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 REPLY BRIEF

In Re:

MICHELLE LACLAE CUMMINGS, PETITIONER

V.

DAVID ALLEN CUMMINGS, RESPONDENT

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I. RESPONSE TO FACT SECTIONS

The Respondent to this appeal filed a Responsive brief with 31 pages of facts. Outlining everything that occurred at trial. The RAP rules not only suggest that briefs should not be more than 50 pages long, the "statement of facts" should be "A fair statement of the facts and procedure relevant to the issues presented for review, without argument."

Although their brief is 56 pages and that is not arguably a great difference, it has created an undue burden on the Appellant given the fact that the Respondent threw in everything and even at times seemed to be testifying (if not arguing) about what happened at trial. This appeal is about two pieces of property, the Dean Rental and the family home/office, and the nonstatutory basis for their award to the wife. With their lengthy brief, it is this writer's opinion that it misses the mark by dealing with every piece of property of the parties and the entire trial. Although it is appropriate for a judge to deal with all the property, there is little basis for the awards of these two important property items. That being said, the facts are the facts,

and the Appellant does not argue with the fact that all the issues were before the court at the time of trial. But, that does not answer the important question of why these two property items were awarded to the wife in spite of the fact that the recipient of these items actually moved out of the family home/office in the beginning of the case, to seemingly assist the Appellant in maintaining his business from the family home.

With the above in mind the Appellant objects to the lengthy responsive brief and asks this court to focus its attention on the relevant facts (as they always do). The appellant trusts that this court will be able to cut through the 30+ pages of facts and help resolve this matter accordingly.

II. LAW AND ARGUMENT

A. When the written findings of fact are not clear as to why the court awarded certain valuable and important items of property to one party over the other, the court is instructed to look at the oral ruling for guidance as to why certain orders were made.

Ms. Cummings makes much of the fact that all of the facts were before the court to make this decision and that in its findings the trial court stated that this was a "just and equitable distribution". She states that this clearly shows that the distribution was a proper and just

determination and is basically immune from an appeal. However, counsel misses the mark in stating this conclusion. Mr. Cummings is specifically basing this appeal on the contention that there was error in the distribution of the family home/office and the "Dean Rental property" specifically because of the announced reason for this transfer. That error was due to the court's failure to use proper statutory standard for this decision. Mr. Cummings asks this court to turn to the court's oral ruling for clarification of the basis for this order.

A dissolution court has an obligation to set forth findings that have some clarity in light of the character of the property distributed and its relationship to the factual circumstances of the parties. *In re Marriage of Rink*, 18 Wn.App. 549, 553, 571 P.2d 210 (1977). In this case the findings of fact and conclusions of law were not clear about any of the distributed items and merely stated that,

> "The Court finds that the distribution of the parties' community property and liabilities; as set forth in paragraph 3.2-3.5 of the decree of dissolution, (filed herewith and fully incorporated herein by this reference), is a just and equitable division based upon the circumstances of the parties as determined by the evidence produced at trial. The net distribution to the Wife is greater than the net distribution to the Husband. However, because of the substantial separate property

awarded to the Husband; which he inherited from his mother, the Court finds that an equalization payment from the Wife to the Husband is not warranted." CP 58.

CR 52(a)(1) states that, "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law." Nowhere in the Findings are there specially outlined facts of this case. "Generally, where findings are required, they must be sufficiently specific to permit meaningful review." *In re LaBelle* 107 Wn.2d 196, 218, 728 P.2d 138 (1986). "The purpose of the requirement of findings and conclusions is to insure the trial judge 'has dealt fully and properly with all the issues in the case before [she] decides it and so that the parties involved and this court on appeal[s] [sic] may be fully informed as to the bases of [her] decision when it is made.'" *LaBelle* 107 Wn.2d at 218-19.

In this case the judge's findings may say that equity or fairness was accomplished, it leaves out how it applied the statutory factors to come to that conclusion. In such a case the findings are deemed unclear. See e.g. *LaBelle* supra. In such cases, the court then can look to the next level of the decision, the oral ruling to determine

if the proper factors were used. See *In re Marriage of Murray*, 28 Wn.App. 187, 189, 622 P.2d 1288 (1981).

In this case the husband argues that an inappropriate standard was used in the distribution of two of the largest tangible assets, the family home/office, as well as the Dean Rental property, and that simply looking at a statement that this "distribution is equitable" or even "fair" leaves out the "why's and wherefores" of the decision, resulting in a substantial lack of clarity. Therefore, it is proper to look at the court's oral ruling for further information as to why the judge did this and what statutory factors she used in that decision, and also that this cannot be specifically gleaned from going over the presentation of the evidence alone. Id; see also *Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wash.2d 476, 481, 670 P.2d 648 (1983); *In re Meistrell*, 47 Wash.App. 100, 107, 733 P.2d 1004 (1987); *Toyota of Puyallup, Inc. v. Tracy*, 818 P.2d 1122, 63 Wn.App. 346 (Wash.App. Div. 2 1991).

In conclusion, and in contrast to what Ms. Cummings states in her responsive brief, that since there were many things considered at trial, therefore, it is obvious that the judge met her statutory duties in this

distribution. If the court does not say which statutory factors she considered in this distribution, the oral ruling is the place to go to see why the property was distributed the way it was. Mr. Cummings asks this court to look at the oral ruling in this matter to glean why this distribution was made to see if the statutory factors were used in that determination.

B. The Appellant's argument in his opening brief is sufficient to put the court and Ms. Cummings on notice as to which finding of fact and conclusion of law were error, therefore, a failure to state a general assignment of error as to the findings by the appellant is not fatal to this appeal.

Although it is almost axiomatic that a failure to assign error to a particular portion of a trial court's ruling on appeal, and may waive any objection to that particular decision; this kind of "form over substance" argument is not a rule of preclusion, causing a kind of default in the Appellant's argument. The rulings on unchallenged findings make it clear that if the opening brief is sufficiently clear to state specifically why the appeal was filed, he or she has not waived their right to contest the decision. The court of appeals will generally waive "technical violations" of RAP 10.3(g) where the appellant's brief makes the nature of the appeal clear.

Harris v. Urell, 133 Wash.App. 130, 137, 135 P.3d 530 (2006), review denied, 160 Wash.2d 1012, 161 P.3d 1026 (2007); see *Skagit County Public Hosp. Dist. No. 1 v. State, Dept. of Revenue*, 242 P.3d 909, 158 Wn.App. 426 (2010).

In this case the Appellant specified that this appeal is about the trial court's failure to utilize the required statutory factors in distributing the family home/office and the Dean Rental property; therefore, there was no need to technically say that the findings were entered in "error".

The Appellant made the following assignments of 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.*

It is clear that the main issues in this case revolve around an alleged failure to use the statutorily required factors in its distribution and failed to follow the statutes as to the order to pay his own attorney sanctions. This

writer feels it could not be more clear what the error was, regardless of the highly simplified findings. It is the Appellant's position that this satisfies the specific need to identify the issues on appeal.

C. It is a manifest abuse of discretion for a judge to make a property decision in a dissolution that significantly goes outside the required factors in the dissolution statutes of this state.

A judge presiding over a dissolution trial, where there is a large amount of marital property has a duty to divide those items in not only a fair and equitable manner, they must also make sure that they use this state's statutory factors in distributing those items between the parties. *In re the Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). The *Muhammad* court stated,

> "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. State v. Rundquist, 79 Wash.App. 786, 793, 905 P.2d 922 (1995) (citing WASHINGTON STATE BAR ASS'N, WASHINGTON APPELLATE PRACTICE DESKBOOK § 18.5 (2d ed.1993)), review denied, 129 Wash.2d 1003, 914 P.2d 66 (1996)." From In re Marriage of Littlefield, 940 P.2d 1362, 133 Wn.2d 39 (Wash. 1997) which has been superseded on other grounds." (Emphasis added)

More specifically, in a dissolution case, the court cannot simply say a distribution is "fair and equitable". They must be concerned with the fairness of an award of property as determined by the factors set out in RCW 26.09.080. *In re Marriage of Hadley*, 565 P.2d 790, 88 Wn.2d 649 (1977). Again, if it is shown that a dissolution court does not use the proper factors and uses some other factor, that is not part of the statutory reasons to decide what property a party should be awarded, it is said to be a manifest abuse of discretion. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). This is said to be a decision that is based on untenable grounds and/or untenable reasons. *In re Marriage of Littlefield*, supra. See also e.g *In re Marriage of Kraft*. 119 Wn.2d 438, 450, 832 P.2d 871 (1992). If it can be shown that the trial court failed to apply the factors from the statute then the appeals court must consider the decision to be based on improper grounds. Id. For example, a dissolution trial court abuses its discretion by distributing property using fault as their basis. *Muhammad*, supra..

In this case the judge clearly stated why Ms. Cummings was given the family home/long time family

business office. She made this decision based on factors that are outside the required statutory reasons and in some ways relate to fault because Mr. Cummings had not created as good a relationship with the grandchildren as Ms. Cummings. Ms. Cummings was awarded these property items, not because of her age, her economic condition, or the other factor, but because she will be closer to where the children live and had a better long term relationship with their grandchildren than the Appellant.

Looking at the oral ruling of the judge it is clear what factors she used in awarding the Montague home/office to Ms. Cummings. Those factors were: 1). the husband's care of the grandchildren "was a very recent vintage based on his work flexibility", as compared to his wife's long time history of care and involvement with them; 2). The husband's geographical area of work was potentially changing (emphasis added); and 3). The husband has the potential to use and work out of the Dean Office bldg. Then she further clarified her reasoning for this distribution by saying, "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." No other factors were used as a basis for giving the Monague home/office to Ms. Cummings. The number 1 basis is clearly not a statutory factor and deals with personalities and the grandchildren's and Ms. Cumming's needs more than Mr. Cumming's business needs; one must ask then, what does the relationship with the grandchildren have to do with anything related to the factors at RCW 26.09.080? Nothing, unless the children were somehow tied into the value, upkeep or monthly care of the home/office. Factor number 2 factor could be one of the statutory factors but was mere speculation and inappropriately tells Mr. Cummings where he should do his appraisals, removing his person choices; and number 3 was a moot factor since the judge gave the Dean office building to the wife.

To reiterate the error in this distribution, in spite of the fact that the judge indicated that after being removed from the family home, which again was his business site, and Mr. Cummings could "work out of the Dean" office building, she ironically gave Ms. Cummings the Dean building, basically ignoring one of the primary factors of RCW 26.09.080, the economic circumstances of the parties at the end of the divorce. This decision basically

threw the husband's important business out into the street, without a place to do business anymore because he did not have as good a relationship with the grandchildren as his wife.[1]

This decision clearly was a violation of not only the factors required to be used in these distributions, but how those factors are to be used. The judge might as well have decided this on the basis of fault since there is nothing in the four corners of the statute anywhere where proximity to grandchildren and the parties' efforts to encourage that relationship is to be used in such important property decisions. If a reasonable person was stopped on the sidewalk and asked, after reading the oral ruling, why Ms. Cummings received the home/office, they would without a doubt virtually all state, "Because of his lack of relationship with his grandchildren, and his wife's better relationship with the children." Even if they read the entire transcript of testimony and saw all the exhibits

[1] It is clear that at some point the Judge did in fact base much of her decision on the fact that although Ms. Cummings worded as well, and made a good living, Mr. Cummings (because of his good appraisal business reputation) made a better living, therefore, there was a disproportional distribution in favor of the wife. Then, the Judge reduced the seeming value of this business, although no valuation was made, but destroying his connection with the place he used as his business place for years.

admitted they could not have come up with any other reason.

The basis for this distribution was clearly a manifest abuse of the court's authority and was completely arbitrary in nature. If this decision is allowed to stand, pretty soon we will have divorce parties' adult children testifying who should get the business or some large piece of property like a home because their children like one grandparent over the other. Divorcing spouses upon separation may set up visitation with their children's children to care for them and keep a log of that care for trial, just to insure they get the property over the other party. Cross examinations would consist of such items as "Why were you so uncaring about your grandchildren?" or "How many times did you attend family reunions?" We will have children of children lobbying for a place in the divorce decree. This author apologizes for these seemingly whimsical arguments; however, this decision and its foundation absolutely violated the entire purpose of RCW 26.09.080 in this property decision. Mr. Cumming's will no longer have an established appraisal business in the banking community if this is allowed to stand, all because he simply failed to establish as good a

relationship with his grandchildren as his wife. Again, in a way this is similar to the use of fault in that it was his "fault" that his relationship with family members was not as good as Ms. Cummings relationship. This must not stand.

Finally, to reiterate, it also belies logic for the court to use the factor that Mr. Cummings can use the "Dean" building for his business, but then distributed that building to the wife. That makes no sense when combined with the "grandchildren factor" and underscores why this ruling was a clear manifest abuse of the court's authority.

D. The Judge errored by ordering the husband to pay $1,000 to his own attorney.

There are a number of statutes and court rules which can form the basis for an award of fees and costs to the other side of a case. See CR11, 26 & 35, RCW 26.09.140, RAP 18.1 etc. to name a few. There are no laws that interfere with the attorney/client relationship other than the RPC's. Specifically this writer knows of no statutes or rules that allow a court to order fees to be paid by a client to his own attorney, unless it is the Attorney Lien statute at RCW 60.40.010. Attorney's fees have to have a legal basis for there to be an order requiring them

to be paid to the other side. *Bowman v. Two*, 704 P.2d 140, 104 Wn.2d 181 (1985). A malpractice action is one such action that forms the basis for a client's attorney to seek fees from his or her client. Other than that and the attorney lien statute, it is inappropriate to order a client to pay his or her own counsel fees, especially by a court order. This is because an attorney client relationship is primary, if not entirely based on a contract for services that limits what a client has to pay their counsel for legal help and this state would likely never try to damage that relationship by forcing either the attorney or the client to try and reconcile an order seemingly trying to put an embarrassing wedge between their relationship. It is not for the court to intervene in that process unless specifically asked to do so by the attorney via a lien or malpractice action. The judge's order to have Mr. Cummings pay his own counsel fees should be overturned.

E. There should be no award of attorneys fees and costs.

A review of the final orders in this case indicates that neither party was awarded attorneys fees for such things as intransigence, bad faith, CR11 sanctions, or

even a RCW 26.09.140 "need and ability to pay" fee order. In fact the one conclusion of law that was clear was at 2.15 of the Findings of Fact and Conclusions of Law wherein, it states, "*There is no award of fees or costs they incurred throughout this dissolution of marriage action.*" CP 58. Now, since Ms. Cummings feels that this appeal should not have been filed, she feels that her fees should be awarded simply because this appeal was taken and is frivolous, or that the exhusband was somehow intransigent in filing this appeal. See RAP 18.1

Intransigence. Again, the trial court after days of trial did not award fees for such a theory. Now, it appears that Ms. Cummings sees this appeal as "foot dragging" without supporting it by making a citation to the record. [That alone should be a basis for Mr. Cummings fees to be paid instead of Ms. Cummings fees, since a citation to the record is required for allegations of facts – see RAP Title 10 generally]. Ms. Cummings counsel states that Mr. Cummings opening brief did not cite to the record, therefore this was intransigent. However, a close look at the Opening Brief clearly shows that not only statutes were cited, case law was cited repeatedly. This is a substantial misrepresentation of the facts. Additionally,

intransigence can only be found by showing a continual pattern of obstruction. See *In re Marriage of Crosetto*, 918 P.2d 954, 82 Wn.App. 545 (Wash.App. Div. 2 1996). Counsel for Ms. Cummings cites no evidence to support this type of fact pattern, therefore, there is no basis for this claim.

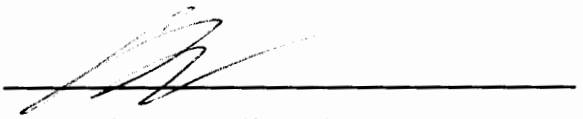
Frivolous appeal. This appeal is replete with allegations of both statutory violations by the court, as well as failure to provide a proper basis for the distribution of significant assets, greatly affecting Mr. Cummings and his livelihood. How Ms. Cummings and her attorney can say that this is a frivolous appeal is beyond this author's understanding. If this appeal is frivolous then the *Muhammad* case and appeal was likewise without merit. In fact, Mr. Cummings would say that Ms. Cummings request for fees is likewise frivolous and is completely devoid of merit. He requests that fees be paid to him under the same RAP code since she and her attorney have indicated that "there [is] no possibility of reversal". An opinion without merit in and of itself. In addition, her own case law belies her allegation of frivolity. The *Streater v. White* case at 26 Wn.App. 430, 613 P.2d 187, rev. denied 94 Wn.2d 1014 (1980)

indicated that just because an argument is rejected by the court of appeals, this does not mean an appeal is frivolous, and since the analysis for frivolity indicates that if there are any debatable issues it is not frivolous. Here, there are huge debatable issues surrounding the distribution of these two pieces of property, along with the order requiring the now ex-husband to pay his own attorney sanctions is beyond anything wrong legally, if not ethically. Therefore, this case is not frivolous.

RCW 26.09.140 Need and ability to pay fees. In order to have an award of fees using this statutory basis, a financial declaration must be supplied with the motion requesting fees under this statutory authority. Ms. Cummings states she will timely file such an affidavit. This is certainly required. However, the trial judge indicated that there would not be an award of fees after extensive testimony of their financial needs and ability to pay fees. See record of proceedings generally. And Findings of Fact and Conclusions of Law. CP 58 section 2.15. Mr. Cummings is no better off than Ms. Cummings financially, and especially since Ms. Cummings received a higher amount of community property than he did. The

exchange of financial information will show that this is the case and fees should not be granted on this basis.

Respectfully submitted this 13th day of June 2016 by,



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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 June 6th, 2016, a copy of this APPELLANT'S REPLY BRIEF was mailed to the office of Ellen Hendricks, 1403 W Broadway Ave, Spokane, WA 99201.

Dated this 6th day of June 2016.

Robert J. Hervatine,
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