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No. 74427-5-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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IN RE THE MARRIAGE OF

GINGER PAUL GALANDO, Respondent

v.

MATTHEW PAUL GALANDO, Appellant

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BRIEF OF APPELLANT

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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

TABLE OF CONTENTS

I. Statement of the Case.....1

II. Assignments of Error.....7

1. Failing To Implement The Factors Required By *In Re Marriage of Daubert*, 124 Wa.App 483, 99 P.3d 401 (2004).....7

2. Imputing Earned Income At \$8,333 Per Month.....7

3. Imputing \$15,233 Per Month In Trust Income.....7

4. Imposing An Obligation On Mr. Galando To Pay 100% Of The Children’s Private School Tuition, Work Related Day Care, Extra-Curricular Activities and Uninsured Health Care Expenses Under Sections 3.15 And 3.19 Of The Child Support Order.....7

5. Ordering The Payment of 100% Of The Cost Of Ms. Galando’s Schooling In Lieu of Maintenance.....8

6. Mischaracterizing \$362,000 In Personalty As Community Property.....8

7. Valuing Amps Northwest At \$150,000 And The Galando Trust Interests At \$8 million.....8

8. Mischaracterizing The Relationship Of The Parties As A Committed Intimate One Before The Marriage And As A Long Term Marriage, Finding Of Fact 2.8).....8

9. Section 3.13.4: Ordering Psychological Evaluations For Both Parties.....8

10. Finding A Pattern Of Emotional Abuse Of A Child.....	8
11. Finding A History Of Acts Of Domestic Violence Or Sexual Abuse Or Assault.....	8
12. Failing To Find That Both Parent’s Engaged In Abusive Use Of Conflict Which Creates The Danger Of Psychological Damage To The Children.....	9
13. Finding A Long Term Impairment Resulting From ...Alcohol Or Other Substance Abuse That Interferes With The Performance Of Parenting Functions (Including The Findings Under Section 3.10 Of Past Alcohol Abuse).....	9
14. Conditioning Residential Time Between The Children And Mr. Galando By Requiring.....	9
a. Drug Treatment For At Least 12 Months.....	9
b. Prohibiting Possession of Alcohol.....	9
c. Requiring Random Testing As To Alcohol.....	9
d. By Ordering Random Drug And Alcohol Testing Every 80 Hours For Six Months Followed By Six Months Once Per Week.....	9
e. Suspending Visits If He Is Suspected Of Having Consumed Alcohol.....	9

f. Prohibiting Any Contact With The Police.....	9
15. Ordering Random Testing Every 80 hours (Twice per Week) For Six Months (CP 59 and 60).....	9
16. Ordering The Suspension Of All Contact With The Children Should He Fail To Comply With Any Of The Foregoing Restrictions Under Section 3.10 (3).....	10

### III. Argument

1. The Court Erred By Failing To Weigh The <i>Daubert</i> Factors.....	10
2. The Court Erred In Its Imputation of \$8333 Per Month In Earned Income In Violation Of The Standards Set Forth In RCW 26.19.071 (6).....	12
3. The Court Erred By Imputing \$15,333 Per Month In Trust Income.....	15
4. The Court Erred In Failing To Pro-Rate The Calculation Of The Amount Of Mr. Galando’s Support Obligations As Required Under RCW 26.19.080 (2) And (3) [Costs Not Included In The Transfer Payment].....	15
5. Ordering The Payment of 100% Of The Cost Of Ms. Galando’s Schooling In Lieu of Maintenance.....	17
6. Mischaracterization of \$362,000 In Personalty As Community Property.....	18
7. The Valuation Of The Trust Assets And Amps Northwest Inventory.....	21
a. The Amps Northwest Inventory.....	21
b. The Value Of The SDM Trust.....	22

8. Mischaracterization Of The Relationship As A Long Term Marriage And Committed Intimate Relationship (Finding Of Fact 2.8).....	23
9. Ordering Psychological Evaluations For Both Parties (Section 3.13.4).....	24
10. No Evidence Of A Pattern Of Emotional Abuse Of A Child.....	26
11. No History Of Acts of Domestic Violence As Defined On RCW 26.50.010 (1) Or An Assault Or Sexual Assault Which Causes Grievous Bodily Harm Or The Fear Of Such Harm.....	26
12. Abusive Use Of Conflict By The Parent Which Creates The Danger Of Serious Damage To The Children’s Psychological Development.....	28
13. No Long Term Impairment Resulting From ... Alcohol Or Other Substance Abuse That Interferes With The Performance Of Parenting Functions (Including The Findings Under Section 3.10 Of Past Alcohol Abuse).....	29
14. The Court Erred By Imposing Conditions On Implementation Of His Residential Time With The Children Hereinafter Identified.....	31
a. Section 3.2.1 c: Requiring Drug and Alcohol Treatment For At Least 12 Months And AA/NA Meetings.....	33
b. Prohibiting Possession Of Alcohol.....	34
c. Requiring Random Testing As To Alcohol.....	34

d. By Ordering Random Drug Testing Every 80 Hours For Six Months Followed By Six Months Once Per Week.....	34
e. Suspending Visits If He Is Suspected Of Having Consumed Alcohol.....	34
f. Prohibiting Any Contact With The Police.....	35
15. Ordering Random Testing Every 80 hours (Twice per Week) For Six Months (Section 3.2 1 a And 2 a (CP 90-91).....	35
16. The Punishment For Violating The Conditions Under Sections 3.2, 3.10 And 3.13 Harm The Children Rather Than Protect Them From Harm Since All Residential Time Is Suspended.....	37
IV. Conclusion.....	39

## TABLE OF AUTHORITIES

### Table of Cases

<i>Berol v. Berol</i> , 37 Wa 2d 380, 223 P.2d 1055 (1950).....	18
<i>Connell v. Francisco</i> , 127 Wash.2d 339, 898 P.2d 831 (1995).....	24
<i>In re Estate of Haviland</i> , 162 Wa.App 548, 255 P.3d 854 (2011).....	24
<i>In re Marriage of Chandola</i> , 180 Wa.2d 632, 327 P.3d 644 (2014).....	32, 33, 40
<i>In Re Marriage of Daubert</i> , 124 Wa.App 483, 99 P.3d 401 (2004).....	7, 10, 11, 12
<i>In re Marriage of Leslie</i> , 90 Wa.App 796, 954 P.2d 330 (1998).....	10
<i>In Re Marriage of Littlefield</i> , 133 Wa.2d 39, 940 P.2d 1362 (1997).....	24
<i>In re Marriage of McCausland</i> , 159 Wa.2d 607, 152 P.3d 101 (2007).....	11
<i>In re Marriage of Rockwell</i> , 157 Wa.App 449, 238 P.3d 11844 (2010).....	23
<i>In re Marriage of Sedlock</i> , 69 Wa.App 484, 849 P.2d 1243 (1993).....	15
<i>In re Marriage of Wright</i> , 179 Wa.App 257, 319 P.3d 45 (2013).....	18
<i>Johnson v. Dar Denne</i> 161 Wa 496, 296 P.1105 (1931).....	19

<i>Lucker v. Lucker</i> , 71 Wa 2d 165, 426 P.2d 081 (1968).....	21
<i>Mayo v. Mayo</i> , 75 Wa 2d 35, 448 P.2d (1968).....	22
<i>State ex rel JVG v. VanGuilder</i> , 137 Wa.App 417, 154 P.3d 243 (2007).....	16
<i>State v. Kintz</i> , 169 Wa.2d 537, 238 P.3d 470 (2010).....	27

#### Statutes

RCW 26.09.002.....	45
RCW 26.09.170.....	17
RCW 26.09.191 .....	26, 28, 31, 32, 34, 40
RCW 26.19.035.....	15
RCW 26.19.071.....	10, 12
RCW 26.19.075.....	10, 12
RCW 26.19.080.....	15, 16
RCW 26.50.010.....	26, 28

#### Secondary Article Sources

Winsor, Washington Bar News, January 1982.....	23
Webster’s International Dictionary page 1278 Third College Ed, 1988.....	18

Merriam Webster's Collegiate Dictionary,  
Tenth edition p. 580 (1995).....27

**I. Statement of the Case:**

The parties were married on July 14, 2000 at Newcastle, Washington and separated August 12, 2014. (July 21, RP 402). They have two children who, at the time of trial in 2015 were ages 9 and 7. (July 21 RP 460).

Prior to the marriage, Ginger Galando had served in the regular army. (July 21, RP 403) During the marriage, she initially worked at Costco, then went to the Art Institute to study fashion design in 2002 and worked from time to time in arts and crafts. (July 21, RP 433). By the time of trial she was working as an office manager, for a company called Northwest Geophysics on an average of 35 hours per week (July 22, RP 669). She stated that her employer will pay for retraining that she intends to pursue effective September 2015. (July 22, RP 721). As of trial she was earning \$2,600 per month. (July 16, RP 443)

At the time of marriage Matt Galando worked for a family owned business, Aurora Foods. He had earned \$120,000 during the one year he worked there until it was sold in the year 2000. (July 23, RP 160). At that time, the couple moved back to Washington. He received about \$25,000 per year from a trust during that time. (July 23, RP 161) He remained unemployed until 2002 when he started a home theatre business. (July 23,

RP 159) He earned about \$40,000 per year in that endeavor which lasted until 2006. (July 23, RP 160).

By 2005, he tried to develop a landscaping business for residential properties. (July 21: RP 443- 444). Ms. Galando testified that he had a serious motorcycle accident in 2005 that was “life changing” (July 21, RP 444). He had fused ankles when he attempted the landscape business and four screws and a steel plate in his heel. For three months he could put no weight on either of his ankles. (July 21, RP 447). He ultimately went through six or seven ankle surgeries. His right ankle broke in half and he shattered his left ankle in multiple places in which there is also metal. (July 23, RP 164).

He was in constant pain, and could not make a go of the landscaping business. (July 21, RP 450 – 451). It ceased doing business in 2012. (July 23, RP 166 - 167).

As to employment that would not aggravate his physical condition, in 2008, he worked full time as a mortgage banker, on commission earning about \$24,000 per year until he was laid off due to the recession in 2009. (July 23, RP 161-162). He also tried to make a go of an amplifier, guitar, and accessory business called Amps Northwest. (July 21, RP 444 and July 23, RP 163). He had a storefront in Burien but eventually had to

close it down for lack of business and the fact that the last of his surgeries occurred during that year. (July 23, RP 166 – 167). Amps Northwest earned no income in 2013. (July 23, RP 167, trial exhibit 323).

By 2013, he was in the throes of depression. He became addicted to prescription pain medication, even to the point that he obtained meds in his wife's name. Eventually he was persuaded to voluntarily get into an in-patient drug rehabilitation facility for 60 days, in Malibu, California, beginning February 2014 which he completed. He followed through with after care through Smart Recovery in lieu of Narcotics Anonymous, which has a religious orientation. Treatment was successful and he maintained his sobriety from such medications through counseling in Seattle with Nurse Practitioner Elizabeth Mueller, regularly, since April of 2014. (Trial Exhibit 518).

He also abstained from alcohol even though he was not diagnosed as being an alcoholic. His decision to abstain from alcohol (except for use of wine occasionally when cooking marsala) was out of concern that it might be a precursor to going back to prescription pain killing medications. (Aug 25, RP 193 – 195).

As of trial in July of 2015, his provider had administered Urinalysis (UA) testing through Swedish Hospital in Seattle. She also

monitors the prescription medication he does take, such as Cymbalta, an antidepressant and Subutex, an opioid craving suppressant. (July 15, RP 217, 373, 384 – 386, 389, 393; 396 August 24, RP 59 and 146). He failed none of his UA's (August 24, RP 16) which were random and observed by the provider (July 15, RP 397), and which occurred sometimes weekly (Aug 24, RP 187). This success is in spite of the fact that as of trial he was still struggling with ongoing pain. (August 24, RP 60). He has arthritis, can barely walk in the mornings, and by the end of the day is physically and emotionally tired out and has swelling of the ankles due to inflammation. (Aug 24, RP 59).

What then were his sources of income as of trial?

**Earned Income:**

The court imputed \$100,000 per year based upon his 2000 income earned during that one year. His last year of earned income was in 2008-2009 when he earned \$24,000 for a year's work. (July 23, RP 161-163).

**The Trusts:**

Matt Galando has beneficial interest in two trusts. Attorney Ed Ahrens is the independent trustee of the descendant's trust helped the family do estate planning since 1998. (July 23, RP 66 and 93). He testified as follows:

Matt Galando and his two brothers were beneficiaries of a home on Hood Canal that they all deeded back to their parents when Matt was in rehab in California in February 2014. (July 15, RP 65 and 197).

They are also equal beneficiaries of what is called the SDM trust (July 16, RP 140) and sole beneficiaries of each of three descendants, spend thrift trusts. (July 15, RP 77). The SDM trust has assets of \$9 million which includes the Galando HP LLC which is Galando Hawaii Properties LLC has \$13.4 million in liabilities, \$2.9 million of which those liabilities are owed by it to Matt's Descendent Trust (July 15, RP 93). It makes annual interest payments on the debt it due the descendant trust of Matt Galando. The principal debt is not owed for another 15 years (July 15, RP 91 and 95 and 183).

The descendant's trust was set up by Matt Galando's parents in 1998, one for Matt and one for each of his two brothers. (July 15, RP 67 and 68). Each of the sons as beneficiaries are also the trustees of their trusts. (July 15, RP 68).

The initial contributions to each of those trusts was stock purchased by the trusts, subject to a debt back, and stock that was sold from their parents' seafood business subject to a loan obligation of \$4.2 million to be retired by 2007. There was also created a similar trust for

their mother Barbara Galando. Loan paybacks were to come from the earnings of the stock. (July 15, RP 70, 71 and 74). At some point Matt's descendant's trust changed from being a grantor trust to a complex trust. (July 15, RP 75).

The tax returns of the complex trust show the amount of the distributions annually to the beneficiary. (July 15, RP 76) Trial exhibit 515 shows what is in Mr. Galando's descendant's trust as of trial: \$23,000 in cash; \$116,000 in two investments in a gas and oil company called Coachman, in North Dakota (July 15, RP 110). The trust also owns a residential home valued at \$2.3 million, and a loan receivable owing to the descendant trust listed at a value of \$2.9 million owed by the SDM trust; \$199,000 in the cash value of life insurance. There is a deferred capital gains tax obligation resulting from the trust's sale of its interest in Galando Hawaii Properties LLC to the SDM trust mistakenly referred on the account statements as a note payable. (July 15, RP 91).

Ahrens concluded the descendant's trust could distribute to Mr. Galando \$150,000 per year which would include some invasion of principal since income was \$130,000 of which is paid by SDM to the descendant trust annually. (July 15, RP 111 and 113). The court imputed trust income of over \$180,000 per year.

**The Galando Investment Limited Partnership:**

There is a Galando Investment Limited Partnership that has three general partners of which Matt is one. Decisions about distributions are made by a majority of the general partners who are his brothers. (July 15, RP 95 – 96). They would not authorize distributions to Matt, although asked by the independent trustee and Matt who is also trustee. (July 15, RP 93-94).

**II. Assignments Of Error**

The Trial Court committed the following Errors:

**The Child Support Order:**

1. Failing To Implement The Factors Required By *In Re Marriage of Daubert*, 124 Wa.App 483, 99 P.3d 401 (2004).
2. Imputing Earned Income At \$8,333 Per Month.
3. Imputing \$15,233 Per Month In Trust Income.
4. Imposing An Obligation On Mr. Galando To Pay 100% Of The Children’s Private School Tuition, Work Related Day Care, Extra-Curricular Activities and Uninsured Health Care Expenses Under Sections 3.15 And 3.19 Of The Child Support Order.

**Spousal Maintenance**

5. Ordering The Payment of 100% Of The Cost Of Ms. Galando's Schooling In Lieu of Maintenance.

**The Property Division:**

6. Mischaracterizing \$362,000 In Personalty As Community Property.
7. Valuing Amps Northwest At \$150,000 And The Galando Trust Interests At \$8 million.
8. Mischaracterizing The Relationship Of The Parties As A Committed Intimate One Before The Marriage And As A Long Term Marriage, Finding Of Fact 2.8).

**The Final Parenting Plan Order:**

9. Section 3.13.4: Ordering Psychological Evaluations For Both Parties
10. Finding A Pattern Of Emotional Abuse Of A Child.
11. Finding A History Of Acts Of Domestic Violence Or Sexual Abuse Or Assault.

12. Failing To Find That Both Parent's Engaged In Abusive Use Of Conflict Which Creates The Danger Of Psychological Damage To The Children.
13. Finding A Long Term Impairment Resulting From ...Alcohol Or Other Substance Abuse That Interferes With The Performance Of Parenting Functions (Including The Findings Under Section 3.10 Of Past Alcohol Abuse).
14. Conditioning Residential Time Between The Children And Mr. Galando By Requiring
  - a. Drug Treatment For At Least 12 Months.
  - b. Prohibiting Possession of Alcohol
  - c. Requiring Random Testing As To Alcohol
  - d. By Ordering Random Drug And Alcohol Testing Every 80 Hours For Six Months Followed By Six Months Once Per Week
  - e. Suspending Visits If He Is Suspected Of Having Consumed Alcohol.
  - f. Prohibiting Any Contact With The Police.
15. Ordering Random Testing Every 80 hours (Twice per Week) For Six Months (CP 59 and 60).

16. Ordering The Suspension Of All Contact With The  
Children Should He Fail To Comply With Any Of The  
Foregoing Restrictions Under Section 3.10 (3)

**III. Argument:**

**The Child Support Order and Work Sheet**

**1. The Court Erred By Failing To Weigh The *Daubert*  
Factors.**

The trial court determined that the net monthly income of both parties exceeded the maximum advisory level on the child support economic table of \$12,000 per month. (CP 60). A transfer payment in excess of the standard calculation is not a deviation where, as here, the combined net incomes of both parties exceed the maximum advisory level as defined by RCW 26.19.071. (CP 34). *In re Marriage of Leslie*, 90 Wa.App 796 at 804, 954 P.2d 330 (1998). The court erred in concluding that the deviation standards under RCW 26.19.075 govern its award of \$1,800 per month as an upward deviation. (CP 36-37).

The standards which must be fulfilled to justify imposing an amount that exceeds the maximum advisory level where the court finds parties combined net monthly incomes exceed \$12,000 per month have been defined by case law. They are that there must be findings that are not

cursory, even if supported by the record. (*In re Marriage of McCausland*, 159 Wa.2d 607, 152 P.3d 101 (2007). Here the findings are cursory.

Furthermore, *McCausland* supra requires that the court consider and implement the factors under *In re the Marriage of Daubert*, 124 Wa.App 483, 99 P.3d 401 (2004). *McCausland* supra at 614 (2007). Under *Daubert* supra, a trial court was reversed for misapplying those factors as reflected by findings that the father has sufficient wealth, that the children need an additional amount to have a standard of living commensurate with their father and that they will benefit by the opportunities available to them from the additional funds. Those findings were deemed insufficient as a result of which the trial court's decision was reversed. *Daubert* supra at 407 (2004).

The court held: "The fact that the children will benefit by the opportunities available to them from additional funds is not the test for additional support. It is not enough that the funds might be spent on allowable or beneficial opportunities. The opportunities and expenditures ... must be both necessary and reasonable." *Daubert* supra at 407 (2004).

Although the child support order notes that the parties agreed that he ay \$1800 per month amounts in excess of the standard calculation

cannot be based upon an agreement of the parties (See RCW 26.19.075 (15)).

The findings justifying the award here are virtual mirror images of those deemed legally insufficient under *Daubert* supra at 407 (2004). The court attempted to use child support as a vehicle “to balance the vastly disparate living situations and resources in the parent’s respective households...” (CP 61). That is precisely what caused the trial court’s decision in *MacCausland* supra to be reversed. The award must be reversed along with the pro rata sharing of expenses not included in the transfer payment.

**2. The Court Erred In Its Imputation of \$8333 Per Month In Earned Income In Violation Of The Standards Set Forth In RCW 26.19.071 (6).**

The standards that circumscribe the discretion of a trial court as to whether and how much income to impute to an unemployed parent are set forth in RCW 26.19.071 (6). “The court shall impute income to a parent when the parent is voluntarily unemployed...The court shall determine whether the parent is ...voluntarily unemployed based upon the parent’s work history, education, health and age, and any other relevant factors...Income shall not be imputed to an unemployable parent...In the

absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based upon reliable information, such as employment security department data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
- (d) Full-time earnings at minimum wage ... if the parent has a recent history of minimum wage earnings...
- (e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census current population reports ...”

Here there is nothing in the record to indicate that the court considered Mr. Galando's health in determining what he is employable to do and what he could reasonably be expected to earn, as required by the statute.

The court found that Matt Galando testified that he historically earned \$100,000 per year. The child support order under section 3.2 c observes: “Reliable historical rate of pay information. Obligor's trial

testimony stated his last full time income was \$100,000 per year.” (CP 59). No evidence supports that finding. Counsel for Ginger Galando argued that the last full time job he had was when he earned \$100,000 and that the court can impute income based upon his last full time job. (November 2, RP 29). That was not his testimony, nor was that what he earned from his most recent full time job.

He only managed to earn \$100,000 one year working for a family business in Aurora Colorado, 16 years before the dissolution of the marriage in 2000. (July 23, RP 160). However, the business was sold. His family does not operate any more businesses as a potential source of employment. (July 23, RP 160). He testified that his last full time employment income was working for a residential home mortgage lender in 2008 – 2009, earning \$24,000 for a full year of work before being laid off. (July 23 RP 161 - 163). There was no evidence to refute that testimony.

While RCW 26.19.071 (6)(c) only authorizes a trial court to rely on a “past rate of pay” where evidence of earnings or ability to earn is “incomplete or sporadic.” That was not the state of the evidence here.

The appellate court is to defer to the trial court if the factual determination is “within the range of credible evidence.” *In re Marriage of*

*Sedlock*, 69 Wa.App 484 at 491, 849 P.2d 1243 (1993). To find that Mr. Galando is currently capable of finding employment that will pay him \$8,333 per month is not within the range of any of the evidence. The imputation of earned income must be reversed.

**3. The Court Erred By Imputing \$15,333 Per Month In Trust Income.**

The Court imputed \$15,233 in month trust interest income, based upon the interest earned in 2014. (CP 59). However, as of trial the only income earned by the trust was the interest payments owed by the SDM Trust, the principle of which is not due for several years (July 15, RP 91, 95 and 183).

The independent trustee testified that his descendant's trust is paying out interest income of \$120,000 per year and could invade principle, but only safely pay out \$150,000 per year (July 15, RP 111 and 113). That equates to \$12,500 per month.

**4. The Court Erred In Failing To Pro-Rate The Calculation Of The Amount Of Mr. Galando's Support Obligations As Required Under RCW 26.19.080 (2) And (3) [Costs Not Included In The Transfer Payment].**

Whether to impose a deviation upward cannot be known until there is a finding as to the standard calculation pursuant to the requirement of RCW 26.19.035 (2) and (4).

To impose on Mr. Galando the obligation to pay 100% of the two children's private elementary school tuition of \$36,000 per year (August 24, RP 46) was also an abuse of discretion given Mr. Galando's inability to pay and given the statutory requirement to apportion expenses of that nature on a basis between the parties proportionate to their incomes. Inability to pay is a complete defense to the imposition of private school tuition costs.

Ability to pay must be found to justify imposition of such "extraordinary costs" beyond "a child's basic needs" such as private school tuition. "Even if the trial court finds that there is sufficient evidence of ...need for private schooling, the inquiry cannot end there. On remand the lower court must consider whether the father can afford to pay for private school before ordering him to do so." *State ex rel JVG v. VanGuilder*, 137 Wa.App 417 at 430, 154 P.3d 243 (2007).

Proration based upon net incomes private school tuition, work related day care and uninsured health care expenses is required under RCW 26.19.080 (2) and (3).

Imputation of income based upon his most recent full time earnings as a mortgage broker was \$24,000 per year or \$2,000 per month. Appendix A shows what the standard calculation would be given the

maintenance obligation of \$4,000 per month, his trust income at \$12,500 per month and earned income imputed at \$2,000 per month. The standard calculation is \$1552 per month and the percentages would share of the expenses not included in the transfer payment are 69% to him and 31% to her.

### **Spousal Maintenance**

#### **5. Ordering The Payment of 100% Of The Cost Of Ms. Galando's Schooling In Lieu of Maintenance.**

The imposition of paying for Ms. Galando's schooling was also an abuse of discretion in two respects.

The first is that the court's order opens the door to him having to pay for any schooling she might decide to pursue at some indefinite time in the future with no evidence of what it would cost or whether it will be within his economic means to pay whenever those circumstances should arise.

The second is that by making the award a quasi-form of property distribution, in lieu of maintenance, he will not be able to avail himself of the ability to seek modification under RCW 26.09.170 since it is not denominated as spousal maintenance. As ordered, Ms. Galando could re marry, and decide to go to back to school several years after this

dissolution and send him the bill for all tuition. This provision should be reversed and eliminated.

### **Property Division**

#### **6. Mischaracterization of \$362,000 In Personalty As Community Property.**

It is reversible error for a court to mischaracterize property if characterization played a role in the court's division of the assets and was an issue at trial. *In re Marriage of Wright*, 179 Wa.App 257 at 264, 319 P.3d 45 (2013). The court concluded finding 2.8 that Mr. Galando failed to prove that his business assets such as the Amps N.W. inventory, vehicles, art work and other miscellaneous property were his separate property. (Trial Exhibit 43a).

The party asserting separate property has the burden of proving it by clear cogent and convincing evidence. Proof need not be absolute however, nor, necessarily through documentation. If tracing is involved, it must only prove the separate source "...with some degree of particularity." (*Berol v. Berol*, 37 Wa 2d 380 at 382, 223 P.2d 1055 (1950). The word "some" is defined by Webster's dictionary as "being a certain one or ones not specified or known". (Webster's International Dictionary page 1278 Third College Ed, 1988).

That the court was influenced by the characterization of the assets is revealed by the court's emphasis on an equitable division of what it perceived to be community property rather than a division of the assets regardless of character: "Based upon the limited amount of property acquired, the allocation of debt and Respondent's extremely significant separate property, the court finds that it is fair and equitable to award the community property to the parties as set forth in exhibit 43 a. (CP 78)

**The Guns and Gun Safe: \$50,000**

Ms. Galando did not deny that the Glock 9 x 19 gun the Mac 90 and Uzi A-2 and ammunition and his grandfather's Browning 380 were all owned by him before marriage. (RP 100). That left only a kimber 45, 92 gauge Chinese shotgun , a AR 25 bolt action and 22 Riger Rifle as community property. ((August 24, RP 100 - 101).

Nor did she deny that the gun safe was given to him by her as a gift. (August 24, RP 100). Gifts purchased during a marriage from community funds are separate property of the donee spouse. *Johnson v. Dar Denne* 161 Wa 496, 296 P.1105 (1931). They should have been characterized as his separate property.

**The Artwork: \$130,000:**

There remained three major pieces of art: A painting of a rose which was a gift from Matthew to Ginger Galando, therefore her separate property, and two paintings that he owned before the marriage, bought with his parents when they vacationed in Carmel California: a seascape/landscape that he valued at \$60,000 and a purple Iris that he valued at \$50,000. (August 24, RP 113). That they were purchased by him before the marriage was not disputed. They should have been characterized as his separate property.

**The 2014 Toyota Tundra Automobile: \$32,000**

Nor did Ms. Galundo refute the evidence that the source of acquisition of this automobile was the 1999 Corvette owned by Mr Galando since 1998, two years before the marriage. The Toyota should have been characterized as his separate property.

**The Amps Northwest Inventory: \$150,000**

Proof that the only source of acquisition of such extensive inventory was his trust is established by the following evidence. In 2009 Amps Northwest did not exist. The only income earned by the couple that year was \$12,996 from his landscape business. (Trial exhibit 319). In 2010 when the business first began earning income, there was only \$1,353 in wages, \$25,129 in Landscape business income and \$5,289 in gross sales

from Amps Northwest. (Trial Exhibit 320). In 2011, the only earned income through wages was \$2,656, \$9,569 through Amps Northwest and \$17,167 through the landscape business. With two children to support, and family living expenses to pay, the only source from which over \$50,000 in inventory could have been purchased had to be from his separate property trust. In fact, in 2011, they received \$148,201 in trust distributions.

In 2014, he was able to sell some inventory to a retailer in Texas for \$8,000, \$5,972 of which was paid and \$2,038 of which was still owing (August 26, RP 54 – 56 and 91). What remained were 20 guitars 3 combo amps, 4 guitar heads, 4 speaker cabinets, some cable and wires extra strings and some Dunlap pedals. (August 24, RP 54).

Whatever its value, the remaining inventory should have been characterized as his separate property.

## **7. The Valuation Of The Trust Assets And Amps Northwest Inventory**

### **a. The Amps Northwest Inventory**

“Fair market value, both its increases and decreases, is the basis upon which property divisions are to be fashioned in marital dissolution cases. The dates of valuation are to be uniform.” See *Lucker v. Lucker*, 71

Wa 2d 165 at 168, 426 P.2d 081 (1968) and *Mayo v. Mayo*, 75 Wa 2d 35 at 39, 448 P.2d (1968). He estimated the sale value at \$10,000.

The \$150,000 found by the trial court was Ms. Galando's testimony that in her opinion the value of the inventory that existed as of April 2011 (July 22, RP 700.) That list is trial exhibit 531. The list reflects that total replacement value of what then existed was \$50,570.81; that a retailer would sell the items at that time for \$90,570.81. (August 26, RP 55).

The business closed its doors at its Burien location in early 2013 when he let the inventory replacement insurance lapse. (August 24 RP 89, 90 and 99). The sale value diminished as the inventory aged. (August 24, RP 54 – 55). The court abused its discretion by accepting an arbitrary value of \$150,000 with no evidentiary foundation other than Ms. Galando unsupported opinion.

**b. The Value Of The SDM Trust.**

Trust records and the testimony of independent trustee Ed Ahrens established that the SDM trust had \$9,000,000 in assets and \$13,400,000 in liabilities. Of the \$13.4 million in liabilities \$2.9 million is owed with principle due in 15 years, to Matt Galando's descendant's trust (July 16, RP 140). Thus, excluding the \$2.9 million, his one third value interest in

the SDM trust is of an approximate negative or under water value of \$500,000. (July 16, RP 124 – 125). There is no other evidence of the value of Mr. Galando’s one third interest in the SDM Trust.

The court’s valuation of the SDM trust at \$3,000,000 has no evidentiary foundation.

**8. Mischaracterization Of The Relationship As A Long Term Marriage And Committed Intimate Relationship (Finding Of Fact 2.8).**

The court’s concept of equity under RCW 26.09.080 was also influenced by two erroneous observations. The first is that this is a long term marriage as defined by Judge Robert Winsor in his article Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions, published in 1982 as expressly referenced in finding 2.8 (CP 77). Virtually taking a page from the Winsor article written nearly 30 years prior, this court virtually held that in marriages of 25 years that distinctions between separate and community property have no relevance in long term marriages. (See *In re Marriage of Rockwell*, 157 Wa.App 449, 238 P.3d 11844 (2010). Judge Robert Winsor defines a long term marriage as 25 years or more. (See Winsor, Washington Bar News, January 1982 page 16). Winsor defines marriages of this length as “mid-range”.

The court also erroneously concluded that before the marriage that the parties were in a committed intimate relationship having pooled their resources and personal efforts for 4 years. (CP 77). There simply was no evidence that they pooled their resources during that time. See *Connell v. Francisco*, 127 Wash.2d 339, 898 P.2d 831 (1995).

### **The Final Parenting Plan Order**

#### **Introduction: Standards of Appellate Review**

Where there are mixed findings of fact and conclusions of law, review of the factual components are under the substantial evidence standard and conclusions of law, including those mistakenly characterized as findings of fact, are reviewed de novo. (*In re Estate of Haviland*, 162 Wa.App 548 at 561, 255 P.3d 854 (2011)). In a parenting dispute the court's conclusions of law are subsumed into the court's final order. An abuse of discretion is defined as a decision based upon untenable grounds or for untenable reasons. (*In Re Marriage of Littlefield*, 133 Wa.2d 39 at 46-47, 940 P.2d 1362 (1997)).

Hereafter, use of the word "section" means as contained in the final parenting plan order.

#### **9. Ordering Psychological Evaluations For Both Parties (Section 3.13.4).**

The court ordered that both parties submit to psychological evaluations to be performed by the same psychologist. The court further ordered that the evaluations could be used as a basis for petitions for future minor modifications of the parenting plan as to non-residential provisions. There was no evidence as to why the evaluations should be performed, what information a psychological evaluation would reveal about either party, that would implicate any provisions of the parenting plan not related to residential time. The requirement should be reversed and eliminated.

**Summary Of Parenting Plan Provisions Related To The Balance Of The Assignments Of Error: The Conditions For Implementation Of Unfettered Residential Time And The Punishments For Violations Of Those Obligations.**

The parenting plan order provides for increasing unsupervised residential time between Mr. Galando and the children in three phases over a 36 month period. During the first phase, he and the children are to be with each other every other weekend Friday through Sunday evening for twelve months. Beginning 36 months later, during the third phase, every other weekend from Friday to Monday morning and every other Thursday overnight to Friday morning. (CP 89).

The balance of the assignments of error relate to a number of the conditions which Mr. Galando must fulfill to have the right to exercise those residential provisions and a number of the consequences for his failure to meet those conditions.

**Section 2.1: Parental Conduct Under RCW 26.09.191 (1) and (2)**

**10. No Evidence Of A Pattern Of Emotional Abuse Of A Child**

The court found a pattern of emotional abuse of a child. There was no evidence that Mr. Galando engaged in a pattern of emotional abuse of either of the children.

**11. No History Of Acts of Domestic Violence As Defined On RCW 26.50.010 (1) Or An Assault Or Sexual Assault Which Causes Grievous Bodily Harm Or The Fear Of Such Harm.**

There was no allegation of sexual abuse let alone any evidence of it.

As to domestic violence, RCW 26.50.010 (1) does not define domestic violence. RCW 26.50.010 (3) defines it as: “(a) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual

assault of on family or household member by another; (c) stalking....”

There was no allegation of stalking.

Ms. Galando admitted that Mr. Galando committed no acts of physical violence as defined by the statute nor damaged property (July 21, RP 478). Ms. Galando testified that he at no time got physical with her or the children. (July 21, RP 417 and 449) and (July 25, RP 566 and 567), Mr. Galando developed an addiction to prescription pain killers. Although the evidence was in dispute as to whether he would hallucinate stealth helicopters in the back yard and “ninja guys crawling up the side of the house” (July 21, RP 463). Ms. Galando made it a point to say that he never struck her or the children (July 22, RP 566-567). He would be depressed and withdraw from the family to his room; that he would not act out. (July 15, RP 236, 374, and 482). She had a generalized fear, but described no acts which caused her fear of imminent bodily harm, nor fear of such harm (July 22, RP 596).

The legislature is presumed to intend the ordinary dictionary definition of words. (*State v. Kintz*, 169 Wa.2d 537 at 547, 238 P.3d 470 (2010). Imminent is defined by Webster’s as “ready to take place.” Merriam Webster’s Collegiate Dictionary, Tenth edition p. 580 (1995).

There simply was no evidence on the basis of which the court could find that he engaged in any acts that caused the fear of imminent bodily harm or any other conduct defined as domestic violence under RCW 26.50.010 (3).

There was no evidence supporting the “Basis for Restrictions” under RCW 26.09.191 (1) and (2) reflected in section 2.1 of the parenting plan order. They must be reversed and eliminated. That leaves RCW 26.09.191 (3) restrictions.

**Basis for Restrictions Under RCW 26.09.191 (3),  
Section 2.2**

**12. Abusive Use Of Conflict By The Parent Which Creates  
The Danger Of Serious Damage To The Children’s  
Psychological Development.**

The evidence was that both parents engaged in this abusive use of conflict that created the danger of serious psychological harm to the children. The evidence for that conclusion was provided by the children’s guardian ad litem who testified that this was one of the most highly conflicted parenting cases he’s seen in the 12 years he has been a g a l for King County. (July 20, RP 213 and 245). He cited examples of what he termed abusive use of conflict by both parents. (RP 265). He recommended an abusive use of conflict that creates the danger of

psychological harm finding as to both parents. (RP 265 and 289). He emphasized when asked about attendance at public events such as soccer games: “I think these kids are so stressed by the conflict between their parents, that frankly having both of them at a soccer game would be too much right now.” (RP 283-284). Later he emphasized the residential schedule is less important than the fact that “...the kids are aren’t going to do well if the parents can’t stop fighting, and manage their own emotions about the breakup so the kids are less aware of them. “ (RP 285).

The appropriate exercise of discretion would have been to conclude that both parents engaged in abusive use of conflict that created the danger of serious damage to the children’s psychological development as recommended by the guardian ad litem. This finding does not relate to the balance of the assignments of error.

**13. No Long Term Impairment Resulting From ...Alcohol Or Other Substance Abuse That Interferes With The Performance Of Parenting Functions (Including The Findings Under Section 3.10 Of Past Alcohol Abuse).**

Mr. Galando’s addiction to painkilling drugs was admitted. (August 24, RP 11 and 22). The inpatient treatment program in Malibu, California in which he voluntarily committed himself for 60 days of inpatient treatment as to prescription pain killing opiates also treats for

alcohol addiction. (Trial Exhibit 518). There was no evidence that he was dependent upon alcohol. Ms. Galando's concerns about Mr. Galando's use of alcohol was while he was also on painkilling medication. (July 15, RP 218). He abstained from alcohol since leaving in patient treatment upon medical advice out of concern that regular use of alcohol might induce the desire for prescription pain killers, and because it was contraindicated with the anti-depressant medication, Cymbalta that he was using. (July 20, RP 217, 221). The exception was use of wine when cooking marsala, an Italian dish (August 25, RP 194) The Guardian Ad Litem in his investigation noted that use of marijuana or alcohol was not a significant concern. (July 20, RP 218). His aftercare program including random testing was overseen by Nurse Practitioner Elizabeth Mueller since April, 2014 (July 21, RP 373, 383-386 and August 24, R 15-17).

There was no evidence that his parenting or any other behavior was affected by consumption of alcohol or marijuana except when consumed when he used opioids. (July 20, RP 218). Ms. Galando raised a question about whether he was consuming alcohol during separation having observed wine bottles in a dumpster by his apartment, but he denied drinking and pointed out the dumpster was also used by another tenant. (July 20, RP 292; August 24, RP 13.-131).

After he went through 60 days of in-patient drug treatment in January and February of 2014 in Malibu, California, he faithfully pursued after care, which included random ETG/UA's by his after care provider (July 21, RP 384 and 386 and 393). This began nearly a year before the filing of the dissolution proceeding (July 21, RP 373) as part of his out-patient treatment regimen. He was not ordered to do so. His provider testified that he failed none of the testing and that she would continue to provide random monitoring if the court were to order it. (July 21, RP 385-386). No alcohol turned up in the drug testing that he had done voluntarily as part of his aftercare regimen. (Trial Exhibit 525; July 21, RP 383; and August 24 RP 32). Thus the finding under section 2.2 as to impairment due to alcohol or substance abuse other than prescription opiates should be reversed and eliminated.

**14. The Court Erred By Imposing Conditions On Implementation Of His Residential Time With The Children Hereinafter Identified.**

RCW 26.09.191 (3) defines what a court must find in order to impose restrictions on parental conduct. One essential requirement is that the evidence must reveal that the conduct proscribed harms the children. “(3) A parent’s involvement or conduct may have an adverse effect on the child’s best interests, and the court may preclude or limit any provisions of

the parenting plan, if any of the following factors exist....” (RCW 26.09.191 (3)).

“In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties’ parental responsibilities...or as required to protect the child from physical, mental or emotional harm” (RCW 26.09.002 Policy). The exercise of court discretion under RCW 26.09.191 (2) and (3), which govern conditions for the exercise of residential time, must be read in pare materia with that statement of policy. *In re Marriage of Chandola*, 180 Wa.2d 632 at 649, 327 P.3d 644 (2014).

Whether the remedy is necessary to achieve protection against the harm, is a conclusion of law to be reviewed de novo. *Chandola* supra at 654 (2014).

In *Chandola* supra the trial court ordered that Mr. Chandola allow his parents to be present when he was with the child no more than 20% of the time since their presence prevented him from developing the necessary parenting skills that he lacked and made demeaning and devaluing comments about the mother. *Chandola* at 654 (2014). The court observed that even if that concern were supported by the evidence, but reversed and eliminated the restriction since other restrictions imposed were “...more

than sufficient to remedy the harm”, and because the trial court failed to “identify any particular harm in its ruling” that the restriction was designed to prevent. *Chandola* supra at 655 (2014). Measured against the crucible of those standards the following must be reversed and eliminated from the parenting plan.

**a. Section 3.2.1 c: Requiring Drug and Alcohol Treatment For At Least 12 Months And AA/NA Meetings.**

That he has not been diagnosed as being alcohol dependent even though the inpatient program for pain killers he attended included alcohol treatment, was established in the following colloquy between counsel for Ms. Galando and the guardian ad litem. “And if he was diagnosed as having an alcohol abuse and dependence issue, do you think that it would be appropriate for him to have treatment? My preference is to abstain from alcohol because of the drug addiction. ... I don’t think he needs to go through another treatment program again unless there is evidence of a current alcohol use problem.” (July 20, RP 294).

There is no evidence of any harm that alcohol treatment would prevent the children from suffering. Thus, that condition at section 3.2.1 c (CP 90) should be reversed and eliminated.

As far as the AA requirement is concerned, the judge herself commented near the end of the trial: “I don’t really care whether he is in AA or not. AA works for some people. It doesn’t work for everybody...I mean; it’s pretty fabulous that he is still in aftercare. That’s what I’m really more concerned about, is that he is in after care and he is aware of it and he is still doing his work books. (August 24, RP 371).

- b. Prohibiting Possession Of Alcohol**
- c. Requiring Random Testing As To Alcohol**
- d. By Ordering Random Drug Testing Every 80 Hours For Six Months Followed By Six Months Once Per Week**
- e. Suspending Visits If He Is Suspected Of Having Consumed Alcohol.**

In the absence of evidence that he is alcohol addicted, all of the restrictions related to alcohol possession and use, abstention, suspension of visitation if Ms. Galando suspects consumption of alcohol (Section 3.10 (3) CP 96), and testing are unwarranted under sections 3.2.1 a, b and 2 a and b (CP 90 -91 and; CP 96 and 97 and CP 99).

RCW 26.09.191 (3) restrictions must relate to the prevention of harm to the children and there is no evidence or finding of what harm the children would suffer if he fails to get alcohol treatment or uses or even

possess alcohol. Those restrictions must be reversed and eliminated from the parenting plan.

**f. Prohibiting Any Contact With The Police**

Similarly, the prohibition under section 3.10 3 c (CP 96-97) as to any contact with the police as a condition for him being able to exercise his rights to residential time with the children is inappropriate since there is no evidence that mere contact with the police would implicate the welfare of the children. The only evidence of conflict with the police was an arrest for drug possession 25 years before trial (July 15, RP 216).

All of those restrictions must be reversed and eliminated from the parenting plan order.

**15. Ordering Random Testing Every 80 hours (Twice per Week) For Six Months (Section 3.2 1 a And 2 a (CP 90-91)).**

In the absence of evidence that he failed to maintain his sobriety as to prescription pain killing drugs, the frequency of such testing is not justified by the evidence. In response to a question about UA's every 80 hours, the guardian ad litem disagreed in two respects. The guardian ad litem recommended weekly random U A's but only if the court should find after trial that he had not maintained his sobriety. (July 20, RP 292). The court did not make such a finding. There was no evidence that he had

done so. The evidence was that he in fact maintained his sobriety since his inpatient treatment began a year and a half earlier. There was no testimony or other evidence on the basis of which the court could conclude that the children would be adversely affected or harmed in the absence of random testing twice per week.

Finally the need for that frequency of testing must be balanced against the cost. The evidence was that it costs \$500 each for the extensive array of testing ordered by the court. (August 24, RP 32). With the correct imputation of his ability to earn income his net income per month is \$7915 per month after the payment of \$4,000 per month in spousal maintenance. Assuming the standard calculation of child support at \$1552 per month, and a pro ration of the children's tuition, his sharing being \$1782 per month (\$21,390 divided by 12) that would leave him with \$4581 per month in disposable income with which to pay \$4300 per month in random testing (\$1000 per week time 4.3 weeks per month). If the child support remains unchanged he has nothing left for food and transportation, clothes or incidental expenses.

In the absence of evidence that testing twice a week is necessary, since it is not affordable, the requirement should be reversed and eliminated on this appeal.

**16. The Punishment For Violating The Conditions Under Sections 3.2, 3.10 And 3.13 Harm The Children Rather Than Protect Them From Harm Since All Residential Time Is Suspended.**

The court erred by prohibiting any residential contact between Mr. Galando and the children if any of the following should occur:

Should Ms. Galando suspect he has consumed any alcohol Section 3.10 (3).

Should he have any contact with the police (Section 3.10 (3) CP 97).

Should he test “dirty” in the words of the court by failure to take a test even once (Section 3.2 1 a), and not being able to reinstate residential contact until he would then get himself into an inpatient state certified drug and alcohol treatment program. Section 3.2 3 provides: “If Father ... violates the requirements of any provision under 3.2, 3.10 or 3.13 all his visitation with both children shall be suspended pending further order of the court and he shall immediately enroll in an in-patient drug/alcohol treatment program ...for a minimum of 30 – day program.”

Should he violate any one of the requirements under each of those sections “...**his visitation and all contact with both children shall be suspended pending further court order.** Section 3.2 CP 92).

Those provisions directly contradict two other provisions under sections 3.2 and 3.10. His unfettered residential time under phase I is restored under section 3.10 b: “After father has produced the four negative ETG UA’s the father’s residential time with the children returns to Phase I under Section 3.2 (except all requirements in Section 3.2 must be completed to begin phase II). Section 3.10 c provides however, should there be any 3.2 or 3.10 requirement violations “...the first month (30 days) of father’s resumed visitation under phase I shall be supervised.” These provisions would suggest that it would take 30 days to produce the four negative test results. But once he does so, phase I can continue unfettered even if he fails to obtain the treatment required under Section 3.2 or follow the other conditions. If anything this reflects the court’s awareness that contact between he and the children is necessary to promote their best interests.

The order suspends residential contact unless he gets into inpatient treatment for both prescription pain killers, to which he was addicted, and for alcohol, for which no evidence supports treatment for its use is necessary, even if he continued to maintain his sobriety, as the guardian ad litem pointed out: “I mean he misses a UA say, and that’s treated as a

positive. Is it going to trigger all this necessarily? What if there is a credible explanation for the missed UA.” (July 20, RP 296).

The use of the word “dirty” in its order connotes the sense of making the drug issue all about punishing Mr. Galando rather than finding a means to protect the children’s right to have an ongoing relationship with their father in a safe environment.

The court failed to identify what harm will befall the children should he fail to obtain a drug test that necessitates them having no contact with each other under any circumstances as the necessary remedy.

There is no evidence that failure to get in to treatment, drug or alcohol, failure to commit to an NA or AA program, or that having contact with the police, or drink or possess alcohol, will result in harm or in any way adversely affect the children during his residential time or as a volunteer at their school.

#### **IV. Conclusion:**

The restrictions imposed by the trial court fail to fulfill the standards that govern such constraints on a parent’s responsibilities. The guidepost is the need to protect the children from predictable harm in the absence of the restriction. “While the court need not wait for actual harm to accrue before imposing restrictions, it may impose restrictions only

where substantial evidence shows that a danger of damage exists.” *In re Marriage of Chandola*, 180 Wa.2d 632 at 649, 327 P.3d 644 (2014). RCW 26.09.191 (3) in particular requires either proof of “... the lack of any meaningful parent-child relationship whatsoever or conduct by the parent that seriously endangers the child’s physical or emotional well-being.” *Chandola*, supra at 647 (2014).

The court’s goal for the children was appropriate and succinctly stated: “All I really care about is that I have two sober parents who can prove a safe environment for the children. (August 24, RP 371). However, the courts remedy to achieve that goal conflates the children’s need to be free of risks should Mr. Galando be impaired with punishment of them as well as him, by severing all contact between them should he fail to meet any particular condition.

A remedy that would balance their need to be with him on an ongoing basis, but in a safe environment should he relapse into prescription pain killing drugs would be as follows:

1. Require weekly random testing for opioids.
2. Should he fail to take a test, require professionally supervised residential time unless and until he can prove his failure to be tested was for reasons beyond his control.

3. Should he fail to prove his failure was for reasons beyond his control or should his testing show that he has relapse, requiring professionally supervised residential time, rather than no contract at all.
4. Require that phase I unsupervised can only resume if Mr. Galando should decides to get into a state certified drug treatment program and can demonstrate that he is compliant with all treatment protocols defined by the program.

That is the regimen that would balance the children's need to be with their father, but in a safe, risk free environment.

DATED this 8<sup>th</sup> day of July, 2016.

Respectfully submitted,

  
H. Michael Finesilver *USCA # 30184*  
(f/k/a Fields) *Carena C. McIlwain*  
Attorney for Appellant  
W.S.B.A. #5495

**Appendix A**

## Washington State Child Support Schedule Worksheets

[ ] Proposed by [ ] [ ] State of WA [ ] Other (CSWP)  
 Or, [ ] Signed by the Judicial/Reviewing Officer. (CSW)

County KING Case No. 14-3-05355 SEA

Child/ren and Age/s: Gavin Galando, 9; Makena Galando, 7

Parents' Names: Matt Galando (Column 1) Ginger Galando (Column 2)

	Matt	Ginger
<b>Part I: Income</b> (see Instructions, page 6)		
<b>1. Gross Monthly Income</b>		
a. Wages and Salaries Imputed for Matt	-	-
b. Interest and Dividend Income	-	-
c. Business Income	-	-
d. Maintenance Received	-	\$4,000.00
e. Other Income	\$12,500.00	-
f. Imputed Income	\$2,000.00	-
g. Total Gross Monthly Income (add lines 1a through 1f)	<b>\$14,500.00</b>	<b>\$4,000.00</b>
<b>2. Monthly Deductions from Gross Income</b>		
a. Income Taxes (Federal and State) Tax Year: 2016	\$1,762.57	\$377.92
b. FICA (Soc. Sec. + Medicare)/Self-Employment Taxes	\$822.50	-
c. State Industrial Insurance Deductions	-	-
d. Mandatory Union/Professional Dues	-	-
e. Mandatory Pension Plan Payments	-	-
f. Voluntary Retirement Contributions	-	-
g. Maintenance Paid	\$4,000.00	-
h. Normal Business Expenses	-	-
i. Total Deductions from Gross Income (add lines 2a through 2h)	<b>\$6,585.07</b>	<b>\$377.92</b>
<b>3. Monthly Net Income</b> (line 1g minus 2i)	<b>\$7,914.93</b>	<b>\$3,622.08</b>
<b>4. Combined Monthly Net Income</b> (add both parents' monthly net incomes from line 3)	<b>\$11,537.01</b>	
<b>5. Basic Child Support Obligation</b> (Combined amounts →)		
Gavin Galando \$1131.00		
Makena Galando \$1131.00	<b>\$2,262.00</b>	
-		
-		
-		
<b>6. Proportional Share of Income</b> (divide line 3 by line 4 for each parent)	<b>.686</b>	<b>.314</b>

	Matt	Ginger
<b>Part II: Basic Child Support Obligation</b> (see Instructions, page 7)		
7. Each Parent's Basic Child Support Obligation without consideration of low income limitations (Each parent's Line 6 times Line 5.)	\$1,551.73	\$710.27
8. Calculating low income limitations: Fill in only those that apply.		
Self-Support Reserve: (125% of the Federal Poverty Guideline.)	\$1,238.00	
a. <u>Is combined Net Income Less Than \$1,000? If yes</u> , for each parent enter the presumptive \$50 per child.	-	-
b. <u>Is Monthly Net Income Less Than Self-Support Reserve? If yes</u> , for that parent enter the presumptive \$50 per child.	-	-
c. <u>Is Monthly Net Income equal to or more than Self-Support Reserve? If yes</u> , for each parent subtract the self-support reserve from line 3. If that amount is less than line 7, enter that amount or the presumptive \$50 per child, whichever is greater.	-	-
9. Each parent's basic child support obligation after calculating applicable limitations. For each parent, enter the lowest amount from line 7, 8a - 8c, but not less than the presumptive \$50 per child.	\$1,551.73	\$710.27
<b>Part III: Health Care, Day Care, and Special Child Rearing Expenses</b> (see Instructions, page 8)		
10. Health Care Expenses		
a. Monthly Health Insurance Premiums Paid for Child(ren)	-	-
b. Uninsured Monthly Health Care Expenses Paid for Child(ren)	-	-
c. Total Monthly Health Care Expenses (line 10a plus line 10b)	-	-
d. Combined Monthly Health Care Expenses (add both parent's totals from line 10c)	-	-
11. Day Care and Special Expenses		
a. Day Care Expenses	-	-
b. Education Expenses	-	-
c. Long Distance Transportation Expenses	-	-
d. Other Special Expenses (describe)	-	-
	-	-
	-	-
	-	-
e. Total Day Care and Special Expenses (Add lines 11a through 11d)	-	-
12. Combined Monthly Total Day Care and Special Expenses (add both parents' day care and special expenses from line 11e)	-	-
13. Total Health Care, Day Care, and Special Expenses (line 10d plus line 12)	-	-
14. Each Parent's Obligation for Health Care, Day Care, and Special Expenses (multiply each number on line 6 by line 13)	-	-
<b>Part IV: Gross Child Support Obligation</b>		
15. Gross Child Support Obligation (line 9 plus line 14)	\$1,551.73	\$710.27

	Matt	Ginger
<b>Part V: Child Support Credits</b> (see Instructions, page 9)		
16. Child Support Credits		
a. Monthly Health Care Expenses Credit	-	-
b. Day Care and Special Expenses Credit	-	-
c. Other Ordinary Expenses Credit (describe)	-	-
	-	-
	-	-
d. Total Support Credits (add lines 16a through 16c)	-	-
<b>Part VI: Standard Calculation/Presumptive Transfer Payment</b> (see Instructions, page 9)		
17. Standard Calculation (line 15 minus line 16d or \$50 per child whichever is greater)	\$1,551.73	\$710.27
<b>Part VII: Additional Informational Calculations</b>		
18. 45% of each parent's net income from line 3 (.45 x amount from line 3 for each parent)	\$3,561.72	\$1,629.94
19. 25% of each parent's basic support obligation from line 9 (.25 x amount from line 9 for each parent)	\$387.93	\$177.57
<b>Part VIII: Additional Factors for Consideration</b> (see Instructions, page 9)		
20. Household Assets (List the estimated value of all major household assets.)		
a. Real Estate	-	-
b. Investments	-	-
c. Vehicles and Boats	-	-
d. Bank Accounts and Cash	-	-
e. Retirement Accounts	-	-
f. Other: (describe)	-	-
	-	-
	-	-
	-	-
21. Household Debt (List liens against household assets, extraordinary debt.)		
a.	-	-
b.	-	-
c.	-	-
d.	-	-
e.	-	-
f.	-	-
22. Other Household Income		
a. Income Of Current Spouse or Domestic Partner (if not the other parent of this action)		
Name	-	-
Name	-	-
b. Income Of Other Adults in Household		
Name	-	-
Name	-	-



Other Factors For Consideration (continued) (**attach additional pages as necessary**)

**Signature and Dates**

I declare, under penalty of perjury under the laws of the State of Washington, the information contained in these Worksheets is complete, true, and correct.

\_\_\_\_\_  
Parent's Signature (Column 1)

\_\_\_\_\_  
Parent's Signature (Column 2)

\_\_\_\_\_  
Date

\_\_\_\_\_  
City

\_\_\_\_\_  
Date

\_\_\_\_\_  
City

\_\_\_\_\_  
Judicial/Reviewing Officer

\_\_\_\_\_  
Date

**This Worksheet has been certified by the State of Washington Administrative Office of the Courts.  
Photocopying of the worksheet is permitted.**