

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

ELIZABETH URBANA,
RESPONDENT,
v.
ROBERT M. URBANA
APPELLANT.

BY _____
STATE OF WASHINGTON
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CLERK OF COURT
COURT OF APPEALS
DIVISION TWO

Appeal from the Superior Court of Clark County
The Honorable James Rulli, Judge

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

The trial court erred in ordering a prospective equitable contribution by the father toward the wife's child support expenses through a disproportionate award of property to the wife in addition to a determination of child support pursuant to RCW 26.19.

SECOND ASSIGNMENT OF ERROR

The trial court erred by ordering a disproportionate share of property not authorized by common law rules of child support or the family expense statute, RCW 26.16.205.

THIRD ASSIGNMENT OF ERROR

The trial court erred by ordering a method of child support, namely a disproportionate award of community property to the wife, which was not authorized by the child support statutes in RCW 26.09 and RCW 26.19.

FOURTH ASSIGNMENT OF ERROR

The trial court erred by awarding a disproportionate share of community property to the wife to assist her with the economic burden of raising the husband's step-children after entry of the decree of dissolution.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by awarding a disproportionate share of the parties' community property to the wife as an equitable contribution by the husband to the support of his child when the husband was found to be unable to pay child support pursuant to RCW 26.19?

2, Did the trial court err by awarding a disproportionate share of the parties community property to the wife to alleviate the economic burden of raising her family without child support payments by the husband if such awards were not authorized by common law or RCW 26.16.205?

3. Did the trial court err by departing from the statutory child support framework by awarding a disproportionate share of the parties' community property to the wife as a means of alleviating the economic burden of raising her family without child support payments by the husband?

4. Did the trial court err by using the wife's post-dissolution financial burden of supporting the husband's step-children as a factor in awarding a disproportionate share of the parties' community property to the wife?

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III. STATEMENT OF THE CASE

The facts here are fairly simple. The wife filed for dissolution of marriage in Clark County on August 4, 2005. The parties had one child of the marriage, a son. The wife also had two teen-age daughters by her previous marriage. The two girls accused the husband of several lewd acts and, on September 15, 2005, the Clark County Prosecuting Attorney's Office filed an information charging the husband with four counts of Child Molestation. The husband went to trial on May 15, 2006 and was found guilty on one count of 1st Degree Child Molestation 1, two counts of 2nd Degree Child Molestation, and one count of 3rd Degree Child Molestation. He went immediately into custody. After considerable post-verdict argument, the verdict on the 1st Degree Child Molestation count was vacated under an agreement with the prosecution and then amended to a conviction for 2nd Degree Child Molestation. After this unusual plea bargain, the husband was sentenced to 100 months in prison on July 27, 2006.

The dissolution trial before Judge James Rulli of the Clark County Superior Court was held on October 4, 2006 with the husband attending by telephone from the state correctional facility in

Shelton. At the close of trial, the court ruled that "under the laws of the State of Washington," the husband was unable to pay child support because he was unemployed due to his incarceration. RP at 114, line 19. The court then ruled that child support (or the lack of it) could be used as part of the economic circumstances determining the division of property between the parties. RP at 114, line 24. Based on her support of "her children," she was awarded ownership of the family home. RP at 115, line 2. This basic award is not disputed by the husband.

However, the trial court then determined that the burdens of child support on the wife justified a disproportionate award of the community property to the wife:

So no child support order can be entered because he [the husband] is unemployed. However that factor does not have to be overlooked in the disposition of property in a divorce case such as this. Again, looking to the economic circumstances of the parties, Mrs. Urbana will be supporting her children and herself, of course, post-decree. Is it important for her to maintain a household for the children? Well, of course it is, and that's why the Court is awarding the home to her.

The question then becomes, what sort of -- kind of financial interest then would Mr. Urbana have in the property? I've considered *the factors that I've gone over* and I feel some economic benefit should also flow to Mr. Urbana

under the laws of the State of Washington and under the just and equitable doctrines that I've just elicited. I'm awarding Mr. Urbana a 20 percent interest in the community property of the parties.

RP at 114, line 21 to 115, line 13. (emphasis added). The court then valued the community property at \$103,900, with a 20% share for the husband at \$20,780. The court then reduced the 20% award to \$9,790.00 for payment of past-due temporary child support and a share of certain community debts. RP at 115, line 14 to 117 at 1.

No Order of Child Support was entered to reflect the court's ruling. However, the Decree of Dissolution stated that "[b]ecause the father is presently incarcerated, no child support obligation is required. If the father is released from prison prior to the child reaching the age of majority, the mother may petition the court to establish child support." Decree, page 3.

The husband moved for CR 59 reconsideration of the disproportionate award. The trial court denied the motion at a hearing on March 16, 2007, when it determined that the court had discretion to look at all the circumstances of a marriage, including child support, in dividing property and that Cleaver v. Cleaver, 10 Wn. App 14, specifically

authorized consideration of the burdens of child custody in awarding property. RP at 158 at 14.

According to the court,

Yes, Mr. Urbana will not be paying any child support, but that's the child support law because he doesn't have any income at the time, but I don't think you can ignore that factor and then making an equitable division of property, and that's what Counsel [for the husband] is asking the court to do, is ignore the fact that he is not paying it on one hand, and therefore, he shouldn't have to pay it on the other. I don't feel that's the test in the equitable division of property, and that's not how I ruled, either.

Further, I - we did address the step-daughters again. It is an overall - it was a finding of the Court because it does look to her post-economic circumstances. Again, she will be raising not only her son, but her other two kids. True, he does not have an obligation to support them. But then, again, is that a factor that the Court can look at in dividing that property? I think the Court can.

RP at 158, line 20 to 159, line 12. In the order on the husband's CR 59 motion, the court made these findings:

- a) The court has broad discretion to divide property in a marital dissolution action;
- b) The court shall make such disposition of property as shall appear just and equitable, considering all relevant factors including but not limited to those enumerated in RCW 26.09.080.
- c) In terms of what is just, equitable and fair, the court may consider all circumstances of the marriage, both past

and present, and an evaluation of the future needs of the parties pursuant to In re Marriage of Zahm, 138 @n.2d 213;

d) The court may consider the contributions of separate property to the marital community;

e) In making a distribution of property, the court should consider the responsibilities of raising the parties' minor child pursuant to Cleaver and Cleaver, 10 Wn.App 14.

f) The post-dissolution circumstances of the wife, including her financial obligations to children born from another marriage may be considered by the court in making a property award.

Order on Respondent's Motion for Reconsideration,
pp. 1-2.

IV. LAW AND ARGUMENT

A. The trial court erred in ordering a prospective equitable contribution by the father toward the wife's child support expenses through a disproportionate award of property to the wife in addition to a determination of child support pursuant to RCW 26.19.

The court ruled that the husband's potential income in prison was so low that, under applicable law, his child support should be set at zero. RP at 114, line 19. However, it then determined that "just and equitable doctrines" permitted a disproportionate division of property in favor of the wife to support herself and her children after the divorce. RP at 114, line 21 to 115, line 13. Based on this decision, the court awarded the

husband 20% of the value of the community property, or \$20,780. This amount was further reduced by offsets to \$9,790. RP at 115, line 14 to 117, line 2. A 50% share, without offsets, would have been \$49,224.

Although the term wasn't used, the court apparently followed the doctrine of "equitable contribution" to reduce the husband's property award. The doctrine of equitable contribution means that when several parties may be liable for the same debt and one is compelled to pay all of it, the paying party may have a right of contribution against the other debtors to obtain from them the payment of their respective shares. See Franco v. Peoples National Bank, 39 Wn.App. 381, 385, 693 P.2d 200, ___ (1984). Equitable contribution has been applied to child support cases on the theory that under RCW 26.16.205, both parents have an obligation to support their children. Henry v. Russell, 19 Wn.App 409, 411-412, 576 P.2d 908, ___ (1978). However, equitable contribution is applied when the dissolution decree is silent as to the parties' support obligations. See *id.*, 19 Wn.App at 416, 576 P.2d at ___. Moreover, it is applied only to "just proportion of past support up to one-

half of the amount expended by the custodial parent for the reasonable and necessary expenses paid on behalf of the child. Henry, 19 Wn.App at 412, 576 P.2d at ____ (emphasis added). Since the court's ruling and the Decree in the present case specifically addressed the husband's support obligation and set it at zero, the doctrine of equitable contribution, as applied to child support, could not apply. Furthermore, because the disproportionate property division anticipated child-related expenses rather than compensating for actual past expenses, equitable contribution ordered by the court was not retrospective and therefore improper.

B. The trial court's disproportionate award of community property to the wife as a contribution to the future child support needs of the wife and her family was not authorized by common law or by RCW 26.16.205.

Even in the absence of a statute, parents are obligated under common law to support their children. This rule, which has been largely codified as RCW 26.16.205 ("the family expense statute,"), a parent is responsible for reimbursement of child-related expenses. State v. Benjamin, 50 Wn.App 284, 291, 751 P.2d 1189, (1988).

However, the common law principle and RCW 26.16.205 must be interpreted in light of the standards and policies set forth in RCW 26.19.001. Harmon v. DSHS, 134 Wn.2d 523, 538, 951 P.2d 770, ___ (1997). RCW 26.19.001 states that the goals of meeting a child's needs commensurate with the parents' circumstances and of equitable apportionment of the obligation between the parents "will be best achieved by the adoption and use of a statewide child support schedule." RCW 26.19.001. Like any other statutes, the family expense statute in RCW 26.16.205 and the the child support statutes in RCW 26.19 must, if possible, be interpreted and applied in a manner which gives effect to both statutes. See, e.g., Christensen v. Ellsworth, 134 Wn.App. 295, 298, ___ P.3d ___ (Div. 3, 2006).

The basic support schedules of RCW 26.19 and the common law obligations of RCW 26.16.205 can be harmonized as follows: (1) RCW 26.16.205 is not a child support statute but rather a statute making both parties equally responsible for the necessary expenses of the family. Harmon, 134 Wn.2d at 542, 951 P.2d at ___ (1997); (2) prospective child support covering basic necessities like food, shelter, and ordinary medical care may be set only

through the child support statutes in RCW 26.19 in the form of a monthly child support obligation; (2) expenses not subject to basic child support calculations under RCW 26.19 may be subject to reimbursement under RCW 26.16.205, but only after such expenses have been incurred. A basic reading of the family expense cases indicates that contribution under the common law principle and RCW 26.16.205 only after the expense is incurred. The exceptional case, Hinson v. Hinson, 1 Wn.App.348, 461 P.2d 560 (1969) (overturned on other grounds in Van Dyke v. Thompson, 95 Wn.2d 726) applied RCW 26.08.110 and RCW 26.16.205 to allow for theoretical contribution for future child support if none had been awarded in the divorce decree. However, the "contribution" upheld by the Hinson court looks exactly like a child support modification - \$25 per month per child until the child reaches the age of 21, marries, or is emancipated. Hinson, 1 Wn.App. at 350, 461 P.2d at _____. In practice, therefore, only child support operates prospectively.

Since the husband's child support had been set at zero in the present case, the prospective contribution awarded by the court to the wife in

the form of a disproportionate property award is unreasonable and based on untenable grounds. As such, it is a manifest abuse of discretion and should be subject to reversal.

C. The trial court abused its discretion by departing from the statutory framework for child support through a disproportionate award of property to the wife.

If the doctrine of equitable contribution didn't apply, the trial court should have followed the provisions of RCW 26.09 and RCW 26.19 in determining the husband's support obligation. Child support is statutory and the provisions of RCW 26.19 should be applied in every case involving child support. State ex. rel D.R.M. v. Wood, 109 Wn.App 182, 192, 34 P.3d 897, ___ (Div. 1, 2001). RCW 26.19 does not provide for any mechanism for payment of child support aside from monetary payments. Therefore, if a court determines that a spouse's economic circumstances will be diminished by the inability of the other spouse to pay child support, it may not devise an extra-statutory compensatory property division to benefit the potential obligor. Child support must be delivered through the front door, not deposited at the back door.

In addition to "just and equitable doctrines," the court justified the disproportionate property award as authorized by Cleaver v. Cleaver, 10 Wn.App 14, 516 P.2d 508 (1973). RP at 158 at 14. According to Cleaver,

RCW 26.08.110 directs that a divorce decree shall make such disposition of the property of the parties as shall appear just and equitable. An equitable division of the property involved does not entail a right to strictly equal division thereof. (Citations omitted),

In Baker v. Baker, supra at 746, the court detailed the factors which are to be considered by the trial court in making a disposition of the property of the parties to a divorce action:

["]They are the merits of the parties; the condition in which they will be left by the divorce; the burdens imposed by child custody; the necessities of the wife and the financial ability of the husband; the age, health education and employment history of the parties; the future earning prospect of the parties; the sources through which the property was acquired by the parties during the marriage and what properties each brought into or contributed to the community property; and the kinds of property left to be divided at the divorce. (Citations omitted).

Id., 10 Wn.App at 17, 516 P.2d at ____ (emphasis added).

Cleaver and Baker pre-date the current scheme for dissolution of marriage, which was enacted in 1973. The statute on which they rely, RCW 26.08.110, was repealed in 1973 and its provisions

for property division replaced by RCW 26.09.080. See, e.g., RCW Annotated, 26.08. Unlike the present child support statutes, RCW 26.08.110 is a catch-all statute setting forth all the powers of the court in a divorce, including property division which should "have regard" (in part) for the "burdens imposed on it [a party] for the benefit of the children." See, e.g., Morris v. Morris, 69 Wn.2d 506, 509, 419 P.2d 129, ____ (1966). By contrast, the present property division statute, RCW 26.09.080, omitted child custody as a basis for property division, although its list of factors is non-exclusive. RCW 26.09.080.

...judgment shall be entered accordingly,
... and making such disposition of the property of the parties, either community or separate, as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired, and the burdens imposed upon it for the benefits of the children...

RCW 26.08.110;

...the court shall, without regard to marital misconduct, make such disposition of the property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- 1) The nature and extent of the community property;
- 2) The nature and extent of the separate property;

- 3) The duration of the marriage; and
- 4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

RCW 26.09.080. When a change is made in the wording of a statute, a change in the legislative intent is presumed. The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are generally construed to effect a change. Childers and Childers, 89 Wn.2d 592, 575 P.2d 201, ___ (1978). If this rule is applied to RCW 26.08.110 and RCW 26.09.080, it is evident that the Legislature intended the new child support statutory scheme in 26.09 and in RCW 26.19 to be the judicial means of determining the support obligations of parents and therefore omitted child support as a specific factor in property awards. Going beyond the current statutory framework should therefore be deemed an abuse of discretion and grounds for reversal. See, e.g., Watt v. Weyerhaeuser, 18 Wn.App 731, 573 P.2d 1320 (1977).

In addition, it is unclear how a disproportionate award of property would help support the children, if that was the court's purpose. The mother received ownership of something of value, a larger share of the community property, which she could convert to cash for her own uses upon a sale of the real estate, perhaps long after the children are adults. Ownership by itself would not substitute for child support by putting food on the table or clothes on the children's back. It would not, by itself, lower the mortgage and free up more household income for use by the children. To the extent that a larger judgment for the father could result in less resources for the children if the mother had to satisfy such a judgment while not receiving child support, the court could avoid such consequences by making the judgment fall due when the father was out of prison and capable of paying support again. In the absence of clear benefits to the children, a disproportionate award of property on grounds of the burdens of child support was outside the range of acceptable choices, and therefore unreasonable, and based on untenable grounds, meaning based on incorrect standards, and therefore an abuse of discretion. See, e.g.,

Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362, ____ (1997).

As a final matter, although it can't be demonstrated, it is patently obvious that the court used the disproportionate award to punish the sex-offender husband, contrary to the principle that property awards should be made without regard to marital misconduct. RCW 26.09.080. It is inconceivable that the court would have made a comparable disproportionate award if the husband were unable to pay child support due to a catastrophic injury or illness rather than incarceration for child molestation. Therefore, this disproportionate award is unreasonable and based on untenable ground and should be reversed for abuse of discretion. See *id.* at ____.

D. The trial court abused its discretion by making a disproportionate award of property to the wife to assist her with the economic burdens of raising the husband's step-children.

The court framed its disproportionate award partly in terms of compensating for the wife's post-decree economic burden of raising her two

Building the mother's "bottom line" - her assets - to assist the children who live with her is reminiscent of the old proverb about stuffing the horse with oats to make sure the sparrows get fed.

daughters by a previous marriage as well as the son that she and the husband had together. RP at 158, line 20 to 159, line 12. A spouse's obligation to support stepchildren terminates upon dissolution of the marriage. RCW 26.16.205. To take property from a spouse to help support children to whom he has no obligation of support could not be more unreasonable or based on more untenable grounds. Indeed, the court lacked authority under any theory to extend the husband's step-parent support obligation beyond entry of the decree of dissolution. Wood, 109 Wn.App at 200, 34 P.3rd at _____. The disproportionate property award to support step-children is a manifest abuse of discretion by the trial court.

V. ATTORNEY FEES

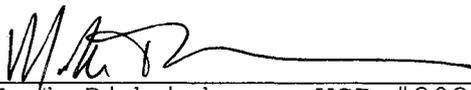
The husband requests an award of reasonable attorney fees and costs. These fees include a flat fee of \$2,500.00 paid to the attorney from the judgment herein that was satisfied by the wife, \$616.00 for transcript costs, and the \$250.00 appellate filing fee.

VI. CONCLUSION

The court's decision to make a disproportionate award of property to the wife due

to the economic circumstances of supporting the parties' child and the husband's two stepchildren after dissolution of the marriage was not sanctioned by the principle of equitable contribution, common law support obligations and RCW 26.16.205, the present statutory framework for child support in RCW 26.09 or RCW 26.19, or any post-decree obligation of the husband to his former stepchildren. The disproportionate award was therefore unreasonable and based on untenable grounds and, as such, it was a manifest abuse of discretion. The court's decision should be reversed and remanded for appropriate modification.

RESPECTFULLY SUBMITTED THIS 27th DAY OF
NOVEMBER, 2007.


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COURT OF APPEALS
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STATE OF WASHINGTON
BY Mark Didrickson
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

ELIZABETH URBANA,

Respondent,

and
ROBERT URBANA,

Appellant,

NO. 36260-1-II

DECLARATION RE SERVICE
OF NOTICE FOR APPEAL
TO COURT OF APPEALS,
DIVISION II

I, Mark Didrickson, declare:

On November 27, 2007, I served the Respondent, Elizabeth Urbana, with a copy of the Brief of Appellant to the Washington State Court of Appeals, Division II, for Clark County Cause # 05-3-01325-4 by causing a full, true, and exact copy of the same to be deposited, postage prepaid, in the U.S. Mail for delivery to the Respondent at her address of record:

Elizabeth Haynes [aka Urbana]
702 SW 21st Avenue,
Battle Ground, WA 98604

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington on November 27, 2007


Mark Didrickson, WSB #20349,
Attorney for Appellant