FILED
SUPREME COURT
STATE OF WASHINGTON
10/12/2023
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FILED
Court of Appeals
Division I
State of Washington
10/11/2023 4:16 PM

102420-7

Court of Appeals No. 843427-1

King County Superior Court No. 21-3-02412-2 SEA

IN THE COURT OF THE SUPREME COURT OF THE STATE OF WASHINGTON No.102420-7

PHAVY PEL
APPELLANT, PRO SE
v.

LAURENCE COATES BATEMAN
RESPONDENT.
RESPONDENT'S ATTORNEY: LESLIE J. OLSON

MOTION TO AMENDED APPELLANT'S PETITION FOR DISCRETIONARY REVIEW 13.4

Phavy Pel
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Honorable Justices of the Supreme Court of Washington State,

Respectfully requesting to Amend the Petition for Review Rap 9.10 and Rule 15. Multiple attempts and security issues impacted my ability to upload the file on September 25, 2023 via electronic filing to the Supreme Court of Washington instead, the system took the test file in error. Attempts the next day on September 26,2023 took. I have attached the Amended Petition for Review to this motion and filed it as well.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Word Count: 154

10/11/2023

Phavy Pel Date

Court of Appeals No. 843427-1

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IN THE COURT OF APPEALS

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DIVISION I

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LAURENCE COATES BATEMAN
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RESPONDENT'S ATTORNEY: LESLIE J. OLSON

AMENDED-APPELLANT'S PETITION FOR
DISCRETIONARY REVIEW 13.4

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2. THE COURTS ABUSED ITS DISCRETION BY FINDING THAT THE MOTHER REPUDATED THE CR2A BECAUSE THE FINDING LACKS SUBSTANTIAL SUPPORT IN THE RECORD.

3. THE COURTS ABUSED ITS DISCRETION BY FINDING OF ABUSIVE USE OF CONFLICT BECAUSE THE MOTHER WAS GRANTED AN EXPARTE EMERGENCY TEMPORARY PROTECTION ORDER AND WANTED SOBER VISITATION SUPERVISORS NOT THE DRUG ADDICTED PARTERNAL GRANDPARENTS FOR THE FATHER'S VISITS.

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I. IDENTITY OF PETITIONER

Phavy Pel, Pro Se is the mother of S.L.B, A.M and J.M. This case is regarding S.L.B. Ms. Pel is the custodial parent of the two older siblings. She is the Respondent in the trial court and Petitioner here.

II. CITATION TO COURT OF APPEALS DECISION

Peititioner seeks review of the decision of the Court of Appeals -Division I, In regards to the parenting of SLB. The court affirmed in the parenting plan, child support in favor of the Petitioner King County, holding that Ms. Pel's claims were barred by RCW 26.09.191(3) (e) and repudiated CR 2A. Ms. Pel seeks review of the Courts decision pursuant to RAP. 13.4 (b), because the Court overlooked and misapprehended the law. A motion for reconsideration was filed with the Court of Appeals and denied on August 25, 2023.

ISSUES PRESENTED FOR REVIEW

These three issues are presented for review:

A. The first issue has to do with the meaning behind **abusive use of conflict** RCW 26.09.191(3)(e) by the parent which creates the danger of serious damage to the child's psychological development…" the Courts finding, that an Exparte Emergency Temporary Protection Order **was granted** and pending a Final Protection Order, that by not using paternal grandparents to supervise visitation for the child, is abusive use of conflict. [1]

B. The second issue has to do with the application of inherent fundamental constitutional rights of a mother for a child concerning additional future harm to the child, defines "domestic violence" RCW 26.50.010(3) after witnessing her mother being physically harmed by

[1] Court of Appeals- A pg. 4

Laurence during an exchange after that incident[2] an Ex-parte Emergency Protection Order was granted, pending a final protection order.

C. The third issue has to do with the the Court of Appeal and Pro-tem Judge Ponomarck finding[3], that Ms. Pel repudiated the CR2A. This very issue was addressed by Judge Holloway when the temporary family law parenting plan orders[4] were entered on June 30, 2021 for Case#21-3-02412-2. There was a finding that Ms. Pel had **not** repudiated the CR2A, that **it was the the lack of follow through on the Petitioner Laurence's attorney Leslie Olson for not filing the final orders that the case#19-2-28694-6 was administratively dismissed**.

[2] SUB#181 pg. 676-688 New evidence of current case# 22-2-15253-2 Summary judgement of Laurence physically harming Ms.Pel

[3] Court of Appeals pg. 5-6

[4] SUB#87 pg.646-648 Temporary Family Law Order

STATEMENT OF THE CASE

In this parenting case, the court entered RCW 26.09.191(3)(e) findings against the mother that lack substantial support in the record, using these findings to enter a restricted plan that allows the mother only every other weekend starting afterschool Friday-Monday morning, every Wednesdays, only 2 weeks of summer vacation, and restricted holidays. When the mother had a 50/50 hybrid plan prior to litigation.

The Courts found that the mother abused conflict in a way that endangers or damages the psychological development of a child, but the two allegations of abuse of conflict was when the father claimed that the mother's highly corroborated request for domestic violence protection for visitation supervisors to be sober, and repudiating CR 2A amounted to abuse of conflict. This is insufficient to support a restriction.

The Courts parenting plan deprives 8 year old child of a meaningful relationship with her mother for the next 10 years and fails to recognize the fundamental importance of the parent-child

relationship to the welfare of the child. This parenting plan must be reversed and remanded for proceedings that result in findings based on substantial evidence that recognize the mother's importance to the child's welfare.

ARGUMENT

Review should be accepted under one or more of the tests established in Rap 13.4 (b).

Finding of Abusive use of Conflict and repudiated CR 2A:

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

Washington v. Glucksberg, 521 U.S. 702, (1997):

The question in this case is whether the 14th Amendment specifically the Due Process Clause protects the fundamental rights of parents to direct the care, upbringing and education of their children. *Id* at 720. Can a request without a motion for supervised visitation with paternal grandparents or request of professional supervision denied by Commisioner Lack be consider Abusive Use of Conflict per RCW 26.09.191 (e) (f)? Stated simply, does the mother have the ability to protect her

child from additional harm when a parenting plan is not in place only an Exparte Emergency Protection Order was granted?

Exparte Emergency Protection Order was granted and according to the Washignton Supreme Court, the Consistitution permits a state to interfere with the rights of parents to rear their children only to prevent harm or potential harm to a child. [5]Section 26.10.160(3) …. it does not show the threshold showing harm." Id, at 15-20,969 F.2d at 28-30.

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

***In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014):**

Holds that the provisions of RCW 26.09.191(3) "are typically invoked only after identifying a specific, and fairly severe, harm to the child." Mere matters of parenting style do not justify invoking the statute. *Id.* The Courts finding that preferred the father's parenting style

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[5] CP#253- 04/20/2019 –Sophya's Birthday with additional people a video- Shows paternal grandmother Linda Morrow in drug/alcohol induced state

verses the mother's parenting style for the paternal grandmother to supervise visitatation for the father is not Ms. Pel engaging in abusive use of conflict.

"[A]ny limitations or restrictions imposed [in a parenting plan] must be reasonably calculated to address the identified harm." In re Marriage of Katare[I], 125 Wn.App. 813, 826, 105 P.3d 44 (2004). RCW 26.09.002 recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship should be fostered unless inconsistent with the child's best interests. RCW 26.09.187(3)(a) provides that the trial court should make residential provisions for children that encourage each parent to maintain a loving, stable, and nurturing relationship with the child. Here, without substantial evidence in the record to support .191 findings, the Courts limited the child's time with her mother to this restricted schedule for the next 10 years

without considering an increase of residential time overtime for the best interest of the child.

RCW 26.09.191(1) prohibits the court from ordering mutual decision-making if a parent is found to have physically abused a child. Did the trial court abuse its discretion by ordering sole decisionmaking when there is not substantial evidence supporting the finding of child abuse?

The trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). Martha Wakenshaw has a Masters in Counseling., is licensed to conduct parent-child observations, has been conducting them for well over 25 years, and has testified in literally dozens of court proceedings as an expert since the late 1990s. Here, when the mother moved to have Martha Wakenshaw admitted as an expert, Pro-tem Judge Ponomarck stated "Advise

both parties that she was his daughter's counseler[6]." Pro-tem Judge Ponomarck finding that Martha Wakenshaw's "credentials as provided on her CV were questionable and was not qualified to perform a parent-child observations and to provide an expert opinion on increase time with the child and the mother." Did Pro-tem Judge Ponomarck abuse his discretion in refusing to admit Martha Wakenshaw, LMCH,MA as an expert and finding that she was unqualified to perform a parent-child observation and her opinion on increase residential time for Ms. Pel?

A reviewing court must defer to the trial court's credibility findings unless those findings lack substantial supporting evidence in the record. In re the Parenting and Support of M.M.M.[7]

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[6] CR pg.578, 591

[7] In re the Parenting and Support of M.M.M. No. 81788-4-I - Appendix

Here, the trial court decided that the mother and all her witnesses lacked credibility. This finding lacks substantial supporting evidence in the record because the mother and her witnesses corroborated one another on all important points and the only points that did not match were extremely minor details. Further, the trial court failed to take the father's domestic violence behavior, some of which he admitted in court, into account in the credibility determinations.

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

One would be hard-pressed to think a mother's inherent fundamental right to raise her child(s) as she sees fit would not be a significant question of law under the Constitutions of the State of Washington and the United States.[8]

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[8] 14th Amendment of the Constitiution of the United States

4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This petition involves issues of **substantial public interest that should be determined by the Supreme Court.**

State v. Verharen, 136 Wash. 2d 888, 907 (1998) ("[T]he argument is of constitutional magnitude, debatable, and a matter of first impression for this state, and thus could not be "frivolous " as that term has been previously defined. See Moorman v. Walker, 54 Wn. App. 461,466, 773 P .2d 887 (1989). ") In re Combs, 353 P.3d 631 (2015) ("When determining the degree of public interest involved, courts consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question. Id; In re Mines, 146 Wash. 2d 279, 285, 45 P.3d 535 (2002).") In In re Pers. Restraint of Mattson, 166 Wash. 2d 730, 736, 214 P .3d 141 (2009) the court

tells us what matters in determining the concept of "substantial interest": Nevertheless, we may retain and decide a case if it involves matters of continuing and substantial interest. *Id.* We consider three factors when determining whether the issue presents a continuing and substantial public interest: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question.'

AWARD OF ATTORNEY FEES UNDER RAP 18.9(A)

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

An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. Tiffany Family Trust Corp. v. City of Kent, 155

Wash. 2d 225,241, 119 P.3d 325 (2005). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. Id. Advocates v. Hearings Bd., 170 Wash. 2d 577, 580-81 (2010) ("Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. Because the action was not frivolous in its entirety, the Court of Appeals should not have awarded attorney fees as sanctions.")

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

In re Miller, 162 Wn. App. 1041 (2011) ("Washington courts hold an appeal is "frivolous" if there are no debatable issues upon which reasonable minds might differ and the appeal is so totally devoid of merit 14 that there was no reasonable possibility of reversal. RAP 18.9(a); See Fay v. Northwest Airlines, Inc., 115 Wash. 2d 194, 200-01, 796 P.2d 412 (1990).") Bill of Rights Legal Foundation v. Evergreen State College, 44 Wn. App. 690, 698 (1986) ("In

determining whether an appeal is brought for delay under RAP 18.9(a), 'our primary inquiry is whether, when considering the record as a whole, the appeal is frivolous, i.e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal.'" All doubts as to whether an appeal is frivolous should be resolved in favor of the appellant.

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest.

Marriage of Horner, 151 Wash. 2d 884, 891-92 (2004) ("A case is moot if a court can no longer provide effective relief" Orwick v. City of Seattle, 103 Wn.2d 249,253,692 P.2d 793 (1984). As a general rule, this court will not review a moot case. Id. However, this court may review a moot case if it presents issues of continuing and substantial public interest. In deciding whether a case presents issues of continuing and

substantial public interest: Three factors in particular are determinative: "(l) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; 15 and (3) whether the issue is likely to recur". A fourth factor may also play a role: the "level of genuine adverseness and the quality of advocacy of the issues." Lastly, the court may consider "the likelihood that the issue will escape review because the facts of the controversy are short-lived." [City of] Seattle v. State, 100 Wash. 2d 232,250,668 P.2d 1266 (1983) (Rosellini, J., dissenting).

CONCLUSION

The Washington Supreme Court should grant this Petition for Discretionary Review.

APPENDIX

An appendix containing a copy of the Court of Appeals decision,any order granting or denying a motion

for reconsideration fo the decision, and filed with this amendment copies of statutes and constitutional provisions relevant to the the issues. Also the copy of service to the attorney on file with opposing party. Pursuant to RAP 18.17(2)(b), the foregoing is 2868 words.

Respectfully submitted,

Phavy Pel Date: 10/11/2023

Phavy Pel <phavypel@gmail.com>

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Case Title: Laurence Coates Bateman, Respondent v. Phavy Pel, Appellant (843427)
From: Phavy Pel
Organization: Phavy Pel - Filing Pro Se

This is to inform you that the file(s) listed below were electronically filed for the above mentioned case by Phavy Pel , who is filing Pro Se,.

Below is a link to each of the document(s) which have been filed with the court. Note: document(s) will be available online for 6 months.

- DCA_Motion_Discretionary_Rvw_of_COA_20230925162339SC471693_0225.pdf

Attached is a copy of the Transmittal Letter sent to the court.

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LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
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July 17, 2023

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Case #: 843427
Laurence Coates Bateman, Respondent v. Phavy Pel, Appellant
King County Superior Court No. 21-3-02412-2

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Finding no error, we affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Lea Ennis
Court Administrator/Clerk

jh
c: The Honorable Leonid Ponomarchuk

FILED
7/17/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Parenting and Support of S.B., Child, LAURENCE BATEMAN, Respondent, and PHAVY PEL, Appellant.	No. 84342-7-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Phavy Pel appeals from a parenting plan and child support order entered after a bench trial. Finding no error, we affirm.

I

In May 2021, Laurence Bateman petitioned to establish a parenting plan for S.B., the then six year old daughter he shares with Pel. Bateman alleged Pel had withheld S.B. in violation of a CR 2A agreement the parties had reached in an earlier parenting plan proceeding, which was administratively dismissed without final orders being entered. Bateman requested that he be designated S.B.'s primary residential parent and "that [S.B.]'s time with her mother be returned to alternating weeks from Friday to Sunday, which is the same number of overnights

that she had for a year before [the parties] settled." He also requested child support. Pel opposed Bateman's requests and sought a 50-50, week on/week off residential schedule. Pel agreed child support should be set, but requested a deviation downward.

Following a four day trial, the court found Pel had "engaged in an abusive use of conflict." It ordered that S.B. would have majority residential time with Bateman, and would have residential time with Pel after school on Wednesdays and every other weekend. The trial court ordered Pel to pay Bateman $676.00 per month in child support beginning in May 2022, and it denied Pel's request for a deviation. Pel appeals.[1]

II

We review a trial court's rulings concerning parenting plans and child support for an abuse of discretion. In re Marriage of Christel, 101 Wn. App. 13, 20-21, 1 P.3d 600 (2000) (parenting plan); In re Marriage of Fiorito, 112 Wn. App. 657, 663, 50 P.3d 298 (2002) (child support). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or

[1] On July 12, 2023, the day after this matter was set for hearing before the court, this court received additional clerk's papers designated by Pel in filings in superior court on June 23, 2023. These designations of clerk's papers are untimely and without leave of court under RAP 9.6(a). Also, it appears the additional clerk's papers were filed after trial and were not before the trial court, and some of them were the subject of a commissioner's earlier ruling denying Pel's motion for an extension of time to supplement the record with the same documents. The additional clerk's papers are not properly before the court, and we have not considered them. We note that although Bateman also filed an untimely designation of trial exhibits on May 26, 2023, that designation specified only trial exhibits that had already been designated in a timely supplemental designation of clerk's papers filed herein on March 6, 2023.

untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A court bases its decision on untenable grounds if the record does not support the court's factual findings, the court used an incorrect standard, or the facts do not meet the requirements of the correct standard. In re Marriage of Mansour, 126 Wn. App. 1, 8, 106 P.3d 768 (2004).

We review challenged findings of fact to determine if substantial evidence supports them. In re Marriage of DeVogel, 22 Wn. App. 2d 39, 48, 509 P.3d 832 (2022). Evidence is substantial if it is "sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). "We will not substitute our judgment for the trial court's, weigh the evidence, or adjudge witness credibility." In re Marriage of Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

Pel appeals pro se. Pro se litigants are held to the same standards as attorneys and must comply with all procedural rules on appeal. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). Pel's opening brief does not clearly specify any assignments of error, as required by RAP 10.3(a)(4) and RAP 10.3(g). Pel nevertheless articulates certain dissatisfactions with the trial court's rulings sufficient to permit review, and to that extent we review Pel's claims on appeal. To the extent we do not reach any challenges that Pel raises in her appellant's brief, it is because they are not adequately briefed to warrant consideration. Cf. Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (appellate court "will not consider an inadequately briefed argument").

A

Pel argues substantial evidence does not support the trial court's finding that she engaged in an abusive use of conflict. We disagree.

The trial court made the following findings: Pel petitioned for a domestic violence protection order (DVPO) after an October 2019 incident during which Pel alleged Bateman assaulted her.[2] "On that basis, [Pel] obtained an *ex parte* order restraining all contact between [S.B.] and [Bateman]." While Pel's DVPO petition was pending, Bateman asked to have contact with S.B., supervised by his mother. Pel denied the request "on the basis that [Bateman's mother] would 'cross the line' with her advice," but "[t]his basis was not a sufficient basis to deny supervised residential time to the petitioner and [was] contradicted by the many videos offered into evidence . . . that depict[ed] the warm relationship of [Bateman's parents] with all the members of the family as well as [Pel and Pel's] older children."[3] Additionally, Pel's stated basis for denying Bateman's request "[was] not relevant to [S.B.'s] safety," and Pel still denied the request even after Bateman proposed professionally supervised contact.

[2] Pel's petition was later denied because she failed to prove by a preponderance of the evidence that domestic violence occurred.

[3] Pel asserts that Bateman's parents "are drug addicts." But she provides no citation to the record to support this assertion. Nor does she provide any citation to the record to support her assertion, made for the first time in her reply brief, that the trial court's "abusive use of conflict" finding was based on Pel's "demand that supervisors be sober during visitation." We do not consider these assertions. See RAP 10.3(a)(5) ("Reference to the record must be included for each factual statement."); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (declining to consider argument that was not supported by any reference to the record).

The trial court also made the following findings: Pel and Bateman entered into a CR 2A agreement wherein they agreed that S.B. would reside primarily with Bateman, and they "would have formalized this Agreement into a final parenting plan had [the first parenting plan matter] not been administratively dismissed." Pel "repudiated the parties' agreement, taking [S.B.] in violation of the agreement." She then "kept [S.B.] for an additional several day period on the basis that there was no action, no temporary order, and no agreement." Furthermore, Pel's "explanation that she was not represented by counsel [did] not justify her conduct," because "[o]n a practical level, [she] knew that the parties had signed a contract; she did not need to have the technicalities of an administrative dismissal explained to her to understand her obligation under the agreement." Meanwhile, Bateman "offered to deliver [S.B.'s stuffed animal called] 'Piggy' to [Pel] so that [S.B.] could have her stuffed animal that she is attached to." Bateman also "offered to deliver [S.B.]'s school work to her so that she would not miss school or have late assignments." But Pel rejected both offers.

The foregoing findings are unchallenged and thus accepted as true on appeal. See DeVogel, 22 Wn. App. 2d at 50. They establish that Pel interfered with Bateman's time with S.B. in a manner that, as the court found, "may harm [S.B.]'s best interests." They support the trial court's determination that Pel used conflict in an abusive way, to unreasonably interfere with Bateman's time with S.B.[4]

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[4] In her reply brief, Pel argues further that substantial evidence did not support a finding that her conduct created a danger of serious damage to S.B.'s psychological development. See RCW 26.09.191(3)(e) (authorizing the trial court to "preclude or limit any provisions of the parenting plan" based on "[t]he abusive

Cf. DeVogel, 22 Wn. App. 2d at 50 (parent engages in abusive use of conflict by "us[ing] conflict in an abusive way").

Pel argues the CR 2A agreement stated that Bateman's counsel would "prepare the final papers within 14 days" and "present the final papers to the court for testimony/entry within 14 days of agreement by all parties on the final documents or after arbitration." (Bold face omitted.) She asserts Bateman and/or his attorney breached the CR 2A agreement because they did not file final orders, causing the first parenting plan proceeding to be administratively dismissed. But the trial court observed that as a "practical" matter, Pel understood her obligation under the agreement but relied on a technicality to assert that "all bets [were] off." The court "did not find that credible" and found Pel's "conduct [was] unreasonable." An appellate court will not revisit that credibility determination on appeal.[5]

The trial court's ruling concerning abusive use of conflict under RCW 26.09.191 is supported by unchallenged findings and by substantial evidence.

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use of conflict by [a] parent which creates the danger of serious damage to the child's psychological development"). Pel raises this argument for the first time in her reply brief, and thus, we do not consider it. See Ainsworth v. Progressive Cas. Ins. Co., 180 Wn. App. 52, 78 n.20, 322 P.3d 6 (2014) ("We will not consider issues argued for the first time in the reply brief."). In any case, it is accepted as true on appeal that Pel's abusive use of conflict resulted in significant interruptions in S.B.'s contact with her father, with whom she shared a close bond. Cf. In re Marriage of Burrill, 113 Wn. App. 863, 872, 56 P.3d 993 (2002) ("severe impairment of parent/child contact . . . constitutes sufficient evidence from which the trial court could conclude that [a parent] created a danger of serious psychological damage to the children").

[5] In her reply brief, Pel argues based on commercial contract cases that the asserted breach of the CR 2A agreement by Bateman excused her further performance. The trial court's determination Pel lacked credibility in asserting she could unilaterally keep S.B. for residential time contrary to the parties' agreement obviates the need to address this argument.

B

In the earlier parenting plan proceeding, the court referred the parties to Family Court Services (FCS) for a parenting plan evaluation, which was completed in December 2020 and admitted into evidence in this proceeding. Pel argues the trial court erred by not ordering an updated FCS report or appointing a guardian ad litem (GAL). But it does not appear Pel requested an updated report or a GAL below, and arguments not raised in the trial court generally will not be considered on appeal. See RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."). Furthermore, although Pel cites to RCW 26.12.175 and RCW 26.12.190 in support of reversal, these statutes provide only that the trial court "may" appoint a GAL or use FCS services under certain circumstances. RCW 26.12.175(1)(a); RCW 26.12.190(2). Here, the trial court had before it a recent FCS evaluator's report, and Pel does not cite any authority establishing that the trial court was required to order an updated report or appoint a GAL. Pel does not establish that the trial court erred.

C

Pel raises two constitutional challenges to the trial court's parenting plan. First, she argues a provision directing S.B.'s physicians to accept Bateman's reports over Pel's in the event of a conflict violates Pel's rights under the First Amendment to the United States Constitution. Pel does not show the provision implicates her First Amendment rights. Second, she argues the trial court deprived her of her right to a fair trial under the Sixth Amendment to the United States Constitution. The Sixth Amendment does not apply because it applies only to

"criminal prosecutions." U.S. CONST., Amend. VI. Pel's constitutional challenges fail.

D

The parenting plan requires Pel herself—and not a designee—to drop S.B. off at school on Monday mornings after Pel's weekends with S.B. Pel argues this requirement is error.

Bateman requested Pel's weekend time with S.B. end on Sunday evening, arguing that "[i]t would be in [S.B.'s] best interest, especially at her young age, to be able to come home and recuperate and get ready for school and sleep in her regular bed." Pel advocated for more time with S.B., testifying she was already taking S.B. to school on Mondays and had the work flexibility to continue doing so. The trial court allowed S.B. to stay with Pel through Sunday night but directed that Pel herself drop S.B. off at school on Monday morning, and that if she could not, her weekend time would end on Sunday at 6:00 p.m. The reason for this was to maximize S.B.'s time with Pel, as Pel's counsel did not object when Bateman's counsel observed "the whole idea [was] for [S.B.] to spend time with [Pel] on Monday mornings." It was not error for the trial court to recognize that Pel's employment circumstances could change, and that if she were unable because of work to drop S.B. at school on Mondays the purpose of this schedule would be defeated. Pel does not show an abuse of discretion.

E

Pel asserts the trial court erred by failing to consider all of the statutorily required factors in establishing the parenting plan. See RCW 26.09.187(3) (setting

forth seven factors the court "shall consider" in cases "[w]here the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule"). Pel relies on In re Marriage of Kovacs, but that case is distinguishable because there, the court erred by interpreting the relevant statute "to *require* placement with the parent who has provided primary daily care of the child, unless the trial court finds that the personality or parenting style of the primary caregiver has resulted in harm to the child." 121 Wn.2d 795, 802, 854 P.2d 629 (1993). Pel points to nothing in the record to show that the trial court relied on any such presumption here. To the contrary, the court considered on the record each of the statutory factors in determining the residential schedule. Pel does not show error.

F

Pel asserts the trial court erred to the extent that it did not grant her request for a 50-50 residential schedule. She contends a 50-50 schedule would have been in S.B.'s best interests because "[m]any studies show that having the presence of both parents in a child['s] life is beneficial and in the best interests of the child" and Pel "works in the city [where S.B.] attends school and lives in the bordering school district."

Pel does not cite the "[m]any studies" she relies on, or show that they were presented to the trial court. Cf. Morgan v. Briney, 200 Wn. App. 380, 394, 403 P.3d 86 (2017) (this court does not accept evidence that was not before the trial court). The trial court's parenting plan did not deprive S.B. of Pel's presence in her life. While the record reflects that Pel lives in Renton and works in Issaquah, where S.B. attends school, Bateman testified that "the commute from Renton to [S.B.'s]

school . . . could be up to 45-minutes per day"; that "[e]arly in the morning, it will just take away from her sleep schedule, [which] gets her kind of out of whack"; and that it was logistically easier for S.B. to stay with him. There was conflicting evidence as to what was in S.B.'s best interests with regard to her commute to school. We will not reweigh that conflicting evidence. See Thompson v. Hanson, 142 Wn. App. 53, 60, 174 P.3d 120 (2007) ("An appellate court defers to the trier of fact for purposes of resolving conflicting testimony."), aff'd, 168 Wn.2d 738, 239 P.3d 357 (2009).

Pel asserts the trial court abused its discretion because the parties "ha[d] a history of . . . 50/50 physical residential time." But the trial court weighed the evidence and found that Bateman "had taken on a greater share of the parenting responsibilities for [S.B.]," explaining,

> [Pel] was working, she was going to school, and she had older children. In her mind, she was still primary caretaker of [S.B.] And with all due respect, I can't find that. How can you have all of these other obligations and still feel that you are a primary caretaker versus the father who had none of those obligations by circumstances and was caring for her?

It thus rejected Pel's claim that the parties had historically had a 50-50 residential schedule, finding instead that the Bateman home was S.B.'s "constant home." Again, we will not reweigh the evidence to reach a different determination on appeal.

Pel asserts the trial judge "testified as a witness" when he explained why he found that Bateman had taken a greater share of the parenting responsibilities, but the trial judge did not testify. He explained why the evidence did not support a

finding that Pel was S.B.'s primary caretaker and instead supported a finding that Bateman was. This finding was supported by the record: Bateman testified he was "a stay-at-home father for [S.B.] and raise[d] her full time." Bateman's mother testified that after Pel and Bateman broke up in early 2017, S.B. would spend "[m]aybe a maximum . . . of a couple weekends a month" at Pel's home. Similarly, Bateman testified that after he and Pel broke up, he "was still taking care of [S.B.] the vast majority of the time," and S.B. would sometimes go as long as a month without going to Pel's home "because [Pel] was always busy working or doing other stuff." Pel's assertion that the trial court's finding was untenable or contrary to the evidence is without merit. Cf. DeVogel, 22 Wn. App. 2d at 48 (in substantial evidence review, this court need consider only the evidence most favorable to the prevailing party, even if there is conflicting evidence).

Pel also argues that the trial court abused its discretion "in not considering the testimony of [Pel's] expert witness . . . regarding increasing residential time for . . . Pel." But the trial court did consider Pel's expert's testimony, noting it established S.B. had a bond with Pel, but that did not take away from other evidence showing S.B. had a bond with Bateman. To the extent that the trial court did not rely on Pel's expert as Pel would have liked, we defer to the trial court. See In re Marriage of Bundy, 12 Wn. App. 2d 933, 938, 460 P.3d 1111 (2020) (appellate court defers to trier of fact for purposes of evaluating the persuasiveness of the evidence and credibility of witnesses).

G

Pel asserts that the trial court abused its discretion in determining the child support transfer payment. Pel argues the court did not account for the "additional assets of Mr. Bateman when he provided financial information that shows he is a joint signer, authorized user[ ] on several checking, savings, credit care, and investment accounts," and directing child support payments to begin in May 2022 resulted in an overpayment to Bateman. Pel provides no citation to the record to support her assertions that Bateman had "additional assets" that should have been considered or that she already paid child support for May 2022.

Pel also asserts that because Bateman lives with his parents and does not contribute to the household financially, the trial court "should have also considered a deviation . . . due to [Bateman']s little to no bills and rent." But although Pel requested a deviation based on her having two other children, she did not request a deviation based on the fact that Bateman lives with his parents. Accordingly, she failed to preserve this issue for appeal. Similarly, Pel argues that support should be reduced on the ground that Bateman is voluntarily underemployed. But the trial court imputed to Bateman the income he received under the G.I. Bill and found it was equivalent to the amount he earned when employed. Pel's assertion of voluntary underemployment is unsupported by the record.

III

Bateman requests an award of fees on appeal based on RCW 26.26B.060, which he asserts "provides that in an action for establishment of a parenting plan, a trial court may order one party to pay the reasonable attorney fees of another

party" without consideration of the parties' financial resources. But that statute was enacted as part the Uniform Parentage Act, which governs actions to establish parentage. See LAWS OF 1976, ch. 42, §§ 4, 15. We are not persuaded it authorizes an award of fees in a parenting plan proceeding where, as here, parentage was previously established. Cf. In re Marriage of T, 68 Wn. App. 329, 842 P.2d 1010 (1993) ("While RCW 26.09 governs matters such as child custody, visitation and support that arise *after* paternity has been established, *issues related to paternity itself are addressed by RCW 26.26.*" (emphasis added)).

Bateman also argues that an award of fees is warranted because of intransigence. " 'Intransigence is the quality or state of being uncompromising.' " In re Marriage of Raskob, 183 Wn. App. 503, 517, 334 P.3d 30 (2014) (quoting In re Marriage of Schumacher, 100 Wn. App. 208, 216, 997 P.2d 399 (2000)). Although the trial court found in Bateman's favor on a number of contested issues and although Pel's arguments on appeal lack merit, we are not persuaded that Pel's appeal is intransigent, and we observe that the trial court declined to make a finding of intransigence. Cf. In re Marriage of Sievers, 78 Wn. App. 287, 312, 897 P.2d 388 (1995) (upholding award of attorney fees based on intransigence where one party's "bad acts permeated the entire proceeding").

Finally, Bateman argues that we should award fees as a sanction because Pel's appeal is frivolous. Pel's arguments approach frivolousness in some instances. However, while Pel shows no basis for appellate relief, she articulates reasoned challenges to the trial court's rulings such that, giving her the benefit of

the doubt at this stage, we do not find her appeal is frivolous. See Streater v. White, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

We affirm and deny Bateman's request for fees on appeal.

Birk, J.

WE CONCUR:

Chung, J. Mann, J.

LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
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Case #: 843427
Laurence Coates Bateman, Respondent v. Phavy Pel, Appellant
King County Superior Court No. 21-3-02412-2

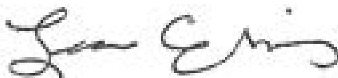
Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,



Lea Ennis
Court Administrator/Clerk

lls

cc: Hon. Leonid Ponomarchuk

FILED
11/29/2021
Court of Appeals
Division I
State of Washington

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

In re the Parenting and Support of: M.M.M., Child, MATTHEW WAYNE MEYERS, Respondent, and MCKAYLA SATIVA BEECHER, Appellant.	)	No. 81788-4-I UNPUBLISHED OPINION

VERELLEN, J. — When a court concludes the child's best interests warrant the imposition of restrictions under RCW 26.09.191 due to a parent's conduct, findings of fact about that parent's conduct must be supported by substantial evidence. Substantial evidence supports the finding that McKayla Beecher has a long-term emotional impairment that affects her ability to perform parenting functions, and restrictions based upon that finding were not an abuse of discretion. But because the parenting plan imposed restrictions on Beecher based in part upon findings of fact that lacked substantial evidence, remand is required to revisit and revise the parenting plan to reflect Beecher's conduct and her son's best interests. Because remand is required and recent developments likely impact a

previous finding of abuse, the abuse finding and related restrictions should be revisited.

Therefore, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

McKayla Beecher and Matthew Meyers began dating in April of 2016, her senior year of high school. The relationship was getting "near the end" in the spring of 2018 when they learned Beecher was pregnant.[1] Their son, "M," was born in December of 2018. In May of 2019, when M was six months old, they decided to separate because they were arguing about "everything" and "just stopped wanting to be around each other."[2] They came to an arrangement to share physical and legal custody of M.

In August of 2019, M was severely injured and hospitalized. Child Protective Services (CPS) and the Arlington Police Department began investigating. CPS filed a dependency petition, placing M with Meyers's sister, Jacquie Grogel, and then with Beecher's extended family. Beecher later filed a petition for a domestic violence protection order (DVPO) against Meyers.

In September of 2019, the police cleared Meyers from suspicion of injuring his son. The dependency court found Meyers was "not a risk to the child" and

[1] Report of Proceedings (RP) (July 9, 2020) at 88.

[2] Id. at 92.

awarded him custody over M.[3] It also did "not find the father to be the aggressor of domestic violence in the relationship"[4] and transferred the case to family court. A superior court commissioner later denied the DVPO petition, concluding Beecher failed to demonstrate domestic violence because she presented "conflicting evidence" that called her credibility into question.[5]

In February of 2020, the Arlington police filed a certificate of probable cause for Beecher, concluding probable cause existed to arrest her for first degree assault of a child, making a false or misleading statement to a public servant, and obstructing a law enforcement officer. In April, the family court entered a temporary parenting plan which limited Beecher to three, two-hour supervised visitation sessions each week. Meyers received sole decision-making authority and the authority to approve all visitation supervisors. The dependency was terminated.

A bench trial was held on a permanent parenting plan in June of 2020. Beecher proffered an expert, Dr. JoAnne Solchany, who has a Ph.D. in nursing and is an advanced registered nurse practitioner, to testify about her psychological evaluation of Beecher. Dr. Solchany diagnosed Beecher with posttraumatic stress disorder (PTSD) from M's injury and from domestic violence inflicted on her by

[3] Ex. 3, at 3.

[4] Id.

[5] Ex. 2, at 1.

Meyers. The court admitted Dr. Solchany's testimony but found neither Beecher nor any of her witnesses, including Dr. Solchany, were credible.

The court found Beecher abused and neglected M, used conflict in an abusive manner, had a substance abuse problem that interfered with her ability to parent, and had a long-term emotional problem that interfered with her ability to parent.

Pursuant to RCW 26.09.191, it restricted her physical and legal custody over M. The court limited Beecher to three weekly supervised visits with M, each for three hours. It gave Meyers sole decision-making authority.

Beecher appeals.[6]

ANALYSIS

I. Evidentiary Rulings

Beecher argues the court abused its discretion by finding she and other witnesses were not credible. We review evidentiary decisions for abuse of discretion.[7] A trial court abuses its discretion when its decision rests on untenable evidentiary grounds or was made for untenable reasons, such as a ruling contrary to law.[8]

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[6] Beecher also assigns error to the trial court "failing to enter a [DVPO] protecting the mother from the father." Appellant's Br. at 4. Because she makes no arguments in support of this assigned error, we decline to consider it.

[7] In re Wagner, ___ Wn. App. 2d ___, 496 P.3d 742, 746 (2021) (citing Blomster v. Nordstrom, Inc., 103 Wn. App. 252, 259, 11 P.3d 883 (2000)).

[8] Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 919, 296 P.3d 860 (2013) (citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

Citing an unpublished case, State v. Scott,[9] Beecher asserts that the trial court's credibility determinations can be reviewed for substantial evidence. But well-established and controlling Washington law holds that when a trial court takes live testimony and weighs the evidence, a reviewing court does not reevaluate the credibility of witnesses or reweigh evidence.[10] When deciding child placement decisions, a reviewing court should be particularly deferential to the trial court "[b]ecause the trial court hears evidence firsthand and has a unique opportunity to observe the witnesses."[11] Because, here, the trial court was acting as the factfinder in a bench trial, we will not reevaluate its credibility determinations.

Beecher also argues the court abused its discretion by declining to admit Dr. Solchany's testimony under ER 702. Expert testimony can be admitted under ER 702 when the witness qualifies as an expert and their testimony will assist the

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[9] State v. Scott, No. 45944-2-II, slip op. at 7-8, Wash. Ct. App. June 30, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2045944-2-II%20%20Unpublished%20Opinion.pdf.

[10] E.g., In re A.W., 182 Wn.2d 689, 711, 344 P.3d 1186 (2015) ("The reviewing court should not decide the credibility of witnesses or weigh the evidence.") (citing In re Dependency of A.V.D., 62 Wn. App. 562, 568, 815 P.2d 277 (1991)); Winter v. Dep't of Soc. & Health Servs. on behalf of Winter, 12 Wn. App. 2d 815, 839, 460 P.3d 667 ("We cannot review a fact-finder's credibility determinations on appeal.") (citing Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)), review denied, 196 Wn.2d 1025, 476 P.3d 565 (2020).

[11] Young v. Thomas, 193 Wn. App. 427, 442, 378 P.3d 183 (2016) (citing In re Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001)).

factfinder.[12] "Unreliable testimony does not assist the trier of fact."[13] Although the trial court reserved ruling on admitting Dr. Solchany's testimony under ER 702, she was permitted to testify and opine about hypotheticals. The court later found she was not credible and discounted her testimony. Because determining credibility is squarely within the factfinder's discretion,[14] and the trial court concluded Dr. Solchany was unhelpful because she was not credible, Beecher fails to show the trial court abused its discretion.

II. Parenting Plan

Beecher contends reversal and retrial are required on the parenting plan because substantial evidence does not support the findings of fact and related restrictions imposed under RCW 26.09.191. The court found Beecher abused M, neglected him, used conflict in an abusive manner, had a long-term substance abuse problem, and had a long-term emotional impairment. Based upon those findings, the court imposed a range of related restrictions on Beecher, which included limited, supervised contact, no decision-making authority, no control over who could be present during her visits, restrictions on her consumption of alcohol or drugs and a requirement to "shield" M from "normalizing the use of drugs and/or alcohol,"[15] urinalysis testing when demanded by Meyers, no discussing residential

[12] Lakey, 176 Wn.2d at 918 (citing State v. Cauthron, 120 Wn.2d 879, 890, 846 P.2d 503 (1993)).

[13] Id. (citing Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 603, 260 P.3d 857 (2011)).

[14] A.W., 182 Wn.2d at 711 (citing A.V.D., 62 Wn. App. at 568).

[15] Clerk's Papers at 36.

placement decisions with M, and no phased increase in time with M without a formal modification of the parenting plan.

We review the provisions of a parenting plan for abuse of discretion.[16] When a trial court has acted as a factfinder, our role is to determine whether the findings are supported by the record and, in turn, if those findings support the court's conclusions of law.[17] We will accept the trial court's findings of fact so long as they are supported by substantial evidence.[18] Substantial evidence supports a finding when the record contains "evidence sufficient to persuade a fair-minded person of the truth of the matter asserted."[19] Evidence in the record is viewed in a light most favorable to the respondent, as are all reasonable inferences from the evidence.[20]

We note that the trial court fashioned this parenting plan faced with unusual circumstances. M had suffered serious physical injuries. The police had investigated both parents, cleared the father of criminal concerns, and forwarded a probable cause certificate to the prosecutor for possible criminal charges against

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[16] In re Marriage of Chandola, 180 Wn.2d 632, 642, 327 P.3d 644 (2014) (citing In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012)).

[17] Greene v. Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999) (quoting Organization to Preserve Agric. Lands (OPAL) v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996)).

[18] Matter of A.F.M.B., 1 Wn. App. 2d 882, 887, 407 P.3d 1161 (2017) (citing Feree v. Doric Co., 62 Wn.2d 561, 568, 383 P.2d 900 (1963)).

[19] Chandola, 180 Wn.2d at 642 (citing Katare, 175 Wn.2d at 35).

[20] In re Marriage of Zigler & Sidwell, 154 Wn. App. 803, 812, 226 P.3d 202 (2010) (citing Keever & Assocs., Inc. v. Randall, 129 Wn. App. 733, 737, 119 P.3d 926 (2005)).

the mother for first degree assault of a child, making a false or misleading statement to a public servant, and obstructing a law enforcement officer. The probable cause certificate, which included the police investigation report, was admitted only for background and not as substantive evidence. No witness testified to seeing any abuse of the child by the mother or by those around her. Both parents contemplated some form of phased restrictions on the mother's parenting role with increasing visitation and diminishing restrictions depending on the outcome of the criminal investigation. And, while this appeal was pending, there were material developments because the prosecuting attorney's office declined to file criminal charges against the mother for assault of a child.[21] With this background in mind, we turn to the parenting plan.

RCW 26.09.191(1) and .191(2) mandate limitations on a parent's decision making and visitation upon a finding the parent "engaged in . . . physical, sexual, or a pattern of emotional abuse of a child."[22] Subsection .191(3), by contrast, gives a court discretion to impose limits on any provision of a parenting plan when the court's findings of fact support imposing restrictions.[23]

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[21] Wash. Court of Appeals oral argument, Beecher v. Meyers, No. 81788-4 (Nov. 3, 2021), at 0 min., 58 sec. through 1 min., 36 sec., http://www.tvw.org/watch/?clientID=9375922947&eventID=2021111029&startStreamAt=58&stopStreamAt=96&autoStartStream=true.

[22] Wagner, 496 P.3d at 746 (citing In re Marriage of Watson, 132 Wn. App. 222, 232, 130 P.3d 915 (2006)); RCW 26.09.191(1)(b), (2)(a)(ii).

[23] Id. (citing RCW 26.09.191(3)).

Citing In re Marriage of Watson,[24] Beecher argues restrictions imposed under subsection .191 are appropriate "only when substantial evidence demonstrates that a restrictive factor makes unrestricted involvement or conduct with the children likely to adversely affect them."[25] But, as the Supreme Court explained in Katare v. Katare, Watson does not stand for this broad conclusion.[26] Watson stands for the unremarkable proposition that "restrictions cannot be imposed for unfounded reasons."[27] As clarified by In re Marriage of Chandola, a specific finding linking the parent's conduct to harm is required under only subsection .191(3)(g), the catchall provision, because it does not specify inherently harmful conduct.[28] Because none of the restrictions here were imposed under the catchall provision, the question for each .191 restriction imposed is whether substantial evidence supports the findings of fact.[29]

A. Emotional Impairment

RCW 26.09.191(3)(b) allows imposing restrictions upon a finding of a parent's "long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004." "Parenting functions" are defined in RCW 26.09.004(2) as "those aspects of the

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[24] 132 Wn. App. 222, 233, 130 P.3d 915 (2006).

[25] Reply Br. at 18.

[26] 175 Wn.2d 23, 37, 283 P.3d 546 (2012).

[27] Id.

[28] 180 Wn.2d 632, 646-48, 327 P.3d 644 (2014).

[29] Greene, 97 Wn. App. at 714 (citing OPAL, 128 Wash.2d at 882).

parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child." Examples of statutory parenting functions include "[m]aintaining a loving, stable, consistent, and nurturing relationship" and

> [a]ttending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family.[30]

Beecher testified to having been diagnosed with PTSD with symptoms of depression and anxiety. Her PTSD symptoms can be triggered by thinking about M's injury or about his hospitalization. Once they begin, she will "relive that over and over," becoming "depressed and upset."[31] If triggered, she soothes herself by "tak[ing] a quick breather to myself, [or by] listen[ing] to some music."[32]

Meyers testified that Beecher was an "amazing" parent before M's injury but has become less capable since.[33] He saw her become frustrated when she struggled to soothe M and needed to defer to him for help. Beecher showed "frustration instantly" and "no problem-solving" skills when M became upset.[34] Miranda Gracey, Meyers's girlfriend, explained Beecher left a visitation early once because she could not soothe M. Grogel testified that Beecher "would get

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[30] RCW 26.09.004(2)(a), (b).

[31] RP (July 13, 2020) at 6.

[32] Id.

[33] RP (July 9, 2020) at 129.

[34] Id.

frustrated and upset" when M was cranky and "wasn't comfortable dealing with him getting upset."[35] If Beecher was unable to soothe M easily, then "she didn't really want to deal with it at that point," might not hold him, and would defer to others to soothe him.[36]

Two statutory parenting functions are attending to the child's daily needs and maintaining a nurturing relationship. The record shows Beecher struggles to meet M's emotional needs or be nurturing when her PTSD symptoms are triggered by her son becoming upset or cranky. Viewed in a light most favorable to Meyers, a reasonable factfinder could conclude that Beecher's emotional impairment interferes with her ability to perform parenting functions, and substantial evidence supports this finding of fact.

B. Substance Abuse

RCW 26.09.191(3)(c) allows restrictions on a parenting plan when the court finds "[a] long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions." Beecher argues the record does not support this finding.

In In re Marriage of Rostrom, this court upheld a trial court's restrictions under subsection .191(3)(c) due to a father's alcohol abuse.[37] After the couple filed for dissolution, the father crashed into several parked cars and was arrested

[35] Id. at 117-18.

[36] Id.

[37] 184 Wn. App. 744, 758, 339 P.3d 185 (2014).

for driving under the influence.[38] The mother and her sister both testified about the father drinking heavily on weekends.[39] A psychologist diagnosed the father with alcohol use disorder.[40] The father denied ever drinking to the point of impairment.[41] A parenting evaluator testified that the father should have limited time and no overnight visitations with his children due to his alcohol use until he could show six months of sobriety from clean urinalysis tests.[42]

Here, Meyers testified that Beecher would rely on others to care for M because she was lethargic, lazy, sleepy, and uninvolved while high. But the evidence does not show a "long-term impairment" from smoking marijuana that affected Beecher's ability to parent. Viewed most favorably to Meyers, the evidence showed Beecher smoked marijuana regularly while in a relationship with him, and her ability to parent was affected only when high. A recent hair follicle test showed she had not used marijuana in the three months before trial. Indeed, when not prevented from doing so by PTSD, Beecher regularly performed various parenting functions. Unlike Rostrom, the record does not show a "long-term impairment" from substance abuse that interfered with Beecher's ability to parent. Substantial evidence does not support this finding.

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[38] Id. at 757.

[39] Id.

[40] Id. at 757-58.

[41] Id. at 758.

[42] Id. at 755, 758.

C. Abusive Use of Conflict

Subsection .191(3)(e) allows restrictions when the court finds "[t]he abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development." Thus, a substantiated finding must show the use of conflict itself creates the danger to the child's development.[43]

In Burrill v. Burrill, this court upheld the trial court's imposition of restrictions due to a mother's abusive use of conflict.[44] After a couple filed for dissolution and disagreed about who should be the primary residential parent, the mother made unsubstantiated reports that the father abused alcohol and marijuana.[45] When the parents had an argument over their daughter's shoes, the mother unilaterally terminated the father's contact with their children.[46] And two weeks before trial, the mother made a misleading report to a pediatrician about the father sexually abusing their daughter.[47] This misleading report led to an eight-month delay of the trial and to the couple's children not being allowed to see their father for nine months, even though they had enjoyed being with him.[48] Because the mother

[43] Burrill v. Burrill, 113 Wn. App. 863, 872, 56 P.3d 993 (2002).

[44] 113 Wn. App. 863, 871-72, 56 P.3d 993 (2002).

[45] Id. at 866.

[46] Id. at 866-67.

[47] Id. at 867.

[48] Id. at 867-68, 872.

used her conflicts with the father to prevent her children from having a relationship with him, substantial evidence supported the trial court's finding of fact.[49]

Here, the trial court appeared to conclude Beecher engaged in an abusive use of conflict because she repeatedly accused Meyers of committing acts of domestic violence against her. Three different judicial officers, including the judge in the parenting plan trial, concluded her accusations were not credible.

Critically, unlike Burrill, Beecher did not use conflict to deprive M of his father. The Burrill mother used conflict to prevent the children from seeing their father because she had an argument with him. She also made a misleading report about the father harming their daughter, preventing the children from him.[50] The record here does not show Beecher's accusations were made in a way that presented a risk of psychological harm to M Because a substantiated finding under subsection .191(3)(e) requires a connection between the conflict and risk of serious damage to the child,[51] this finding of fact lacked substantial evidence.

D. Neglect of Parenting Functions

RCW 26.09.191(3)(a) allows restrictions upon a finding of "[a] parent's neglect or substantial nonperformance of parenting functions." The court found Beecher "neglected her parental duties" but did not explain which duties or how they were neglected.[52] Meyers argues the neglect finding was supported based

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[49] Id. at 871-72.

[50] Id. at 866.

[51] Id. at 872.

[52] CP at 10.

upon a combination of the abuse finding and the substance abuse finding. But the substance abuse finding was not supported by substantial evidence, and Meyers cites only inapposite authority to conflate "abuse" and "neglect" under RCW 26.09.191.[53] Based upon the record presented, substantial evidence does not support this finding.

E. Abuse

RCW 26.09.191(1) and .191(2) mandate limitations on a parent's decision-making and visitation upon a finding the parent "engaged in . . . physical, sexual, or a pattern of emotional abuse of a child."[54] When the court found Beecher had abused M, it relied upon the undisputed fact that "[t]here has been a referral to the Snohomish County Prosecuting Attorney from [the] Arlington Police Department."[55] Thus, the apparent basis for the trial court's finding of abuse was the existence of the certification for probable cause and referral to the prosecutor for possible criminal charges. But, subsequently, assault charges were not filed.[56] These unusual circumstances suggest it is appropriate for the court to revisit the abuse

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[53] Meyers relies upon the definitions of "abuse" and "neglect" in RCW 26.44.020(1). That statute is expressly applicable "throughout this chapter," not throughout all of Title 26 RCW. Id. Meyers does not define "neglect" as opposed to "abuse" for purposes of RCW 26.09.191, and we need not do so to resolve this issue.

[54] Wagner, 496 P.3d at 746 (citing Watson, 132 Wn. App. at 232); RCW 26.09.191(1)(b), (2)(a)(ii).

[55] CP at 9.

[56] Wash. Court of Appeals oral argument, Beecher v. Meyers, No. 81788-4 (Nov. 3, 2021), at 0 min., 58 sec. through 1 min., 36 sec., http://www.tvw.org/watch/?clientID=9375922947&eventID=2021111029&startStreamAt=58&stopStreamAt=96&autoStartStream=true.

issue. As explained below, remand is necessary to revisit restrictions within the parenting plan and previously unknown evidence also makes it appropriate to revisit the question of abuse.

F. Parenting Plan Restrictions

When substantial evidence supports a finding of abuse, then the restrictions in subsections .191(1) and (2) are mandatory.[57] RCW 26.09.191(1) requires supervised visitation, and RCW 26.09.191(2) requires limits on the parent's residential time. Restrictions under subsection .191(3) are discretionary.[58]

Here, the trial court crafted a parenting plan for a parent who posed a danger to her son due to neglect, the abusive use of conflict, long-term substance abuse, physical abuse, and a long-term emotional impairment. Because substantial evidence does not support several of the court's .191 findings, remand is required for the court to revise the parenting plan in accordance with Beecher's substantiated conduct and M's best interests. And because new facts about the risk of physical abuse have arisen since the parenting plan was entered, it is appropriate for the trial court to determine whether current evidence supports a finding of abuse under RCW 26.09.191(1) or .191(2).[59] On remand, the court is

[57] Wagner, 496 P.3d at 746 (citing Watson, 132 Wn. App. at 232).

[58] Id. (citing RCW 26.09.191(3)).

[59] See In re Marriage of Thompson, 32 Wn. App. 179, 186, 646 P.2d 163 (1982) (remanding for further proceedings on a parenting plan in light of new, material developments about mother's conduct and children's welfare during the pendency of appeal); cf. Zigler & Sidwell, 154 Wn. App. at 811-12 (explaining modification of a parenting plan can be justified by new evidence unknown to the trial court when the plan was entered).

not limited to the evidence previously before it and may apply its discretion to address any and all aspects of RCW 26.09.191.[60]

III. Attorney Fees and Costs

Beecher requests attorney fees from this appeal pursuant to RAP 18.1 and RCW 26.09.140. Under RCW 26.09.140, a court may award costs and attorney fees after considering the financial resources of both parties. In considering the financial resources of both parties, we consider the needs of the requesting party and the other party's ability to pay.[61] Each party has filed a financial declaration showing equivalent economic circumstances. We decline to award attorney fees under RCW 26.09.140.

Pursuant to RAP 14.2, Beecher also requests the costs of preparing the record for appeal. RAP 14.2 allows an award of costs "to the party that substantially prevails on review." But costs should not be awarded "[i]f there is no

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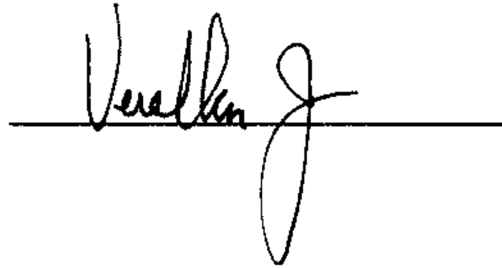
[60] Meyers argues that the concerns of Beecher underlying her appeal can all be adequately addressed by means of a modification proceeding. Whether or not that is possible, we conclude that under the unique circumstances of this appeal, a remand to revisit the parenting plan based upon supported .191 restrictions is a more direct and appropriate remedy. See Little v. Little, 96 Wn.2d 183, 198, 634 P.2d 498 (1981) (remanding to trial court following reversal of a parenting plan to "look into the present circumstances of the children and their parents" to ensure the children's best interests were served); see also In re Marriage of Possinger, 105 Wn. App. 326, 335, 19 P.3d 1109 (2001) ("'The major purpose behind the requirement of a detailed permanent parenting plan is to ensure that the parents have a well thought out working document with which to address the future needs of the children.'") (internal quotation marks omitted) (quoting In re Marriage of Pape, 139 Wn.2d 694, 705, 989 P.2d 1120 (1999)).

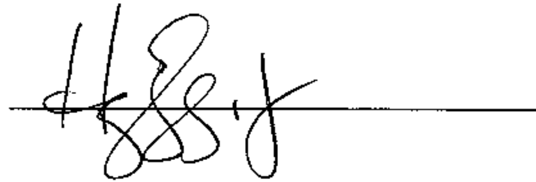
[61] In re Marriage of Trichak, 72 Wn. App. 21, 26, 863 P.2d 585 (1993).

substantially prevailing party on review."[62] Because Beecher does not substantially prevail, she is not entitled to costs.

Therefore, we affirm in part, reverse in part, and remand for further proceedings.



WE CONCUR:



[62] RAP 14.2.

37585-4-III
Court of Appeals of Washington

In re S.A.A

Decided Sep 28, 2021

37585-4-III 37586-2-III 37683-4-III

09-28-2021

In the Matter of the Visits with: S.A.A [†] T.A. and D.A., Petitioners, and H.E.L., Appellant, and A.A.A., Respondent. In the Matter of the Parenting and Support of: S.A.A. A.A.A., Respondent, and H.L., Appellant.

Pennell, C.J.

UNPUBLISHED OPINION

Pennell, C.J.

H.L. appeals various court orders regarding the residential placement of her child, S.A. We affirm and grant the father's request for attorney fees.

BACKGROUND

In 2013, A.A. (father) and H.L. (mother) had a child, S.A. The parents' relationship was acrimonious. The mother also had a difficult relationship with the father's family and did not wish for S.A. to have contact with the paternal grandparents.

In 2018, the paternal grandparents brought a petition for third-party visitation. The petition was later dismissed with prejudice. While the petition for third-party visitation was pending, the father brought a separate petition to establish a parenting plan. After a bench trial, the court awarded 50/50 custody to the mother and father. No restrictions were imposed. Because the father was living with his parents, the residential split meant the paternal grandparents would inevitably have contact with S.A. during the father's residential time.

The mother appeals.

ANALYSIS

The mother assigns error to various court orders. However, the only issue that has been argued is whether the trial court was required to preclude contact between S.A. and the paternal grandparents based on the dismissal of the third-party visitation petition and the mother's fundamental rights to parent. An issue to which a party assigns error but does not argue is waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We therefore limit our analysis to the mother's arguments regarding contact between S.A. and the paternal grandparents.

We agree with the trial court that the mother lacks any basis to preclude contact between S.A. and her paternal grandparents during the father's residential time. Contrary to the mother's arguments, the court's orders do not undermine the dismissal of the grandparents' third-party visitation petition by awarding them de facto visitation.[1] The grandparents were not awarded any rights. Instead, the father was awarded residential time without restrictions. This means he can decide who S.A. has contact with during his residential time. *In re Marrige of Magnusson*, 108 Wn.App. 109, 112-113, 29 P.3d 1256 2001). Both the mother and father have equal rights to direct S.A.'s upbringing. Neither parent has veto rights over how the other spends their residential time. Under the terms of the 50/50 parenting plan, the mother and father must each defer to the other's normal right of parental decision-making, including who S.A. has contact with during residential time.

[1] Given the lack of shared subject matter, neither res judicata nor collateral estoppel are at issue.

Both sides request attorney fees on appeal. We award fees to the father under RAP 18.9(a). We agree with the father that the mother's appeal is frivolous. "An appeal is considered frivolous when it presents no debatable issues and is so devoid of merit that there is no possibility of reversal." *Griffin v. Draper*, 32 Wn.App. 611, 616, 649 P.2d 123 (1982). This is a difficult standard, but it is met in this case. The mother's appeal misapprehends the nature of the trial court's orders. The court trial did not address competing rights between a parent (who enjoys constitutional rights to parent) and third-party grandparents (whose rights, if any, are limited). Instead, the court addressed competing rights of parents. It is well established in our case law that a fit parent is entitled to decide how a child spends residential time. *Magnusson*, 108 Wn.App. at 112-113; *see also In re Marriage of McNaught*, 189 Wn.App. 545, 563-65, 359 P.3d 811 (2015). The mother's briefing fails to acknowledge this authority. Because the mother presents no debatable reason for success on her appeal, we award attorney fees to the father as a sanction.

CONCLUSION

The orders on appeal are affirmed. The father (A.A.) is awarded reasonable attorney fees, pursuant to RAP 18.9(a), subject to his timely compliance with RAP 18.1(d). Such fees shall be payable by counsel for the mother (H.L.).

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: Fearing, J., Staab, J. *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash.Ct.App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber =2012_001&div=III.

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Analysis and Interpretation of the U.S. Constitution

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Fourteenth Amendment Equal Protection and Other Rights

- Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens
- Amdt14.2 State Action Doctrine

Section 1 Rights

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- Amdt14.S1.1 Citizenship
  - Amdt14.S1.1.1 Historical Background on Citizenship Clause
  - Amdt14.S1.1.2 Citizenship Clause Doctrine
  - Amdt14.S1.1.3 Loss of Citizenship
- Amdt14.S1.2 Privileges or Immunities
  - Amdt14.S1.2.1 Privileges or Immunities of Citizens and the Slaughter-House Cases
  - Amdt14.S1.2.2 Modern Doctrine on Privileges or Immunities Clause
- Amdt14.S1.3 Due Process Generally
- Amdt14.S1.4 Incorporation of Bill of Rights
  - Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights
  - Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights
  - Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights
- Amdt14.S1.5 Procedural Due Process

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