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No. 102054-6

**THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**In re the Marriage of:
DEVIN C. KIENOW, Appellant/Petitioner,**

v.

TERESA DITTENTHOLER f/k/a KIENOW, Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING RESPONDENT

Respondent Teresa Dittenthaler asks this Court to deny the Petition for Review.

II. COURT OF APPEALS DECISION

The unanimous and correct decision by Division III of the Washington Court of Appeals adhering to long-standing Washington law filed on March 14, 2023, in Matter of Marriage of Kienow, 25 Wn. App. 2d 1064 (2023).

III. ISSUES PRESENTED FOR REVIEW

1. Has Petitioner asserted a cognizable basis for Supreme Court review under the limited criteria set forth in RAP 13.4(b)?

IV. STATEMENT OF THE CASE

The facts of this case are accurately set out in Division III's opinion. They are not restated here for the sake of brevity but are incorporated by this reference.

V. LEGAL ARGUMENT

The Court should deny Petitioner's Petition for Review, as Petitioner has presented no argument that the Court of Appeals or the Superior Court's decisions were in error. Petitioner takes issue with the substance of the lower courts' rulings on parental decision making and the parenting plan and the trial court's decision to assert jurisdiction, which is an insufficient basis to reverse the Court of Appeals and the trial court.

A. THERE ARE NO GROUNDS FOR REVIEW UNDER RAP 13.4(B)

Under RAP 13.4(b), a petition for review will only be accepted by the Supreme Court:

- (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 of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (emphasis added)

Petitioner has not identified any conflict between the Court of Appeals' decision and a Supreme Court decision or another decision of the Court of Appeals. Nor does this case involve a significant question of constitutional law. Therefore, RAP 13.4(b)(1)-(3) do not provide grounds for review. Finally, review is not warranted under RAP 13.4(b)(4), because the Petition does not involve "an issue of substantial public interest that should be determined by the Supreme Court."

In short, Petitioner in this matter has failed to provide this Court with any basis justifying acceptance of review and this Court should deny review of the case.

B. THE COURT OF APPEALS' RULING REGARDING JURISDICTION DOES NOT IMPLICATE RAP 13.4(B)

Petitioner argues that the trial court erred in not asserting exclusive jurisdiction over the matter. *Petition for Review at 7.* He argues this presents a significant question of constitutional

law. *Id.* It does not, and the jurisdiction argument fails to justify discretionary review under RAP 13.4(b) for several reasons.

First, as an initial matter, the Court of Appeals correctly held that the jurisdiction issue was not properly before it since Petitioner has not timely appealed it. Matter of Marriage of Kienow, 25 Wn. App. 2d 1064 at *5. The Court of Appeals' decision not to review an issue that was never properly raised on appeal does not present a significant question of constitutional law. It presents a routine question of appellate procedure. See RAP 2.4. That should end the inquiry.

Second, it is not entirely clear what error Petitioner claims the lower courts made. The trial court did in fact assert jurisdiction. See Matter of Marriage of Kienow, 25 Wn. App. 2d 1064. Petitioner seemingly takes issue with how long it took to do so, but that is a red herring. If the trial court asserted jurisdiction, that renders Petitioner's argument moot. To the extent Petitioner asserts that the trial court, by delaying asserting

jurisdiction, improperly deferred to the tribal court's parenting plan, the Court of Appeals has already appropriately assessed and rejected that argument as unfounded. As the Court of Appeals emphasized, Petitioner failed "to demonstrate that any ruling by Commissioner (later Judge) Tutsch on the residential schedule in and after the summer of 2019 was not independently arrived at by her. Independent decision-making does not require a court to act as if earlier court orders do not exist." Matter of Marriage of Kienow, 25 Wn. App. 2d 1064 at *6.¹ That issue likewise does not involve a significant question of constitutional law.

Third, the Court of Appeals also emphasized that Petitioner failed to object to and challenge the tribal court's assertion of jurisdiction, and in fact availed himself of the tribal court to pursue the issue of jurisdiction. Id. at *5. That similarly does not present a significant question of constitutional law. It presents ordinary state law issues, such as waiver.

¹ In fact, the trial court's order specifically noted that it was reaching its decision independent of the order. CP at 115.

Fourth, Petitioner fails to establish that his untimely substantive objection to the Court of Appeals' ruling, even if properly raised, impacts RAP 13.4(b). As the Court of Appeals noted, Petitioner identified no legal authority that supports this proposition. The Court of Appeals recognized that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) recognizes that more than one state (or Indian tribe, since tribes are treated as states) may have jurisdiction. Matter of Marriage of Kienow, 25 Wn. App. 2d 1064 at *5. While Petitioner attempts to argue that the UCCJEA does not apply because the children never lived on tribal land, *Petition for Review at 6*, there is no citation to the record for that unsupported assertion.

C. PETITIONER'S DISSATISFACTION WITH THE PARENTING PLAN DOES NOT IMPLICATE RAP 13.4(B)

Petitioner takes issue with the trial court's parenting plan and argues that the trial court applied the RCW 26.09.191 restrictions too leniently to Respondent in light of the

trial court's finding of domestic violence. *Petition for Review at 8-10.*

Petitioner argues that domestic violence involves a public interest. *Petition for Review at 8-10.* But that misstates the standard. Petitioner must show “an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). Washington has a general public policy interest in many things, including preventing workplace discrimination (Roberts v. Dudley, 140 Wn.2d 58, 993 P.2d 901 (2000), as amended (Feb. 22, 2000)), promoting workplace safety (Cudney v. ALSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011), overruled on other grounds by Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 358 P.3d 1139 (2015)), and preventing wrongful discharge (Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 935, 913 P.2d 377, 379 (1996)).

That does not mean, however, that every case involving such scenarios warrants review by this Court. If that were the

case, this Court would be inundated with review of such cases.² The interest, rather, must be substantial such that review by this Court is justified. For instance, in State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005), the Court concluded discretionary review was appropriate where the Court of Appeals' decision made sweeping changes to sentencing guidelines that "while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue."

Nothing in the Petition supports the conclusion that the Court of Appeals' decision here implicates a substantial public interest warranting review by this State's highest court, or somehow would have a sweeping impact affecting other parties. The Court of Appeals did not disavow the importance of

² Moreover, under Petitioner's interpretation, review of such cases would for all intents and purposes be as of right, thus contradicting the discretionary purpose of RAP 13.4(b).

domestic violence laws. The Court of Appeals simply considered the trial court's finding that Respondent had committed domestic violence and used its discretion not to impose residential restrictions where it found that the conduct was unlikely to recur or did not have an impact on the child. That was a routine and discretionary application of well-settled law that applies only to the parties in this particular matter, not to other litigants. Matter of Marriage of Kienow, 25 Wn. App. 2d 1064 at *11.³ Petitioner's dissatisfaction with the Court of Appeals' ruling does not justify this Court's review.

VI. CONCLUSION

Division III's opinion is consistent with the long-standing and well-settled law. Petitioner has not shown that Division III's decision conflicts with this Court's precedent or that this dispute

³ As the Court of Appeals properly pointed out, however, a trial court wields broad discretion when fashioning a permanent parenting plan. Katara v. Katara, 175 Wn.2d 23, 35, 283 P.3d 546 (2012) (citing In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993)). Petitioner fails to show how the trial court's routine and discretionary application of RCW 26.09.187 and RCW 26.09.191, or its decision not to consider expert testimony, meets the mandatory criteria in RAP 13.4(b), let alone was even erroneous.

involves an issue of substantial public interest. The Court should therefore deny review and award fees to Respondent.

Certificate of Compliance: I hereby certify there are 1367 words contained in this Answer, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of August, 2023



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