SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF THE MARRIAGE OF

JUDITH TULLENERS, Appellant
Respondent on Petition

V.

ANDRE TULLENERS, Respondent/Cross-Appellant
Petitioner for Review

Supreme Court No. 100789-2
Court of Appeals No. 37742-III

JUDITH TULLENERS' MEMORANDUM IN OPPOSITION TO PETITION FOR REVIEW

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STATUTES AND RULES

WASHINGTON SUPREME COURT CASES

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ARGUMENT

This petition for discretionary review is very unusual given that the unpublished opinion of the Court of Appeals was, in essence, a review of whether the trial court on remand appropriately applied the directives of the Court of Appeals in the published case of In re Marriage of Tulleners, 11 Wn. App.2d 358 (2019). Andre Tulleners never sought review of that published opinion.

There are four factors under RAP 13.4(b) that the Washington Supreme Court should consider when determining whether a Petition for Review of the Supreme Court should be accepted or denied. These factors are: "1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or 2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or 3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or 4) If the petition involves an issue of substantial interest that should be determined

by the Supreme Court. RAP 13.4(b). In essence, as there is no substantial constitutional argument present here, Mr. Tulleners has the burden of either establishing that Division III's unpublished opinion regarding the parties' maintenance modification in some way conflicts with a decision of the Washington Supreme Court or another Court of Appeals decision, or that it is of significant interest. *See* In re Coats, 173 Wn. 2d 123, 132 (2011).

The issue in this case is whether Andre Tulleners provided a sufficient tracing of the portion of his Williams Communications 401(k) that he claimed to be his separate property. There are no conflicts in the Division of the Court of Appeals or the Supreme Court regarding the holdings of this case as to tracing of separate property, commingling doctrine, and the law as applied. In fact, the Court of Appeals in its opinions has followed established precedent in every regard.

The only assertion that Mr. Tulleners could make for discretionary review is that it would be of significant interest.

However, this argument fails as well. It is well-established that aa asset is separate property if acquired before marriage, acquired during marriage by gift or inheritance, acquired during marriage with the traceable proceeds of separate property, or, in the case of earnings or accumulations, acquired during permanent separation. In re Marriage of White, 105 Wash. App. 545, 550 (2001). Separate property brought into the marriage will retain its separate character as long as it can be traced or identified. In re Marriage of Schwarz, 192 Wash. App. 180, 190 (2016). If community and separate funds are so commingled that they cannot be distinguished or apportioned, the entire amount is rendered community property. In re Marriage of Pearson-Maines, 70 Wash. App. 860, 866 (1993).

In fact, all of this law was directly cited to in the first decision of the Court of Appeals. See In re Tulleners, 11 Wash.App.2d 358, 369, 453 P.3d 996 (2019). This law is longstanding in Washington. See In re Witt's Estate, 21 Wn.2d 112 (1944), Jacob v. Hoitt, 119 Wash. 283 (1922), and In re

Carmack's Estate, 133 Wash. 374 (1925) for identical holdings. The law as applied by the Court of Appeals is in full acord with this Court's rulings in Estate of Borghi, 167 Wm.2d 480 (2009) and the recent case of Marriage of Watanabe, No. 100045-6 (Supreme Court, March 2022).

The primary issue in this case is that Andre Tulleners failed to provide *any* tracing of his claimed separate property interest in the 401(k) at trial. As the Court of Appeals noted in the first appeal:

> **"The trial court's decision explaining its division of assets stated that Mr. Tulleners offered "no evidence ... as to the structure of [the] pension, such as the amounts or timing of the contributions by Mr. Tulleners' employer." Clerk's Papers at 87. Mr. Tulleners also offered "no documentation as to how and when contributions were made to [the 401(k)] account between May 1997 and May 2006 when he took the funds upon retirement." Id. at 87-88. Because there was no tracing done by Mr. Tulleners, the trial court characterized his IRAs and annuity as entirely community property."** In re Tulleners, 11 Wash.App.2d 358, 362 (2019).

The evidence for this determination by the Court of Appeals, that Mr. Tulleners presented no evidence whatsoever of

any value or tracing, was replete from the trial. Prior to trial, Mr. Tulleners failed to provide discovery and a motion to compel was required. CP 1-14 from first appeal attached at Appendix A for second appeal brief. (The record from the first appeal was incorporated into the second appeal by order of the Commissioner of Court of Appeals, Division III.) The trial court had ordered Mr. Tulleners, pursuant to this motion to compel, to provide this discovery and entered sanctions against him. CP 1-14 at Appendix B for second appeal brief. It is worth noting from this CP 1-14 Appendix B order that Mr. Tulleners had not provided answers to interrogatories for 10 months and was faced with the potential sanction of not providing evidence at trial.

Mr. Tulleners' interrogatory answers were ultimately provided. They were admitted as P-52 at trial and were before the Court on the original appeal and second appeal. Since the trial record remains before the Court of Appeals for the second appeal, this Court can look at P-52, page 4, answer 4(d) where

Mr. Tulleners mentions his Williams Co. account with no values noted. At page 15, question 17 (a), the Respondent merely refers to prior responses (which don't exist). At page 28, the separate property tracing begins and provides a notice and definitions. The questions relative to the financial accounts begin at page 30 question 47. As can be seen just at int. 47, no values are provided, Mr. Tulleners cannot recall dates, and he refers to int. answer 4(d), which provides no such information whatsoever.

These separate property questions continue through page 33. Mr. Tulleners' continual answer is "I have provided all documents that I could reasonably access." He provides no values whatsoever as to accounts exiting before separation. These answers do not remotely meet the requirement of this Court's Opinion on Appeals.

These entirely deficient answers and production were addressed during direct examination of Mr. Tulleners at trial. (Again, the original trial transcript remains before the Court of

Appeals for review per the Commissioner's ruling.) Inquiry into the relevant financial accounts during direct begins at RP 82, line 17. RP 83 begins the tracing of documents, showing that there is nothing provided which would provide values that were either brought into the marriage much less preserved through marriage. RP 84, line 2 shows that the available accounts statements were for a period 8 ½ years after marriage.

At RP 87, line 22, Mr. Tulleners indicates that he does not know how his pension plan was "figured out". The same answer is provided at RP 88, line 21.

As also noted by the Court of Appeals in its first published opinion, Mr. Tulleners does admit maxing his contributions during marriage and further admitted that it did decline in value because of problems with its investment in Williams Communication stock. See also RP, page 89. line 14-24. Further, Mr. Tulleners admitted at RP page 90, line 8 that he provided no documentation and that he made no request for documents he alleged were at the house. See In re Tulleners, 11

Wash.App.2d 358, 361-363 (2019).

At RP page 92, line 16, Mr. Tulleners admitted that he didn't know what portion of the financial account was community or separate. At RP page 93, line 22, he admitted that his Williams Investment Plan exhibit provides no values.

At RP page 103, line 23, I walked Mr. Tulleners through the trial court's compel order and then proceeded to tracing questions. At page 109, line 15, Mr. Tulleners admitted there is no tracing. RP page 100 shows a similar lack of any values provided.

Securities questions begin at RP page 113, line 5. Beginning at RP page 114, questions are asked as to any values. This can be seen through page 123. As can be seen, no values are provided. In fact, at RP page 123, line 21, it is established that there are no values before 2006 provided by Mr. Tulleners.

Similar questions continue through RP page 126 line 25 where Mr. Tulleners was asked if he even called Williams and asked for a statement. He admitted at RP page 127 line 5 that

he made no effort to even call the company or make a request in writing. See also RP page 129, line 9. At RP page 130, line 15 it is established again that there are no documents provided that have any valuation information.

The examination over the complete lack of information continued through RP page 138. At RP page 138 line 12, I questioned Mr. Tulleners about the financial accounts. This continues through page 139, line 21 where he admitted that he has provided no answer.

If this Court looks at RP page 140, it will see a series of questions that document that no answer was provided in the interrogatories. At one point, Mr. Tulleners claimed that this lack of information was due to the fact that he could not make a phone call. See RP page 141, line 5. It cannot be argued that Mr. Tulleners provided any information before 2005.

It is very unusual that Mr. Tulleners raises any issue with regard to the opinion pf the Court of Appeals, whether the first published opinion or the second unpublished opinion currently

before this Court on his petition for review. Despite the fact that he has utterly failed to trace his claimed separate interest, the Court of Appeals has now provided him with *two* chances to trace his claimed separate property and thus meet the *Nuss* standard articulated by this Court in its first published opinion.

In both the published and unpublished opinions, the Court of Appeals was clear and direct in its expectations on remand. The Court of Appeals discussed In re Marriage of Nuss, 65 Wn.App. 334, 341 (1992) in both opinions. In both opinions, the Court of Appeals found that the trial court provide on remand a Nuss-type credit in its discretion if credible information existed to support that valuation. However, the Court of Appeals appropriately noted that all inferences must be viewed in the light most favorable to Judith Tulleners and that Mr. Tulleners could not be rewarded for failing to provide an appropriate tracing. There is nothing of significant interest in the Court of Appeals two rulings that a property tracing of separate property needs to occur before this Nuss-type credit can be given.

Conclusion

If a petition for discretionary review was to be appropriately filed, it would have been filed following the first published decision. The published decision was where the Court of Appeals engaged in its primary legal analysis. That decision was where the Court of Appeals directed the trial court to ascertain whether an appropriate tracing had been provided, and only if such tracing was provided, to then apply a Nuss-type credit.

The trial court failed to follow the directive of the Court of Appeals following the first remand. Thus, the Court of Appeals remanded the case for a second time via the instant unpublished opinion for entry of a decision in accord with its original published opinion. Why would the Estate of Andre Tulleners choose to seek discretionary review now?

The reason that a petition for discretionary review follows the second remand on an unpublished decision is purely one of delay. This appeal is being managed by the Estate of

Andre Tulleners who passed away shortly after the conclusion of the original trial. Judith Tulleners, as shown by the record and the Court of Appeals' decisions is of advanced age, and medically fragile with a history of breast cancer and other serious medical concerns. Equities raised by Judith Tulleners, such as a request for a disproportionate award of the community property, become moot if she were to pass. Delay serves interests of the Estate. As is, the Estate has sufficient funds from the dissolution award (that were not appealed from) to outlast the efforts of Judith Tulleners to receive a fair sharing of the community estate. As is, six years have now passed form the original divorce filing date of 2016.

There are no conflicts as to the application of community property and separate property holdings. Such issues of tracing of separate property are not of significant interest given the litany of rulings on the subject and given that the Court of Appeals has strictly adhered to established precedent. If anything, the Court of Appeals has provided Mr. Tulleners with too many

opportunities to provide a tracing that should have occurred din discovery and then at the first trial. Judith Tulleners respectfully requests that this Court decline the petition for discretionary review.

RESPECTFULLY SUBMITTED this 4th day of May, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion to be competent to serve papers. That on the 4th day of May, 2022, he served this Memorandum In Oppostion via the efiling Portal for the Washington State Appellate Courts:

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