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

APPELLANT'S OPENING BRIEF

In Re:

MICHELLE LACLAE CUMMINGS, RESPONDENT

V.

DAVID ALLEN CUMMINGS, APPELLANT

Stenzel Law Office
Gary R. Stenzel, WSBA # 16974
Attorney for Appellant
1304 W. College Ave. LL
Spokane, Washington 99201
Stenz2193@comcast.net
(509) 327-2000

Table of Contents

Citations to Authorities

Authorities **Page**

WA Supreme Court

Washington Appeals Court

Statutes

I. FACTS

This case presents the divorce of two older people who were both employed during the marriage (RP 361-362) and who had been married for 34 years (RP 361). Mr. Cummings was a self employed professional appraiser with his office in the family home (RP 189-190) and the wife is 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. As a result 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 on "Dean". RP 13 & 190.

During the trial the focus was clearly on describing the family home (where Mr. Cummings lived and worked), the commercial Dean property, and the "rentals". RP 60-112 generally. Ms. Cummings went back and forth on what arrangement would be best for

the distribution, however, she focused on the family home being a place she wanted so she could visit with her grandchildren, even though the family home was in such bad repair that the wife admitted that the grandchildren should not walk near certain areas of the property. See RP 126. Nevertheless, the wife indicated 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.

As the trial wound down there was a focus on some of the details of the parties' personal lives. Ms. Cummings lived away from the Montague home in an apartment and wanted something bigger to visit with her grandchildren. RP 163. In contrast, Mr. Cummings lived at the Montague home and again ran his appraisal and rental business out of that home. RP 189-190. This fact

[1] The focus of this appeal will be on the distribution of the two properties known as the Dean and Montague properties (and thus RCW 26.09.080), as well as the unusual sanction of having to pay his own attorney $1,000. Other issues such as the husband's alleged "intransigence", failure to fully answer all discovery, and/or the use of 3 different attorneys are not addressed in this appeal, and are irrelevant to the outcome in this matter, as well as the alleged errors by this judge.

was never denied by Ms. Cummings throughout the entire trial. See RP generally. At no time was there any testimony about any other options for Mr. Cummings' business other than the Montague home. *Id.* However, there was un-refuted evidence that his primary business took place around the area of their home, Cheney, Washington. 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. He said at page 189 -190 of the RP:

> Q: So 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 your 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 Cheney Montague home to continue his business.

One fact of lesser importance, but of seeming importance to the judge was the "relationship between the parties and their grandchildren". In the court's final oral decision, the judge indicated that her primary reason for awarding the Montague home to the wife was due to three primary reasons. 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 to the wife so she could spend more time with the grandchildren. RP 367-369. There appeared to be no other clear reason for this allocation since in her final comment she said why this decision and distribution was made, as follows:

> *"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 seeming support for this decision the Court indicated that Mr. Cummings could possibly also relocate his business to the "Dean" office building, therefore, he would not need the Montague home. See RP 369 Lines 5-7. However, the judge then gave the wife the Dean house as well, she said at RP 369 line 19-21. Stating: "Although the wife is not requesting it, the court is satisfied that the Dean property is more equitably awarded to the wife."

The upshot of this ruling was that because the wife had a better relationship with the grandchildren she was awarded the family home, and although she said the husband could work out of the Dean property, she gave that to the wife as well. This decision basically destroyed the husband's appraisal business until he finds a new place to work, and rebuild his practice, and completely ignored his

unrebutted testimony and the 30 years of building this West side mortgage appraisal business.

More importantly the judge failed to use any of the factors required by the statutes in the distribution of marital property, and instead based it on what appears to be an irrelevant emotional family issue, their relationship with their grandchildren. Had Mr. Cummings ever thought that this would be the controlling issue in his livelihood, he would have set aside daily contact with his grandchildren, to become a Super-grandparent. Instead, he simply lost out to his wife, who made them the focus of her life. (It should be noted that the Judge did this in spite of the fact that she admitted that the parties had no dependent children in their lives in her recitation of the facts of the case. See RP 362.)

Finally, to cap all this off the judge sanctioned the husband for what she saw was intransigence in discovery by forcing him to pay his own counsel sanctions in the amount of $1,000. RP 366 Lines 14-

19. Yes, she sanctioned him in favor of his own attorney, placing his attorney in what was then an adversarial position.

II. JUDICIAL ERROR

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 to his attorney, in a manner not allowed by law.*

III. LAW & ARGUMENT

A. It is error for a judge to fail to use the statutory required factors at RCW 26.09.080 in the distribution of marital property in a dissolution matter.

In any dissolution trial/case, it is required that the Superior Court Judge presiding over the case use

the factors outlined at RCW 26.09.080 to distribute the marital property. That statute states:

> *In a proceeding for dissolution of 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.*

A property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion. *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). It is manifestly unreasonable or the decision is based on untenable ground or reasons if the statutes are not followed as to the process of the dissolution. *Id.* Specifically, the trial judge is not required to make a specific 50/50 distribution, that is up to each judge, however, they must use the factors outlined at section .080 of the RCW or their decision will likely be found to be based on untenable grounds. See *In re Marriage of Muhammad*, 108 P.3d 779, 153 Wn.2d 795 (Wash. 2005); *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971); *In re Marriage of Underwood*, 326 P.3d 793, 181 Wn.App. 608 (Wash.App. Div. 2 2014) [reviewing the *Muhammad*

case and the need to apply RCW 26.09.080 factors in the distribution of property in a divorce action.] If a Superior Court Judge fails to follow this statute and apply these factors it is error. *Id.*

In reviewing the history of the application of the factors at section .080, the courts are somewhat scattered in their interpretation. However, of all the factors, it appears that it is the "economic circumstances that each of the parties are left with at the time of the distribution" that is of paramount importance in the distribution. See *In re Marriage of Crosetto*, 82 Wn.App. 545, 556, 918 P.2d 954 (1996); *In re Marriage of Tower*, 55 Wn.App. 697, 700, 780 P.2d 863 (1989); *In re Marriage of Griswold*, 112 Wn.App. 333, 347, 48 P.3d 1018 (2002); *Matter of Olivares*, 69 Wash.App. 324, 848 P.2d 1176 (cert. denied) (1993).

In this case, the Findings of Fact and Conclusions of Law do not provide enough clarity about the application of the factors at .080. The court

may reference the record of the proceedings, specifically the court's oral ruling, to see what the Judge said about the distribution and what was used to determine the division of property ordered. See e.g. *In re Marriage of Horner*, 93 P.3d 124, 151 Wn.2d 884 (Wash. 2004).

In this case, as pointed out, the oral ruling falls short of applying the statutory factors at .080 to this distribution, especially in the application of the statutory factors. The relationship between the grandchildren and the parties is not a relevant factor to base the distribution of the property on in any case. Therefore, the decree's distribution of the family home and the Dean property needs to either be remanded or revised on appeal.

B. The Judge in this case completely failed to follow the factor of RCW 26.09.080 in the distribution of the parties property and the decree should be overturned.

A review of the record and oral ruling of the judge in this case shows that the parties had two primary pieces of property of significance. They have the "family residence" used by the husband solely for

his private appraisal service. And the commercial rental on Dean. It was very clear that the judge failed to make her decision based on the final economic circumstances of the parties, especially the husband. He basically lost his entire business, except what he could take with him in his head or "rolla-dex". RCW 26.09.080 was not followed in this case in this distribution.

C. There is no law that allows the court to order the sanctions to be paid to a parties own attorney for alleged intransigence.

As can be seen, the Judge in this case ordered Mr. Cummings to pay his own counsel sanctions of $1,000.00. RCW 26.09.140 is the statute that deals with fees in a dissolution of marriage. That statute is based on an analysis of the income and needs of both parties, it does not allow for sanctions against you as a party to pay your particular attorney.

There are obviously court rules that allow for the award of fees for intransigence, however, those rules only apply for fees for the other parties' counsel,

not your own counsel. This part of the decree should also be overturned.

IV. CONCLUSION

In conclusion, the court committed reversible error by a failure to properly apply the factors of RCW 26.09.080 in the distribution of the parties' property. By so doing they completely destroyed the husband's business and past business associations using his family home residence as his business place. Additionally, the court compounded this error by ordering payment of sanctions to the Respondent's own counsel from him personally. The decree should be vacated as to the distribution of the real property.

Dated: 1-6-16

Gary R Stenzel, WSBA #16974
Stenz2193@comcast.net

Affidavit of Mailing

I, Robert J. Hervatine, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on January 6th, 2016, a copy of this APPELLANT'S OPENING BRIEF was mailed to the office of Ellen Hendricks, 1403 W Broadway Ave, Spokane, WA 99201.

Dated this 6th day of January 2016.

Robert J. Hervatine,
STENZEL LAW OFFICE
WSBA# 41833