

## **Suit Money: A Cure For The Bully Appeal?**

By: Catherine W. Smith

*“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.*

My practice now is largely strategizing in civil corporate and tort cases on (or heading to) appeal, drafting and editing briefs and substantive motions, and preparing for and presenting oral argument to a panel deciding an appeal. Back in the day, though I handled a LOT of family law appeals, especially after our firm successfully defended the state Supreme Court’s decision in the U.S. Supreme Court in *Troxel v. Granville*.<sup>1</sup>

My partner Valerie Villacin does a wonderful job as lead counsel on most of our family law cases now. And we have the luxury, in many instances, of deciding whether we want to appeal, or defend, a particular trial court decision, because we are often called by both sides when a family law case is headed for appeal.

It has been a real privilege helping to develop the law in this area—particularly given that many folks think that “family law,” like “military intelligence,” is a misnomer. I’ve always thought that dismissive attitude was largely because women and children were among those affected, many family lawyers are women, and the high stakes in “family law” are usually not accompanied by hefty bankrolls or big payoffs that attract corporate and tort lawyers. But knotty issues of statutory interpretation and profound considerations of substantive due process and individual personal liberties permeate this area of the law. Family law decisions impact, and have the possibility of impacting, far more people than in most other areas of the law. After all, we all have families.

Seeing so many family law decisions headed for (or headed off from pursuing) an appeal over the years, however, I have to disagree with Tolstoy's observation that "All happy families are alike, but every unhappy family is unhappy in its own way."<sup>2</sup> In my experience, there are several familial, and familiar, dynamics that make it more likely the dissolution of an "unhappy family" will result in an appeal. In this column, I want to discuss the phenomenon of the Bully Appeal.

The Bully Appeal is prosecuted by the economically advantaged spouse (usually, but not always, the husband). The Bully usually controlled the family finances during the marriage, and continues to have an outsized income. The Bully is dissatisfied with a result that usually leaves them at least half (and often much more) of the marital estate, but it takes more than that to be a Bully. The signature "tell" of the Bully Appeal is that the Bully wants to use the appellate process to prevent the other spouse from obtaining any of her share of the marital estate during the pendency of the appeal.

Sometimes, the Bully is very upfront about his intention to attempt to starve his ex-wife into submission. But that motive is often left unsaid. Always, however, the Bully thinks he should be able to fully utilize his share of the marital estate (especially, use it to hire an appeal lawyer), while limiting his ex-spouse's access to any portion of the marital estate.

Economic bullying of this sort is often effective in the short (and sometimes in the long) run. If, as is often the case, the equity in the family home is a significant part of the portion of the marital estate awarded to the other spouse, the Bully's filing of a notice of appeal alone will often foreclose sale or other disposition of the asset, because title insurers (a law unto themselves) will rarely insure title without exception despite the provisions of RAP 7.2(c)<sup>3</sup> and RAP 12.8.<sup>4</sup> If the Bully has been ordered to pay an

equalizing judgment—often the case when the Bully is an entrepreneur or professional, who earns his outsized income through a closely-held business—the Bully will seek to (and will often be allowed to) stay enforcement of the judgment using the property he controls itself as “alternate security.”

The Bully also may be allowed to delay QDROs or other mechanisms intended to transfer to the other spouse assets under the Bully’s control, even if he does not challenge those particular awards on appeal. And although the trial court has discretion to deny a stay of any maintenance award, the Bully may just ignore that or other provisions of the decree. And even the ex-spouse’s dependence on maintenance itself empowers the Bully when he continues to control the marital estate pending appeal.

And that is just the financial bullying. Usually, the Bully appeals after protracted, expensive trial court litigation that has psychologically worn down the other spouse—if decades of living with the Bully hadn’t done so already. Trial counsel often is carrying a five- (or six-) figure receivable, and facing the prospect of another two years before funds may be released for payment at the end of the Bully Appeal. It takes fortitude to represent the respondent in a Bully Appeal, especially in the face of the aggravating spectacle of the Bully’s free spending on opposing counsel willing to prosecute a Bully Appeal.

The courts do have tools for dealing with the Bully Appeal. The trial court has broad authority to award “suit money” to a party as an advance payment to cover the cost of defending an appeal.<sup>5</sup> RCW 26.09.140 and RCW 26.09.190 authorize trial courts to award “suit money” for “maintaining or defending any proceedings” on any basis that “may appear just and equitable” “after considering the financial resources of both parties.” RAP 7.2(d) also recognizes the trial court’s authority to award attorney fees and litigation expenses for an appeal in a marriage dissolution.

An award of suit money should be made whenever the requesting party demonstrates a need for advance fees on appeal and the other party has the ability to pay.<sup>6</sup> “Where a husband has maneuvered himself, however lawfully, into possession and control of all the income-producing property of the community and practically all of its liquid assets, the trial court can, and should, require him to adequately support his wife pending an appeal, particularly where she is the prevailing party in the trial court and the respondent on the appeal, and does not have the cash available to support herself.”<sup>7</sup>

But in my experience, the authority to award suit money is underutilized. Many trial attorneys do not know that they can ask, and many trial courts do not know that they have the authority, to make a “suit money” award when a Bully appeals. Worse, the appellate court usually will not condition prosecution of an appeal on payment a suit money award, and may even let the Bully “appeal” the suit money order in a separate proceeding,<sup>8</sup> despite the appellate courts’ authority under RAP 18.9(a) “to condition a party’s right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party.”

If the Bully Appeal is seen for what it really is, I think the provisions for suit money and conditional participation on review would be better utilized. With apologies to Tolstoy, I hope this column provides some insight into how to deal with this particular type of “unhappy family” on appeal.

*Catherine W. Smith is a principal in Smith Goodfriend. She founded the Washington Appellate Lawyers Association and is a Past President of the American Academy of Appellate Lawyers. She can be reached at [cate@washingtonappeals.com](mailto:cate@washingtonappeals.com).*

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<sup>1</sup> 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000), *affirming Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998).

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<sup>2</sup> Leo Tolstoy, *Anna Karenina* (1878).

<sup>3</sup> “Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 and 8.3.”

<sup>4</sup> “An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.”

<sup>5</sup> See *Marriage of Bernard*, 137 Wn. App. 827, 838, ¶ 25, 155 P.3d 171 (2007) (affirming an advance award of attorney fees to wife to cover the cost of responding to husband’s appeal), *aff’d*, 165 Wn.2d 895, 204 P.3d 907 (2009).

<sup>6</sup> *Baker v. Baker*, 80 Wn.2d 736, 748-49, 498 P.2d 315 (1972).

<sup>7</sup> *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360-61, 333 P.2d 936 (1959); see also *Baker*, 80 Wn.2d at 748-49 (affirming advance award of attorney fees pending appeal where “all of the income producing property of the community and practically all of the parties’ liquid assets are controlled by the former husband”).

<sup>8</sup> See, e.g., *Van de Graaf v. Van de Graaf*, 10 Wn.App.2d 1008, 2019 WL 4072509 (Aug. 29, 2019).