No. 98821-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:
JENNIFER CORINNE (ANDERSON) EMERY,

Respondent,

vs.

LOREN HEATH ANDERSON,

Appellant.

RESPONDENT JENNIFER (ANDERSON) EMERY'S ANSWER TO PETITION FOR REVIEW

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I. Identity of Respondent

Respondent is mother Jennifer (Anderson) Emery, petitioner in the underlying parenting plan case, as well as appellant respondent who was successful in obtaining affirmance of the trial court's final parenting plan.

II. Restatement of Issues

The Court faces two straightforward issues:

1. Has father Heath Anderson failed to meet the criteria in RAP 13.4(1) and (2) because there is no conflict with a decision of the Supreme Court and no conflict with a published decision of the Court of Appeals?

2. Has Heath[1] failed to meet the criteria in RAP 13.4(b)(4) because there is no constitutional fundamental liberty interest in a parenting dispute between parents?

III. Restatement of the Case

The facts are more fully set out in the unpublished Court of Appeals Opinion in this matter, Case No. 79612-7-I, entered on June 1, 2020[2] and are incorporated here by reference. In his Petition for Review, Heath does not challenge the trial court's or the Court of Appeals' factual findings.

In this dissolution/parenting plan case, Heath admits he had notice nearly two months before trial in a motion for temporary orders that Jennifer was seeking RCW 26.09.191 restrictions regarding: (1) Heath's

[1] For clarity, consistent with the Court of Appeals opinion, Jennifer refers to both parents by their first names.

[2] *Available at* https://www.courts.wa.gov/opinions/pdf/796127.pdf.

emotional abuse of Jennifer and then three-year-old G.A., (2) the safety of Heath caring for G.A.[3] at his store and farmer's markets while he was working instead of taking her to preschool, and (3) safety issues regarding Heath's then 16-year-old son, A.A. Petition for Review ("Pet.") at 4; CP 170, 175-76, 181, 182, 308-11, 215, 217-18. The commissioner ordered a guardian ad litem ("G.A.L.") to investigate but conditioned the appointment of a G.A.L. on the trial court continuing the trial, as there was insufficient time before trial for the required 60-day period for a report. CP 280-81. Heath admits that the commissioner entered an order prohibiting G.A. from being alone with A.A. Pet. at 4; CP 279.

Heath successfully opposed Jennifer's motion to continue. CP 308. 366. The parties proceeded to trial, without a GAL or GAL report.

During the five-day trial, both parties presented evidence on the emotional abuse and safety issues litigated two months before trial, among others. RP 68, 163, 356, 528, 648. Heath testified that he was "happy to agree" to a limitation that G.A. should not be left alone with A.A. RP 476:14-18.

The trial court entered a final parenting plan that imposed RCW 26.09.191 restrictions on Heath, limiting his time with G.A. to 48 hours every other weekend and prohibiting Heath from taking G.A. to his

[3] The Court of Appeals entered an order requiring initials for the minor children. *See* Court of Appeals Dkt. At 12/17/2019.

workplace while he was working. CP 772-73 ¶ 3, 4; CP 774-776. In a section addressing G.A.'s safety, the trial court also prohibited A.A. from being alone with G.A. CP 781.

Heath appealed, alleging that because Jennifer did not include the potential .191 restrictions in her petition, the trial court had no jurisdiction to impose them, which he alleged constituted a due process violation, despite having notice of these issues nearly two months before trial and an opportunity to be heard. Opinion at 1. He also claimed a new trial was warranted because the trial court granted a request to appoint a guardian ad litem without sufficient time for a GAL to file a report. *Id.*

The Court of Appeals held that the trial court had jurisdiction to enter restrictions under RCW 26.09.187(3)(a), which requires the trial court to create a parenting plan consistent with RCW 26.09.191.[4] Opinion at 7. The Court of Appeals held that there was substantial evidence to support the trial court's unchallenged findings,[5] holding that "Heath's abusive use of conflict presents a danger of damage to G.A.'s emotional well-being and physical safety." Opinion at 12. The Court of Appeals also upheld the trial court's "Safe Environment" section of the parenting plan

[4] "The child's residential schedule *shall* be consistent with RCW 26.09.191." RCW 26.09.187(3)(a), in pertinent part (emphasis added).

[5] On appeal, Heath did not assign error to any of the trial court's findings, but argued that the trial court's findings and the trial record do not support imposition of the restrictions. Opinion at 9.

prohibiting G.A. from being alone with A.A. Opinion at 12-13.

Heath "[did] not assign error or otherwise challenge" the trial Court's grant of decision making authority to Jennifer. Opinion at 6 n. 2. The Court of Appeals upheld the trial court's unchallenged finding on this issue. *Id.*

A legal aid group moved to publish the decision, to which neither Jennifer nor Heath responded. Court of Appeals Dkt. 6/22/2020. The Court of Appeals denied publication, stating that "the opinion will not be of precedential value." *Id*. 7/7/2020.

Heath petitioned this Court for review. [6]

On August 7, 2020, the day after he filed his petition for review, Heath stated to the trial court, "I am confident that the court's decision on this issue will be reversed." Appendix 1.

Jennifer now timely answers.

IV. Standard for Acceptance of Review

A petition for review will be accepted by the Supreme Court under RAP 13.4(b) only:

[6] In his petition, Heath presents many alleged facts that are irrelevant to this petition for review. For example, he presents "statements" from "early in the case" that he asserts are contradictory to the trial court's imposition of RCW 26.09.191 restrictions after a five-day trial. Pet. for Rvw. at 5. But, as the Court of Appeals held, appellate courts "defer to the trial court to resolve conflicts in testimony and assess credibility[,]" citing *State v. Merritt*, 200 Wn.App. 398, 408, 402 P.3d 862 (2017), aff'd, 193 Wn.2d 70, 434 P.3d 1016 (2019). Opinion at 6, 10 n.3.

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved.

RAP 13.4(b) (in pertinent part.)

V. Argument for Denial of Review

A. Heath fails to meet the criteria in RAP 13.4(1) and (2) because there is no conflict with a decision of the Supreme Court and no conflict with a published decision of the Court of Appeals.

The Court of Appeals properly rejected the default judgment decisions Heath presents as "in conflict with" the Opinion:

> The cases cited by Heath do not require a different result. As he acknowledges, *In re Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989), addresses the court's authority to grant relief from a default judgment, which is not at issue here. Nor is *In re Marriage of Watson*, 132 Wn.App. 222, 130 P.3d 915 (2006), applicable. As the court acknowledged in *Katare*, *Watson* "simply indicate that restrictions cannot be imposed for unfounded reasons," which was not the case here. 175 Wn.2d at 37.[7]

[7] *Ware v. Phillips*, 77 Wn.2d 879, 468 P.2d 444 (1970) involved damages in a civil case imposed on a garnishee that were greater than requested by the plaintiff. This Court held:

> The injustice of penalizing a defaulting garnishee by holding him liable for the debt of the defendant in the main action, without having warned him that this would be his penalty, is apparent when the happier position of the debtor himself is considered. That defendant must have

Opinion at 7. The Court of Appeals further distinguished *Watson*, holding:

> Unlike in *Watson*, the trial court here did not impose restrictions under RCW 26.09.191 for unfounded reasons. The trial court did not impose restrictions sua sponte after denying a petition for modification of a parenting plan; rather, the trial court was tasked with creating a permanent parenting plan, requiring it to consider limitations under RCW 26.09.191. *Katare*, 175 Wn.2d at 35-36; RCW 26.09.187(3). And the record is clear that both parties contemplated and argued the restrictions imposed. Jennifer raised issues of emotional abuse and abusive use of conflict well before trial in her motion for temporary orders and again at trial. Heath responded to those allegations before and at trial. Indeed, Heath succeeded in preventing a GAL from investigating these allegations by opposing Jennifer's motion to continue the trial to allow appointment of a GAL. Moreover, as discussed below, substantial evidence supports the court's findings.

Opinion at 8-9.

In his petition for review, Heath merely makes the same arguments the Court of Appeals rejected when it held:

> In In re Marriage of Fan & Antos, No. 77490-5-I (Wash. Ct. App. April 1, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/774905.pdf, an unpublished decision cited by Jennifer, we rejected the same argument Heath advances here:
>
> > Antos argues that the trial court did not have jurisdiction to enter parenting plan restrictions under RCW 26.09.191, when Fan's pleadings did not request those

---

> a summons advising him to appear and answer a claim being asserted against him. He must be advised of the amount of the claim and he must be warned that judgment will be taken against him if he fails to answer.

Id. at 883.

> restrictions. . . .
>
> His arguments ignore the mandatory language of RCW 29.09.187(3)(a) [sic], requiring the trial court to create a parenting plan consistent with RCW 26.09.191. Because the statutory scheme requires the court to consider parenting plan restrictions, it was not an abuse of the trial court's authority or discretion to consider those restrictions. Instead, failing to comply with the statute's mandatory language would have been an abuse of the trial court's discretion.
>
> Fan, No. 77490-5-I, slip op. at 4. We adopt that reasoning here. The court had jurisdiction over the dissolution proceeding and properly considered restrictions under RCW 26.09.191.

Opinion at 7.

Heath does not address the Court of Appeals reasoning or conclusions, nor does he explain how this Court could reach a different result.[8] Where no authority is cited in support of a proposition, the court is not required to search for them and may assume counsel has diligently searched and found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

There is no conflict with any Supreme Court or Court of Appeals decision. Heath's petition should be denied.

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[8] Heath's attorney in the instant case is the same attorney who advanced the argument rejected in In re Marriage of Fan & Antos. *See* http://www.courts.wa.gov/content/Briefs/A01/774905%20Appellant%20's%20.PDF#search=fan%20antos%20marriage.

B. Heath fails to meet the criteria in RAP 13.4(b)(4) because there is no constitutional fundamental liberty interest in a parenting dispute between parents.

Anderson relies upon *Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21, 28 (1998) (involving the rights of parents versus non-parents) and *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (involving termination of parental rights by the state) as supporting his contention that the Opinion "conflicts with and upsets settled precedent interpreting due process in family law cases in Washington." Pet. at 10.

As this Court determined six years ago, neither case is a reason to depart from this Court's rule that the best interests of the child standard governs disputes between those in equivalent parental positions:

> To be sure, the right to parental autonomy is a " 'fundamental liberty interest protected by the Fourteenth Amendment,'" and the State may not intrude upon it absent a compelling interest and narrow tailoring. *In re Custody of Smith*, 137 Wn.2d 1, 14-15, 969 P.2d 21 (1998) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). Strict scrutiny therefore applies to the state's infringement on parental autonomy in favor of a nonparent's interest. But it does not apply in a proceeding characterized by the " equivalent parental positions of the parties." *In re Parentage of L.B.*, 155 Wn.2d 679, 710, 122 P.3d 161 (2005). [

In re Marriage of Chandola, 180 Wn.2d 632, 646, 327 P.3d 644 (2014).

Custody of Smith and *Santosky* do not support a departure from the analysis supplied by the Court of Appeals that a trial court has a

mandatory duty under RCW 26.09.187(3)(a) to create a parenting plan consistent with RCW 26.09.191 and that Heath had ample notice and an opportunity to be heard on this issue. Opinion at 7.

Heath's failure to acknowledge this Court's important distinction in *Chandola*, when it was called to his attention in Jennifer's appellate briefing, is disingenuous, at best.[9] *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d at 126. There is no constitutional fundamental liberty at stake and no due process violation. The petition should be denied.

C. Under RAP 18.1 and RAP 18.9 and due to intransigence, Jennifer is entitled to an award of attorneys' fees and costs on review.

Washington law provides for an award of attorney fees when authorized by contract, a statute, or a recognized ground of equity. *See* RAP 18.1. "The appellate court may order a party or counsel . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." RAP 18.9. *See, e.g., Stiles v. Kearney*, 168 Wn.App. 250, 267-68, 277 P.3d 9 (2012) (awarding fees where the arguments "fail because they either lack merit, rely on a misunderstanding of the record . . . or are not adequately briefed.").

[9] Jennifer addressed Heath's misplaced "fundamental liberty" argument. Respondent's appellate Brief at 14-15, *citing Chandola*.

As discussed in this Answer, the Court of Appeals clearly expressed its reasoning for rejecting Heath's arguments and affirming the trial court's imposition of .191 sanctions. His counsel's argument has twice been rejected by the Court of Appeals (the instant case and *In re Marriage of Fan and Antos*) and he now seeks a different result from this Court without addressing the Court of Appeals' clearly stated reasoning and conclusions in both cases. He merely reiterates the unsuccessful arguments. The avoidance of the Court of Appeals reasoning and conclusions renders this petition for review frivolous under RAP 18.9.

"Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in foot-dragging and obstruction or simply when one party made the trial unduly difficult and increased legal costs by his or her actions." *In re Marriage of Katare*, 175 Wn.2d at 42. When intransigence is established, financial resources are irrelevant. *In re Marriage of Greenlee*, 65 Wn.App. 703, 708, 829 P.2d 1120 (1992).[10] Heath's attempt to use his alleged estimation of the "confidence" of the success of his Supreme Court appeal demonstrates

[10] The legislature has recently enacted new law under Title 26 addressing "abusive litigation" regarding the situation at issue, i.e. "legal contentions made in litigation" that "are not warranted by existing law or by a reasonable argument for the extension, modification, or reversal of existing law, or the establishment of new law" when restrictions have been imposed under RCW 26.09.191. The new sections of Title 26 become effective January 1, 2021. *See* Senate Bill 6268, signed into law on April 2, 2020, available at
http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/Senate/6268-S.SL.pdf?q=20200814150427

that the petition for review is apparently for the purpose of a delay in the trial court proceedings and to increase legal costs. RAP 18.9(a).

There is no reasonable basis to claim the trial court abused its discretion in issuing any part of the final parenting plan or that the Opinion conflicts with Supreme Court or Court of Appeals decisions. There is no reasonable basis to claim a due process violation when Heath admits he had notice nearly two months before trial and this Court has clearly stated that there is no fundamental liberty interest between parents litigating a parenting plan. Even viewing these issues in the light most favorable to Heath, there is no reasonable chance of reversal. The petition is frivolous, Heath has increased legal costs by his actions in filing this petition for review. Attorney's fees should be awarded to Jennifer, jointly and severally against Heath and his counsel.

VI. Conclusion

There is no conflict with this Court’s decisions or Court of Appeals decisions. There is no Constitutional issue. In his Petition for Review, Heath relies only on inapplicable authority and fails to address the well-reasoned analysis and conclusions of the Court of Appeals. The petition should be denied.

/

/

Respectfully submitted this August 14, 2020.

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VII. Appendix

In compliance with RAP 10.4(c), for those statutes not quoted verbatim above, Jennifer provides the following statutes and rules:

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CASE #: 17-3-06387-1 SEA

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

In re: Petitioner: JENNIFER EMERY fka JENNIFER ANDERSON And Respondent: LOREN HEATH ANDERSON,	**No. 17-3-06387-1 SEA** **Declaration of HEATH ANDERSON in RESPONSE to Motion for Temporary Order Allowing Move With Children**

My name is Loren Heath Anderson, am over 18 years old. I am the Respondent in this matter and I declare:

I will refer to Jennifer Emery as "Jennifer" herein. I will refer to our daughter Grace Anderson as "Grace" herein.

First, I request that the court deny any move away request, either temporary or permanent in this matter. Such a move is not in the best interest of Grace as explained in detail below and in my Objection about Moving that I filed with the court in this matter.

Jennifer's underlying Notice of Intent to Move with the Children, dated June 22, 2020, which this Motion is based upon, is fatally deficient and should be thrown out on its face. The law requires that the Notice have the address/location of the proposed move. Jennifer did not give proper notice since there was no address or even a city, state or country listed

everything was shut down. We are a well-known brand in the area and near the local high school and middle school, with exclusive contracts for farmers markets, catering, etc. All of my 7 years of hard work and my retirement would be gone and would have been for nothing if I have to move and walk away from the business now. I will volunteer at her school and coach or help out in her activities wherever she goes. I choose my baby girl over everything; I just hope it doesn't cost me a business that became successful and I know will be again once things reopen. But to me Grace is more important.

If I move, there will be no family or friends. All of my family is basically in the local area. I will need to except a minimum wage job which would not support having rent, child support, utilities etc. After the child support itself I wouldn't even have enough to rent a place close to my daughter's school. I would have to be homeless but instead of having a growing company to help me, I would have nothing to help.

This move will absolutely break me emotionally and financially as well as my daughter. She loves and needs me, asking me all the time to stay with her at her Mom's house. Grace even created a secret potion (mostly m&m's) to make me invisible so I can stay at her Mother's in Grace's bedroom. She said she will make her Mom stay downstairs so we can play and her Mother would not know.

This little girl is obviously literally crying out to see me more often, not less.

The issue of decision making is currently under appeal in the courts and I am confident that the court's decision on this issue will be reversed.

I have the following additional good faith reasons for objecting to the planned move: Both of our jobs and our family are in Washington. Our daughter is only 4, almost 5, and

The court made a temporary change to the parenting plan based upon me not having permanent housing at the time we were in court, however there was a misunderstanding as I had temporary housing options available when Grace stays with such as in a motel, but that was not made clear in court. At this time as I mentioned I am in a position to secure housing again and I will have a place for Grace to stay when she is with me going forward.

The court should deny the request to move as a temporary and as a permanent order on this matter.

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

DATED this 7th day of August 2020, at Issaquah, Washington.

Heath Anderson

8/7/20
Dated

RCW 26.09.187 **Appendix 2**

Criteria for establishing permanent parenting plan.

(1) DISPUTE RESOLUTION PROCESS. The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW **26.09.191** applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:

(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;

(b) The parents' wishes or agreements and, if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and

(c) Differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process.

(2) ALLOCATION OF DECISION-MAKING AUTHORITY.

(a) AGREEMENTS BETWEEN THE PARTIES. The court shall approve agreements of the parties allocating decision-making authority, or specifying rules in the areas listed in RCW **26.09.184**(5)(a), when it finds that:

(i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by RCW **26.09.191**; and

(ii) The agreement is knowing and voluntary.

(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:

(i) A limitation on the other parent's decision-making authority is mandated by RCW **26.09.191**;

(ii) Both parents are opposed to mutual decision making;

(iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection.

(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

(i) The existence of a limitation under RCW **26.09.191**;

(ii) The history of participation of each parent in decision making in each of the areas in RCW **26.09.184**(5)(a);

(iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW **26.09.184**(5)(a); and

(iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW **26.09.191**. Where the limitations of RCW **26.09.191** are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW **26.09.004**(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

(b) Where the limitations of RCW **26.09.191** are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

(c) For any child, residential provisions may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of residential time by a parent, including but not limited to requirements of reasonable notice when residential time will not occur.

[**2007 c 496 § 603; 1989 c 375 § 10; 1987 c 460 § 9**.]

NOTES:

***Reviser's note:** RCW **26.09.004** was alphabetized pursuant to RCW **1.08.015**(2)(k), changing subsection (3) to subsection (2).

Part headings not law—2007 c 496: See note following RCW **26.09.002**.

*Custody, designation of for purposes of other statutes: RCW **26.09.285**.*

RCW 26.09.191

Appendix 3

Restrictions in temporary or permanent parenting plans.

*** CHANGE IN 2020 *** (SEE 6268-S.SL) ***

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy; or (iv) the parent has been convicted as an adult of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (a)(iv)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (a)(iv)(A) through (H) of this subsection.

This subsection (2)(a) shall not apply when (c) or (d) of this subsection applies.

(b) The parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy; or (iii) the person has been convicted as an adult or as a juvenile has been adjudicated of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW **9A.64.020** (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(H) Chapter **9.68A** RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (b)(iii)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (b)(iii)(A) through (H) of this subsection.

This subsection (2)(b) shall not apply when (c) or (e) of this subsection applies.

(c) If a parent has been found to be a sexual predator under chapter **71.09** RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter. If a parent resides with an adult or a juvenile who has been found to be a sexual predator under chapter **71.09** RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with the parent's child except contact that occurs outside that person's presence.

(d) There is a rebuttable presumption that a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection poses a present danger to a child. Unless the parent rebuts this presumption, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter:

(i) RCW **9A.64.020** (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW **9A.44.073**;

(iii) RCW **9A.44.076**, provided that the person convicted was at least eight years older than the victim;

(iv) RCW **9A.44.079**, provided that the person convicted was at least eight years older than the victim;

(v) RCW **9A.44.083**;

(vi) RCW **9A.44.086**, provided that the person convicted was at least eight years older than the victim;

(vii) RCW **9A.44.100**;

(viii) Any predecessor or antecedent statute for the offenses listed in (d)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (d)(i) through (vii) of this subsection.

(e) There is a rebuttable presumption that a parent who resides with a person who, as an adult, has been convicted, or as a juvenile has been adjudicated, of the sex offenses listed in (e)(i) through (ix) of this subsection places a child at risk of abuse or harm when that parent exercises residential time in the presence of the convicted or adjudicated person. Unless the parent rebuts the presumption, the court shall restrain the parent from contact with the parent's child except for contact that occurs outside of the convicted or adjudicated person's presence:

(i) RCW **9A.64.020** (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW **9A.44.073**;

(iii) RCW **9A.44.076**, provided that the person convicted was at least eight years older than the victim;

(iv) RCW **9A.44.079**, provided that the person convicted was at least eight years older than the victim;

(v) RCW **9A.44.083**;

(vi) RCW **9A.44.086**, provided that the person convicted was at least eight years older than the victim;

(vii) RCW **9A.44.100**;

(viii) Any predecessor or antecedent statute for the offenses listed in (e)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (e)(i) through (vii) of this subsection.

(f) The presumption established in (d) of this subsection may be rebutted only after a written finding that the child was not conceived and subsequently born as a result of a sexual assault committed by the parent requesting residential time and that:

(i) If the child was not the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, and (B) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the offending parent is in the child's best interest, and (C) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child.

(g) The presumption established in (e) of this subsection may be rebutted only after a written finding that the child was not conceived and subsequently born as a result of a sexual assault committed by the parent requesting residential time and that:

(i) If the child was not the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent residing with the convicted or adjudicated person is appropriate and that parent is able to protect the child in the presence of the convicted or adjudicated person, and (B) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the parent residing with the convicted or adjudicated person in the presence of the convicted or adjudicated person is in the child's best interest, and (C) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes contact between the parent and child in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child.

(h) If the court finds that the parent has met the burden of rebutting the presumption under (f) of this subsection, the court may allow a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection to have residential time with the child supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(i) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who has been adjudicated as a juvenile of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the person adjudicated as a juvenile, supervised by a neutral and independent

adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(j) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who, as an adult, has been convicted of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the convicted person supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(k) A court shall not order unsupervised contact between the offending parent and a child of the offending parent who was sexually abused by that parent. A court may order unsupervised contact between the offending parent and a child who was not sexually abused by the parent after the presumption under (d) of this subsection has been rebutted and supervised residential time has occurred for at least two years with no further arrests or convictions of sex offenses involving children under chapter **9A.44** RCW, RCW **9A.64.020**, or chapter **9.68A** RCW and (i) the sex offense of the offending parent was not committed against a child of the offending parent, and (ii) the court finds that unsupervised contact between the child and the offending parent is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treating child sexual abuse victims who has supervised at least one period of residential time between the parent and the child, and after consideration of evidence of the offending parent's compliance with community supervision requirements, if any. If the offending parent was not ordered by a court to participate in treatment for sex offenders, then the parent shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the offender has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child.

(l) A court may order unsupervised contact between the parent and a child which may occur in the presence of a juvenile adjudicated of a sex offense listed in (e)(i) through (ix) of this subsection who resides with the parent after the presumption under (e) of this subsection has been rebutted and supervised residential time has occurred for at least two years during which time the adjudicated juvenile has had no further arrests, adjudications, or convictions of sex offenses involving children under chapter **9A.44** RCW, RCW **9A.64.020**, or chapter **9.68A** RCW, and (i) the court finds that unsupervised contact between the child and the parent that may occur in the presence of the adjudicated juvenile is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treatment of child sexual abuse victims who has supervised at least one period of residential time between the parent and the child in the presence of the adjudicated juvenile, and after consideration of evidence of the adjudicated juvenile's compliance with community supervision or parole requirements, if any. If the adjudicated juvenile was not ordered by a court to participate in treatment for sex offenders, then the adjudicated juvenile shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the adjudicated juvenile has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child which may occur in the presence of the adjudicated juvenile who is residing with the parent.

(m)(i) The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional

abuse or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

(ii) The court shall not enter an order under (a) of this subsection allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused the child, except upon recommendation by an evaluator or therapist for the child that the child is ready for contact with the parent and will not be harmed by the contact. The court shall not enter an order allowing a parent to have contact with the child in the offender's presence if the parent resides with a person who has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused a child, unless the court finds that the parent accepts that the person engaged in the harmful conduct and the parent is willing to and capable of protecting the child from harm from the person.

(iii) The court shall not enter an order under (a) of this subsection allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence pursuant to RCW **26.26A.465** to have committed sexual assault, as defined in RCW **26.26A.465**, against the child's parent, and that the child was born within three hundred twenty days of the sexual assault.

(iv) If the court limits residential time under (a) or (b) of this subsection to require supervised contact between the child and the parent, the court shall not approve of a supervisor for contact between a child and a parent who has engaged in physical, sexual, or a pattern of emotional abuse of the child unless the court finds based upon the evidence that the supervisor accepts that the harmful conduct occurred and is willing to and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing to or capable of protecting the child.

(n) If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and (m)(i) and (iv) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iv) of this subsection. The weight given to the existence of a protection order issued under chapter **26.50** RCW as to domestic violence is within the discretion of the court. This subsection shall not apply when (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m)(ii) of this subsection apply.

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW **26.09.004**;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

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

(4) In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.

(5) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

(7) For the purposes of this section:

(a) "A parent's child" means that parent's natural child, adopted child, or stepchild; and

(b) "Social worker" means a person with a master's or further advanced degree from a social work educational program accredited and approved as provided in RCW **18.320.010**.

[**2019 c 46 § 5020**; **2017 c 234 § 2**; **2011 c 89 § 6**; **2007 c 496 § 303**; **2004 c 38 § 12**; **1996 c 303 § 1**; **1994 c 267 § 1**. Prior: **1989 c 375 § 11**; **1989 c 326 § 1**; **1987 c 460 § 10**.]

NOTES:

Effective date—2011 c 89: See note following RCW **18.320.005**.

Findings—2011 c 89: See RCW **18.320.005**.

Part headings not law—2007 c 496: See note following RCW **26.09.002**.

Effective date—2004 c 38: See note following RCW **18.155.075**.

Effective date—1996 c 303: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 30, 1996]." [**1996 c 303 § 3**.]

Effective date—1994 c 267: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [April 1, 1994]." [**1994 c 267 § 6**.]

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