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No. 53236-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEPHANIE LYNNE MOFFETT,

Respondent,

v.

DAVID B.D. JAMES,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE TIMOTHY L. ASHCRAFT

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves the separation of an unmarried couple and establishment of a parenting plan and child support for their two minor children.

Mr. James only contests one of the trial court's findings. Mr. James' failure to provide a verbatim report of proceedings renders the trial court findings verities on appeal, which requires this Court to affirm the trial court's decision to include an RCW 26.09.191 finding in the final parenting plan. Mr. James' remaining arguments posit that the trial court was without authority to 1) enter a final parenting plan that did anything other than establish an equal residential schedule, 2) deny his request for a trial by jury, and 3) subject him to child support enforcement.

Mr. James' arguments are frivolous and rely on a gross misunderstanding and misapplication of the law. As such, this Court should affirm the trial court's findings regarding limiting factors under RCW 26.09.191, its denial of Mr. James' request for a trial by jury, and the final child support order and parenting plan. Because of the frivolous nature of Mr. James' appeal, this Court should award Ms. Moffett her

attorney fees.

II. STATEMENT OF FACTS

This case involves the separation of an unmarried couple who had been together for approximately fifteen years. CP 75. The parties began dating in 2003 and lived together from 2005 until 2018. CP 106. The parties separated in February 2018, and Ms. Moffett filed a Petition for a Parenting Plan in March 2018 pertaining to only the parties' daughter, Aria, because Mr. James had refused to sign a paternity acknowledgment for their son, Dresden. CP 106, 109-110. The trial court established a temporary parenting plan and support order for the parties' daughter, Aria, in May 2018. The parties' son, Dresden, was added to the order in July 2018 after Mr. James signed a paternity acknowledgment. Ex. 105. CP 55.

Shortly before trial, Mr. James filed a frivolous Motion to Dismiss that contained several arguments similar to those he presents in his Brief. CP 60-74. His motion was denied at attorney fees were reserved. CP 160-61. Mr. James moved for revision, and the trial court denied his motion to revise. CP 176-79.

This matter went to a bench trial on March 4 and 5,

2019. Four witnesses testified, including the parties. CP 176, 181-83, 186. After a letter ruling from the trial court on March 14, 2019, the trial court appropriately entered a Final order and Findings for a Parenting Plan, Residential Schedule, and/or Child Support; a Final Parenting Plan; and a Final Child Support Order on March 22, 2019. CP 176-185, 215-243.

Mr. James filed a Motion to Vacate on April 2, 2019 and, following a hearing on April 12, 2019, the Court entered an Order Denying Respondent's Motion to Vacate. CP 90-100. Mr. James filed a Notice of Appeal on April 22, 2019.

Mr. James filed his Designation of Clerk's Papers on May 20, 2019, but only included six documents: his Motion to Vacate, various sealed personal health care records, a sealed chemical dependency evaluation, the Motion to Dismiss he filed prior to trial (which was denied), and his Proposed Parenting Plan. CP 1-173. Mr. James failed to include a number of mandatory pleadings or documents, including the Summons and Petition, the written order or ruling, the final pretrial order or complaint and answer, and written opinion, findings, or conclusions of law. *See* RAP 9.6(b)(1)(C)-(F). Ms. Moffett had to supplement the record to include the required pleadings that Mr. James omitted. Mr. James filed his Statement of

Arrangements the same day. He elected not to file a verbatim report of proceedings because it was his “belief that they are unnecessary in the pursuit of justice in this case.” Statement of Arrangements (filed May 20, 2019). Mr. James filed his Opening Brief twenty-four days late and failed to cite to the Clerk’s Papers anywhere therein. *See* RAP 10.4(a)(2)(f).

III. ARGUMENT

A. Mr. James’s factual argument should be denied because of Mr. James’s failure to provide a verbatim report of proceedings.

Mr. James failed to provide a verbatim report of proceedings. As such, the findings of fact are verities and binding upon this Court. *Morris v. Woodside*, 101 Wn.2d 812, 815, 682 P.2d 905, 907 (1984) (en banc) (citing *Chace v. Kelsall*, 72 Wn.2d 984, 987, 435 P.2d 643 (1967)). This Court cannot consider Mr. James’ argument that it was an abuse of discretion to make its finding under RCW 26.09.191.

Additionally, Mr. James presented five issues but failed to identify the findings of fact and conclusions of law to which error was assigned, which violates RAP 10.4(c). Mr. James further failed to cite to the Clerk’s Papers in his Brief. These errors and omissions make it difficult for the Court to review, make it difficult for Ms. Moffett to respond, and should—in

addition to his failure to provide a verbatim report of proceedings—be dispositive and result in the dismissal of his appeal.

Equally problematic is Mr. James repeated reference to facts not in the appellate record. His failure to include citations makes it difficult to discern which alleged facts are part of the appellate record and which are him impermissibly introducing evidence . It is not the Court's or counsel's job to undertake this effort, and this Court should not consider any alleged facts in Mr. James' Brief that do not contain a citation to the Clerk's Papers.

Further compounding the above problem is Mr. James' attempt to smuggle in evidence that the trial court refused to admit under the Rules of Evidence. Attached to Mr. James' Motion to Vacate are many of the exhibits he attempted to admit at trial but that the trial court denied because of various evidentiary deficiencies. *See* CP 1-49.

Even if Mr. James's failure to 1) provide a verbatim report of proceedings, 2) identify the findings and conclusions to which he assigned error, and 3) cite to the appellate record are not dispositive, Judge Ashcraft's finding with respect to Mr. James's chemical dependency was not an abuse of discretion.

Unless that discretion is abused, it should not be disturbed on appeal. *In re Marriage of Kovacs*, 121 Wn.2d 795, 800-801, 854 P.2d 629 (1993). An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Id.* at 801.

In his Brief, Mr. James minimizes the evidence that Judge Ashcraft relied on to make a finding under RCW 26.09.191. Judge Ashcraft found:

Ms. Moffett testified that Mr. James would, primarily on holiday weekends, binge drink. She described certain episodes of his drinking. Evidence of a positive UA was admitted, with high scores. Mr. James acknowledged that event, a bachelor party, but denied any chronic problem. He did acknowledge that his parents had drug/alcohol problems. Based on the evidence presented, the Court does find that there is a basis for a restriction based on alcohol use.

CP 83-84. Judge Ashcraft's findings were based on Ms. Moffett's credible testimony, Mr. James's testimony regarding a family history of substance abuse and admission of abusing alcohol on several occasions, and Mr. James's UA result with alcohol levels of 4310

ng/ml—all of which provided reasonable grounds for Judge Ashcraft’s finding. Ex. 29; *see also* Ex. 32.

B. Each of Mr. James’s legal arguments should be denied and trial court rulings affirmed because each of these issues are controlled by settled law.

i. *Troxel v. Granville* is inapplicable.

Mr. James concedes in his Brief that *Troxel v. Granville*, 530 U.S. 57 (2000), is a nonparental custody case. As such, it has little or no bearing on the instant case. *Troxel* analyzed a trial court’s authority to infringe on the decision-making rights of a fit parent. Mr. James’ attempts to extrapolate the holding from *Troxel* to a parenting plan case and suggest that—so long as neither parent is unfit and there is no imminent danger to the child—the trial court cannot do anything but order equal residential time for each parent. This Court has clearly and repeatedly drawn a constitutionally grounded distinction between cases involving two biological parents and cases involving a biological parent and nonparent. “This standard [then-RCW 26.09.190] essentially compares the merit of the prospective custodians, and awards custody to the better of the two. This is properly applied between parents, but between a parent and a nonparent, application of a more stringent balancing test is required to justify awarding custody to the

nonparent.” *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981) (internal citations omitted).

To adopt Mr. James’ argument, this Court would have to disregard RCW 26.09.187—which the trial court correctly applied and analyzed—and the line of cases interpreting and applying same. *See, e.g., In re Marriage of Kovacs*, 121 Wn.2d at 802-10 854 P.2d 629 (1993) (analyzing the legislative history behind RCW 26.09.187 and rejecting appellant’s argument for a reinterpretation of RCW 26.09.187 that suggested a presumption of placement with the children’s primary historical caregiver); CP 81-85. Mr. James does not argue that the trial court misapplied RCW 26.09.187, he argues that the entire statutory framework is unconstitutional.

Mr. James’ argument is in direct contravention to the well-established principle that parents’ rights and involvement in their children’s lives is secondary to the welfare of the child. *In re Parentage of Schroeder*, 106 Wn. App. 343, 348, 22 P.3d 1280 (2001) (“While courts also should encourage the involvement of both parents, this is a secondary goal and courts should never sacrifice the best interests of the child to allow both parents to be involved.”); *Pickler v. Pickler*, 5 Wn. App. 627, 628-29, 489 P.2d 932 (1971) (internal citations omitted)

“A proper determination of the exercise of jurisdiction in child custody cases involves three interests: the wellbeing of the child; the right of a parent to the care, custody, management, and companionship of the child; and the concern of the state for the welfare of its citizens. In Washington, the primary consideration must be the welfare and best interests of the child.”); *Horen v. Horen*, 73 Wn.2d 455, 459, 438 P.2d 857 (1968) (“The best interests and welfare of the children in custody matters are the paramount and controlling considerations. The interests of the parents, including claims of the right to child custody, are subsidiary in relation to consideration of the welfare of their children.”); *Joslin v. Joslin*, 45 Wn.2d 357, 364, 274 P.2d 847 (1954) (“In divorce actions courts are not particularly interested in custody or visitation rights of the parents, but are primarily interested in the welfare of the children.”).

A trial court’s authority to make determinations related to the welfare is grounded not only in statute but derived from common law. *In re Marriage of Possinger*, 105 Wn. App. 326, 333-34, 19 P.3d 1109 (2001) (citing *Chandler v. Chandler*, 56 Wn.2d 399, 403-04, 353 P.2d 417 (1960) (“But the authority of the superior courts over matters relating to the welfare of minor

children is not derived from statute alone but also from common law.”)).

Troxel is inapplicable to this case, RCW 26.09.187 is constitutional and was appropriately applied, and Mr. James’ contention is without merit.

- ii. Mr. James is not entitled to a trial by jury and denial of same did not violate Mr. James’s due process rights.

Mr. James has no right to a trial by jury under the Federal or Washington State Constitutions. Mr. James is correct that the right to a trial by jury is included in the Seventh Amendment to the United States Constitution; however, the Seventh Amendment is not made applicable to the states through the Incorporation Doctrine. *U.S. ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 850 (2d Cir. 1965); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644, 771 P.2d 711, 716 (1989).

The Washington Supreme Court held that “[o]ur basic rule in interpreting article 1, section 21 is to look to the right as it existed at the time of the constitution’s adoption in 1889. We have used this historical standard to determine the scope of the right as well as the causes of action to which it applies.” *Sofie*, 112 Wn.2d at 645. Under Article 1, Section 21, “[i]n a civil action, a right to a jury trial exists where the action is purely

legal in nature. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980); *see also Allard v. Pacific Nat'l Bank*, 99 Wn.2d 394, 399, 663 P.2d 104 (1983). Where the action is purely equitable in nature, however, there is no right to a trial by jury. *Brown*, 94 Wn.2d at 365, 617 P.2d 704.” *Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 718, 846 P.2d 550, 557 (1993). “The divorce action from its inception was an equitable proceeding.” *Erickson v. Erickson*, 30 Wn.2d 914, 918, 194 P.2d 954, 956 (1948). Similarly, all custody disputes involving children are equitable. “Prior to any statutory governance, Washington courts relied solely on their equity jurisdiction to determine custody disputes affecting children.” *In re Parentage of L.B.*, 155 Wn.2d 679, 697, 122 P.3d 161, 171 (2005). Simply put, there is “no right to a jury in a divorce action or other equitable proceeding.” *Brust v. Newton*, 70 Wn. App. 286, 291, 852 P.2d 1092, 1094 (1993).

iii. *Virginia v. Rives* is inapplicable.

Mr. James’s argument on this issue borders on being unintelligible. *Virginia v. Rives*, 100 U.S. 313 (1879), addressed the remedies for improper removal of a case to federal court and due process rights associated with the racial composition of

juries. It has zero application to a bench trial parenting plan case in state court.

The phrase “adjudicated fact” does not appear in *Rives*, and it is unclear what Mr. James is referring to when he uses this phrase. An adjudicated or adjudicative fact is a fact that may be judicially noticed because it is not subject to reasonable dispute. F.R.E. 201. Adjudicative facts include facts that are “generally known within the trial court’s territorial jurisdiction” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” F.R.E. 201(b). There are no facts from *Rives* that would require the trial court to take judicial notice of in a parenting plan case, and Mr. James does not identify any in his brief.

Coram non iudice is a latin phrase meaning in the presence of a person not a judge. Black’s Law Dictionary, 2d. Ed. It refers to proceedings where a judicial officer lacked jurisdiction and, as such, the proceedings were void. *Rives*, 100 U.S. at 316. Again, the purpose and argument for which Ms. James uses this phrase is unclear. Mr. James did not assign error to the trial court’s jurisdictional findings and conclusions and makes no argument to that effect. He, Ms. Moffett, and the children resided in Washington for several years prior to the

institution of the parenting plan case, and Mr. James was served in Washington. CP 106, 217. As such, the trial court had subject matter jurisdiction because Washington was the children's home state and personal jurisdiction over the parties by virtue of their residence in Washington and service being effectuated here.

Mr. James seems to suggest that the trial court erred in not vacating orders entered by commissioners in the case. The only order signed by a commissioner that Mr. James sought review or revision of was the order denying his motion to dismiss. He did not seek review, revision, appeal, or move to vacate any prior commissioner orders—including temporary parenting plans and child support orders—except the motion to dismiss, for which he sought revision. *See* RCW 2.24.050. Because he failed to seek any appellate relief, these issues are not before this Court.

Even if these temporary orders were before this Court, the commissioners' orders were within their delegated authority. RCW 26.12.050 identifies the appointment process for family court commissioners. RCW 26.12.060 describes a family court commissioner's authority, which supplements the authority described in RCW 2.24.040 and which includes "exercise[ing] all the powers and perform[ing] all the duties of court

commissioners” and “caus[ing] the orders and findings of the family court to be entered in the same manner as orders and findings are entered in cases in the superior court.” It is unclear which orders entered by court commissioners to which Mr. James objects and why the commissioner(s) lacked jurisdiction to enter those orders. Again, however, those orders are not before this Court on appeal.

- iv. The trial court did not abuse its discretion in ordering child support or ordering enforcement through the Office of Child Support Enforcement.

“In Washington, both biological parents have an obligation to support their children regardless of marital status. A parent’s obligation for the care and support of his or her child is a basic tenet recognized in this state without reference to any particular statute.” *In re the Parentage of A.L.*, 185 Wn. App. 225, 236, 340 P.3d 260 (2014) (citing *State v. Wood*, 89 Wn.2d 97, 100, 569 P.2d 1148 (1977) (internal citation omitted). In *A.L.*, the Court analyzed the process for setting child support in a superior court. *Id.* at 236-38. Mr. James does not contest the process by which the trial court established child support. In fact, he does not even argue that the trial court was without authority to order him to pay child support. Instead he argues

that he is not subject to various means of enforcing his child support obligation. Each of his arguments fail.

Both state and federal law require the establishment of child support enforcement procedures. On the federal level, 42 U.S.C. Sec. 651 *et seq.* (or Social Security Title IV-D as it is referred to in Mr. James’s Brief) requires states to establish a system for collection or enforcement of child support obligations owed to the custodial parent. *See* 42 U.S.C. Sec. 654. As such, 42 U.S.C. Sec. 651 *et seq.* applies to the states—not individuals—although the enforcement action is taken against individual obligors. Mr. James’s argument that 42 U.S.C. Sec. 651 *et seq.* doesn’t apply to him is technically correct assertion but does not actually support his ultimate argument.

In Washington, Chapter 388-14A WAC identifies the Division of Child Support as Washington’s Title IV-D support enforcement agency and prescribes the procedures and rules for the creation of child support obligations and the enforcement thereof. Additionally, “The legislature unquestionably has authority, as exercised in RCW 74.20A, to provide for the administrative establishment and enforcement of support obligations and to prescribe the relationship between such

proceedings and support orders entered by the superior court pursuant to RCW 26.09.” *Dep’t of Soc. & Health Servs. v. Handy*, 62 Wn. App. 105, 108, 813 P.2d 610 (1991); *see also* RCW 26.23.050.

Mr. James appears to confuse child support with the amount in controversy language from the Seventh Amendment. This argument is misplaced but nevertheless is addressed hereinabove.

Executive Order 12953 implemented procedures to ensure the cooperation of federal agencies in facilitating child support payments involving federal employees. Exec. Order No. 12953 at Sec. 101, 60 Fed. Reg. 11013 (Feb. 28, 1995) (“Requires all Federal agencies, including the Uniformed Services, to cooperate fully in efforts to establish paternity and child support orders and to enforce the collection of child and medical support in all situations where such actions may be required.”). There is no evidence in the record that Mr. James is or was a federal employee. Even if there was evidence that Mr. James is or was a federal employee, Executive Order 12953 does not except federal employees from child support enforcement under 42 U.S.C. Sec. 651 *et seq.*; it seeks to ensure

the enforcement of child support obligations in cases involving federal employees.

42 U.S.C. Sec. 666 mandates that states to do exactly what Mr. James complains of: enforce child support obligations. 42 U.S.C. Sec. 666(a) (“Each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program [Temporary Assistance to Needy Families] which the State administers under this part.”). There is no colorable argument that 42 U.S.C. Sec. 666 obviates Mr. James of his child support obligation or excepts him from enforcement thereof.

The Uniform Interstate Family Support Act (“UIFSA”), 42 U.S.C. Sec. 654 *et seq.*, functions similarly by ensuring the states have sufficient procedures in place to establish and enforce child support obligations, especially in situations where enforcement may involve interstate agencies. UIFSA doesn’t apply in the circumstances at issue here when the state that issued the support order is enforcing it and all parties live and work in that state.

C. This court should award attorney fees to Ms. Moffett because the appeal is frivolous pursuant to RAP 18.9.

Ms. Moffett requests that she be awarded her fees for this appeal as authorized by CR 11, RCW 4.84.185, RCW 26.09.140, RCW 26.26.140, RCW 26.26B.060, RAP 18.1, and RAP 18.9(a) because this appeal is frivolous, this is the fourth permutation of the same legally and factually baseless arguments, and because Ms. Moffett has the need for attorney fees. If this Court deems Mr. James's appeal to be frivolous, a finding to that effect should be made.

“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.” *Advocates for Responsible Dev. V. Wash. Growth Mgmt. Hearings Bd.*, 170 Wn.2d 577, 580 (2010). An appeal is not frivolous where the appellate raises even one debatable issue. *Advocates*, 170 Wn.2d at 580. In this appeal, there is not even one debatable issue. All of Mr. James' issues are well settled matters of law or are precluded from appellate review by virtue of his failure to provide a verbatim report of proceedings.

IV. CONCLUSION

Judge Ashcraft was within his discretion to enter the appealed final orders in this matter on March 22, 2019. Each of Mr. James's arguments are legally frivolous and either disposed of by virtue of his failure to provide a verbatim report of proceedings or a by cursory review of the legal authority to which he cites. Accordingly, Ms. Moffett should be awarded her fees and costs as authorized and referenced above and Mr. James's appeal should be dismissed.

Based upon the foregoing, this court should affirm the trial court in all regards. This court should reject Mr. James's appeal and award Ms. Moffett her attorney fees on appeal.

Dated this 10th day of October, 2019.

RESPECTFULLY SUBMITTED,

DocuSigned by:

Jonathan Moffitt

865189052F3640F...

Jonathan Moffitt, wSBA # 47345

Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the ____ day of October, 2019, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

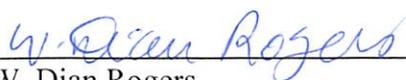
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DATED this 10th day of October, 2019, at Lakewood,
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