

FILED  
Court of Appeals  
Division II  
State of Washington  
3/23/2018 3:29 PM  
No. 51551-2-II

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

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In re Marriage of Sperry,

Daniel Sperry,

Appellant,

v.

Liberty Sperry (n/k/a Liberty Weaver),

Respondent.

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**Brief of Appellant**

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## **1. Introduction**

Daniel Sperry and Liberty Weaver have a broken relationship and a 5-year old daughter. The final orders in their divorce were entered by agreement but did not accurately reflect the terms that the parties had negotiated. The poorly drafted parenting plan, combined with the parties' inability to work together, made this modification proceeding inevitable.

At trial, Sperry worked hard to demonstrate the flaws in the parenting plan, seeking a rewrite consistent with the parties' original bargain. Weaver worked hard to demonstrate the flaws in Sperry, seeking to write him out of their daughter's life if possible. The trial court sided with Weaver, entering a one-sided parenting plan that eliminated Sperry's time with his daughter.

The trial court's decision was an abuse of discretion. The trial court ordered restrictions under RCW 26.09.191(3)(f) that were not reasonably calculated to prevent the identified harm; made factual findings based on unfounded allegations and evidence that did not exist; and used those findings and restrictions to minimize Sperry's role in his daughter's life.

This Court should reverse the restrictions, findings, and parenting plan and remand for a new plan with Sperry as primary residential parent and no limitations on his time with his daughter.

## **2. Assignments of Error**

### **Assignments of Error**

1. The trial court erred in finding that Sperry provided an unsafe environment for R.S.

Final Order and Findings at ¶ 4: “The children’s current living situation is harmful to their physical, mental, or emotional health.” CP 93.

At ¶ 5: “To protect the child, the court will limit the parenting time and participation of Daniel Sperry.” CP 93.

2. The trial court erred in finding that Sperry had kept Weaver away from R.S. “for a long time, without good reason.”

Parenting Plan at ¶ 3.b.: “Daniel Sperry has kept the other parent away from a child listed in 2. for a long time, without good reason.” CP 70.

3. The trial court erred in finding, “the father is less likely to encourage a relationship between the mother and child considering his conduct related to travel to and from Denver and his failure to allow visitation with the child when he was in Southern California.” CP 65.
4. The trial court erred in finding that Weaver had a stronger relationship with R.S. and greater potential for performance of parenting functions. CP 65-66.
5. The trial court erred in its interpretation of the original, agreed parenting plan.
6. The trial court abused its discretion in ordering Sperry to undergo a psychological evaluation on sexual issues.

7. The trial court abused its discretion in conditioning all of Sperry's visitation rights on completion of the psychological evaluation.
8. The trial court abused its discretion in limiting Sperry's visitation to every other weekend and half the summer, with no holidays or school breaks.
9. The trial court abused its discretion in restricting Sperry's weekend visitation to within 25 miles of Weaver's residence.
10. The trial court abused its discretion in denying Sperry's motion for reconsideration.

#### **Issues Pertaining to Assignments of Error**

1. Restrictions imposed on a parent under RCW 26.09.191(3) must be reasonably calculated to prevent the type of harm identified in the court's findings. The trial court imposed restrictions on Sperry that bear no relation to the only RCW 26.09.191 finding made by the court: that Sperry withheld R.S. from Weaver. Should this Court reverse those restrictions? (assignments of error 6, 7, 8, 9, and 10)
2. Findings of fact in a parenting plan are reviewed for substantial evidence. Many of the trial court's findings were not supported by substantial evidence. Should this Court reverse those findings? (assignments of error 1, 2, 3, 4, 5, and 10)
3. In crafting the residential provisions of a parenting plan under RCW 26.09.187, a trial court must consider the relationship of the child with each parent and the parents' performance of parenting functions. In making this determination, the trial court ignored evidence that favored Sperry and made unsupported findings in favor of Weaver. Did the trial court abuse its discretion in giving primary residential placement to Weaver? (assignments of error 4, 8, and 10)

### **3. Statement of the Case**

Daniel Sperry and Liberty Weaver married in June 2013. CP 5. They had one child together, their daughter, R.S., born in November 2012. RP 41. The couple separated in July 2015. CP 5. Weaver moved to Portland, leaving R.S. with Sperry. RP 42-43. She returned to Pacific County for one month, then moved to southern California. RP 43. The divorce was final and an agreed parenting plan entered January 26, 2016. CP 27.

Between the separation and the divorce, R.S. lived with Sperry for five out of six months. *See* RP 215-16. Weaver's one month with R.S. in Pacific County involved a CPS complaint against Sperry. RP 45. When CPS reported the allegations unfounded, Weaver returned R.S. to Sperry and moved away to California. RP 45.<sup>1</sup> After the move, Weaver did not visit R.S. for five months, except for a visit near the end of 2015, initiated and financed by Sperry. RP 48, 248-49.

#### **3.1 Sperry and Weaver negotiated terms of an agreed parenting plan as part of the divorce.**

Sperry and Weaver arrived at an agreed parenting plan as part of the divorce. CP 27-33. They were discussing potential terms of the plan in September. RP 60. At the end of October, they agreed that each would be responsible to pay for picking up

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<sup>1</sup> Ultimately, there were three investigations touching on this same issue, and all three came back unfounded. RP 216.

R.S. for their turn with her, but the length of visitations was still undecided. CP 280, 292-95.<sup>2</sup> By the end of November, they agreed that when R.S. started school, she would live with Sperry during school and be with Weaver over the summer. CP 281, 300-01. Just days after the parenting plan was signed, Weaver confirmed, “until [R.S.] starts school we switch off every single month.” CP 281, 307-08.

Sperry testified at trial that his original understanding of the agreement was that he was the primary parent. RP 122. Until R.S. started school, Sperry and Weaver would each have R.S. every other month. RP 122-23. After school started, R.S. would live with Sperry during school, and Weaver would get summer visitation for three months. RP 122-23.

The written parenting plan entered by the court stated,

### **3.1 Schedule for Children Under School Age**

Prior to enrollment in school, the child shall reside with the petitioner [Sperry], except for the following days and times when the child will reside with or be with the other parent:

The parents shall alternate custody of the child every month, with the receiving parent assuming the cost of the transportation and responsibility for being present during the travel. Such exchanges and timing shall be by agreement of the parties.

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<sup>2</sup> Citations to Clerk’s Papers numbered 102 and above refer to papers filed in connection with Sperry’s motion for reconsideration of the trial court’s final orders.

The mother shall have an extended period of custody in the summer time lasting no more than 3 consecutive months.

...

### **3.2 School Schedule**

Upon enrollment in school, ... See 3.1, by agreement of the parties.

CP 28-29. All other scheduling paragraphs state, "See 3.1." CP 29-30. Paragraph 3.12 stated, "The children named in this parenting plan are scheduled to reside the majority of the time with the petitioner [Sperry]." CP 30. The child support order lists Weaver as the party paying support to Sperry, in an amount of \$0. CP 20-21.

### **3.2 Sperry and Weaver had problems with the parenting plan from the very beginning.**

The first month of the plan, February 2016, R.S. stayed with Sperry. RP 47. At the end of February, Weaver picked up R.S. to visit her in California for March. RP 47. Weaver made a report to California's child protection agency, which quickly came back unfounded. RP 48. R.S. returned to Sperry for the month of April. RP 111.

Weaver was unable to pay for transportation for her May visitation. RP 119-20. Sperry paid for plane tickets and gave Weaver an additional \$500 for other needs. RP 120.

Weaver and Sperry argued over the exact date for exchanges until finally establishing a pattern of the 27<sup>th</sup> of each month. RP 159; Ex. 27.

Frustrated with the plan and the arguments it seemed to generate rather than solve, Sperry petitioned for a modification of the parenting plan. RP 103-04; CP 34-43. Weaver filed a cross-petition for modification. CP 50-57.

### **3.3 Weaver missed her visitation in July and then accused Sperry of withholding R.S. from her.**

Weaver was unable to pay for transportation for her July visitation. RP 114-15, 179; CP 163. She asked Sperry to pay for the tickets and then she would pay to return R.S. to him at the end of the month. RP 179; CP 173-74. Sperry refused, not wanting to lend Weaver money again. RP 179; CP 174. Sperry told Weaver that if she could raise the funds to pick up R.S. at some time during July, he would still expect to be picking R.S. up for his regular turn at the end of the month under the parenting plan. CP 176. Weaver responded by threatening to take R.S. for two months (August and September) if she missed July. RP 239-40; CP 177.

Part way into July, Weaver asked to pick up R.S. on July 19. RP 180; CP 189. Sperry re-iterated that he still intended to have his regular turn for August. RP 180. Weaver changed her

plans and asked to pick up R.S. on July 30. RP 180, CP 202. Sperry responded that he would not be there because he would be in California for a friend's funeral. RP 183, 242; CP 202, 205-06. Weaver asked to exchange R.S. while Sperry was in California. RP 183; CP 202. Sperry said they could make arrangements when he got there. RP 183; CP 202.

Weaver attempted to make arrangements, but Sperry was slow to respond during the funeral. RP 187, 242; CP 203-06. In her frustration, Weaver argued for the first time that she should have R.S. for a three-month summer. RP 241-42; CP 204, 209. Sperry held fast to the every-other-month plan, under which August was his month. CP 209.

Weaver and her grandfather drove to Sperry's location on July 27<sup>th</sup>, accompanied by a sheriff's deputy. RP 189. The deputy handled communication between the parties. RP 189. Weaver showed up unannounced while R.S. was napping. RP 243. Sperry told the deputy he would allow a supervised visit if Weaver was willing to wait. RP 243. Sperry would not allow an exchange, because Weaver had threatened to keep R.S. for two or three months and because it was already the 27<sup>th</sup>, the start of his next scheduled month. RP 243; CP 278. The deputy told Weaver that Sperry would not allow Weaver to see R.S. RP 189.

### **3.4 Weaver trumped up allegations of abuse that repeatedly came back unfounded.**

Between the separation and the divorce, Sperry and Weaver had an argument that prompted Weaver to speak with a crisis support counselor. RP 44. Weaver disclosed that in 2014, Sperry had told her that while bathing R.S. he had thoughts of inappropriately touching R.S., but that he would never act on it. RP 43, 66. Sperry testified that he had been feeling sexually repressed and had thoughts about sex with adult women while bathing his daughter, which made him uncomfortable. RP 146, 233, 245. When he mentioned the subject to Weaver, he was asking her to help him by taking over bathing duties so he would not have these conflicting thoughts. RP 146, 245.

An investigation was initiated by CPS. RP 44. In less than one month, CPS reported the incident as unfounded, meaning more likely than not, no abuse occurred. RP 45; Ex. 25. Weaver trusted the conclusion and believed R.S. was not in danger with Sperry. RP 45, 80.

During Weaver's visitation in March, she noticed that R.S. was dirty. RP 82. R.S. also exhibited what Weaver described as sexual behavior. RP 82. Weaver told Sperry about the sexual behavior. RP 83; Ex. 27. Each party accused the other of wrongdoing and wanted to be the one to take R.S. to a doctor. RP 83; Ex. 27. Weaver made a report to California's child

protection agency. RP 111, 216. The allegations quickly came back as unfounded. RP 111, 216.

Weaver's grandmother encouraged Weaver to make another report in November 2016. RP 174-75. It also came back unfounded. RP 174. After a total of three investigations arising from the same allegations of potential misconduct by Sperry, all three came back unfounded. RP 216.

Weaver had never been concerned about Sperry's statement until after the separation. RP 104, 147. At trial, Weaver testified that she does not believe that Sperry ever did anything and does not believe that he actually has a problem; she just wants to make sure. RP 57.

### **3.5 Sperry provided more testimony than Weaver about his relationship with R.S. and his performance of parenting functions.**

Prior to the separation, Sperry handled many of the parental duties. Sperry would handle R.S.'s morning routine while Weaver slept in. RP 245. Sperry would come home from work to have lunch, put R.S. down for a nap, then go back to work. RP 245. Sperry cooked dinner half of the time. RP 245, 253. Sperry went to the grocery store with Weaver and held R.S. while they shopped. RP 245-46, 253. Sperry bathed R.S. and put her to bed. RP 245, 253.

Weaver's grandfather testified that Weaver paid attention to R.S. at home, did makeup and hair together, and played with toys. RP 166. Weaver's grandmother testified that when R.S. was with Weaver on visitation, Weaver would handle R.S.'s routines and a little bit of discipline. RP 172. Weaver did not testify about her relationship with R.S., except to say she disagreed with Sperry's testimony. RP 177-78.

Weaver testified that she encouraged R.S. to stay focused on FaceTime calls with Sperry and that Sperry gave the same respect to R.S.'s calls with Weaver. RP 178.

**3.6 The trial court entered a new parenting plan that placed unreasonable restrictions on Sperry without making any findings that would support the restrictions.**

The trial court concluded that neither Sperry nor Weaver was a good parent. RP 277. Weaver was unstable; Sperry was controlling and manipulative. RP 277. The court described the trial in unflattering terms:

Usually when we're involved here, we're talking about the child's best interest. I have this education. I have this experience. I'm going to do this with my child. We do these kind of things. We go camping. We go fishing. We play with castles and read books, and here's what we read, Berenstain Bears. And we go to the zoo. We go hiking. We have play dates with other people. I didn't hear anything. Shockingly didn't hear any of that. All I heard was a, I gotcha kind of -- I gotcha

for this and I gotcha for that. I gotcha. But I didn't hear anything about I love my child, I demonstrate that love this way. I go and do things. I want to have -- I have aspirations for the child, and I have aspirations for that child's relationship with the other parent. Didn't hear any of that.

RP 278.

The court held that the agreed parenting plan was unequivocal in granting Weaver a three-month summer from the very beginning. RP 279. Under the court's interpretation, the parents exchanged R.S. every month, except that Weaver got a three-month summer every year, resulting in seven months for Weaver and five for Sperry. RP 279.

In a memorandum decision, the court re-iterated that the agreed parenting plan was clear and that its designation of Sperry as primary custodian was an error that had no effect on the other terms of the plan. CP 64. Nevertheless, the court held that a modification was proper because the parties agreed that some modification was necessary, because "the present environment" is detrimental to the child, and because the plan's alternating months would be unworkable once R.S. started school. CP 65.

The court found that Sperry is less likely to encourage a relationship between R.S. and Weaver, considering his conduct regarding visitation in July 2016. CP 65.

In a change from the oral ruling, the court found that Weaver had testified regarding her relationship with R.S. and her performance of parenting functions. CP 66. The court apparently found that these factors weighed in Weaver's favor, despite her long absence from R.S.'s life during the separation. *See* CP 66.

The court expressed concern about Sperry's sexual thoughts while bathing R.S., but made no specific findings of possible harm to R.S. CP 66-68.

The trial court's new, written parenting plan identified only one reason for placing limitations on a parent under RCW 26.09.191: "Sperry has kept the other parent away from a child listed in 2. for a long time, without good reason." CP 69-70. The court imposed the following limitations on Sperry under RCW 26.09.191: 1) limited contact with R.S. under the parenting schedule; 2) completion of a psychological evaluation regarding sexual issues; and 3) visitation under the parenting schedule will not commence until Sperry completes and reports the results of his evaluation. CP 70.

Under the parenting schedule, Sperry is entitled to visitation every other weekend, so long as it is within 25 miles of Weaver's residence. CP 71. Sperry gets R.S. during her summer vacation, except that Weaver gets six weeks of the summer. CP 71. Weaver gets R.S. for all holidays and school breaks. CP 71.

As noted above, Sperry does not get any of this already limited visitation until after he completes his psychological evaluation. CP 70.

The trial court's Final Order and Findings state that a major change to the parenting plan is approved because "The children's current living situation is harmful to their physical, mental, or emotional health. It would be better for the children to change the parenting/custody order." CP 93. The findings also state, "To protect the child, the court will limit the parenting time and participation of Daniel Sperry. The reasons for this limitation are listed in the new Parenting Plan." CP 93. The Final Order also purports to incorporate the findings in the Memorandum Decision. CP 94.

Sperry moved for reconsideration, which was denied. CP 355. This appeal followed. CP 356.

#### **4. Argument**

The trial court's final orders in this case bear little to no relation to the evidence, or even to the trial court's own findings. This Court should reverse and remand for entry of new findings supported by evidence, removal of all restrictions on Sperry, and entry of a new parenting plan that does not restrict Sperry's time with R.S.

After a statement of the applicable standards of review, Sperry's arguments will be organized under three major issues:

First, restrictions imposed on a parent under RCW 26.09.191(3) must be reasonably calculated to prevent the type of harm identified in the court's findings. The trial court made only one finding under RCW 26.09.191: that Sperry withheld R.S. from Weaver. But the trial court's restrictions are not calculated to prevent any future harm from withholding the child. This Court should reverse all of the restrictions imposed on Sperry.

Second, findings of fact in a parenting plan must be reversed if they are not supported by substantial evidence in the record. This Court should reverse all of the trial court's findings that are not supported by substantial evidence. This Court should also reverse any conclusions based on the unsupported findings.

Third, in crafting the residential provisions of a parenting plan under RCW 26.09.187, a trial court must consider the relationship of the child with each parent and the parents' performance of parenting functions. In making this determination, the trial court ignored evidence that favored Sperry and made unsupported findings in favor of Weaver. This Court should reverse the parenting plan and remand for a new plan that does not limit Sperry's time with R.S.

**4.1 Review of the parenting plan and restrictions are for abuse of discretion. Review of the trial court's findings is for substantial evidence.**

This Court reviews a trial court's parenting plan for abuse of discretion. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). A trial court abuses its discretion when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.*

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). The trial court's discretion is cabined by statutory provisions such as RCW 26.09.187 and RCW 26.09.191. *Chandola*, 180 Wn.2d at 642.

This Court will uphold a trial court's findings so long as the findings are supported by substantial evidence. *Chandola*, 180 Wn.2d at 642. Substantial evidence is that which is sufficient to convince a fair-minded person of the truth of the matter asserted. *Id.*

**4.2 This Court should reverse all RCW 26.09.191(3) restrictions that are not reasonably calculated to prevent harm that could be caused by Sperry withholding R.S. from Weaver.**

Restrictions imposed on a parent under RCW 26.09.191(3) must be reasonably calculated to prevent the type of harm identified in the court's findings. The trial court made only one finding under RCW 26.09.191: that Sperry withheld R.S. from Weaver. But the trial court's restrictions are not calculated to prevent any future harm from withholding the child. This Court should reverse all of the restrictions imposed on Sperry.

RCW 26.09.191(3) permits a court to impose restrictions on a parent if one or more specifically listed factors is found to exist. The listed factors relate to either the lack of any meaningful parent-child relationship or to conduct of a parent that seriously endangers the child's physical or emotional well-being. *Chandola*, 180 Wn.2d at 647; RCW 26.09.191(3)(a)-(f).

The statement of policy in Chapter 26.09 RCW provides that "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 ... required to protect the child from physical, mental, or emotional harm." RCW 26.09.002. In light of this policy, the legislature intended RCW 26.09.191(3) restrictions to apply only where necessary to protect the child from physical, mental, or emotional harm. *Chandola*, 180 Wn.2d

at 648; *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996). Thus, a trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent the harm identified in the trial court's RCW 26.09.191(3) findings. *See Id.; Wicklund*, 84 Wn. App. at 770-71.

None of the trial court's restrictions against Sperry are reasonably calculated to prevent harm to R.S. from Sperry withholding her from her mother. Instead, they are more in the nature of punishment for past misconduct, which is an impermissible reason for a restriction. *See In re Marriage of Thompson*, 56 Wn.2d 244, 250, 352 P.2d 179 (1960) ("The custody of the child is not to be used as a reward or punishment for the conduct of the parents").

Because the restrictions against Sperry are not reasonably calculated to prevent harm to R.S. from Sperry withholding her from her mother, the trial court abused its discretion. This Court should reverse all of the restrictions and remand for a new parenting plan that does not restrict Sperry's conduct or time with R.S.

The trial court imposed three conditions on Sperry, all ostensibly based on the finding that Sperry withheld R.S.:

- 1) Sperry must complete a psychological evaluation regarding sexual issues;
- 2) Sperry gets no visitation until he completes and reports the results of the psychological evaluation; and

3) Sperry's contact with R.S. in the parenting schedule is limited under RCW 26.09.191(3) in two ways: a) limiting Sperry's visitation to every other weekend, half the summer, and no holidays or school breaks; and b) requiring that Sperry's weekend visitation occur within 25 miles of Weaver's residence. CP 70-71. Each of these restrictions was an abuse of discretion.

**4.2.1 The trial court abused its discretion in ordering Sperry to undergo a psychological evaluation for sexual issues.**

In its Memorandum Decision, the trial court expressed concern about Sperry's sexual thoughts while bathing R.S. CP 66-68. However, the trial court did not enter any findings under RCW 26.09.191(3) that Sperry's thoughts had any probability of harming R.S. *See* CP 69-70 (listing the only reason for RCW 26.09.191 restrictions as Sperry's withholding of R.S.). Without any finding of potential harm from Sperry's sexual thoughts, the trial court had no grounds upon which to require Sperry to undergo a psychological evaluation for sexual issues. The trial court abused its discretion by basing its decision on untenable grounds and untenable reasons.

Three times the issue of Sperry's sexual thoughts became the subject of official investigations by child protection agencies in Washington and California. RP 216. All three times the allegations were unfounded. RP 216. Unproven allegations of

sexual abuse do not provide substantial evidence to support restrictions under RCW 26.09.191(3). *In re Marriage of Watson*, 132 Wn. App. 222, 233-34, 130 P.3d 915 (2006).

There was only one finding available upon which the trial court could base its restrictions: that Sperry withheld R.S. from Weaver. There is absolutely no logical connection between withholding the child and the trial court's requirement of a psychological evaluation for sexual issues. The trial court abused its discretion because this restriction was manifestly unreasonable (outside the range of reasonable choices) and based on untenable reasons.

**4.2.2 The trial court abused its discretion in conditioning all of Sperry's visitation rights on completion of the psychological evaluation.**

The considerations in Part 4.2.1, above, apply equally to this restriction. There is no logical connection between the harm of withholding the child and elimination of Sperry's visitation if he does not complete a psychological evaluation on sexual issues. The sexual issues are unfounded. There are no tenable grounds or reasons for this restriction.

Additionally, before effectively eliminating a parent's time with a child based on RCW 26.09.191(3) factors, the trial court must consider the policy directives of RCW 26.09.002 and RCW 26.09.187(3)(a) recognizing the "fundamental importance of the

parent-child relationship to the welfare of the child” and requiring the trial court to craft residential provisions that “encourage each parent to maintain a loving, stable, and nurturing relationship with the child.” *In re Marriage of Underwood*, 181 Wn. App. 608, 612, 326 P.3d 793 (2014).

The trial court must also consider a parent’s liberty interest in the “care, custody and management of their children” before effectively eliminating a parent’s residential time with his or her children based solely on the RCW 26.09.191(3) factors. *Underwood*, 181 Wn. App. at 612 (quoting *In re Dependency of J.H.*, 117 Wn.2d 460, 473, 815 P.2d 1380 (1991)).

This restriction effectively eliminates Sperry’s residential time with R.S. unless he completes a psychological evaluation for which there is no need (the allegations were unfounded) and makes a report that satisfies the trial court. As a practical matter, this becomes an impossible task. The trial court will not be satisfied unless the evaluation shows some problem to justify the trial court’s concerns, but Sperry will be unable to obtain such an evaluation because he has no problem! *See* CP 254 (“Client [Sperry] does not meet criteria for a mental health diagnosis”).

There is no indication in the record that the trial court considered the fundamental importance of the relationship between Sperry and R.S. or Sperry’s constitutional right to be

involved in parenting his child. The trial court abused its discretion by not considering these guiding principles before imposing this restriction. The trial court also abused its discretion for the reasons stated in Part 4.2.1, above.

**4.2.3 The trial court abused its discretion in limiting Sperry’s visitation to every other weekend and half the summer, with no holidays or school breaks.**

Even if the restriction discussed in Part 4.2.2 is reversed or satisfied, Sperry’s residential time with R.S. is still limited under RCW 26.09.191(3)(f) to every other weekend and half the summer, with no holidays or school breaks. Although the trial court might have had discretion to craft such a schedule under RCW 26.09.187 (*but see* Part 4.4, below), the trial court expressly made these restrictions under RCW 26.09.191(3)(f). CP 70, 93; *cf. Chandola*, 180 Wn.2d at 640, 644 (noting that the trial court had imposed limitations under RCW 26.09.191(3) and not RCW 26.09.187).

Because the trial court imposed these limitations under RCW 26.09.191(3)(f), the limitations must be reasonably related to the potential harm of Sperry withholding R.S. from Weaver. They are not.

Sperry’s withholding of R.S. from Weaver came as a direct result of his interpretation of the original parenting plan. The mutual understanding of the parties prior to and just after the

parenting plan was signed was that the parents would alternate “every single month” until R.S. started school. *See, e.g.*, RP 122-23; CP 281, 307-08: *see also* Part 4.3.2, below. The record reveals only two reasons that Sperry withheld R.S.: 1) he believed that August was his scheduled month with R.S.; and 2) Weaver had threatened to keep R.S. for two or three months straight, contrary to Sperry’s understanding of the parenting plan. *See, e.g.*, CP 278.

Now that the old parenting plan is no longer in place, there is not the same danger that Sperry will misinterpret the new plan to take R.S. when it is not his turn. The old plan was burdened with the baggage of what Sperry thought it was supposed to say. The new plan says what it says. The best way for the trial court to prevent the potential harm of Sperry withholding R.S. from Weaver is to draft the plan in language that cannot be misunderstood. The new parenting plan forms are far superior in this regard to the custom drafting used in the old plan.

No additional purpose is served by limiting Sperry’s time with R.S. Limiting Sperry’s time with R.S. does not make it any less likely that Sperry might withhold R.S. from Weaver in the future. In fact, it may, perversely, make it more likely that Sperry might try to keep R.S. for more time because he misses

her. Limiting Sperry's future time with R.S. does not help heal any past wounds from the withholding in July 2016.

Indeed, it appears that this limitation is nothing more than a punishment for Sperry's withholding in July 2016. As noted above, this would be an abuse of discretion. *See In re Marriage of Thompson*, 56 Wn.2d 244, 250, 352 P.2d 179 (1960). Limiting time with the child is not to be used as a punishment for a parent's withholding visitation from the other parent. *Id.* Contempt is the proper remedy for past parental misconduct, not limitations on the parenting schedule.

The limitations imposed on the parenting schedule under RCW 26.09.191(3)(f) are not reasonably calculated to prevent the harm of Sperry withholding R.S. in the future. Instead they appear to have been designed as punishment for Sperry's past conduct. This is an abuse of discretion. This Court should reverse the limitations and remand for a new parenting plan that does not limit Sperry's time with R.S.

**4.2.4 The trial court abused its discretion in restricting Sperry's weekend visitation to within 25 miles of Weaver's residence.**

The trial court also restricted Sperry's travel during his weekend visitations with R.S. Again, this restriction is not reasonably calculated to prevent the potential harm of Sperry withholding R.S. from Weaver. In July 2016, Sperry was within

a short distance of Weaver's residence when he refused to give R.S. to Weaver. There is no reason to think that geographical proximity would have any deterrent effect on potential future withholdings.

Instead, this restriction has the practical effect of increasing the cost to Sperry of every weekend visitation, making it less likely that Sperry will be able to actually exercise his weekend visitation. Additionally, it severely limits the activities that Sperry would otherwise be able to do with R.S. during his weekend visitations.

Because this restriction is not reasonably calculated to prevent the potential harm of Sperry withholding R.S. from Weaver, it is an abuse of discretion. This Court should reverse the restriction and remand for a new parenting plan that does not limit Sperry's travel during visitations.

**4.3 This Court should reverse all of the trial court's findings that were not supported by substantial evidence. This Court should also reverse any conclusions based on the unsupported findings.**

Findings of fact in a parenting plan must be reversed if they are not supported by substantial evidence in the record. *See Chandola*, 180 Wn.2d at 642. Substantial evidence is that which is sufficient to convince a fair-minded person of the truth of the matter asserted. *Id.* This Court should reverse all of the trial court's findings that are not supported by substantial evidence.

This Court should also reverse any conclusions based on the unsupported findings.

At least the following findings are not supported by substantial evidence in the record: 1) that Sperry provided an unsafe environment for R.S.; 2) that Sperry kept R.S. away from Weaver “for a long time, with no good reason”; 3) that Sperry is less likely to encourage a relationship between the mother and child; and 4) that Weaver had a stronger relationship with R.S. and performance of parenting functions.

This Court should reverse each of these findings, together with any conclusions that rely on them.

#### **4.3.1 The trial court erred in finding that Sperry provided an unsafe environment for R.S.**

The trial court’s restrictions on Sperry, such as the requirement of a psychological evaluation, appear to be based on a phantom finding that Sperry’s sexual thoughts pose a danger to R.S. This finding does not appear anywhere in the trial court’s decision-making process or in the final orders.

However, the trial court’s Final Order and Findings, at ¶¶ 4-5, seems to imply a finding that Sperry provided an unsafe environment for R.S.: “The children’s current living situation is harmful to their physical, mental, or emotional health.” CP 93, ¶ 4. “To protect the child, the court will limit the parenting time

and participation of Daniel Sperry.” CP 93, ¶ 5. To the extent this might be the phantom finding, Sperry addresses it here.

The trial court never specifies what it means when it says the “current living situation” is harmful to the child’s health. The language of this finding mirrors the language of RCW 26.09.260(2)(c), which is one of the statutory justifications for a change to a prior parenting plan’s residential schedule. None of the other statutory justifications applies in this case, so the trial court had to make this finding in order to change the residential schedule. The finding is made, but never explained.

The trial court’s Memorandum Decision indicates that the current parenting plan is unworkable in the context of R.S.’s schooling. CP 65. The trial court found that it would be better to address the problem now rather than later. CP 65. These findings should be sufficient to support the finding at CP 93, ¶ 4 and to satisfy RCW 26.09.260(2)(c), allowing for a modification of the residential schedule. Perhaps this was what the trial court meant all along.

However, Sperry is concerned that the findings at CP 93, ¶¶ 4-5 might be interpreted as referring to the trial court’s concern with Sperry’s sexual thoughts. To the extent the trial court intended this meaning, it is not supported by substantial evidence in the record and must be reversed.

There is no evidence in the record that Sperry ever harmed R.S. sexually. There is rampant speculation by Weaver and her grandparents, much of which is based on inadmissible hearsay. None of their allegations of harm are substantiated by evidence in the record. In fact, on three occasions these allegations were reported to child protection agencies in Washington and California. RP 216. Three times the allegations came back unfounded. RP 216. Weaver even admitted at trial that she did not believe Sperry had a problem or had ever done anything to R.S.; she just wanted the court to require an evaluation to satisfy her curiosity. RP 57.

Unproven allegations of sexual abuse do not provide substantial evidence of potential harm to a child. *See In re Marriage of Watson*, 132 Wn. App. 222, 233-34, 130 P.3d 915 (2006). The trial court's finding that "the children's current living situation is harmful to their physical, mental, or emotional health," cannot refer to any harm from Sperry's sexual thoughts. To the extent it was so intended, it is not supported by substantial evidence and must be reversed. To the extent any restrictions on Sperry could be interpreted as relying on this finding, those restrictions must be reversed because the finding is not supported by substantial evidence.

**4.3.2 The trial court erred in finding that Sperry had kept Weaver away from R.S. “for a long time, without good reason.”**

The trial court found, in the Parenting Plan at ¶ 3.b., “Daniel Sperry has kept the other parent away from a child listed in 2. for a long time, without good reason.” CP 70. This finding was intended to support restrictions on Sperry’s conduct and time with R.S., pursuant to RCW 26.09.191(3)(f). The statute permits a trial court to limit any provisions of the parenting plan if “a parent has withheld from the other parent access to the child for a protracted period without good cause.” RCW 26.09.191(3)(f). There is not substantial evidence to support the trial court’s finding. This Court should reverse the finding and the restrictions that rely on it.

In *In re Parentage of E.S.S.*, No. 69446-4-I (Wn. Ct. App. March 10, 2014) (unpublished),<sup>3</sup> this court held that there was not sufficient evidence to support a finding of withholding under RCW 26.09.191(3)(f). In that case, the mother withheld the children from the father on July 30 and petitioned the court for a parenting plan. On September 9, the court issued a temporary restraining order against the father based on harassment and

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<sup>3</sup> This case is cited as persuasive authority under GR 14.1. There are no published cases that interpret and apply RCW 26.09.191(3)(f) to a parenting plan.

domestic violence. Later orders of the court granted the father some visitation, which apparently took place.

This court held that the period over which the mother controlled the withholding of the children—from July 30 to September 9, just over one month—was “relatively short,” not the “protracted period” contemplated by the statute. Additionally, this court held that there were good reasons for the withholding, including harassment and domestic violence. Because there were good reasons for the withholding, it did not matter that there were also some bad reasons. Under these facts, this court held that there was not sufficient evidence to support a finding of withholding under RCW 26.09.191(3)(f).

Here, the trial court did not specify the time period of Sperry’s withholding of R.S. The record shows that Sperry refused to deliver R.S. to Weaver on July 27. RP 189, 243. Sperry kept R.S. until he was ordered by the trial court to deliver her to Weaver in mid-August. RP 50, 114. Sperry withheld R.S. for less than one month, shorter than the time period in *E.S.S.* There is not substantial evidence to support a finding that Sperry withheld R.S. for a “protracted period” as contemplated by RCW 26.09.191(3)(f).

Sperry also had good reason for the withholding. He believed he was following the parenting plan. The mutual understanding of the parties prior to and just after the

parenting plan was signed was that the parents would alternate “every single month” until R.S. started school. *See, e.g.*, RP 122-23; CP 281, 307-08. Paragraph 3.1 stated, “Prior to enrollment in school, the child shall reside with the petitioner [Sperry], except for the following days and times when the child will reside with or be with the other parent: The parents shall alternate custody of the child every month.” CP 28. Paragraph 3.12 designated Sperry as custodian—the parent with which R.S. spends the majority of time. CP 30. This is further confirmed in the original child support order, which designates Weaver as the person paying support to Sperry, because Sperry was the primary residential parent. *See* CP 20.

Under this understanding of the plan, Sperry was entitled to have R.S. in August. Weaver’s failure to take her visitation in July did not create an obligation for Sperry to give up his scheduled visitation in August. *See* RCW 26.09.184(7) (“If a parent fails to comply with a provision of a parenting plan or a child support order, the other parent's obligations under the parenting plan or the child support order are not affected”). Sperry reasonably believed that he was following the parenting plan. The fact that the trial court disagreed and interpreted the plan differently does not mean that Sperry did not have good

cause for his actions.<sup>4</sup> Even though the trial court found he was wrong, Sperry had good cause. There is not substantial evidence to support a finding that Sperry withheld R.S. “without good cause” under RCW 26.09.191(3)(f).

Because there is not substantial evidence to support the trial court’s finding that Sperry withheld R.S. “for a long time, without good reason,” this Court should reverse the finding. Because there are no other findings supporting restrictions on Sperry under RCW 26.09.191, this Court should reverse all of the restrictions and remand for a new parenting plan without any restrictions on Sperry’s conduct or time with R.S.

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<sup>4</sup> The trial court erred in its interpretation of the parenting plan. Evidence of the mutual intent of the parties leading up to and immediately after the plan was signed supports Sperry’s interpretation. Evidence of the entire circumstances of a contract’s formation is admissible to aid the court in understanding the meaning of the words used. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Ambiguity is not required before the evidence is admissible. *Berg*, 115 Wn.2d at 669.

Even if this Court agrees with the trial court’s interpretation, the context rule and the conduct of the parties leading up to the July conflict gave Sperry good cause to believe that his actions were in line with the parenting plan.

**4.3.3 The trial court erred in finding Sperry is less likely to encourage a relationship between the mother and child.**

In its Memorandum Decision, the trial court found that Sperry is less likely to encourage a relationship between R.S. and Weaver, considering his conduct regarding visitation in July 2016. CP 65.

Sperry should not be penalized for his attempt to follow the parenting plan. In July 2016, Weaver did not have the money to exercise her visitation. Sperry would not give or lend her the money. He would not give up any of his scheduled month of August. If his interpretation of the old parenting plan was correct, he had no obligation to do either. The fact that Sperry chose to stick to the terms of the parenting plan should not count against him in the analysis of whether he would encourage a relationship between mother and child.

Sperry testified that it was important to him that R.S. knows her mother. RP 254. During the separation, when Weaver had not requested any visitation with R.S. for months, Sperry made arrangements and paid for transportation for Weaver to come back to Washington so that R.S. could spend time with her. RP 248-49, 254. Sperry also paid for Weaver's transportation for visitation in May 2016. RP 120. The GAL concluded that Sperry

supported the bond between mother and child but Weaver did not support the bond between father and child. RP 38.

The only evidence that Weaver encouraged a relationship between father and daughter was Weaver's testimony that she encouraged R.S. to stay focused on FaceTime calls with Sperry. RP 178. But she simultaneously testified that Sperry gave the same respect to R.S.'s calls with Weaver. RP 178. This evidence does not favor Weaver.

The trial court was very concerned about Weaver's abandonment of R.S. during the separation, stating that it would not be excused. CP 66. Yet, despite the dearth of evidence in Weaver's favor, the trial court found that Weaver was more likely than Sperry to encourage a relationship between R.S. and the other parent. This finding is not supported by substantial evidence. This Court should reverse the finding. To the extent this finding contributed to the trial court's decision to make Weaver the primary residential parent, this Court should also reverse the parenting schedule and remand for a new parenting plan with Sperry as primary residential parent.

**4.3.4 The trial court erred in finding that Weaver had a stronger relationship with R.S. and greater potential for performance of parenting functions.**

After trial, the trial court concluded that neither Sperry nor Weaver was a good parent. RP 277. Weaver was unstable;

Sperry was controlling and manipulative. RP 277. The trial court stated,

Usually when we're involved here, we're talking about the child's best interest. I have this education. I have this experience. I'm going to do this with my child. We do these kind of things. We go camping. We go fishing. We play with castles and read books, and here's what we read, Berenstain Bears. And we go to the zoo. We go hiking. We have play dates with other people. I didn't hear anything. Shockingly didn't hear any of that. All I heard was a, I gotcha kind of -- I gotcha for this and I gotcha for that. I gotcha. But I didn't hear anything about I love my child, I demonstrate that love this way. I go and do things. I want to have -- I have aspirations for the child, and I have aspirations for that child's relationship with the other parent. Didn't hear any of that.

RP 278.

In a surprise turnaround in its Memorandum Decision, the trial court stated, "The mother, however, has testified regarding her relationship with the child and her performance of parenting functions." CP 66. The unspoken implication is that Sperry did not testify to these things. The record demonstrates that the trial court was mistaken on both counts.

Prior to the separation, Sperry handled many of the parental duties. Sperry would handle R.S.'s morning routine while Weaver slept in. RP 245. Sperry would come home from work to have lunch, put R.S. down for a nap, then go back to

work. RP 245. Sperry cooked dinner half of the time. RP 245, 253. Sperry went to the grocery store with Weaver and held R.S. while they shopped. RP 245-46, 253. Sperry bathed R.S. and put her to bed. RP 245, 253.

Weaver's grandfather testified that Weaver paid attention to R.S. at home, did makeup and hair together, and played with toys. RP 166. Weaver's grandmother testified that when R.S. was with Weaver on visitation, Weaver would handle R.S.'s routines and a little bit of discipline. RP 172. **Weaver herself never testified about her relationship with R.S.**, except to say she disagreed with Sperry's testimony. RP 177-78.

There is not substantial evidence to support the trial court's finding that Weaver had a stronger relationship with R.S. and performance of parenting functions. This Court should reverse the finding. To the extent this finding contributed to the trial court's decision to make Weaver the primary residential parent, this Court should also reverse the parenting schedule and remand for a new parenting plan with Sperry as primary residential parent.

#### **4.4 This Court should reverse primary residential placement with Weaver.**

In crafting the residential provisions of a parenting plan under RCW 26.09.187, a trial court must consider a number of

factors, including the relationship of the child with each parent, the parents' past and potential for future performance of parenting functions. In making this determination, the trial court ignored evidence that favored Sperry and made unsupported findings in favor of Weaver. As demonstrated in Parts 4.3.3 and 4.3.4, above, the trial court's findings relating to the RCW 26.09.187(3) factors were not supported by substantial evidence. Without substantial evidence, the trial court's residential provisions were an abuse of discretion, being based on untenable grounds.

Even assuming that the trial court crafted the parenting schedule under RCW 26.09.187, without limitations under RCW 26.09.191(3), the residential provisions were still an abuse of discretion. The parenting schedule giving Sperry only every other weekend and half the summer, without any holidays, birthdays, or school breaks is manifestly unreasonable. It is outside the range of acceptable choices, given the facts and the applicable legal standard.

There is no reasoned basis for entirely excluding Sperry from every special occasion in his young daughter's life. The parenting schedule cannot succeed in its statutory goal of encouraging "a loving, stable, and nurturing relationship with the child." RCW 26.09.187(3)(a). It is not in the best interest of the child. This Court should reverse the parenting plan and

remand for a new plan with Sperry as primary residential parent.

## **5. Conclusion**

The trial court ordered restrictions on Sperry under RCW 26.09.191(3)(f) that were not reasonably calculated to prevent harm caused by potential future withholding of R.S. by Sperry. The trial court made many factual findings that were not supported by substantial evidence. On the basis of these unsupported findings and restrictions, the trial court crafted an unreasonably one-sided parenting plan that placed R.S. with Weaver and left Sperry with almost no visitation at all. All of these decisions abused the trial court's discretion.

This Court should reverse all of the RCW 26.09.191(3) restrictions listed in the parenting plan at CP 70 because they are not reasonably calculated to prevent harm to R.S. under RCW 26.09.191(3)(f), the only reason for restrictions identified by the trial court.

This Court should reverse all of the findings identified in Part 4.3, above, none of which were supported by substantial evidence. Sperry's past sexual thoughts do not present a risk of harm to R.S.; all of the restrictions based on sexual issues must be reversed. Sperry did not withhold R.S. from weaver "for a protracted period" or "without good cause" under RCW

26.09.191(3)(f); all of the RCW 26.09.191(3) restrictions must be reversed. Weaver is not more likely than Sperry to encourage a relationship between R.S. and the other parent, does not have a stronger relationship with R.S., and is not stronger in performing parenting functions; the residential provisions of the parenting plan must be reversed.

This Court should reverse all of the RCW 26.09.191(3) restrictions imposed on Sperry; reverse all of the trial court's unsupported findings of fact; reverse the residential provisions of the parenting plan; and remand for a new plan with Sperry as primary residential parent and without any limitations on Sperry's time with R.S.

Respectfully submitted this 23<sup>rd</sup> day of March, 2018.

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## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on March 23, 2018, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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DATED this 23<sup>rd</sup> day of March, 2018.

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March 23, 2018 - 3:29 PM

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**Appellate Court Case Title:** In re the Marriage of Daniel Sperry, Appellant v Liberty Sperry, Respondent  
**Superior Court Case Number:** 15-3-00079-4

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