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

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

In Re the Parentage of:

E.S. and C.S.,
Children,

SIMON BRUCE SOTHERON,
Petitioner/Appellant,

and

MEAGAN ANASTASIA PALMER,
Respondent.

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

The Honorable Jean Rietschel, Judge

PETITIONER/APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE1

II. ARGUMENT1

 A. THE TRIAL COURT ERRED IN FAILING TO FIND THAT PALMER WITHHELD THE CHILDREN FOR A PROTRACTED PERIOD WITHOUT GOOD CAUSE.....1

 B. THE TRIAL COURT ERRED IN IMPOSING RESTRICTIONS ON SOTHERON UNDER RCW 26.09.191(3)(G)3

 C. EVEN IF THE OTHER RESTRICTIONS WERE APPROPRIATE, THE COURT HAD NO BASIS FOR RESTRICTING SOTHERON’S ABILITY TO TRAVEL WITH HIS CHILDREN4

 D. THE TRIAL COURT WAS IMPROPERLY INFLUENCED BY THE TEMPORARY ORDERS6

 E. THE UPDATED GAL REPORT WAS IMPROPERLY ADMITTED INTO EVIDENCE6

 F. ATTORNEY FEES SHOULD NOT BE AWARDED TO PALMER8

III. CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

| | |
|---|------|
| <i>Fernando v. Nieswandt</i> , 87 Wn. App. 103, 940 P.2d 1380, <i>review denied</i> , 133 Wn.2d 1014, 946 P.2d 402 (1997) | 6 |
| <i>Guardianship of Stamm</i> , 121 Wn. App. 830, 91 P.3d 126 (2004)..... | 6, 7 |
| <i>Katare v. Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012) <i>cert. denied</i> , 133 S.Ct. 889, 184 L.Ed.2d 661 (2013)..... | 3 |
| <i>State v. Martinez</i> , 78 Wn. App. 870, 899 P.2d 1302 (1995), <i>review denied</i> , 128 Wn.2d 1017, 911 P.2d 1342 (1996) | 7 |

Statutes

| | |
|---------------------|---------|
| RCW 26.09.191 | 1, 2, 3 |
|---------------------|---------|

I.
STATEMENT OF THE CASE

Palmer's statement of the case is based almost entirely on her testimony. She correctly notes that it is up to the trial court to determine credibility. Sotheron's claims, however, are based primarily on undisputed evidence. He has challenged factual findings only to the extent that they were not supported by substantial evidence in the record.

II.
ARGUMENT

A. THE TRIAL COURT ERRED IN FAILING TO FIND THAT PALMER WITHHELD THE CHILDREN FOR A PROTRACTED PERIOD WITHOUT GOOD CAUSE

Sotheron agrees with Palmer that RCW 26.09.191 applies when a parent has withheld the children for a protracted period *and* without good cause. But the undisputed evidence shows that both elements are satisfied here. By all accounts, Palmer withheld Sotheron's children from him beginning on June 30, 2010. It is also undisputed that for two months before that she made threats to take the children away if Sotheron did not meet her demands for more money. *See* Petitioner's Opening Brief (POB) at 14. It is also undisputed that she made good on her threat immediately after Sotheron reduced his payments to \$2500 a month (which was still

250% more than the court ultimately awarded). *Id.*¹ It is likewise undisputed that Sotheron did not get to see his children again until November 20, almost five months after they were taken from him.

As Sotheron explained in the POB at 15, the trial court considered only the time period beginning on September 1, 2010, the date that Sotheron filed a proposed parenting plan. That was an error of law. *See* POB at 16-17. The trial court seemed to believe that RCW 26.09.191(3)(f) could apply only if Palmer was in contempt of a court order. But the plain language of the statute imposes no such condition. In her Response, Palmer does not attempt to justify the trial court's limitation on the time period during which the children were withheld.

Rather, Palmer focuses on the trial court's finding that there were both proper and improper reasons for the withholding. The supposedly proper reasons were "harassment, domestic violence, [and] the following of [D.P.]." However, these matters were fully aired before a Commissioner, who rejected Palmer's claims of harassment and stalking. POB at 16. Likewise, Judge Rietschel rejected Palmer's claims of a history of domestic violence. Thus, even if section .191(3)(f) could permit

¹ In the opening brief, undersigned counsel mistakenly stated that Mr. Sotheron reduced his payments to \$1500. In fact, that figure was for the amount he directly deposited into Ms. Palmer's account. As the transcript indicates, he also paid another \$1000 that month towards various specific expenses.

withholding the children for a mixture of good and bad reasons, there is no substantial evidence in this case to support legitimate reasons for withholding.

Palmer next argues that, even if the trial court erred in failing to find that .191(3)(f) applied, there is no remedy because any limitations on Palmer's parenting would be discretionary. But the portion of section .191 that the court found applicable to Sotheron was likewise discretionary. This Court cannot determine that the result would have been the same if the trial court had made findings against both parents. Even if the court finds no other errors in the trial, it should at least remand for the trial court to reconsider the appropriate parenting plan in view of the proper findings. Typically, a parent who withholds children from the other parent should have limited, and perhaps supervised, time with the children because she cannot be trusted to comply with a parenting plan.

B. THE TRIAL COURT ERRED IN IMPOSING RESTRICTIONS ON SOTHERON UNDER RCW 26.09.191(3)(G)

Palmer concedes that the trial court's imposition of restrictions was based on "speculation" but maintains that that is permissible.

Respondent's Brief (RB) at 10. She cites to *Katara v. Katara*, 175 Wn.2d 23, 39, 283 P.3d 546, 554 (2012) *cert. denied*, 133 S.Ct. 889, 184 L.Ed.2d 661 (2013). That case, however, said no such thing. Rather, the Supreme

Court upheld the admissibility of expert testimony regarding risk factors for abduction because the expert was well-qualified and had an adequate basis for his opinion. *Id.* at 38-40. To be sure, the *Katara* Court acknowledged that restrictions can be imposed without a finding that harm has occurred or that it is certain to occur. But there must be at least a “danger of serious damage.” *Id.* at 36. As Sotheron has explained, there is no substantial evidence to support such a danger in this case. *See* POB at 20-23.

C. EVEN IF THE OTHER RESTRICTIONS WERE APPROPRIATE, THE COURT HAD NO BASIS FOR RESTRICTING SOTHERON’S ABILITY TO TRAVEL WITH HIS CHILDREN

Palmer’s first argument in the trial court for travel restrictions was that she did not trust Sotheron to bring the children back to the United States. RP 1171. She also noted that it would be a long flight for young children, and that they would not be able to “reach out for help” if they “weren’t feeling safe.” *Id.*

As Palmer concedes there was insufficient evidence to justify a concern for abduction. Yet that appears to be the reason the trial court forbid such travel for 18 months. The court focused on the “high conflict nature of this action.” RP 1172. But there would obviously be less opportunity for conflict between Sotheron and Palmer while they were in

different countries. The only reason to mention “high conflict” would be speculation that Sotheron would abduct the children.

In any event, the other reasons suggested by Palmer were likewise invalid. It is true that a plane flight to Australia is relatively long, but the same could be said regarding flights to India, China, Russia, Ethiopia or the Philippines. Yet many Seattle parents make such trips with their young children in order to connect them with their relatives in the “old country.” They find the value in bonding with relatives and learning about their culture outweighs the inconvenience of a boring flight. In this case, there was no evidence that E.S. or C.S. had any physical or mental difficulties that would make travel particularly difficult for them. Further, there was some urgency in making the trip because Sotheron’s parents were soon to celebrate their 50th wedding anniversary, and they were too elderly to make the trip to Seattle. *Id.* at 1170, 1172.

Likewise, the notion that the children would not be safe in Australia was not based on any evidence. There was not the slightest suggestion that Sotheron’s parents, or anything in their neighborhood, posed any danger.

In short, the trial court abused its discretion in restricting travel. To the extent the ruling was based on the length of the journey, it was based on an untenable reason. To the extent that ruling was based on a concern

for abduction or danger to the children, it was not based on substantial evidence.

D. THE TRIAL COURT WAS IMPROPERLY INFLUENCED BY THE TEMPORARY ORDERS

Palmer maintains that the trial court focused on the mother's involvement with the children throughout their lives, rather than during the course of the temporary orders. In fact, the court noted that, historically, *both* parents had significant involvement with the children: the mother handled more of the domestic matters while the father took primary responsibility for education and school. RP 115. The court then noted that the mother's relationship with the children "is stronger *at this point* due to the level and extent of her involvement." *Id.* (emphasis added). That could only be a reference to the situation under the recent temporary orders. Palmer concedes that she urged the court to maintain the "stability" of that arrangement. The most reasonable conclusion is that the court accepted Palmer's invitation.

E. THE UPDATED GAL REPORT WAS IMPROPERLY ADMITTED INTO EVIDENCE

Palmer maintains that *Fernando v. Nieswandt*, 87 Wn. App. 103, 940 P.2d 1380, *review denied*, 133 Wn.2d 1014, 946 P.2d 402 (1997), and *Guardianship of Stamm*, 121 Wn. App. 830, 91 P.3d 126 (2004), hold that

the guardian ad litem (GAL) may present the sort of hearsay testimony that was permitted in this case. *Nieswandt*, however, has nothing to say about hearsay. It merely notes that a GAL may give a recommendation even if she is not an expert. *Id.* at 107-08.

The holding in *Stamm* is that the GAL's testimony in a guardianship jury trial was improper because she gave opinions on credibility and aligned herself with the court. *Stamm*, 121 Wn. App. at 840-41. Any statements about the use of hearsay in a bench trial were *dicta*.

In any event, the *Stamm* Court's musings on that issue were circumspect. The Court did suggest that the trial court had discretion to permit the GAL to discuss hearsay statements as they relate to the basis of her opinion. *Id.* at 838. "This is not to suggest, however, that all information relied upon by a GAL should automatically be recounted at trial. *The GAL's testimony must not be used as a vehicle to present and reiterate otherwise inadmissible hearsay.*" *Id.* at 838 (emphasis added), citing *State v. Martinez*, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017, 911 P.2d 1342 (1996) (rules governing expert testimony were not designed to enable a witness to summarize and reiterate inadmissible hearsay evidence).

In this case, the GAL's report was admitted into evidence in its entirety. The bulk of the report was the repetition of hearsay statements, some of them in multiple levels of hearsay. *See* POB at 29-30. In this case, the report was clearly a "vehicle to present and reiterate otherwise inadmissible hearsay." The trial court's suggestion that she was not considering the matter for its truth made no more sense in this context than it did in the context of expert testimony at a criminal trial. *See* POB at 30-31. If the statements in the report were not the truth, how could they support the court's findings?

Thus, the improper GAL report is another reason to grant a new trial.

F. ATTORNEY FEES SHOULD NOT BE AWARDED TO PALMER

The Court should not award attorney fees to Palmer. Sotheron has raised significant issues concerning the trial. Even if the Court were to disagree with some or all of his claims, it should find that they were arguable and made in good faith.

Sotheron is currently out of work and is unable to pay Palmer's fees. He will submit a financial declaration prior to oral argument.

**III.
CONCLUSION**

Based on the foregoing argument, this Court should reverse and remand with the following directions: for the trial court to consider appropriate restrictions on Palmer based on her withholding the children; for the trial court to strike all restrictions on Sotheron (or at least the restriction on travel); and for the trial court to revisit the parenting plan without consideration of the updated GAL report and without reliance on the provisions of the temporary parenting plan.

DATED this 13th day of November, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of the foregoing brief on the following:

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