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No. 71456-2

King County Superior Court No. 12-3-01157-9SEA

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

In re the Parenting and Support of:

S.H.P.-A.,
Child,

EILEEN C. ACHESON,
Respondent,

v.

MARK E. PHILLIPS,
Appellant.

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

The Honorable Palmer Robinson, Judge

RESPONDENT'S OPENING BRIEF

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I.
STATEMENT OF THE CASE

In the interest of brevity, Ms. Acheson will not repeat portions of Mr. Phillips's statement of the case that are undisputed.

Mark Phillips obtained a degree from the University of Washington in computer science and architecture. RP 392. He worked as a software engineer for "a couple of companies" and was then promoted to Chief Technology Officer of Fullplay, a media company based in Bellevue, Washington. He developed the first portable mp3 player for devices, and sold that to Microsoft. RP 393-94. In 2001 he created A-Dot Corporation, which did research for Microsoft regarding wireless protocols and embedded software. In 2005 he founded MOD Systems, and in 2006 he founded MetaWallet. MOD Systems developed a music compression system that allowed customers at record stores to sample the content. RP 395. MOD obtained a lucrative contract with Starbucks. RP 396. Mr. Phillips owned the valuable source code and patents for this technology. RP 397.

Mr. Phillips met Ms. Acheson in early 2010, around the time that he was being investigated by the FBI for wire fraud, mail fraud and money laundering. RP 406; Ex. 8 at p. 4. Ms. Acheson did not learn of the investigation until she saw something about it in the news. RP 636. She

was shocked and traumatized by the coverage. Ex. 8 at p. 4. Mr. Phillips's attorney assured her that the charges were just a misunderstanding. When Ms. Acheson became pregnant, she decided to go through with the pregnancy. She initially believed Mr. Phillips's claims of innocence. *Id.*

Mr. Phillips attempted suicide on the same day Ms. Acheson told him she was pregnant with their baby. RP 177. Mr. Phillips inhaled several bottles of dust cleaner. Ms. Acheson found him on the bathroom floor, completely naked and with purple lips. She called 911 and he was taken to the hospital in an ambulance. RP 178-79. After this incident, he was taken back into custody by the FBI. RP 183.

Ms. Acheson attended much of the federal criminal trial. She was shocked by what she heard because the evidence was so different from what Mr. Phillips had been telling her. RP 186. This was very painful to her, and ultimately caused her to decide against marrying Mr. Phillips. RP 210-13. On March 2, 2011 a federal jury convicted Mr. Phillips on seven of the eight counts. He spent only 2.5 years in federal custody because he volunteered for a drug treatment program.

When Mr. Phillips was in prison, he wrote letters to Ms. Acheson explaining how he would retaliate against the people in his company who had caused him to be convicted due to their lies. RP 207. He wanted Ms.

Acheson to assist him with lawsuits against these people. RP 218. He would constantly have requests for Ms. Acheson. At one point she decided to stop communicating with Mr. Phillips because she needed to keep her attention on the baby. RP 215-16. Eventually, Mr. Phillips sued Ms. Acheson as well. Among other things, he claimed she had taken a computer of his with \$500 million worth of source code on it. RP 231.

While Mr. Phillips was in prison, he sent, or caused to be sent, several letters and emails that frightened Ms. Acheson. Among these were letters from other prisoners asking for money, although the actual text of the letters was sometimes in Mr. Phillips's handwriting. RP 280-88; Ex. 1. Mr. Phillips also sent Ms. Acheson a letter which included: "I am concerned for your safety and retaliation against you and [S.H.P.-A.]" RP 316.

Ms. Acheson was also concerned about Mr. Phillips's erratic behavior. For example,

one time he was screaming in the middle of the night, banging on the walls. He thought someone was outside in a van, he was paranoid. He talked about needing people to protect him, armed people, for when he got out. He talked about good and evil in the world. . . . He texted that he was invincible, that it was himself against the world, and he made grandiose comments.

Ex. 8 at p. 6. Mr. Phillips was ordered to obtain a psychological evaluation prior to trial, but failed to do so. RP 572-73.

Although Mr. Phillips initially acknowledged paternity of the baby, he later served Ms. Acheson with legal papers in which he declared that he was not the father, and that she had been sleeping around. RP 230-31. Ultimately, DNA testing proved that he was the father. RP 233.

Ms. Acheson learned from the paternal aunt and from the criminal investigation that Mr. Phillips had a history of abusing nitrous oxide, Oxycodone, Vicodin, and cocaine. Ex. 8 at p. 6. Mr. Phillips insisted that his only abuse of narcotics took place in 2008. *Id.* at 9. He also acknowledged “huffing” chemicals, but said he only did that to “pass out” rather than to kill himself. *Id.* at 10. In a letter to Ms. Acheson, however, he referred to the incident as “my suicide attempt through asphyxiation.” Ex. 26 at p.1.

Ms. Acheson developed an anxiety disorder. She went on medical leave from work in the fall of 2010 on the advice of her doctor. RP 195-96. She now receives disability benefits. RP 239.

The parenting evaluator, Jennifer Bercot, has an undergraduate degree in psychology and a master’s degree in marriage and family therapy. She has been employed by King County Family Court Services since 2007. At the time she completed her report, Ms. Bercot was concerned about the father’s domestic violence, substance abuse, and potential mental health issues. “And it was a concern that the father

establish contact with the child and that he start to engage and build a relationship with the child.” RP 69.

II. ARGUMENT

A. STANDARD OF REVIEW

Family law rulings regarding parenting plans and child support orders are reviewed for abuse of discretion. *Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (parenting ruling reviewed for abuse of discretion); *State ex rel. J.V.G. v. Van Guilder*, 137 Wn. App. 417, 154 P.3d 243 (2007) (child support ruling reviewed for abuse of discretion).

Abuse of discretion is generally defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).¹

A trial court’s factual findings must be upheld if they are supported by “substantial evidence.” *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). An appellate court will not ordinarily substitute its judgment for that of the trial court even though it might have resolved the factual dispute differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003). The trial court is generally

¹ *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971), superseded on other grounds by *Seattle Times Co. v. Benton County*, 99 Wn.2d 251, 661 P.2d 964 (1983).

free to believe or disbelieve a witness in reaching factual determinations. *State v. Chapman*, 78 Wn.2d 160, 469 P.2d 883 (1970). In family law cases, this deferential standard of review applies even when the trial court relied solely on documentary evidence. *Marriage of Rideout*, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPUTING INCOME TO MR. PHILLIPS

Mr. Phillips concedes that he was voluntarily unemployed at the time of the trial, and that it was appropriate for the Court to impute income to him. Brief of Appellant (BOA) at 12. He maintains, however, that the trial court should have relied on his income during four months in the past, rather than on the median income for a man of his age.

RCW 26.19.071(6) requires the trial court to impute income when, as here, a parent is voluntarily unemployed. The statute sets out six methods of imputing income in order of priority. Mr. Phillips argues that three different subsections could apply to him:

- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic; [and]
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent . . . has recently been released from incarceration.

See BOA at 16. Mr. Phillips maintains that the trial court inexplicably chose instead subsection (e): “Median net monthly income of year-round full-time workers as derived from the United States bureau of census . . .”

In fact, the Court did give a reason for choosing subsection (e). In its Order of Child Support, the Court made a factual finding that “the obligor’s income is unknown.” The Court also stated that

[t]he amount of imputed income is based on the following information in order of priority. The Court has used the first option for which there is information: . . . net monthly income table.

CP 2.² Mr. Phillips has not assigned error to the factual findings that his income was “unknown.” The finding is therefore a verity on appeal. *See, e.g., Robel v. Roundup Corp.*, 148 Wn.2d 35, 52, 59 P.3d 611, 620 (2002).

In any event, even if this finding were challenged, it would be upheld because it is based on substantial evidence. It is undisputed that Mr. Phillips had a luxurious lifestyle prior to his incarceration conviction for fraud. Undoubtedly, his felony conviction impaired his ability to garner investors for new start-up ventures, but that does not mean he was unable to earn money. Mr. Phillips testified that his source code and patents were potentially worth millions of dollars. RP 533-34. By all

² Throughout his brief, Mr. Phillips cites incorrectly to the clerk’s papers. Rather than citing the pages as numbered by the superior court clerk, he cites to the docket numbers of the documents.

accounts he is a gifted software and hardware engineer. As discussed below he still has many friends and associates from his work for various companies.

In his testimony, he relied on paychecks from December, 2012 through March 2013, showing monthly income of \$2,500. During this time he was living in a halfway house after release from prison. RP 512-13. He was employed by a friend former client of MOD Systems, Al Battson of Battson Consulting Group. RP 512, 576-77. Mr. Phillips was required by the federal court to work during this time and therefore needed to show some income.

He claimed that he had no employment after leaving the halfway house, but the trial court was not required to believe that. Mr. Phillips acknowledged that he spent over \$300,000 in legal fees, that he lived in a condo in Belltown, and that he had living expenses. RP 576; RP 583. He maintained that various friends gave him tens of thousands of dollars each as “gifts.” RP 580; RP 588-89. This included Mr. Battson, who provided “gifts” of somewhere between \$10,000 and \$25,000 in Phillips’s estimate. This same man, of course, had recently paid Mr. Phillips for his consulting. Mr. Phillips at first claimed that his fiancée, Jennifer Schweickert would simply pay his expenses for him without giving him money directly. RP 581. When questioned about his bank deposits,

however, he admitted that Ms. Schweickert and others would put money into his bank account using paypal. RP 592-93. Mr. Phillips provided no proof that these funds were all gifts rather than income from work. He did not submit tax returns. Under these circumstances, the trial court had ample evidence to conclude that Mr. Phillips's income could not be determined.

When income cannot be determined, it is appropriate to impute income based on the median census figures. *See Marriage of Dodd*, 120 Wn. App. 638, 86 P.3d 801 (2004). Frankly, the trial court likely did him a favor by doing so, since he appears to be capable of earning much more.³

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING MR. PHILLIPS TO PAY HIS PROPORTIONAL SHARE OF DAYCARE EXPENSES

The basic transfer payment is intended to cover only costs for food, clothing, and housing. RCW 26.19.001. "The [C]ourt may exercise its discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation." RCW 26.19.080(4). The statute expressly includes daycare expenses as an option for the court. RCW 26.19.080(3). When such expenses are

³In this section of his brief Mr. Phillips cites to an unpublished case. BOA at 15. That is improper. *See Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273, 1278 (2005).

ordered, they must be shared in the same proportion as the basic child support obligation (as was done here). *Id.* Nowhere does the statute state that child care expenses may be incurred only for the purpose of work.

In this case, the Court was within its discretion to require both parents to pay their share of daycare and other expenses.⁴ The Court was well aware that Ms. Acheson is disabled due to an anxiety disorder, and that she needs some extra assistance in the home. Ms. Acheson testified that she relies on her nanny for approximately 18 hours per week. RP 267. This permitted her to attend various appointments without dragging her toddler along. RP 358. The only flaw in Ms. Acheson's parenting, according to the evaluator, was that she had once left her son unattended while attempting to run an errand. The trial court was within its discretion to find that this cost was reasonable and necessary, and that it was in the best interests of the child.

Mr. Phillips maintains that the trial court was "required by statute" to make an express, written finding that the daycare expense was "reasonable and necessary." In fact, RCW 26.19.080 contains no such requirement. Mr. Phillips does not cite any case for that proposition. (Mr. Phillips cites many cases holding that expenses beyond the basic

⁴ Mr. Phillips has not objected to certain other expenses beyond basic child support, such as tennis lessons for S.H.P.-A.

child support obligation must be split proportionately, but there is no dispute that the trial court did so.)

Certainly, the trial court was well aware of the legal standard. For one thing, Mr. Phillips filed a motion for reconsideration on this issue in which he argued that the daycare expense was not reasonable and necessary (CP ___; Dkt. 134 at p. 3)⁵, but the trial court declined to reconsider on that issue. CP 20.

Mr. Phillips also maintains that the trial court could not grant funds for daycare expenses unless Ms. Acheson provided proof beyond her own testimony that she was paying those expenses. He relies solely on *Fairchild v. Davis*, 148 Wn. App. 828, 207 P.3d 449 (2009), but that case is inapposite. The issue in *Fairchild* was not whether the trial court properly included a provision for daycare expenses in the child support order; the issue was whether the father was later entitled to reimbursement for such expenses based on his allegation that the mother did not actually incur them. In that setting, the appellate court found it necessary for the mother to produce some form of proof other than her own testimony.

It would make little sense to apply the same requirement to an initial order of child support. Often a parent has not begun to incur the

⁵ Ms. Acheson is filing a Supplemental Designation of Clerk's Papers today with the King County Superior Court.

expenses requested because she has yet to obtain an order ensuring that the other party will pay his proportionate share. She may not be able to afford the expense until the order is in place.

In this case, the trial court specifically provided that Mr. Phillips would receive reimbursement for any child support expenses not actually incurred. CP 3. If he makes a motion for such reimbursement, Ms. Acheson will be required to produce appropriate proof, as set out in *Fairchild*.

D. MR. PHILLIPS'S ISSUES REGARDING THE PARENTING PLAN ARE NOT PROPERLY BEFORE THIS COURT

Mr. Phillips's notice of appeal in this case is expressly limited to the trial court's ruling regarding child support. Nevertheless, his opening brief contains assignments of error, issues, and legal argument regarding the parenting plan. Those portions of the brief should be disregarded.

RAP 2.4(a) reads in pertinent part: "The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal." There are some exceptions set out in RAP 2.4(b), (c), (d), and (e), but none apply here. Further, RAP 5.3(a) states that a

notice of appeal must . . . designate the decision or part of decision which the party wants reviewed . . . The party filing the notice of appeal should attach to the notice of

appeal a copy of the signed order or judgment from which the appeal is made.

Id.

The full text of Mr. Phillips's notice of appeal, filed through counsel, is as follows:

Respondent, Mark Phillips, seeks review by the designated appellate court of the Trial Court's decision of the Child Support Order and Child Support Worksheets entered on November 20, 2013 and affirmed by the trial court's decision on respondent's Motion for Reconsideration on January 15, 2014.

Respondent seeks review specifically with the trial court's decision to impute income to respondent based upon the median net income for his age, rather than his most recent wage history; and upon the trial court's exercise of discretion to order apportionment of day care expenses.

CP ___; Dkt. 140 at p. 1 (emphasis added).⁶

A copy of the child support order is attached. Also attached is a copy of the trial court's findings of fact and conclusions of law, and the ruling on Mr. Phillips's motion for reconsideration, both of which address, in part, issues regarding the child support ruling. The parenting plan is not attached to the notice of appeal.

Mr. Phillips not only specified that the appeal was limited to the child support order, he further limited it to two aspects of that order: the

⁶ Mr. Phillips has failed to include the notice of appeal in his designation of clerk's papers, although including that document is mandatory. See RAP 9.6(b)(1)(A).

trial court's decision to impute income to Mr. Phillips based upon the median net income for his age and the trial court's apportionment of daycare expenses.

Nevertheless, the brief of appellant, filed on June 9, 2014, includes the following assignments of error:

4. The trial court erred in entering .191 findings in the Parenting Plan that Mr. Phillips had engaged in "willful abandonment," "substantial refusal to perform parenting functions," and neglect or substantial nonperformance of parenting functions of the minor child.

5. The trial court erred in requiring "supervised" visits and a graduated plan of visitation with the minor child.

These parenting plan issues are discussed in the introduction (p. 1), the statement of the case (pp. 4-12), sections 3 and 4 of legal argument (pp. 22-35), and the conclusion (pp. 36-37). Those portions of the brief violate the rules of appellate procedure.⁷ Ms. Acheson promptly filed a motion objecting to those portions of the brief, but the Court Clerk ruled that the matter should be addressed in this responsive brief.

Ms. Acheson is not suggesting that the mere failure to attach the parenting plan to the notice of appeal waives all parenting plan issues. Rather, the failure to attach that document is just additional evidence that

⁷ Mr. Phillips has also failed to provide issue statements as required by RAP 10.3(a)(4), but respondent does not object to the brief on that basis because the issues concerning the parenting plan are reasonably clear from the legal argument.

Mr. Phillips did not intend to appeal the parenting plan. The strongest evidence, however, is his clear and specific listing of the issues he intended to raise, none of which involved the parenting plan.

Mr. Phillips may point out that he attached the ruling on motion for reconsideration and the Findings of Fact and Conclusions of law. Those documents do make some reference to the parenting plan. But that hardly shows an intent to appeal the parenting plan since the documents were necessary to challenge the child support ruling as well.

In short, this is not a case in which the appellant made some inadvertent, technical error in drafting the notice of appeal. Rather, Mr. Phillips made a clear decision to appeal only certain aspects of the child support order. That decision is consistent with Mr. Phillips's statement to the parenting evaluator that he wished to take "baby steps" towards parenting his son. He did not argue in the trial court that he should have more time with his son than the evaluator recommended. *See* Section E, below. Undersigned counsel agreed to represent Ms. Acheson pro bono with that understanding. Then, at some point, Mr. Phillips changed his mind and proceeded to brief arguments regarding the parenting plan, yet he did not notify opposing counsel or seek permission from this Court. Under these circumstances, the Court should decline to address the parenting plan.

Unfortunately, Ms. Acheson will also have to address the merits of the parenting plan issues in the alternative since she cannot be sure whether the Court will disregard those issues.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING RESTRICTIONS ON MR. PHILLIPS'S PARENTING

Mr. Phillips broadly protests the trial court's restrictions on his parenting under RCW 26.09.191. Specifically, the court found "willful abandonment that continues for an extended period of time and a substantial refusal to perform parenting functions" under subsection (2)(a)(i); "neglect or substantial nonperformance of parental functions" under subsection (3)(b); and the "absence or substantial impairment of emotional ties between the parent and child" under subsection (3)(d).

Mr. Phillips's main argument appears to be that he cannot be faulted for failing to be involved in his son's life because he was incarcerated for much of that time. This reasoning turns statutory policy on its head. In Washington, the focus is on the "best interests of the child," rather than the interests of the parent. *See* RCW 26.09.002. Whether or not the parent had a good reason for his absence from the child's life is largely irrelevant from the child's point of view. In either case, the child could not develop a bond with the absent parent. In any event, the reason for Mr. Phillips's absence was not an innocent one. He

was incarcerated because he chose to commit multiple counts of fraud against his business partners. In addition, Mr. Phillips acknowledged in a letter to Ms. Acheson that his suicide attempt ruined any opportunity to be with his son pending trial.

First, let me address your concern of my suicide attempt through asphyxiation. I have no excuse for what happened. . . . I acted impulsively and emotionally . . . If it were not for that event, I would have been with you through your pregnancy, child birth, and perhaps have a fighting chance with my case. Alas, I have irreparably damaged our family.

Ex. 26 at p. 1.

Further, Mr. Phillips's incarceration was hardly the only reason for the Court's findings. Mr. Phillips first acknowledged, and then contested, his paternity. Ultimately, it had to be proved through DNA testing. *See* Parenting Plan Evaluation of Jennifer Bercot, Plaintiff's Ex. 8 at p. 5; RP 230-33 (testimony of Acheson). According to Dr. Lorene Robertson, Phillips avoided eye contact and was unusually "void of any emotion" when he attended an ultrasound examination. Ex. 8 at p. 12. Although Ms. Acheson brought their infant son to the sentencing, Mr. Phillips would not even look at him. RP 215. When Ms. Acheson took the child to prison to visit Mr. Phillips, he focused on what food Ms. Acheson could get for him and on how he was going to pursue lawsuits against his former business associates. He did not talk about their son or any plans for how they might

raise him together. In fact, he would hardly look at the boy. RP 217-18, 337-38. Finally, Ms. Acheson suggested that Mr. Phillips hold the child because he had not asked to on his own. Mr. Phillips complied but then quickly went back to his food. RP 339-40.

Mr. Phillips himself acknowledged that he was not ready to take on a significant role in parenting. In his interview with the parenting evaluator, Mr. Phillips stated that he “would like to be able to see the child once a week or once every several weeks for a day until he’s able to petition the Court for more time.” He explained: “I need to do baby steps. I haven’t been in his life for 2 years.” Before he could spend more time with S.H.P.-A, Mr. Phillips said he would “need to stabilize, reduce my litigation, get to a more normal work life, more money, housing, his own room, and having support.” Ex. 8 at p. 10. Yet there was no showing that Mr. Phillips was taking such steps by the time of trial. In fact, his fiancée, Jennifer Schweikert, testified that she and Mr. Phillips planned to move together to California once Mr. Phillips’s many lawsuits were resolved. RP 630-31.

Mr. Phillips maintains that the Court should follow the definition of “willful abandonment” set out in *Adoption of Lybbert*, 75 Wn.2d 671, 453 P.2d 650 (1969). See BOA at 25. In that case, the Court found that

“abandonment” was shown by the failure to provide the “commonly understood general obligations of parenthood.” Specifically:

(1) express love and affection for the child; (2) express personal concern over the health, education and general well-being of the child; (3) the duty to supply the necessary food, clothing, and medical care; (4) the duty to provide an adequate domicile; and (5) the duty to furnish social and religious guidance.

Lybbert at 674. As discussed above, there was ample evidence that these failures applied to Mr. Phillips.

Another theme in Mr. Phillips’s brief is that Ms. Acheson and the parenting evaluator claimed that Mr. Phillips committed domestic violence, but the trial court found them both to be liars. In fact, the trial court never rejected the testimony of either witness. Neither Ms. Acheson nor Ms. Bercot ever stated that Mr. Phillips committed any *physical* violence. As summarized by Ms. Bercot:

With respect to issues of domestic violence, the Court has determined that the mother has a basis for a full protection order and the father has been ordered to complete domestic violence treatment. He indicated that he does not plan to attend treatment but he is pursuing a civil case in which he is suing the mother for slander for accusing him of domestic violence. He plans to have the protection order dismissed once the court agrees that the mother is liable for slander.⁸ While there are not allegations of physical violence occurring in the parties relationship[,] the father’s

⁸ It does not appear that Mr. Phillips followed through on suing Ms. Acheson for slander, but he did file two other suits against her.

behaviors (harassment, intimidation, threats) while incarcerated caused the mother to be fearful, and though the father had an explanation for his behaviors given the history of his suicide attempts (violence), allegedly criminal behavior, and his part in allowing other inmates to obtain the mother's information[,] it would seem reasonable that the mother and others would be fearful. The professionals working with the mother during that timeframe described the mother becoming fearful, anxious, stressed due to the father's behaviors that were inappropriate and threatening. The father's current behaviors could also be perceived as retaliatory, harassing, intimidating, and manipulative as he is pursuing the mother via the court system in reportedly 3 cases (family law matter, suing for slander, and suing for allegedly possibly liquidating his assets even though he reportedly wants to provide for the mother and the child).

Ex. 8, p. 15 (footnote added).

[T]he father would likely benefit from learning that his actions, while he denies any malicious intention, could be perceived by others as coercive, threatening, and intimidating, and as he has already been ordered, the father should complete domestic violence treatment.

Id. at 15-16.

It is true that the trial court declined to impose restriction based on domestic violence, but that was not because the Court disbelieved Ms. Bercot or Ms. Acheson. In fact, the Court expressly stated that "Ms. Bercot is an experienced Family court evaluator and has provided the necessary testimony to support her recommendations for the Parenting Plan for the minor child [S.H.P.-A]." The Court apparently found that Mr. Phillips's conduct did not meet the specific definition of domestic violence

required to impose restrictions. *See* RCW 26.09.191(2), which cross-references to the definition of domestic violence in RCW 26.50.010(1):

“Domestic violence” means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

The Court did follow Ms. Bercot’s recommendations regarding other bases for restrictions under section .191. The Court never rejected the facts presented by Ms. Acheson or Ms. Bercot.⁹

Mr. Phillips finds it suspicious that Ms. Acheson waited until his release from prison was imminent before filing for a domestic violence protection order. BOA at 27. But of course the need for such an order was not as great while Mr. Phillips was behind bars.

Mr. Phillips complains that he was put in a “catch-22” when he was ordered to enter DV treatment because he could not receive treatment without falsely admitting that he had engaged in domestic violence. As discussed above, however, Ms. Bercot clearly explained the issues Mr. Phillips needed to work on, none of which involved physical violence.

⁹ Mr. Phillips continues to object to Ms. Bercot’s recommendation for a restriction based on domestic violence (BOA at 29), but the issue is moot since the trial court did not impose that restriction.

Mr. Phillips simply refused to accept that his behavior had caused trauma to Ms. Acheson. He maintains the same level of denial in his opening brief by referring to himself as the “victim” in this case. *See* BOA at 32.

Mr. Phillips seems to imply that he is the better parent because Ms. Acheson once left her son in the care of a valet attendant while running an errand. While the parenting evaluator took that incident seriously, she found that Ms. Acheson received appropriate professional help and that there was no concern for S.H.P.-A.’s safety by the time of trial. Ex. 8 at 16-17. *See also*, Ex. 4 and RP 53-57.

Mr. Phillips claims that he should not have been required to take the King County Court’s parenting seminar, “What about the Kids”, because he purportedly took a different parenting seminar while in prison. Ms. Bercot, however, questioned whether that program was adequate. RP 59-60. Mr. Phillips claims that he was misled because in the judge indicated in the Order on Pretrial Conference that he had completed that obligation. In fact, it is clear that someone checked the wrong box on that document. The form refers specifically to the “What about the Kids” seminar. CP 50. Although there is an X in the box indicating attendance by the father, it is undisputed that he did *not* attend that seminar. Mr. Phillips could not have been misled. In any event, Mr. Phillips’s failure to

attend the King County seminar was hardly the only reason for the restrictions on his parenting.

Finally, Mr. Phillips argues that the Court erred in awarding sole decision-making to Ms. Acheson. He concedes, however, that this ruling was mandatory in view of the restrictions imposed. Since the restrictions were proper, the ruling regarding decision-making was proper as well. In any event, the trial court gave several other reasons for sole decision-making besides the restrictions. *See* CP 46-47.

F. REQUEST FOR ATTORNEY FEES

Ms. Acheson asks this Court to award her attorney fees and costs based on the relative resources of the parties and the lack of merit of Mr. Phillips's appeal. *See* RCW 26.09.140; RAP 18.1; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003, 972 P.2d 466 (1999).

The court should also award fees because the appeal is frivolous. RAP 18.9. An appeal is frivolous if the lower court rulings at issue are discretionary, and the appellant has failed to make a debatable showing of abuse of discretion. *Johnson v. Jones*, 91 Wn. App. 127, 955 P.2d 826 (1998). Here, Phillips concedes that his claims are reviewed under an abuse of discretion standard, yet his arguments for reversal are little more than complaints that the Court accepted Ms. Acheson's position rather

than his. Further, to the extent the issues turn on findings of fact, Mr. Phillips simply asks this Court to accept his version despite substantial evidence presented to the contrary.

The appeal is also frivolous due to numerous violations of the Rules of Appellate Procedure: briefing claims that were not raised in the notice of appeal; failing to include the notice of appeal in the designation of clerk's papers; failing to provide issue statements; citing to an unpublished case; and failing to cite properly to the clerk's papers.

III. CONCLUSION

The Court should reject Mr. Phillips's claims and award attorney fees and costs to Ms. Acheson.

DATED this 7th day of August, 2014.

Respectfully submitted,



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Attorney for Eileen Acheson

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below and in the manner listed below, I served one copy of this brief on the following:

VIA EMAIL ONLY
Mr. Reed Yurchak
Email: yurchaklaw@gmail.com

08/07/2014
Date

Peyush
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