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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

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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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PETITIONER'S OPENING BRIEF

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**David B. Zuckerman**  
Attorney for Petitioner  
1300 Hoge Building  
705 Second Avenue  
Seattle, WA 98104  
(206) 623-1595

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~~COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON~~

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**I.**  
**ASSIGNMENTS OF ERROR**

The trial court erred as to the following findings and conclusions:

**Finding of Fact 2.10(i):** that mother Meagan Palmer’s relationship with the children is “stronger at this time due to the level and extent of her involvement.”

**Finding of Fact 2.10(iii):** that mother has “performed a greater role” in parenting and that that father Simon Sotheron must deal “with the factors set forth in RCW 26.09.191(3) that court [sic] has identified as restricting his ability to parent effectively.” *See also* paragraph 2.11 below.

**Finding of Fact 2.10**

**Findings Under Paragraph 2.11:**

- that “there is a pattern of coercive behavior without physical violence in this case;”
- that “there is a history of domestic violence arrests and charges without convictions.” These should not have been considered in view of the court’s finding that there was no proof of domestic violence.
- that Sotheron “admits he pulled the phone cord” during an argument over financial charges on August 5, 2006;

- that the testimony of Dr. Arden supported a finding of coercive behavior;
- that the failure to replace Palmer's lost key to the garage demonstrated an unhealthy relationship;
- that Sotheron offered Annie Njuguna \$25,000 to terminate her pregnancy;
- that Sotheron failed to report his Nevada arrest to his DV treatment provider.
- To the extent the Court relied on the report and testimony of GAL Pamela Edgar for factual findings, the findings were invalid because Edgar had only hearsay knowledge of the facts.
- Although Sotheron does not agree with several other factual findings by the trial court, he understands that this Court will not generally weigh conflicting evidence.

#### **Other Errors**

The trial court erred in:

1. failing to find that Palmer withheld the children from Sotheron for a protracted period and without good cause;
2. imposing restriction on Sotheron under RCW 26.09.191(3)(g);
3. relying on the temporary orders when crafting the parenting plan;
4. imposing restrictions on travel without a sufficient basis;

5. admitting the updated GAL report over a hearsay objection.

All of these specific errors contributed to the overarching error: a parenting plan providing only limited residential time for Sotheron, imposing restrictions on his decision-making, and requiring him to engage in counseling.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Ms. Palmer withheld Sotheron's children from him for about six months after he refused to meet her informal demands for child support and maintenance (which were vastly greater than the sums ultimately awarded by the court). Should the trial court have placed restrictions on Palmer under RCW 26.09.191(3)(f) due to her withholding the children "for a protracted period without good cause"?
2. Did the trial court improperly place restrictions on Sotheron based on alleged coercive and controlling behavior?
3. In particular, was there any basis for restricting Sotheron's ability take his children to Australia to visit their grandparents, where there was no evidence whatsoever of a threat of abduction?
4. Did the trial court improperly rely on the temporary residential schedule when deciding on a permanent parenting plan?

5. Should the updated GAL report have been excluded on the basis that it consisted mostly of hearsay statements?
6. In view of the many errors at trial, should the Court reverse and remand for reconsideration of the parenting plan under the appropriate standards and without consideration of improper factors and inadmissible evidence?

### **III. STATEMENT OF THE CASE**

Simon Sotheron was born in Australia. He studied business computing at the University of Sydney and then went to work for Barclay's Bank. I RP 73. He left Australia in 1991 for a position in Los Angeles. *Id.* at 75. He was a lawful resident until he became a U.S. citizen in 2011. *Id.* at 76.

Sotheron moved to Seattle to work for Washington Mutual around 1994. He bought a home in the Green Lake area around that time. *Id.* at 79. He later worked for Chase Bank and then Wells Fargo. *Id.* at 83-84.

Sotheron met Meagan Palmer around 2003. I RP 90. Palmer had a six-year-old son, D.P. III RP 457. By that time, Sotheron was working on a new house on Columbia Drive, which he eventually purchased. I RP 90. Around June of 2004, Palmer and D.P. moved with Sotheron into the new

house. *Id.* at 91. The couple never married. Palmer acknowledged that Sotheron quickly became a father figure to D. P. III RP 463.

E.S., a boy, was born to Sotheron and Palmer in 2005. I RP 92.

C.S., a girl, was born to them in 2006. CP 1-6.

According to Sotheron, his relationship with Palmer was always volatile. II RP 186. If they had an argument, Palmer would quickly escalate and often hit Sotheron or grab his keys or wallet. If he tried to drive away, she would throw things at the car. *Id.* at 187. Michelle Picard, a co-worker of Sotheron's, would often overhear Sotheron's telephone conversations with Palmer. Many times, she would hear Palmer screaming profanity and also hear children's voices in the background. *Id.* at 330, 339-40.

One issue causing disputes was homework. Sotheron thought it important for children to get their homework done promptly and then have fun. He considered Palmer too lax about if and when homework was completed. I RP 102. Palmer felt that Sotheron was too strict. *See, e.g.,* III RP 467.

Sotheron called the police on one occasion when Palmer threw a picture frame at him. It missed and broke a window. II RP 189.<sup>1</sup>

Sotheron described several other incidents when Palmer attacked him physically or destroyed property. This usually happened when Sotheron tried to leave the house. *Id.* at 190-92.

Palmer's sister, Shirline Wilson, testified at trial. IV RP 772-814. She confirmed sending various emails to Sotheron concerning Palmer and the difficulties he was having with her. In one of them, Wilson stated that Palmer needed mental health treatment. Ex. 147. In another, Wilson described Palmer's "uncontrolled frustration and anger," her use of the children as "pawns," her "narcissism," her verbal abusiveness, and her lying. Ex. 148. In another email, Wilson noted that she herself had observed the sort of "fury" from Palmer that Sotheron described. Ex. 150.

Sotheron testified that Palmer would hit, pinch or spank the children whereas he would use time-outs or discussions for discipline. II RP 256-59.

Palmer reported Sotheron to the police three times; in each case the prosecutor declined to file charges. *Id.* at 193-207. In counseling sessions with Dr. Irene Arden, Palmer never mentioned physical domestic violence.

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<sup>1</sup> Palmer's version of this incident was that she threw a stack of papers without realizing the picture frame was in them. V RP 855-56.

II RP 236. Arden recommended that Palmer learn to disengage when conflicts arose. *Id.* at 240.

The couple's first separation began in October 2007 and lasted until June 2009. I RP 110. During that time, Palmer had an apartment near Sotheron's house and came over regularly. *Id.* at 96. The two divided parenting responsibilities about equally, although by Sotheron's estimate they lived with him more than half the time. *Id.* at 97. During most of the separation, Sotheron covered Palmer's living expenses, including those for D.P, who was not his child. *Id.* at 98. Even during the separation, D.P. considered Sotheron to be his father and they spent significant time together. *Id.* at 100.

The couple reconciled in July 2009, and Palmer moved back to Sotheron's house. *Id.* at 110. In February, 2010, Palmer suddenly moved out. *Id.* at 116. Sotheron had a couple of hours' notice. *Id.* Palmer showed up with a bunch of people, including her new boyfriend Robin Tafoya and some movers. *Id.* She left all three children with Sotheron. *Id.* at 117. They were present during the move. *Id.* After several days, she got back in contact, and they started exchanging the children. *Id.*

Sotheron and Palmer were very cooperative about sharing time with the children based on their schedules. *Id.* at 121. *See also* Ex. 19. By Sotheron's calculations, the children were with him nearly 60% of the

time. I RP 122; Ex. 15. As discussed in section IV(B) this changed in June 2010 when Palmer withheld Sotheron's children from him because he would not pay her all the support she requested (which was over four times the amount due under Washington's schedule). This led to Sotheron filing a petition for a parenting plan. I RP 170.

In December, 2010, four-year-old C.S. was found wandering down Jackson Street (in the Central District of Seattle) in her pajamas at about 6:30 A.M. A passerby called 911, and the police responded and wrote a report. C.S. said she was looking for her mother. She had left the ground-floor door to their apartment wide open. An officer entered the home and found 13-year-old D.P. and 5-year-old E.S. asleep. D.P. told him that their mother went out for the night with some friends and provided Palmer's number. She did not respond to repeated phone calls, but ultimately the police contacted her through her boyfriend, Robin Tafoya. Palmer stated that she had too much to drink that night so she stayed at Tafoya's house to sleep it off and did not hear the phone ringing in the morning. The incident was reported to CPS. It found the matter "concerning" but did not institute a dependency action. Ex. 24; Ex. 37. At trial, Palmer contended that the problem was not that she was drunk but that she did not have anything to eat. V RP 1021.

Sotheron was ordered to engage in domestic violence counseling after an incident in Las Vegas with his new girlfriend, Annie Njuguna. IV RP 640. Njuguna explained at trial that she broke into Sotheron's phone in order to read his emails. When she found some that spoke poorly of her she confronted Sotheron. He then took his phone but she struggled to get it back so she could finish reading the emails. Eventually, she decided to leave the room but Sotheron tried to convince her to stay and discuss the emails. V RP 910-11.

Parenting evaluator Pamela Edgar noted that Sotheron's psychological testing showed nothing out of the normal range. III RP 591-92. Palmer's tests could not be evaluated because of her defensiveness or deliberate deception. *Id.* at 589-90. Nevertheless, Edgar recommended restrictions on Sotheron's residential time based largely on her view that he was inflexible and had unreasonably high expectations for the children.

Several witnesses testified to the loving relationship between Sotheron and his children. *See* II RP 329-32 (Michelle Picard); III RP 416-19 (Stephanie Sandino-Chang); III RP 426-31 (Sherry Goong); III RP 431-35 (Marcus Dabney).

The trial court rejected Palmer's argument that restrictions should apply to Sotheron based on domestic violence. CP 105. Nevertheless, the

court imposed restrictions under RCW 26.09.191(3)(g) (“such other factors or conduct as the court expressly finds adverse to the best interest of the child”) based on a “pattern of coercive behavior without physical violence.” *Id.* The court recognized that the domestic violence counseling Sotheron had been undergoing was not “necessarily the most appropriate treatment for the father.” CP 107. However, “if father seeks to modify the parenting plan at a later date he shall be required to show verification of treatment participation” in a program of his choice. *Id.*

In the parenting plan, the court restricted Sotheron to alternate weeks of Wednesday night or the weekend with his children. CP 109. The court also gave Palmer the authority for decisions regarding education and non-emergency health care. CP 114. The court prohibited the parents from removing the children from the State of Washington without court approval or agreement of the other parent for 18 months. CP 113.

On September 12, 2012, the court denied Sotheron’s motion for reconsideration. CP 125. This appeal was timely filed on October 12, 2012. CP 126-162.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

A trial court's ruling regarding a parenting plan is reviewed for abuse of discretion. *Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Abuse of discretion is generally defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)), *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1996).

*Marriage of Littlefield*, 133 Wn.2d at 47.

The trial court's findings of fact will be upheld if supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Questions of law are reviewed de novo. *See King v. Snohomish County*, 146 Wn.2d 420, 423-24, 47 P.3d 563 (2002).

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

RCW 26.09.191 includes the following:

(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: . . .

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

As noted in section III, Palmer suddenly moved out of Sotheron's house in February 2010, initially leaving the children with Sotheron. The parties shared parenting time approximately equally for about five months.

Shortly after Palmer moved the parties informally agreed that Palmer would look for a new job and Sotheron would support her until she found one. I RP 124-25. Between February and June 2010 he provided her approximately \$25,000. *Id.* at 125. He was paying as much as \$4500 per month at one point in support of Palmer and the children. *Id. See also* Ex. 18. This included significant support for D.P., for whom Sotheron had no legal obligations. *Id.*

By the end of April, however, Palmer changed her mind. She said she wanted to go back to school and did not intend to find work. She wanted Simon to increase the amount of money to her and also to buy her a new car. I RP 123.

On April 28, 2010, Palmer sent Sotheron a text message, which requested he send her all of the children's clothing and some other belongings.<sup>2</sup> Ex. 16. She also demanded "Promised payment of all medical/dental/choir bills."<sup>3</sup> *Id.*

If all of these issues are not addressed and resolved by this Friday along with your child support payment for May then please do not pick the children up from preschool and if that's the case I will file for full custody of the children because clearly you have choosen [sic] to neglect some of your parental responsibilities.

*Id.* See also I RP 150. Sotheron's understanding was that Palmer expected him to continue sending about \$4500 a month. *Id.*

On May 21, Palmer sent a text message which included the following:

You are too cheap to have your daughters cavities filled or help me have a free piano tuned so [D.P.] can play because you refuse to give me his keyboard but you can take your new carless single mom and her fatherless child to the greatwolf lodge. Starting today I will be keeping [E.S.] and [C.S.] indefinetly [sic] and filing for full custody and a restraining order first thing on Monday. . . . If you don't want me to file for child support and full custody then I need you to honor all of your previous commitments to the children and I.

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<sup>2</sup> Sotheron thought it appropriate that the children keep their rooms intact at his house since they stayed with him at least half the time. II RP 377. He soon purchased various items for use at Palmer's new residence, including beds and a vacuum cleaner. *Id.* at 377-79.

<sup>3</sup> The only child in a choir was D.P, who was not Sotheron's son.

Ex. 17. Palmer then set out a long list of demands for property and money. *Id.* She concluded that she was now “ready to play hardball to ensure my children and I are taking [sic] care of.” *Id.*

Disagreements over money lasted until June 28. I RP 165. On that date, Sotheron calculated that the maximum amount of child support a court might order was \$1500 per month and he deposited that amount of money into Palmer’s account. (This sum is approximately 50% greater than the child support ordered after trial.) Immediately after that, Palmer made good on her threat to deprive Sotheron of his children. *Id.*

Sotheron got no response at first when he tried to contact Palmer. *Id.* at 167-68. On July 30, 2010, Palmer sent him a text message saying she would not allow him any contact with his children. *Id.* at 168. It includes the following: “You are to have no contact with my children or myself in anyway. I will not tolerate your irrational behavior and harassment anymore. If you choose to disregard my request I will immedietly [sic] file a no contact order.” Ex. 22.

At that point, Sotheron reached out for legal counsel to determine what he could do to see his children. That resulted in the filing of this action on July 30, 2010. I RP 170; CP 1-6.

Sotheron filed a proposed parenting plan on September 1, 2010. Supp. CP<sup>4</sup> \_\_\_\_ (Dkt. 13). A hearing on that matter was set for September 16. Palmer promptly responded by obtaining an ex parte temporary order of protection on September 9, which prohibited Sotheron from seeing his children. Supp. CP \_\_\_\_ (Dkt. 17); I RP 171; Ex. 3. A hearing on that matter was initially set for September 23. Palmer then declined to appear on September 16 for the hearing on the proposed parenting plan, causing the court to continue both matters to October 7. Ex. 4. “At the hearing, the respondent/mother shall give her reasons why her petition for order of protection should not be dismissed for failure to appear for the hearing on 09/23/2010.” *Id.* On October 7, Palmer obtained another extension of time to November 4, 2010. Ex. 6. The court also granted Sotheron limited, supervised visitation. Ex. 7. When he finally saw the children on November 20, they called him “Simon” rather than “Dad.” I RP 174-75.

On November 3, Palmer filed a large stack of untimely documents, forcing another continuance until November 18. Supp. CP \_\_\_\_ (Dkt. 35). Much of the content was copied verbatim from the King County *Domestic and Dating Violence* handbook. See Supp. CP \_\_\_\_ (Dkt. 38) (Sotheron’s

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<sup>4</sup> A Supplemental Designation of Clerk’s Papers is being filed today with the King County Superior Court.

response brief at p.2). On November 18, Palmer requested another continuance to December 7 so that an attorney could be present. Ex. 9. The court ordered her to pay for the time of Sotheron's attorney in appearing that day. It also authorized some additional, unsupervised visitation time for Sotheron. *Id.* Each of these continuances was accompanied by a reissuance of the temporary protection order. *See* Ex. 5; Supp. CP \_\_ (Dkt. 29); Supp. CP \_\_\_ (Dkt. 35).

Finally, on December 7, Commissioner Jacqueline Jeske heard testimony from Palmer and Sotheron. She denied Palmer's motion for a protection order, finding that Palmer had not proved domestic violence or stalking by a preponderance of the evidence. I RP 175-76; Ex. 12. She also entered a temporary parenting plan providing approximately equal time to both parents. I RP 175; Ex. 11.

Palmer acknowledged in her testimony that Sotheron was unable to obtain any contact with his children from June to November. V RP 989-91.

The trial court found that RCW 26.09.191(3)(f) did not apply. VI RP 1108. The court agreed that Palmer withheld the children, but without explanation considered only the time after July 30, 2010 (the date the petition was filed). VI RP 1107. She then seemed to further diminish the time period. "Whether or not there was a protracted period, the period

under the mother's control was relatively short, from September 30<sup>th</sup> until the court was issuing the orders." VI RP 1108. As for the issue of good cause, the court stated:

From the evidence of the emails, some of the reasons were money promised for support, money being sought, the holding of possessions 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. . . . 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.

*Id.* at 1107-08.

There does not appear to be any published case interpreting RCW 26.09.191(3)(f). This Court should find that it was an abuse of discretion for the trial court to fail to make the finding.

First, there is no dispute that Palmer withheld the children from Sotheron for five months. It is not clear why the court believed it should not consider the time before a petition was filed. The issue is not whether Palmer was in contempt of court, but whether she prevented Sotheron from seeing his children. The state of the court proceedings is at most relevant to whether she had "good cause" for her actions.

Neither the statute nor any case law appears to define the meaning of a "protracted" period of time. The touchstone should be the effect on the children, since parenting issues are primarily controlled by the "best

interest of the child” standard. *See, e.g.*, RCW 26.09.002 (“In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties’ parental responsibilities.”) Here, Sotheron’s young children had never before been separated from him for more than a few days. Even the initial one-month separation prior to legal filings was undoubtedly traumatic for them. That the separation continued for an additional four months was unconscionable. At that point, the children no longer called Sotheron “Dad.”

Second, it is clear that Palmer acted without good cause. After leaving Sotheron for her new boyfriend, she did not initially voice any concerns about Sotheron’s time with the children. In fact, she initially disappeared from sight, leaving the children with Sotheron. At the same time, she insisted that Sotheron continue to support her and all three children, and far more lavishly than required by Washington’s child support schedule. She expressly stated that she would withhold the children if he did not make the payments she demanded. When Sotheron eventually insisted on limiting his contributions to \$1500 – which was still well beyond the child support schedule – Palmer immediately made good on her threat. She did not make any claims of “harassment” or “irrational behavior” at that time.

After Sotheron filed a proposed parenting plan, Palmer immediately responded by seeking a protection order based on domestic violence. Although the superior court ultimately dismissed the petition as unfounded, Palmer managed to keep Sotheron's children away from him for another four months by repeatedly continuing the hearing (in one instance by simply failing to show up).

Thus, when the statute is properly interpreted, Palmer unquestionably withheld the children for a protracted period of time without good cause. The trial court abused its discretion in failing to impose restrictions on her.

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

A trial court may not impose restrictions on residential time without a finding that one of the provisions of RCW 26.09.191 applies. *Katare v. Katare*, 125 Wn. App. 813, 825-26, 105 P.3d 44 (2004), *review denied*, 155 Wn.2d 1005, 120 P.3d 577 (2005). Further, "any limitations or restrictions must be reasonably calculated to address the identified harm." *Id.* at 826 (footnote omitted). "Parental conduct may only be restricted if the conduct would endanger the child's physical, mental, or emotional health." *Marriage of Wickland*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996). Imposing restrictions requires "more than the normal . .

. hardships which predictably result from a dissolution of marriage.”  
*Katara v. Katara*, 175 Wn.2d 23, 36, 283 P.3d 546 (2012), *cert. denied*,  
133 S.Ct. 889, 184 L.Ed.2d 661 (2013), quoting *Marriage of Littlefield*,  
133 Wn.2d at 55.

Courts should be particularly careful about imposing restrictions when, as here, they are made under RCW 26.09.191(3)(g). The other bases for restrictions under .191 require the presence of a specific, harmful factor. For example, there can be no doubt that a history of domestic violence under RCW 26.09.191(2)(a) justifies restrictions. But the trial court here expressly rejected that provision. Subsection .191(3)(g) permits restrictions based only on “[s]uch other factors or conduct as the court expressly finds adverse to the best interests of the child.” This is so open-ended that there is great risk of a judge imposing restrictions based only on personal preference.

Here, the trial court found a “pattern of coercive behavior without physical violence.” *See* CP 105. It based that on several faulty premises.

First, the Court frankly considered a “history of domestic violence arrests and charges without convictions.” *Id.* These incidents proved nothing more than that Palmer knew how to use the police to her advantage. In none of the incidents did the prosecutor even see fit to file

charges. Both the commissioner who considered Palmer's motion for a protection order and the trial judge found no proof of domestic violence.

Second, the trial court found that Sotheron "admits he pulled the phone cord" during an argument over financial matters on August 5, 2006. *Id.* In fact, Sotheron explained that someone else, apparently Meagan, disabled the phone by removing the router. II RP 200-01. The police officer's testimony is consistent with that. II RP 450-51. Sotheron was trying to explain to the officer that he coiled up a phone cord only after the phone had been made useless.

Third, Dr. Arden's testimony did not truly support the court's finding. In couple's counseling, she concluded that both Palmer and Sotheron needed to "disengage" from arguments. She found Sotheron to be controlling only in the context of the home remodel. There was no mention of domestic violence or coercion even when Palmer met privately with Dr. Arden. II RP 231-50.

Fourth, as discussed below in section IV(F), the court should not have relied on hearsay presented through the GAL, Pamela Edgar.

Fifth, the court accepted that the reason Ms. Palmer could not enter the garage at the time of one argument may have been because she lost the key. The court concluded, however, that "if this family had operated within reasonably usual bounds, even if she had lost the key, it would have

been replaced.” CP 105. This reasoning was faulty because there was no testimony about how recently the key was lost.

Sixth, the court found that Sotheron offered Annie Njuguna \$25,000 to terminate her pregnancy (CP 106), even though both Sotheron and Njuguna denied that. *See* V RP 907 (testimony of Njuguna); III RP 412 (testimony of Sotheron).

Seventh, the court improperly relied on the notion that Sotheron had failed to report his Nevada arrest to David Vandegrift, his DV treatment provider. CP 106. This shows a misunderstanding of the sequence of events. Sotheron was ordered to attend DV treatment only after Ms. Njuguna contacted GAL Pamela Edgar and told her of the Nevada incident. Ms. Edgar then convinced a commissioner to modify the temporary parenting plan, giving Sotheron less time with the children and requiring him to engage in DV counseling. *See* Ex. 14. As Sotheron was aware, Edgar and Vandegrift were in contact with each other. *See* Ex. 128. Sotheron naturally assumed that Vandegrift was aware of the Nevada incident since that was the very reason Sotheron was sent to Vandegrift. At trial, Vandegrift testified that he was aware “early on” that the Nevada incident with Ms. Njuguna was the precipitating event for treatment. IV RP 640. Vandegrift did not express concern that Sotheron failed to mention the incident at intake. VI RP 606-53.

In short, the court's finding of coercive and controlling behavior was not based on substantial evidence and should be reversed. Accordingly, this Court should likewise reverse the restrictions placed on Sotheron, including the limitations on his parenting time and decision-making, and the requirement that he engage in counseling before seeking a modification of the parenting plan.

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

As noted in section C, above, any restrictions on parenting must be reasonably calculated to address an identified harm. Even if the trial court had a legitimate basis to restrict Sotheron's residential time and decision-making, it had no reason at all to restrict him from taking the children out of the State of Washington.

When the judge announced her oral ruling, she used Palmer's proposed plan as a starting point for many of the provisions. When she reached paragraph 3.13, she stated:

3.13, which regards removing from Washington. It says, "without court approval." I'm going to add, "or by agreement of the parties."

VI RP 1117.

When the parties returned to court over a month later for presentation of final orders, Sotheron requested clarification that he could take his children to visit their paternal grandparents, who lived in Australia. He noted that they would soon celebrate their 50<sup>th</sup> anniversary. VI RP 1170. The Court responded: “I haven’t precluded travel. I haven’t made any special arrangements for travel.” *Id.* Palmer then reminded the judge that she had previously voiced approval of her paragraph 3.13. The judge then correctly noted: “I’m not sure there’s any showing that there’s a likely abduction on this case or anything like that. There was no testimony, so.” *Id.* at 1171. Palmer’s attorney responded that “Ms. Palmer does have trust issues with Mr. Sotheron.” *Id.* Sotheron’s attorney pointed out that the children should have an opportunity

to develop a relationship with [Sotheron’s] extended family. And the only way that he can do that realistically given the age of his parents is to be able to travel there with them.”

*Id.* at 1172. The Court resolved the dispute by limiting paragraph 3.13 to “the next 18 months.” Her only basis for the restriction was as follows:

Given the 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.

*Id.* at 1172-73.

The Washington Supreme Court recently addressed the issue of travel out of the country in *Katara v. Katara*, 175 Wn.2d 23, 283 P.3d 546 (2012). In that case, the father, an Indian citizen, had made threats to abduct the children to India. He had strong ties to India and had engaged in planning activities evidencing his intent to move there, including an attempt to obtain the children's passports. *Id.* at 34. The mother pointed out that India was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, "which provides for mandatory summary proceedings in cases of international child abduction." *Id.* at 30. "The treaty provides a remedy only if both countries are signatories." *Id.* An expert testified that the father presented several risk factors regarding abduction and the trial court found a significant danger of abduction. *Id.* at 33-38.

Here, by contrast, the trial court acknowledged that there was no showing that Sotheron was likely to abduct the children to Australia. In fact, the issue did not come up at all during the trial. Sotheron has resided in the United States since arriving here in 1991 at the age of 22. I RP 72. He became a U.S. citizen in 2011 after twice extending his lawful visa. *Id.*

at 75-76. As the trial testimony indicates, he owns two houses in Seattle, and all his business and social connections are in this area. His desire to take his children to Australia during his residential time is understandable. It is important for children to connect with their extended family, and particularly with grandparents. *Marriage of Maurer*, 245 Or. App. 614, 634-35, 262 P.3d 1175 (2011).

Further, unlike India, Australia has signed the Hague Convention. In fact, it was one of the first handful of countries to do so.<sup>5</sup>

Palmer's only reason for the restriction was a vague concern about "trust issues." Further, the Court noted that the children were young and that this was a "high conflict" case. None of those factors are unusual in divorce cases. Significantly, Sotheron has *never* withheld his children from their mother. Rather, the undisputed testimony was that he was cooperative with transfers during all periods of separation. The same cannot be said for Palmer. *See* Section IV(B) above.

Thus, there was no evidence and no finding to support the court's restriction on travel during Sotheron's residential time. As a matter of law, the trial court abused its discretion in that regard.

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<sup>5</sup> *See* U.S. Department of State, *Hague Abduction Convention Country List*, available at [http://travel.state.gov/abduction/resources/congressreport/congressreport\\_1487.html](http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html)

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

As discussed in section IV(B), above, the court signed a temporary parenting plan on December 7, 2010, providing for essentially equal time with each parent. This was consistent with the practice of the parties during most of the several years they lived separately. On July 6, 2011, however, Palmer obtained an amended parenting plan providing for Sotheron to have his children either Wednesday night or the weekend on alternating weeks. Ex. 14.

At trial, Palmer's counsel argued that the court should keep the temporary plan to maintain the "stretch of stability" that the children had while waiting for the trial. VI RP 1087. The trial court agreed, finding that the mother's relationship with the children was stronger at the time of trial "due to the level and extent of her involvement." CP 104.

The Court of Appeals dealt with a similar situation in *Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006). In that case, as here, the mother alleged that the father sexually abused their young daughter. *Id.* at 226. The mother obtained a protection order during the lengthy wait for a trial. *Id.* The trial judge found the allegations were unproven, but also noted that he could not say the abuse did not happen. *Id.* at 227. Relying on RCW 26.09.191, the court restricted the father's time with the daughter

based on “substantial impairment of emotional ties” between the father and daughter.

The Court of Appeals found no substantial evidence to support the restrictions. *Id.* at 233. In particular, there was insufficient evidence that the father’s “involvement or conduct” caused the restricting factor. *Id.* at 234. “On the contrary, the evidence shows only that Watson did the most parenting he could under the restrictive conditions available to him.” *Id.* at 234 (internal quotation marks omitted). It was improper for the trial court to “permit the effects of the lawsuit itself to constitute grounds for modifying a parenting plan, inviting potential abusive use of conflict.” *Id.* The court also noted that “the provisions of a temporary parenting plan or other temporary order should not adversely affect the final determination of a parent’s rights.” *Id.*, citing RCW 26.09.191(4) and RCW 26.09.060(10)(a). *See also, Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469, *review denied*, 144 Wn.2d 1013, 31 P.3d 1184 (2001) (trial court improperly relied on mother’s “success as a temporary residential parent as a factor in naming her the permanent primary residential parent”). “The trial court abused its discretion when it imposed continued visitation restrictions after concluding that the sexual abuse allegations were unproven.” *Watson*, 132 Wn. App. at 235.

Similarly, in this case, the mother turned herself into the primary parent, first by essentially abducting Sotheron's children, later by making unfounded allegations of domestic violence, and finally by convincing a commissioner to limit Sotheron's time prior to trial. By all accounts, Sotheron's children lived with him at least half the time before this action was filed. The trial court therefore erred in relying on the mother's purported "success as a temporary residential parent" when crafting the permanent parenting plan.

F. THE UPDATED GAL REPORT WAS IMPROPERLY ADMITTED INTO EVIDENCE

Palmer moved to admit the updated GAL report (Ex. 128).

Sotheron objected to the report on the grounds that the GAL was biased<sup>6</sup> and that most of the report related inadmissible hearsay. I RP 49-50.

Counsel was correct about the hearsay nature of the report. For example, the report contains:

- A lengthy summary of an interview with Ms. Palmer, which in turn includes double-hearsay statements related to Palmer by the children's teachers, the children, Robin Tafoya (Palmer's new boyfriend), and DV treatment provider David Vandergrift. It also

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<sup>6</sup> Sotheron argued the bias issue initially in his trial brief at 11-16. CP 37-42.

contains third-hand statements of Annie Njuguna and Sotheron, related to Palmer by the children. Ex. 128 at 2-5.

- Statements from David Vandergrift, including double-hearsay statements from Annie Njuguna to Vandergrift. *Id.* at 9-10.
- Statements from E.S.'s teacher, Teresa D'Augustino *Id.* at 11.
- Statements from C.S.'s teacher, Shirley Larrison. Ex. 128 at 11-12.

The trial judge did not dispute that the report largely consisted of hearsay, but believed she could “consider the hearsay insofar as that it’s a reason that she bases her opinions but it doesn’t establish the truth of the matter asserted.” I RP 82.

The U.S. Supreme Court recently rejected such reasoning in *Williams v. Illinois*, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). The issue in that case was whether the Confrontation Clause prohibited an expert DNA witness from testifying based on information obtained from other analysts. The Illinois Supreme Court affirmed on the basis that the Cellmark report was not used for the truth of the matter asserted but only as a basis for the expert’s opinion. *Id.* at 2231-32.

On review by the U.S. Supreme Court, five Justices rejected the state court’s reasoning. Justice Kagan, writing for four Justices, explained that when a witness repeats an out-of-court statement as the basis for a conclusion “the statement’s utility is then dependent on its truth.” *Id.* at

2268. “If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness’s conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies.” *Id.* at 2268-69. Justice Thomas, writing only for himself, agreed on this point: “There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert’s opinion and disclosing that statement for its truth.” *Id.* at 2257.

Only four Justices accepted the state court’s reasoning. *See* opinion of Justice Alito, *id.* at 2233-41. Thus, a majority of the Court unequivocally rejected the notion that out-of-court statements relied on by an expert witness satisfy the Confrontation Clause as long as they are not offered for the truth of the matter asserted.

Although the Confrontation Clause does not apply in a civil case, the same reasoning should apply here. The hearsay statements contained in the GAL’s report could support her opinion only if they were true. Thus, if they were not being considered for the truth of the matter asserted, they should not have been considered at all.

This error was highly prejudicial because the updated GAL report contained mostly negative information about Sotheron.

**V.**  
**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 11<sup>th</sup> day of July, 2013.

Respectfully submitted,



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David B. Zuckerman, WSBA #18221  
Attorney for Simon Sotheron