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COURT OF APPEALS
DIVISION ONE
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No. 71456-2-I

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

IN RE THE PARENTING OF S.H.P-A.

MARK E. PHILLIPS,

Appellant

vs.

EILEEN C. ACHESON,

Respondent

2014 SEP 10 AM 10:47
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

Appeal From The Superior Court For King County
Hon. Palmer Robinson

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Ms. Acheson's response brief contains a recitation of her testimony at trial and presents this testimony as if it is fact, simply because she gave utterance to those statements. Most of Ms. Acheson's statements were not true and are not supported by the evidence that is of record in this matter. To introduce such statements as verities to this Court is intentionally misleading. It is thus, incumbent upon Mr. Phillips to rectify these misstatements for this court's edification. Moreover, this recitation of facts is largely irrelevant in that the ultimate fact finder in this matter is the trial court, whose findings cannot be disturbed so long they are supported by "substantial evidence." *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Much of the "facts" presented by Ms. Acheson were disregarded by the trial court.

First, Ms. Acheson states she met Mr. Phillips when he was being investigated by the FBI in January 2010 and that she first learned of the investigation from the news and was shocked by it. (Brief of Respondent, "BOR", p. 6-7). However, Mr. Phillips was not being investigated by the FBI when he first met Ms. Acheson in January 2010 and testified that the criminal allegations came out four months later. RP 406. He further testified that Ms. Acheson was well aware of the allegations and that she had her own father, an attorney, consult with Mr. Phillips about the

allegations. RP 412-413. Furthermore, her pregnancy came well after the criminal complaint had been filed. It is also reasonable to infer that Ms. Acheson would have relied upon her own father's representations, given that he prepared a power of attorney between Mr. Phillips and Ms. Acheson and advised Mr. Phillips on his criminal case. RP 412-415.

Ms. Acheson states Mr. Phillips attempted suicide. (BOR, p. 6). Mr. Phillips' testimony was clear that he did not attempt suicide. RP 418. Moreover, the court did not find this to be a concern and did not order psychological testing.

All of Ms. Acheson's proffered "facts" of Mr. Phillips' contact with her (retaliation against the people who caused him to be convicted (RP 207), requests to assist with lawsuits (RP 218), made constant requests upon her (RP 215-16), sued her (RP 231), sent her frightening letters (RP 280-88), was ordered to obtain a psychological evaluation (RP 572), BOR, p.6-7) were clearly given no regard by the court. Ms. Acheson's inclusion of such "facts" in her Response Brief can only be for the inappropriate purpose of prejudicing this Court's opinion of Mr. Phillips. Moreover, the record was abundantly clear that Ms. Acheson maintained constant contact with Mr. Phillips throughout his incarceration, sending him loving cards and updates about their child. Psychological

testing was ordered by the family law court, but was not a condition ordered by the trial court.

Last, Ms. Acheson states Mr. Phillips “served [her] with legal papers in which he declared that he was not the father.” (BOR, p. 8). This was factually incorrect and unsupported by the record.

ARGUMENT

1. THE TRIAL COURT DID ABUSE ITS DISCRETION IN IMPUTING INCOME TO MR. PHILLIPS

Ms. Acheson is correct that the Court did not give a reason for choosing subsection (e) of RCW 26.19.071 when imputing income to Mr. Phillips and finding that “the obligor’s income is unknown.” (BOR, p. 7). Ms. Acheson states that Mr. Phillips did not assign error for the court’s finding that his income was “unknown.” (BOR, p. 7). Ms. Acheson’s argument is splitting hairs. Mr. Phillips assigned error to the fact that the court imputed income based upon the incorrect application of RCW 26.19.071. If the court has to impute income to an obligor, it is axiomatic according to statute that the income is unknown.

Ms. Acheson opines that the trial court’s findings were supported by substantial evidence on the basis that “Mr. Philips testified that his source code and patents were potentially worth millions of dollars. RP 533-34.” (BOR, p. 7). However, the actual testimony of Mr. Phillips was

that his source was more valuable to him, he needed to have a vehicle in order to monetize it and it was not a liquid asset, was dated, had been erased from the laptop he recovered from Ms. Acheson, and gave no testimony as to its actual worth. RP 533-35. Mr. Phillips testified that his search for work in his prior field of expertise had been futile due to his felony conviction for wire fraud. RP 514.

Mr. Phillips did testify to receiving gifts from various people and testified that many of those gifts were either for living expenses or were paid to third parties / entities performing legal work on his behalf. Ms. Acheson again attempts to split hairs by stating that Mr. Phillips did not account for all of these gifts given that he did not provide “proof that these funds were all gifts rather than income from work. He did not submit tax returns.” (BOR, p. 9). Mr. Phillips presented all the information required of him by LFLR 6. He provided 6 months of bank statements, his last 6 pay stubs, and testified he did not have bank statements to provide because he had been incarcerated and his accountant had to reconstruct his work history. RP 511-512. Moreover, the gifts were provided in 2013, meaning the soonest he could have reported these “gifts” on his tax return would have been in 2014. The testimony regarding the nature of this money as a “gift” was unrebutted at trial. Mr. Phillips’ income was demonstrably determined. He worked at the only job he was able to obtain after his

release from prison and thereafter has not been able to find work. As already argued in his opening brief, Mr. Phillips had an established work history, which by statute, the court was obliged to follow when imputing income to Mr. Phillips at the first level of priority. There is no basis for any finding that Mr. Phillips' income was unknown, simply because he received gifts and had last worked in 2009. The case cited by Ms. Acheson, *In re Marriage of Dodd*, is easily distinguishable because Mr. Dodd was self-employed, worked sporadically, admitted to having checks written to his girlfriend, who would cash them, and owned expensive logging equipment that could not be properly accounted for. *In re Marriage of Dodd*, 120 Wn. App. 638, 640, 86 P.3d 801 (2004). None of these factors were present in the case at bar to support a finding by the trial court that Mr. Phillips' income was unknown.

**2. THE TRIAL COURT ABUSED ITS DISCRETION BY
REQUIRING MR. PHILLIPS TO PAY A
PROPORTIONAL SHARE OF DAYCARE EXPENSES**

Ms. Acheson's statement that the trial court must make an express written finding that day care expenses are "reasonable and necessary" misconstrues Mr. Phillips' argument to this Court. Again, Mr. Phillips contends that the trial court abused its discretion by ordering day care expenses where such an expense for an unemployed parent is not reasonable or necessary. Because the court ordered such expenses, Mr.

Phillips second argument is that the sufficiency of proof for such expenses under *Fairchild* was inadequate.

First, there was no substantial evidence to support that the day care expenses were “reasonable and necessary” for an unemployed parent. RCW 26.19.080(4) and *In re Marriage of Mansour*, 126 Wn. App. 1, 11, 106 P.3d 768 (2004) requires the court to determine that expenses beyond the basic child support obligation are reasonable and necessary. While the court is not expressly mandated to enter a finding of fact in this regard, the record must contain substantial evidence to support that the day care expenses are reasonable and necessary. Ms. Acheson’s only argument in her Response Brief that such expenses were reasonable and necessary was that she is “disabled due to an anxiety disorder, and that she needs some extra assistance in the home.” (BOR, p. 10). Ms. Acheson, however, never testified that she needed a nanny due to her disorder. The only testimony about how her disorder affected her was with respect to her employment, that because of stress she finds it “harder... to process numbers....” RP 242.

Second, Ms. Acheson’s argument that *Fairchild v. Davis*, 148 Wash. App. 828 (2009) is inapposite is simply inaccurate. As Ms. Acheson posits, *Fairchild’s* holding discussed only whether the obligor was entitled to reimbursement for expenses not actually incurred, and not

whether the trial court properly included a provision for day care in the child support order. (BOR, p. 11). The key holding of *Fairchild* is clear and directly on point with the issue in this case with respect to the sufficiency of proof for day care expenses. Mr. Phillips argument is that regardless of whether day care expenses should be ordered or not, *Fairchild* established the necessary standard of proof for such expenses. The holding of *Fairchild* is that a self-serving declaration without actual proof of the expenses incurred is inadequate and that adequate proof is necessary to prevent a windfall. *Fairchild*, 148 Wash. App. at 451.

3. THE PARENTING PLAN ISSUES ON APPEAL ARE PROPERLY BEFORE THIS COURT

The basis for excluding review of the parenting plan is the claim that the notice of appeal did not provided “notice” of appellant’s claims because the parenting plan was not attached to the notice of appeal. However, the trial court’s Findings of Fact and Conclusions of Law was attached to the notice of appeal. In addition, a copy of the Order Granting Motion for Reconsideration, In Part was attached, which sought reconsideration of certain aspects of the Parenting Plan.

RAP 5.3(a) states that a party “should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made.” This appellate rule is clear that there is no mandatory language that a party

shall attach a copy of the order from which the appeal is made. The requirement under RAP 5.3(a) is discussed in detail in the *Washington Lawyers Practice Manual*, section C(1), at page 10, noting that RAP 5.3(a):

does not mean that every order or judgment which might be the subject of review must be attached to a notice of appeal. It is only the written order or judgment which triggers the right of review that should be attached to the notice. The rule is intended to help the appellate court determine if review has been timely sought, and if appeal as a matter of right is available. The failure to attach the written order or judgment is *not* jurisdictional. *Id.* (emphasis added).

Indeed, under RAP 1.2(a), mere technical violations of the rules will not prevent appellate review. *See Daughtry v. Jet Aeration*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979) (stating, “RAP 1.2(a) makes clear that technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review. In these circumstances, where the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, we will consider the merits of the challenge”).

Thus, by attaching the findings of fact which contained the parenting plan and a copy of the Order Granting Motion for Reconsideration, In Part, appellant provided the required notice to argue those issues on appeal. Further, Mr. Phillips, out of an abundance of

caution, filed a Designation of Clerk's Papers on June 3, 2014 for the final signed Parenting Plan to be submitted to the Appellate Court.

4. THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN ORDERING .191 FINDINGS IN THE PARENTING PLAN

Ms. Acheson offers no basis in law, either by statute or case law, in defense of Mr. Phillips' argument that incarceration is a basis for a .191 restriction for "willful abandonment," "neglect or substantial nonperformance of parenting functions," and "an absence or substantial impairment of emotional ties." Ms. Acheson's only argument is that from the perspective of the "best interests of a child standard," the focus should be on the needs of the child, and not the parent, and that Mr. Phillips' absence from his child's life was not "an innocent one." (BOR, p. 16). Even assuming any credence to this argument, any actions taken by Mr. Phillips that led to his incarceration happened prior to the child even being born. Second, as Mr. Phillips has already argued, incarceration alone should not be a basis for .191 restrictions, especially in light of the steps Mr. Phillips attempted to take in order to see his child between the time of his release from prison and the trial date. Mr. Phillips, however, was thwarted from seeing his child due to the DVPO Ms. Acheson filed shortly before his release from prison. Even despite Ms. Bercot's parenting evaluation recommending a .191 restriction for domestic violence and a

recommendation for DV classes and a continued protection order, the trial court adopted none of requested limitations and restrictions arising from any allegation of domestic violence. That leaves only one of two possible rationales for the court entering the .191 restrictions that it did. Either they are justified because of Mr. Phillips' incarceration, or because he was unable to see and form a bond with his child after his release in October 2012 until the trial date in August 2013 when he was finally able to see his child. That latter period of time cannot justify such .191 restrictions because the trial court implicitly conceded in its disregard of any .191 restrictions based on DV that Mr. Phillips should never have been restrained from seeing his child. Moreover, Mr. Phillips testified that he did try to obtain DV counseling in order to see his child, but was rejected from the program because he could not admit to any act of domestic violence, an impossible catch-22 that Ms. Acheson argues should, nonetheless, be a basis for a .191 restriction due to Mr. Phillips' "substantial nonperformance of parental functions." Imposing .191 a restriction for that period of time due to Ms. Acheson's frivolous allegations of DV would reward her bad faith conduct and unfairly prejudice Mr. Phillips. As Mr. Phillips has already argued, he should not otherwise be limited for reasons of his incarceration alone, which was not

a voluntary act undertaken by him to cause an impairment of ties between himself and his child.

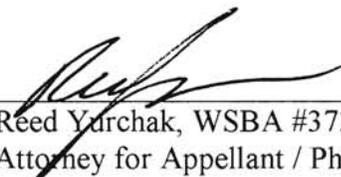
Ms. Acheson posits that certain actions taken by Mr. Phillips do support the trial court's imposition of the .191 restrictions: Mr. Phillips' desire for DNA testing, Dr. Lorene Robertson's statement that Mr. Phillips was "void of any emotion," and his statement that he needed to take "baby steps" with the child. Citing to these factors is yet another baseless attempt at prejudicing this Court's interpretation of the record in this matter. First, Mr. Phillips seeking to "contest his visitation" (BOR, p.17) was simply a request by Mr. Phillips to undertake DNA testing to confirm paternity. The parties were never married, were together a short time, and had limited contact with each other due to Mr. Phillips' pre-trial confinement. To argue a .191 limitation should be entered simply because a parent chose to initiate an action to determine parentage would lead to a chilling effect on a party's statutory right to do so and completely disregard due process. Second, Ms. Robertson's statements were contained in the Parenting Evaluation and are thus inadmissible hearsay. It is totally inappropriate for any reference to be made to such statements; Ms. Robertson herself could have testified but did not. In fact, Ms. Acheson offered no witnesses at trial. Furthermore, Ms. Robertson is Ms. Acheson's step-mother and thus was not an unbiased witness. Third, the

explanation for the “baby steps” comment was clear on its face in the Parenting Evaluation in that was given in response to an inquiry raised by Ms. Bercot from Ms. Acheson’s father as to their belief that Mr. Phillips would be seeking full custody of the child. Mr. Phillips was clearly acknowledging the need to gradually become reintegrated in his child’s life given his absence from it. Last, Ms. Acheson could have brought the child to the prison for visitations, but did not do so other than one time in November 2012, alleging falsely that Mr. Phillips was distracted and disengaged during this only visit with his child.

5. MS. ACHESON’S REQUEST FOR ATTORNEY FEES SHOULD BE DENIED

Ms. Acheson requests attorney fees based upon the fact that Mr. Phillips’ appeal lacks merit and is frivolous. (BOR, p. 23). Ms. Acheson’s request should be disregarded. Mr. Phillips raises genuinely valid issues in his appeal in terms of the trial court’s findings of fact, the evidence that supported those findings, and the court’s application of law in this matter both with respect to child support and parenting issues. Certain issues appear even to be of first impression to this Court.

Dated this 10th day of September, 2014



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