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No. 97023-8

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

BARBARA TEMPLIN
(f/k/a Klavano),

Respondent,

and

JAMES KLAVANO,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. Relief Requested By Responding Party.

Respondent Barbara Templin asks this Court to deny petitioner James Klavano's petition for review of an unpublished decision by Division One of the Court of Appeals affirming the wholly fact-based and discretionary decision by the trial court awarding superior court attorney fees and costs to respondent under RCW 26.09.140. This Court should also deny review of the Court of Appeals' decision declining to reconsider its award of fees to respondent in an earlier appeal, in which it remanded for the trial court to reconsider its previous order denying respondent superior court fees. Nothing in the Court of Appeals' unpublished decision warrants review by this Court under RAP 13.4(b). This Court should deny review and award fees to respondent. RAP 18.1(j).

B. Response to Statement of the Case.

Klavano's "Statement of the Case" continues his baseless (yet relentless) efforts to discredit his former wife that the trial court on remand, and Division One in both this appeal and in an earlier appeal, rejected as a reason to deny Templin an award of fees under RCW 26.09.140. Klavano's claims of Templin's supposed divorce "planning" and alleged "embezzling" are not only baseless, but irrelevant to an award of fees under RCW 26.09.140. (Petition 2-3)

RCW 26.09.140 requires consideration of the parties' financial resources, not a party's alleged marital misconduct, in awarding fees, as Division One correctly recognized in originally reversing the trial court's denial of attorney fees in the earlier appeal, under Cause no. 73415-6-I, because it was not based on consideration of Templin's "need or Klavano's ability to pay." (Petition, App. A-93) Instead, in its original order denying superior court fees to Templin, the trial court referenced Templin's journal entry (which Klavano attaches to his petition) to erroneously conclude that the parties' marriage was a 4-year short-term marriage, rather than the 10 years they were actually married (CP 3622) and Templin's withdrawal of funds from a joint account when the parties separated, which the trial court found began the litigation "on its troubled path." (CP 3623)

In reversing the denial of need-based fees and awarding fees to Templin in the earlier appeal, Division One also rejected Klavano's claims, repeated again in his petition, that Templin's property award was a reason to deny her fees based on her "financial need" (Petition 3-4), and Klavano's claims that Templin has "never submitted a credible Financial Declaration." (Petition 4) Instead, it concluded that "Templin's most recent financial declaration demonstrates her

need for an award of reasonable attorney fees on appeal. Klavano's most recent financial declaration demonstrates his ability to pay Templin's reasonable attorney fees." (Petition, App. A-93)

Division One left it to the trial court on remand to determine the amount of the appellate fee award. (Petition, App. A-93) On remand, far from "simply accept[ing] unquestioningly" the fee affidavit submitted by Templin's appellate counsel (Petition 7), the trial court "[went] through the billings" submitted by Templin (5/4/2017 RP 4), and had "started looking at [the fee affidavit] immediately knowing I was going to have to start reading and going through the bills pretty carefully." (5/4/2017 RP 31) In its written findings, the trial court found that the fee affidavit "provides the necessary information to make a determination of the reasonableness of the attorney fees and expenses requested." (CP 4952)

In reconsidering its earlier decision denying superior court fees, the trial court considered the parties' financial resources and awarded fees and costs to Templin after finding she "has established her need for the payment by [Klavano] of her attorney fees and costs." (CP 4963) Contrary to Klavano's claims (Petition 6-7), the trial court "independently determin[ed]" that Templin should be

awarded her reasonable fees and costs incurred prior to the appeal. (CP 4956) In doing so, the trial court considered “the financial resources of the parties,” including that Klavano was awarded \$7.6 million in property and “short of selling jewelry of limited value and borrowing further against her retirement, which she had already encumbered to pay some of her litigation costs, or worse, liquidating her retirement, the wife had no other assets available to pay fees”:

Petitioner’s resources at the commencement of this action were limited because at the beginning of this litigation the wife had virtually no liquid assets of her own with which to pay her fees and costs. At the end of the parties’ marriage, the wife was left with less than 10 percent of the marital estate (consisting mostly of her own retirement accounts), no maintenance, and fees still owed of more than \$246,000, as well as expert witness fees owed of more than \$36,000. Short of selling jewelry of limited value and borrowing further against her retirement, which she had already encumbered to pay some of her litigation costs, or worse, liquidating her retirement, the wife had no other assets available to pay fees.

At the time this action was commenced, respondent had a net worth of several million dollars. At the end of the parties’ marriage the husband was awarded \$7.6 million in property, a significant portion of which was liquid assets. The monthly income disparity between the parties was also significant – in respondent’s favor.

(FF 3, 4, CP 4963)

Division One affirmed both fee awards in their entirety in its unpublished decision, and once again awarded fees to Templin on

appeal, rejecting the arguments that Klavano makes in his “Statement of the Case,” including that the trial court’s original findings related to its property division and denial of spousal maintenance to Templin “conflicted” with the findings it made on remand to support its award of trial fees. (Petition 4-5) As Division One stated, “the trial court’s findings made to support its disposition of property and maintenance do not conflict with a conclusion that Templin needs help paying her litigation expenses.” (Petition, App. A-106)

Division One also rejected Klavano’s argument that the trial court erred in awarding fees based on his allegation that Templin “never submitted a credible Financial Declaration.” (Petition 4) Division One noted that “we do not make credibility determinations or findings about whether a party misrepresented her finances.” (Petition, App. A-108) Division One nevertheless found substantial evidence supported the trial court’s fee award because “Templin received approximately 10 percent of the marital estate and no maintenance and owes more than \$246,000 in trial attorney fees and \$36,000 in expert witness fees. Klavano received \$7.6 million in property. Relative to Klavano, Templin has a need, and relative to Templin, Klavano has the ability to pay. The trial court did not err in

concluding that Templin established her need and Klavano has the ability to pay.” (Petition, App. A-109)

Division One also declined Klavano’s request under RAP 2.5(c)(2) to reconsider its award to Templin of fees for the earlier appeal – the amount of which was established by the trial court on remand. Instead, it affirmed the amount of appellate fees awarded by the trial court. Division One held that the trial court made an adequate record for it to review its award (Petition, App. A-116), and “conducted an adequate independent review” of the reasonableness of the fees requested. (Petition, App. A-117) Finally, Division One once again awarded fees to Templin on appeal, holding “Klavano did not present any meritorious legal arguments on appeal. Based on the disparity in income and assets between them and Klavano’s ability to pay, we award reasonable costs and fees for this appeal to Templin.” (Petition, App. A-119)

Klavano petitions, challenging Division One’s decision affirming the award of superior court fees to Templin, and its decision declining to reconsider its previous award of fees to Templin in the first appeal. Klavano does not challenge the decision affirming the amount of the appellate fee award found by the trial court.

C. Grounds for Denial of Review.

- 1. The Court of Appeals' unpublished decision is consistent with earlier decisions affirming awards of attorney fees under RCW 26.09.140.**

Review of Division One's unpublished decision affirming the trial court's award of superior court fees to Templin under RCW 26.09.140 is not warranted under RAP 13.4(b)(1), (2) because it is wholly consistent with decisions from this Court and each division of the Court of Appeals. Klavano's arguments that by affirming the award of fees, Division One invented a "new basis" under RCW 26.09.140 because it considered that "[r]elative to Klavano, Templin has a need, and relative to Templin, Klavano has the ability to pay" (Petition 10) is baseless, as is his claim that considering the "relative" financial positions of the parties before awarding fees is a "new formulation of how 'need' is determined." (Petition 12)

RCW 26.09.140 provides that "the court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees..." As this Court, and each division of the Court of Appeals, has recognized, this consideration of the "financial resources of both parties" requires that the courts consider each

party's financial resources *relative* to the other, and is indeed the “law” of this state. (Petition 12)

This Court considered the “relative resources” of the parties in awarding fees to the wife under RCW 26.09.140 in *Marriage of Littlefield*, 133 Wn.2d 39, 58, 940 P.2d 1362 (1997). Likewise, this Court considered whether there was a “disparity in the parties’ income that would justify an award of attorney fees to either party” in *Marriage of Chandola*, 180 Wn.2d 632, 657, ¶ 56, 327 P.3d 644 (2014). And this Court held that “the decision to award fees under RCW 26.09.140 is discretionary and must be based upon a consideration that balances the needs of the spouse seeking fees against the ability of the other spouse to pay” in *Marriage of Moody*, 137 Wn.2d 976, 979, 976 P.2d 1240 (1999). *See also Marriage of Valente*, 179 Wn. App. 817, 832, ¶ 35, 320 P.3d 115 (2014) (Div. One) (“We may award attorney fees [under RCW 26.09.140] after considering the relative resources of the parties”); *Walsh v. Reynolds*, 183 Wn. App. 830, 858, ¶ 60, 335 P.3d 984 (2014) (Div. Two) (“[W]e have discretion to award attorney fees [under RCW 26.09.140] after considering the relative resources of the parties”), *rev. denied*, 182 Wn.2d 1017 (2015); *Marriage of Tahat*, 182 Wn. App. 655, 679, ¶ 67, 334 P.3d 1131 (2014) (Div. Three) (a fee award

under RCW 26.09.140 “requires an inquiry into the party’s need and the nonmoving party’s ability to pay”).

Klavano argues that Templin cannot establish her need for attorney fees “as a matter of law” because she “received a substantial award of marital property,” but Klavano recognizes, as he must, “a spouse’s receipt of substantial property or maintenance does not preclude that spouse from also receiving an award of attorney fees and costs...” (Petition 14, *citing Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989)).

In *Marriage of Irwin*, 64 Wn. App. 38, 822 P.2d 797, *rev. denied*, 119 Wn.2d 1009 (1992), for instance, Division One affirmed an award of attorney fees to the wife, who received nearly \$4.7 million in assets. And in *Walsh v. Reynolds*, 183 Wn. App. 830, Division Two rejected an argument similar to the one Klavano makes here, that a trial court cannot award fees to a party who was alleged to have already received “significant assets and financial benefits,” noting that appellant “fails to provide any authority to support her implicit argument that a trial court abuses its discretion by awarding attorney fees to a party who has received assets during the relationship and after dissolution.” 183 Wn. App. at 857, ¶ 57.

Regardless of the amount of property awarded to Templin¹ (which would have been exhausted by her obligation to pay fees), Division One’s decision affirming the fee award because “relative to Klavano, Templin has a need, and relative to Templin, Klavano has the ability to pay,” (Petition, App. A-109), is wholly consistent with precedent from this Court and the Court of Appeals. Review is not warranted under RAP 13.4(b)(1), (2).

Ultimately, Klavano’s challenge to Division One’s decision is his belief that Templin “never submitted a credible financial declaration to the trial court.” (Petition 13) But it does not matter whether *Klavano* believes that Templin “needs Klavano to pay any portion of her attorney fees.” (Petition 14) The *trial court* believed that Templin needed a fee award, and as this Court has recognized, appellate courts do not review “the trial court’s credibility determinations or weigh conflicting evidence.” *Marriage of Black*, 188 Wn.2d 114, 127, ¶ 23, 392 P.3d 1041 (2017) (quoting *Welfare of Sego*, 82 Wn.2d 736, 740, 513 P.2d 831 (1973)). The credibility of the

¹ Klavano exaggerates the amount of property actually awarded to Templin, as it included over \$132,000 in temporary spousal maintenance that the trial court treated as a “pre-distribution,” and valued a two-year old car at its purchase price of over \$62,000. (See CP 3653) The most significant assets awarded to wife were her retirement accounts with Alaska Airlines. (See CP 3652)

parties' assertions regarding their relative financial resources for purposes of awarding or denying fees under RCW 26.09.140 is not "an issue of substantial public interest" that warrants review by this Court under RAP 13.4(b)(4).

2. The Court of Appeals properly exercised its discretion in not revisiting its prior award of appellate attorney fees to Templin.

This Court should deny review of Division One's decision declining to reconsider its previous award of appellate fees to Templin. Whether an appellate court "reviews the propriety of an earlier decision of the appellate court in the same case" is entirely discretionary. RAP 2.5(c)(2) ("the appellate court *may* at the instance of a party review the propriety of an earlier decision of the appellate court in the same case") (emphasis added).

In awarding fees to Templin in the first appeal, Division One stated, "Templin's most recent financial declaration demonstrates her need for an award of reasonable attorney fees on appeal. Klavano's most recent financial declaration demonstrates his ability to pay Templin's reasonable attorney fees. Accordingly, we award her reasonable attorney fees on appeal." (Petition, App. A-93) In that earlier appeal, Division One also considered and rejected Klavano's arguments, made in the "merits" brief and in his motion

for reconsideration, that Templin's financial declaration was not credible and that she did not corroborate her need for an award of fees on appeal in light of the property awarded to her.

Division One was not required to reconsider those arguments in a subsequent appeal of the trial court's order establishing the amount of reasonable fees to award Templin for the appeal. Review of previously rejected factual arguments was not necessary to serve justice, nor was there any change in the law to warrant Division One's reconsideration. RAP 2.5(c)(2) ("where justice would be best served, [the appellate court may] decide the case on the basis of the appellate court's opinion of the law at the time of the later review").

In any event, Klavano does not even attempt to show how review of Division One's decision declining to revisit its earlier ruling awarding fees on appeal to Templin is warranted under RAP 13.4(b). Nor does Klavano cite any authority to support his argument that review by this Court is warranted because Division One "refused to even address Klavano's motions throughout his briefs that it should reconsider its ruling, pursuant to RAP 2.5(c)(2)."

3. This Court should award attorney fees to Templin for having to respond to this petition under RAP 18.1(j).

Division One awarded fees to Templin based on her need and Klavano's ability to pay under RCW 26.09.140, and the lack of "any meritorious legal arguments on appeal." (Petition, App. A-119) This Court should also award Templin her fees for having to respond to his petition in this Court, because it too raises no "meritorious legal arguments." RAP 18.1(j).

D. Conclusion.

This Court should deny review of Klavano's petition, and award attorney fees to Templin for having to respond to this petition.

Dated this 29th day of May, 2019.

SMITH GOODFRIEND, P.S.

By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 29, 2019 I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 29th day of May, 2019.



Sarah N. Eaton

SMITH GOODFRIEND, PS

May 29, 2019 - 4:20 PM

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