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No. 63063-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BRENT JAMES SAMODUROV,

Appellant

v.

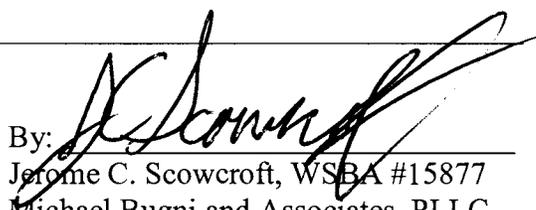
MICHELLE L. SAMODUROV,

Respondent

Appeal from the Superior Court of Snohomish County
The Honorable Richard J. Thorpe

No. 07-3-02227-1

BRIEF OF RESPONDENT

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INTRODUCTION

Appellant Brent Samodurov (the “father”) and Respondent Michele Samodurov (the “mother”) were divorced on January 29, 2009. The father appeals from provisions in the Parenting Plan that limit his visitation with the children to 14 hours of professionally supervised visitation every two weeks and require all major decisions to be made by the mother. Those decisions are based on the trial court’s Findings of Fact ¶¶2.19.2 – 2.19.6, CCP 53-54, which are set forth in Appendix I hereto.

ISSUE PRESENTED FOR REVIEW

The question raised by the father’s appeal is whether the evidence was sufficient to justify the trial court’s decision.

CONCLUSION

The evidence was more than sufficient under the applicable standard of review, and the trial court’s decision must be affirmed.

ARGUMENT

SECTION 1 – APPLICABLE LEGAL STANDARDS

I. PROTECTION OF THE CHILDREN

In *Borenback v. Borenback*, 34 Wash.2d 172 (1949), the Washington Supreme Court affirmed the determination of the trial court to terminate the father’s right of visitation. The Court stated that in awarding custody of children in divorce proceedings, “the paramount and

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controlling consideration is the welfare of the child or children...”
“Although the privilege of visitation enjoyed by a parent is an important one, it is not of itself an absolute right, nor is it the paramount consideration; it must always yield to what is best for the welfare of the child.” “Necessarily, in matters of this kind, each case must be judged by its own facts,” and “the superior court has large power and discretion.”

Likewise in *In re the Marriage of Allen*, 28 Wash.App. 637 (1981), the court upheld an award of custody to a stepmother on the basis that:

Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference, they are not absolute and must yield to fundamental rights of the child or important interests of the State.

Clearly, parental unfitness will outweigh the deference normally given parents' rights. If the parents' actions threaten the child's welfare, the state's interest takes precedence.

28 Wash.App. at 646.

The Parenting Act of 1987 preserves the “best interests of the child” as the overarching standard for parental determinations.

Under the Parenting Act, the best interests of the child continues to be the standard by which the trial court determines and allocates parenting responsibilities....Moreover, although “[t]he Parenting Act revised the factors previously considered by the court under former law, [it] continues to give the trial court broad discretion when making [residential placements].”

In re the Marriage of Possinger, 105 Wash.App. 326, 335 (2001), citing *In re Marriage of Kovacs*, 121 Wash.2d 795, 801 (1993). See also *In re the Matter of the Parentage of L.B.*, 155 Wash.2d 679, 701 (2005).

This policy is implemented by RCW 26.09.002 and RCW 26.09.184(g). RCW 26.09.002 provides that “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.” RCW 26.09.184(1)(g) mandates that the parenting plan must “protect the best interests of the child consistent with RCW 26.09.002.”

The effect of the best interests standard is that it “directs attention not to adults' self-ownership, intent, or action, but to how best to provide a particular child with physical sustenance and psychological nurture.” *Parentage of L.B.*, 155 Wash.2d at 709, n.26. As applied to this case the best interest standard requires the children to be protected from “physical, mental, or emotional harm.” *Marriage of Possinger*, 105 Wash. App. At 335.

II. RESTRICTION OF VISITATION

RCW 26.09.187(3)(a)(i) – (a)(vii) identify factors for the trial court to consider in making residential provisions for the children. In addition, section 187(3)(a) specifies that “The child’s residential provisions should be consistent with RCW 26.09.191.” “Any provision of the parenting plan will or may be limited if the trial court finds any one of a number of factors set forth in RCW 26.09.191.” *Marriage of Kovacs*, 121 Wash.2d

at 801, n.5. “[W]here physical, mental, or emotional harm to the child are at issue, the limitations provided for in RCW 26.09.191(2) or (3) would apply.” *Id.* at 808.

In *Marriage of Littlefield*, 133 Wash.2d 39, 54-55 (1997), the Court stated in particular that:

RCW 26.09.191(3) permits a trial court to restrict a parent's actions under the parenting plan if the court finds that the parent's involvement or conduct may have an adverse effect on the child's best interests and if *any* of the following factors exist:

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.”

Construed together, RCW sections 187 and 191 mean that if the trial court determines there are “factors or conduct as the court expressly finds adverse to the best interests of the child,” it is obligated under the best interests standard to formulate a parenting plan that will protect the children’s interests from that time forward. *Marriage of Kovacs*, 121 Wash.2d at 809. If the trial court finds a pattern of conduct by a parent that creates a risk of physical, mental, or emotional harm to the children, it may protect the children by restricting that parent’s visitation and decision-making. That is precisely what happened in this case.

III. THE ABUSE OF DISCRETION STANDARD OF REVIEW.

The father appeals on the basis that the evidence does not support the restrictions that the trial court imposed. For example the father

disputes the father court's finding of "strong evidence" that the father sexually exposed himself to Brynn, and states that the failure to disprove sexual abuse is not substantial evidence that the parent's conduct would affect the children. However, In appeals of this kind, Washington law has long recognized that the trial court's decision will be reviewed only for a manifest abuse of discretion..

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

In re Marriage of Landry, 103 Wash.2d 807, 810-811 (1985).

[T]he trial court decisions in dissolution proceedings will seldom be changed on appeal. The spouse who challenges such decisions must show the trial court manifestly abused its discretion. When there is no abuse of discretion, we have upheld the trial court.

In re the Marriage of (Griffin) Booth, 114 Wash.2d 772, 779 (1990).

A. The Court of Appeals need not consider all of the evidence. In determining whether the trial court has abused its discretion, the appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wash.2d 150, 155 (1963); *Endicott v. Saul*, 142 Wash.App. 899, 910, 176 P.3d 560 (2008).

B. Evidentiary conflicts are to be resolved by the trial

court. The father's brief cites evidence which he considers to be in conflict with the evidence upon which the trial court relied. However, the resolution of conflicts in the evidence is a task that is reserved particularly for the trial court. "As an appellate court, we cannot weigh conflicting evidence." *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wash.App. 695, 699 (1971). "Where the trial judge is presented with conflicting evidence, we will not disturb his finding based upon that evidence." *Maehren v. City of Seattle*, 92 Wash.2d 480, 501, (1979)(*en banc*), *cert. denied*, 452 U.S. 938. In this case the record contains extensive evidence discussed below that the father has a history of sexually deviant conduct, suffers from a long-term impairment reflected by things such as abuse of alcohol and addiction to pornography, and sexually exposed himself to his daughter Brynn. Insofar as there is any conflicting evidence, the resolution of such evidentiary conflicts is within the trial court's decision.

C. The credibility of witnesses is determined by the trial court. Likewise the father's appeal seeks to challenge the trial court's decision as to whose testimony should be believed. However, findings that involve assessments of the credibility of witnesses are particularly within the province of the trial court. *Matter of Kuvara*, 97 Wash.2d 743, 747 (1982); *In re Marriage of Mahalingham*, 21 Wash.App. 228, 230 (1978).

The reviewing court cannot conduct its own weighing of the credibility of witnesses. *In re Sego*, 82 Wash.2d 736, 739-740 (1973). “Our role or function is not to substitute our judgment for that of the trial court or to weigh the evidence or credibility of witnesses.” *In re Marriage of Rich*, 80 Wash.App. 252, 259, review denied, 129 Wash.2d 1030, 1031 (1996). Even when the witnesses are parties, as in this case, their credibility is to be determined by the trial judge and may not be reviewed by the court of appeals. *Blais v. Phillips*, 7 Wash.App. 815, 816 (1972). In this case the trial court’s decision to believe the mother rather than the father about the attempted rape at Costco, and to believe the testimony of the mother, Brynn and Kaleb rather than the father about the indecent exposure incident, are credibility determinations that cannot be overturned on appeal.

D. The Court of Appeals may not substitute its judgment for that of the trial court. “This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances.” *In re Marriage of Stern*, 57 Wash.App. 707, 717, review denied, 115 Wash.2d 1013 (1990); *Brown v. Voss*, 105 Wash.2d 366, 373 (1986); *In re Marriage of Nicholson*, 17 Wash.App. 110, 119 (1977). The appellate court must accept the judgment of the trial

court “even though it might have resolved the factual dispute differently.” *Beeson*, 88 Wn.2d at 503; *Hansen v. Pacific Int’l Corp.*, 76 Wn.2d 220, 227 (1969).

The decision in *Marriage of Kovacs* is especially on point. A parental evaluator testified that the mother had a personality disorder and the father was more capable of providing a stable environment for the children. 121 Wash.2d at 799. The trial court therefore ruled that primary custody should be awarded to the father. On appeal the mother challenged the trial court’s conclusion that the evidence supported placement of the children with the father. The court of appeals reversed and remanded because the trial court did not find specifically that the child had been harmed by the primary caregiver. 121 Wash.2d at 800. The Supreme Court reversed the court of appeals and reinstated the decision of the trial court on the basis of the mandate in RCW 26.09.184(1)(g) that the permanent parenting plan must be designed to protect the best interests of the child. 121 Wash.2d at 803. The Supreme Court stated in rejected the mother’s argument because:

An appellate court may not substitute its findings for those of the trial court where there is ample evidence in the record to support the trial court’s determination.

121 Wash.2d at 810. Likewise in *State v. Ramer*, 151 Wash.2d 106 (2004), in which the Supreme Court stated:

We do not substitute our judgment for that of the superior court. While reasonable minds might differ over conflicting evidence, we will reverse the superior court only if, based upon the record, no rational trier of fact could reach the conclusion that the State failed to meet its burden.

151 Wash.2d at 115. See also *In re Marriage of Landry*, 103 Wash.2d at 809-810, where the Supreme Court affirmed the trial court's distribution of marital property because:

The distribution that we might have made collectively or individually is not relevant. The trial court carefully analyzed the respective positions of the parties, exercised its discretion and rendered a thoughtful decision. That ends the matter.

In this case as discussed in Section 2 below, the trial court considered extensive evidence regarding the father's conduct and its potential impact upon the children. The trial court concluded after considering the evidence that the children's interests were best served by restricting the father's visitation and decision-making. As in *Marriage of Landry*, "The [parenting plan] we might have made collectively or individually is not relevant. The trial court carefully analyzed the respective positions of the parties, exercised its discretion and rendered a thoughtful decision. That ends the matter."

IV. THE ABUSE OF DISCRETION STANDARD APPLIES WITH PARTICULAR FORCE TO PARENTING ISSUES.

"Trial courts are given broad discretion over parenting issues, which are very fact-specific and consequently not overturned on appeal."

Wechsler and Appelwick, Parenting Plans, Ch. 47, WSBA Family Law Deskbook §47.4(2)(a)(a). Appellate courts are especially reluctant to disturb parenting determinations “because of the trial court’s unique opportunity to personally observe the parties.” *In re Marriage of Murray*, 28 Wash.App. 187, 189 (1981). See also *In re Marriage of Littlefield*, 133 Wash.2d at 46-47.

Thus in *Marriage of Burrill*, 113 Wash.App. 863 (2002), the trial court awarded primary residential care of the children to the father under RCW 26.09.191(3) because it found that the mother had engaged in abusive use of conflict by making false allegations that the father had engaged in sexual misconduct. The mother argued on appeal that the trial court had erred in finding that she had made unfounded allegations of sexual abuse. The Court of Appeals rejected the mother’s argument because it was supported by substantial evidence, and “So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.” 113 Wash.App. at 868. The mother also argued that even if she did engage in abusive use of conflict, the trial court’s imposition of parenting restrictions was erroneous because there was no evidence that the children had been alienated from the father. The Court of Appeals agreed that the evidence showed no alienation of the children’s affections. However, it affirmed the trial court’s decision

because “evidence of actual damage is not required. Rather, the required showing is that a danger of psychological damage exists.” 113 Wash.App. at 872. The record contained “sufficient evidence from which the trial court could conclude that [the mother] created a danger of serious psychological damage to the children.” *Id.* Likewise in the present case there is substantial evidence to support the conclusion of the Guardian Ad Litem (RP.II,108-109) and the trial court that the placement of parenting restrictions on the father was necessary to reduce the risk of harm to the children.

The decision in *In re the Marriage of Chua and Root*, 149 Wash.App. 147 (2009), is squarely on point. When the parties divorced a parenting plan was entered that placed their two children primarily with the mother. A year later, when the mother requested authorization to relocate her children, a history of sexual misconduct by the father came to light. As in the present case, one of the parent’s children made a disclosure which prompted a referral for an evaluation of sexual misconduct by the father. Other incidents were reported as well.

A doctor who conducted a psycho-sexual evaluation of the father reported that he appeared to have “an unusual and perhaps unhealthy interest in young females,” but also that he had been investigated several times by the police, had passed a polygraph test, and had not been

prosecuted. 149 Wash.App. at 155-56. The father in this case argues similarly that he has been investigated several times without being prosecuted and passed a polygraph test.

The trial court stated that it did not find any sexual abuse, but found that the father had “shown a pattern of a lack of understanding of appropriate boundaries when communicating with minor females and that he used bad judgments in some of his communications.” 149 Wash.App. at 152-53. In this case the Guardian Ad Litem made a similar finding (RP II.64, lines 3-6; RP II.75 lines 9-10; RP II.108), and the trial court determined that the father needs to address “sexual/boundary issues.” Ex. 8, p.3.

Based on its findings, the trial court in *Chua and Root* entered a final parenting plan that restricted the father’s residential time to two supervised visits per year. When the father appealed the Court of Appeals responded that “The trial court’s review of a matter concerning the rights of custody and visitation will not be disturbed absent an abuse of discretion.” 149 Wash.App. at 153-54. “Based on the record here, the court did not abuse its discretion by issuing the permanent restraining order or placing restrictions in the parenting plan.” 149 Wash.App. at 156. The same is true in this case.

SECTION 2 - EVIDENCE SUPPORTING

THE TRIAL COURT'S DECISION

Particularly with respect to the legal standards recited above, the evidence in this case is more than sufficient to justify the trial court's decision.

I. HISTORY OF SEXUAL MISCONDUCT: The evidence demonstrates that the father has a long history of sexual misconduct which, when combined the sexual misconduct with his daughter Brynn, justifies the trial court's conclusion that parental restrictions were necessary to protect the children from the risk of physical, mental, or emotional harm.

A. The 1997 Indecent Exposures: The father admits that he sexually exposed himself on an occasion in 1997 when both adults and minors were present. RP I.19, lines 11-13, 16-19; RP III.162-63. In fact the Everett Herald reported that according to a police report filed on May 29, 1997, "three students from Ingraham High School in Shoreline saw a naked man masturbating in a dark gray car in a Kmart parking lot. They said the same man had done the same thing 10 days earlier in a silver sports car. Half an hour later on that May morning, police dispatchers go a call from a group of students from the Court Reporting Institute nearby, saying they'd heard someone yell "Hey!" and looked over to see a naked man masturbating next to a dark gray car. They too said the same man had

done the same thing previously in a silver sports car. The license plate number and description the students gave matched Samodurov's car, and the description of a white male, 20 to 25 years old, with brown hair and a 'very conservative haircut' matched Samodurov." He was arrested and charged with indecent exposure on June 11, 1997. Exhibit 44, pp. 1-2. See also Ex. 36, p.10; RP I.19. The father admitted at trial that while the case was pending, no fewer than eight no contact orders were entered to keep him from having contact with underage girls. RP I.19-20, 21; Exhibit 36, pp. 22-23. The father also lost his job as a youth pastor at the Westminster Assembly of God when he was arrested for indecent exposure. RP I.136, lines 13-23.

The father seeks to minimize the 1997 incidents by saying that the charges against him were ultimately dismissed. The same argument was disregarded by the Court of Appeals in *Marriage of Chua and Root, supra*. Moreover, the father misstates the facts. What the record actually shows is that the father took an Alford plea and was sentenced to two years of treatment. Ex. 36, pp 5, 22; RP III.165. The record also states specifically that a guilty finding was entered. Ex. 36, p. 22. It was only later on, after the father was supposed to have gone through sexual deviancy treatment, that the matter was "dismissed with prejudice". However, the sexual deviancy treatment is in doubt. (See Paragraph

Moreover, the father admitted at trial that he exposed himself on several occasions during that period of time. RP III.162-63. For example, the record indicates at RP III.28 that the father admits to having committed at least four or five acts of indecent exposure and to having been arrested for two of them. On another occasion the father admitted to “five to ten” incidents in his early twenties. RP III.29, lines 1-2. It is therefore an unchallenged fact and a “verity on appeal” that the father engaged in acts of indecent exposure in the past. *Endicott v. Saul*, 142 Wash.App. at 910; *In re Estate of Jones*, 152 Wash.2d 1; RAP 10.3(g). The fact that he did so in the past makes it more likely that he exposed himself to his daughter Brynn as discussed in Section IX*, below.

B. The Costco Attempted Rape: The mother testified that the father told her that in October of 2003 he went to a Costco parking lot with the intention of raping a woman. He pretended that he had a gun in his pocket and grabbed a female jogger with the intention of raping her. She screamed, startling him, and he ran back into his apartment. RP I.55. The father claims that he did not tell the mother about any such incident. However, the trial court “is persuaded by the major aspects of the Wife’s testimony, such as:… (3) the Husband’s telling the Wife about the Husband’s going to Costco with the expressed intent to rape a woman…” Findings of Fact ¶2.19.3, CP 53.). Even when the witnesses are parties, as

in this case, their credibility is to be determined by the trial judge and may not be reviewed by the court of appeals. *Blais v. Phillips*, 7 Wash.App. at 816.

C. The Kathy Owili Incident: Kathy Owili testified that an incident occurred in 2001 when she was renting a room in a house in Sacramento that was owned by Virginia Buckner, Michele Samodurov's mother. An incident occurred in July of 2004 when the mother and father stayed at the house to visit Virginia. Their room was next door to that of Ms. Owili. Ms. Owili was walking to her bedroom, fully dressed, when the father met her in the hallway dressed only in a pair of shorts. He blocked her way, took her hands, and began telling her how beautiful she was. RP II.45-46. The father's actions made Ms. Owili uncomfortable. She went downstairs to get a bottle of water. She was hoping to find the mother or Virginia, but they had gone out. Ms. Owili then returned to her bedroom and closed the door, hoping to avoid the father. Shortly thereafter the lights in the house suddenly went out. The father came into her bedroom without being invited, lay down at the foot of her bed, and began caressing her calf. Ms. Owili became very afraid, jerked her legs away, and lay in a fetal position at the head of the bed. Then before anything else could happen, automobile headlights appeared on the window. Upon seeing the lights the father realized that Virginia and the mother had

returned home. He immediately went to his room and turned on the television as if nothing had happened while they were away. Ms. Owili moved out of the house as soon thereafter as she was able to avoid having to encounter the father again. RP III. 47-49.

D. The Allstate Incidents: The record shows that the father received a job-in-jeopardy notification from his employer, Allstate Insurance Company, for behavior that involved drunkenness and sexual harassment implications on a business trip to Chicago. Ex.93; RP II.111-114. On February 27, 2007, the father became drunk at an establishment with other employees and attempted to return to their hotel with an employee who was a woman. When they arrived at the hotel he stated that he could not remember the location or number of his room. He rejected the woman's suggestion that he inquire at the front desk, followed her, and passed out on one of the beds in her room. The woman had to call two regional marketing managers to remove him from her room. See RP II.112 and Ex. 93. Then when his return flight to Seattle was cancelled his manager instructed him to get a hotel room at the airport. Instead he went drinking with other employees, one of whom reserved a room for him at a downtown hotel so that he would have a place to stay. Instead of checking into that hotel the father went to the room of a couple of women he knew, even though they were uncomfortable having him there and told him not

to stay. The women ended up having to share one bed while the father took the other. The next morning the father offended the women by coming out of the shower wearing only a towel. RP II.70, 112-113. See also RP II.114, lines 13-14.

E. Other Sexual Misconduct: The indecent exposures in 1997, the attempted rape at Costco in 2003, and the Kathy Owili occurrence in 2004 are all incidents of sexual misconduct, as are the father's addiction to pornography and his tendency to leave sexually explicit materials around the house where they would be found by the children. See Section VV** below. In addition, the mother testified at trial that the father admitted to her "countless infidelities, visits to nudist colonies and massage parlors, picking up street walkers, and escapades with prostitutes." RP I.53. The report of Dr. Lennon also indicates that the father made "many unwanted advances" toward a young woman at their church, who eventually left the church because of it. Ex. 16, p.13. He also commenced a relationship with another woman shortly after Isabella's birth. *Id.* Despite the father's appeal, there is very little conflict in the record that such incidents occurred. Insofar as the evidence is conflicting, "Where the trial judge is presented with conflicting evidence, we will not disturb his finding based upon that evidence." *Maehren v. City of Seattle*, 92 Wash.2d at 501.

II. ANGER, NARCISSM, AND ABUSIVE USE OF CONFLICT: The trial court found that the father is a very angry and narcissistic individual. Findings of Fact ¶2.19.2, CP 53. As to the factors upon which its decision was based, the trial court found that that the mother’s testimony was more credible than that of the father and chose to believe her rather than him. Findings of Fact ¶2.19.3 – 2.19.6, CP 53-54. As stated above, these credibility determinations “are solely for the trier of fact [and] cannot be reviewed on appeal.” *Endicott v. Saul*, 142 Wash.App. at 910.

Likewise on May 2, 2008, the trial court entered an order that required the father to undergo alcohol testing and participate in counseling for his “sexual/boundary issues, compulsive behavior, and binge drinking. The order contained extensive findings regarding the father’s overuse of sex, anger, impulsive behavior, binge drinking, and pattern of denial. CP 236-239. These findings, which illustrate the father’s abusive use of conflict and support the imposition of parenting restrictions under RCW 26.09.191, are well-supported by the record.

A. Dr. Lennon’s Report: Dr. Lennon’s report states that in one of the diagnostic tests he administered, “Mr. Samodurov obtained adjusted score of 16 on the Factor One scale.” Ex. 16, p.33. The report states that “This scale, which indicates his thoughts and attitudes (self-

centeredness and callous and remorseless use of others) places him at the 100th percentile when compared to adult male patients in a forensic setting.” The Guardian Ad Litem testified at trial that this was of concern to her because “it’s a part of what I have seen in the collateral data where he does not seem to appreciate the feelings of the people that he is making feel uncomfortable.” RP III.27-28. Dr. Lennon testified likewise, in response to a question from the father, that “factor one is the callous and remorseless use of others, which comes down to the self-centeredness, narcissistic area. You scored as high on that as an individual can score.” RP III.95.

Dr. Lennon also found that “there was a moderate level of similarity between Mr. Samodurov’s observed interpersonal attitudes and those of individuals who have been previously identified as having psychopathic character traits, but a lower level of similarity of behaviors.” Ex. 16, p.33 The Guardian Ad Litem described Dr. Lennon’s finding as “another way of talking about this disregard for others...So while in many scores he did not rise to the level of sexual deviant, he does share similarities, and psychopathic character traits is one of them.” RP III. 27-28.

B. The My Space Postings: The record shows that the father made several My Space postings that were hostile, directed at the mother,

and accompanied by pictures of his children. RP V.4 – 6. Among them was a posting on December 27, 2007, in which the father vowed that “I shall have my revenge.” Ex.106; RP V.4. Then on February 21, 2008, an order on show cause regarding contempt judgment was entered in which Section 3.3 stated that “The father shall have no contact whatsoever, including phone calls/emails whatsoever with his children.” Ex. 40; TR I.29-30. The following day a My Space page was posted which showed the father with their daughter Brynn and stated “you are not going to defeat me, bitch.” Ex. 42. The guardian ad litem testified that the father’s behavior “makes me wonder about revenge, payback, you know, if I can’t have them then you can’t have them kind of behavior, because he’s – we have his My Space pages where he is pretty angry, pretty revved up about losing in court or being angry about court outcomes and being angry at Michele.” RP II.128. The trial court was entitled to draw the same conclusions.

C. The False DUI Message: The evidence shows that father the father tried to provoke the mother by sending a text message to a mutual friend stating “Bummer about the flooding...I think the DUI I got last week beats it though...just when I almost had Michele convinced alcohol wasn’t a problem...” Ex. 40, p.4, lines 6-9. See also RP IV.177 and Ex. 100. This incident provides a good illustration of the father’s

abusive use of conflict. The mutual friend forwarded the message to the mother. Because alcohol was a serious problem for the father (See Section 2.III immediately below), and because the case was so contentious, the mother obtained an emergency order in ex parte suspending the father's visits. At the return hearing on that order to show cause, the father stated that the message was a "joke", and brought a copy of his driving record to show there were no DUIs. The Commissioner issued a contempt order on February 21, 2008, which barred any contact between the father and the children and awarded fees to the mother. The Court found with respect to the DUI message that it was "beyond a bad sense of humor", "illustrates poor judgment on respondent's part," and "finds the respondent's credibility in question." Ex. 40, pp.5, 8; CP 823-830.

D. The Home Equity Loan and Pornographic Movies: The record also contains evidence that the father drew up papers for a home equity loan without consulting the mother. When the mother refused to sign the papers the father became enraged to the point where she began to fear for her safety. RP I.50, lines 6-10. On another occasion when the parties' daughter found sexually explicit movies among the family's Walt Disney movies (see RP I.64, 66, and Section IV below*), the father became enraged when the mother disposed of them. RP I.66.

E. Endangering the Fetus: The mother testified to another

incident in which the father's anger endangered her and the child she was carrying. She testified that the father had told her of certain "red flags" to watch out for in connection with his addiction to pornography and prostitution. See Section V* below and RP I.56. One of them was leaving the house unexpectedly at odd hours. One evening after returning from a church event the father suddenly came downstairs dressed in jogging clothes, grabbed the car keys, and said that he was going to drive somewhere to go jogging. RP I.67, The mother was then about 35 weeks pregnant with Isabella, their fourth child. Since the father's behavior corresponded to the reds flags he had warned about, the mother questioned him. The father "flew off the handle" and became enraged to the point where it caused the mother to go into labor. RP I.69, lines 3-16. As a result Isabella was born early with breathing problems and had to be taken to an intensive care unit after being born. RP I.70, lines 8-10. The mother was struck with how mean, callous, and angry he seemed as they drove to the hospital. RP I.70, lines 2-7. Then while Isabella was still in intensive care, there was another episode of the father leaving them with the excuse of getting videos to watch in the hospital room, turned his cell phone off so that he could not be reached, and failing to return for several hours with no explanation of his whereabouts. RP I.70-71.

F. The Guardianship Action: The evidence also shows that

after the police investigation of the father's indecent exposure to Brynn, the father's parents in Oregon retaliated by starting a guardianship proceeding to have the children taken from the mother. RP I.118-125; RP IV.19. They prepared a petition for appointment of a temporary guardian (Ex. 57) which listed the children by name and recited that the parents' rights to them could be taken away if the petition were granted. RP I.121. They then called the mother's telephone and read a message into her answering machine, where it could be heard by the children. The message stated that an emergency ex parte hearing had been scheduled regarding the guardianship of the children and listed the children by name. RP I.118, 123. The message was heard by the parents' daughter Madelyn. RP I.23. Neither the father nor his parents disclosed this matter to the guardian ad litem. RP II.106, lines 6-20.

The matter came to an end when the commissioner at the ex parte hearing determined that no action should be taken, RP I.124, lines 24-25. However, the commissioner could not take away the effect on the mother or the children of hearing the threat on the answering machine that the children might be taken away. RP I.125, lines 15-25; RP I.126, lines 1-6. In fact, the Guardian Ad Litem interpreted the guardianship action as follows when cross-examined by the father:

I am surprised that there hasn't been a comment from you about it.

I am concerned that this is part of behaviors on your part that have to do with inflicting damage on Michele simply to win her over. I can't imagine that you think it would be in your child's interests to have them taken out of their mother's home and placed in the grandparents' home in Oregon where they've never lived, where they would be far from their mother and father...you didn't go to court to fight it, you didn't call me to explain it to me. I would assume then, because you didn't fight it, that it was okay with you, if they won this third party action. It also leads me to believe you agreed you were unsuitable.

RP III.21-22. The trial judge was entitled to reach the same conclusion.

All of the foregoing evidence supports the trial court's finding that the father's behavior is characterized by anger, narcissism, and sexual misconduct to the point of being adverse to the children's interest within the meaning of RCW 26.09.191(3).

III. THE FATHER'S DRINKING PROBLEMS: The father seeks to minimize the evidence of his alcohol abuse problems by stating, for example, that the mother's concern over having a bottle of wine in the house was exaggerated. However, the evidence of the father's drinking problems was overwhelming. The mother testified that the father sometimes drank alcohol to the point of requiring hospitalization. RP I.49. He often passed out drunk on their couch. On one occasion he passed out drunk on their oldest daughter's bed. RP I.49. On one occasion the mother had to call family friends get her and the children because the father had passed out on the couch. RP I.52, lines 19-25.. There were still more occasions when the father called the mother to say that he was on the way

home but went to a bar instead. The mother would panic and call friends to help try to locate him. The father would finally arrive home around 2:00 or 3:00 a.m. intoxicated and reeking of alcohol. RP I.62.

Once when the father was working with Allstate Insurance Company the mother received a call from Allstate saying that the father had passed out at his computer terminal and was taken by ambulance to the hospital emergency room. RP I.62-63. Medical records from Evergreen Hospital (Ex.87) show that the father's boss went to check on him and found him unconscious at his desk. RP II.33, lines 18-19. The father was hospitalized for two days, from January 23 to January 25, 2006. It was determined at the hospital that that the father had consumed an entire bottle of Vodka on the morning before he passed out, and that he had "an elevated blood alcohol level of 197." He was diagnosed as having "Acute ETOH intoxication with transient focal neurological symptoms." RP II.32, lines 18- 25; Ex. 87.

The record reflects another occasion, also described in Section I.D* above, when the father got drunk on a business trip with Allstate to point the where he refused to go to his own room, passed out on the bed of a female employee, and had to be removed by two marketing managers. RP II.112 and Ex. 93. When his boss later told him to go to a hotel at the airport, he refused, got drunk again, and stayed in the room of a couple of

women he knew despite their objections.. Vol. II TR 70, 111-114; Ex. 93. The father's episodes of drunkenness in work-related environments jeopardized his job with Allstate and caused the guardian ad litem to be concerned about his judgment and recommend that he refrain from drinking for at least 24 hours before having any visitation with the children.. RP II.70-71, 112-114.

IV. THE FATHER'S ADDICTION TO PORNOGRAPHY:

The evidence shows not only that the father was addicted to pornography, but that his addiction manifested itself in a manner that affected his potential for future parenting functions within the meaning of RCW 26.09.004(3) and RCW 26.09.187(3)(a)(iii), and which could have had an adverse impact upon the children's interests under RCW 26.09.191(3) but for the trial court's parenting restrictions.

The mother testified that the father he admitted to her that he has a life-long addiction to pornography. RP I.51, 53. See also Ex. 54, Report of Officer Koonz, p.14. The mother testified that she frequently found pornography around the house that was "pretty hard core". On one occasion she found an entire suitcase of hard core pornography in the father's car. RP I.52. On another occasion their daughter Madelyn discovered pornography on a laptop that was used as a family computer. RP I.63-64. On still another occasion Madelyn discovered several movies

with sexually explicit covers in the family's movie cabinet alongside their Walt Disney movies. RP I.64. The trial court, having heard the witnesses and reviewed the evidence, chose to believe the mother's testimony. Findings of Fact ¶2.19.2, CP 53. The choice of whom to believe is "solely for the trier of fact [and] cannot be reviewed on appeal." *Endicott v. Saul*, 142 Wash.App. at 910. Where as in this case the addiction extends to leaving sexually explicit items where the children will encounter them, the trial court is justified in determining that unsupervised visitation with the addicted parent is "adverse to the best interests of the child" within the meaning of RCW 26.09.191(3).

V. HISTORY OF VISITATION PROBLEMS: The evidence demonstrates that even before the father's indecent exposure to Brynn (See Paragraph IX* below), there was a significant history of problems involving the father's visitation with the children. The record that when the divorce commenced, a temporary parenting plan was adopted which gave the father visitation on Sundays from 10:00 a.m. until 3:00 p.m. with all the children except Isabella. See **Ex. 53 dated August 22, 2007**. From January of 2008 the father's visitation was ordered to be supervised. RP II.35. On two occasions the father's visitation was suspended completely. RP II.35, line 17; RP II.36; Ex. 40, ¶3.3.

At times when visitation was permitted problems arose on several

occasions because father created hostile confrontations with the mother in front of the children, disregarding the guardian ad litem's instructions that the parties should remain strictly out of eyesight of each other. RP II.37, lines 1-9.

Once in August of 2008 the mother was told by her daughter that the father planned to take the children to a waterpark. The mother was concerned because the size and structure of the waterpark made supervision difficult. She notified the guardian ad litem, who told the father to refrain from visiting the waterpark until unsupervised visits were permitted. The father disobeyed the guardian ad litem's instructions, as a result of which a contempt order was issued on August 18, 2008. RP II.39; Ex. 51, dated August 18, 2008. The order recites that the father had violated prior court orders requiring supervised visitation by taking the children to the waterpark. RP II.40; Ex. 51,p.3, lines 17-20.

On another occasion the father threatened to keep Madelyn from participating in a dress rehearsal for her church choir unless the mother agreed to let him extend his visit to 7:00 pm so that he could take Madelyn to dinner. The mother was the director of the children's choir. She called the guardian ad litem, who called the father and made arrangements so that Madelyn could participate in the concert as scheduled. However, the incident created a lot of stress for Madelyn and the mother. RP II.42.

On still another occasion Madelyn was scheduled to sing a solo at a church choir concert. Madelyn had been in the church choir for a long time and loved it. The father emailed the mother that he would not allow Madelyn to participate in the choir because he had family members coming to town. Madelyn called the father and asked him to let her sing her solo at the concert. The guardian ad litem attempted to intervene as well. The father refused to let her participate, however, and Madelyn was in tears the entire weekend. RP II.43-44.

Yet another instance occurred when Madelyn was scheduled to participate in her first karate tournament. The father sent the mother an email saying that he would not allow Madelyn to attend the tournament unless the mother promised that she and her family would not attend. RP II.45-46. The guardian ad litem intervened because she felt that it was beneficial for Madelyn to have both parents at such events. RP II.47, lines 4-11; Ex. 88. . Madelyn was able to go to the tournament only because the guardian ad litem intervened. RP II.48. This history of visitation problems during the divorce proceedings is indicative that such problems would continue and grow worse if the father were given unsupervised visitation after the divorce was finalized, especially since the Guardian Ad Litem would no longer be there to intervene.

VI. LACK OF CREDIBILITY AND DISREGARD OF AUTHORITY: There is a wealth of evidence that demonstrates the father's lack of credibility and justifies the trial court's decision to believe the mother instead. The evidence includes:

A. Denial of the My Space Posting: The father feigned ignorance of this My Space posting which called the mother a "bitch". However, he admitted that the posting occurred the very day after the order on show cause was entered, required the use of his password, and showed a photograph of him and Brynn. RP I.31-32; Ex. 107. That posting was also similar to other My Space postings to which the father admitted. RP I.36. The trial court was justified in finding that the father was responsible for both postings, and that his attempt to deny the abusive one demonstrated his lack of credibility.

B. The Home Equity Loan and Credit Cards: The evidence shows that the father attempted to take out a home equity loan without consulting the mother (RP I.50). On another the parties' daughter Madelyn saw the father go into the mother's purse and take her credit card without her permission. The father denied having taken the card when the mother asked about it. His denial was troubling to Madelyn because had seen him take the card. . The father later admitted having taken the card and refused to give it back. RP I.73..

Then after the parties separated the father fraudulently opened credit cards in the mother's name and made charges to them without her knowledge or consent. RP I.86, lines 23-25; RP I.87, lines 1-3, 13-17; RP I.88, lines 3-9; RP I.95-96; Ex. 40. p.3, lines 12-16. The father used those credit cards to pay expenses that he was ordered to pay in the divorce proceedings as well as his own attorneys' fees and other items the mother was not even aware of. See for example RP I.179-80 and Ex. 77. The mother did not learn of the credit cards until she began receiving collection notices from the issuing banks. RP I.182 – 184. She had to go to court to obtain an order requiring the father make payments on the credit card accounts. RP I.88. The trial court was entitled to conclude that a credible person would not steal his wife's credit card and then open credit cards in her name, without her knowledge or consent, to pay expenses that he had been ordered to pay in the divorce proceeding.

C. The Unexplained Absences: The evidence showed that the father persistently left his family for the purpose of sexual adventure and lied about where he was going, where he had been, and what he had done. See for example RP I.67, 70-71.

D. Cancellation of Health Insurance: During the dissolution proceeding the father was found to have violated court orders by changing his health insurance plan to require higher co-pays. Ex. 40 ¶2.3, lines 14-

17. The trial testimony also that there was an order in place which required the father to maintain insurance coverage for the mother and the children. RP II.9, lines 15-21. When the father moved to Sacramento his attorney assured the mother that the insurance would not be changed in any way without notice to her. RP II.14, lines 1-4. Later when the mother scheduled a routine examination, she found that the father had cancelled the insurance for her and the children without telling her. RP II.9-12; RP II.14, lines 4-6. She was therefore required to pay for medical expenses that the insurance would otherwise have covered. Ex.'s 81-83. The father subsequently obtained temporary insurance, but it was useless for the mother and the children because the deductible (\$1,000) and co-pay were so high that the things for which the children usually required treatment were not covered. RP II.15, lines 2-15. Moreover, the mother was never informed about the deductible and did not know it was so high until she contacted the insurance provider. RP II.16, lines 20-23. The mother and children were therefore without coverage in April and May of 2008. The father obtained replacement insurance in June of 2008, but even then it took repeated requests from the mother and a significant period of time before the father provided proof of insurance or identified the providers who were covered under the plan. RP II.15-16.

E. Removal of the Children's Effects: After the parties

separated the mother and children visited her mother in Sacramento, where they eventually relocated. RP II.19. The took some of the children's belongings with them but left others in the family home, planning to come back for them. RP II.19, lines 8-12. The mother later made plans to return and get the rest of the children's belongings. She notified the father of her plans and purchased an airplane ticket. At the last minute the father sent her an email saying she could not come to the home, and that whatever had been left in the there now belonged to him. As a result the mother was unable to get things the children needed, including their winter clothes, and the father did not send them their clothes. RP II.21.

The mother learned subsequently that the father was planning to remove the children's belongings from the family home and take them to Sacramento, where he had followed the mother. RP II.24, lines 17-25. In response to a letter from her attorney, the father's attorney advised him not to remove items from the family home at that time. RP II.22, lines 8-11; Ex. 85 and attachment E thereto. The father disregarded those instructions by removing the children's furniture, clothing, and other valuables to his apartment in Sacramento. It took three months before the mother could even get their youngest daughter's high chair. The parties' daughter Madelyn became so concerned about it that when she visited her father she tried to sneak things such as family movies from his apartment,

hid in the closet from him on one occasion, and asked him to let her stay at home with her mother instead of visiting him. RP II.27, lines 5-9, 19-25; RP II.29, lines 7-10; RP II.30, lines 10-15; Ex. 86.

F. Lying About Drinking Problems: The father sent a false message about drunken driving as discussed in Section II.2* above. In its order of February 21, 2008, the court found that the message undermined the father's credibility. In addition "The Court finds that Respondent's UA's are dilute, and that they represent a continuation of Respondent's pattern of deceit." Ex. 40 p.8, lines 14-22; CP 830.

G. Lying About Sexual Misconduct: Ex. 44 shows that the father denied newspaper reports about having committed acts of indecent exposure in 1997. However it was established at trial that these acts had indeed occurred. The trial court was entitled to conclude that the father's previous denials undermined his credibility. That conclusion is reinforced by evidence produced at trial that the father lied to the mother and his parents about his history of indecent exposures. Finding of Fact ¶2.19.3, CP 53; RP I.165, lines 18-19; RP III.95, lines 5-10; RP III.165, lines 3-5. The father also failed to disclose the Allstate incidents in interrogatories propounded by the mother and supposedly answered under oath. RP III.133.

The Guardian Ad Litem testified that “based upon his history – the other thing that bothered me as I came to learn from articles, newspaper articles that Mr. Samodurov did not – he was not forthcoming to his wife about what happened. He was not forthcoming to his mother...I then couldn’t be sure about truthfulness when he told me about various incidents from then on.” RP II.TR 75, lines 18-22; RP II.76, lines 16-18.

Overall, the evidence shows a plethora of dishonest and deceitful acts by the father. Credibility determinations are within the particular province of the trial court. The evidence in this case supports the trial court’s determination that the father was not credible and could not be counted on to follow its orders.

H. The Sexual Deviancy Treatment: When the father was charged with indecent exposure in 1997, he was ordered to undergo sexual deviation treatment. He claims that he did so. RP I.44; RP III.165; RP IV.119-120. However, there is no record that he completed the treatment except for the criminal court docket in the indecent exposure charge. The father has produced no evidence of where he attended treatment or the names of any doctors or therapists who treated him, even though the treatment was supposed to have gone on for two years. Moreover the father disclosed nothing about the treatment to the Guardian Ad Litem and made no attempt to help the Guardian Ad Litem obtain records of the

treatment. RP II.74; RP III.31; RP IV.182-84. The Guardian Ad Litem testified that “we have no records” of the treatment, and that she was skeptical about the fact that the father seemed unable to recall anything about such a “milestone event in his life. RP II.73, lines 10-19, 21-22.

VII. BOUNDARY ISSUES: In *Marriage of Chua and Root*, the Court of Appeals affirmed the trial court’s parenting restrictions even though the parenting evaluator found no sexual abuse, because the parenting evaluator found that the father had “shown a pattern of a lack of understanding of appropriate boundaries when communicating with minor females and that he used bad judgments in some of his communications.” 149 Wash.App. at 153. The same findings of boundary issues exist in this case. The Guardian Ad Litem testified that:

It was determined (by Dr. Lennon) that Mr. Samodurov had boundary issues with mature females, that he likely over used alcohol as he has done on occasions, to extreme usage in some occasions, as it’s related to stress. RP II.64, lines 3-6.

I read the declarations from various female acquaintances of Mr. and Mrs. Samodurov. And there were incidents of women saying they felt uncomfortable. I determined that Mr. Samodurov had boundary issues, that he didn’t pick up on the signals from women. I don’t know if what he was doing had sexual intent...his mother said that, oh, these people were all people that Michele got to and that they basically shaded their stories to make Brent appear in a bad light. So based upon his history – the other thing that was impressive to me, I guess, that bothered me as I came to learn from articles, newspaper articles that Mr. Samodurov did not – he was not forthcoming to his wife about what happened. He was not forthcoming to his mother. RP II.75, lines 5 - 25.

Further when the guardian ad litem was asked whether she had “concerns...about the sexual deviancy issues in this matter, she responded:

Well, yes...when you look at sexual deviancy, it is sort of – is a pervasive behavior that is not cut and dried, it’s not turned on and off, it’s a process...And because of reports from some of the collaterals that Michele brought and because of the Allstate job where he is just blurring the lines, pushing the boundaries with people to make them uncomfortable, nothing criminal, but a lack of understanding how his behavior affects someone else. That’s troubling to me. RP II.108.

See also the trial court’s Order on Respondent’s Motion for Temporary Order and Review Hearing, May 2, 2008, CP 236-239. In *Chua and Root* such findings were held to justify the trial court’s decision limiting the father to supervised visitation. The same is true in this case.

VIII. PATTERN OF DENIAL: The father’s pattern of denial is related to his lack of credibility. The record demonstrates a persistent and ongoing problem in the form of the 1997 indecent exposures, the attempted rape in 2003, the Owili incident in 2004, the Allstate incidents in 2007, the “countless infidelities, visits to nudist colonies and massage parlors, picking up street walkers, and escapades with prostitutes” which the father confessed to the mother (RP I.53), and the indecent exposure to Brynn discussed immediately below.

In his evaluation with Dr. Lennon, his trial testimony, and his appellate brief the father seeks to minimize these incidents of sexual

misconduct. However, the fact that they occurred at all is something which the trial judge was obligated to consider when formulating the parenting plan.

Moreover, the father's attempt to minimize his sexual misconduct buttresses the conclusions of the Guardian Ad Litem and Dr. Lennon that the father is unable or unwilling to face up to his problems, and that his "level of denial" (RP III.25, line 23) is such that treatment is not a viable option for him. RP III.25-26, 30-31. It also buttresses the May 2, 2008, order referred to at RP II.49, in which the trial court "questions the risk of harm to the kids" and finds that the father "minimizes [his] behavior," "has a total lack of insight", and "lacks understanding of the need to cooperate in the court process." Ex. 89 pp.2-4; CP 236-239.

IX. THE FATHER'S MISCONDUCT WITH BRYNN: The father disputes the trial court's findings, set forth in Appendix I, that he sexually exposed himself to Brynn. However, there was substantial evidence of those findings. The resolution of any conflicts in the evidence is a matter for the trial court, not to be disturbed on appeal. *Maehren v. City of Seattle*, 92 Wash.2d at 501; *Bland v. Mentor*, 63 Wash.2d at 155.

A. The Mother's Testimony: The mother testified at trial that Brynn told her the father had exposed himself to her as recited in the trial court's findings of fact. RP I.103-05. The incident occurred on the last

Sunday in September during the father's first partially unsupervised visit with the children. The parties were at that time living in Sacramento. The mother immediately called the Guardian Ad Litem and reported what Brynn had told her. RP I.103-05; RP II.98. The Guardian Ad Litem contacted Child Protective Services ("CPS") and filed a police report. RP I.107.

B. The Police Report: Officers Mireles and Arnott of the Sacramento Police Department were sent to investigate. They interviewed the mother and each of the children separately on October 1, 2008. The trial testimony shows that when Officers Mireles and Arnott questioned Brynn, she reported the incident to them precisely as she had reported it to the mother. RP I.107-08; RP I.109, lines 13-18. When they questioned Kaleb, he confirmed what his sister had said to him as reflected in Finding of Fact 2.19.4, CP 54; RP I.112, lines 2-6. The transcript also reflects that Brynn told his sister Madelyn and Deputy Arnott that the father had warned her not to tell anyone about the incident. RPI.111, lines 15-22; RP I.112, lines 16-18, 24-25; RPI.113, lines 1-4.

The results of the police investigation are reported in Sacramento County Sheriff's Department Report No. RCPD 2008-0052547, Ex. 54. The Police Report shows that when Deputy Arnott interviewed the mother, she reported that when she was getting their children ready for

bed after a visit with their father, “Brynn DOE (V) asked her younger brother to pull down his pants. When her brother Kaleb DOE pulled down his pants she pointed to his penis and said some day you will be big like daddy. Brynn DOE told her mother that daddy pulled it out of his pocket and showed it to her.” Ex. 54, Report of Deputy Arnott pp.5-6, 12:45 hrs. The report of Deputy Arnott is confirmed by the report of Deputy Mireles. Ex. 54, Report of Deputy Mireles p.1, 12:45 hrs. The mother’s written account of what Brynn told her is set forth in Ex. 54 at p.6 of Deputy Arnott’s report.

The Police Report shows further that when the officers spoke separately with Brynn, she recounted the indecent exposure incident in precisely the same manner as her mother. Ex. 54, Arnott Report p.5, 1305 Hours; Mireles Report p.5, 1305 Hours. Brynn’s statement to the police is set forth verbatim in Ex. 54, Arnott Report, p.6, 0105 Hours, and reads as follows:

I am five years old. I went to visit my daddy at his apartment. His apartment has a big swimming pool. When I was visiting daddy this weekend he showed the thing that he pee’s with (that is how Brynn refers to a penis) to my sister Maddy and my brother Kaleb. I was peeking around the corner when I saw him show them. He saw me and called me over and showed it to me. He pulled it out and it was big.

The father notes the statements by Brynn’s sister Madeline and brother Kaleb that the father did not expose himself to them. . However,

that reflects at most a conflict in the evidence for the trial court to resolve. Moreover, the record contains no denials that the father exposed himself to Brynn. (See also Paragraph C below.)

Deputy Arnott reports further that when he spoke separately with Kaleb, Kaleb confirmed the testimony given by the mother at trial and her report to the police. Ex. 54, Arnott Report p5, 1411 hrs. Kaleb's statement to the police is set forth verbatim in Ex. 54, Arnott Report p.8, 0217 Hours, and reads as follows:

"I am four years old. I know the difference between the truth and a lie. I did not see Daddy show Brynn the thing he pee's out of (that is how Kaleb refers to penis). When we were getting dressed the other night Brynn asked me to pull down my pants, she pointed down there (at his penis) and told me I would be as big as daddy someday.

See also the testimony of the guardian ad litem, RP II.101, lines 1-3. The trial court found that the scenario recounted by Brynn and Kaleb is by its very nature unlikely to have been falsified. Findings of Fact ¶2.19.5, CP 54. The Guardian Ad Litem agrees that Kaleb's description of what Brynn said to him provides strong corroboration of Brynn's account to her mother and the police of the indecent exposure incident. RP III.15, lines 8-13; RP III.33, lines 3-8.

C. Nondisclosure in the SAFE Interview: The father attempts to argue that Brynn denied the incident in a later interview,

referred to as the “SAFE Interview,” that was conducted by Officer Koonz November 4, 2008. However, that is not what the report says. The report states only that “Doe *did not disclose* being touched by her father or seeing his penis while at his home.” Ex. 54, Koonz Report p.4, 1410 hrs, 11/04/08 (emphasis added). The Guardian Ad Litem notes that such a failure to disclose is simply failure to mention the incident in response to open-ended questions. RP II.162-163. It is not a denial. Consequently the Koonz report should not be regarded as creating a conflict in the evidence. However, even if there were a conflict, the trial court was entitled to infer that Brynn’s failure to disclose the incident on November 4 did not negate the account of the incident that she had gave to the police on October 10. “Where the trial judge is presented with conflicting evidence, we will not disturb his finding based upon that evidence.” *Maehren v. City of Seattle*, 92 Wash.2d at 501.

The trial court’s finding is supported by the Guardian Ad Litem, who testified that that Brynn’s failure to disclose the incident in the SAFE interview on November 4 is less persuasive than her account of the incident on October 1 because of Brynn’s age and the fact that the SAFE interview occurred so long after the incident happened. RP II.164, lines 1-8; RP II.165, lines 8-9. The Guardian Ad Litem testified that Brynn’s failure to disclose the incident on November 4 could be due to factors such

as nervousness and her reluctance to “get someone in trouble. And so, if its – to me, it’s oftentimes not conclusive.” RP II.163, lines 10-12.

The police report reinforces supposition by the Guardian Ad Litem that Brynn’s failure to disclose the incident in the SAFE interview was due to her reluctance to get the father in trouble. It shows that in the statement which Brynn gave to officers Arnott and Mireles on October 1, 2008, she said:

Daddy told me that I would have to keep it a secrete and if you tell anybody your going down into the pool with your clothes on.

Ex. 54, Arnott Report p.7, 0105 Hours.

The report shows further that on November 15, 2008, the mother told Officer Koonz that “after the SAFE interview her daughter, Madelyn Samodurov, came to her. She said Madelyn told her that Madelyn had asked Doe about the interview. Madelyn told M. Samodurov that Doe said her father had told Doe not to talk about what happened at his home.” Ex. 54, Koonz Report p.4, 1414 hours, 11/15/2008. The trial court was entitled to conclude from this evidence that Brynn’s failure to disclose the indecent exposure in the SAFE interview was due to the father’s warning.

D. The Decision Not to Prosecute: The father attempts to argue that the trial court erred in relying on Brynn’s account of the incident exposure after the police decided not to prosecute. The same argument was made by the father and rejected in *Marriage of Chua and*

Root. 149 Wash.App. at 370. Dr. Lennon testified that what is at issue with respect to a criminal prosecution is very different from what is at issue in family court RP III.107. A decision of whether to prosecute is based on a determination of whether the evidence will satisfy the “guilt beyond reasonable doubt” standard applicable to criminal prosecutions. Parenting plans are based on the safety of the children. RP III.107. The trial court’s decision reflects the attitude of the Guardian Ad Litem when the father’s mother attempted to minimize the 1997 occurrences on similar grounds:

“You cannot white wash this by talking about what legally happened. The point is, your son did it and that’s what you need to know.

RP II.96, lines 14-20.

Likewise for the incident with Brynn, the trial judge could not use the lack of a criminal prosecution to whitewash what he believed to have happened, based upon the evidentiary determinations and findings of credibility that he was required to make. The report of Officer Koonz states that the decision not to prosecute resulted not because the incident did not occur, but instead because of Brynn’s failure to disclose it during the SAFE interview. Ex. 54, Koonz Report p.4. The Guardian Ad Litem agreed that the decision to not prosecute does not mean that the incident did not occur and can be disregarded in a parenting evaluation. RP III.32,

lines 15-25; RP III.33, lines 1-8. The trial court was entitled to conclude from the statements given by the mother, Brynn, and Kaleb to the police on October 1, 2008, and the later statements by Brynn and Madelyn about the father's warnings not to disclose the incident, that the father did indeed expose himself to Brynn and the incident could not be whitewashed.

E. Sexual Deviancy Profile and Polygraph Test: The father attempts to rely on the fact that he passed a polygraph test and the conclusions of Dr. Lennon that he did not fit the profile of a sexual deviant. This reliance is misplaced in several respects.

First, Dr. Lennon testifies specifically that his report did not address the father's prior history of sexual misconduct and particularly his history of exposing himself to underage girls. RP III.105, lines 10-13. As to those incidents, Dr. Lennon stated that what the father did was "illegal, inappropriate, wrong, needs treatment." RP III.105, line 11.

Second, the report of Dr. Lennon was completed on April 7, 2008, more than five months before the father is alleged to have exposed himself to Brynn. Ex. 16, p.1. Dr. Lennon's report is therefore irrelevant to the trial court's finding that the father did in fact expose himself to Brynn. RP III.111, lines 5-10. The polygraph exam, which was administered during Dr. Lennon's evaluation, is irrelevant for the same reason.

Moreover, Dr. Lennon's report was based on the premise that

since the incidents in 1997, the father “has not exposed himself since, nor has he had the urge to expose himself since.” Ex. 16 p.36. “No evidence that he has re-offended in the past 10 years is presented.” Ex. 16, p.40. “No evidence of re-offense was noted.” Ex. 16 p.41, ¶7. The father’s indecent exposure to Brynn completely destroys that fundamental premise of Dr. Lennon’s conclusions. Dr. Lennon admits that knowledge of a recent indecent exposure incident might have changed his evaluation (RP III.106, lines 2-6). Even if the trial court might otherwise have relied on Dr. Lennon’s report, it was obligated after the incident with Brynn to reassess the risks posed by the father to the children.

Third, the Guardian Ad Litem testifies that Dr. Lennon’s report is limited by the fact that he was forced to rely primarily upon information provided by the father himself. For example, there were no records of the father’s alleged treatment in 1997. RP III.73. The Guardian Ad Litem testifies that “If you read through the report many times the data is self-report by Brent, and he denied many things. If you look at other information in the report, seems that’s an unrealistic position to take...he did a good job, I think, but it doesn’t mean that Brent doesn’t have problems.” RP III.36, lines 2 – 10.

F. The Lack of a Treatment Option: The father attempts to rely upon Dr. Lennon’s conclusion that he was not a candidate for

treatment. That reliance is also misplaced. Dr. Lennon's conclusion was not that the father didn't require treatment, but rather that he would not respond to treatment. The evidence is extensive that one of the father's problems is his failure to recognize or acknowledge that he has problems. The Guardian Ad Litem testified that "what Dr. Lennon is saying to me is that he probably would not do well in treatment. He doesn't, because he doesn't consider himself to have sexual deviancy problems." RP III.31, lines 5-9. She testifies further that treatment was not recommended "[b]ecause Brent isn't amenable to it...[Mr. Samodurov]...does not believe he has a problem with sexual deviancy or sexual compulsion. When [Dr. Lennon] says [treatment] is not appropriate, he doesn't say that it's not needed." RP III.39. Vol. III TR 39. Dr. Lennon confirmed in response to questions by the father that "[H]ow can you treat someone for something that he doesn't believe he did?...That doesn't mean that somebody doesn't need treatment. If they don't see that they need treatment for that, they would not be amenable to treatment. So I did not find you amenable to treatment, didn't see that you were interested in it, invested in it, wanted to do it, or thought you needed it." RP IV.100.

G. Continuation of the Father's Pattern: The father seeks to argue that he is not a sexual deviant. However, for purposes of the parenting plan what matters is what the father does, not what he is called.

The numerous incidents of indecent exposure in the 1997 are admitted facts. The Allstate incidents are established by Allstate records that were generated independently of this proceeding. The record contains a plethora of other evidence relating to sexual misconduct as well as the other dysfunctional behaviors recited above. The trial court's decision to accept that evidence as true is within its discretion. The Brynn incident demonstrates that the father's history of sexual misconduct was just not a thing of the past. The mother testified that she was asking for supervised visitation because "I just want to make sure my kids are safe at all times." RP III.131. The trial judge's conclusion that parental restrictions are necessary is all the more justified because the incident with Brynn is a continuation of a much broader and more pervasive pattern of misconduct that has lasted for many years. The court's conclusions are supported by those of the Guardian Ad Litem, who testified:

The fact that what Brynn reported was, you know, is consistent with what he does, which is to show himself, that's what he did before and this is what he did again, bothers me a lot, because it isn't some new kind of behavior, but reminiscent of what he did before, you know, when he shouldn't have done it, and knew he shouldn't have done it.

So I am concerned about aberrant behavior. I think probably ninety percent of the time he would be great, but I'm worried about the times when he wouldn't be.... I don't want to guess the children are going to be okay. It's taking precautions that they are safe.

I'm concerned about aberrant behavior coming up and I need to

take the conservative approach and think of the children, safety of the children.

RP II.108-09; RP II.127, lines 13-16.

CONCLUSION

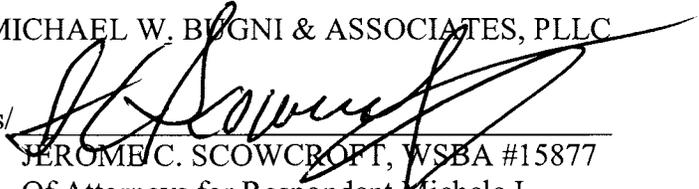
In this case the evidence is more than sufficient to support the trial court's conclusions that the father exhibits an enduring pattern of conduct including sexual misconduct, abuse of alcohol, addiction to pornography, anger, narcissism, abusive use of conflict, deceit, and disregard of authority, that creates a risk of physical, mental, or emotional harm to the children.

If the father had not sexually exposed himself to Brynn, the report of Dr. Lemon might have carried more weight. When the father did so the very eve of trial, the trial court was virtually obligated under the "best interests of the child" standard to conclude that he might do so again, and to adopt restrictive measures for the children's welfare. The visitation and decision-making restrictions imposed by the trial court represent an appropriate exercise of its discretion in matters involving parenting, and should be affirmed on appeal.

RESPECTFULLY SUBMITTED this 31st day of August, 2009:

MICHAEL W. BIGNI & ASSOCIATES, PLLC

/s/


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Of Attorneys for Respondent Michele L.

Samodurov

APPENDIX I - TRIAL COURT FINDINGS OF FACT

The findings of fact from which this appeal is brought are the following subparagraphs in Paragraph 2.19 of the Parenting Plan, which are also set forth in the Clerk's Papers at CP 53-54:

2.19 PARENTING PLAN.

The court specifically finds that:

- 2.19.2** The father/Husband, Brent Samodurov, is ver angry. The court finds that the father is a narcissistic individual with sexual deviancy conduct in the recent past, severe alcoholic problems in the recent past and attraction to pornography, which continues.
- 2.19.3** Although the court finds that the Wife tends to exaggerate and overreact, the court is persuaded by the major aspects of the wife's testimony, such as (1) the Husband's lying to her about the indecent exposure charge; (2) the Husband's telling the Wife of his addiction to pornography; (3) the Husband's telling the Wife about the Husband's going to Costco with the expressed intent to rape a woman, and (4) the Husband's telling his Wife what warning signs to look out for in his conduct. The court is persuaded that the Husband told these things to the Wife.
- 2.19.4** The court is persuaded that the parties' 5 year-old child, Brynn, stated to the parties' 4 year-old child, Caleb, that "Yours is going to be as big as daddy's some day." The court finds that Brynn confirmed the statement to the police and that Caleb confirmed to the police that she had done so as well.
- 2.19.5** The court finds that it is highly unlikely that anybody could have come up with a more credible scenario and taught a 5

and 4 year old to make this up, as the Father alleged in his testimony. The court does not find that the mother is imaginative enough to come up with it either.

2.19.6 The court finds that the Father denies Brynn's statement to the police that "Yours is going to be as big as daddy's some day," just as the Father has denied unpleasant things in the past. However, the court is persuaded and finds that Brynn did say this and that having said it, it is strong evidence that the Father, Brent James Samodurov, did pull his penis out of his "pocket" and show it to Brynn as Brynn described. Thus the court finds under RCW 26.09.191(2)(a)(ii) that the father's time shall be restricted and the court orders supervised visitation for the father and adopts the guardian ad litem's recommendations. The court finds under RCW 26.09.187(2)(b) and RCW 26.09.191(1), that sole decision-making is appropriately given and ordered to the mother....