always Appealing: Attorney Fees in Family Law Appeals

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Bar Bulletin Blog: General

By Valerie Villacin

"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.

While a party who substantially prevails on appeal is entitled to recover costs,[1] they are not automatically entitled to attorney fees. RAP 18.1, which governs fees on appeal, instead provides that a party is only entitled to fees if allowed by "applicable law."

Washington of course follows the "American rule" for fee awards, which "is that each party in a civil action will pay its own attorney fees and costs."[2] The exception to the American rule is when there is a right to fees under a contract, statute, or a recognized ground in equity.[3] Several statutes support, or require, an award of fees when frequently-occurring issues are raised in a domestic relations appeal.

Statutory grounds for awarding fees to a prevailing party include when the appeal arises from enforcement of a maintenance or child support award under RCW 26.18.160 or an appeal from a contempt order under RCW 26.09.160. But neither statute is a true "prevailing party" fee statute. Under both statutes, only the party seeking to enforce maintenance, child support, or a court order is entitled to fees if they prevail. A party that prevails in defending against claims of enforcement is not automatically awarded fees. Under RCW 26.18.160, an obligor is not considered a prevailing party for purposes of an award of fees unless the party

who sought to enforce maintenance or support "has acted in bad faith in connection with the proceeding in question." And under RCW 26.09.160, a party who successfully avoids a finding of contempt is not entitled to fees unless the court finds "the motion was brought without reasonable basis."[4]

The most frequently-invoked statutory fee provision in dissolution cases is RCW 26.09.140, which 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." The statute also provides that "[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs."

While RCW 26.09.140 on its face also is not a "prevailing party" fee statute, in exercising its discretion in deciding whether to award fees on appeal under RCW 26.09.140, the appellate courts consider both the merits of the appeal, including which party prevails, and the parties' relative financial resources. Thus, an award of fees on appeal under RCW 26.09.140 requires consideration of both the merits of the appeal and financial resources.[5] An appellate court cannot award fees based solely on which party prevails without also considering the relative financial resources of the parties.[6] In other words, a party is not entitled to fees on appeal under RCW 26.09.140 simply because they prevailed if the other party does not have the financial resources to pay the prevailing party's fees.[7]

Notably, the standard for applying RCW 26.09.140 is different between the trial court and appellate court. In awarding fees under RCW 26.09.140 in the trial court, there is no consideration of the "merits," or who "prevails;" an award of fees is based solely on the parties' relative financial resources. By including consideration of the "merits" of an appeal, appellate courts can deny fees to an appellant with fewer financial resources than respondent if their appeal does not raise meritorious issues.

An award of fees under RCW 26.09.140 is not based solely on whether the party seeking fees, based on financial need, prevails. For instance, in Marriage of Tower,[8] the appellate court awarded fees to the wife who showed a "financial need" for her fees to be paid even though she did not prevail in her appeal, as the appeal raised a "matter of first impression in this state" as to whether cohabitation

is a factor warranting termination of maintenance. Conversely, in Marriage of Herridge,[9] the appellate court denied fees to the wife who successfully defended against the husband's appeal even though the husband had greater financial resources when the court found the issue raised by the husband regarding the stay requirements of the Servicemembers Civil Relief Act had "previously never been addressed by a Washington appellate court and has generated divergent approaches in other jurisdictions."

Even though consideration of the "merits" of an appeal may result in a party who has financial need not being awarded fees, I think such a consideration is appropriate to the extent it acts as a "check" against meritless appeals. Simply because the other party has greater financial resources does not mean they should be required to fund the other party's litigation decisions. With that said, appellate courts should be cautioned against relying too heavily on consideration of the merits in denying fees to parties who can show they have the need for their fees to be paid and the other party has the ability to pay, especially if the party seeking fees is the respondent.

Domestic relations cases that go up on appeal are, by definition, high conflict. One or both parties are often driven by the need to "win." Perpetuating a "win or lose" mentality. By denying fees to an economically disadvantaged spouse on the grounds she did not prevail as a respondent on appeal makes it more difficult for these families to effect closure in a positive manner. It can also encourage the proliferation of issues, in the hopes that a partial "win" may prevent the economically disadvantaged spouse from being the "substantially prevailing party," thus inoculating a more financially able spouse from a request for fees. Finally, even though the appeal may establish legal principles that can help other families avoid litigation, it can discourage counsel from taking or defending appeals for family law litigants who are not as financially able to pay fees, especially when the case presents a close or unsettled issue of family law that could benefit from experienced and competent argument.

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1 RAP 14.2.

2 Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc., 159 Wn.2d 292, 296, 149 P.3d 666 (2006).

3 Cosmopolitan, 159 Wn.2d at 296; RAP 18.1.

4 RCW 26.09.160(7).

5 See Marriage of Rostrom, 184 Wn. App. 744, 764, 339 P.3d 185 (2014) (while father filed an affidavit of financial need, he was not the prevailing party, and his focus on mother's "'superior ability to pay' alone does not address the requirements of RCW 26.09.140 or RAP 18.1 to award fees.").

6 Marriage of Rideout, 150 Wn.2d 337, 357-58, 77 P.3d 1174 (2003) (Court of Appeals erred in awarding fees to the prevailing husband under RCW 26.09.140 because there was "no indication that the relative financial circumstances of the parties were a consideration in the award").

7 If an appeal is found to be frivolous, fees may be awarded without regard to the parties' relative financial resources. Marriage of Greenlee, 65 Wn. App. 703, 711, 829 P.2d 1120 (1992). That is a very high threshold to meet, as discussed in the July 2024 "Always Appealing" column addressing frivolous appeals.

8 Marriage of Tower, 55 Wn. App. 697, 705, 780 P.2d 863 (1989).

9 Marriage of Herridge, 169 Wn. App. 290, 303, ¶ 43, 279 P.3d 956 (2012); see also Marriage of Booth, 114 Wn.2d 772, 780, 791 P.2d 519 (1990); see also Marriage of Raskob, 183 Wn. App. 503, 520, 334 P.3d 30 (2014)