SUPREME COURT NO. 94323-1

COURT OF APPEALS DIVISION III NO. 33355-8-III

Spokane County Superior Court Case No. 13-3-02021-0

The Honorable Linda Tompkins
Spokane County Superior Court Trial Judge

DAVID ALLEN CUMMINGS,

Appellant,

and

MICHELLE L. CUMMINGS,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION/COUNTER-STATEMENT OF THE CASE

Appellant David Cummings seeks to reverse the ruling of the trial court in a dissolution trial that was held on March 23, 24, and 30 of 2015. Both parties were represented by counsel before and during trial. The trial judge was Linda Tompkins of the Spokane County Superior Court and the superior court case information was Cummings vs. Cummings, 13-3-02021-0. The parties had a long-term marriage of 34 years. Because the parties had no minor children, the only disputed issues at trial were spousal maintenance, distribution of the parties' assets and debts, and attorney fees. On April 2, 2015, after much deliberation of the trial testimony, admitted trial exhibits, and arguments of counsel, the trial judge issued its oral ruling; whereby Mrs. Cummings' request for maintenance was denied, the parties' community and separate assets and debts were distributed, and limited attorney fees were awarded. RP 2. Final documents, including detailed findings of fact and a detailed decree of dissolution were entered on April 23, 2015.

On May 14, 2015, Mr. Cummings filed and served a Notice of Appeal of the trial court's ruling with Division III under cause number 333558-III. Mr. Cummings filed his opening brief with the Court of Appeals on January 7, 2016. In his opening brief, Mr. Cummings only assigned errors to the trial court's ruling as follows:

1. The judge committed error by failing to base the property distribution on the statutory requirements of RCW 26.09.080.
2. The judge committed error by specifically using a primary factor that is not part of the statutorily required factors under RCW 26.09 et seq., i.e. the parties' relationship with their grandchildren.
3. The judge committed error by awarding fees from him [Mr. Cummings] to his attorney, in a manner not allowed by law. Appellant's Opening Brief page 8.

Mr. Cummings appeal was solely limited to the distribution of two of the parties' five real properties; which he alleged were erroneously awarded to Mrs. Cummings. One of those properties was the marital home, designated at trial as the Montague home located in Cheney, WA, and the other property was a commercial rental property designated as the Dean property in Spokane, WA. Opening Brief, page 2, Footnote.

Mrs. Cummings filed and served a Responsive Brief of the Respondent on April 8, 2016. Included in her brief, Mrs. Cummings cited extensively to the record created at trial, including the parties' stipulations, exhibits that were admitted, and the Report of Proceedings. Responsive Brief, pages 1-19. Ms. Cummings' brief contained citations to the record that specifically showed that the trial judge considered each of the factors set forth in RCW 26.09.080 and that the parties' relationships with the grandchildren was merely one of the factors that the trial judge considered. Responsive Brief, pages 7-21.

Mr. Cummings filed his Reply Brief on June 13, 2016. In his Reply Brief Mr. Cummings reiterated the same assignments of error set forth in his Opening Brief. Reply Brief, page 7.

At no point in his opening or reply brief to the Court of Appeals did Mr. Cummings assign errors to the trial judge's alleged consideration of "*fault*" in making its property distribution or "*bias*" in the trial judge's final rulings. Appellant's Opening and Reply Briefs.

As to the first assigned error before this Court, of *"fault"*: Mr. Cummings did opine that the trial judge, "*...made this decision based on factors outside the required statutory reasons and in some ways relate to fault because Mr. Cummings had not created as good a relationship with the grandchildren as Mrs. Cummings.*" Reply Brief, Page 10. Mr. Cummings later stated that, "*The judge might as well have decided this on the basis of fault since there is nothing in the four corners of the statute anywhere where proximity to grandchildren and the parties' efforts to encourage that relationship is to be used in such important property decisions.*" Reply Brief, Page 12. He later stated that, "*Again, in a way this is similar to the use of fault in that it was his 'fault' that his relationship with family members was not as good as Ms. Cummings' relationship.*" Reply Brief, Page 14.

Other than opining in his two appellate briefs that the trial judge based her decision regarding the award of the marital home to Mrs. Cummings on the basis of "*fault*", Mr. Cummings did not assign error to the trial judge's decision in either of his Appellate Briefs on the basis of "*fault*". Moreover, Mr. Cummings did not cite any legal authority in either of his Court of Appeals' appellate briefs to support his opinion that the trial judge considered his lesser relationship with the grandchildren to be a fatal flaw justifying awarding the marital home to Mrs. Cummings.

As to Mr. Cummings' second assignment error before this Court, of *"alleged bias"*: At no point in his opening or reply briefs to the Court of Appeals did Mr. Cummings discuss, opine, or assign error to the trial court's property distribution on the basis of judicial bias.

On February 23, 2017 the Court of Appeals' unpublished decision, Cause Number 333558, Division III was filed. Neither party moved for reconsideration of or objection to that decision. That decision affirmed the trial court's ruling, refused to address the sanction set forth in Mr. Cummings' assignments of error # 4, and denied Mrs. Cummings' request for attorney fees. Court of Appeals, Division III, Cause Number 333558-III Unpublished Decision.

As to Mr. Cummings first appellate argument (that the relationship with the grandchildren is not a relevant factor for consideration in a

property distribution case, see page 12 of the Opening Brief), the Court of Appeals disagreed with Mr. Cummings' conclusion. Appellate Decision, page 7. The Court of Appeals also rejected Mr. Cummings' next appellate argument (that the trial court did not consider the factors set forth in RCW 26.09.080 because those factors were not explicitly incorporated into the written findings of fact and conclusions of law). See Appellate Decision, page 7. The Court of Appeals cited to In re Marriage of Steadman, 63 Wn. App. 523, 526, 821 P.2d 59 (1991) when it stated that, "*...neither the statute nor case law require formal findings. It must only be evident from the record that the trial court actually considered all relevant factors.*" Appellate Decision, page 7. The Court of Appeals also stated that, "*The record, for that purpose, includes the court's oral decision and its written findings of fact. In re Marriage of Rink, 18 Wn. App. 549, 554, 571 P.2d 201 (1977); cf. Johnson v. Whitman, 1 Wn. App. 540, 463 P.2d 207 (1969) (oral decision consistent with findings and conclusions and may be used to interpret them*)." Appellate Decision, page 7. After reviewing the totality of the trial court's oral ruling, the Court of Appeals determined that, "*It is clear [the trial court] considered the four specific factors identified by RCW 26.09.080.*" Appellate Decision, page 8. The Appellate Court then addressed each of those four factors with specific references to the trial court's oral ruling and record. Appellate Decision, page 8 and 9. It

concluded that the trial court "*considered both parties' expressed wish to be awarded the family home to be near the grandchildren and made the observation, supported by the evidence that, "Husband's caring for grandchildren was a very recent vintage based on his work flexibility. However, I didn't see an overall history of profound and consistent involvement as was the case with the wife.*" Appellate Decision, Page 10. Finally the Court of Appeals concluded that, "*It is clear that Mr. Cummings' characterization of the trial court's reason for awarding the family home to his ex-wife-that "Mr. Cummings had not created as good a relationship with the grandchildren as Ms. Cummings," Reply Br. At 10- is a gross and unfair simplification. No abuse of discretion in awarding the properties has been shown."* Appellate Decision, page 11.

Mr. Cummings timely filed and served a Petition for Review with this Court on March 27, 2017. For the first time, Mr. Cummings alleged in his Petition for Review that the trial judge improperly considered *"fault"* in distributing the Montague and Dean properties to the wife. Petition for Review, page 1, Issues Presented. Also for the first time, Mr. Cummings alleged in his Petition for Review to this Court, that the trial court's decision regarding the award of the Montague and Dean properties to the wife was a *"biased"* decision. Petition for Review, page 1.

II. ARGUMENT WHY PETITION FOR REVIEW SHOULD BE DENIED.

This Court should deny review both on procedural and substantive grounds.

A. The Issues Mr. Cummings' Raises In His Petition For Review To This Court Were Not Raised In His Appeal To The Court Of Appeals Division III.

As stated in Section I above, and as made clear by Mr. Cummings' Court of Appeals' briefings, Mr. Cummings never argued either issue that he now cites to this Court as reasons for granting his petition for review. On that procedural basis alone, discretionary review should not be granted.

The Supreme Court has a long history of denying review of issues not previously raised in the Court of Appeals. State v. Cunningham, 93 Wn. 2d 823, 837, 613 P.2d 1139 (1980), *citing* Peoples Nat'l Bank v. Peterson, 82 Wn. 2d 822, 830, 514 P.2d 159 (1973) ("*This court has previously stated that it will refrain from reviewing questions not raised in the Court of Appeals*"). There are limited exceptions to this rule where issue pertain to jurisdiction, right to maintain an action, illegality, invasion of fundamental constitutional rights, and lack of a claim of relief. Peoples Nat'l Bank v. Peterson, 82 Wn.2d 822 at 830. However, none of those exceptions apply in this case. See also, State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) (*"An issue not raised or briefed in the Court of*

Appeals will not be considered by this court"), citing State v. Laviollette, 118 Wn.2d 670, 679, 826 P.2d 684 (1992). See also, State v. Benn, 161 Wn.2d, 256, 262, 165 P.3d 1232 (2007).

B. Invited Error Doctrine Prohibits Review

Mr. Cummings' Petition for Review on the claim that the Court considered "*fault*" in awarding the marital home and the Dean property to Mrs. Cummings should also be denied procedurally under the doctrine of invited error.

The invited error doctrine precludes a party from seeking appellate review of an error he or she helped create. State v. Studd, 137 Wn. 2d 546-47, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn. 2d 867, 870-71, 792 P.2d 514 (1990). Under the doctrine of invited error, a party cannot complain about an alleged error at trial that he set up himself. In re Marriage of Blakely, 111 Wn. App. 351, 358, 44 P.3d 924 (2002).

In this case, both parties willingly and knowingly testified about their relationships with their children at trial. Also at trial, both parties testified that the proximity of the marital home to the grandchildren was a reason each of them asked that the Court award the marital home to them. RP 190-192, Mr. Cummings' testimony on direct examination. RP 30-31, 61, 162-163, 169, Mrs. Cummings' testimony on direct examination. Thus, the parties believed that their relationships with the grandchildren,

and the proximity of the marital home to where the grandchildren lived, and how being able to reside in that home would further facilitate their relationships with the grandchildren, were considerations relevant to the award of the marital home. It is also clear from the record that both of the parties intended for the court to compare their relationships with the grandchildren and take those relationships into consideration; in addition to other reasons they expressed at trial for wanting the home awarded to them. The doctrine of invited error would have precluded Mr. Cummings asserting that the trial court erred in considering the parties' comparative relationships with their grandchildren at the Court of Appeals level, as he and his attorney set up his testimony about his relationships with the grandchildren in the hopes of convincing the trial judge that he had a better relationship with the grandchildren and therefore, the family home should be awarded to him. He cannot now claim error for the trial judge considering those relationships as part of the totality of the evidence in distributing the Montague and Dean properties to Mrs. Cummings.

C. The Trial Court Found No Prohibitive "*Fault*"

Even if this Court considered the substance of Mr. Cummings' first claim – that the trial court impermissibly relied on a *"fault"* finding – it should deny relief because no such *"fault"* finding occurred.

"[T]he trial court has broad discretion in distributing the marital property," and its decision will be reversed only if exercised on untenable grounds or for untenable reasons. In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). *"The trial court is in the best position to assess the assets and liabilities of the parties"* and to determine what constitutes an equitable outcome. In re Marriage of Brewer, 137 Wn. 2d 756, 769, 976 P.2d 102 (1999).

In this case, at no time did the trial court rule that it was awarding the marital home to Ms. Cummings solely because of her relationship with the parties' grandchildren, or due to Mr. Cummings' failure to develop the same relationship. Instead, this was a complex process in which the issue of familial relationships was raised by both parties and was just one of many factors. The complexity of the ruling was outlined by the Court of Appeals. Appellate Decision, pages 7-10. The Court of Appeals then concluded:

> It is a thus clear that Mr. Cummings' characterization of the trial court's reason for awarding the family home to his ex-wife – that "Mr. Cummings had not created as good a relationship with the grandchildren as Ms. Cummings," Reply Br. at 10 – is a gross and unfair simplification. No abuse of discretion in awarding the properties has been shown.

Appellate Decision, page 11.

In fact, contrary to Mr. Cummings' assertions, when making its oral ruling to grant Ms. Cummings the marital home and the Dean rental property, the trial court was able to found:

> 1. Mrs. Cummings had only minimal involvement in the management of the rental properties. RP 59-60, 62, 288-291.
>
> 2. Mr. Cummings was solely responsible for the accounting, repairs, upkeep, managing of the rental properties. RP 59-60, 62-63, 288-291.
>
> 3. Mr. Cummings failed to properly manage and upkeep the duplex rentals, creating problems for management. RP 62, 154-155.
>
> 4. Mr. Cummings reaped a financial benefit by being able to remain in the family home for 2 years and only paying less than $100 per month for a HELOC payment while Mrs. Cummings paid rent and renters insurance in the amount of $885 per month. RP 39 and 99.
>
> 5. Mr. Cummings' refusal to fully disclose documents or provide testimony regarding his income, or rental incomes, prevented the Court from making an accurate determination of what those rental income amounts were. RP 244-245, 247-251, 255-257, 280, 284-288.
>
> 6. Mrs. Cummings, though she had limited experience in managing the rental properties, could handle managing the Dean property because the tenant was stable and long-term, and the property was in good condition. RP 369.
>
> 7. Mr. Cummings lost clients and needed to expand geographically anyway, so he did not require the marital home to continue his business. He provided contradictory testimony in saying that he needed the family home because that was the location of his business, and his clients' assigned appraisals based upon his business location, because he went on to testify he wanted the Dean property to give one last shot to rebuilding his business.

> Finally, there was no evidence that he was prohibited from getting another business location in Cheney (the marital home location). RP 195, 283, 311 & 326.

This Court should reject Mr. Cummings' effort to equate the trial court's careful analysis of all relevant factors as ruling improperly. "*Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.*" In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). "*Appellate courts [in dissolution actions] should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality.*" In re Marriage of Landry, 103 Wn. 2d 807, 809, 699 P.2d 214 (1985) (emphasis added).

Mr. Cummings' labeling of his own level of activity with the grandchildren as a "bad act" is a strange synopsis. There is no "good" or "bad" with these relationships. His entire posture here is that he should have manipulated facts at trial in order to appear more connected to the grandchildren in order to achieve his ultimate goal of retaining the family home for his business. That would have resulted in him being less than truthful with the trial – a concern that the trial court already had with regard to him during the trial, see RP 364, line 25; 365, lines 1-5.

There was no finding that Ms. Cummings was a "better person," as Mr. Cummings has alleged, see Petition at page 16. This was a matter of dissolution law and the dissection of a long-term marriage – nothing more.

Moreover, while a trial court shall make property distribution in dissolution cases under RCW 26.09.080 *"without regard to misconduct"*, there is no evidence of *"misconduct"* here. *"Misconduct"* is defined as *"immoral or abusive"* conduct. See In re Marriage of Steadman, 63 Wn. App. 523, 528, 821 P.2d 59 (1991). Generic family relationships do not fit this category. And even *"immoral or abusive"* misconduct can have consequences that impact property distribution. See e.g., Steadman, supra, 63 Wn. App. at 528, n.8 (*"We note, however, that this is not to say that a court may not consider abuse by one spouse against another where that abuse has affected the economic circumstances of the abused spouse"*). At best, Mr. Cummings can try to argue that family relationships resulted in a logical reason for Ms. Cummings to receive the family home. Even that argument is incomplete, as noted by the Court of Appeals, and fails to take into consideration the entirety of the evidence before the trial court of this 34-year marriage, *including* Mr. Cummings' lack of candor regarding the sources of his income, and *including* the fact that Ms. Cummings had no experience in managing rental properties and so could not be granted the

properties in poorer shape, and *including* that Mr. Cummings himself was willing to run his business outside of the Cheney area.

There is no allegation that Mr. Cummings' relationships with his grandchildren were *"immoral"*, nor were those relationships the basis of the ruling. They are, however, one factor only in a proper distribution of property. For example - what if the marital home had been an hour's drive from the grandchildren? Proximity to them no longer would be relevant. But distribution to Mr. Cummings of the marital home would still have been an issue, given the lack of community assets that could reasonably be granted to Ms. Cummings and given Mr. Cummings' lack of candor about the rental properties. This is not about immoral behavior, as Mr. Cummings has alleged – it is about reorganizing lives according to factors relevant to the parties.

Mr. Cummings does cite to other jurisdictions in his attempt to present his allegedly new twist on this provision. None of his citations, however, address how a court should address familial relationships. This is likely because relationships are a necessary component of dissolution law. Families have been created; they are being restructured. How a piece of property relates to all aspects of that family and marital structure is relevant to final dissolution. There is nothing *"immoral"* about this.

To the extent that Mr. Cummings is simply reiterating his issue that the trial court erred when considering factors not listed in the RCW 26.09.080 statute, that argument also must fail. Mr. Cummings should not succeed in his attempt to turn the rulings of the trial court into something that they were not.

Mr. Cummings argues on pages 17-18 of his Petition that the Court of Appeals erred in ruling that the trial court used proper factors. Further, he argues that the grandchildren were *"obviously the major reason"* why Ms. Cummings received the marital residence and that the *"preponderance of the record"* shows this *"obvious"* fact. This is a specious argument. It must be made (as Mr. Cummings finally acknowledges that *"martial fault"* in conjunction with other actions can be part of a trial court's ruling, it just cannot be marital fault *"alone"*, see Petition at 18), but it deviates far from this record. Mr. Cummings also fails to support this legal argument with a citation of his newly-created standard of *"preponderance"* of evidence for a dissolution appeal, which is an *"abuse of discretion"* standard. Under either standard, he is incorrect. No such evidence exists, and this record is replete with recitation of facts and circumstances that justify the trial court's distribution of property. As stated above, and as noted by the Court of Appeals, *"Mr. Cummings' characterization of the trial court's reason for*

awarding the family home to his ex-wife – that "Mr. Cummings had not created as good a relationship with the grandchildren as Ms. Cummings," Reply Br. at 10 – is a gross and unfair simplification. No abuse of discretion in awarding the properties has been shown." Appellate Decision, page 11. This incorrect recitation of the facts and record should not be rewarded with the granting of this Petition.

D. Mr. Cummings fails to cite to any appellate rule that would justify this review, pursuant to RAP 13.4.

He references "*public policy*," which could be his attempt to request Supreme Court review on that ground, see RAP 13.4(b)(4)) (a petition should state whether it involves a *"substantial public interest"* that *"should be determined by the Court"*). Even if that *"public policy"* reference in his brief is an attempt to provide a basis to this Court for review under RAP 13.4, it is misplaced.

There is no substantial public interest that needs to be redefined here – the case law already defines the term *"misconduct"* appropriately, as cited above. Even if this Court did want to further define this term via case law, there is no substantial public interest in having the Court address that term via *this* case, where the trial court considered numerous factors in dividing property, *not* just quality of the parties' relationships with the grandchildren). The court was faced with the dilemma here of dividing

property that was primarily rental property. The court's ruling was appropriate. There is no benefit to this Court to grant review of this case.

E. There Is No Basis to Allege *"Bias."*

Mr. Cummings' final argument – first made here in this Petition – is that the trial court was biased against him so that any remand requires a new judge. He cites to no case law for this argument. This is an improper argument without citation and should be stricken.

F. Attorney Fees.

This is a frivolous Petition as stated above. Ms. Cummings asks that the Court order fees under RAP 18.9. Where a party files an appeal without reasonable cause, this Court may require him to pay the prevailing party expenses, including fees that party incurred in opposing the action. RCW 4.84.185. *"An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists."* Chapman v. Perera, 41 Wn.App. 444, 455-56, 704 P.2d 1224, review denied, 104 Wn.2d 1020 (1985). See also Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980) (in determining frivolous nature of appeal, court should consider that: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4)

an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no possibility of reversal). Here, the issues were not raised below and Mr. Cummings' actions invited any alleged error. This is not a proper Petition.

Ms. Cummings also asks for fees pursuant to RCW 26.09.140 and RAP 18.1. To make such an order, the Court of Appeals will examine the arguable merit of the issues on appeal as well as the financial resources of the respective parties. In re Marriage of CMC, 87 Wn.App. 84, 89, 940 P.2d 669 (1997). Mrs. Cummings is providing a financial affidavit in a timely manner, as required by RAP 18.1, to demonstrate her need for her fees to be paid. The merits of her defense of Mr. Cummings' Petition are set forth above, and justify an order of fees at this level.

III. CONCLUSION

For the foregoing reasons, Ms. Cummings ask that this Court deny Mr. Cummings' Petition and order that he pay Ms. Cummings' fees for having to prepare this Answer.

DATED: 4/26/2017 Ellen Hendrick

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COURT OF APPEALS NO. 33355-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DAVID ALLEN CUMMINGS, Appellant,	)	
vs.	)	Court of Appeals No. 33355-8-III Sup. Ct. No. 13-3-02021-0
MICHELLE L. CUMMINGS, Respondent.	)	

CERTIFICATE OF SERVICE

I, Ellen Hendrick, do hereby certify, swear and affirm that the following is true and correct:

1. On April 26, 2017, I caused to be hand-delivered the Answer to Petition for Review to the Court of Appeals, Division III, 500 North Cedar Street, Spokane, 99201.

2. On April 26, 2017, I caused to be hand-delivered a copy of this Answer to Petition for Review by having them hand delivered to Gary R. Stenzel, at his law office, located at 1304 W. College Avenue, LL, Spokane, Washington 99201.

3. I certify that the foregoing is true and correct.

DATED: 4/26/17

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