

No. 721470
Snohomish County Superior Court No. 12-3-02040-1

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

CHRISTOPER BURROWS,
Plaintiff-Appellee,
v.

ALICIA DEGON,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Millie Judge, Judge

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing restrictions against Alie deGon under RCW 26.09.191(2) (if the court's findings were based on this subsection) and (3) as follows:
 - (a) limiting residential time with her three children;
 - (b) precluding DeGon from participating in major decision making;

2. The trial court's imposition of restrictions was based on the following erroneous factual findings set out in the Court's Oral decision, its Findings of Fact and Amended Findings of Fact
 - (a) "Dr. Burrows has remarkably good insight into his mental illness..." CP 51.

 - (b) Ms. DeGon was "diagnosed by Dr. Maioro as having Histrionic Personality Disorder wit Narcissistic Traits and Obsessive Features..." and "Ms. DeGon related to Dr. Burrows by attempting to "dominate, browbeat or control" him. CP 51-52.

 - (c) Ms. DeGon, abused Dr. Burrows' by pushing the limits on sexual freedom, experimentation to a degrading and punitive level because she was aware of his vulnerability and dependent nature due to his mental illness

 - (d) "Ms. DeGon has a tendency to overstate and exaggerate claims about Dr. Burrow's behavior, consistent with her personality disorder." And "Ms. DeGon engaged in repeated behaviors that appear to have been directly designed to push Dr. Burrows past the breaking point." CP 52.

 - (e) Ms. DeGon "engaged him endlessly (day and night) in discussions about the break-up of their relationship." Ms. DeGon was aware of Dr. Burrows' fragile mental state and lacked "empathy for it and how her behavior and the continued conflict made it worse." CP 52.

 - (f) Mr. Maioro concluded that both consensual and non-consensual sex acts and his relationship with Ms. Degon "rendered Dr. Burrows

vulnerable and traumatized. “Dr. Maioro determined that such behavior was abusive.” CP 52.

- (g) Whether Dr. Burrows actually suffers from PTSD is “not important to the overall disposition of this case.” CP 53 fn 1.
- (h) “Ms. DeGon’s actions intentionally traumatized Dr. Burrows on an emotional and physical level.” CP 53.
- (i) “Ms. DeGon has engaged in a pattern of child neglect toward her children...” CP 53
- (j) Ms. DeGon refused to seek mental health counseling for Jack and Simon after both have exhibited serious psychological conditions...” CP 53 and “Ms. DeGon tends to minimize the impact that Jack’s abusive behavior has on his younger brother and sister, and has left them in his care, placing them in danger.” CP 53.
- (k) “Ms. DeGon failed to seek medical treatment for Jack after he jumped from a ladder and seriously injured his leg and was in obvious pain.” CP 53-54.
- (l) “Ms. DeGon left the family home for a period of six month and abandoned her children, focusing on her own needs, while Dr. Burrows was falling into a depression over the breakup of their relationship.” CP 54.
- (m) DeGon "intentionally cut off Dr. Burrows from having contact with the children.” CP 53.

3. The trial court made the following legal errors in reaching the conclusion to impose restrictions:

(a) The Court’s restrictions were based on consensual atypical sexual activity between the parties, which Dr. Burrows later regretted, and not any actual acts of domestic violence or harm to the children.

(b) The Court’s improperly concluded that Ms. DeGon engaged in a pattern on neglect when that conclusion is in direct contradiction to the GAL’s and Dr. Maioro’s findings and when several CPS investigations were reported to be unfounded.

4. The trial court erred in awarding spousal maintenance to Dr. Burrows
5. The trial court erred in imputing income to Ms. DeGon for purposes of child support
6. The trial court erred in its valuation of the Agile Recruiter Software
7. The trial court erred in characterizing the Scenic Drive family home as community property at its inception and placing the burden on Ms. DeGon to show that it became separate property.
8. The trial court erred in its calculation of health insurance premiums Dr. Burrows owed to Ms. DeGon.
9. The trial court erred in awarding the costs of the experts, psychological evaluations, GAL fees and other court costs to Ms. DeGon, especially when the court awarded her the \$50,000 line of credit as a separate debt.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court impose restrictions without a sufficient showing of harm to the child?
2. Did trial court err in finding Ms. DeGon's behavior rose to the level of domestic violence defined by RCW 26.50.010(1), as required in RCW 26.09.191?
3. Did the trial court violate DeGon's due process when it did not grant a new trial, or reopening the case to take new evidence?
4. Did the trial court err in characterizing the family home as community property and thus requiring Ms. DeGon to show by clear and convincing evidence that its character had changed?
5. Did the trial court err in awarding spousal maintenance without considering the amount of child support Dr. Burrows receives?

6. Did the trial court when it imputed income to Ms. DeGon without a showing that she was underemployed for the purpose of avoiding child support?
7. Did the trial court err in valuing Agile Recruiter at \$80,000 when both parties testified it was not worth more than \$10,000, the technology is no longer competitive, and neither party wanted it?
8. Did the trial court err in awarding the \$50,000 line of credit to Ms. DeGon as separate debt when she was also awarded the community debt she paid with that line of credit?

III. INTRODUCTION

During Ms. DeGon's and Dr. Burrows' eleven year marriage they experienced incredible passion in which the couple experimented with varying levels of bondage, discipline, and sadomasochism (BDSM) and sexual scenarios with each other and bringing in other people in a controlled environment. But, it was also plagued by mental illness that Dr. Burrows hid from DeGon at first. Both parties have advanced degrees and have been professionally successful both separately and in building a company together, which they sold for roughly \$3 million in 2007.

Dr. Burrows suffers from major depression and has been diagnosed with Bipolar II. When Dr. Burrows suffered a major depressive episode he was unable to work or function and DeGon was left to work long hours

outside the home, but the couple always employed a nanny, until a few months before their separation, to assist Dr. Burrows.

The court appointed a guardian ad litem (GAL) and a CR 35 examiner, Dr. Maiuro, who performed tests on both parties and found no evidence of domestic violence by either party. The GAL's only recommendation for restrictions was based on their abusive use of conflict.

At trial, Dr. Burrows re-characterized their sexual activities, as rape and false imprisonment. He re-characterized his own mental illness as PTSD caused by DeGon's emotional abuse. To her shock and dismay, the trial court found that DeGon had a history of domestic violence because she caused Dr. Burrows' mental breakdown by brow beating and raping him. The court further found that DeGon engaged in a pattern of child neglect and, as a result, limited her residential time to two weekends per month.

IV.STATEMENT OF THE CASE

A. HISTORY OF THE MARRIAGE

Christopher Burrows and Alecia DeGon first met in person in 2000, shortly after Dr. Burrows' first marriage ended, after talking online for nearly two years. RP 386. Dr. Burrows has three children from his previous marriage. CP 481. Dr. Burrows suffers from major depression

and had just recovered around the time the parties met. He was diagnosed with Bipolar II by Dr. Jeffrey Benarchi around the time his first marriage ended and by Dr. Maiuro, the court appointed CR 35 examiner in this case. RP 567, 847, Exh. 36 at 20.

The parties were married on April 14, 2001 and separated on or about June 1, 2012. CP 481. During their eleven year marriage, they frequently engaged atypical sexual activity. The couple enjoyed activities such as BDSM and shared a quasi-open marriage. Exh. 36 at 4. Dr. Burrows participated in activities such as caning in which he was beaten with sticks in a controlled environment. RP 652. Some of their activities included Dr. Burrows being bound for a prolonged amount of time. Exh. 36 at 4.

The parties' had three children of their own – Jack (born 2/8/2002) Simon (born 5/30/2003) and Isabel (born 2/13/2006). CP 2234. Their large blended family of six (6) children enjoyed a relatively high quality of life that included frequent international travel, ample enrichment opportunities for the children of all ages and the ability to pursue a variety of business ventures. RP 401, 671-72; CP 480-81.

Dr. Burrows holds a Ph. D in high energy physics and an MA in Mathematics with High Honors from Cambridge University and is a world renowned astrophysicist. He joined the European Space Agency in 1984

and was brought to the United States to help operate the Hubble Space Telescope while he was married to his first wife. RP 395. Dr. Burrows worked for the ESA until 2000 and since then has worked on a contract basis for NASA. RP 396. After Jack was born, Dr. Burrows worked at Jet Propulsion Lab, where he created a way to detect extrasolar planets, and continued to perform contract work for them until that job ended and he started working on the Agile Recruiter software about 2004. RP 406-07.

Ms. DeGon holds an MBA and during the first two years of their marriage she worked as a Recruiter for Yoh Scientific. RP 400. She then formed her own business called MetaJiva. RP 400. While working at MetaJiva, DeGon collaborated with the company Dataweb to develop some recruiting software. RP 400. In 2005, Dr. Burrows joined MetaJiva to work on the recruiting software they named Agile Recruiter. RP 401. They incorporated in 2006, with DeGon owning 51% of the shares and Dr. Burrows owning 49%. Dr. Burrows testified that he created Agile Recruiter from the ground up and wrote all of the code. RP 401. Ms. DeGon testified that she created the story board for the software and had previously engaged at least Dataweb and other individuals to help write the code to perform in accordance with her vision. RP 774, 900.

The Agile Recruiter is software that works on the Internet to make hiring professionals faster and easier and cheaper for companies to use. It

is more than a database of names, in its time it was an evolutionary step in web based outsourcing. RP 901. DeGon testified that the value of the software was in its ability to limit what each user can view and as a source of income the value was in being able to license the software, not in using it as a consumer to put people together. *Id.*

MetaJiva became successful and it sold to SolutionsIQ in 2007 in a deal worth about \$3 million. RP 402. The deal essentially merged MetaJive with SolutionsIQ and required DeGon to stay on as vice president and Dr. Burrows as a contractor to maintain the software at \$100 per hour. It also included a \$10,000 per month cash payment plus a salary for DeGon. RP 403. In dire market conditions in 2008, the deal unraveled and the parties were forced to sue SolutionsIQ. As part of the settlement the parties received a copy of Agile Recruiter back, along with the trade names Agile Recruiter and MetaJiva, and a settlement of just over \$800,000. As part of the settlement, each party received a copy of Agile Recruiter. RP 415, 811.

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payment plus a salary for DeGon. RP 403. In dire market conditions in 2008, the deal unraveled and the parties were forced to sue SolutionsIQ. As part of the settlement the parties received a copy of Agile Recruiter back, along with the trade names Agile Recruiter and MetaJiva, and a settlement of just over \$800,000. As part of the settlement, each party received a copy of Agile Recruiter. RP 415, 811.

During their marriage, both parties worked inside and outside the home. RP 665, 781. Dr. Burrows testified that he always worked from home. RP 391, 407. But, travelled to Washington D.C. for a few weeks at the end of each NASA review. RP 12. During the time both parties worked on MetaJiva and Agile Recruiter, both had home offices. RP 409. The family also employed a full time nanny, Melania Pitalua, from the time Jack was only a few weeks old. RP 665. She arrived about 7:00am to help get the children ready for the day, she was present after school to care for them, and she also made home-cooked meals and stayed to clean up after dinner. Exh. 44 at 2. DeGon testified that they decided to employ a nanny because she knew there were things Dr. Burrows could not provide even though he worked from home. RP 665-66.

After the settlement with SolutionsIQ, Dr. Burrows and DeGon discussed what to do with Agile Recruiter and they decided that Dr. Burrows would update it for re-entry into the market place. RP 936. That

never took place. In 2010, Dr. Burrows started to fall into depression and Ms. DeGon took a job at Intellectual Ventures in Issaquah while Dr. Burrows was unemployed. RP 780-81.

During that year, DeGon spent about three nights a week out at the home over six months. DeGon testified that she and Dr. Burrows agreed that she should spend weeknights at their friend Mary Baker Anderson's home in Seattle to reduce travel time. RP 781. Ms. Baker Anderson confirmed this. RP 937. DeGon also testified that she spent a couple of nights per week at Baker Anderson's home and spent the weekends at her own home. RP 782. Dr. Burrows testified that Ms. DeGon left the home and did not return for the entire six months. He postured that she left to pursue an affair. RP 389-90. During the time DeGon was staying at Baker Anderson's home, Dr. Burrows fell deeper into depression. He testified that he was left alone with the children during that time, but DeGon their nanny, Pitalua, was there during that period. RP 390. Dr. Burrows also testified that Ms. Pitalua stayed with them until 2011. RP 390.

After about six months at Intellectual Ventures, DeGon was able to telecommute and was able to avoid having to spend week nights away from home. RP 781. In 2011, she largely stayed home with the children. RP 528. That was when the couple's marital problems intensified and Dr. Burrows entered Clinical Trials for the severely depressed at the UW. The

parties could not agree on how to leverage Agile Recruiter or how to bring in income for the family. DeGon thought Agile Recruiter was ready to be released to the market in some form and Dr. Burrows insisted it was not ready. RP , 379, 936. These disagreements were stressful and ultimately contributed to their separation and eventual divorce.

B. CONDUCT DURING SEPARATION

When marital counseling proved to be ineffective, the couple agreed to a trial separation in June 2012. Dr. Burrows moved to his native England for a couple of months to be with family. RP 386. Before leaving, the parties divided their community funds into three parts. Dr. Burrows and DeGon each received about \$35,000 and they put \$25,000 into a separate account to use for the children. RP 529. DeGon testified that she insisted on this arrangement after she her banker alerted her that most of their community funds had been diverted into an account to which only Dr. Burrows had access. RP 592, 676.

While he was in England, DeGon asked Dr. Burrows to commit to nonviolence before he returned. Exh. 49. He did not, and she filed a DVPO against him alleging that she and Jack were abused by Dr. Burrows. RP 76. A temporary restraining order was put in place, which prohibited contact with DeGon. CP 2227-28.

Before he left, Dr. Burrows set up a Skype account to communication with the children while he was away. RP 436. Shortly after Dr. Burrows arrived in England, he suffered a major depressive episode and ended up in an inpatient treatment facility. Dr. Burrows testified that he was hospitalized partly as a result of having his contact with the children cut off. RP 856. He testified at length about how he was unable to reach the children through Skype. RP 554. DeGon disallowed Skype contact because Dr. Burrows used Skype calls to remotely gain access to and control the home computers. RP 217, 437, 686. At trial, Dr. Burrows testified that he had the knowledge and capability to do this and that he did remotely control some things on the computer. RP 445. DeGon also testified that she encouraged the children to talk with Dr. Burrows on the telephone, but he refused. When the children called him, he would not answer. RP 90-91

Before the Skype calls ended, Dr. Burrows testified that during one call he observed the children fighting while DeGon was not in the room. RP 436. He called both CPS and the police to report that the children were being left alone, that DeGon had a gun in the house and was threatening to use it against the children and herself, and that DeGon had poured glue on the keys of his piano. A sheriff went to the house to conduct a welfare check and found nothing out of the ordinary. RP 680-81.

Throughout their separation, Dr. Burrows brought several motions claiming DeGon neglected the children and put them in danger, but the reports were unproven. Exh. 36,

While Dr. Burrows was in the hospital, his friend came to the home to collect the family computers. That is when Ms. DeGon first learned that Dr. Burrows had taken all the hard drives from the computers, and the only working copy of Agile Recruiter, with him to England. RP 676-76.

On August 9, 2012 a GAL was appointed to avoid some of recurring areas of conflict over residential time with the children and Agile Recruiter. CP 2055-56. Some of the conflict was caused by the absence of a temporary parenting plan. Temporary orders made DeGon the primary residential parent and allowed Dr. Burrows supervised visitation every other weekend. RP 102-103. When Dr. Burrows showed progress in his treatment, DeGon voluntarily offered more time with the children and she agreed that he should see the children every weekend. Eventually, DeGon also agreed that he should no longer be supervised. RP 688.

During their separation both parties proceeded at different times with and without counsel. Dr. Burrows insisted that DeGon not have any contact with him, even when he proceeded pro se and she was forced to

communicate through third parties. DeGon obtained a limited court order requiring him to communicate with her, but only through email, once daily and the emails were limited to 100 words. RP 99-100.

The children, especially Jack and Simon had a hard time adjusting and Dr. Zarat recommended they seek ongoing mental health counseling. RP 457. The GAL recommended Dr. Burrows be in charge of the children's mental health care because she perceived that Ms. DeGon did not obtain ongoing counseling, although she did take the children to a Dr. Grant periodically. RP 152, 734.

The court ordered Dr. Burrows to produce a copy of Agile Recruiter and allow DeGon to use it. RP 494. Dr. Burrows hosted the program on RackSpace.com, and he testified that DeGon could use it as any other consumer would. However, she could not use it in the way she had historically used it, by selling licenses. RP 793.

In any event, DeGon testified that when she finally received a copy, it did not work. The parties dispute whether DeGon had access to the passcodes and could access the source code. Each party accused the other of wasting the asset. Dr. Burrows testified that he thought DeGon had shared it with a third party, rendering it virtually worthless, although he could not substantiate those claims. RP 973. DeGon testified that although it was worth \$1 million in 2007, it would need to be significantly

upgraded and would take a considerable amount of resources and risk to re-market it in 2014. This was a risk she was not willing to take as a newly single mother. RP 700. Both parties told the court they thought it should be awarded to the other party.

C. THE EXPERT WITNESSES

Because of Dr. Burrows' history of mental illness, the court appointed a CR 35 examiner and Dr. Burrows chose Dr. Maiuro. Dr. Maiuro interviewed both DeGon and Dr. Burrows and gave them both the same tests. He diagnosed Dr. Burrows as having an axis I mental illness, Bipolar II. Dr. Burrows first alleged that DeGon subjected him to psychological and sexual abuse during the course of the marital relationship resulting in the exacerbation of his depression and need to seek hospitalization. CP 162. As time passed, his allegation escalated to suggest that he was suffering from Posttraumatic Stress Disorder (PTSD) as a result of her sexual abuse of him. He also reported to Dr. Maiuro that DeGon's alleged extra-marital affairs caused him to suffer a major depressive episode. CP 165.

Despite his claims, he admitted they had a quasi-open marriage and that he consented to their sexual activities. CP 165. But, in retrospect, he felt intense shame about it. At trial, Dr. Maiuro testified that this was a common symptom of Bipolar II. Many people with that illness engage in

experimental sex acts in a state of hypomania and then later regret it. RP 845-46. Dr. Burrows went as far as to accuse DeGon of anally raping and false imprisoning him. CP 165, RP 648. He reported to Dr. Maiuro that it was DeGon who kept a FetLife account, but at trial he testified that the account belonged to him, that his screen name was LockedUp and that he paid a monthly fee to be a member. CP 166; RP 651.

In contrast, DeGon reported that these sexual activities were part of the initial attraction and that although she happily participated, the activities were Dr. Burrows' idea. CP 166.

Dr. Burrows' test results showed that he has a chronic tendency to misunderstand the motives of others, attributes malevolent motives to others, and often feels that they have harmed him and are partially responsible for his present depression. CP 170. One example of this is a letter he wrote to GAL, Jenny Heard, which named her, his lawyer, Damon Canfield, Ms. DeGon, Dr. Maiuro, and Commissioner Brutvik as co-conspirators in a plot to keep him from seeing his children. He filed this statement with the FBI. CP 819-20.

DeGon was not diagnosed with any mental illness. Dr. Maiuro did report that the presence of some longstanding personality problems with histrionic and narcissistic features are possible, but he did not diagnose her with a personality disorder. CP 171.

Dr. Maiuro tested both parties using the domestic violence inventory to specifically evaluate whether each posed a threat to anyone, especially their children. Both parties showed risk on the truthfulness scale, meaning they tended to under-report problems. CP 173. Dr. Burrows' results show that he is more likely to have an anger and irritability problem than a domestic violence problem. CP 174. His anger and irritability is more tied to compromised coping skills, which is a symptom of his mental health issues. CP 174.

DeGon's results on the domestic violence inventory showed she scored slightly higher than Dr. Burrows on the truthfulness scale, but the scales were appropriately adjusted to provide accurate information. CP 174. Although DeGon's response pattern showed that she may attempt to dominate, browbeat or control others and that her personal needs could interfere with her judgment, her response patterns essentially ruled out any violence. CP 174.

Dr. Maiuro also considered Dr. Burrows' treating physician at the time of trial, Dr. Morgan's, report. Without ever meeting or interviewing Ms. DeGon, he postured that Ms. DeGon "may suffer from 'Borderline Personality Disorder.'" CP 179. In addition, Dr. Morgan could not confirm whether Burrows' mental status and conduct could be fully explained by a

PTSD reaction. CP 180. Instead, he said that it was “a complicated picture that might include PTSD or something like it.” CP 180.

During his interview, Dr. Burrows reported that the children were going to be with him from now on and never again with their mother. RP 823. Dr. Maiuro told the GAL that he was concerned Dr. Burrows may share that opinion with the children. RP 833. When Dr. Burrows found out about that communication he told the GAL the kids were now prepared to say otherwise and he began to see Mr. Maiuro as an enemy. RP 834. Dr. Burrows refused to submit to any more testing unless Dr. Maiuro shared the report with him prior to reporting it to the court and Dr. Maiuro agreed to interview a third party. RP 834-35.

While Dr. Maiuro was waiting for him to make a follow up appointment, Dr. Burrows engaged another doctor, Dr. Dixon, to perform the CR 35 exam. RP 834-35; CP 180. The GAL testified that she thought Dr. Burrows had done this because he was expert shopping and looking for a favorable outcome. RP __. Dr. Dixon’s report made no mention of PTSD. CP 180. Dr. Maiuro concluded that Dr. Burrows had an established history of major mental illness, very likely Bipolar II, recurrent over a significant part of his adult life, and preceding his marriage to DeGon. CP 181. At trial, Dr. Maiuro testified that Bipolar II is not curable with short term therapy. It requires long-term care. CP 182.

Both Dr. Morgan and Dr. Dixon agreed that Dr. Burrows' symptoms may be part of a more generalized Anxiety Disorder, or an agitated depression. CP 181. Dr. Burrows provided some information about his past diagnosis and prior hospitalizations, but mostly he blamed his depression and DeGon's abuse. RP 826.

Dr. Maiuro did not diagnose Dr. Burrows with PTSD because his symptoms were already accounted for by a bipolar diagnosis mixed with anxiety and depression. RP 841. Dr. Maiuro believed that Dr. Burrows was undertreated. RP 843. Dr. Burrows was not forthcoming with Dr. Maiuro about his previous diagnosis of bipolar. RP 843-44.

Further, Dr. Maiuro testified that even if Dr. Burrows took PTSD medication and showed some preliminary results it does not necessarily indicate that PTSD was the right diagnosis because he has to be monitored over time. RP 860-61. This was consistent with what happened in reality. Dr. Burrows stopped taking his medication in December 2013 at Dr. Morgan's suggestion because he was showing progress. RP 393. However, Dr. Burrows ended up being hospitalized in March 2014. RP 860.

Dr. Burrows vehemently disagreed with a diagnoses of bipolar. RP 576. He instead believes he suffers from PTSD as a result of the abuse he suffered at DeGon's hand. RP 577.

Dr. Maiuro reported that there was no evidence she abused or neglected the children, despite Dr. Burrows' allegations and two CPS investigations that he had instigated. CP 182. Specifically, "Ms. DeGon's delay of seeking medical care for Jack during an impulsive playing incident, does not rise to this threshold." CP 182. In fact, Dr. Mairuo reported that Dr. Burrows' repeated proceedings began to establish a pattern of harassment and not documented concern. CP 182-83. The particular incident referenced by Dr. Maiuro was a playground accident where Jack jumped off a ladder. Previously Dr. Burrows reported to the GAL that DeGon had failed to treat Jack's broken leg. But, Dr. Burrows testified at trial that he took Jack to the Everett Clinic and the x-ray was inconclusive, so they decided to treat it like a fracture. RP 452.

Dr. Maiuro's report revealed that no evidence of a Borderline Personality Disorder existed, especially one that affected her attachment to the children. CP 183. Dr. Maiuro also ruled out the possibility of domestic violence in either party. CP 183.

GAL, Jenny Heard's, report did not recommend any limitations on either parent even though both parents engaged in abusive use of conflict. CP 999. Her final report recommended that the children reside with the mother from Sunday at 6:00pm to Thursday after school, joint decision

making authority with the help of a case manager, and that the father be responsible for engaging counselors. CP 998.

Much of Dr. Burrows' questioning of the GAL was about his perception that DeGon had a habit of offering time and then taking it back. When questioned at length about this, the GAL testified that both parties were to blame. She testified that Dr. Burrows was often non-responsive and that DeGon would take the time back after she did not hear from him. RP 108-111. The GAL gave several examples of Dr. Burrows behaving in this way and she even gave an example of him voluntarily giving up time when he did not receive the outcome he wanted. In one incident, DeGon wrote to him and told him that she no longer felt comfortable with him having the children every weekend. RP 147-48. He received this letter on a Saturday during his residential time with the children and he immediately packed their things and brought them back to DeGon. He refused to see them on his next scheduled visit the next weekend. RP 193. Dr. Burrows then characterized this incident to the GAL as an example of him having insight into his own limitations. RP 233.

D. THE TRIAL

The petitioner's case in chief mostly consisted of negative testimony about how the parties did not get along, to the point that the

court asked if this was necessary to go through more testimony about the dysfunction in their relationship. RP 490.

Despite Mr. Maiuro's report that there was no evidence Ms. DeGon had a Borderline Personality Disorder, Dr. Burrows' attorney twice referred to DeGon as having a diagnosed personality disorder. RP 1020, 171. The first time the GAL corrected her and pointed out that Dr. Maiuro actually found that she had those personality features not a disorder. RP 171. The second time she mentioned it was in closing arguments when she referred to DeGon's personality disorder as the elephant in the room. RP 1020. Dr. Burrows alleged a personality disorder since their separation and even though it had been ruled out, he continued to use that terminology. RP 221-22.

Dr. Burrows did not argue domestic violence in his pleadings, nor did he present any evidence that DeGon committed domestic violence or sexual assault on direct examination. When asked if the alleged nonconsensual sexual activity was the basis for the PTSD diagnosis, Dr. Burrows said that it was not and that his doctor "came up with" PTSD in March 2013. RP 648-49. Nevertheless, the court imposed restrictions under 26.09.191 based on sexual and emotional abuse of Dr. Burrows. Vol. II RP 4.

Dr. Burrows accused DeGon of neglecting the children's mental health needs and refusing to take them to counseling. The GAL testified that DeGon did not follow through on obtaining long term mental health counseling for the children (RP 9), although DeGon did take Jack to see Dr. Grant several times and at the time of the trial he was regularly seeing Dr. Richards.¹

Daniel Burrows testified at length about how it took 26 emails between DeGon and himself to coordinate a visit with Dr. Burrows' mother. RP 308-09. He presented this as evidence that DeGon used the children as bargaining chips. But, the emails reveal that there were four parties involved – DeGon, Daniel, Dr. Burrows' new counsel, Veronica Freitas, and GAL, Jenny Heard – and DeGon was concerned about the children's safety since Dr. Burrows had just returned from inpatient treatment. *Id.*; Exh. 85.

E. THE COURT'S RULING

Again, despite Dr. Maiuro's report that DeGon did not have a borderline personality disorder, in the trial court's oral decision, it mentioned DeGon as having a personality disorder two times. RP 1030, Vol 2 RP 6, Vol 2 RP 12. The court imposed .191 restrictions based on its

¹ Alecia Richard was under a subpoena, but she failed to appear for trial.

finding that DeGon had a history of domestic violence, specifically emotional and sexual abuse of Dr. Burrows, including the nonconsensual sexual fetishes which resulted in his beating, rape, humiliation and unlawful imprisonment, and that she had engaged in a pattern of child neglect. Vol. 2 RP 4. The court also imposed a restraining order against her. The court made Dr. Burrows the primary parent and awarded him child support based on DeGon's financial declaration and spousal maintenance, finding he could only work more than part time due to his mental status. Vo. 2 RP 20.

The court found that, even though he suffers from bipolar II disorder, it was just as likely that it may be PTSD and anxiety, and that, according to Dr. Maiuro's report, it may be as a result of a sexual assault perpetrated on him by Ms. DeGon. Vol. 2 RP 4.

The Court found that Dr. Burrows had remarkably good insight into his mental illness, and was willing and able to take medications and continue individual therapy with a mental health treatment provider. Dr. Burrow needs access to his children to continue his recovery from his last bout of depression and DeGon's intentional interference further constituted abuse. Vol 2 RP 5.

The court found that DeGon's neglect included refusing to seek ongoing mental health counseling for Jack and Simon after both have exhibited serious conditions. Vol. 2 RP 9.

DeGon was given residential visitation from Thursday afternoon at 3:30 until Monday at 9:30 every other weekend and required DeGon to see a sex addiction counselor as a pre-condition to any visitation. RP 10. The court said it was its hope that through counseling Ms. DeGon could work towards understanding her personality disorder. RP 11-12. Dr. Burrows was given major decision making authority for all three children and was authorized to travel abroad outside of the U.S. RP 12.

The Court characterized the family home as community property, and found that DeGon failed to show by clear, cogent and convincing evidence that the residence was her separate property and valued it at \$450,000. RP 14. The found that evidence of community property included that the parties only placed the home in DeGon's name to shield it from claims from Dr. Burrows' ex-wife, that Ms. DeGon later executed a quitclaim deed containing the title to the property as marital community, and that the mortgage on the property was paid for with community funds. RP 14. The court awarded the home to Dr. Burrows and ordered an equalizing payment of \$125,475. RP 15.

The court awarded AgileRecruiter and the trademark, the software, including the source code and the contacts that are the content in the database, to Ms. DeGon. RP 15. The Court evaluated the database of contacts in AgileRecruiter at \$80,000. RP 15.

The court characterized the health care, insurance premiums, court costs and other litigation expenses as community debts, but found that DeGon had paid for those with community funds. RP 16-17.

F. RECONSIDERATION

On reconsideration, DeGon argued the court should grant a new trial or to take additional evidence regarding the domestic violence findings because she was not given notice and an opportunity to respond. She provided declarations from several people showing Dr. Burrows did not finally acquiesce, as he testified to, but actively sought both male and female partners with whom he could have a BDSM experience. Dr. Burrows was still seeking the types of sexual experiences into which he alleged DeGon to have coerced him. CP 104, 114, 117.

Numerous declarations from their various playmates described those experiences as safe, loving, creative, erotic explorations. CP 104.

DeGon also sought to admit testimony from Christina Bandaragoda and Stephanie Harvey who were both present on July 5, 2013 when Dr. Burrows picked up the children and took Jack to the doctor

and Jack did not act like he was in pain. They both testified that ack never complained of any pain or mentioned tripping over a hole the previous night. CP 154.

On reconsideration, DeGon provided a supplemental declaration of which explained the court's gross misinterpretation of his findings. CP 219. Specifically, he stated that the court's finding that the parties' participation in sexual fetishes and experimentation constituted unlawful imprisonment by Ms. Degon was inaccurate because Dr. Burrows indicated that he consented to the full spectrum of those behaviors. It was only afterward that he felt ashamed and humiliated. But, those feelings do not mean the acts were non-consensual. CP 220-21. In addition, neither party has a mental disorder, centered upon sexual conduct. CP 219.

Dr. Maiuro corrected the court's finding of child neglect in as far as the court based its decision in part upon his opinions. He did not find that Ms. DeGon engaged in child neglect as a mother and, in his opinion, the court is in error in describing the mother as having not attended to an injured child because his assessment revealed that DeGon talked with Jack about the incident and ultimately it involved a common sprain and not a broken bone. CP 221.

In response to the court's interpretation of his report that Dr. Burrows may just have likely have PTSD as a result of the sexual

activities and general psychological maltreatment by Ms. DeGon, Dr. Maiuro specifically stated that his diagnosis of Bipolar Disorder was rendered with great care. Bipolar is genetic or biologically inherited and cannot be caused by maltreatment. Further, Dr. Burrows' symptoms predate his involvement with DeGon.

Notably, Dr. Maiuro found that the court's appreciation for Dr. Burrows' level of insight, is misplaced because he has attempted to "deny and dilute" a finding of Bipolar Disorder. Equally important, Dr. Burrows has never been firmly diagnosed with PTSD, even by his own treating physician, Dr. Morgan. CP 223. Lastly, Dr. Maiuro reported witnessing Dr. Burrows' claims of PTSD as a result of his alleged victimization escalate over time. CP 223. Lastly, PTSD does not explain his own "abusive and terrorizing behavior toward Ms. DeGon" and his "potentially alienating interrogation of the children" CP 223.

Even after clarification from Dr. Maiuro, the court's amended findings of fact contained most of the same finding with the exception the it took out the word rape.

On reconsideration, the court re-calculated both parties' income and imputed income to DeGon. The court re-assigned the \$50,000 line of credit to DeGon in addition to court costs and expert fees. The court denied reconsideration of the characterization of the Scenic Drive home.

V. ARGUMENT

A. STANDARD OF REVIEW

The trial court must consider a number of provisions in the Parenting Act in adopting a parenting plan. The guidelines set forth in RCW 26.09.187(3) must be read in conjunction with RCW 26.09.184 (listing the objectives and required contents of a permanent parenting plan), RCW 26.09.002 (stating the policy of the Parenting Act), and RCW 26.09.191 (setting forth limiting factors which require or permit restrictions upon a parent's actions or involvement with a child). *See In re Marriage of Littlefield*, 133 Wn.2d 39, 50, 940 P.2d 1362 (1997).

RCW 26.09.002 provides, in part:

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

A trial court's decision regarding a parenting plan is generally reviewed for abuse of discretion, *Littlefield*, 133 Wn.2d at 47, which is defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Littlefield, 133 Wn.2d at 47.

The trial court's factual findings may be reversed if they are not supported by substantial evidence in the record. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). The appellate court will overturn an award of child support only when the party challenging the award demonstrates that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. *In re Marriage of Peterson*, 80 Wn.App. 148, 152-53, 906 P.2d 1009 (Ct. App. Div. 1 1995) citing *In re Marriage of Stenshoel*, 72 Wn.App. 800, 803, 866 P.2d 635 (1993).

Non-constitutional error requires reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220, 1229 (1991) (citations and internal quotation marks omitted). “Constitutional error is presumed to be prejudicial, and the [opposing party] bears the burden of proving that the error was harmless.” *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error can

be deemed harmless only if the appellate court is persuaded beyond a reasonable doubt that the error did not affect the outcome of the trial and that the trier of fact would have reached the same result without the error, *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The same constitutional harmless error rule is applied in a civil case where the constitutional right of a parent is implicated. *See, e.g., Dependency of A.W.*, 53 Wn. App. 22, 30, 765 P.2d 307 (1988).

B. THE EVIDENCE AND FINDINGS ARE INSUFFICIENT TO SUPPORT THE TRIAL COURT'S RESTRICTIONS TO DEGON'S RESIDENTIAL TIME UNDER RCW 26.09.191

1. Legal Standards

A trial court may not impose restrictions on residential time without a finding that one of the provisions of RCW 26.09.191 applies. *Katare v. Katare*, 125 Wn. App. 813, 825-26, 105 P.3d 44 (2004), *review denied*, 155 Wn.2d 1005, 120 P.3d 577 (2005). Further, "any limitations or restrictions must be reasonably calculated to address the identified harm." *Id.* at 826 (footnote omitted). "Parental conduct may only be restricted if the conduct would endanger the child's physical, mental, or emotional health." *Marriage of Wickland*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996).

Section .191 does not violate any constitutional right of a parent when properly applied. *Marriage of Wickland*, 84 Wn. App. 763, 823, 932

P.2d 652 (1996). But, “[t]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Troxel v. Granville*, 530 U.S. 57, 72-73, 120 S.Ct 2054, 147 L.Ed.2d 49 (2000). In *Troxel*, the Court struck down a Washington statute permitting a judge to order third-party visitation based on the “best interest” of the child without a finding that the parent was unfit or that the child was harmed by the lack of visitation. Similarly, the due process clause prohibits imposing restrictions under RCW 26.09.191 without a showing that they are necessary to avoid an identified harm to the child.

Further, a court cannot place restraints on a parent based on sexual preference. *In re Marriage of Cabalquinto*, 43 Wn. App. 518, 519, 718 P.2d 7 (1986).

RCW 26.09.191 makes restricts on a parent’s residential time mandatory if that parent has history of acts of domestic violence as defined in RCW 26.50.010(1) or sexual assault which causes grievous bodily harm or the fear of such harm, or emotionally abuses a child. RCW 26.09.191(2)(a). The court may impose restrictions for neglect. RCW 26.09.191(3).

2. In This Case, There is an Insufficient Showing of Harm to Justify Restrictions

Judge Judge found that .191 restrictions should apply and Ms. DeGon's time with the children should be limited. As a result, DeGon is now limited to 8 out of 30 days in a month. There is no finding – nor evidence that could support such a finding – that more time with DeGon would be harmful to the children.

The trial court imposed .191 restrictions for two reasons. First, the trial court found that DeGon had engaged in domestic violence toward Dr. Burrows emotionally and sexually abusing him. She did so by talking too much, pushing the limits on sexual freedom and experimentation, and purposefully pushing Dr. Burrows past the breaking point, which caused him to be traumatized and ultimately resulted in his mental breakdown.

Second, the trial court found that DeGon engaged in a pattern of child neglect, citing four specific instances. DeGon failed to seek medical treatment for Jack after he jumped from a ladder and “seriously injured” his leg, she left the home for six months in 2010, to focus on her own needs, and left the children in Dr. Burrows' care while he was falling into depression, she was unwilling to seek mental health counseling for Jack and Simon and she tends to minimize issues, especially the impact of Jack's abusive behavior on his younger siblings. CP 53-54.

a. DeGon did not commit domestic violence by sexual abuse because Dr. Burrows consented to their sexual activities

The court found that Dr. Burrows was traumatized by sexual abuse and that he believes he suffers from PTSD as a result of it, yet noted that whether he actually suffers from PTSD is “not important to the overall disposition of this case.” CP 53.

Whether Dr. Burrows suffers from PTSD is absolutely dispositive to the disposition of this case because Dr. Burrows, and the court, made it dispositive. If Dr. Burrows suffers from Bipolar Disorder, as three professionals agree he does, then nothing Ms. DeGon did contributed to his mental state and she could have committed domestic violence or emotional abuse. If Dr. Burrows suffers from PTSD, then some of his symptoms could be caused by someone else. Dr. Burrows tried very hard to show, and succeeded in convincing the court, that the latter was the case. However, the record does not support this conclusion. The evidence actually showed that this was a pervasive and calculated attempt to blame DeGon for his mental illness.

Dr. Burrows’ feelings of regret and victimization about his sexual encounters with DeGon were a result of his mental illness. The trial court’s finding that Ms. DeGon engaged in acts of domestic violence when she “pushed the limits on sexual freedom, experimentation to a degrading and punitive level” directly contradicts Dr. Maiuro’s testimony that

individuals who suffer from Bipolar Disorder often engage in experimental sex acts in a hypomanic state and then later regret it. CP 52. This is evidenced by Dr. Burrows' admission that he consented to the sexual activities RP 845-46. At trial Dr. Burrows testified his PTSD was not caused by DeGon's sexual abuse.

Even more, at the time of trial, Dr. Burrows maintained a FetLife account, with the screen name Locked Up, and he maintained an adult friend finder account for which he paid a monthly subscription. RP 651. He further admitted that he willingly participated in caning for sexual pleasure. RP 652. These are hardly the actions of someone who only went along with these activities to please his wife.

b. Emotional abuse is not domestic violence as defined by RCW 26.50.010(1)

The court's finding that DeGon somehow abused Dr. Burrows by engaging him day and night is absurd. First, DeGon's actions could not have caused his current mental status because it predated his marriage to her. Second, even if it was possible for DeGon to cause Dr. Burrows' mental status, emotional abuse is not domestic violence as defined by RCW 26.50.010(1) and cannot be used as a basis for restricting DeGon's residential time.

Whether emotional exploitation or abuse falls under the definition of domestic violence in RCW 26.50.010(1) is a matter of statutory interpretation and is reviewed de novo. *Advanced Silicon Materials, LLC v. Grant Cnty*, 156 Wn.2d 84, 89, 124 P.3d 294 (2005). The court must give effect to a statute's plain meaning. *State Dept. of Ecology v. Campbell & Gwinn, LLC* 146 Wn.2d 19-10, 43 P.3d 4. "[A]n unambiguous statute is not subject to judicial construction." *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). "A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable." *Id.*

RCW 26.50.010(1) defines "domestic violence" as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members." RCW 26.50.010(1) is not ambiguous and therefore its meaning is derived from the plain language of the statute alone. *Neilson ex rel Crump v. Blanchette*, 149 Wn.App. 111, 116, 201 P.3d 1089 (2009). The definition does not include "emotional abuse." Therefore, the trial court erred when it found that DeGon's alleged emotional abuse, even if true, constituted domestic violence and warranted parenting restrictions. In the unpublished portion of *In re Marriage of Underwood*, 181 Wn.App. 608, 326 P.3d 793 (Ct. App. Div. 2 2014), the court of appeals came to the same conclusion.

c. Parental Restrictions cannot be based on sexual preference

The court's findings of fact and amended findings of fact spend a considerable amount of time discussing what the court perceived as "particularly disturbing." II RP 8; CP 52-53. The court may disagree with a parent's chosen lifestyle, but, unless it creates harm to the child, it cannot be used to restrict a parent's residential time. The court's requirement that Ms. DeGon seek a mental health evaluation with a sexual addiction specialist shows the court's disgust for DeGon's sexual activity. If parental conduct may only be restricted if the conduct would endanger the child's physical, mental, or emotional health then it necessarily follows that the court cannot place conditions on residential time without the same showing of harm. There was no evidence presented that the children were exposed to the couples' sexual activities or that it caused any harm to them. Exh. 36 at 24. Therefore, the trial court lacked authority to restrict DeGon's residential time without a showing that her lifestyle exposed the children to harm. It also lacked authority to further qualify her limited time with a condition that was not reasonably calculated to address an identified harm.

d. Insufficient evidence to show a pattern of child neglect

The critical fact here is that, by the account of every professional familiar with Simon and Jack, they have flourished under Ms. DeGon's

care. Notably, neither Dr. Maiuro nor GAL Jeanette Heard, found that any concerns about DeGon's parenting rose to a level requiring restrictions. It is interesting that the trial court pointed to the incident in which Jack jumped from a ladder and injured himself, as an indication of neglect when Dr. Maiuro specifically noted that incident and reported that it did not rise to the level of abuse. CP 53-54; Exh. 36.

The court found that DeGon tends to minimize issues, especially the impact of Jack's abusive behavior on his younger siblings. CP 53. However, the only evidence that Jack poses a threat to them was Dr. Burrows' own testimony and it has already been established that as a result of his mental illness he tends to attribute malevolent motives to others. In any event, DeGon testified that when she observed Jack invading Simon and Isabel's space, and she practiced nonviolent communication. It is unconstitutional for the court to impose restrictions because it believes a better decision could be made. *Troxel*, 530 U.S. at 72-73. Our society must tolerate a variety of parenting styles. DeGon's parenting was not sufficiently harmful to justify .191 restrictions.

In the trial court's amended findings of fact it found that DeGon refused to obtain mental health counseling for Jack and Simon. CP 53. This is simply incorrect and not supported by the record. The GAL's concern was that DeGon did not obtain *enough* counseling. DeGon first

engaged Janelle Woolf, Jack's speech language pathologist at Harbour Point middle school as Jack's counselor, but the GAL told DeGon that was not sufficient and she needed to take him to a licensed psychologist. That is when she took Jack to see Dr. Grant. The GAL perceived that DeGon did not take Jack often enough, but took him only when a crisis developed. However, at the time of trial Jack was regularly seeing Dr. Richards, whom DeGon was referred to, and was approved by, Jack's primary doctor, Dr. Zarat.

Even if the trial court's finding was correct, the children have not been harmed. Furthermore, the trial court's concern would have been adequately alleviated by following the GAL's recommendation that Dr. Burrow be in charge of their mental health care. Restricting DeGon's residential time is not reasonably calculated to address an identified harm. The fact that there was a less restrictive alternative is fatal.

Despite the GAL's concern, both the principal of Picnic Point Elementary School, Lynn Olsen, and Ms. Woolf testified about the children's progress. Woolf testified that there is a strong chance he would not need a continuing IEP. RP 884, 886. She also testified that Jack is mature and is making progress showing socially acceptable behavior. RP 877-78, 882. Olsen testified that Simon had behavioral problems in the

past, but had no incidents in the current school year. Izzie had no behavioral incidents. RP 950-51.

The court's finding that Ms. DeGon committed child neglect by leaving the home for six months in 2010, to focus on her own needs, and leaving the children in Dr. Burrows' care while he was falling into depression is not supported by the record. CP 54. DeGon and Ms. Baker Anderson testified that DeGon left the home to be closer to work, so she could provide for the family. In addition, DeGon and Dr. Burrows testified that DeGon saw the children on the weekends. Most importantly, the family employed a full time nanny during that time, so the children were not left in Dr. Burrows' care alone. Dr. Burrows testified that he spun into a depression at that time because DeGon had left the home and was engaging in an extra-marital affair, something both DeGon and Baker Anderson denied. This court does not review the facts de novo or make credibility determinations, but this is another example of how his correct diagnosis is dispositive. If he suffers from PTSD, as the court incorrectly concluded was just as likely, then his depression could be blamed on DeGon's absence and he could blame her for his mental degradation and neglect. If he suffers from Bipolar Disorder, then this is yet another example of how his mental illness causes him to blame his depression on others whom he perceives as having wronged him.

Because these are constitutional errors, they are presumed to be prejudicial and the burden is on Dr. Burrows to prove beyond a reasonable doubt that the error did not affect the trial. Not only did this error affect the trial, but it was the pivotal decision in the case. DeGon's residential time was unconstitutionally restricted because the trial court made findings without substantial evidence to support it and relied upon an incorrect legal standard.

C. THE TRIAL COURT VIOLATED DEGON'S DUE PROCESS IN GRANTING A RESTRAINING ORDER AND DENYING A NEW TRIAL OR ADDITIONAL EVIDENCE

1. The Restraining was issued without notice and an opportunity to be heard

A person may seek an order of protection by filing a petition alleging he or she is the victim of domestic violence. RCW 26.50.020(1); RCW 26.50.060(1)(a)-(1). Due process requires the court to balance the respondent's private interest, and the risk of erroneous deprivation of that interest, with the government's interest in maintaining the procedures. *State v. Lee*, 82 Wn. App. 298, 312-13, 917 P.2d 159 (1996).

Before the court can impose a permanent restraining order it must find that the respondent is likely to resume acts of domestic violence when the order expires and the petition must show a reasonable likelihood of imminent harm. *Freeman v. Freeman*, 169 Wn.2d 664, 674, 239 P.3d 557 (2010); RCW 26.50.060(2).

Here, DeGon's right to the care, custody, and management of her children is implicated and far outweighs any interest the government may have in judicial economy. Dr. Burrows did not allege domestic violence in his petition for dissolution, nor did he file a petition for a protective order, thus creating a high risk of erroneous deprivation at trial. She was not prepared to defend herself from claims of domestic violence, especially when it was ruled out by Dr. Maiuro, it was not a concern raised by the GAL and Dr. Burrows did not ask the court for a protective order prior to trial.

2. The trial court should have granted a new trial or re-opened the case to take additional evidence because DeGon was unfairly surprised.

CR 59 authorizes the court to grant a new trial when there was surprise which ordinary prudence could not have guarded against or when an irregularity in the proceeding prevented a party from receiving a fair trial. At a bare minimum, procedural due process "requires notice and an opportunity to be heard." *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).

As argued above, Dr. Burrows did not allege domestic violence in his petition for dissolution, nor did he file a petition for a protective order. DeGon sought to limit Ms. Baker-Anderson's testimony about the alleged abuse because it had not been pled, the GAL raised no concerns about

domestic violence and Dr. Maiuro ruled it out. Therefore, DeGon did not want to open the door to bring in irrelevant and prejudicial testimony. In addition, there were multiple CPS investigations launched by Dr. Burrows and none of them resulted in a finding of neglect or abuse. CP 92.

Although Dr. Burrows did allege sexual abuse to Dr. Maiuro, his report ruled out domestic violence.

Any court rule such as CR 15 that allows the parties to amend the pleadings at any time is outweighed by DeGon's fundamental right to parent her children. This is especially true when the evidence she sought to admit so thoroughly refutes Dr. Burrow's claims of sexual abuse, to the point that it may prove he perjured himself.

DeGon presented voluminous evidence of how the fetishes she was accused of coercing him into actually belonged to him and he actively sought them out. Dr. Burrows' requested a third party tie him up in various ways, cane him, and put him in sensory deprivation. CP 105. Dr. Burrows talked about his involvement with BDSM openly and viewed it as a "source of delight and fun." CP 134.

Lastly, the court should have granted a new trial or taken additional evidence because the court abused its discretion and substantial justice was not done. The court grossly misinterpreted Dr. Maiuro's report. Dr. Maiuro provided a supplemental declaration detailing the

extent of the courts misinterpretation. He clarified that Dr. Burrows has a mental illness, most likely Bipolar II, which cannot be caused by maltreatment, he has never been firmly diagnosed with PTSD and PTSD does not fully explain his symptoms. Mostly importantly, Dr. Burrows admitted that he consented to the full spectrum of sexual activity and it was only later that he felt regret. Equally important, the court continually referred to DeGon as having a personality disorder when none had been diagnosed. Even when presented with this evidence, the court refused to remove the restrictions it placed based on its misinterpretation of Dr. Maiuro's report. The court emphasized that Dr. Burrows has remarkable insight into his illness, but actually he denied and diluted his diagnosis.

D. THE TRIAL COURT ERRED IN AWARDING SPOUSAL MAINTENANCE

The trial court may, in its discretion, grant a maintenance order for either spouse for such amount and for such periods of time as the court deems just. RCW 26.09.090. The court found that Dr. Burrows was in need of spousal support because he was unable to work more than half time and DeGon had the ability to pay.

But, the court awarded spousal maintenance based on DeGon's imputed income. There is no authority that permits a court to impute income for the purposes of spousal maintenance. While it is true that

RCW 26.09.090(1)(a) does not direct the trial court to recalculate child support after a maintenance amount is determined, it does direct the court to consider the amount of child support the custodial parent receives when determining whether maintenance is necessary. The court should have considered the amount of child support Dr. Burrows will receive as a factor in determining the need for maintenance. CP 99. The court determined that Dr. Burrows' income is roughly \$6,600 per month. After his \$1,900 child support payment from Ms. DeGon, the parties were already on equal footing.

E. THE TRIAL COURT ERRED IN IMPUTING INCOME TO MS. DEGON BECAUSE SHE WAS A FULL TIME EMPLOYEE OF CAYMAN AND WAS NOT INTENTIONALLY UNDEREMPLOYED

The court determines whether the parent is voluntarily underemployed based upon that parent's work history, education, health, and age, or other relevant factors. RCW 26.19.071. But, a court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed for the purpose of reducing the parent's child support obligation. RCW 26.19.071(6). "Gainful" means employment compensated by a wage or as the person's usual or customary occupation. *In re Marriage of Peterson*, 80 Wn.App. at 153. "Full-time" does not necessarily mean 40 hours per week. *Schumacher v. Watson*, 100 Wn.App. 208, 215, 997 P.2d 399 (Ct.

App. Div. 1 2000). Instead, the court should consider whether the person is working in their customary occupation. *Id.*

DeGon's compensation at Cayman was only 80% FTE, but she testified that she worked 32-40 hours per week. Not only was DeGon working a full work week in her customary occupation, but she also sought additional work as a contractor. The court imputed another \$900 as income generated by that independent contract work.

DeGon was gainfully employed on a full time bases and it was error to impute income to her without a finding that she was underemployed for the purpose of reducing child support.

F. THE TRIAL COURT ERRED IN ITS VALUATION OF AGILE RECRUITER AT \$80,000 WHEN BOTH PARTIES TESTIFIED IT WAS OF ALMOST NO VALUE TO THEM AND NEITHER PARTY WANTED IT. THE TRIAL ALSO COURT ERRED IN ITS VALUATION OF AGILE RECRUITER'S ASSOCIATED DATA ASSETS.

The court has broad discretion in awarding property in a dissolution action, and will be reversed only upon a showing of a manifest abuse of discretion. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).

Both parties testified that the other party wasted this asset. DeGon testified that the value was not in the names or the database itself, but in the more efficient system they created. In its current condition it is not

market ready and neither party is willing or able to assume the risk of building it back up to be the profitable asset it once was. In DeGon's financial declaration, she listed the cost of using a similar database for her contracting business at \$249 per month. Agile recruiter should have been valued at that cost of replacement for a reasonable amount of time. Valuing what has become obsolete technology at \$80,000 was a manifest abuse of discretion.

G. THE TRIAL COURT ERRED IN BOTH ITS CHARACTERIZATION OF THE SCENIC DRIVE HOME AND THE APPLICABLE LEGAL STANDARD

Property is characterized as of the date of its acquisition. *In re Estate of Borghi*, 167 Wn.2d 480, 484 219 P.3d 932 (2009). Property is acquired when the mortgage obligation is undertaken. *Beam v. Beam*, 18 Wn.App. 444, 453, 569 P.2d 719 (1977). It is only re-characterized as community property, if the person arguing the characterization has changed can show, by clear and convincing evidence that the separate property owner intended to change its character. *Borghi*, 167 Wn.2d at 484-85. Placing a spouse's name on a deed or title does not sufficient evidence of an intent to transmute separate property into community property. *Borghi*, 167 Wn.2d at 489.

In a dissolution, all property is before the court for a just and equitable division in light of all relevant factors. *White v. White*, 105 Wn.App. 545, 549 20 P.3d 481 (Ct. App. Div. 2 2001); RCW 26.09.080.

It was undisputed that the property was purchased before marriage. RP 623. Dr. Burrows testified that he contributed \$30,000 to the purchase price and that it was always intended to be community property, but he produced no evidence of his contribution. RP 623. DeGon testified that she purchased the home with her own money, other than a \$5,000 gift Dr. Burrows had given her. She used the money she received from the sale of her home in Mountlake Terrace, which she sold for \$136,950 in January 2000. Exh. 144, 153, 154.

DeGon further testified that Dr. Burrows came to the marriage with no income and a lot of debt and she did not intend the house to be community property. The trial court placed the burden on DeGon to show by clear and convincing evidence that the transaction fell within the scope of a separate property exception and she did not meet her burden. But, because the home was purchased before marriage and the title was in DeGon's name only, it should be characterized as separate property and that character did not change even if some of the mortgage payments were paid using community property or both names were later placed on the

title. It was Dr. Burrows' burden to show by clear and convincing evidence that DeGon intended to create community property.

When DeGon executed the Quit Claim Deed on November 13, 2011, the equity in the house (it's value less the mortgages) should be entirely allocated to DeGon. The book value of the house according to experts November 18, 2013 was \$447,353 with roughly \$125,000 owed meaning that the equity in the house was approximately \$350,000.

H. THE TRIAL COURT ERRED IN ITS CALCULATION OF HEALTH INSURANCE PREMIUMS DR. BURROWS OWED TO MS. DEGON

Evidence at trial showed the a September 23, 2012 order required Ms. DeGon to provide proof of Dr. Burrows' share of the premium. CP 2051. However, the court relied solely on a December 21, 2012 order which ordered Dr. Burrows to pay his own medical premium directly to the provider starting on January 1, 2013. CP 1903. The December court ordered simply enforced the earlier September order. It is manifestly unreasonable to interpret these orders together to mean that even though Ms. DeGon was required to keep track of how much Dr. Burrows owed, he was not actually required to pay it.

I. THE TRIAL COURT ERRED IN AWARDING BOTH COSTS AND EXPERTS FEES AND THE \$50,000 LINE OF CREDIT TO DEGON.

In the order appointing GAL, 100% of the retainer was to be paid by the mother from the \$50,000 line of credit subject to reallocation. CP 2059. On reconsideration, the trial court found that DeGon paid the court costs, expert fees, and her own attorney fees using community funds, namely the \$50,000 line of credit against the house. But, the court also awarded that line of credit as a separate debt. Essentially, DeGon paid twice.

VI. REQUEST FOR ATTORNEY FEES AND COSTS

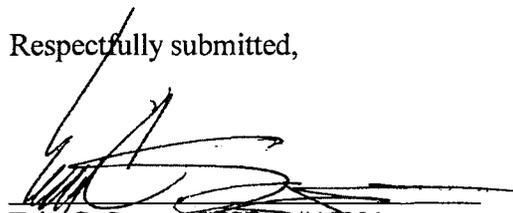
DeGon asks this Court to award her attorney fees and costs based on the relative resources of the parties and the merits of the appeal. *See* RCW 26.09.140; RAP 18.1; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003, 972 P.2d 466 (1999).

VII. CONCLUSION

For the foregoing reasons, this Court should vacate the trial court's orders re-instate the pre-trial orders and remand for a new trial.

DATED this 3rd day of August, 2015.

Respectfully submitted,



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I, Erin C. Sperger declare under penalty of perjury that I filed an original and one copy of Appellant's opening brief at the Court of Appeals Division I on August 3, 2015.

I further declare that I mailed, via U.S. mail, a copy to the following attorneys of record:

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