial public interest that should be addressed by this Court. This Court should accept review and reverse the trial court and Court of Appeals.

This Court should reverse the § 191(3)(c) restrictions against John in Parts 4-5 and 8-11 and the unsupported findings of fact in Parts 3.a, 3.b and 16. This Court should remand to the trial court for entry of new findings supported by the evidence, for imposition of § 191(1) or (2)(a) restrictions against Tomi, for designation of John as primary residential parent, and for reconsideration of the Parenting Time Schedule.

Respectfully submitted this 4th day of January, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Petitioner
kevin@olympicappeals.com

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on January 4, 2018, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

John Charles Purbaugh
Northwest Justice Project
715 Tacoma Ave S
Tacoma, WA 98402
johnp@nwjustice.org
carolc@nwjustice.org

DATED this 4th day of January, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Filed
Washington State
Court of Appeals
Division Two

October 17, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: TOMI LEE INGERSOLL, Petitioner, v. JOHN PATRICK INGERSOLL, Respondent.	No. 49229-6-II UNPUBLISHED OPINION

MAXA, J. – John Ingersoll appeals the trial court's parenting plan entered in a dissolution action regarding his marriage to Tomi Ingersoll. The parenting plan designated Tomi[1] as the primary residential parent of John and Tomi's two children and placed limitations on John's contact with the children under RCW 26.09.191(3)(c) based on a finding that he had an alcohol problem that affected his ability to parent.

We hold that (1) the trial court was not required to make a detailed finding that John's alcohol problem would cause specific harm to the children to impose a limitation on his conduct under RCW 26.09.191(3)(c), (2) substantial evidence supported the trial court's finding that John's alcohol problem affected his ability to parent and warranted a limitation on his contact with the children, (3) substantial evidence supported the trial court's finding that Tomi did not

[1] To avoid confusion, first names are used to identify John and Tomi. No disrespect is intended.

have a history of acts of domestic violence, and (4) the trial court did not improperly base its designation of Tomi as the primary residential parent on her status as the primary residential parent in the temporary parenting plan.

Accordingly, we affirm the trial court's parenting plan.

FACTS

John and Tomi were married in 2000. During their marriage they had two children. By 2012, the marriage had deteriorated and the couple had several intense arguments. Once, Tomi threatened to kill herself with a knife and then threatened to kill John, although John just laughed at Tomi's threats. Another time Tomi kicked open the bathroom door during an argument and then repeatedly hit John's chest after he grabbed her. Witnesses also claimed that Tomi choked John at a family gathering, although she denied that she choked him. John once held his pistol to his head after an altercation with Tomi.

During this tumultuous time John was drinking regularly, which increased the conflicts. Tomi and John had gone to a group meeting for alcoholics and their affected family members, but the meetings became a point of contention. The frequent and violent fights frightened Tomi to the point that she feared for her life. She eventually got a friend's help to flee the house and she went with the children to a shelter. Following several short-term moves, Tomi moved with the children to live near her parents in Alaska.

Tomi filed a dissolution action in Grant County. The trial court in Grant County entered a temporary parenting plan that designated Tomi as the primary residential parent. A guardian ad litem (GAL) from Grant County met with John, Tomi, and the children on several occasions during 2012 and 2013. The GAL raised questions about the credibility of both John and Tomi in

his reports. Following a change of venue to Pierce County, a new GAL evaluated the family members and made written recommendations to the court.

After a bench trial, the trial court entered a permanent parenting plan that designated Tomi as the primary residential parent. In the parenting plan, the court found that John had a long-term problem with alcohol that "gets in the way of [his] ability to parent." Clerk's Papers (CP) at 72. The court also entered an additional finding that John's alcohol problem "includes or influences behavior requiring psychological evaluation and treatment." CP at 81-82. Based on these findings, the court placed limitations on John's conduct that included abstaining from alcohol, enrolling in a random urinalysis program, and enrolling in counseling therapy with a psychologist to address his alcohol dependence and other issues. The parenting plan stated that John's parenting time would be suspended if he did not comply with the court's limitations.

The parenting plan also included the court's finding that neither parent had a problem with domestic violence requiring a mandatory limitation on parenting time.

John appeals the trial court's parenting plan.

ANALYSIS

A. PARENTING PLAN PROVISIONS

A trial court has broad discretion in developing a parenting plan. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). This discretion is guided by (1) RCW 26.09.184, which states the objectives of a parenting plan and identifies the required provisions; (2) RCW 26.09.187(3)(a), which lists seven factors that the court must consider when adopting residential provisions; and (3) RCW 26.09.002, which declares that the best interests of the child is the standard for determining parental responsibilities. *See Katare*, 175 Wn.2d at 35-36. In

addition, the trial court's discretion is guided by RCW 26.09.191, which provides certain factors that *require* limitations on a parent's residential time (subsection (2)) and *permit* limitations on parenting plan provisions (subsection (3)). *See Katare*, 175 Wn.2d at 36.

RCW 26.09.187(3) states that a child's residential schedule must be consistent with RCW 26.09.191 and that the seven factors listed in RCW 26.09.187(3)(a) must be considered only if limitations imposed under RCW 26.09.191 are not dispositive of the residential schedule.

We review a trial court's parenting plan for an abuse of discretion. *In re Marriage of Black*, 188 Wn.2d 114, 127, 392 P.3d 1041 (2017). A trial court abuses its discretion where its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* The trial court's findings of fact are verities on appeal as long as they are supported by substantial evidence. *Id.* Substantial evidence is that which is " 'sufficient to persuade a fair-minded person of the truth of the matter asserted.' " *Id.* (quoting *Katare*, 175 Wn.2d at 35). We do not review the trial court's credibility determinations or weigh evidence. *Black*, 188 Wn.2d at 127.

We are extremely reluctant to disturb child placement decisions "[b]ecause the trial court hears evidence firsthand and has a unique opportunity to observe the witnesses." *In re Parenting & Support of C.T.*, 193 Wn. App. 427, 442, 378 P.3d 183 (2016).

B. RESTRICTIONS BASED ON ALCOHOL ABUSE

John argues that the trial court abused its discretion in placing a limitation on his contact with the children because (1) the court was required to make a detailed finding that his alcohol problem would cause specific harm to the children to impose a restriction under RCW 26.09.191(3)(c), and the court's boilerplate finding regarding the restriction was insufficient to

satisfy this requirement; (2) even if the court's finding was sufficient, substantial evidence did not support that finding. We disagree with both arguments.

1. Statutory Provisions

Under RCW 26.09.191(3), the trial court "may preclude or limit any provisions of the parenting plan" if at least one of seven listed factors exist. The existence of one of the factors permits but does not require the trial court to impose limitations. *See Katare*, 175 Wn.2d at 36. The rationale for imposing limitations on a parenting plan is that "[a] parent's involvement or conduct may have an adverse effect on the child's best interests." RCW 26.09.191(3).

The third factor that permits a trial court to impose limitations is "[a] long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions." RCW 26.09.191(3)(c). A seventh factor is a catchall provision for "[s]uch other factors or conduct as the court expressly finds adverse to the best interests of the child." RCW 26.09.191(3)(g).

2. Requirement of Finding of Specific Harm

To support imposing limitations on John's contact with the children, the trial court made a factual finding that tracked the language of RCW 26.09.191(3)(c): "John Ingersoll has a long-term problem with drugs, alcohol, or other substances that gets in the way of his/her ability to parent." CP at 72. John argues that this finding was insufficient because a trial court is required to make a detailed finding of specific harm to the child before imposing restrictions under any of the subsections of RCW 26.09.191(3). We disagree.

We must determine whether RCW 26.09.191(3) requires a trial court to make certain findings to support limitations on parenting plan provisions. Statutory requirements are a

question of statutory interpretation, which we review de novo. *Pope Res. v. Dep't Nat. Res.*, 197 Wn. App. 409, 416-17, 389 P.3d 699 (2016), *review granted*, 188 Wn.2d 1002 (2017).

Nothing in RCW 26.09.191 expressly requires a trial court to make any specific level of findings before limiting parenting plan provisions under RCW 26.09.191(3). *See* RCW 26.09.191(6) (stating only that "[i]n determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure").

John relies on the Supreme Court's decision in *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014). In that case, the court addressed a trial court's imposition of limitations on a parent's contact with his child under the catchall provision, RCW 26.09.191(3)(g). *Id.* at 636. The issue was what type of adverse effect on the child's best interests a trial court must find before imposing parenting plan limitations under the catchall provision, subsection (3)(g). *Id.* (quoting RCW 26.09.191(3)(g)). The court's holding was that limitations imposed under RCW 26.09.191(3)(g) "must be reasonably calculated to prevent relatively severe physical, mental, or emotional harm to a child." *Chandola*, 180 Wn.2d at 636.

In the course of its analysis, the court in *Chandola* stated, "RCW 26.09.191(3)(g) does require a *particularized finding of a specific level of harm* before restrictions may be imposed." *Id.* at 646 (emphasis added). John claims that this rule also applies to the other subsections of RCW 26.09.191(3).

But the court's explanation of the rule does not support John's claim. The court pointed out that the other subsections of RCW 26.09.191(3) "concern either the lack of any meaningful parent-child relationship whatsoever or conduct . . . that seriously endangers the child's physical or emotional well-being." *Chandola*, 180 Wn.2d at 647. In other words, the legislature already

had determined that the conduct described in subsections (3)(a)-(f) involved harm to the child. The court concluded that "the nature of the specific grounds for parenting plan restrictions listed [in] RCW 26.09.191(3)(a)-(f)" show that the legislature intended subsection (3)(g) to apply only when necessary to protect the child from harm "similar in severity to the harms posed by the 'factors' specifically listed in RCW 26.09.191(3)(a)-(f)." *Chandola*, 180 Wn.2d at 648.[2]

The court's implication in *Chandola* was that application of subsection (3)(g) requires a finding of specific harm to the child because application of the other subsections *necessarily*, by their terms, involves a finding of harm to the child. *See id.* at 646-48. For example, under subsection (3)(c) a parent's long-term alcohol abuse that interferes with parenting functions necessarily "seriously endangers the child's . . . emotional well-being." *Id.* at 647.

We conclude that *Chandola* requires detailed findings of specific harm to the child only for application of RCW 26.09.191(3)(g), not for application of any of the other subsections of RCW 26.09.191(3).

John also cites this court's decision in *In re Marriage of Underwood*, 181 Wn. App. 608, 326 P.3d 793 (2014), for the proposition that a trial court must enter detailed findings when applying RCW 26.09.191(3)(c). But the court in that case required detailed findings in a very narrow situation: "*allowing a child to decide* whether to have *any* residential time with the non-custodial parent based solely on the RCW 26.09.191(3) factors." *Underwood*, 181 Wn. App. at

[2] In its conclusion regarding the necessity of harm, the court referred generally to RCW 26.09.191(3) rather than specially to RCW 26.09.191(3)(g). This appears to be an inadvertent omission. Considered in context – following directly after a reference to RCW 26.09.191(3)(a)-(f) – the court's holding clearly referred only to subsection (3)(g).

612-13 (emphasis added). *Underwood* did not impose a detailed finding requirement for any application of RCW 26.09.191(3).

Finally, John cites *Thompson v. Thompson*, 56 Wn.2d 683, 355 P.2d 1 (1960), to support his position. In that case, the court affirmed an award of custody of a child to the father despite the mother's assertion that he was a "drunkard." *Id.* at 685. The court discounted this assertion because there was no evidence that his drinking habit rendered the father incompetent in any way. *Id.* But *Thompson* said nothing about the detail of the trial court's findings, and supports only a rule that there must be some connection between a parent's alcohol problems and parenting abilities. Here, the trial court expressly found that John's alcohol problem "gets in the way of [his] ability to parent." CP at 72.

We hold that the trial court's general finding that tracked the language of RCW 26.09.191(3)(c) was sufficient for the court to impose limitations on John's contact with his children under that subsection.

3. Substantial Evidence Supporting Restriction

John argues that substantial evidence did not support the trial court's finding that John had a long-term problem with alcohol that got in the way of his ability to parent. We disagree.

John testified that he drank to deal with the problems in his marriage. John further testified that his use of alcohol had been unhealthy. Tomi testified that during their time together John would drink a lot of alcohol at home. She stated that he would drink an entire bottle of liquor in a single day. We hold that this evidence was sufficient to support the trial court's finding that John had an alcohol problem.

Regarding the effect of John's alcohol use on his parenting, Tomi testified that John's use of alcohol played a role in the arguments between them. He would become angrier and more violent, and then he would have a short temper with the children. Tomi stated that when he would drink he would yell at and spank the children.

The Pierce County GAL testified that alcohol exacerbated John's problematic personality traits that made him prone to impulsive, self-indulgent, and short-sighted behavior. And the GAL stated that both children were apprehensive about John's anger. One child told the Grant County GAL that her primary concern was with John's anger and behavior during Skype visits. The other child told a therapist that he was afraid when John drank alcohol.

John relies on testimony from the Pierce County GAL and a person who supervised his visits with his children that did not identify any risk of harm to the children from John's alcohol use. But under RCW 26.09.191(3)(c), the standard is whether the alcohol problem "interferes with the performance of parenting functions." As we conclude above, the trial court was not required to make a specific finding that the problem caused harm to the children.

The trial court's finding involves witness credibility, and we do not interfere with the trial court's credibility determinations. *Black*, 188 Wn.2d at 127. In addition, the trial court is in the best position to evaluate the evidence. *C.T.*, 193 Wn. App. at 442. We hold that this evidence was sufficient to support the trial court's finding regarding John's alcohol problem.

The evidence is sufficient for a fair-minded person to conclude both that John had an alcohol problem and that his problem got in the way of his ability to parent. Therefore, we hold that substantial evidence supported the trial court's RCW 26.09.191(3)(c) finding.

C. DESIGNATION OF PRIMARY RESIDENTIAL PARENT

John challenges the designation of Tomi as the primary residential parent in the parenting plan. He argues that the trial court erred in failing to enter limitations against Tomi for a history of acts of domestic violence under RCW 26.09.191(2)(a)(iii) and improperly relied on Tomi's status as the primary residential parent under the temporary parenting plan. We disagree.

1. Finding of No Domestic Violence

The trial court made a specific finding in the parenting plan that neither parent had any problems, including domestic violence, that required a limitation on parenting time. John argues that substantial evidence does not support the trial court's finding that Tomi's behavior did not constitute a history of domestic violence. Therefore, he argues the trial court was required to limit Tomi's residential time. We disagree.

Under RCW 26.09.191(2)(a), "[t]he parent's residential time with the child shall be limited" if the trial court finds that the parent has engaged in certain specified conduct. If the trial court finds that a parent has engaged in such conduct, the limitation of that parent's residential time is mandatory. *Underwood*, 181 Wn. App. at 611-12.

One type of conduct that requires a limitation on residential time is engaging in "a history of acts of domestic violence as defined in RCW 26.50.010([3])[3] or an assault or sexual assault which causes grievous bodily harm or the fear of such harm." RCW 26.09.191(2)(a)(iii). RCW 26.50.010(3)(a) defines "domestic violence" to include "[p]hysical harm, bodily injury, assault,

[3] This RCW includes an asterisk that leads to the following note: "Reviser's note: RCW 26.50.010 was alphabetized pursuant to RCW 1.08.015(2(k), changing subsection (1) to subsection (3).

or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members."

John argues that there was undisputed evidence that Tomi engaged in conduct meeting the statutory definition of domestic violence and constituting an assault that caused a fear of grievous bodily harm. He relies on Tomi's testimony that she admitted grabbing a kitchen knife and threatening to kill John, and kicking open a door and beating John's chest. He also relies on an incident in which witnesses stated that Tomi choked John at a family gathering, although Tomi denied that she choked him. John claims that Tomi's admission of at least the first two incidents requires a finding of domestic violence as a matter of law.

However, Tomi actually provided more detail regarding these incidents than John summarizes in his brief. The knife incident occurred when Tomi told John that she and their 15-month-old daughter were going to California to visit her sister and John grabbed the child and refused to let her go. Although the child was crying, John was taunting Tomi and telling her that she could not have the child. Tomi admitted grabbing a knife and threatening to kill herself and then threatening to kill John, but she said that John just laughed at her. Given John's response, this evidence supports a finding that this incident did not involve "fear of imminent physical harm, bodily injury or assault" under RCW 26.50.010(3)(a).

Tomi testified that the incident when she hit John's chest started when she kicked open the bathroom door while John was taking a shower. John was mad, and grabbed her arms and pushed her from the bathroom to the bedroom. In response, Tomi hit John repeatedly in the chest. This evidence supports a finding that Tomi was defending herself rather than assaulting John.

Tomi denied that she choked John at the family gathering. She testified that John was grabbing her younger brother and messing with him, and she tried to gently push John away. Tomi's arm moved up from John's chest and John claimed that he was choking her, but Tomi denied wrapping her hands around John's neck. Tomi's testimony supports a finding that she did not choke John.

The Grant County GAL did not offer any opinion on domestic violence allegations regarding either party. The Pierce County GAL found it difficult to reach a conclusion or make recommendations regarding the parties' reciprocal allegations of domestic violence, but testified that any such allegations did not impact his opinion on the parenting abilities of either party.

The totality of the evidence is sufficient to persuade a fair-minded person that Tomi did not have a history of acts of domestic violence. Therefore, we hold that substantial evidence supported the trial court's finding that Tomi did not have a problem with domestic violence that required limitations on her parenting time.

2. Reliance on Temporary Parenting Plan

John also argues that the trial court improperly based its designation of Tomi as the primary residential parent on her status as the primary residential parent in the temporary parenting plan, in violation of RCW 26.09.191(5). We disagree.

As discussed above, the trial court has broad discretion in developing a permanent parenting plan. *Katare*, 175 Wn.2d at 35-36. However, RCW 26.09.191(5) expressly states that a trial court may not draw presumptions from the temporary parenting plan. Under this statute, a trial court cannot establish a permanent parenting plan solely on the basis of the temporary parenting plan or presume that maintaining the same primary residential parent is in the child's

best interest. *In re Marriage of Kovacs*, 121 Wn.2d 795, 808-09, 854 P.2d 629 (1993). Further, the trial court cannot apply a presumption based on the temporary parenting plan to determine the primary residential parent when the analysis of the factors in RCW 26.09.187(3)(a) results in a "tie." *In re Marriage of Combs*, 105 Wn. App. 168, 176-77, 19 P.3d 469 (2001).

Here, the trial court's designation of Tomi as the primary residential parent was consistent with the RCW 26.09.191(3)(c) limitation placed on John, and there is no indication in the record that the court applied a presumption based on the temporary parenting plan. Accordingly, we hold that the trial court did not improperly base its designation of Tomi as the primary residential parent on her status in the temporary parenting plan.

CONCLUSION

We affirm the trial court's parenting plan.

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.

MAXA, J.

We concur:

WORSWICK, J.

BJORGEN, C.J.

No. 49229-6-II

Court of Appeals, Div. II,
of the State of Washington

In re Marriage of Ingersoll,

John Patrick Ingersoll,

Appellant,

v.

Tomi Lee Ingersoll,

Respondent.

Appellant's Motion for Reconsideration and to Publish

Kevin Hochhalter
Attorney for Appellant

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com
WSBA # 43124

1. Identity of Moving Party

Appellant, John Ingersoll, asks for the relief designated in Part 2.

2. Statement of Relief Sought

Reconsider the Court's Unpublished Opinion filed October 17, 2017. Whether reconsideration is granted or denied, publish the opinion.

3. Facts Relevant to Motion

John and Tomi Ingersoll were married in 2000. 1 RP 27. They separated in May 2012.[1] The trial for their divorce was held in May 2016.

At trial, John readily admitted to having inappropriately used alcohol in the past, and particularly as an escape from the conflicts with Tomi leading up to their separation. 1 RP 70-72. But John enrolled himself in a group alcohol treatment program at the VA in 2015. 1 RP 98-99, 3 RP 590. During the group

---

[1] On May 25, 2012, without any notice or explanation to John, Tomi took the children, left the marital home, and moved into a shelter. 1 RP 54, 59-60, 118-24, 4 RP 696. Tomi petitioned for dissolution in June 2012. 1 RP 157. Then, without notice to John or to the court, Tomi moved with the children to Alaska. 1 RP 127-29, 3 RP 606, 4 RP 652.

This Court's recitation of the facts leaves the impression that Tomi was already in Alaska before she petitioned for divorce. Op. at 2. This is incorrect.

treatment, John successfully reduced his alcohol consumption from 12 drinks per week to 0-2 drinks per week. 3 RP 448-49. John then completed a 12-week individual alcohol treatment program and moved on to individual, general counseling that helped him learn coping mechanisms other than drinking. 1 RP 100-02, 3 RP 592.

The Guardian Ad Litem based his recommendation of ongoing alcohol treatment on 3-year old reports that reflected John's **pre-separation** issues with alcohol abuse. 3 RP 446, 448, 450. However, witnesses to John's **post-separation** visits with the children testified that John was never intoxicated when the children were around. 4 RP 734, 736; 5 RP 870. The GAL even acknowledged that John had reduced his alcohol consumption since the separation. 3 RP 448-49. He further testified that the information he relied on did not support a finding that John's parenting would be harmful to the children. 3 RP 515-16.

John and Tomi's testimony at trial about domestic violence incidents varied in many respects, but certain key facts were undisputed. First was the knife incident. Both parties testified that during an argument, Tomi grabbed one or two kitchen knives and threatened to kill John while he was holding their infant child. 1 RP 210-11 (Tomi's testimony), 3 RP 573-74 (John's testimony). Tomi realized she was out of control and put the knives down and left the house. 1 RP 211, 3 RP 574. The

police were called. 1 RP 212, 3 RP 575. Tomi was arrested. 1 RP 212, 3 RP 575-76.

Next was the shower incident. Both parties testified that Tomi was angry that John was showering alone. 1 RP 206, 3 RP 577. Tomi kicked in the bathroom door. *Id.* Tomi punched John's chest. 1 RP 207, 3 RP 577. John grabbed Tomi's arms. *Id.*

The third was the strangling incident. Here, the accounts diverged, but Tomi did not have a credible explanation for how three of four witnesses saw her grab John's throat and strangle him for two or three seconds. *Compare* 1 RP 208 (Tomi's testimony) *with* 3 RP 579 (John's testimony), 5 RP 858 (Howard Ingersoll), 6 RP 942 (Louise Ingersoll). Tomi did not call the fifth eyewitness to the incident, her brother, to testify on her behalf.

The trial court noted that it could not accept Tomi's testimony about domestic violence because her manner was inconsistent with her words. 6 RP 1024. The trial court noted that the first guardian ad litem made the same observation. 6 RP 1035.

In ruling on the parenting plan, the trial court stated,

> So while, on the one hand, the Court is not supposed to be looking at a temporary order in entering a final parenting plan, one can't help but look at the circumstances that have existed for four years. The children have lived primarily with Mom, and they've lived in Alaska, so they've had a long distance relationship with their father for four

> years. That makes it very difficult for the Court to … then say, Well, Dad would then become the primary residential parent.

6 RP 1026.

This Court's Unpublished Opinion affirmed the parenting plan entered by the trial court. Opinion at 2. The Court held that a restriction on parenting time under RCW 26.09.191(3)(c) does not need to be supported by a finding of specific harm to the children. Op. at 7. The Court found that evidence of John's pre-separation drinking problems supported a finding that John had a long-term problem with alcohol that interfered with parenting functions. Op. at 9. The Court found that unsubstantiated portions of Tomi's testimony were sufficient to convince a fair-minded person that she did not have a history of domestic violence and had not committed an assault that caused fear of grievous bodily harm. Op. at 12. Finally, the Court found "no indication in the record that the court applied a presumption based on the temporary parenting plan." Op. at 13.

4. Grounds for Relief

John believes that this Court may have overlooked or misapprehended key points of fact or law in arriving at its opinion in this case. First, this Court interpreted the language of the Supreme Court's decision in *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014), to have been a mistake.

This Court might reconsider whether its own decision might be the mistaken one. Second, this Court justified the § 191(3) restrictions on the basis of **pre-separation** drinking problems, when all of the testimony regarding John's **post-separation** conduct was that drinking did not impair his parenting. A fair-minded person would be convinced that John's drinking problems were behind him. Third, this Court justified the finding of no domestic violence by lending credence to Tomi's unsubstantiated testimony even though the trial court itself did not find that testimony credible. The facts on which the parties agreed were sufficient to convince a fair-minded person that Tomi had a history of domestic violence. Finally, this Court appears to have overlooked the trial court's clear statement that the court would find it difficult to place the children with John after they had lived primarily with Tomi for four years under the temporary parenting plan.

4.1 The Supreme Court meant what it said in *Chandola*.

In *Chandola*, the court stated, "we conclude that the legislature intended RCW 26.09.191(3) restrictions to apply only where necessary to 'protect the child from physical, mental, or emotional harm.'" *Chandola*, 180 Wn.2d at 648 (quoting RCW 26.09.002). "By requiring trial courts to identify specific harms to the *child* before ordering parenting plan restrictions, RCW

26.09.191(3) prevents arbitrary imposition of the court's preferences." *Id.* at 655 (emphasis in original). The court's holding is straightforward: before imposing restrictions under any of the "factors" in RCW 26.09.191(3), a trial court must find that the factor would cause specific harm to the child.

This Court has interpreted the Supreme Court's conclusions as "inadvertent[ly] omi[tting]" a reference to subsection (3)(g). However, where much of the Supreme Court's opinion **did** include the reference to (3)(g) when the court was speaking specifically of that subsection, it may be more reasonable to conclude that the court knew what it was doing when it omitted the reference to (3)(g).

As the court noted, all of the subsections of RCW 26.09.191(3) are intended to protect children from harm. It is consistent with this legislative intent to require trial courts to make specific findings of harm when applying **any** of the § 191(3) factors. It is logical to conclude that the Supreme Court meant exactly what it said when it held that **all of § 191(3)**—not just § 191(3)(g)—requires trial courts to make findings of specific harm to a child before imposing restrictions on a parent.

This Court's decision in *In re Marriage of Underwood*, 181 Wn. App. 608, 326 P.3d 793 (2014), is consistent with John's reading of *Chandola*. This Court's reading of *Chandola*, on the other hand, renders *Underwood* an outlier—a special exception

based on a unique and rare fact pattern. Under this Court's reading, *Underwood* is the kind of decision that would not be published because it is so fact-specific as to have little precedential value. Yet this Court **did** publish the portion of *Underwood* that required specific findings to support the restriction of parental time based on § 191(3) factors.

This Court should reconsider whether it has correctly interpreted the rule established by the Supreme Court in *Chandola* and should remand for entry of the required findings or removal of the conditions. If, instead, this Court seeks to modify or clarify the precedent established by the Supreme Court in *Chandola* and by this Court's earlier decision in *Underwood*, this Court should publish its opinion in this case. *See* RAP 12.3(d)(2), (4).

4.2 There was not substantial evidence that John had a drinking problem, post-separation, that impacted his ability to parent.

This Court justified the imposition of § 191(3)(c) restrictions on the basis of evidence—primarily from Tomi's testimony—of John's pre-separation conduct. This Court reasoned that this stale evidence, of alleged conduct more than four years in the past, was sufficient to support the trial court's conclusion that John had an alcohol problem that would interfere with his ability to parent in the future.

The testimony on which this Court relied all related to alleged **pre-separation** behavior. The parties separated in 2012. The trial was four years later. John readily admitted at trial that his past behavior was unhealthy. 1 RP 70-72. But John enrolled himself in a group alcohol treatment program in 2015. 1 RP 98-99, 3 RP 590. During the group treatment, John successfully reduced his alcohol consumption from 12 drinks per week to 0-2 drinks per week. 3 RP 448-49. John then completed a 12-week individual alcohol treatment program and moved on to individual, general counseling that helped him learn coping mechanisms other than drinking. 1 RP 100-02, 3 RP 592.

The Pierce County GAL, contrary to this Court's characterization, did **not** testify that alcohol exacerbated problematic personality traits for John. That opinion came from a 2013 report by a Dr. Mays. 3 RP 447-48. The Mays report dealt primarily with alleged **pre-separation** conduct. *See, e.g.,* 3 RP 446. The GAL only testified that alcohol has that tendency for people in general, but did not appear to agree with Dr. Mays' assessment of John. 3 RP 447-48. The GAL even acknowledged that John had received treatment and reduced his alcohol consumption since the separation. 3 RP 448-49. Although he recommended that John complete his treatment and achieve zero consumption, 3 RP 450, he testified that any alcohol or psychological issues were "not serious enough to interfere with

his unsupervised visitation with his children," 3 RP 453-54. That is, he did not believe John had an alcohol problem that would interfere with his ability to parent.

The GAL also testified that while the children are apprehensive of John's anger, "They don't appear to be apprehensive that his anger is going to turn on them." 3 RP 515. The GAL did not believe that John's parenting would be harmful to the children. 3 RP 515-16. Witnesses to John's post-separation visits with the children were complimentary of his parenting and did not express any concern that alcohol would interfere with his ability to parent. 4 RP 734-37; 5 RP 870. Not a single witness testified that as of the time of trial John had an alcohol problem that would interfere with his ability to parent.

There was not sufficient evidence for a fair-minded person to conclude that John had an alcohol problem that would interfere with his ability to parent. This Court should reconsider its decision, reverse the § 191(3)(c) restrictions, and remand to the trial court to reconsider the parenting plan.

4.3 The undisputed evidence is that Tomi had a history of domestic violence.

The trial court found both parties had credibility issues. 6 RP 1023. In particular, the trial court found it difficult to believe Tomi's testimony about domestic violence because her manner was inconsistent with her words. 6 RP 1023-24. Yet this

Court's opinion relies entirely on Tomi's testimony—testimony that the trial court found less than credible—to supply the "substantial evidence" to support the trial court's finding.

Given the credibility problems identified by the trial court, a fair-minded person would look to the undisputed evidence—those portions of the testimony on which the parties agreed—to determine whether there was a history of domestic violence.

Both Tomi and John agreed that in the heat of an argument, Tomi drew one or two kitchen knives and threatened to kill John. They agree that John was holding their infant child when the threat was made. They agree that Tomi was arrested as a result of the incident, although charges were never filed.

A fair-minded person would conclude from this undisputed evidence that Tomi had committed an assault that would have caused fear of grievous bodily harm to John or the child. This Court instead re-weighed the credibility of the witnesses and gave credence to the whole of Tomi's testimony even though the trial court specifically indicated that it was not wont to believe either party when it came to the domestic violence issues.

This Court relied on Tomi's testimony that John laughed at the knife threats to conclude that the incident did not cause fear for John. While Tomi testified that John laughed, John

testified that he escaped from Tomi into their bedroom and then pleaded with her to put the knives down. 3 RP 574. This Court should not discount John's reasonable fear on the basis of testimony the trial court found not credible. A fair-minded person would conclude from the fact of the knife threat that John would have been placed in fear of grievous bodily injury to himself or to the child in his arms. The alleged laughter, even if believed, is inconclusive because even a laugh can be a natural reaction to fear. John's testimony that he escaped and pleaded with Tomi, if believed, confirms his fear of grievous bodily injury.

Similarly, with the shower incident, the parties agree that Tomi was angry because John was showering alone. They agree that Tomi kicked in the bathroom door. They agree that Tomi punched John's chest and that John grabbed Tomi's arms, although they disagree on who made contact first.

Where the trial court has already discounted the testimony of both parties as generally not credible when discussing domestic violence, all that is left for the fair-minded person to consider are the undisputed facts. Tomi was mad. She kicked in the door. She repeatedly punched John. From these undisputed facts, a fair-minded person would conclude that Tomi was the instigator of the violence. Her violence was an assault against John. It qualifies as domestic violence under the

statutory definition for purposes of determining whether Tomi had a history of domestic violence under RCW 26.09.191(2).

This Court should reconsider its analysis of Tomi's history of domestic violence. There is not sufficient credible evidence to support the trial court's finding that she did not have a domestic violence problem. This Court should reverse that finding and remand for reconsideration of the parenting plan with restrictions based on Tomi's history of domestic violence.

4.4 This Court overlooked the trial court's statement that it was relying on the temporary parenting plan.

This Court's opinion states, "There is no indication in the record that the court applied a presumption based on the temporary parenting plan." Op. at 13. However, the trial court stated in its oral ruling that the fact the children had lived for four years in Alaska with Tomi (under a temporary parenting plan) was a significant factor in the court's decision:

> So while, on the one hand, the Court is not supposed to be looking at a temporary order in entering a final parenting plan, **one can't help but look at the circumstances that have existed for four years.** The children have lived primarily with Mom, and they've lived in Alaska, so **they've had a long distance relationship with their father for four years. That makes it very difficult for the Court to** – all things being equal, which I don't believe they are, but all other things being equal – **then say, Well, Dad would then become the primary residential parent.**

6 RP 1026 (emphasis added).[2] This reliance on the temporary parenting plan is prohibited and is, alone, grounds for reversal.

This Court appears to have overlooked the trial court's overt reliance on the temporary parenting plan. This Court should reconsider its decision, reverse the trial court decision, and remand for reconsideration of the parenting plan.

5. Conclusion

This Court appears to have overlooked or misapprehended the facts or the applicable law. The Supreme Court did not make a mistake in requiring findings of specific harm to a child to support restrictions under all subsections of § 191(3). There was not sufficient evidence to convince a fair-minded person that John had an alcohol problem that would interfere with his ability to parent. There was not sufficient credible evidence to convince a fair-minded person that Tomi did not have a history of domestic violence. The trial court overtly and improperly relied on the temporary parenting plan to designate Tomi as primary residential parent.

This Court should reconsider its Unpublished Opinion. This Court should reverse the parenting plan, including the § 191 restrictions against John in Parts 4-5 and 8-11 and the

---

[2] As noted above, Tomi's move to Alaska was made without notice, agreement, or permission of the Court, after temporary orders were already in place.

findings of fact in Parts 3.a, 3.b and 16. This Court should remand to the trial court for entry of new findings supported by the evidence, imposition of § 191 restrictions against Tomi, designation of John as primary residential parent, and reconsideration of the Parenting Time Schedule.

If the Court does not reconsider its Opinion, the Court should publish it. This Court's reading of *Chandola* either modifies or clarifies the rule set forth by the Supreme Court in that opinion and by this Court in the published portion of *Underwood*. Such a modification or clarification should be published.

Respectfully submitted this 6th day of November, 2017.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on November 6, 2017, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

John Charles Purbaugh
Northwest Justice Project
715 Tacoma Ave S
Tacoma, WA 98402
johnp@nwjustice.org
carolc@nwjustice.org

DATED this 6th day of November, 2017.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Filed
Washington State
Court of Appeals
Division Two

December 5, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: TOMI LEE INGERSOLL, Petitioner, v. JOHN PATRICK INGERSOLL, Respondent.	No. 49229-6-II ORDER DENYING MOTION FOR RECONSIDERATION AND TO PUBLISH AND CORRECTING CAPTION

Appellant moves for reconsideration and to publish the court's October 17, 2017 opinion. Upon consideration, the court denies both motions. Further, due to an inadvertent error, the parties were incorrectly designated in the caption of the opinion. The caption of this court's opinion is corrected in this case to reflect that the respondent is Tomi Lee Ingersoll, and the appellant is John Patrick Ingersoll. Accordingly, it is

SO ORDERED.

FOR THE COURT:

MAXA, J.

We concur:

WORSWICK, J.

BJORGEN, C.J.

OLYMPIC APPEALS PLLC

January 04, 2018 - 4:46 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Marriage of John Patrick Ingersoll, Appellant v Tomi Lee Ingersoll, Respondent (492296)

The following documents have been uploaded:

- PRV_Petition_for_Review_20180104163039SC705990_8203.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review 2018-01-04.pdf

A copy of the uploaded files will be sent to:

- carolc@nwjustice.org
- johnp@nwjustice.org

Comments:

Filing fee is being paid by check deposited in the mail today.

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com
Address:
4570 AVERY LN SE STE C-217
LACEY, WA, 98503-5608
Phone: 360-763-8008

Note: The Filing Id is 20180104163039SC705990