

No. 69446-4-1  
King County Superior Court No. 10-3-05763-7 SEA

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In Re the Parentage of:  
  
E.S. and C.S., Children,  
  
SIMON BRUCE SOTHERON, Petitioner,  
  
and  
  
MEAGAN ANASTASIA PALMER, Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jean Rietschel, Judge

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RESPONDENT'S RESPONSE BRIEF

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**TABLE OF CONTENTS**

STATEMENT OF THE CASE.....1

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THAT PALMER WITHHELD THE CHILDREN FOR A PROTRACTED PERIOD WITHOUT GOOD CAUSE, OR IN FAILING TO IMPOSE RESTRICTIONS BASED ON SUCH A FINDING.....5

II. THE TRIAL COURT DID NOT ERR IN IMPOSING RESTRICTIONS ON SOTHERON UNDER RCW 26.09.191(3)(G).....8

III. THE RESTRICTION ON SOTHERON'S TRAVEL WITH THE CHILDREN WAS AN APPROPRIATE RESTRICTION UNDER RCW 26.09.191(3)(G).....16

IV. THE TRIAL COURT WAS NOT IMPROPERLY INFLUENCED BY THE TEMPORARY ORDERS.....19

V. THE UPDATED GAL REPORT WAS PROPERLY ADMITTED INTO EVIDENCE.....23

VI. ATTORNEY'S FEES SHOULD BE AWARDED TO PALMER.....29

CONCLUSION.....30

## TABLE OF AUTHORITIES

### Cases

<u>Combs v. Combs</u> , 105 Wn. App. 168, 177, 19 P.3d 469 (2001)....	21
<u>Fernando v. Nieswandt</u> , 87 Wn. App. 103, 940 P.2d 1380 (1997).....	23, 25
<u>Holland v. Boeing Co.</u> , 90 Wn.2d 384, 390, 583 P.2d621 (1978)....	7
<u>In re Custody of Smith</u> , 137 Wn.2d 1, 9, 969 P.2d 21 (1998).....	6
<u>In re Guardianship of Stamm</u> , 121 Wn. App. 830, 91 P.3d 126 (2004).....	23, 25, 26, 27, 28
<u>In re Marriage of Burrill</u> , 113 Wn. App. 863, 868, 56 P.3d 993 (2002).....	7, 9
<u>In re Marriage of Kovacs</u> , 121 Wn.2d 795, 809, 854 P.2d 629 (1993).....	21
<u>In re Marriage of Littlefield</u> , 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).....	14, 18, 19
<u>In re Marriage of Murray</u> , 28 Wn.App. 187, 189, 622 P.2d 1288 (1981).....	23
<u>In re Marriage of Rich</u> , 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).....	14
<u>In re Marriage of Rideout</u> , 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).....	16
<u>In re Marriage of Spreen</u> , 107 Wn. App. 341, 346, 28 P.3d 769 (2001).....	16
<u>In re Marriage of Thomas</u> , 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).....	15

<u>In re Marriage of Watson</u> , 132 Wn. App. 222, 130 P.3d 915 (2006).....	21, 22
<u>In re Marriage of Wickland</u> , 84 Wn. App. 763, 770, 932 P.2d 652 (1996).....	9
<u>Katare v. Katare</u> , 125 Wn. App. 813, 826, 105 P.3d 44 (2004), <u>review denied</u> , 155 Wn.2d 1005, 120 P.3d 577 (2005).....	8, 17
<u>Katare v. Katare</u> , 175 Wn.2d 23, 283 P.3d 546 (2012).....	10, 16
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	7
<u>Williams v. Illinois</u> , 567 U.S. ____, 132 S.Ct. 2221 (2012).....	23

**Statutes**

RCW 26.09.002.....	11
RCW 26.09.003.....	11
RCW 26.09.184.....	19
RCW 26.09.187.....	20, 21
RCW 26.09.191.....	<i>passim</i>
RCW 26.09.220.....	24
RCW 26.12.175.....	24, 25
RCW 26.50.010.....	13

**Court Publications**

<u>DV Manual for Judges</u> , Washington State Administrative Office of the Courts (2006).....	13
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## STATEMENT OF THE CASE

The contested issues in this parentage action revolve around the dynamics between Sotheron and Palmer, and between Sotheron and the children—E.S. and C.S., children of both parties, and D.P., Palmer’s older son from a prior relationship. Although D.P. was not a subject of this action, the way Sotheron treated him was illustrative of the overly harsh parenting tactics that contributed to the court’s decision to impose restrictions.<sup>1</sup>

When it came to parenting, Palmer took a supportive, encouraging approach, while Sotheron “would do the opposite. He would find the flaws and just go with that.”<sup>2</sup> Palmer at times had to sneak food to D.P.’s room after Sotheron sent him to bed without dinner.<sup>3</sup> Sotheron would force D.P. to sit in the middle of the yard in the dark at night, and “keep him on lockdown except for going to school for extended periods of time at a very young age.”<sup>4</sup> These punishments were meted out for infractions as minor as getting an A- or B+ on an assignment, or forgetting to take out the trash.<sup>5</sup>

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<sup>1</sup> See, e.g., VRP 1114

<sup>2</sup> VRP 842

<sup>3</sup> VRP 840

<sup>4</sup> Id.

<sup>5</sup> Id.

Sotheron glosses over his obsession with the children's homework, stating he "thought it important for children to get their homework done promptly and then have fun."<sup>6</sup> However, as Palmer testified,

[Sotheron] took it to a different level, where he started to obsessively track every single thing that [D.P.] did. Every letter he wrote, every homework assignment. And at the time, he was only six years old. He'd go to his school in front of his classmates and he would dump out his desk, the contents, and scold him for his desk not being tidy.<sup>7</sup>

Sotheron treated Palmer similarly. Palmer was the homemaker in the relationship, raising the children and doing all of the cooking, cleaning, and laundry, but "it was never ever good enough" for Sotheron.<sup>8</sup> Palmer was expected "to cater to all of his needs," and would be "scolded" for failures such as being too exhausted to drive him to work because she was up with the baby all night.<sup>9</sup> Any imperfections would be photographed by Sotheron.<sup>10</sup> Palmer's weekly cash allowance, with which she was expected to meet the

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<sup>6</sup> Appellant's opening brief at p5

<sup>7</sup> VRP 466

<sup>8</sup> VRP 842

<sup>9</sup> Id.

<sup>10</sup> VRP 844

household's needs, would be withheld by Sotheron if he was displeased with her performance of household tasks.<sup>11</sup>

At times, this displeasure would escalate to anger that scared Palmer and prompted her to try to leave, which Sotheron would not allow.<sup>12</sup> The first time Palmer called for police assistance in such circumstances was "After hours and hours and hours and hours of [Sotheron] following [Palmer] and badgering [Palmer] around the house."<sup>13</sup> Palmer had tried locking herself in the bathroom to get away from Sotheron, but had to go comfort the children who were scared by Sotheron "storming around the house."<sup>14</sup> To keep Palmer from being able to leave, Sotheron collected her personal belongings and locked them in the garage; Palmer recalled, "his focus was to keep us there by any means necessary."<sup>15</sup>

After each of several such events, Palmer agreed to reconcile because Sotheron would always promise he had

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<sup>11</sup> VRP 474

<sup>12</sup> VRP 485

<sup>13</sup> VRP 869

<sup>14</sup> VRP 869-870

<sup>15</sup> VRP 489

changed.<sup>16</sup> Additionally, Palmer felt she and the children were “very, very, very dependent” on Sotheron, which influenced the attempts at shared parenting during the parties’ separations.<sup>17</sup> Palmer tried to maintain healthy boundaries between them, but after their final break-up, Sotheron’s “behavior started to escalate;” in addition to showing up Palmer’s residence uninvited, Sotheron’s “excessive emails, phone calls, text messaging, him following [D.P.]” were “extremely concerning” to Palmer.<sup>18</sup> When it was time for the children to return to start a new school year and Palmer was not convinced that Sotheron would stop the harassment, she filed for a protection order.<sup>19</sup> Around the same time, after not having seen the children over the summer, Sotheron filed this action.<sup>20</sup>

A guardian ad litem was appointed to investigate and report on the best interests of the children; she met with the parties, observed the children with each parent, reviewed an abundance of documents, and spoke to several collaterals.<sup>21</sup> This GAL was experienced, having been appointed in over 250 cases, and she

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<sup>16</sup> See, e.g. VRP 492, 503, 873

<sup>17</sup> VRP 872

<sup>18</sup> VRP 877

<sup>19</sup> VRP 883-884.

<sup>20</sup> VRP 170; 883

<sup>21</sup> VRP 516-524

does not apply .191 factors lightly.<sup>22</sup> She testified that in her most recent 24 cases, 13 had domestic violence or abuse allegations, and in only three—including the present case—did she “affirm[ ] that the concerns rose to the level of impacting others significantly enough to warrant .191 restrictions.”<sup>23</sup> Including the GAL, the trial court heard testimony from lay and expert witnesses for five days, reviewed all of the exhibits, and made rulings that specifically referenced the evidentiary bases that supported them.<sup>24</sup>

## **ARGUMENT**

- I. THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THAT PALMER WITHHELD THE CHILDREN FOR A PROTRACTED PERIOD WITHOUT GOOD CAUSE, OR IN FAILING TO IMPOSE RESTRICTIONS BASED ON SUCH A FINDING.

Restrictions under RCW 26.09.191(3)(f) require the finding that “A parent has withheld from the other parent access to the child for a protracted period without good cause.” As Sotheron notes, there do not appear to be any published cases interpreting this statute;<sup>25</sup> however, this case does not call for any interpretation. “When the words in a statute are clear and

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<sup>22</sup> VRP 583; “.191 factors” shorthand used by witnesses and the court for factors considered in parenting plans under RCW 26.09.191.

<sup>23</sup> VRP 583

<sup>24</sup> VRP 1107-1126

<sup>25</sup> Appellant’s brief at 17

unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written.”<sup>26</sup> The finding required is not that the parent withheld access for a protracted period *OR* without good cause, but rather, as written: “for a protracted period without good cause.” Only if the withholding is without good cause would the inquiry into whether it was for a sufficiently protracted period to be damaging to the child, and thus warrant a restriction, be relevant. Here, good cause was explicitly found:

COURT: The mother did withhold the children after July 30<sup>th</sup>. The petition was filed July 30<sup>th</sup>. From the evidence of the emails, some of the reasons were money promised for support, money being sought, the holding of possession of the children. Other reasons were harassment and, from her testimony, the concern she had with the father following Dallas, who is not a part of this proceeding. ...The court concludes in terms of this issue that there was a withholding. Some of the reasons were for good cause: the reasons of harassment, domestic violence, the following of Dallas. Some were not for good cause: the seeking of funds, the seeking of monies that had not been agreed.<sup>[27]</sup>

The finding that there were additional improper motives as well does not negate the finding that there were indeed proper motives. Again, the plain meaning of the statute is illustrative: the legislature did not authorize restrictions in cases where parents acted with

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<sup>26</sup> In re Custody of Smith, 137 Wn.2d 1, 9, 969 P.2d 21 (1998).

<sup>27</sup> VRP 1107.

mixed intentions, but rather wholly without good cause. The court's findings of harassment, domestic violence, and following Dallas are enough to support the good cause finding.

An appellate court will uphold a finding of fact if substantial evidence exists in the record to support it.<sup>28</sup> Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise.<sup>29</sup> *So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.* This is because credibility determinations are left to the trier of fact and are not subject to review.<sup>30</sup> The trial court acted within its discretion to rely on "the compelling testimony of the mother"<sup>31</sup> regarding the father's behavior and her legitimate reasons for responding as she did.

Even if this court were to grant Sotheron's request to hold that it was an abuse of discretion for the trial court to fail to make the finding that Palmer acted without good cause when withholding

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<sup>28</sup> Holland v. Boeing Co., 90 Wn.2d 384, 390, 583 P.2d 621 (1978).

<sup>29</sup> Holland, 90 Wn.2d at 390-91.

<sup>30</sup> State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (emphasis added); In re the Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002).

<sup>31</sup> VRP 1113.

the children,<sup>32</sup> Sotheron does not address what he expects this court to do with that finding. Unlike subsections (1) and (2) of RCW 26.09.191, which mandate the imposition of restrictions upon certain findings, subsection (3) is entirely discretionary: “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” (emphasis added). Therefore it is possible that the trial court would not have imposed any restrictions even if it had made the requested finding.

Sotheron goes on to argue, “The trial court abused its discretion in failing to impose restrictions on her”,<sup>33</sup> but does not suggest what restrictions should have been imposed. “[A]ny limitations or restrictions imposed must be reasonably calculated to address the identified harm.”<sup>34</sup> Sotheron offers no evidence to support a conclusion that any type of restriction would remedy the complained of offense, and thus remand for restrictions on the basis of a (3)(f) finding would not be proper relief in this case.

II. THE TRIAL COURT DID NOT ERR IN IMPOSING RESTRICTION ON SOTHERON UNDER RCW 26.09.191(3)(G).

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<sup>32</sup> Appellant’s Brief at 17.

<sup>33</sup> Appellant’s Brief at 19.

<sup>34</sup> Katare v. Katare, 125 Wn. App. 813, 826, 105 P.3d 44 (2004), review denied, 155 Wn.2d 1005, 120 P.3d 577 (2005).

While “[p]arental conduct may only be restricted if the conduct would endanger the child’s physical, mental, or emotional health,”<sup>35</sup> “evidence of actual damage is not required. Rather, the required showing is that a danger of psychological damage exists.”<sup>36</sup> Here, the guardian ad litem testified to the dangers presented by Sotheron’s unlimited involvement:

Q (Ms. Garrison): And why were you making a recommendation that reduced the time that Mr. Sotheron currently had with the children?

A (Ms. Edgar): Well, I felt that there was more likely than not evidence of .191 restrictions, both in terms of his ability to provide a safe and conflict-free and non-abusive household, as well as concerns about his overall inflexibility and the implications for parenting.<sup>37</sup>

The GAL went on to further explain some of the specific psychological harms those general characteristics might inflict on the children; for instance:

...And so that tendency to be rule bound and inflexible becomes really difficult as kids get older and they try to assert autonomy. The other thing about it is it tends to be performance and task based so that kids in those environments feel that affection and love is conditioned on

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<sup>35</sup> In re Marriage of Wickland, 84 Wn. App. 763, 770, 932 P.2d 652 (1996).

<sup>36</sup> Burrill 113 Wn. App. at 872.

<sup>37</sup> VRP 547.

doing things right, not making mistakes, being perfect, having high performance. So kids become anxious because they're stressed by that, and at times, they become resistant and act out.<sup>[38]</sup>

This sort of speculation is permissible under the statute: "By its terms, RCW 26.09.191(3) obligates a trial court to consider whether '[a] parent's involvement or conduct *may* have an adverse effect on the child[ren]'s best interests.' To make this determination, the court must engage in a form of risk assessment."<sup>39</sup> Here, the court was aided in assessing the possibility of future harm to the parties' children by testimony about the pattern of interaction between Sotheron and Palmer's older child, not a subject of this action; this too is permissible, as "deciding whether to impose restrictions based on a threat of future harm necessarily involves consideration of the parties' past actions."<sup>40</sup>

The open-endedness of RCW 26.09.191(3)(g), "[s]uch other factors or conduct as the court expressly finds adverse to the best interests of the child," is not an invitation for judges to impose restrictions "based only on personal preference,"<sup>41</sup> but rather to address the specific problems of the particular family that do not fit

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<sup>38</sup> VRP 553.

<sup>39</sup> Katare, 175 Wn.2d at 39 (emphasis added).

<sup>40</sup> Katare, 175 Wn.2d at 39.

<sup>41</sup> Appellant's Brief at 20.

within the confines of the first six subsections but are nonetheless harmful. "When judicial officers have the discretion to tailor individualized resolutions, the legislative intent expressed in RCW 26.09.002 can more easily be achieved. Judicial officers should have the discretion and flexibility to assess each case based on the merits of the individual cases before them."<sup>42</sup> Here, the court's commentary at the presentation hearing reveals that this was precisely the intent of the written rulings:

COURT: ...And Mr. Sotheron, I want to say something to you specifically. The reason I'm saying either Mr. Vandegrift or other appropriate treatment is because I think you're a good man and I think you have a problem. I think people who choose their treatment do better than people who have the court impose a specific treatment. You are not a typical domestic violence person. You don't use physical abuse. That is not what I've found. But I think you have a problem that you need help with. If you think Mr. Vandegrift can help you, all well and good. If there's something else that you think will work for you, I'm specifically authorizing you to do something else. But I want you to do something because your problem is getting in the way of your love for your kids, and that's basically what I have found. I have no question that you love your kids and that you want to be the best dad you can. But what I found is that there's something getting in the way of that. So if you have another way of dealing with that, all well and

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<sup>42</sup> RCW 26.09.003.

good. I'm not imposing a cookie cutter specific type of treatment because that's not what I found. I don't find that there's domestic violence per se. But I want you to do something because there's something getting in your way. I think you can do better.<sup>[43]</sup>

Sotheron's problem is coercive control, and the restrictions imposed in this case are tailored to serve the best interests of these particular children by addressing the way this problem manifests.

Sotheron highlights several bases for the finding of coercive control that it describes as faulty; however, he misinterprets the significance of the findings. The "history of domestic violence arrests and charges without convictions" were not being used as a basis for a finding of statutorily-defined acts of domestic violence, but rather as a descriptor of the unhealthy family dynamic, which the trial court went on to recount in detail:

COURT: There is the August 5th incident where she wanted to leave; he didn't want her to leave with the child. He started collecting her possessions, the purse, the phone, and the keys. When the police were called and wanted a car seat to be given, he didn't want the police to take that car seat. There is the August 6 incident when he is upset about her financial charges, but he admits on cross-examination that he is the one who pulled the phone cord. And that incident was six weeks after the

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<sup>43</sup> VRP 1125-1126.

incident where the allegations of physical force were made. There's the October 7th incident where the investigation of her moving out was made. She testified that he would not let her leave.<sup>[44]</sup>

The trial court is not limited to imposing restrictions only on parents who have convictions; the problematic conduct can be found detrimental to the children without rising to the level of a criminal offense. The absence of a finding of statutorily-defined domestic violence,<sup>45</sup> which would trigger the mandatory restrictions of RCW 26.09.191(1) and (2), does not mean that the other behavioral components characteristic of abusive relationships are not present and negatively impacting the children. The Washington State Administrative Office of the Courts defines domestic violence as “the on-going behavior of inappropriate control and domination by on person over another.”<sup>46</sup> “Even if the domestic violence between the parents does not rise to the level sufficient to trigger a mandatory restriction, it may still be a factor that the court may appropriately consider in crafting a parenting plan.”<sup>47</sup> The trial court’s questioning of counsel during closing arguments provides

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<sup>44</sup> VRP 1109-1110.

<sup>45</sup> RCW 26.50.010 defines domestic violence to include “Physical harm, bodily injury, assault, or the inflicting of fear of imminent physical harm, bodily injury or assault...sexual assault...or stalking.”

<sup>46</sup> DV Manual for Judges, “Parenting Plans,” 10-1 (2006).

<sup>47</sup> DV Manual for Judges, at 10-6.

evidence that the court was considering precisely this type of scenario when evaluating the need for restrictions in this case:

COURT: The question for the court is should I consider their opinions not to find domestic violence but whether there is another .191 issue in terms of their findings of controlling behavior. And how do you respond to that? Because certainly there's evidence with the allowance, the lack of information about bills, the police incidents, the various relationship issues that have been brought up is supportive of both of their conclusions that there's an issue of control here.<sup>[48]</sup>

Finding controlling behavior adverse to the best interests of the children is not "manifestly unreasonable or based on untenable grounds or untenable reasons," and thus not abuse of discretion.<sup>49</sup>

Regarding the questions Sotheron raises about such issues as the phone cord, the garage door, and Ms. Njuguna's pregnancy,<sup>50</sup> these were disputed, and the appellate court does not review the trial court's credibility determinations or weigh conflicting evidence.<sup>51</sup> Moreover, Sotheron ignores the majority of the other facts on which the court specifically stated its rulings were based:

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<sup>48</sup> VRP 1072-1073.

<sup>49</sup> In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

<sup>50</sup> Appellant's Brief at 21-22.

<sup>51</sup> In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

- “The court relies on the opinions of the experts. The guardian ad litem found a pattern of coercive behavior, financial control, some isolation, relentless pursuit and arguments, attempts to prevent the mother from leaving, attempts to prevent her from calling for aid... The court finds the report thorough and reliable.”<sup>[52]</sup>
- “The court relies on the 18 pictures of cigarette butts given to the guardian ad litem and clearly incredible testimony of the father to the effect that if the mother threw the butts on the ground, the spit would solidify and you couldn’t pick them up...he provided 18 pictures of cigarette butts but no pictures to substantiate his allegations against her regarding the planter box, the toys, or the alleged gouge.”<sup>[53]</sup>
- “The expert Vandegrift concluded that the emotional, psychological, financial damage to her was severe.”<sup>[54]</sup>
- “But what is most compelling to the court is that he appears while this case is pending to be reenacting the pattern with the mother involved in this case.”<sup>[55]</sup>
- “The court also considers the compelling testimony of the mother that ‘Simon was involved with every aspect, every detail of our lives. It escalated into something that became a problem...’<sup>[56]</sup>
- “The court also relies on the guardian ad litem’s report on Dallas’s feelings.”<sup>[57]</sup>

Trial court findings of fact that are supported by substantial evidence must be upheld.<sup>58</sup> Evidence is substantial if it persuades

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<sup>52</sup> VRP 1110.

<sup>53</sup> VRP 1111.

<sup>54</sup> VRP 1112.

<sup>55</sup> VRP 1112.

<sup>56</sup> VRP 1113.

<sup>57</sup> VRP 1114.

<sup>58</sup> In re Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

a fair-minded, rational person of the truth of the finding.<sup>59</sup> Even if this court found Sotheron's arguments about certain evidence persuasive, the remainder of the unchallenged evidence is substantial and thus sufficient to uphold the findings on appeal; this court may affirm on any basis established by the pleadings and supported by the record.<sup>60</sup>

III. THE RESTRICTION ON SOTHERON'S TRAVEL WITH THE CHILDREN WAS AN APPROPRIATE RESTRICTION UNDER RCW 26.09.191(3)(G).

Appellant focuses on distinguishing Sotheron from the father in Katare v. Katare,<sup>61</sup> where a prohibition against travel outside the country was justified by threats of abduction. The trial court in this case appears to have been aware of Katare,<sup>62</sup> and dismissed the analogy because the conduct at issue in that case was not present here. The court noted, "I'm not sure there's any showing that there's a likely abduction or anything like that."<sup>63</sup> The Katare

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<sup>59</sup> In re Marriage of Spreen, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

<sup>60</sup> In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (quoting Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 766, 58 P.3d 276 (2002)).

<sup>61</sup> 175 Wn.2d 23, 283 P.3d 546 (2012).

<sup>62</sup> "There has just been a recent case that came down from the Washington State Supreme Court on removal which holds the court authority in this." VRP 1171.

<sup>63</sup> VRP 1171.

analysis is not applicable because abduction is not the harm the trial court sought to prevent.

Palmer's trial counsel did allude to abduction among other additional possible bases for a travel restriction, citing "a trust issue and concerns that Mr. Sotheron's ties to this community are fairly limited,"<sup>64</sup> but went on to present the argument that ended up being persuasive to the court:

Australia is almost a full day of travel. It's a 21-plus hour flight, and these are a five-and a seven-year-old child. And that in and of itself. The kids are not in a position to advocate for themselves in any way, shape or form if things became uncomfortable for them or they weren't feeling safe, they have no cognitive and physical ability to reach out for help. So it's the duration, the youth of the children.<sup>[65]</sup>

Unlike a threat of abduction, which could presumably be permanent, the threat here is expected to abate over time. "[A]ny limitations or restrictions imposed must be reasonably calculated to address the identified harm,"<sup>66</sup> and the fact that the restriction was limited to a duration of eighteen months supports the conclusion that the court crafted a restraint that was no more restrictive than necessary to prevent the harm at issue:

This is what the court is going to do. I'm going to amend the 3.13 "Other," and just say for the next 18 months. Given the

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<sup>64</sup> VRP 1171.

<sup>65</sup> VRP 1171.

<sup>66</sup> Katare, 125 Wn. App. at 826.

age of the children, given the high conflict nature of this action. And after that, there can be other arrangements. But I don't think there's a sufficient showing. After that, I'm hoping that after time, the amount of conflict lessens, the children will be older, they'll have more ability to raise any concerns that they have, so I'm going to limit 3.13 to for the next 18 months.<sup>[67]</sup>

In the Katare series of cases, the trial court originally found RCW 26.09.191(3) inapplicable, and only applied it on remand when required to clarify the legal basis for the foreign travel restrictions it had imposed. Here, conversely, the trial court had already found that there were bases for restrictions on Sotheron's parenting under RCW 26.09.191(3), and extended those restrictions to include travel. The potentially harmful scenario of young children on a long journey in the sole care of someone struggling "with the .191 issues that the court has identified which restrict his ability to parent effectively"<sup>68</sup> is not one of the usual "hardships which predictably result from a dissolution of marriage,"<sup>69</sup> and thus not an improper basis for restrictions. The legislature mandates that among the many objectives of a permanent parenting plan are to "Maintain the child's emotional stability" and "Provide for the child's changing needs as the child

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<sup>67</sup> VRP 1172-1173.

<sup>68</sup> VRP 1115.

<sup>69</sup> Littlefield, 133 Wn.2d at 55.

grows and matures,” RCW 26.09.184(1)(b) and (c), so it is anticipated that some provisions may only be relevant during certain periods of a child’s life.

A requirement that the children reach a certain age before traveling internationally with an otherwise restricted parent is not “outside the range of acceptable choices, given the facts and the applicable legal standard,” and thus not “manifestly unreasonable” and reversible.<sup>70</sup>

#### IV. THE TRIAL COURT WAS NOT IMPROPERLY INFLUENCED BY THE TEMPORARY ORDERS

Sotheron mischaracterizes the court’s ruling<sup>71</sup> by combining the argument of Palmer’s counsel regarding the “stretch of stability”<sup>72</sup> and the finding that Palmer’s relationship with the children was stronger “due to the level and extent of her involvement.”<sup>73</sup> The involvement the court spoke of was throughout the children’s lives, not merely during the pendency of the parentage action:

There’s no disagreement that the mother was the stay-at-home parent. She took greater responsibility for the daily needs of the children. There’s no disagreement that the father was involved with the children, particularly regarding

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<sup>70</sup> Littlefield, 133 Wn.2d at 47.

<sup>71</sup> Appellant’s Brief at 27.

<sup>72</sup> VRP 1087.

<sup>73</sup> CP 104.

homework and school. Each of them has a stable, loving relationship with the children. The mother's relationship the court would find is stronger at this point due to the level and extent of her involvement.<sup>[74]</sup>

The court made this evaluation in its discussion of RCW 26.09.187(3)(a)(i), the "relative strength, nature and stability of the child's relationship with each parent." It is not unreasonable to find that young children are more closely bonded with the parent who has spent more time at home and been more responsible for meeting their daily needs, and the court acknowledged the fact that this is the factor prescribed by the legislature to be given the most weight.<sup>75</sup> The court's only reference to the temporary orders was briefly describing Palmer's position when applying RCW 26.09.187(3)(a)(vi): "The next factor is the wishes of the parent and the wishes of a child sufficiently mature to express a preference. That's not so with the children here. The father wants 50-50; the mother wants the same as the temporary plan."<sup>76</sup> Sotheron ascribes an improper motive to the trial court which is not supported by the record.

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<sup>74</sup> VRP 1115.

<sup>75</sup> VRP 1114.

<sup>76</sup> VRP 1116.

In Combs v. Combs,<sup>77</sup> where the appellate court found the trial court abused its discretion by favoring the temporary primary residential parent in a “tie” between fit parents, the primary error was reaching this determination without proper consideration of the RCW 26.09.187(3)(a) factors: “Arguably, the court improperly applied a presumption in favor of the status quo in violation of Kovacs. Even if it did not, however, its failure to examine the statutory factors relevant to its determination was an abuse of discretion.”<sup>78</sup> Here, the trial court clearly understood its responsibilities, and carried them out precisely on the record: “In looking at the parenting plan, the court is required to consider the factors laid out in the statute, and I will go through them.”<sup>79</sup> Those oral findings regarding each factor are reflected in the written orders without reliance on the temporary orders.

For the same reasons, this case is also unlike Marriage of Watson, 132 Wn. App. 222, 130 P.3d 915 (2006), emphasized by Sotheron, where the “substantial impairment of emotional ties”

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<sup>77</sup> 105 Wn. App. 168, 19 P.3d 469 (2001).

<sup>78</sup> Combs v. Combs, 105 Wn. App. 168, 177, 19 P.3d 469 (2001) (citing In re Marriage of Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629 (1993)) (the Parenting Act “did not intend to create any presumption in favor of the primary caregiver but, to the contrary, intended to reject any such presumption”).

<sup>79</sup> VRP 1114.

leading to a restriction was a direct result of unfounded allegations and ensuing limitations imposed by the court. Whereas “there was insufficient evidence that the father’s ‘involvement or conduct’ caused the restricting factor” in Watson, Sotheron’s conduct was found to warrant a restriction even after the court declined to make a finding of statutorily-defined domestic violence. It was not “the effects of the lawsuit itself” that caused the need for a restriction, but rather his deep-seated personality traits that lead him to attempts to exert inappropriate control over others. In no way did the temporary orders create the circumstances that influenced the court to impose restrictions on Sotheron’s parenting.

Palmer’s history as the stay-at-home parent also clearly predated the litigation, so she did not gain an unfair advantage by continuing to fulfill that role under the temporary orders. Being involved with homework and school, as Sotheron is described, does not necessarily mean he was an equally involved parent in meeting the overall daily needs of the children. Prior informal agreements to 50/50 splits of time also do not prove Sotheron was equally involved prior to the litigation—there is no guarantee that time spent in a parent’s home directly correlates with the “level and extent” of that parent’s involvement.

As an appellate court we are reluctant to disturb a child custody disposition because of the trial court's unique opportunity to personally observe the parties. *In re Marriage of Timmons*, 94 Wash.2d 594, 617 P.2d 1032 (1980). When written findings of fact do not clearly reflect a consideration of the statutory factors, resort can be made to the court's oral opinion. See *In re Marriage of Dalthorp*, 23 Wash.App. 904, 598 P.2d 788 (1979). When evidence of those factors is before the court and its oral opinion and written findings reflect consideration of the statutory elements, specific findings are not required on each factor. *In re Marriage of Croley*, 91 Wash.2d 288, 588 P.2d 738 (1978).<sup>80</sup>

Here, the court observed the parties, heard from many witnesses, and made both oral and written rulings that did include specific findings on each factor, which all stand independently of the temporary orders. There was no abuse of discretion.

V. THE UPDATED GAL REPORT WAS PROPERLY ADMITTED INTO EVIDENCE

Appellant acknowledges that the principles of the Confrontation Clause it issue in the analyzed case of Williams v. Illinois<sup>81</sup> do not apply to civil matters, and yet asks this court to adopt them here anyway, without any discussion of Washington's on-point case law, specifically, Fernando v. Nieswandt<sup>82</sup> and In re Guardianship of Stamm.<sup>83</sup>

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<sup>80</sup> In re Marriage of Murray, 28 Wn.App. 187, 189, 622 P.2d 1288 (1981)

<sup>81</sup> Williams v. Illinois, 567 U.S. \_\_\_\_\_, 132 S.Ct. 2221 (2012).

<sup>82</sup> 87 Wn. App. 103, 940 P.2d 1380 (1997).

<sup>83</sup> 121 Wn. App. 830, 91 P.3d 126 (2004).

Before reaching appellate courts' interpretations, the underlying law itself reveals this analogy is inapt. Whereas there is no statutory provision for DNA experts to testify about other analysts' information in criminal cases, Washington law provides for investigators in domestic relations cases to collect information from a variety of sources:

(1)(a) The court may order an investigation and report concerning parenting arrangements for the child, or may appoint a guardian ad litem pursuant to RCW 26.12.175, or both.

(2) In preparing the report concerning a child, the investigator or person appointed under subsection (1) of this section may consult any person who may have information about the child and the potential parenting or custodian arrangements.... If the requirements of subsection (3) of this section are fulfilled, the report by the investigator or person appointed under subsection (1) of this section may be received in evidence at the hearing.<sup>84</sup>

Subsection (3) addresses procedural matters such as timing of the report submission as well as making all underlying data and reports available to parties. Additionally, "Any party to the proceeding may call the investigator or person appointed under subsection (1) of this section and any person whom the investigator or appointed person has consulted for cross-examination." If Sotheron disputed

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<sup>84</sup> RCW 26.09.220

the statements conveyed by the GAL, he had the right to call the declarants at trial and challenge the veracity on cross-examination.

RCW 26.12.175(1)(b) specifically provides for GALs to testify about the information they gather from lay and expert sources and the conclusions subsequently drawn:

The guardian ad litem's role is to investigate and report factual information regarding the issues ordered to be reported or investigated to the court. The guardian ad litem shall always represent the best interests of the child. Guardians ad litem under this title may make recommendations based upon his or her investigation, which the court may consider and weigh in conjunction with the recommendations of all the parties.

The appellate court in Fernando clarify that these statutes “authorize the family courts to hear the opinions of a witness who would not be a traditional expert under ER 702.”<sup>85</sup> The GAL “acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a common sense impression to the court. But the court is also free to ignore the guardian ad litem's recommendations if they are not supported by other evidence or it finds other testimony more convincing.”<sup>86</sup> In applying the Fernando principles to guardianship proceedings, the Stamm

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<sup>85</sup> Fernando, 87 Wn. App. at 107.

<sup>86</sup> Fernando, 87 Wn. App. at 107.

court expanded on this analysis and specifically scrutinized the hearsay issue for both Title 11 and Title 26 GALs:

In performing his or her duties under the statute, a GAL is required to consult with those knowledgeable about the allegedly incapacitated person. The statute thus contemplates that hearsay will be a basis for the GAL's opinions. And in order to evaluate the GAL's opinions, the fact finder needs to know the basis for them. We therefore hold the trial court has discretion under ER 702 to permit a GAL to testify to his or her opinions if the court is persuaded the testimony will be of assistance, and may permit the GAL to state the basis for those opinions, including hearsay.<sup>[87]</sup>

The GAL's testimony in that case was nonetheless found improper by the appellate court because she "improperly gave her testimony the appearance of the court's sanction and bolstered her conclusions and recommendations,"<sup>88</sup> telling the jury "we're the eyes and ears of the court" and making explicit credibility judgments.<sup>89</sup> The court distinguished this situation from what could be properly admissible in a bench trial: "Judges understand that the GAL presents one source of information among many, that credibility is the province of the judge, and can without difficulty

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<sup>87</sup> Stamm, 121 Wn. App. at 837.

<sup>88</sup> Stamm, 121 Wn. App. at 841.

<sup>89</sup> Stamm, 121 Wn. App. at 840.

separate and differentiate the evidence they hear. In other words, the judge can cast a skeptical eye when called for.”<sup>90</sup>

In contrast, the report in this case includes a clause indicating the GAL’s understanding of her proper role in the process,<sup>91</sup> and the court properly exercised its own discretion in assessing the credibility and persuasiveness of that report:

The guardian ad litem found a pattern of coercive behavior, financial control, some isolation, relentless pursuit and arguments, attempts to prevent the mother from leaving, attempts to prevent her from calling for aid. The court does find the guardian ad litem’s report credible. Her use of the word ‘visit’ is disturbing, but not sufficient in itself to show bias. She spoke to a number of collaterals. She considered a great deal of materials, interviewed the parties, interviewed the children. The court finds the report thorough and reliable.<sup>[92]</sup>

The Stamm court went on to clarify that its ruling should not be interpreted as approval of all hearsay that comes into court via a GAL. “The permissible scope of a GAL’s testimony is circumscribed by the parameters of the duties assigned by the statute. The trial court has the discretion to decide whether the information is of the type contemplated by the statute and whether it was reasonably

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<sup>90</sup> Stamm, 121 Wn. App. at 841.

<sup>91</sup> “The information contained in this report was gathered from a variety of sources. It is the evaluator’s best understanding of the history and circumstances of the parties and is not intended to represent Findings of Fact.” (Exhibit 128: Updated GAL report, dated 4/16/12, at p2).

<sup>92</sup> VRP 1110.

relied upon by the GAL.”<sup>93</sup> The court in the present case exercised that discretion when counsel for Sotheron objected to testimony about the interviews recounted in the GAL’s updated report:

I’m going to allow as the basis of her opinion that she talked to Dr. Vandegrift, that he was contacted by Annie, and that Annie was asking him to intervene. The substance of what Annie was asking him to intervene in, I’m going to exclude because I don’t think the details of that are relevant, and I don’t see how it cannot be being offered for the truth of the matter asserted, so that, I’m going to exclude.<sup>[94]</sup>

The GAL subsequently articulated the relevance of that exchange if not for the substance of the conversation: “[T]here was concern about whether or not the children were going to be exposed to a high conflict situation. So the quality of the relationship and how conflict is managed or what’s transpiring at any given time is important to the children’s stability and well being.”<sup>95</sup>

Lastly, there is the issue of whether the error, if any, was prejudicial. An error is prejudicial if it has a substantial likelihood of affecting the outcome of the case.<sup>96</sup> Sotheron states the “error was highly prejudicial because the updated GAL report contained mostly negative information about Sotheron.”<sup>97</sup> However, much of the

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<sup>93</sup> Stamm, 121 Wn. App. at 838.

<sup>94</sup> VRP 561.

<sup>95</sup> VRP 564.

<sup>96</sup> Carnation Co. v. Hill, 115 Wn.2d 184, 186, 796 P.2d 416 (1990).

<sup>97</sup> Appellant’s Brief at 31.

negative information in the updated report came from the GAL's own interactions with Sotheron, and the record is replete with negative information about Sotheron not reported by the GAL. Even if the second report were excluded, it is unlikely that the overall outcome of the case would be any different. Therefore it is not a valid basis for the requested relief of reversal and remand.

VI. ATTORNEY'S FEES SHOULD BE AWARDED TO PALMER

Respondent Palmer requests that this court order payment of reasonable attorney fees by Appellant Sotheron under Rule of Appellate Procedure 18.1(a), which allows such an award if the right to recover is granted by statute. RCW 26.09.140 provides for such recovery: "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." In determining whether to award fees, the appellate court must consider "the parties' relative ability to pay' and 'the arguable merit of the issues raised on appeal."<sup>98</sup> An affidavit of financial need will be filed pursuant to RAP 18.1(c).

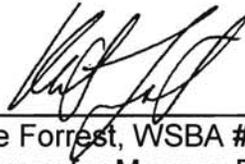
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<sup>98</sup> In re Marriage of Muhammad, 153 Wn.2d 795, 807, 108 P.3d 779 (2005) (quoting In re Marriage of Leslie, 90 Wn. App. 786, 807, 954 P.2d 330 (1998)).

## CONCLUSION

Based on the foregoing argument, this Court should deny the Sotheron's requests for relief, upholding the trial court's orders in their entirety, and award attorney fees to Palmer.

Respectfully submitted this 30<sup>th</sup> day of September, 2013.



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