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DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 33355-8

Spokane County Superior Court Case No. 13-3-02021-0
The Honorable Linda Tompkins
Superior Court Judge

PETITION FOR REVIEW TO THE SUPREME COURT

In Re:

MICHELLE LACLAE CUMMINGS, PETITIONER

V.

DAVID ALLEN CUMMINGS, RESPONDENT

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I. CASE INFORMATION

1. Parties: The ex-husband and the person filing this Petition is David Cummings; his wife and the Petitioner in the original dissolution action in Spokane County Superior Court is Michelle Cummings.
2. Attorneys: Mr. Cummings is represented by Gary R Stenzel, WSBA #16974, and Ms. Cummings is represented by Ellen Hendricks, WSBA #33396.
3. Superior Court Information: Cummings v. Cummings No. 13-3-02021-0; Decree of Dissolution of Marriage entered April 23, 2015 by Judge Linda Tompkins.
4. Appellate decision filed February 23, 2017, cause no. 333558, Division III; No Motion for reconsideration was filed; Due date for filing this Petition for Review - February 27th, 2017 since 30th day fell on a Saturday.

II. ISSUES PRESENTED

1. Did the trial judge violate this state's prohibition against using evidence of fault in using the fact that the husband did not have as strong a relationship with their grandchildren as the wife, to award her the family home where he had his business?
2. If this court remands this case back to the trial court, should this court also order that another judge hear this matter to avoid any further biased decisions?

III. FACTS

This case is about the long term marital divorce of two older people who had been married for a long time, 34 years (RP 361). Mr. Cummings was a self-employed appraiser with his office in the family home (RP 189-190), herein after called home/office. The wife was a nurse who specializes in nursing home administration. RP 362. They

both made about the same net income, except that the couple owned rentals, arranged and managed by Mr. Cummings because of his real estate affiliations. RP 362-365. Because of Mr. Cummings lifetime of real estate involvement, the parties had acquired a few rentals, obviously, their family home (again, used by the husband as his business office in Cheney, Washington), and a commercial building referred to as the "Dean building". RP 13 & 190.

During trial the focus of the case was most on valuing their real property and outlining their different usage. RP 60-112 In addition, there was a lot of emphasis on explaining the use of the family home (where Mr. Cummings lived and worked), the commercial Dean property, and the "rentals". RP 60-112. Regarding the home/office, Ms. Cummings went back and forth on that issue; however, she specifically indicated that she wanted that property because it was close to their grandchildren since she was the grandparent who was closest to their grandchildren, and the family home would allow her to be closer to them. See RP 126, 163. Mrs. Cummings also indicated over and over that she wanted Mr. Cummings to have the "rentals" over and over, narrowing the case down to the family home on Montague and the Dean property.[1] See RP 60-139.

[1] The focus of this appeal will be on the distribution of the two properties known as the Dean and Montague properties (home/office) RCW 26.09.080, and the use of a "fault" determination that Mr. Cummings was not as good a grandparent as Ms. Cummings as the major factor in the distribution of property.

Mr. Cummings lived at the Montague home/office and again, ran his appraisal and rental businesses out of that home. RP 189-190. This fact was never denied by Ms. Cummings throughout the entire trial. See RP generally. At no time was there any testimony about any other serious office options for Mr. Cummings' business other than the Montague place. *Id, see also* RP 189-190. At one point the wife's attorney tried to get Mr. Cummings to say that his business was not doing well in Cheney, however, again, Mr. Cummings responded with a clear and unmistakable statement that if there was going to be more business, it is based on your business address since the banks that hire the appraisers look at the business address and parcel out their appraisals based on that location. And since he had been there a long time he seemed to imply that the current arrangement was best for him. He said at page 189 -190 of the RP:

Q: So, [sic] the bank chooses the appraiser based on location. Is that what you're saying?

A: I'm saying – yes, I'm saying that.

Q: Okay.

A: And then once that person gets to know you, they don't always run it through that program. But the program will pick the appraiser's physical location, and then they will assign orders based on that.

Q: And what physical location does your business show up at when the bank runs through this program?

A: The last eight years at 72 Montague Drive, Cheney.

Q: And did you just testify that the appraisal assignments are based upon location?

A: Most – not all the time, but most of the time now.

Q: Okay so if you were to relocate, say, to Liberty Lake, could you work in the Liberty Lake market the same way you could work in the Cheney and Palouse market?

A: Absolutely not.

At no time did the husband indicate that he had to move from the Cheney area and "branch out" to find more work. His focus was on remaining in the home/office to continue his business. Id.

One fact of tremendous concern to Mr. Cummings after the ruling was the parties' "relationship" between their "grandchildren". In the court's final oral decision, the judge clearly indicated that her primary and major reason for awarding the Montague home/office to the wife was due to her better relationship with their grandchildren, because that home was closer to where they lived. RP 368-369. She said in her ruling the following:

"The family home at 712 North Montague Drive is in close proximity to the grandchildren, and both claimed to want to live in the home in order to be closer to the children and grandchildren. Husband's [sic] caring for [sic] 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.

Further, his geographic market, generally centered in the west plains and the Palouse, was also changing. He lost a major account, and it was clear he was going to have to branch out geographically.

Third, he does have the potential for work from the Dean site, but the Court will go through that analysis." RP 368-369.

The judge subsequently gave the family home/office to the wife so she could be closer to the grandchildren. RP 367-369. The judge said in her ruling:

"In the balance, it was more beneficial to award the family home to the wife as it related to the children's and grandchildren's involvement." RP 369, Lines 8-10.

In addition to this use of an inappropriate basis for awarding the home/office, the Judge compounded this by also contradicting herself and awarding the "Dean" office building to the wife as well, leaving the husband without any property to use as his office. See RP 369 Lines 5-7. She said at RP 369 line 19-21:

"*Although the wife is not requesting it, the court is satisfied that the Dean property is more equitably awarded to the wife,"* as well as the family home. (Last section of this sentence added for clarification purposes).

In summary, the upshot of this property ruling was that because the wife had a much longer and better relationship with the grandchildren than Mr. Cummings, she awarded her the family home/office. The reason for this distribution seemed clearly that it was Mr. Cummings "personal conduct" of failing to be a better grandparent that was the primary reason for his losing his place of business. And although the judge indicated that there were possibly other reasons for this distribution, she contradicted herself when she also gave the wife the Dean property, leaving him with no place to go, even though the parties had a lot of real estate to utilize at the time of their separation. This decision basically destroyed the husband's appraisal business until

he found a new place to work, and to rebuild his practice; and completely ignored his unrebutted testimony and the 30 years of building this West side mortgage appraisal business simply because he was not a very good grandparent "as compared" to his wife.

More importantly the judge seemed to fail to properly use the factors required by the statutes in this distribution of marital property, instead she used an irrelevant emotional family issue, the parties' good or bad relationship with their grandchildren. Had Mr. Cummings ever thought that this would be the controlling issue in his receiving his home/office, he would have likely set aside more daily contact with his grandchildren, to become a better grandparent. Instead, he simply lost out to his wife, because his relationship with the grandchildren was again, only of "recent vintage". RP 368-369. A contest that neither he or his attorney ever contemplated.

This divorce ruling then was appealed to Division III of the Court of Appeals. They upheld the judge's ruling and indicated in that consideration of the relationship and proximity to the grandchildren was a proper factor to be considered, even though it was the main factor articulated by the judge in her oral ruling about the home/office. Mr. Cummings challenged this as an irrelevant factor which should not have been used. They said,

> We reject Mr. Cummings's suggestion that one or both parties' emotional attachment to the family home is irrelevant when a trial court decides how to dispose of it in a dissolution

> proceeding. The fact that the home is near family members for whom a person provides care is a relevant consideration. The fact that it is easier to care for grandchildren or entertain extended family in a house than a small apartment can be relevant. One reason Mr. Cummings expressed a desire to be awarded the family home was because of its proximity to the couple's children, both because he wanted to help out with his grandchildren and because his son might join him in business in the future. These sorts of reasons for seeking award of a home may be relatively unimportant in many cases, but all of them are relevant. None was improperly considered by the court. See *In re Marriage of Cummings*, 33355-8-III (2017) attached herewith as is required.

Mr. Cummings does not take issue with the fact that says either party loves and wants to be around the grandchildren. What he is concerned about is when courts start to step in and say that a party's efforts to be a good grandparent is not enough and they should lose property, especially what amounts to his home/office because of it, this clearly is a fault issue. The solution to this is not to award a piece of property as important as his office based on such a finding, but give the "better more attentive grandparent" funds or property to sell and buy a home even closer to the grandchildren than his place of business. Don't give them the home/office because of one of them being a lesser grandparent.

Mr. Cummings hopes his request for review is granted to deal with this important public policy issue, in defining what is and what is not "fault" in a dissolution action. What he does take issue with is a finding that because his relationship with his grandchildren is less, or of "recent vintage" than his wife's relationship, he should lose his

home/office. Especially when nowhere in the judge's opinion does it talk about the financial effect of losing this office and home other than he can use the Dean property and then lose that as well. Mr. Cummings feels that the reasons for this distribution deals with his bad conduct of working hard as a grandparent, when it should deal with the financial impact of such a decision. And further that the no-fault statutes assured him that his conduct good or bad as it relates to his family, would not be a basis for awarding property or financial benefits. He is asking the Washington Supreme Court to overturn this decision and make it clear that grandparent relations good or bad by comparison is not a proper factor to award property in a long-term dissolution.

IV. LEGAL ARGUMENT FOR ACCEPTANCE OF REVIEW

A. A comparison between Mr. and Mrs. Cummings as to who is the better grandparent is an issue of good or bad conduct which is a fault issue, and if such is used to divide property it is not only irrelevant, it becomes an important public policy issue which needs this court's attention to clarify.

In this state, the legislature passed the no-fault dissolution statutes to make it easier on parties that did not get along to get a divorce. *Strenge v. Clarke*, 89 Wash.2d 23, 569 P.2d 60 (1977). It was the legislations intent to ensure that marital conduct issues not be discussed as a basis for either the divorce nor property allocation. Id. Instead the court could focus on other more important issues such as health, length of the marriage, financial condition at the time of the divorce, etc. See e.g. RCW 26.09.080 & .090. However, as time went

on litigants tried to prejudice the courts against the other party by using other things like filing a domestic violence petition to say one person should receive more property than the other. See *In re Marriage of Muhammad*, 153 Wn.2d 795, 108 P.3d 779 (2005).

Clearly, it appears that litigants will try to do whatever they can to have an "edge" over their spouse to get more property than the other. It seems that family law practitioners should be constantly vigilant to make sure some form of fault, no matter how little does not creep into the trial and evidence, to avoid tainting a decision because one spouse does something better than the other. The trick in all this is to try and define what is really "fault and what is not fault" to insure objectivity. See e.g. *Urbana v. Urbana*, 147 Wn.App. 1, 195 P.3d 959 (Div. 2 2008); and *In re Marriage of Clark*, 13 Wash.App. 805, 538 P.2d 145 (1975) (internal quotation marks omitted) (quoting Hon. Nancy Ann Holman, *A Law in the Spirit of Conciliation and Understanding: Washington's Marriage Dissolution Act*, 9 Gonzaga L.Rev. 39 (1973)); see also *In re Marriage of Little*, 96 Wash.2d 183, 192, 634 P.2d 498 (1981).

And then once the practitioner become more vigilant about trying to define what is and what is not fault, they must remember that the factors to use to distribution property are not exclusive and can be such things as whether the property was inherited, the parties' health and education, their past employment/s, their investment ability, etc. *In*

re Marriage of Olivares, 69 Wash.App. 324, 848 P.2d 1281 (1993); see also *In re Marriage of Zahm,* 138 Wash.2d 213, 978 P.2d 498 (1999). However, at this time there is little or no case discussion of threshold issues of fault, or those things that walk on the edge of what is and what is not fault. Some cases such as *Muhammad, supra* and *In re Marriage of Steadman*, 63 Wash.App. 523, 821 P.2d 59 (1991) have been accepted as beacons in the tunnel of defining fault, however, they still seem to only portray extremes such as sexual violence or domestic violence filing. Id.

The case if *Urbana v. Urbana*, supra, went further and indicated that if the non-award of property is intended in anyway as a *punishment* for one spouse's conduct during the marriage, it is a fault issue and should not be used.

The *Urbana* court (supra) also discussed that consideration of whether one spouse was living with step children or not had no bearing on the property division, and was akin to a "fault" issue and should not be used. They said, "We agree and hold that, because the Washington legislature has clearly stated that a stepparent's duty of support terminates upon dissolution, any consideration of post-separation circumstances that include stepchildren must expressly exclude a division of property amounting to a transfer of property in lieu of child support for the stepchildren." If the trial court in *Urbana* gave the

mother more property because she was living with her step children that was error. *Id.*

We are coming closer to what the "fault line" is from which a decision fails or does not. What we know from Washington case law is that the concept of fault deals with "conduct" of one party versus the other that is negative in some way but should not be important in property distributions. See e.g. *Mohammad, supra.* In *Mohammad* the wife's conduct was to file a domestic violence petition. *Id.* In *Urbana* there were two factors of fault considered, past criminal behavior and the one parent indicated that she should have more property than her husband because he did not have step children to take care of like she did. Id. The court indicated that if the trial court looks beyond "economic factors" and moves to what appears to be social reality factors such as having step children and the other persons rap sheet, it is objectionable.

Even still our case law in Washington is not as clear as it could be on this important public policy issue. Therefore, the appellant Mr. Cummings has looked to law reviews and other state cases to clarify what should be and should not be a fault issue and whether looking at his grandparenting was an appropriate factor as Division III indicated.

In the law review article by Herma Hill Kay *"Equity and Differences: A Perspective on No-fault divorce and its Aftermath"*, University of Cincinnati Law Review, Vol 56 (1987), it dealt with the

ins and outs of the no-fault dissolution statutes and their application around the United States to help define a proper application and understanding of this law. This review made it clear that most no-fault statutes have been drafted and passed to primarily eliminate differences between gender as a basis for the distribution of property. *Id*, pp. 55 to 77. More specifically, it argues that it was the intent of most no-fault legislation to rid court decisions, dealing with property allocations based on gender differences traditionally seen in the home. More specifically those differences focused on when society saw the father as the "bread winner", and mother was a homemaker. *Id.* It also focused on the idea that no-fault statutes are intended to reverse that trend in societal thinking, attempting to show how men can be good homemakers as well, along with showing that women can be productive financially. Thus, it was intended to make irrelevant statements in court such as the husband "should receive more property because he earned the money", or "she just did the laundry" *Id.* Thus, the marital "conduct" of the parties was irrelevant, similar to discussions in Washington cases.

As the no-fault statutes became more and more used by all states, the kinds of things that were objectionable as fault increased. In Louisiana, another community no-fault state, for example, they defined fault as contemplating conduct or substantial acts of commission or omission by a spouse violative of his or her marital duties or

responsibilities. Citing *Pearce v. Pearce*, 348 So.2d 75 (La.1977) (arguing and causing marital discord irrelevant); *Mathews v. Mathews*, 614 So.2d 1287 (La.App. 2d Cir.1993) (abandonment of marital responsibilities irrelevant); *Currier v. Currier,* 599 So.2d 456 (La.App. 2d Cir.1992) (frequent arguing, use of mediacation, and abandonment all irrelevant); and *Taylor v. Taylor*, 579 So.2d 1142 (La.App. 2d Cir.1991) (wife's antagonistic & cruel personality was irrelevant). Therefore, at least in another community property state "fault" evidence can be said to be anything that shows the other party either did or failed to do that the other person felt was a violation of their marital duties. Such things as not spending time with the children could be in Louisiana as a failure of their marital duties.

Given the fact that fault is basically negative conduct of one of the spouses, awarding property based on the fact that one of the partners' conduct was better than the other as it relates to anything during the marriage, seems to be the very thing the statute does not want to occur as a basis for property awards. Such statements "he's not at home as much anymore", or "she doesn't stay home to watch the children as she should", or "he never plays with the grandchildren", all seem to smack of negative conduct surrounding presumed and traditional "duties" that should never be the basis for awarding financial items or benefits.

In Nevada for example, a no-fault community property state, their Supreme Court has indicated that their legislative intent in

enacting this statute was and is to remove "bad conduct" of one of the spouses as a reason for receiving more or less property. They said, "The amendment reflects the legislature's intention that as a no-fault divorce state, fault or *bad conduct of a party* should not be considered when deciding the issues of alimony and community property." (Emphasis added). *Rodriguez v. Rodriguez* 116 Nev. 993, 13 P.3d 415 (2000).

Additionally, other No-fault states have applied this law of inadmissibility to such things as use of illegal drugs (when there are no children in the matter) *Mehren v. Dargan* 118 Cal.App.4th 1167 (2004); "sexual unfaithfulness" *Diosdado v. Diosdada* 97 Cal.App.4th 470 (2002); are some that come to mind. All of which suggest that one of the spouses' behavior was not up to what was expected of them.

In this case, Mr. Cummings apparently only just started to have more time with his grandchildren. He tried to explain that as due to his work load, which makes sense. However, the judge simply said that his "recent vintage" grandparenting was demonstrative of his lack of involvement with them, or at least as compared to his wife, and he lost his home/office because of this conduct. At one point his attorney apparently saw what was happening and asked in argument, why it was not appropriate to place her client in the family home/office to be close to the grandchildren as well; as if to say, his conduct as to the grandchildren was no different than hers. She said,

> Mr. Cummings tells you the reasons why he wants to stay in the marital home. She tells you hers. They both are the parents of the children that are involved. Both children, grandchildren live in Cheney. So why is it any less appropriate for my client to be placed in the marital home so that she can have access to the children or take care of the children when they need her? Why is it more appropriate for Mr. Cummings to do that?

Mr. Cummings attorney could see the writing on the wall, she should have told her client to be nicer to the grandchildren and do more with them if he wanted the house/office. However, this was never contemplated as a primary issue for her to argue on her client's behalf. As such she tried to point out the flaw in the wife's attorneys' argument but it did not work. He lost his home/office to his wife because he was not as good a grandparent, or so it would seem from the record.

This issue of prime importance from a public policy standpoint. The no-fault statute was and is in effect due to a public policy needed to reduce the animosity in dissolutions by removing character flaws and spousal conduct as compared to the other spouse as a factor. See Hon. Nancy Ann Holman, supra. By doing so our legislature attempted to allow divorces that avoided attempts to keep couples together who simply did not want to be together but did not want to try a divorce because they were afraid of being found at fault. *Id.* This directly hits this case since had Mr. Cummings known that he would have been seen as a person not entitled to his home/office because of his poor relationship with his grandchildren he would have likely never thought about a divorce. He would have fixed that problem. Additionally, if this

ruling stands, it sets a terrible policy causing all sorts of personality problems to become relevant such as who the nicer person, spouse's shy personalities will lose out on property because of their shyness, or houses will be awarded to spouses who are more religious because the house they want is closer to their church building, etc.

Mr. Cummings requests the help of the Supreme Court to clarify that when there is a dissolution case involving property only, that any reliance upon evidence of a party's social conduct that may focus on whether one party is a "better person" than the other party, and has nothing to do with financial issues, is "fault" evidence and should not be used to decide what property the parties receive in the matter. Unless this is clarified and/or over turned it will likely erode the concept of the inadmissibility of fault evidence and may eventually lead our courts using such things as for example: one party receiving certain property over the other because they are more likable, have more friends, get along better with in-laws, or go to family parties, to decide what property is awarded to that person.

Allowing such personal qualities or the lack thereof to determine property issues strikes at the heart of the public policy issues the legislature intended to remove in dissolutions. To put it another more down to earth way, what reasonable man or woman walking down the street would think that it is proper to use a party's failure to perform their grandparental duties to win property, especially property that they

use as their place of business. Virtually everyone if asked would say that such a basis would be patently unfair and certainly strikes at the policies behind the No-fault concept we have. The use of such a factor basically punishes Mr. Cummings for not being a better grandparent, and should never have been used.

B. Although the Court of Appeals tried to indicate that the trial court judge actually used proper factors under RCW 26.09.080 to determine who would receive the parties' family home/office, the preponderance of the record shows that the fact that Mr. Cummings had a lessor relationship with his grandchildren was obviously the major reason for his wife receiving that home, and not the other factors.

Case law indicates that when dealing with who should receive what property in a long-term relationship of more than 25 years, the court is mandated to use the non-exclusive factors outlined in RCW 26.09.080. See *Rockwell*, 141 Wn.App. 235, 170 P.3d 572 (2007). In addition, the *Rockwell* case further indicated that of all the factors to use, the primary factor to look at in such long-term marriage cases is the financial condition that the parties will be left in at the end of their marriage, that is the most important factor. Whether the parties had a better relationship with their grandchildren or not does not seem to fit with any of the factors required other than the issue of fault.

Even though the Division III indicated in their ruling that the relationship between the parties and their grandchildren can be a factor under the law, it is clear that it was the most important factor used by this judge. As indicated, much of the application of the no-fault laws

have been clarified by the *Muhammad* case wherein the court said, "While courts have held that negatively productive conduct that causes the dissipation of marital assets can be considered, marital fault alone is not an appropriate consideration. See, e.g., *In re Marriage of Steadman*, 63 Wash.App. 523, 527-28, 821 P.2d 59 (1991)." *In re Marriage of Muhammad*, supra. And even though the appeals court indicated that the reference to certain negative conduct factors in the ruling "may have been inartful" by the trial judge, but was not an abuse of discretion because other economic factors were used to refocus the court toward a more appropriate application of the law. Id. This court indicated that after reviewing not only the written opinion, but the oral ruling shows that fault was used more than they indicated and remanded the case back for a new distribution of property, and even ordered a new judge hear the matter to avoid the bias that was caused by the original judge's application of biased and improper factors.

In this case, the judge used the factor that the wife was a better grandparent as compared to Mr. Cummings, and gave her the home/office because of that. Then Division III tried to do the same thing as the Muhammad court and said the trial court also used other proper factors to justify this award. It is virtually identical to this situation. Mr. Cummings asks that this court remand this matter back to the trial court, and order a different judge hear the property division

without the factor about the grandchildren and their relationship with the parties.

V. CONCLUSION

The trial court heard evidence about the parties' life and activities as it related to work, their property, and their grandchildren. The husband lived in the family home/office where he ran his appraisal business. Regardless of the fact that Mr. Cummings indicated he wanted to stay in their home/office, the trial judge gave that property to the wife on the primary basis that she had a better relationship with their grandchildren, and that home was closer to them for her to visit. The court tried to indicate that other factors were used for that decision however, the oral ruling makes it clear that that was the primary reason for this distribution.

The court's use of the parties relationship with their grandchildren was inappropriate and deals with "fault issues" by the husband in not spending as much time with the grandchildren than his wife, and should not have been used. This court should overturn that decision and remand it back to a new judge for a proper determination without considering the grandchildren over the financial impact of such a decision.

Respectfully submitted this 27th day of March 2017 by,

Gary R Stenzel, WSBA #16974
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APPENDIX

FILED
FEBRUARY 23, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Marriage of MICHELLE L. CUMMINGS, Respondent, and DAVID A. CUMMINGS, Appellant.	)	No. 33355-8-III UNPUBLISHED OPINION

SIDDOWAY, J. — David Cummings appeals the trial court's distribution of property in the dissolution of his and Michelle Cummings's marriage. He also challenges a sanction imposed on him for intransigence, in favor of his trial lawyer. We affirm the decree of dissolution and refuse to review the sanction because it is challenged on appeal against the wrong party.

FACTS AND PROCEDURAL BACKGROUND

Michelle and David Cummings had been married for 34 years at the time they separated in May 2013. Ms. Cummings moved out of the family home and into an apartment. Several months later, she filed a petition for dissolution.

At the time of trial both parties were 58 years old. Testimony at trial established that both had college degrees and were fully employed: Ms. Cummings worked as a director of an assisted living facility, and Mr. Cummings was licensed and worked as a

real estate broker and appraiser. They earned similar incomes. Both claimed to be experiencing health issues that had affected or would affect their ability to make a living in the future. They have two adult children and six grandchildren.

Ms. Cummings had changed jobs frequently and never worked long enough for one employer to establish retirement savings. Mr. Cummings had several retirement accounts, some of which were community property. The value of Ms. Cummings's separate property was minimal, but Mr. Cummings had $75,000 worth of separate property, much of it liquid.

During the marriage, Mr. Cummings had used his broker's license to purchase rental properties for the couple for investment purposes. They owned five pieces of real property at the time of trial: their home in Cheney, and four rental properties in Spokane, one of them a commercial rental. The properties had the following agreed appraised values:

Cheney home	$215,000
North Avenue rental	$115,000
Wabash rental	$113,000
Garland rental	$109,000
Dean rental (commercial)	$140,000

The appraised values reflected the fact that the North Avenue rental was in average condition overall but needed some maintenance and repair, and that the Wabash and Garland properties were both in poor repair.

Both parties asked the court to award them the family home. One reason Ms. Cummings sought to be awarded the family home was its proximity to the couples' grandchildren, who Ms. Cummings babysat full time for two or three years before the trial and continued to have over to her apartment every weekend. She testified that it was difficult to have her grandchildren and other family visit in her small apartment "plus the noise level for my neighbors is not very nice." Report of Proceedings (RP) at 163. Another reason she asked to be awarded the family home was because she wanted Mr. Cummings to continue to own the rental properties. She testified that owning rentals had been his dream, not hers, and unlike her, he could own and operate them profitably. She said she knew nothing about the rentals, and because she did not know how to manage, maintain, or repair them, she would have to hire a property manager or fix them up to sell them if they were awarded to her.

Mr. Cummings explained that he sought an award of the family home because he had conducted his appraisal business out of the home for the prior eight years and was dependent on its Cheney location for appraisal referrals. He testified he had recently lost a longtime appraisal customer and the only appraisal business he was receiving at the time of trial was from banks, who choose an appraiser based on his or her physical

location. He testified he could "[a]bsolutely not" work in other markets the way he did in the Cheney market. RP at 190. Another reason he sought an award of the family home was that he, too, helped out with and wanted to be close to his grandchildren. The evidence supported this reason, although his involvement with the grandchildren had been less extensive than Ms. Cummings's.

Following a several day trial, the court announced its property division. Along with other assets not in contention, it awarded the family home and the Dean property to Ms. Cummings and awarded the other three rental properties, Mr. Cummings's retirement accounts, and his separate property to Mr. Cummings. The value of the community assets it awarded to Ms. Cummings was $378,131 and the value of community assets it awarded to Mr. Cummings was $280,048. It chose not to order an equalization payment in light of Mr. Cummings's significant separate property.

The court ruled that each party would bear its own attorney fees. But as a sanction for what it characterized as Mr. Cummings's intransigence in belatedly disclosing certain assets, it ordered him to pay $1,000 of Ms. Cummings's attorney fees and also ordered him to "pay $1,000 to his own counsel," something the court said, "I have never done . . . before, but it's clear that there was additional work that had to be done over and above preparing for trial just to make sense of a confusing picture." RP at 366.

Mr. Cummings appeals. He has named only Ms. Cummings as a respondent.

ANALYSIS

The issues on appeal are narrow. Mr. Cummings contends the trial court erred by failing to consider the dissolution distribution factors provided by RCW 26.09.080 in awarding the family home and the Dean property to Ms. Cummings. He argues that the court relied instead on an improper factor: which of the two had a stronger relationship with their grandchildren. He also assigns error to the $1,000 sanction in favor of his trial lawyer.

Sanction

The sanction can be summarily addressed. While the court's oral imposition of the sanction in favor of Mr. Cummings's own lawyer was ambiguous, the written findings and conclusions entered by the court state that "[t]he parties shall be responsible for the payment of the attorney fees and costs each of them incurred in this dissolution action *that are in excess of the $1,000 Mr. Cummings is required to pay* to each attorney." CP at 59 (emphasis added).[1] It appears from this that Mr. Cummings was not ordered to pay his trial lawyer anything more than he owed the lawyer under their fee agreement. If Mr. Cummings nonetheless claims to be aggrieved, his dispute is with his trial lawyer, not with Ms. Cummings.

[1] We note that Mr. Cummings's appellate lawyer is not the lawyer who tried the case and in whose favor the sanction was entered.

Property distribution

In a marriage dissolution proceeding, all of the parties' property is before the court for distribution and the court's objective is to divide and distribute it "as shall appear just and equitable." RCW 26.09.080; *Farmer v. Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). In disposing of the parties' property and liabilities, the court, by statute, "shall, without regard to misconduct, make such disposition . . . as shall appear just and equitable *after considering all relevant factors*." RCW 26.09.080 (emphasis added). Relevant factors include, but are not limited to:

> (1) The nature and extent of the community property;
> (2) The nature and extent of the separate property;
> (3) The duration of the marriage or domestic partnership; and
> (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

Id.

A trial court's distribution of property will not be overturned on appeal absent a manifest abuse of discretion. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-43, 170 P.3d 572 (2007); *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). This is because the trial court is in the best position to assess the assets and liabilities of the parties and determine what constitutes an equitable outcome. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

We reject Mr. Cummings's suggestion that one or both parties' emotional attachment to the family home is irrelevant when a trial court decides how to dispose of it in a dissolution proceeding. The fact that the home is near family members for whom a person provides care is a relevant consideration. The fact that it is easier to care for grandchildren or entertain extended family in a house than a small apartment can be relevant. One reason Mr. Cummings expressed a desire to be awarded the family home was because of its proximity to the couple's children, both because he wanted to help out with his grandchildren and because his son might join him in business in the future. These sorts of reasons for seeking award of a home may be relatively unimportant in many cases, but all of them are relevant. None was improperly considered by the court.

Mr. Cummings argues that the trial court awarded the family home and Dean property without considering the four factors relevant to a just and equitable division of property that are explicitly identified in RCW 26.09.080. The court's written findings and conclusions make no formal findings on those factors, but neither the statute nor case law requires formal findings. It must only be evident from the record that the trial court actually considered all relevant factors. *In re Marriage of Steadman*, 63 Wn. App. 523, 526, 821 P.2d 59 (1991). 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 210 (1977); *cf. Johnson v. Whitman*, 1 Wn. App. 540, 463 P.2d 207 (1969) (oral decision consistent with findings and conclusions may be used to interpret them).

After taking the parties' dissolution disputes under advisement for several days following presentation of their evidence and argument, the trial court reconvened the parties to orally announce its decision. It explained at length its findings on contested matters and its decisions on Ms. Cummings's request for maintenance, the parties' requests for awards of attorney fees, the property distribution, and whether to order an equalizing payment. Woven through the court's announcement of its findings and conclusions on these issues were the matters it had considered. It is clear it considered the four specific factors identified by RCW 26.09.080.

As to "the nature and extent of the community property" and "the nature and extent of the separate property," the factors identified by RCW 26.09.080(1) and (2), the court engaged in a complete review of the parties' assets and liabilities, identifying and placing values on those that were community and those that were separate. It also explicitly stated, "The Court considered the nature and extent of the real and personal property, the majority of which was community property." RP at 367-68. Finally, both orally and in its written findings it explained that it was not ordering an equalization payment because of the substantial amount of Mr. Cummings's separate property relative to the community assets.

As to "the duration of the marriage," the factor identified by RCW 26.09.080(3), the court stated, "The marriage is a 34-year marriage, and under those circumstances is

expected to accumulate much in the way of community property, and this community did so." RP at 368.

"The economic circumstances of each party at the time of division," the factor identified by RCW 26.09.080(4), received extensive attention in the court's oral ruling. The court recounted the parties' education and work histories in detail. It noted that Ms. Cummings had no retirement assets. It observed, "The economic circumstances of each of the spouses at the time of trial indicated they were both fully employable. Again, at age 58, they were in great careers that had economic potential with lots of great experience with just the minor diminishing, as the Court has indicated before." RP at 368. The court noted that Ms. Cummings had received temporary maintenance prior to trial and reviewed the evidence the parties had presented as to their monthly expenses and the attorney fees they had incurred. It noted Mr. Cummings's testimony that he had lost a major account and stated, "according to [Mr. Cummings's] testimony," that "[h]is income capacity did appear to be somewhat diminishing and his health was slightly declining at the time of trial." RP at 366. The court expressed its view that Mr. Cummings "was going to have to branch out geographically." RP at 369.

After reviewing these statutory factors, together with both parties' testimony about wanting to be awarded the family home to be close to their grandchildren (which we have already found to be a relevant consideration) the court stated, "The factors, then, as the

Court has analyzed them above result in the following distribution." RP at 369. It then proceeded to explain how it was dividing the parties' assets and liabilities.

Reviewing the trial court's oral decision as a whole, it is apparent that several things contributed to its decision to award the family home and Dean property to Ms. Cummings. The court observed that if Ms. Cummings were no longer paying rent, then her income could cover her expenses. It observed that Mr. Cummings "was managing the acquisition and operations of several rental properties, hiring a contractor for repairs and maintenance," and that while he had assistance from Ms. Cummings with some financial matters, "the management of these properties were under his general financial direction." RP at 367. It 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." RP at 368. While Mr. Cummings does not agree, the court expressed its view that Mr. Cummings would need to address his declining appraisal referrals by "branch[ing] out geographically." RP at 369. Finally, the court explained that it awarded the Dean property to the wife because it was the most stable of the rental properties given its long term tenant, and thereby one she could manage. It also explained the award of the Dean property as a way of adjusting for the fact that Ms. Cummings did not have retirement assets, while Mr. Cummings did.

It is thus clear that Mr. Cummings's 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.

Attorney fees

Ms. Cummings requests attorney fees on appeal on three bases: Mr. Cummings's intransigence, that the appeal is frivolous, and her need.

Intransigence is a basis for awarding fees on appeal. *In re Marriage of Mattson*, 95 Wn. App. 592, 605, 976 P.2d 157 (1999). "Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions," or making a proceeding unduly difficult and costly. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). "[A] party's intransigence in the trial court can also support an award of attorney fees on appeal." *Mattson*, 95 Wn. App. at 606. Ms. Cummings does not demonstrate any intransigence on appeal and Mr. Cummings's earlier intransigence has not affected this appeal, given the narrowly framed assignments of error.

"An appeal is frivolous if the . . . court is convinced that [it] presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997). We do not find the appeal to be frivolous.

Finally, we may award fees on appeal under RCW 26.09.140 after considering the financial resources of both parties. *In re Marriage of Kile & Kendall*, 186 Wn. App. 864, 888, 347 P.3d 894 (2015). Having considered the financial affidavits as to Ms. Cummings's need and the trial record as to Mr. Cummings's ability to pay, we decline to award fees under the statute.

Affirmed.

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

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

RCW 26.09.080

Disposition of property and liabilities—Factors.

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

(1) The nature and extent of the community property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage or domestic partnership; and

(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

[2008 c 6 § 1011; 1989 c 375 § 5; 1973 1st ex.s. c 157 § 8.]

NOTES:

Part headings not law—Severability—2008 c 6: See RCW **26.60.900** and **26.60.901**.

Affidavit of Service

I Gary R Stenzel, due hereby state under penalty of perjury under the laws of the State of Washington that on this 27th day of March 2017, I did personally serve Attorney Ellen Hendrick's with this Petition at her office in Spokane by personally leaving a copy with her receptionist.

Dated: 3-27-17 **Gary R Stenzel:**