

71240-3

71240-3

No. 71240-3-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

In re Marriage of:

HEIDI GOUDE,

Respondent,

and

MICHAEL GOUDE,

Appellant.

MICHAEL GOUDE'S
OPENING BRIEF

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ORIGINAL

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I. Introduction

This is a case of first impression for any appellate court in this state: how do courts handle common couple violence or mutual domestic violence? Appellant argues that courts must employ the same residential time limitation analysis required by the Domestic Violence Prevention Act (DVPA) on both parents if they both have a domestic violence history. The legislature, by statute, limited a trial court's typical discretion in determining a parenting plan when any parent has a domestic violence history. The statute clearly and unambiguously requires courts to limit the domestically violent parent's residential time with the children. The only exception to this otherwise mandatory residential time limitation shifts the burden of proof to the domestically violent parent to show that the children will not be harmed if the residential time limitation is not applied and that the chance the children might be exposed to further abusive acts is so remote that it is in the children's best interests not to apply the otherwise required residential time limitation.¹

¹ Specifically, the parent who has a domestic violence history must prove that the children will not be harmed by contact with that parent *and* that the chance the parent's harmful or abusive conduct will recur is so remote that it would not be in the child's best interest to limit the child's residential time with that parent. A court may also not apply the residential time limitations if it expressly finds no harm to the children would occur if contact were allowed between the children and the domestically violent parent and the children were not harmed by the previous domestic violence. This second exception is not an issue in this case.

Despite this being the only written exception to the otherwise mandatory residential time limitations, Respondent disagreed with Appellant's statutory interpretation and led the trial court into error by improperly exempting Respondent from having to meet her burden of proof under this mandatory residential time limitation analysis. Respondent did so in two ways: First, she argued her repeated marital violence did not constitute a *domestic* violence history. Domestic violence is statutorily defined to include assault between family and household members. Here, Respondent's repeated marital violence history constituted domestic violence history because it occurred between Respondent and Appellant (her husband at the time), between Respondent and her brother, and between Respondent and the parties' oldest child. Second, Respondent misinterpreted the DVPA when she argued there was an unwritten primary aggressor exception to the statutory domestic violence definition. This resulted in Respondent not having to show that the children would not be harmed if the trial court did not impose the otherwise mandatory residential time limitations on her or that the chance her abusive acts would recur would be so remote that not applying the otherwise mandatory residential time limitation would not be in the children's best interests. This is 180 degrees contrary to the purpose behind the DVPA.

The only difference between Appellant's and Respondent's domestic violence was that Appellant admitted his actions and sought appropriate treatment while the Respondent did not. The trial court expressly found both Respondent and Appellant engaged in violence during their marriage. Appellant admitted a domestic violence history from the trial's outset and focused his case on his treatment and rehabilitation. He supplied evidence from his domestic violence treatment provider who opined the chance of Appellant re-offending was remote and from the children's therapist who noticed a marked change in Appellant's behavior as he progressed through DV treatment. At trial, Appellant had also already completed a one-year state certified domestic violence treatment program and was poised to enter Wellspring's DV Dads program as soon as the trial was completed.² Based on this evidence, the trial court made the required express findings to excuse Appellant from the otherwise mandatory residential time limitations.

Respondent, on the other hand, offered no evidence that she did anything to deal with her anger, improve her choices, or improve her behavior; rather, she denied, minimized, justified, and blamed others for

² According to Wellspring, Appellant was unable to commence the DV Dads program at Wellspring until the trial between the parents was finished to avoid a conflict of interest between full disclosure and honesty to the program and his interests in the litigation.

her poor behavior. She also never sought treatment for her recognized anger management and impulse control issues. Respondent's own domestic violence expert, Dr. Roland Maiuro, who evaluated Respondent, testified that Respondent admitted during her domestic violence assessment that she had repeatedly assaulted Appellant, and he opined that Respondent needed counseling to address her anger management and impulse control issues. Similarly, the guardian ad litem ("GAL"), Lynn Tuttle, who did not use the statutory domestic violence definition, testified on cross examination that if she were to have used the statutory domestic violence definition, then she would agree that Respondent had a domestic violence history. The GAL, like Dr. Maiuro, recommended Respondent address her anger and other behavior issues through counseling several months before the trial had begun. Despite this, Respondent, at trial, admitted she did not participate in any counseling for her anger management or impulse control issues. As a result, the trial court had no evidence to make, and did not make, any findings regarding Respondent's abusive or harmful conduct being remote so as to justify not applying the otherwise mandatory residential time limitations on Respondent. Without her proving an exception to the otherwise mandatory residential time limitations, these limitations were

mandatory and it was error not to impose those limitations on Respondent.

In this case, like all domestic violence cases, it is important that the trial court require Respondent to meet her burden of proof to show it is more probable than not that the children would not be further harmed by being victimized and witnessing domestic violence and other abusive acts. The trial court expressly found Respondent dragged the parties' oldest daughter by the hair during a festival the parties were attending. There was also uncontroverted testimony from Appellant that during an argument between the parties where the children were present that he retreated to the bathroom and locked the door to get away from Respondent. Respondent kicked the door in and broke it as pictures demonstrated. Respondent did not contest this fact at trial. Respondent had also been arrested and pled guilty to Assault IV DV in an altercation she had with Appellant. There was also a police report admitted into evidence that showed Respondent "saw red" and attacked her brother with a chair during an argument causing a red mark and pain.

The only other issue Appellant raises is error in valuing his drum-making business's intangible goodwill. Here, Respondent offered no evidence as to any goodwill or other intangible value in Appellant's drum-making business. In fact, Respondent's counsel stated that

Respondent would not be able to testify to the value of the business because no evaluation had been undertaken, after Appellant's counsel objected to the testimony as not supported by an acceptable good will valuation method. All the tangible items used to make the drums were separately valued. Despite this, the trial court assigned a \$25,000 value to the drum-making business over and above its tangible equipment value and inventory. There is not a scintilla of evidence, much less substantial evidence, to support a finding or conclusion that the drum-making business had any intangible good will value. While this amount may seem low, it is over 50% of the parties' assets and requires Appellant to pay all but \$1,600 of his income to Respondent. It is, therefore, material.

II. Assignments of Error

A. The trial court erred when it concluded Respondent's repeated violence during the marriage was not a history of domestic violence.

RCW 26.50.010(1). CP 1174-75, Finding of Fact 2.21

B. The trial court erred when it failed to require Respondent to undergo the same mandatory residential time limitation analysis that Appellant successfully went through during trial (CP 1174-75, Findings of Fact 2.19 and 2.21)

C. The trial court erred when it refused to place the mandatory residential time limitations on Respondent after Respondent failed to

produce evidence on any recognized exception to the mandatory residential time limitation provisions in the DVPA. (CP 1174, Finding of Fact 2.19)

D. The trial court erred when it awarded Respondent sole decision making authority for education, non-emergency health care, childcare, counseling, tattoos and piercing, and marriage before age 18. (CP 1192-93, Parenting Plan ¶¶ 4.1, 4.2, 4.3)

E. The trial court erred when it assigned an intangible goodwill value to the business known as Earthtribe Percussion. (CP 1181, Finding of Fact 2.21; CP 1185, Trial Ex. 256 (CP designation pending))

F. The trial court erred when it entered an order of child support based on the mother being the primary residential parent when she should have been subject to the residential restrictions of RCW 26.09.191. (CP 1150-63).

III. Issues Pertaining to Assignments of Error

A. Whether a court must conclude violence that included assault between family and household members is domestic violence. (Assignment of Error A).

B. Whether a trial court must conclude a parent has a domestic violence history where they repeatedly engaged in violence with family

and household members throughout a 13-year marriage. (Assignments of Error A).

C. Whether a trial court must assure children's safety by engaging in the same mandatory residential time limitation analysis for both parents when both parents have engaged in domestic violence. RCW 26.09.191(a) and (n); (Assignments of Error B, C).

D. Whether a trial court must assure children's safety by imposing mandatory residential time limitations on any parent who has a domestic violence history if that parent cannot prove a recognized, written exception to the otherwise mandatory residential time limitations. RCW 26.09.191(a) and (n) (Assignments of Error B, C).

E. Whether the trial court erred in giving Respondent sole decision making over the children's non-emergency health care and education decisions when Respondent is the one who has not proven an exception to the mandatory residential time limitations in the DVPA. (Assignment of Error D).

F. Whether a trial court may only assign intangible goodwill value to a business if it uses one of five recognized methods to value goodwill. (Assignment of Error E).

G. Whether the trial court erred in valuing the intangible goodwill of Appellant's drum-making business at \$25,000 without any evidence to support the intangible goodwill value. (Assignment of Error E).

H. Whether the trial court's error in valuing Appellant's drum-making business' intangible goodwill at \$25,000 was material considering the overall asset and liability distribution provisions in the Findings of Fact and Decree of Dissolution. (Assignment of Error E).

I. Whether the Order of Child Support should be remanded to the trial court if RCW 26.09.191 restrictions are imposed and the Respondent is no longer the primary residential parent. (Assignment of Error F).

IV. **Statement of the Case.**

The parties, Appellant Michael Goude and Respondent Heidi Goude, were married on May 15, 1999, at Post Falls, Idaho.³ The parents have three common children from their marriage.⁴ After just over thirteen years of marriage, the parties separated on June 15, 2012 when Respondent unilaterally removed the children from their schools and moved to Grant County, Washington.⁵ On June 14, 2012, Respondent filed a petition to dissolve the parties' marriage in Grant County,

³ CP 1171 (Finding of Fact 2.4).

⁴ CP 1186 (Parenting Plan at I.)

⁵ CP 1171 (Finding of Fact 2.5).

Washington.⁶ Over Respondent's objections, the Grant County Superior Court transferred venue back to King County where the parties and the children had lived for 5 continuous years prior to the separation.⁷ In August 2012, the trial court made Appellant the primary residential parent over all three children.⁸ This residential arrangement worked well for the parties and the children. During that time, Appellant provided for after school care, made sure the children attended counseling, school, and their extracurricular activities.⁹

This residential arrangement lasted until the trial court entered final orders on November 26, 2013.¹⁰ At that time, the trial court made Respondent the primary residential parent for the children, whose ages were then 13, 10, and 6.¹¹

During the marriage, Appellant and Respondent both engaged in common couple or mutual domestic violence. The trial court expressly found that "both parties engaged in violence over the course of the

⁶ Petition for Dissolution, Appendix A.

⁷ Order Granting Motion for Change of Venue, Appendix B.

⁸ CP 1-12.

⁹ RP 1455-64 (Michael Goude, Aug. 28, 2013); RP 1254 (Michael Goude, Aug. 27, 2013).

¹⁰ See Findings of Fact and Conclusions of Law, CP 1170-85; Decree of Dissolution, CP 1164-69; Parenting Plan, CP 1186-96; and Order for Support, CP 1150-63.

¹¹ CP 1186.

marriage.”¹² This finding is not contested on appeal. Appellant admitted he had a domestic violence history when the trial began.¹³ Respondent, on the other hand, engaged in a 7½ day bench trial to deny committing domestic violence, minimizing its impact, justifying her actions and blaming Appellant and others for her actions. Despite Respondent’s self-serving testimony, the trial court found Respondent had committed violence throughout the parties’ marriage.

Not only has this finding not been challenged on appeal, it is also fully supported by the evidence.

- August, 1999, the Grant County Superior Court entered a permanent order of protection against Respondent specifically finding she had committed domestic violence.¹⁴ Respondent never appealed this final order of protection.
- May 2000, Respondent was involved in an altercation with her brother where she hit her brother over his left shoulder with a chair.¹⁵ She told the responding law enforcement officers that her brother was involved in a fight with Appellant and after the fight was broken up she “saw red” and picked up a chair and hit her

¹² CP 1174, Finding of Fact 2.21. *See also* RP at 7:8-9 (Oral Ruling, Sept. 12, 2013).

¹³ RP 43:21-44:5 (Opening Argument, Aug. 19, 2013): “Let me talk about the domestic violence. I’m going to tell you right now, father is going to stipulate after going through treatment that he has a history of domestic violence. And there’s no question there. And he agrees with Ms. Tuttle’s finding that he should be found to have a history of domestic violence, given the definition of domestic violence in RCW 26.50.010. He is requesting, however, that this Court is constrained to find that the mother has a history of domestic violence as well under RCW 26.50.010.”

¹⁴ Trial Ex. 119, Order for Protection dated August 16, 1999.

¹⁵ Trial Ex. 252, Moses Lake Police Dept. Deputy Report, May 28, 2000.

brother over the shoulder.¹⁶ The police report also shows the brother said there was pain and there was a visible red mark.¹⁷

- August 2000, Respondent was arrested and charged with Assault IV Domestic Violence. Respondent admitted that she pled guilty to the Assault-IV DV charge in requests for admissions.¹⁸
- August 2009, Respondent pulled the parties' oldest daughter's hair at a festival the family was attending and dragged the daughter back to the car by her hair.¹⁹ Respondent denied this accusation. The trial court did not believe Respondent's denial. It made an express finding "that the evidence supported a finding that Ms. Goude did, in fact, pull [the daughter] by the hair one night in the campsite. I think the evidence was pretty overwhelming that that was the case, regardless of her denying it."²⁰ This finding has not been challenged on appeal.

Witness Jessica Towns recounted the hair pulling incident between Respondent and the parties' oldest daughter:

And Heidi just—she just—she seemed to sort of lose her composure completely. She picked [her daughter] up by her hair and [her daughter's] feet were just barely touching the ground, it was like just the tips of her toes touching the ground, and Heidi started dragging her down the road towards where I was.

It all happened pretty quickly and I stepped out into the road because I thought clearly she does not know that someone is watching her right now. And so I had a flashlight, so I clicked my flashlight on the scene and I caught Heidi doing—holding her [daughter] up by her hair off of her feet and yelling and cursing at her in my flashlight.

¹⁶ Trial Ex. 252, Moses Lake Police Dept. Deputy Report, May 28, 2000; and Trial Ex. 251, Moses Lake Police Incident Report, May 28, 2000.

¹⁷ *Id.*

¹⁸ Although Respondent later testified that she did not plead guilty to the Assault IV DV charges (RP 99-100, Heidi Goude, Aug. 19, 2013), the docket for this charge was admitted into evidence and showed Respondent pled guilty to the Assault IV DV charge. Case docket, Trial Ex. 189.

¹⁹ RP 1147-1148 (Jessica Towns, Aug. 27, 2013).

²⁰ RP 6:21-25 (Oral Ruling, Sept. 12, 2013).

When I did catch her in the flashlight, it was sort of a deer in the headlight, like (gasp), dropped [her daughter], grabbed [her daughter's] arm, and then ran down to their vehicle or toward their vehicle.²¹

Additionally, the GAL testified the child confirmed the incident during her GAL interview.²²

- 2011, Appellant retreated to the bathroom to avoid further aggressive confrontation with Respondent, who then kicked and damaged the bathroom door. Appellant was scared for his physical safety.

Appellant testified as follows regarding the bathroom door incident:

Q. As poor of a picture that is, because it's in black and white, do you recognize that picture?

A. Yes, I do.

Q. What is that a picture of?

A. That's a picture of the door that goes into the bathroom at our house.

Q. Okay. And when was that picture taken?

A. It would have been I think, I believe, around 2011.

Q. And the crack marks on that door, are those cracks in the door?

A. Yes.

Q. Okay. Does that fairly and accurately depict the condition of the door in 2011?

A. Yes.

Q. Who took the picture?

A. I did.

²¹ RP 1147:22-1148:13 (Jessica Towns, Aug. 27, 2013).

²² RP 1018:24-1019:3 (Lynn Tuttle, Aug. 26, 2013).

(Respondent's Exhibit No. 115 admitted into evidence)

Q. (By Mr. McGlothlin) And how did the door get cracked in that manner?

A. Heidi had kicked it.

Q. Okay. Tell me what preceded Heidi kicking the door.

A. We had got in an argument and it started to get very heated and Heidi started getting very aggressive and I'd felt that things were going to escalate. I don't recall what the argument was about. And I wanted to disengage, and so I started going to the back of the house. She followed me. At times—any time that I would disengage in an argument, that was one—that would upset her even more, that I wouldn't kind of stay and continue to fight. And I told her, I said, "I don't want to argue anymore." And I went into the bathroom to get away from it and I shut the door. And she was pounding on the door. I locked the door. And she was yelling and screaming at me and then started kicking the door.

Q. Now, why did you lock the door?

A. I was -- I was scared of what was going to happen. You know, there's times in the past where the arguments would escalate to a point of getting physical. And I could kind of tell from how she was behaving, when things went kind of beyond an argument, where she kind of would see red, so to speak, and I didn't want to engage in it. And so I went in the bathroom trying to get away from the situation.

Q. And then locked the door?

A. And locked the door, yes. Correct.

Q. And when you say "scared," do you mean scared for your physical safety?

A. Yes, absolutely.

Q. Were any of the children present when this incident occurred?

A. Yes, they were.

Q. Who was present?

A. All the kids were there.²³

Respondent admitted kicking the bathroom door in her own testimony, stating, “But the bathroom door, yes, I did kick it.”²⁴

In July/August 2012 Respondent’s own domestic violence expert, Dr. Roland Maiuro, undertook a domestic violence assessment of Respondent and testified that under the language of RCW 26.50.010, Respondent had committed multiple acts of domestic violence:²⁵

Q. And as you read that definition of domestic violence [in RCW 26.50.010(1)], based upon the things that Heidi Goude told you, did she commit multiple acts of domestic violence as the definition is here?

A. The—the—

Q. Yes or no?

A. Well, it depends on what—how you mean multiple. There’s multiple descriptors here, and she did multiple of a narrow set of these.

Q. Okay. So when you—when we’re looking at the descriptors, you’re talking about imminent physical harm, bodily injury, or assault, right?

A. Yes.

Q. So—

A. Assault.

Q. But she committed multiple acts in one of those three?

A. Yes.

Q. Okay. And that was upon Michael, correct?

A. That’s correct.

Q. So she assaulted him on multiple occasions?

²³ RP 1414:25-1417:9 (Michael Goude, Aug. 28, 2013).

²⁴ RP 138:25-139:1 (Heidi Goude, Aug. 19, 2013).

²⁵ RP 760:7-761:9 (Dr. Roland Maiuro, Aug. 22, 2013).

A. Yes.

Q. And you would agree with me, Doctor, that that statute doesn't differentiate between predominant aggressor and secondary aggressor, correct?

A. It doesn't include that element or context or consideration.

Q. And so it does not, correct?

A. It does not.²⁶

Regarding Respondent's anger management issues and need for counseling, Dr. Maiuro's testimony was as follows:

Q. All right. You think that she needs some counseling regarding her anger issues and anger management issues, even if it's not a formalized anger management program, correct?

A. That's correct.

Q. Okay. And another area of focus that Heidi Goude needs treatment on is also her domestic violence or assaultive behaviors on others, correct?

A. That's correct.²⁷

Further testimony came from Lynn Tuttle, the guardian ad litem (GAL). Ms. Tuttle testified that the Respondent was domestically violent on multiple occasions if the domestic violence statutory definition in RCW 26.50.010 were used:²⁸

Q. All right. If we look just at this statute [RCW 26.50.010] and we're trying to fit, use this as the statute for domestic violence, you would agree with me that both people admitted to committing acts described in that statute on more than one occasion, correct?

²⁶ RP 760:7-761:9 (Dr. Roland Maiuro, Aug. 22, 2013).

²⁷ RP 763:12-20 (Dr. Roland Maiuro, Aug. 22, 2013).

²⁸ RP 972:4-15 (Lynn Tuttle, Aug. 26, 2013).

A. They both were physically violent, yes.

Q. And that's what's in the statute, right?

A. Right.

Q. So if we're using 26.50.010, both people committed multiple acts of domestic violence as it's defined in that statute?

A. Yes.²⁹

Lynn Tuttle further testified that she had recommended therapy for the Respondent: "I recommended that she also work with a therapist, a master's degree level therapist for six months, meeting at least twice a month, and then also that she meet with a psychiatrist for at least three one-hour sessions to determine whether she may be a candidate for medication."³⁰

Following a 7½ day dissolution trial, the trial court gave its oral ruling on September 12, 2013.³¹ However, final orders were not entered until two-and-a-half months later, on November 26, 2013.³² These included Findings of Fact and Conclusions of Law, a Dissolution Decree, a Parenting Plan, an Order of Child Support, and a mutual Restraining

²⁹ RP 972:4-15 (Lynn Tuttle, Aug. 26, 2013).

³⁰ RP 920:20-24 (Lynn Tuttle, Aug. 26, 2013).

³¹ RP (Oral Ruling, Sept. 12, 2013).

³² See Findings of Fact and Conclusions of Law, CP 1170-85; Decree of Dissolution, CP 1164-69; Parenting Plan, CP 1186-96; and Order for Support, CP 1150-63.

Order.³³ The parenting plan transferred primary residential responsibility for the parties' three minor children from Appellant to Respondent.³⁴

The trial court incorporated the final parenting plan as part of its findings of fact and conclusions of law.³⁵ Despite the GAL's and the domestic violence evaluator's observations that Respondent was domestically violent, as that term is defined in RCW 26.50.010, the trial court specifically concluded³⁶ that subsections (1) and (2) of RCW 26.09.191 applied only to the Appellant.³⁷

As a result, the trial court gave authority for nearly all major decisions to the Respondent, including education, non-emergency health care, childcare, counseling, tattoos and piercing, and marriage before age 18.³⁸ The parenting plan expressly stated that mutual decision making was to be restricted because RCW 26.09.191 mandated a limitation on the Appellant's decision making authority.³⁹ It stated that this was due to his having "engaged in a history of acts of domestic violence as defined

³³ *Id.*

³⁴ CP 1190-91.

³⁵ CP 1174, Finding of Fact 2.19.

³⁶ "[I]f a determination is made by a process of legal reasoning from, or of interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law." *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197, 584 P.2d 968, 970 (1978).

³⁷ CP 1174, Finding of Fact 2.21

³⁸ CP 1193, Parenting Plan at ¶ 4.2.

³⁹ CP 1193, Parenting Plan at ¶ 4.3.

in RCW 26.50.010(1) or an assault which causes grievous bodily harm or the fear of such harm.”⁴⁰

Although the trial court concluded only Appellant had a domestic violence history and shifted primary residential responsibility for the parties’ children from the Appellant to the Respondent, it then expressly found:

that (1) contact between the respondent and the children will not cause physical, sexual, or emotional abuse or harm to the children and (2) the probability that the respondent’s harmful or abusive conduct will recur is so remote that it would not be in the children’s best interests to limit his time with the children.⁴¹

These findings of fact have not been challenged on appeal. The trial court then concluded that the exception contained in RCW 26.09.191(2)(n) to the otherwise mandatory residential limitations in RCW 26.09.191(a) applied.⁴² As a result, the trial court refused to place restrictions on the Appellant’s residential time with the children.⁴³

The trial court did not find there would be no harm to the children if the mandatory residential time limitations in RCW 26.09.191(2)(a) were applied to Respondent and did not find the chances of Respondent

⁴⁰ CP 1186-87, Parenting Plan at ¶ 2.1.

⁴¹ CP 1190, Parenting Plan at ¶ 3.10.

⁴² CP 1190, Parenting Plan at ¶ 3.10.

⁴³ CP 1175; CP 1190, Parenting Plan at ¶ 3.10; RP 10:4-12:4 (Oral Ruling, Sept. 12, 2013).

re-engaging in abusive acts or domestic violence were remote. The trial court could not make these findings because Respondent put on no evidence to sustain these findings. She put on no evidence she attended counseling, as recommended by the GAL, or even tried to address her anger management and domestic violence issues identified by Respondent's own domestic violence expert. Respondent offered no evidence she had undergone any treatment for anger management or domestic violence. Absent these findings, the trial court did not, and could not, conclude that the exception contained in RCW 26.09.191(2)(n) to the mandatory residential time limitation in RCW 26.09.191(2)(a) applied to excuse the Respondent from these limitations.

The trial court did make a superfluous finding that Appellant was "the aggressor."⁴⁴ But, as Dr. Maiuro testified, there is no primary aggressor or aggressor component in RCW 26.50.010 that would exempt domestic violence from the statutory definition if the other party to mutual or common couple domestic violence is the aggressor or primary aggressor.

Unlike the Respondent, Appellant's case was centered around his treatment and rehabilitation. He put on evidence that he completed a 1-

⁴⁴ CP 1174, Finding of Fact 2.21. *See also* RP at 7:12 and 21 (Oral Ruling, Sept. 12, 2013).

year state-certified domestic violence treatment program.⁴⁵ This led the trial court to properly find that the “chance of recurrence of the father’s domestic violence behavior is remote.”⁴⁶ This finding supported the trial court’s conclusion that the exception contained in 26.09.191(2)(n) to the otherwise mandatory residential limitations under RCW 26.09.191(2)(a) applied and that the otherwise mandatory residential time limitations were not applied to limit Appellant’s contact with the children.⁴⁷

Respondent presented no evidence to justify an intangible goodwill value for the Earthtribe Percussion business, nor the value of any inventory. The only evidence she presented was her own testimony to the value of tools and equipment. Regarding the tools, Respondent’s testimony was, “I would say that there’s probably a thousand to \$1200 worth of tools that he uses for his [drum making] business.”⁴⁸ Respondent’s testimony expressly did not include any valuation for inventory.⁴⁹ Appellant testified that the value of inventory was in the range of \$2000 to \$2500.⁵⁰ Adding Respondent’s testimony to the value of tools to Appellant’s testimony to the value of inventory gives a total

⁴⁵ CP 1175, ¶ b; *see also* RP 10:23-11:9 (Oral Ruling, Sept. 12, 2013).

⁴⁶ CP 1175, Finding of Fact 2.21.

⁴⁷ CP 1186-87, Parenting Plan ¶ 2.1.

⁴⁸ RP 282:22-24 (Heidi Goude, Aug. 20, 2013)

⁴⁹ *Id.* at 282:22-283:1.

⁵⁰ RP 1470:3-16 (Michael Goude, Aug 28, 2013).

value of the business, equipment and inventory, of between \$3000 and \$3700 at most. There was no testimony to any intangible goodwill value.

In sharp contrast, Exhibit 256 gives the drum making business a value of \$25,000. The Court allowed Exhibit 256, a spreadsheet of assets and liabilities, for illustrative purposes, to illustrate Respondent's testimony. Appellant's counsel objected, asking to exclude from Exhibit 256 testimony as to business valuations,⁵¹ and the trial court responded, "I am going to allow the chart to illustrate her testimony [but] with regards to the business evaluation, I don't know how this witness is going to be able to testify to that under those circumstances."⁵² Respondent's counsel then stated, "She can't really testify as to the fair market value because there was no evaluator who went in..."⁵³

The trial court nevertheless used the \$25,000 figure for the value of the drum making business,⁵⁴ even though the testimony was that the tangible assets were worth between \$3000 and \$3700, and even though there was no testimony to intangible value. Subtracting the value of the tangible assets, the intangible value assigned was between \$21,300 and \$22,000.

⁵¹ RP 275:12-276:18 (Counsel for Appellant, Aug. 20, 2013).

⁵² RP 276:19-23 (Aug. 20, 2013).

⁵³ RP 277:1-3 (Counsel for Respondent, Aug. 20, 2013).

⁵⁴ The trial court adopted the property values set out in Trial Ex. 256. CP 1181.

V. Argument

A. Standard of Review.

When reviewing a court's application of the dictates of RCW 26.09.191, the applicable standard is abuse of discretion.⁵⁵ A trial court abuses its discretion when "its decision is based on untenable grounds or reasons, or is manifestly unreasonable."⁵⁶ A court's decision is based on untenable grounds or reasons "if its factual findings are unsupported by the record ... [or] if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard...."⁵⁷ Moreover, a court "acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard."⁵⁸

Statutory construction is a question of law requiring *de novo* review.⁵⁹ A trial court's findings of fact will be upheld if substantial evidence supports them.⁶⁰

Conclusions of law are reviewed *de novo*.⁶¹ The label applied to a finding or conclusion of law is not determinative; the Court of Appeals

⁵⁵ *In re Marriage of Mansour*, 126 Wn. App. 1, 8, 106 P.3d 768 (2004).

⁵⁶ *Id.*, citing *In re Marriage of Wicklund*, 84 Wn. App. 763, 770 n.1, 932 P.2d 652 (1996)

⁵⁷ *Id.*, citing *Wicklund*, 84 Wn. App. at 770 n.1.

⁵⁸ *Id.*, citing *Wicklund*, 84 Wn. App. at 770 n.1.

⁵⁹ *In re Marriage of Caven*, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998).

⁶⁰ *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).

⁶¹ *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611, 615 (2002)

will treat it for what it really is.⁶² If a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law.⁶³

A finding, on the other hand, is a determination from the evidence of the case propounded by one party and denied by another.⁶⁴ Findings of fact are reviewed for substantial evidence to support the finding.⁶⁵

B. The trial court erred when it failed to conclude that Respondent's violence throughout the marriage were acts of domestic violence as defined in RCW 26.50.010(1)

The trial properly found Respondent had committed violence throughout the parties' marriage. Here, the trial court properly found Respondent repeatedly engaged in violence throughout the parties' marriage.⁶⁶ To be sure, this finding has not been challenged on appeal and is, therefore, a verity.⁶⁷ Moreover, ample evidence supports this finding.

Where the trial court erred was not concluding that the Respondent's violence were acts of *domestic* violence as defined in RCW 26.50.010 because all the evidence showed Respondent's violence was between family and household members. Because this argument involves

⁶² *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 397, 739 P.2d 717 (1987).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Matter of Estate of Eubank*, 50 Wn. App. 611, 617-18, 749 P.2d 691, 694 (1988)

⁶⁶ CP 1174, Finding of Fact 2.21. *See also* RP at 7:8-9 (Oral Ruling, Sept. 12, 2013).

⁶⁷ *Ambrose v. Ambrose*, 67 Wn. App. 103, 105, 834 P.2d 101 (1992).

statutory construction, review is de novo.⁶⁸ “In applying rules of statutory construction to the unambiguous language of a statute, ‘[t]he court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute.’”⁶⁹ The primary objective of statutory construction is to carry out the Legislature’s intent by examining the language of the statute.⁷⁰

Domestic violence is defined in RCW 26.50.010(1) as including “...[A]ssault, or the infliction of fear of imminent...assault, between family or household members.”⁷¹ Dr. Maiuro’s expert testimony was that the Respondent admitted committing numerous assaults on the Appellant and that met the definition of domestic violence found in RCW 26.50.010.⁷² Additionally, the guardian ad litem, Lynn Tuttle, agreed in her testimony that both parties had committed multiple acts of domestic violence as defined in RCW 26.50.010.⁷³

RCW 26.50.010(2) further defines “family or household members” to include “spouses,...persons related by blood,...and persons who have a biological or legal parent-child relationship.” Here, Respondent’s

⁶⁸ *McDole*, 122 Wn.2d at 610.

⁶⁹ *Caven v. Caven*, 136 Wn.2d 800, 806, 966 P.2d 1247, 1249-50 (1998). (Citations omitted).

⁷⁰ *In re Marriage of C.M.C.*, 87 Wn. App. 84, 87, 940 P.2d 669, 670 (1997) *aff’d sub nom. Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998).

⁷¹ RCW 26.50.010(1)(a).

⁷² RP 760:7-761:9 (Dr. Roland Maiuro, Aug. 22, 2013).

⁷³ RP 972:4-15 (Lynn Tuttle, Aug. 26, 2013).

violence was perpetrated upon Appellant while they were married to one another (spouses), between Respondent and her brother (related by blood), and between Respondent and the parties' oldest daughter (a person with a biological parent-child relationship). Because Respondent committed domestic violence on each of those individuals, and they are all included within the domestic violence definition; Respondent's violence had to be *domestic* violence as defined by RCW 26.50.010.

Having now established that Respondent's violence throughout the marriage were acts of domestic violence as defined in RCW 26.50.010, it was error for the trial court not to conclude Respondent had "a history of acts of domestic violence as defined in RCW 26.50.010(1)." The term "history of acts of domestic violence" was meant "to exclude 'isolated, de minimus incidents which could technically be defined as domestic violence.'"⁷⁴ Here, the trial court did not find Respondent's acts were isolated or de minimus. To the contrary, the trial court expressly found Respondent engaged in violence *throughout the parties' marriage*.⁷⁵ Moreover, Respondent's hitting her brother with a chair, pulling the parties' oldest child by the hair so her feet were barely touching the ground, and kicking in the bathroom door to go after

⁷⁴ *In re Marriage of C.M.C.*, 87 Wn. App. 84, 88, 940 P.2d 669, 671 (1997) *aff'd sub nom. Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998). (Citations Omitted).

⁷⁵ CP 1174, Finding of Fact 2.21. *See also* RP at 7:8-9 (Oral Ruling, Sept. 12, 2013).

Appellant that caused Appellant to fear for his physical safety, were not isolated or de minimis incidents. In addition, there was also a 1999 incident where a judge found Respondent committed an act of domestic violence, and Respondent pled guilty to a criminal Assault-IV DV charge in 2000. Under these circumstances, the only proper conclusion was that Respondent's violence throughout the marriage on other family and household members was a history of acts of domestic violence as defined in RCW 26.50.010(1).

C. The trial court erred when it failed to conclude Respondent abused the parties' oldest daughter after finding Respondent pulled her hair at a festival and lifted her off the ground

Not only did the trial court err in concluding Respondent did not have a history of acts of domestic violence as defined in RCW 26.50.010(1), but it also erred when it did not conclude Respondent abused their oldest child when she pulled the child by the hair and lifted her off the ground. RCW 26.09.191(2)(a) requires residential time limitations on a parent when the trial court finds that parent engaged in "physical...abuse of a child."⁷⁶ Here, the trial court expressly found that Respondent pulled the

⁷⁶ RCW 26.09.191(2)(a); *Mansour v. Mansour*, 126 Wn. App. 1, 10, 106 P.3d 768, 773 (2004). ("[I]t must limit the abusive parent's residential time with the child.")

oldest child's hair and lifted her off the ground. That rises to the level of abuse of a child.⁷⁷

D. The trial court erred when it failed to shift the burden of proof onto Respondent to prove the exception in RCW 26.09.191(2)(n) to the otherwise mandatory residential time limitations required under RCW 26.09.191(2)(a), which requires proof there would be no harm to the children and the chance of Respondent re-engaging in abusive behavior was remote.

Once it has been concluded that a parent has a history of acts of domestic violence as defined in RCW 26.50.010(1) or that a parent has physically abused a child, it is clear that parent then bears the burden to prove that the exception in RCW 26.09.191(2)(n) to exempt that parent from the otherwise mandatory residential time limitations in RCW 26.09.191(2)(a).⁷⁸ RCW 26.09.191(2)(n) clearly and unambiguously states “[t]he parent's residential time with the child shall be limited if it is found that the parent has engaged in...(ii) physical...abuse of a child [or] (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1)...”

Construing the same provision, but as it related to sexual abuse, Division Two has held that RCW 26.09.191(2) “sets forth a detailed

⁷⁷ Pulling a child's hair and dragging the child is sufficient to have a child declared dependent. *In re Gregoire*, 71 Wn.2d 745, 746, 430 P.2d 983, 984 (1967)
In re Dependency of D.K.M., 146 Wn. App. 1060 (2008)

⁷⁸ *Mansour*, 126 Wn. App. at 10

framework of mandatory restrictions on a parent's residential time...”⁷⁹ It further provides that the statutory scheme “creates a rebuttable presumption that a parent who has [a history of acts of domestic violence as defined in RCW 26.50.010(1)] poses a present danger to a child and requires the court to restrain the parent from contact unless the parent rebuts this presumption.”

Having created a rebuttable presumption, the burden shifted to Respondent to go forward with evidence on the RCW 26.09.191(2)(n) issue. “The sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue.”⁸⁰ Here, once it was proven that Respondent had a history of acts of domestic violence as defined in RCW 26.50.010(1), the burden shifted to Respondent to prove the children would not be harmed if the trial court were not to impose the otherwise mandatory residential time limitations in RCW 26.09.191(2)(a) and that the chance of Respondent engaging in further abusive acts was so remote that it would not be in the children’s best interests to apply the otherwise mandatory residential time limitations in RCW 26.09.191(2)(a).

⁷⁹ *In re Marriage of Watson*, 132 Wn. App. 222, 237, f.n. 9, 130 P.3d 915, 922 (2006)

⁸⁰ *In re Indian Trail Trunk Sewer*, 35 Wn.App. 840, 843, 670 P.2d 675, 677 (1983)

E. The trial court erred when it failed to restrict Respondent’s residential time with the children pursuant to RCW 26.09.191(2)(a).

The DVPA statute *requires* that a court place restrictions on a parent’s residential time when he or she has a history of acts of domestic violence as defined in RCW 26.50.010(1). RCW 26.09.191(2)(a) states in pertinent part:

(2)(a) The parent’s residential time with the child *shall be* limited if it is found that the parent has engaged in ... (ii) physical ... abuse of a child.... (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) ...⁸¹

As a general rule, the use of the word “shall” in a statute is imperative and operates to create a duty.⁸² The trial court was, therefore, required to restrict Respondent’s residential time with the children.

A similar situation was presented in *In re Marriage of Mansour*.⁸³ There, the mother successfully argued on appeal that the trial court erred by not including in the parenting plan the required limitation set forth in RCW 26.09.191(2)(a) on the father’s residential time with their child because the court found the father abused the child with a belt.⁸⁴ The trial court explained that it did “believe there was abusive behavior by the father during the course of the marriage to [his son] with the use of the

⁸¹ RCW 26.09.191(2)(a) (emphasis added).

⁸² *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 82, 605 P.2d 1265, 1266 (1980).

⁸³ 126 Wn. App. 1

⁸⁴ *Mansour*, 126 Wn. App. at 5.

belt.”⁸⁵ Despite this clear finding of abuse, the trial court incorrectly concluded the mandatory residential time limitation in RCW 26.09.191(2)(1) did not apply and utilized the discretionary limitation and restrictions in RCW 26.09.191(3).⁸⁶

In *Mansour*, this court reversed the parenting plan and remanded the case back to the trial court to follow the requirements of RCW 26.09.191(1) and (2) because substantial evidence supported the finding that the father had physically abused the parties’ son.⁸⁷ In explanation, the *Mansour* court stated,

RCW 26.09.191 is unequivocal. Once the court finds that a parent engaged in physical abuse, it *must not* require mutual decision-making and it *must* limit the abusive parent’s residential time with the child. If the court is concerned about the harshness of the limitations required by RCW 26.09.191(2)(a) and their effect on the best interest of the child, in an appropriate case it may apply subsections (2)(m) and (2)(n) to temper the limitations. But the court must first conclude that RCW 26.09.191(2) applies, and then make specific findings that justify any modification of the limitations.⁸⁸

Here, substantial evidence supported the trial court’s express finding that both parties engaged in violence during the marriage and that Respondent physically abused their oldest daughter. The trial court found

⁸⁵ *Id.* at 9.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Mansour*, 126 Wn. App. at 10 (emphasis added).

both these things occurred.⁸⁹ Nobody has challenged these findings and they are verities on appeal.⁹⁰

Similarly, Respondent produced no evidence to exempt her from the mandatory residential time limitations in RCW 26.09.191(2)(a). Here, there was no finding that no harm would come to the children if the limitation was not applied, there was no finding the chance of Respondent re-engaging in abusive conduct was so remote that applying the residential time limitations would not be in the child's best interests. Where a trial court does not make a particular finding, this Court must treat the case as though a finding of fact was made against the party with the burden of proof.⁹¹ Without these findings, there is no basis to exempt Respondent from the mandatory residential time limitations in RCW 26.09.191(2)(a).

In situations where a party has committed multiple acts of domestic violence, as the Respondent has here, *Mansour* makes it plain that RCW 26.09.191(2)(a) is unequivocal: the trial court *must* limit the abusive parent's residential time with the child. The trial court has no discretion to do otherwise. It must conclude that the so-called "191

⁸⁹ CP 1174, Finding of Fact 2.21; *see also* RP at 7:8-9 (Oral Ruling, Sept. 12, 2013). RP 6:21-25 (Oral Ruling, Sept. 12, 2013).

⁹⁰ *Ambrose v. Ambrose*, 67 Wn. App. 103, 105, 834 P.2d 101 (1992).

⁹¹ *See Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 844 P.2d 389 (1993).

restrictions” apply.⁹² The trial court’s failure here to limit the Respondent’s influence on decision making and limit her residential time was clearly error. Just as in *Mansour*, the parenting plan should therefore be remanded to the trial court to follow the requirements of RCW 26.09.191(1) and (2).

The trial court focused on the Appellant as having been the “aggressor” in concluding that he had a history of domestic violence as defined in RCW 26.50.010, but RCW 26.09.191(2)(a) does not use an “aggressor” standard in imposing residential limitations. Instead, this statute simply requires that a “parent’s residential time with the child shall be limited if it is found that the parent has engaged in... (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.”⁹³ A trial court does not have discretion to waive this limited residential time requirement without making the express findings required under RCW 26.09.191(2)(n). It was an obvious error not to conclude that the Respondent’s violence met the definition of domestic violence under RCW 26.50.010. Instead of limiting the Respondent’s residential time, the trial court entered a parenting plan under which the children reside a majority of the time with the Respondent.

⁹² *Mansour*, 126 Wn. App. at 10.

⁹³ 26.09.191(2)(a).

F. It is good public policy to require a parent who either abuses a child or has a history of acts of domestic violence as defined in RCW 26.50.010(1) to prove recurrence of abuse is remote and that their children will not be harmed if the mandatory residential time limitations are not imposed.

In any Washington dissolution proceeding between parents, the best interests of the child are the standard by which the court determines and allocates the parties' parental responsibilities.⁹⁴ The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered *unless inconsistent with the child's best interests*.⁹⁵ Residential time and financial support are equally important components of parenting arrangements.⁹⁶ The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care.⁹⁷ Further, the best interest 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*.⁹⁸ The identification of domestic violence as defined in RCW 26.50.010 and the treatment needs

⁹⁴ RCW 26.09.002.

⁹⁵ *Id.* (emphasis added).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* (emphasis added).

of the parties to dissolutions are necessary to improve outcomes for children.⁹⁹

It is clear from the above statutory policy that the Washington Legislature has concluded that a residential arrangement in which a child is exposed to an abusive or domestically violent parent subjects that child to physical, mental, and emotional harm, and is therefore not in that child's best interests. In accord with this policy, the Legislature has placed mandatory residential restrictions on parenting plans where a court finds that a parent has engaged in certain conduct, including abuse, a history of acts of domestic violence as defined in RCW 26.05.010(1), or an assault or sexual assault which causes either grievous bodily harm or the fear of such harm.¹⁰⁰ The standard under RCW 26.09.191(2)(n) requiring a finding that probability of recurrence is so remote that it would not be in the child's best interests to apply the residential restrictions is a sound policy to protect children from physical, mental, or emotional harm. It protects children from the abusive or domestically violent parent, employing a balancing test, always with the child's best interests uppermost. Requiring a parent to show the remoteness of probable recurrence keeps the protective restrictions in place to insulate children from harm, thus improving outcomes for them.

⁹⁹ RCW 26.09.003.

¹⁰⁰ RCW 26.09.191(2)(a).

G. Residential time limits and limits on decision making should not apply to the Appellant because the trial court expressly found that the probability that the chance of recurrence of the Appellant’s domestic violence behavior is remote.

Under RCW 26.09.191(2)(n), the ordinary mandatory residential limits of RCW 26.09.191 do not apply in cases where the court

expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child’s best interests to apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection.¹⁰¹

The trial court expressly made these findings in favor of the Appellant,¹⁰² and, therefore, the otherwise mandatory residential time limitations in RCW 26.09.191(2)(a) do not apply to him. No similar finding was made regarding the Respondent, who had the burden of proof.

H. The trial court erred in assigning a \$25,000 enterprise value of Earthtribe Percussion when it had limited tangible assets and there was no evidence that it had any intangible goodwill.

Respondent testified that the tools and equipment used in Appellant’s Earthtribe Percussion drum making business amounted to “probably a

¹⁰¹ RCW 26.09.191(2)(n).

¹⁰² CP 1190, Parenting Plan at ¶ 3.10.

thousand to \$1200 worth of tools that he uses.”¹⁰³ Appellant testified that the value of inventory was in the range of \$2000 to \$2500.¹⁰⁴ Yet the trial court assigned a value of \$25,000 to the drum making business¹⁰⁵ without any evidence of intangible goodwill or having engaged in the correct analysis of goodwill.

Evaluation of goodwill must be done with considerable care and caution.¹⁰⁶ A trial court should first determine if goodwill exists in a particular practice; not every professional business as a going concern necessarily even has goodwill.¹⁰⁷ This preliminary inquiry takes place during the general evaluation process.¹⁰⁸

Courts employ what are known as the *Fleege* factors when evaluating goodwill: the practitioner’s age, health, past demonstrated earning power, professional reputation in the community as to his judgments, skill, knowledge and his comparative professional success.¹⁰⁹ However, the *Fleege* factors cannot be evaluated and valued in isolation.¹¹⁰ One or more of the accepted methods of valuation must be employed, and in valuing goodwill, five major formulas have been articulated, described in

¹⁰³ RP 282:23-24 (Heidi Goude, Aug. 20, 2013).

¹⁰⁴ RP 1470:3-16 (Michael Goude, Aug 28, 2013).

¹⁰⁵ Trial Ex. 256.

¹⁰⁶ *In re Marriage of Hall*, 103 Wn.2d 236, 243, 692 P.2d 175 (1984).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 242, citing *In re Marriage of Fleege*, 91 Wn.2d 324, 588 P.2d 1136 (1979).

¹¹⁰ *Id.* at 243.

more detail in *In re Marriage of Hall*.¹¹¹ Specifically, these five formulas are 1. the straight capitalization accounting method, 2. the capitalization of excess earnings method, 3. the IRS variation of capitalized excess earnings method, 4. the market value approach, and 5. the buy/sell agreement method.¹¹²

Here, the trial court assigned a value of \$25,000 to the business¹¹³ when the testimony was that its tools and equipment were worth \$1,200 to \$2,000 and its inventory worth between \$2000 to \$2500. There was no evidence presented regarding intangible goodwill, nor did the trial court engage in one of the accepted methods of valuation when it added the additional value of some \$21,300 to \$22,000 in intangible goodwill. This was error.

This error was material. As the trial court found, “most of [the parties’] assets are of de minimus value.”¹¹⁴ It found that the property division resulted “in the father being awarded property of approximate value of \$35,000 and the mother being awarded that in approximate value of \$7500.”¹¹⁵ The trial court then ordered a \$15,000 equalizing transfer

¹¹¹ *Id.* at 243-44.

¹¹² *Id.* at 243-44.

¹¹³ The trial court adopted the property values set out in Trial Ex. 256. CP 1181.

¹¹⁴ CP 1181.

¹¹⁵ *Id.*

from Appellant to Respondent.¹¹⁶ However, Appellant's property award of \$35,000 included the extra \$22,000 for the drum making business. Without that erroneous padding, the property awards would be \$13,000 to Appellant and \$7500 to Respondent, warranting an equalizing transfer of perhaps about \$2500, not \$15,000.

I. If RCW 26.09.191 residential restrictions are imposed, the child support order should be remanded for revision considering that the Respondent would not be the primary residential parent.

The trial court entered a child support order on the presumption that the Respondent is the primary residential parent.¹¹⁷ If residential restrictions under RCW 26.09.191 are to be imposed, such that the Respondent is not the primary residential parent, the child support order should also be remanded to the trial court for appropriate revision consistent with the Respondent not being the primary residential parent.

J. Request for Attorney Fees.

RAP 18.1(a) allows appellate attorney fees to a party who has the right to attorney fees under applicable law. RCW 26.09.140 allows courts to award attorney fees to a party in a marital dissolution proceeding, after considering both parties' resources, based on need and ability to pay when one party has superior resources. Here, Respondent has superior resources as evidenced by her financial declaration that

¹¹⁶ *Id.*

¹¹⁷ CP 1150-63.

shows she was able to pay \$33,110 in attorney fees at trial.¹¹⁸ Appellant does not have a similar ability to pay his attorney fees. A financial declaration will be filed in accordance with RAP 18.1(d).

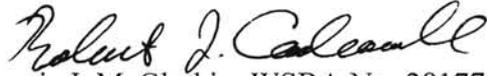
VI. Conclusion.

For the above reasons, this matter should be remanded to the trial court with instructions to enter conclusions that Respondent's violence throughout the marriage were acts of domestic violence as defined in RCW 26.50.010(1), and to impose the mandatory residential and decision-making restrictions under RCW 26.09.191. The child support order should also be remanded with instructions that it be revised in accordance with the residential restrictions imposed under RCW 26.09.191. Additionally, the trial court should be instructed to value the the Earthtribe Percussion drum-making business based only on the tangible assets, which were the only assets to which there was any testimony, and to revise the equalizing transfer payment accordingly. Finally, Appellant should be awarded his attorney fees, to be paid by Respondent.

¹¹⁸ Financial Declarations of Heidi Goude, Trial Exs. 56 and 57.

DATED this 21st day of April, 2014.

WESTERN WASHINGTON LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "Robert J. Cadranell". The signature is written in a cursive style with a large initial 'R'.

Dennis J. McGlothin, WSBA No. 28177

Robert J. Cadranell, WSBA No. 41773

7500 212th St. SW, Suite 207

Edmonds, WA 98026

Phone: 425-728-7296

Attorneys for Appellant

CERTIFICATE OF SERVICE

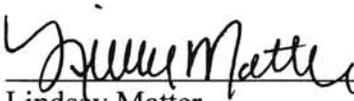
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Michael Goude's Opening Brief to the following via U.S. Mail:

State of Washington
Court of Appeals Division I
600 University Street
One Union Square
Seattle, WA 98101

Heidi Goude
15012 205th Ave SE
Renton, WA 98059

Signed this 21st day of April, 2014 Seattle, Washington.



Lindsey Matter
Paralegal

APPENDIX A

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Superior Court of Washington
County of GRANT

In re the Marriage of:

HEIDI R. GOUDE

Petitioner,

and

MICHAEL Z. GOUDE

Respondent.

No. 12-3-00350-5

Petition for Dissolution
of Marriage
(PTDSS)

I. Basis

1.1 Identification of Petitioner

Name: HEIDI GOUDE Birth date 08/18/1977

Last known residence: Grant County, Washington.

1.2 Identification of Respondent

Name: MICHAEL GOUDE Birth date 06/11/1974

Last known residence: King County, Washington

1.3 Children of the Marriage Dependent Upon Either or Both Spouses

The husband and wife are both the legal (biological or adoptive) parents of the following dependent children:

Name: KCG Age 12

Name: MZG Age 9

Name: QOG Age 5

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WPF DR 01.0100 Mandatory (6/2008) - RCW 26.09.020

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1 **1.4 Allegation Regarding Marriage**

2 This marriage is irretrievably broken.

3 **1.5 Date and Place of Marriage**

4 The parties were married on May 15, 1999 at Post Falls, Kootenai County, Idaho.

5 **1.6 Separation**

6 Husband and wife are not separated.

7 **1.7 Jurisdiction**

8 This court has jurisdiction over the marriage.

9 This court has jurisdiction over the respondent because:

10 The respondent is currently residing in Washington.

11 The petitioner and respondent lived in Washington during their marriage and the
12 petitioner continues to reside in this state.

13 The petitioner and respondent may have conceived a child while within
14 Washington.

14 **1.8 Property**

15 There is community or separate property owned by the parties. The court should make a
16 fair and equitable division of all the property. The division of property should be
17 determined by the court at a later date.

17 **1.9 Debts and Liabilities**

18 The parties have debts and liabilities. The court should make a fair and equitable
19 division of all debts and liabilities. The division of debts and liabilities should be
20 determined by the court at a later date.

20 **1.10 Maintenance**

21 There is a need for maintenance as follows:

22 This is a mid-term marriage of 13 years. Petitioner did not finish high school, but
23 obtained her GED. She does not have any post-secondary education and does not
24 have marketable employment skills. Petitioner is relocating from Issaquah, Washington
25 to Moses Lake, Washington where her parents reside and where she has an
 established support network. There is a large disparity in the income and earnings
 abilities of the parties. Petitioner is in need of financial assistance from the Respondent

1 to meet her day-to-day financial obligations, to give her an opportunity to obtain
2 marketable employment skills and to obtain employment that will allow her become self-
supporting.

3 **1.11 Continuing Restraining Order**

4 A continuing restraining order should be entered which restrains or enjoins the husband
5 from disturbing the peace of the other party.

6 A continuing restraining order should be entered which restrains or enjoins the husband
7 from going onto the grounds of or entering the home, work place or school of the other
party or the day care or school of the following children:

8 KASSIDY C. GOUDE, MILO Z.D. GOUDE and QUENTIN O. GOUDE.

9 A continuing restraining order should be entered which restrains or enjoins the husband
10 from knowingly coming within or knowingly remaining within 100 YARDS of the home,
work place or school of the other party or the day care or school of these children:

11 KASSIDY C. GOUDE, MILO Z.D. GOUDE and QUENTIN O. GOUDE.

12 A continuing restraining order should be entered which restrains or enjoins MICHAEL Z.
13 GOUDE from molesting, assaulting, harassing, or stalking HEIDI R. GOUDE. (If the
14 court orders this relief, the restrained person will be prohibited from possessing a
firearm or ammunition under federal law for the duration of the order. An exception
exists for law enforcement officers and military personnel when carrying
department/government-issued firearms. 18 U.S.C. § 925(a)(1).)

15 **1.12 Protection Order**

16 Does not apply.

17 **1.13 Pregnancy**

18 The wife is not pregnant.

19 **1.14 Jurisdiction Over the Children**

20 This court has jurisdiction over the children for the reasons set forth below.

21 This state is the home state of the children because the children lived in Washington
22 with a parent or a person acting as a parent for at least six consecutive months
immediately preceding the commencement of this proceeding.

1 **1.15 Child Support and Parenting Plan for Dependent Children**

2 A parenting plan and an order of child support pursuant to the Washington State child
3 support statutes should be entered for the following children who are dependent upon
4 both parties.

4 Names of Children

5 KCG
6 MZG
7 QOG

7 The petitioner's proposed parenting plan for the children listed above is attached and is
8 incorporated by reference as part of this Petition.

8 During the last five years, the children have lived in no place other than the State of
9 Washington and with no person other than the petitioner or the respondent.

10 Claims to custody or visitation:

11 The petitioner does not know of any person other than the respondent who has physical
12 custody of, or claims to have custody or visitation rights to, the children.

13 Involvement in any other proceeding concerning the children:

14 The petitioner has been involved in the following proceedings regarding the children (list
15 the court, the case number, and the date of the judgment or order):

15 Lincoln County Cause No. 10-3-00218-3 - Dissolution (Dismissed 10/11/2011)

16 Other legal proceedings concerning the children:

17 The petitioner does not know of any other legal proceedings concerning the children.

18 **1.16 Other**

19 Does not apply.

20 **II. Relief Requested**

21 The petitioner **Requests** the Court to enter a decree of dissolution and to grant the relief below.

22 Provide reasonable maintenance for the wife.

23 Approve the petitioner's proposed parenting plan for the dependent children listed in
24 paragraph 1.15.

Determine support for the dependent children listed in paragraph 1.15 pursuant to the Washington State child support statutes.

Divide the property and liabilities.

Enter a continuing restraining order.

Order payment of day care expenses for the children listed in paragraph 1.15.

Award the tax exemptions for the dependent children listed in paragraph 1.15 as follows:

The exemptions should be shared between the parties. So long as there are three (3) exemptions available, the father should be allowed to claim KCG and the mother should be allowed to claim MZDG for income tax dependency purposes and the parties should alternate the exemption for QOD with the father having the exemption in even numbered tax years and the mother in odd numbered tax years.

At such time as there are only two (2) exemptions available, the mother should be allowed to claim MZDG and the father should claim QOD every year.

When there is only one (1) exemption available, the parties should alternate the exemption with the father having the exemption in even numbered tax years and the mother in odd numbered tax years.

Order payment of attorney fees, other professional fees and costs.

Attorney for Petitioner

Dated:

6/14/12

Barbara J. Black

BARBARA J. BLACK
WSBA #23686

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Issaquah, Washington on June 13, 2012.

Heidi Goude

HEIDI GOUDE

Signature of Petitioner

APPENDIX B

FILED

JUN 29 2012

KIMBERLY A. ALLEN
Grant County Clerk

Superior Court of Washington
County of GRANT

In re the Marriage of:

HEIDI R. GOUDE

Petitioner,

and

MICHAEL Z. GOUDE

Respondent.

No. 12-3-00350-5

**ORDER GRANTING MOTION FOR
CHANGE OF VENUE TO KING
COUNTY**

THIS MATTER having come on regularly before the Court on the motion of the Respondent for an order changing venue of this action from Grant County, Washington to King County, Washington, and the Court having reviewed the files contained herein, and finding that a change should be granted for the convenience of witnesses and the ends of justice, and being fully advised in the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent's Motion for a change of venue is granted and this matter shall forthwith be transferred to King County, Washington.

DONE in open Court this 21 day of June, 2012.

MELISSA K. CHLARSON

Court Commissioner

Order Changing Venue

HARRY E. RIES

Attorney at Law
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(509) 765-3932 Facsimile

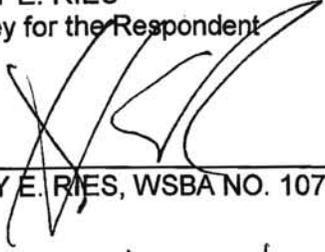


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PRESENTED BY:

HARRY E. RIES
Attorney for the Respondent



HARRY E. RIES, WSBA NO. 10745

Restraining order shall be continued until
further order of the King County Court

Order Changing Venue

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