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DEC 31 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31299-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of:

DAWN DENISE NEUMILLER,

Petitioner/Appellant,

vs.

STEVEN ROBERT NEUMILLER,

Respondent/Respondent.

BRIEF OF STEVEN ROBERT NEUMILLER IN RESPONSE

Martin A. Peltram, WSBA #23681
Attorney for Respondent

900 North Maple Street
Suite 200
Spokane, WA 99201-1807
(509) 624-4922

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A. RESPONDENT'S STATEMENT OF ISSUES PRESENTED

A review of the "Appellant's Brief" shows the petitioner, and appellant herein, Dawn Denise Neumiller, has failed to include in her opening brief and provide this court, "under appropriate headings, . . . [a] . . . "separate concise statement of each error [she] contends was made by the trial court, together with the issues pertaining to the assignments of error" as required under Rule 10.3(a)(4) of the Washington Rules of Appellate Procedure [RAP]. She has also failed to identify in her opening brief the "standards of review" governing each issue as contemplated under RAP 10.3(a)(6), or devote a separate section in her brief to any request for fees as required under RAP 18.1(b).

Given these failures, and to assist this court in framing and deciding the merits, or lack thereof as the responding party maintains, Steven Robert Neumiller now identifies those issues which effectively depose of the present, unperfected and ill-conceived appeal:

Procedural infirmities.

1. Whether as a result of the indisputable failure of Ms. Neumiller to assign error to the trial court's rulings and determination in the manner prescribed in RAP 10.3(a)(4), 10.3(g) and 10.4(c) to neither (a) the oral findings and ruling of the Superior Court of Spokane County, state of Washington, entered on September 14, 2012, [RP 213-45], nor (b) the written findings of fact set forth in the court's Findings of Fact and Conclusions of Law [CP 295-99] and Decree of Dissolution [CP 300-03] on November 2, 2012, those factual determinations of the court should now be considered verities on appeal and the established facts of this case [see, Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959); see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000)]?

2. Whether the unchallenged findings of the Superior Court, which are now verities in this appeal, support the conclusions of law, judgment, and decree of dissolution of the Court [RP 213-45; CP 295-99, 300-03] [See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review

denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984); see also, In re Marriage of Verbin, 92 Wn.2d 171, 184-85, 595 P.2d 905 (1979); see also, State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981)]?

3. Whether, on appeal, Ms. Neumiller has failed to perfect any purported right to request an award of attorney fees and costs on this appeal, by her failure and neglect to abide by the governing court rules? [See, page 28 of the "appellant's brief"].

Substantive Issues. Based upon the foregoing procedural infirmities associated with Ms. Neumiller's brief and the consequences resulting therefrom, the respondent, Mr. Neumiller, submits that the unchallenged findings and conclusions of the Superior Court are now the established facts and record in this case. Therefore, final disposition of this appeal now rests entirely upon the following two [2] issues involving the court's alleged abuse of discretion:

4. Whether, under the established record on appeal, the Superior Court abused its discretion in disallowing Ms. Neumiller's amended petition for dissolution [CP 256-59] with respect to the provisions of subsections (a) and (b) of Rule 15 of the Washington Superior Court Civil Rules [CR], and granting Mr. Neumiller's motion to "prohibit any consideration of a meretricious relationship" [RP 242] [see, Shelton v. Azar, Inc., 90 Wn.App. 923, 954 P.2d 352 (1998)]?

5. Whether, in turn, the Superior Court can be said to have abused its discretion in terms of the court's (a) distribution of property and debt [RP 168, 222, 227, 239-40; CP 296-97, 298, 301-02], (2) denial of spousal maintenance [RP 236; CP 297], and (3) denial of Ms. Neumiller's request for attorney fees and costs [RP 237; CP 297], after having denied her amended petition as well as evidence concerning her claim of a meretricious relationship prior to the parties' marriage [RP 213-59; CP 298] [see, In re Marriage of Kraft, 119 Wn.2d 438, 832 P.2d 871 (1992)]?

6. Whether, in light of the trial court's finding of facts which are now verities on this appeal, it can be said the court abused its discretion in refusing to award Ms. Neumiller attorney fees and costs? [RP 213-45; CP 295-99, 300-03].

B. COUNTER-STATEMENT OF THE CASE

Introduction. This appeal hinges upon the issues as to whether the Superior Court abused its discretion (1) in disallowing Ms. Neumiller's amended petition for dissolution of marriage filed on August 6, 2012 [CP 256-59] which was the commencement of trial and the same date Mr. Neumiller filed his response [CP 260-61] to the appellant's earlier May 26, 2011 summons and petition [CP 1-9]; and then (2) refusing to consider, in terms of (a) distribution of property and debt, (b) petitioner's request for spousal maintenance, and (c) award of attorney fees, any evidence suggesting the parties had for a time, prior to their marriage on January 28, 2005 [CP 295] maintained a meritorious relationship. [RP

213-20, 242; CP 298]. In this regard, the court found that consideration of this new and unrelated claim would be unfair to Mr. Neumiller and would result in extreme prejudice to him in light of the untimeliness of Ms. Neumiller's proposed amendment. [Id.]. Curiously enough, no identification of assignments of error or corresponding issues have been set forth by the appellant, Ms. Neumiller, in her brief as are expressly required under RAP 10.3(a)(4), 10.3(g) and 10.4(c). Thus, concerning the case law associated with these rules, it is Mr. Neumiller's position that the operative facts can now be derived, in part, from the unchallenged findings of the Superior Court. [RP 213-43; CP 295-98].

Statement of the case. The parties were married on January 28, 2005 in Coeur d'Alene, Idaho. [RP 220; CP 295]. They separated on May 26, 2009, and later attempted to reconcile. [RP 177-78, 21718, 220; CP 296]. On May 26, 2011, Ms. Neumiller renewed her desire to have the marriage dissolved by filing a new petition for dissolution on May 26, 2011. [CP 1-9]. This petition, like

its predecessor, contained no claim that the parties had maintained any form of meritorious relationship prior to their January 28, 2005 marriage. [RP 217; CP 1-9].

After several continuances of the trial date in this case, trial was finally scheduled for August 6, 2012. [CP 165-66, 171, 248]. On that date, Ms. Neumiller attempted to file an amended petition for dissolution wherein she alleged for the very first time the existence of a "committed intimate relationship" between the parties prior to the parties' marriage. [RP 217; CP 256-59]. However, at this same exact time and date, Mr. Neumiller filed his response to the original May 26, 2011 petition for dissolution of marriage. [RP 217; CP 260-61].

Given these circumstances, Mr. Neumiller made an oral motion prior at the start of trial seeking exclusion of any and all testimony or evidence of the parties having been involved in any meretricious relationship prior to their formal nuptials. [RP 215]. The court took the matter under advisement until the close of trial, wherein

the court granted the motion during its September 14, 2012 ruling on the basis that consideration of this new claim would be unfair to Mr. Neumiller and would result in extreme prejudice to him in light of the untimeliness of the proposed amendment and Ms. Neumiller's lack of due diligence. [RP 213-20, 242; CP 298]. The court would consider only those issues raised in the petition for dissolution filed on May 26, 2011. [RP 220; CP 1-9].

The court in fact gave no consideration to Ms. Neumiller's claim of a meretricious relation prior to the parties' marriage. [CP 298]. Accordingly, the court undertook to distribute property and debt based simply upon events within the marriage itself. In this regard, the court found the respondent's income to be equal to his social security payments and declined to input any additional income to him. [RP 239-40]. The court also accepted Mr. Neumiller's testimony that the American Funds account in his name was his separate property which he had first established in 1994, and awarded him this asset as his separate property, along with other retirement accounts

which had been established prior to marriage. [RP 168, 227; CP 296].

As to other items of separate property, the court found that the residence in which the parties had lived during the marriage had been purchased by Mr. Neumiller prior to the marriage, and was titled solely in his name. [RP 222]. The court awarded him this asset as his separate property, along with those debts or mortgages incurred against the real estate. [RP 222, 227; CP 296-97].

Finally, the trial court found that the petitioner had failed to demonstrate a need for spousal maintenance and that no maintenance should be awarded. [RP 236; CP 297]. This decision was made in part because the marriage was deemed "short term in nature," and "the parties had been separated for well over three years, during which time the petitioner had made little or no effort to obtain employment." [CP 297]. By the same measure, the court declined to award Ms. Neumiller costs or attorney fees insofar as the respondent "does not have the ability to pay the wife's fees" and "[t]he husband has paid all of the guardian ad

litem fees to date and has been since ordered by the court to pay all GAL fees which are still outstanding." [RP 237; CP 297].

The court's findings of fact and conclusions of law, along with the decree of dissolution, were entered on November 2, 2012. [CP 295-99; 300-03]. This appeal follows. [CP 304-27].

C. STANDARD OF REVIEW

Under the governing standards of review regarding a decision of the Superior Court, the appellant is required to assign specific error to each challenged finding of fact in the manner prescribed in Rules 10.3(a)(4), 10.3(g) and 10.4(c) of the Washington Rules of Appellate Procedure [RAP]. Otherwise, the factual determinations of the trial court are considered verities on appeal and the established facts of the case. See, State ex rel. Bain v. Clallum County Bd. of Cy. Comm'rs., 77 Wn.2d 542, 463 P.2d 617 (1970); Iverson v. Graham, 59 Wn.2d 96, 366 P.2d 213 (1961); Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959). In essence, failure to follow those requirements when

challenging the trial court's findings of fact is not a mere "technical flaw" which can be simply overlooked by the reviewing court. State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000).

When, as in this case, such factual determinations become verities on appeal, the only remaining issue for the appellate court to decide is whether those findings or factual determinations support the conclusions of law, and judgment and decree of the Superior Court. Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984); see also, In re Marriage of Verbin, 92 Wn.2d 171, 184-85, 595 P.2d 905 (1979). In effect, any claim by the appellant that there is a lack of substantial evidence to support the trial court's findings and decision is removed from the issues on appeal. Id.

Finally, with respect to issues involving the exercise of discretion by the trial court, the standard of review is abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120

(1997). The decision whether to allow an amendment to pleading rests within the discretion of the trial court. Shelton v. Azar, Inc.., 90 Wn.App. 923, 954 P.2d 352 (1998). Similarly, a challenge to the court's distribution of property and debt is reviewed only for a manifest abuse of discretion. In re Marriage of Kraft, 119 Wn.2d 438, 832 P.2d 871 (1992). In turn, a decision of court concerning spousal maintenance and an award of attorney fees is reviewed for manifest abuse of discretion. See, In re Marriage of Terry, 79 Wn.App. 866, 869, 905 P.2d 935 (1995).

In sum, great deference has traditionally been accorded the trial court in areas of family law, if for no other reason than to bring about finality and certainty to a situation which is to so often fraught with endless turmoil, frayed emotions, and long-standing hard feelings. See, In re Marriage of Maughan, 113 Wn.App. 301, 305, 53 P.3d 535 (2002); In re Marriage of Olivaries, 69 Wn.App. 324, 330, 848 P.2d 1281 (1993). The trial court only abuses its discretion when it can be said the court acted on untenable grounds or for untenable

reasons. Id.; In re Marriage of Gillespie, 89 Wn.App. 390, 948 P.2d 1338 (1997).

In this regard, the challenging party bears the burden of proving such level of abuse by the court. In re Marriage of Williams, 84 Wn.App. 263, 267, 927 P.2d 679 (1996), review denied, 131 Wn.2d 1025 (1997); In re Marriage of Thomas, 63 Wn.App. 658, 660, 821 P.2d 1227 (1991). Mere disagreement with the trial court's decision will not satisfy such burden of proof. In re Marriage of Nicholson, 17 Wn.App. 110, 114, 561 P.2d 1116 (1977).

Ultimately, the issue of manifest abuse rests upon a determination whether no reasonable judge would have reached the same conclusion under the facts and circumstances presented. See, In re Marriage of Rink, 55 Wn.App. 549, 554, 571 P.2d 210 (1977); Nicholson, at 117; Richards v. Richards, 5 Wn.App. 609, 613, 489 P.2d 928 (1971); see also, State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). Absence such determination, there is no abuse of discretion warranting reversal of the trial court's decision. Id.

D. ARGUMENT IN RESPONSE

1. Counter-issues nos. 1 and 3 [procedural infirmities]. As stated before, the petitioner, and appellant herein, Dawn Denise Neumiller has failed and neglected to include in her opening brief, and to provide this court, "under appropriate headings, . . . [a] . . . "separate concise statement of each error [she] contends was made by the trial court, together with the issues pertaining to the assignments of error" as required under Rule 10.3(a)(4) of the Washington Rules of Appellate Procedure [RAP]. Accordingly, as a consequence of this failure and neglect of the appellant herein to assign error to the trial court's rulings in the precise manner prescribed in RAP 10.3(a)(4), 10.3(g) and 10.4(c), (a) the oral findings and ruling of the Superior Court of Spokane County, state of Washington, entered on September 14, 2012, [RP 213-45], as well as (b) the written findings of fact set forth in the court's Findings of Fact and Conclusions of Law [CP 295-99] and Decree of Dissolution [CP 300-03], on November 2, 2012, should now be considered verities on appeal and the

established facts of this case. See, Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959); see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000). Accordingly, respondent submits that Ms. Neumiller's purported claims on pages 19 through 27 of her opening brief concerning an alleged "lack substantial evidence" are entirely moot and misplaced. Id.

The question then remains whether the unchallenged findings of the Superior Court, as verities on this appeal, support the conclusions of law, judgment and decree of dissolution of the court [RP 213-45; CP 295-99, 300-03]. See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984); see also, In re Marriage of Verbin, 92 Wn.2d 171, 184-85, 595 P.2d 905 (1979); see also, State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). Mr. Neumiller submits there is no question except that they do. Consequently, those unchallenged findings, or verities on appeal, govern any possible, remaining

issue concerning the allegation that the Superior Court in any way abused its discretion. Given the foregoing procedural infirmities and resulting posture of this case, Mr. Neumiller maintains that any assertion or claim that the court abused its discretion is entirely frivolous and devoid of merit.

Finally, the same holds true with Ms. Neumiller's request for attorney fees and costs on this appeal, as set forth in the conclusion section of her brief at page 28. Simply put, she has not cited any supporting legal authority for such "request" as required under RAP 10.3(a)(6); see also, Hollis v. Garwall, Inc., 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999), nor has she complied with the requirement in RAP 18.1(b) which requires that a separate "section of . . . [the] . . . opening brief" must be "devoted" to a request for and award of fees on appeal. For these reasons, along with the lack of any substantive merit to such request, such request by the appellant should not be considered but simply dismissed out of hand. Id.

2. Counter-issue no. 4 [denial of request to amend]. In her brief, at pages 13 through 18, Ms. Neumiller takes issue with the trial court concerning the denial of her untimely request to amend her petition for dissolution, as well as the refusal of the court to consider any evidence claimed to support a meretricious relationship [RP 213-45; CP 298]. In this regard, she mistakenly relies upon the provisions of CR 15(a) and (b). First, as pointed out in Part B above, on the date of trial, Ms. Neumiller filed her amended petition for dissolution, wherein she alleged for the first time the existence of a committed intimate relationship between the parties prior to marriage. [RP 217; CP 256-59]. Simultaneously, and at this same time, Mr. Neumiller filed his response to the original May 26, 2011 petition of Ms. Neumiller. [RP 217; CP 260-61]. Consequently, even ignoring momentarily the equities against her in terms of untimeliness and surprise, she was in no position whatsoever to claim any right to amend as a matter of course under CR 15(a).

Second, and in terms of both CR 15(a) and (b), Ms. Neumiller's assertions of abuse of discretion simply gloss over the fact that the trial court granted Mr. Neumiller oral motion to strike the amended pleading on the expressed basis that consideration of this new claim, and any evidence thereof, would amount to "a game-changer," would be at this point unfair to Mr. Neumiller, and would result in extreme prejudice to him in light of the untimeliness of the proposed amendment and Ms. Neumiller's lack of due diligence. [RP 213-20, 242; CP 298]. Consequently, the court would consider only those issues raised in the petition for dissolution filed on May 26, 2011. [RP 220; CP 1-9]. The court in fact gave no consideration to Ms. Neumiller's claim of a meretricious relationship prior to the parties' marriage. [CP 298].

Given the facts and circumstances presented, as well as the court's reasoning and rationale, it cannot be said that there was an abuse of discretion in this instance. Shelton v. Azar, Inc., 90 Wn.App. 923, 954 P.2d 352 (1998). In

other words, it cannot be viably claimed that no reasonable judge in the court's position would not have denied the amendment proposed by Ms. Neumiller. See, In re Marriage of Rink, 55 Wn.App. 549, 554, 571 P.2d 210 (1977); Nicholson, at 117; Richards v. Richards, 5 Wn.App. 609, 613, 489 P.2d 928 (1971); see also, State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). Therefore, Mr. Neumiller maintains that this aspect of the trial court's decision should be affirmed. RAP 12.2.

3. Counter-issue no. 5 [family law matters]. As stated before, in Part C above, great deference has traditionally been accorded the trial court in areas of family law, if for no other reason than to bring about finality and certainty to a situation which is typically fraught with endless turmoil, frayed emotions, and hard feelings. See, In re Marriage of Maughan, 113 Wn.App. 301, 305, 53 P.3d 535 (2002); In re Marriage of Olivaries, 69 Wn.App. 324, 330, 848 P.2d 1281 (1993). This is true whether the issue is distribution of property and debts, spousal maintenance, or an award of costs and attorney fees. In re Marriage of Kraft, 119

Wn.2d 438, 832 P.2d 871 (1992); see also, See, In re Marriage of Terry, 79 Wn.App. 866, 869, 905 P.2d 935 (1995).

The court only abuses its discretion when it can be said the court acted on untenable grounds or for untenable reasons. Id.; In re Marriage of Gillespie, 89 Wn.App. 390, 948 P.2d 1338 (1997). The challenging party bears the burden of proving such level of abuse by the court. In re Marriage of Williams, 84 Wn.App. 263, 267, 927 P.2d 679 (1996), review denied, 131 Wn.2d 1025 (1997); In re Marriage of Thomas, 63 Wn.App. 658, 660, 821 P.2d 1227 (1991). Mere disagreement with the trial court's decision will not satisfy such burden of proof. In re Marriage of Nicholson, 17 Wn.App. 110, 114, 561 P.2d 1116 (1977).

Here, Mr. Neumiller maintains that, based upon the facts and circumstance presented in this case, including the unchallenged findings of this case as described in Part B above, and the court's denial of the wife's request to amend and present evidence of a meretricious relationship, there are no viable or meritorious grounds to either suggest or claim

that the trial court abused its discretion in terms of resolving issues in the area of family law. In short, finality and certainty mandate affirmance of the trial court in this case. RAP 12.2.

4. Counter-issue no. 6 [appellant's request fee on appeal]. In the conclusion section of her "appellant's brief," page 28, Ms. Neumiller argues that the Superior Court improperly denied her an award of attorney fees at trial. Suffice it to say, the grant or denial of attorney fees is reviewed for abuse of discretion. Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998). A simple review of the trial court's findings of fact and rationale [RP 213-45; CP 295-99, 300-03], to which no error has been properly assigned, demonstrates there was no abuse of discretion in this case. Id.

E. REQUEST FOR AWARD OF ATTORNEY FEES

It is a long-standing rule of law in Washington state that a party is entitled to recovery of his reasonable attorney fees when a statute, contract, or recognized ground in equity

allows for recoupment of the same. See, Panorama Village Condominium Owners Association Board of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001). Insofar as the present appeal is clearly frivolous and without merit under the facts and circumstances presented, as well as the equities of this case, including the unavoidable fact the trial court did not in any sense abuse its discretion, an award of reasonable attorney's fees against Ms. Neumiller and her attorney on this appeal is fully warranted under RCW 4.84.185 and CR 11. See also, RAP 18.9(a); Green v. Normandy Park Riviera Section Community Club, Inc., 137 Wn.App. 665, 678-81 & n.9, 151 P.3d 1038 (2007).

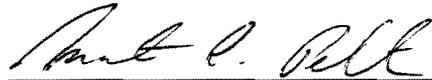
F. CONCLUSION

Based upon the foregoing points and authorities, the respondent, Steven Robert Neumiller, respectfully requests that the subject rulings, decisions, and judgment of the Superior Court of Spokane County, state of Washington, be affirmed for lack of any showing of manifest abuse of discretion, or failure of the court to properly

apply the law to the facts of this case, and accordingly, that this appeal be dismissed with prejudice. Under the authority cited in Part E of this brief, the respondent further requests that he be awarded his costs and expenses, including a reasonable attorney fee, as against the appellant, Ms. Neumiller, in his having been forced by her to respond and defend in this warrantless, imperfected, and ill-conceived appeal.

DATED this 30th day of December, 2013.

Respectfully submitted:



MARTIN A. PELTRAM, WSBA #23681
Attorney for Respondent,
Steven Robert Neumiller