

NO. 36749-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
BY [Signature]

LEONARD SIMPSON
Appellant

V.

SHIRLEY SIMPSON
Respondent

BRIEF OF APPELLANT
LEONARD SIMPSON

Jacqueline McMahon
Attorney For Appellant
WSBA#19321

102 Bridge Street,
Orting, WA. 98360
(360) 893-2527

J.M. 3-7-08

ORIGINAL

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A. INTRODUCTION

Petitioner appeals the decision of the trial court in refusing to grant his request for a continuance so that he could retain an attorney and so that he could provide the court with evidence as to the parties assets, debts and asset valuations. Additionally, Petitioner appeals the trial court's failure to rule on his Motion for Contempt despite its reservation of the issue for trial and assigns error to the division of assets and debts under an abuse of discretion standard.

Further, the Petitioner assigns error to the trial court's ruling in vacating the order of child support on the basis of the failure to notify the State rather than statutory standards as to the Petitioner's biological great grandchildren for whom he has not been designated legal guardian and for whom the great grandchildren's biological parents are obligated to provide support. The Petitioner requests a ruling by this Court on the issue of child support for the great grandchildren.

Finally, this appeal presents the issue of whether it was an abuse of discretion for the trial court to make the ruling it did as to distribution of assets and debts when the court did not have valuations of the assets or a full understanding of the parties debts.

Petitioner requests remand of this matter to the trial court.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error.

(a) Whether the Trial Court erred when it Denied Appellant's Motion To

Continue.

(b) The Trial Court erred in failing to rule on the Petitioner/Appellant's Motion for Contempt.

(c) The Trial Court erred in its distribution of the parties property.

(d) Whether the court erred in vacating the Order of Child Support based on the State's failure to be notified.

(2) Issues Pertaining to Assignments of Error.

(a) Did the trial court err in denying the Appellant the right to a continuance when he made said request at the beginning of trial, when he informed the court that he desired to be represented by an attorney, when the Respondent's records were incomplete and inaccurate, and when he explained the complexities of the case and that specific and necessary documentation as to the assessed valuation of assets and debts had not been obtained or produced?

(b) Did the trial court err in its distribution of the parties property when it did not have a complete list of all the parties debts and assets, the information it had was either incomplete or inaccurate and valuations of the parties assets had not been provided.

(c) Did the trial court err when it refused to rule on the Petitioner's Motions for Contempt when the trial court reserved ruling on the Motions until the time of trial and had the inherent authority to make such ruling?

(d) Did the trial court err in obligating the Petitioner to pay child support to the Respondent who was the step-great grandparent under in loco parentis, when the Petitioner was not designated the legal children's guardian, when the children's biological parents were under court order obligating them to provide support, and considering that he had vacated the family home where the children reside?

C. STATEMENT OF THE CASE

The Appellant and Respondent were married in July of 1958. (CP 1-9) During the course of their marriage the parties engaged in the operation of several businesses; one a used car lot and the other a towing company. The tow company owned by the parties was discontinued during the dissolution action. Additionally, the parties owned six rental properties in addition to their family home. (CP 34-36; 206) Through the course of several motions and rulings thereon, it was ordered that the Petitioner/Appellant shall continue to operate the businesses, that the Respondent be ordered to make an accounting, that the Respondent be prohibited from interfering with the business or harassing the employees and was ordered to pay \$7,000.00 to the Department of Revenue. (CP 37-39; 127-128; 129-130)

On or about September 2005, the Appellant filed a Motion for Show Cause Re: Temporary Orders with the Grays Harbor County Superior Court specifically alleging that the Respondent was interfering with his business, that the Respondent was taking business funds and using them for personal benefit, was taking papers regarding the business and titles to the vehicles making it very difficult if not impossible to run his business. (CP 33-39)

Subsequent thereto, on or about March 2006 and January 2007, the Petitioner/Appellant again brought two separate motions to Show Cause re: Contempt before the Grays Harbor County Superior Court against the Respondent alleging violations of the prior orders of the Superior Court. (CP 106-120; 132- 138) The Grays Harbor County Superior Court reserved ruling on that Motion until trial. (CP CP138)

At the time of trial, the Petitioner/Appellant appeared without counsel, while the Respondent appeared with Counsel. (RP p. 1- March 1, 07)

At the time of trial, the Petitioner/Appellant moved the trial Court to Continue trial on grounds that he required the assistance of counsel in order to properly proceed.
(RP p. 1-10- March 1, 07)

The Petitioner/Appellant represented to the Court that, prior to and in preparation for trial, he did retain the services of an attorney, but indicated that the relationship proved unsuccessful resulting in termination of that relationship, and that although he did make additional good-faith attempts to secure the assistance of counsel, financial inability prevented him from being able to doing so. (RP 1 – 10 – March 1,07)

The Petitioner/Appellant further represented to the Court the complexities of the case, and indicated that the complexities were such that to proceed properly, he did require the assistance of counsel, however, in spite of the representations of the Petitioner/Appellant, the Court denied the Petitioner's/Appellant's Motion for Continuance. (RP 10 – March 1, 07)

At the time of trial counsel for the Respondent alleged that, subsequent to entry of the aforementioned order, assets of the businesses aforementioned had been sold or transferred without consideration being taken or accounted for. (RP 4 – March 1, 07)

Testimony of the Petitioner and the Respondent clearly showed that the Respondent continued to interfere with the businesses identified in violation of prior order of the Court. Testimony also showed that the Respondent failed to document accounting for monies coming into the businesses, (RP 5, 108, 11, 112 and 114 – March 1, 07) and that the

Respondent had written checks to the Department of Labor and Industries to pay personal debts in an amount of \$3,500.00, (RP 126- March 1, 07) and showing that the Respondent had taken monies out of business for personal needs without accounting therefore and that Petitioner/Appellant incurred losses that he believed to be substantially larger than what documentary information showed. Moreover, as a consequence of the Respondent's acts and/or omissions, he personally incurred liability for payments to creditors. (RP 9- March 1, 07)

Evidence showed that the Respondent sold vehicles to relatives without contract, and without accounting for taxation, and thereafter transferred titles to these vehicles back to herself. (RP 4-5 – March 1, 07) The Petitioner/Appellant testified that the Respondent, in violation of prior court orders, took documentary information regarding the operations of the business and thereafter transferred the same, (RP 6 – March 1, 07) and that he did not have knowledge as to what the debts or sales of the businesses amounted. (RP 18) Both parties further testified that they had several credit cards, which had been taken out and controlled by the Respondent to be used for business purposes that he believed had outstanding balances of approximately \$1,200.00 remaining, and that he continued to make payments on these accounts, however, neither the

Petitioner/Appellant nor the Respondent possessed or were able to present any documentary evidence to substantiate these claims. (RP 122 – 125 – March 1, 07)

The Petitioner/Appellant also presented documentary evidence of profit and loss statements from the businesses that had been created and maintained by the Respondent, that were incomplete and/or inaccurate, and the Petitioner testified that such discrepancies required that he shut down the tow yard business. (RP 8 – March 1, 07)

Testimony of the parties likewise showed that the Respondent cared for a son Zachary, and that, as Zachary's care giver, she received payments from the Department of Social Security of approximately \$420.00 per month, and that the Respondent failed to maintain documentary information with respect thereto. (RP 16, 20 – March 1, 07) The Respondent did not deny or refute the assertions. (RP 98 – March 1, 07) Additionally, the testimony of the parties was that they provided support for two of the Respondent's step-great grand-daughters (RP 16, 20. 97. 98 – March 1, 07)

Testimony of the parties showed that outstanding mortgages also remained on properties owned by the community, and the land upon which the businesses were situated, but the Appellant informed the Court that proof thereof was located in a brief case not presently in his possession.

(RP 21 - March 1, 07) When asked by the Court to determine the outstanding amounts, the Petitioner/Appellant stated that he could only provide the Court with what he described as a “ball park figure”. (RP 21 - March 1, 07)

The Petitioner also testified that, the Respondent failed to document or to show receipt of any payments received and/or taxes paid as part of a sales transaction of a Motor Home and Ford Mustang. (RP 26-30 - March 1, 07) The Petitioner/Appellant also presented documentary evidence showing transfer of title to the aforementioned vehicle, and testified that while said documents did evidence transfer of titles to the said vehicles, he did not sign these documents, (RP 24-25 - March 1, 07) and he testified that the vehicles referenced never left the business property. (RP 24-25 - March 1, 07)

The Petitioner further testified that the Respondent continued to fail to document or to show receipt of any payments received and/or taxes paid as part of sales transaction of vehicles, (RP 26- 28 - March 1, 07) most specifically the sale of a 1992 Buick, which he indicated the Respondent transferred into her maiden name, (RP 26 - March 1, 07) sale of a 1995 Ford Windstar, which the parties sold to their Granddaughter, (RP 28 –March 1, 07) sale of a 1995 Ford, which was sold to the Respondent’s grandmother, (RP 29 – March 1, 07) and the sale of a 1978

Chevrolet Nova to Ken Soard. (RP 37 – March 1, 07)

The Petitioner also presented documentary evidence showing outstanding company debts owing to an accountant hired by the company in the amount of \$5,407.55 from December 2006, for which again, no documentary evidence existed showing receipt of any payments made or received as part of the transaction. (RP 35 –March 1, 07). The Petitioner testified that while the Respondent did state to him that “she put a check on that”, (RP 36 - March 1, 07) the accountant never received monies, and that though the Respondent indicated that she was paying the company debts, he did not know what happened to the check allegedly written by the Respondent. (RP 36 – March 1, 07)

The Court also obligated the Appellant to pay child support to the Respondent for his great grandchild who are not biologically related to the Respondent. (RP 150 – 156 – March 1, 07). The basis for the trial court’s decision was based on *in loco parentis* but the great grandchildren were the Respondent’s step great grand-children, the Appellant was not designated their custodian in any court orders and he did not reside in the home where the great-grandchildren were living at the time the order was entered.(CP154-170; 229-249)

The Court awarded all the rental properties and the family home to the Petitioner, failing to award any home to the Respondent and awarded

him the businesses of which one was no longer in operation. Additionally, the Court failed or refused to rule on the petitioner's/Appellant's Motion for Contempt. (RP 150 – 156 – March 1, 07)

The Petitioner/Appellant thereafter filed a Motion with the Grays Harbor County Superior Court seeking Reconsideration and/or New Trial. (CP 154 – 186)

On or about 9/5/07, the Appellant filed his Notice of Appeal with this Court seeking review of the Ruling of the Superior Court Denying his Motions for Reconsideration, and ruling of the Grays Harbor County Superior Court with respect to division of properties of the parties. (CP 250-285)

D. ARGUMENT AND AUTHORITY

(1). Standard of Review.

The standard of review for each of the issues presented on appeal is abuse of discretion. The trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Mayer v. Sto Indust., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

(2). The trial Court erred when it refused to continue the trial.

The Petitioner/Appellant represented to the Court in a somewhat lengthy dissertation, the complexities of the case, and indicated that the complexities were such that to proceed properly, he required the assistance

of counsel, and for the reasons stated, the Petitioner/Appellant moved the Court to continue the trial. As indicated, the Court denied the Petitioner's/Appellant's Motion for Continuance. (RP 10 – March 1, 07)

In deciding whether to grant a continuance on grounds of the absence of evidence, the Court will consider the diligence of the moving party to procure the evidence sought, and the materiality of the evidence expected to be obtained. *State v. Lewis*, 21 Wn. App. 779, 586 P.2d (1978) *Northern State Const., Co. v. Banchemo*, 63 Wn.2d 245, 386, P.2d 625 (1963).

When the requesting party does offer a good reason for the delay in obtaining desired evidence, and the desired evidence would raise a genuine issue of material fact, a motion for continuance should be granted. *Turner v. Kohler*, 54 Wn. App. 688, 775 P.2d 474 (1989).

Where the moving party produces or provides offers of proof of evidence upon which the motion to continue is premised, denial by the court of such a motion constitutes an abuse of discretion. *Northern State Constr., Co. v. Banchemo*, 63 Wn.2d 245, 386 P.2d 625 (1963).

The Petition for Dissolution of the parties filed with the Court, and that was before the Court at the time of trial identified the properties of the parties consisting of Friendly Auto Sales, Friendly Towing and L&S

Towing, and inventory as part thereof located in Aberdeen, Washington, and real estate rentals located at 910 Monroe, 912 Monroe, and 926 Monroe and River Streets in Hoquiam, and the family home at 829 U.S. Highway 101 in Hoquiam, Washington. (RP 17 – March 1, 07)

At the time of trial, and in support of his Motion for Continuance, and in regard to proper disposition of the properties, the Petitioner/Appellant informed the Court that he did not possess specific and necessary documentary information as to the assessed valuation of the aforementioned properties. He also testified that he did not have specific and necessary documentary information regarding assets and debts of the parties, (RP 1-2 March 1, 07) that assets of the businesses aforementioned had been sold or transferred without consideration being taken or accounted for, that documentary information regarding the operations of the business had thereafter been transferred, (RP 6 – March 1, 07) and that profit and loss statements from the businesses, which both parties testified were created and maintained by the Respondent were incomplete and/or inaccurate. (RP 107 – March 1, 07) Further the Petitioner/Appellant did not receive a complete list of assets and debts from the Respondent's attorney and likewise, no valuations regarding the properties had been provided.

The Petitioner/Appellant further indicated that absent such information he believed that the Court was unable to properly characterize

and/or to distribute the same between the parties. (RP 2 – March 1, 07)

The Court disregarded the concerns of the Petitioner/Appellant and denied the Motion of the Petitioner/Appellant to Continue the trial, and proceeded to take judicial notice and to admit evidence that could be presented regarding the parties properties, assets, debts and other property matters.

Additionally, and as previously indicated, the Petitioner/Appellant represented to the Court that, prior to and in preparation for trial, he did retain the services of an attorney, but indicated that the relationship proved unsuccessful resulting in termination of that relationship, (CP 285-286) and that although he did make additional good-faith attempts to secure the assistance of counsel, financial inability prevented him from being able to do so. (CP 285-287) Information likewise shows that, at the time of trial, the Respondent was represented and did have the luxury of having the assistance of counsel, while the Petitioner/Appellant did not.

While an attorney's withdrawal or discharge does not necessarily give a party an absolute right of continuance, *Jankelson, Cisel*, 3 Wn. App. 139, 473 P.2d 202 (1970), the court in passing on a motion for a continuance has to use its discretion, and should be guided by its duty to be fair to both sides and to ensure that substantial justice is done, 14 *Wa. Practice Civil Procedure*, Sec. 10.3 (2007).

The Petitioner/Appellant did show absence of evidence. He

produced or provided offers of proof of evidence upon which the motion to continue was premised. He did offer a good reason for the delay in obtaining desired evidence. He showed due diligence to procure the evidence sought. The evidence expected to be obtained was of material value and would raise genuine issues of material fact. Consequently, the Trial Court's failure to continue the trial amounted to err.

(3). The Trial court abused its discretion in awarding the Respondent all of the rental properties and the family home while not providing a home for the Petitioner to live and in its distribution of debts.

The value of property is material, and an ultimate fact to be determined, *Wold v. Wold*, 7 Wn. App. 872, 503 P.2d 118 (1972). In making its decision as to the distribution of property and debts, the court "**shall**" (emphasis added) consider the nature and extent of the community property; (b). the nature and extent of separate property; (c) the duration of the marriage; and the economic circumstances of each spouse at the time of the division of property is to become effective. R.C.W. 26.09.080.

The aforementioned statutory factors provide only the starting point for analysis. Any discussion of the subject should include a wide variety of property interests subject to distribution, as well as the complexities that may arise because of related issues such as characterization of the property as community or separate, and the value of relatively intangible property interests.

While the statute gives the trial court considerable discretion, failure to exercise this discretion or to consider “all relevant factors” including but not limited to the specified factors constitutes an abuse of discretion, and an appellate court will reverse the distribution based thereon. *In re Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462 (1993)

In making its decision as to the distribution of property and debts, the court in this case did not properly consider the specified factors.

As shown, complexities that could have arisen because of related issues such as characterization of the property as community or separate, and complexities regarding the value of relatively intangible property interests was made known to the court by the Petitioner, however, the Court simply failed to exercise its discretion and did not consider “all relevant factors”, and hence, the decision of the court in distributing the properties constituted an abuse of discretion.

The trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)

If the Court relies on unsupported facts or applies the wrong legal standard, its decision is exercised on untenable grounds or for untenable reasons; and even if the court applies the correct legal standard to the

supported facts, but adopts a view that no reasonable man would take, the trial court is said to have abused its discretion. *Rehak v. Rehak*, 1 Wn. App. 963, 465 P.2d 687 (1970)

In this case, the trial Court adopted a view point as to the property involved without looking to and without applying the statutory factors thereto, and without taking into consideration other relevant factors. The Court relied on unsupported facts and applied the wrong legal standard. The decision of the Court was exercised on untenable grounds or for untenable reasons and the view point taken was that which no reasonable man would have taken had the facts been supported and the correct legal standard been applied.

The trial Court abused its discretion when denying the Motion of the Petitioner/Appellant to Continue, and in distributing the properties of the parties. The proceedings were not fair to both sides, and substantial justice was not done.

As indicated, the Petitioner/Appellant filed a Motion with the Grays Harbor County Superior Court seeking Reconsideration and/or New Trial pursuant to CR 60. (CP 155-185)

CR 60 provides in relevant part that:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for:

- (1). Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; or for
- (2). “Newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under the Rule 59(b); or for
- (3) “Any other reason justifying relief from the operation of the judgment.”

Irregularities have been defined as a departure from some procedural rule or regulation or mode of proceeding *4 l. Orland, Wash. Prac. Rules Practice, sec. 5713 at 543* (3d Ed. 1983); *15 Wn. Prac. sec. 39.5* (2007). *In re Adamec*, 100 Wn. 2d 166, 173, 667 P.2d 1058 (1983)

R.C.W. 26.09.080 provides that:

“in making its decision as to the distribution of property and debts, the court “**shall**” [emphasis added] consider the nature and extent of the community property; (b). the nature and extent of separate property; (c) the duration of the marriage; and the economic circumstances of each spouse at the time of the division of property is to become effective.

The word “shall” in a statute is construed as directory and mandatory. *City of Spokane v. Spokane Police Guild*, 553 P. 2d 1316 (1976)

Here, in making its decision as to the distribution of property and debts, the court did not consider and did not apply the statutory factors, and in failing to comply with the statutory directive, the court did depart from procedural rules or regulations or mode of proceeding.

Sec 3 of CR 60 again provides that:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for (3) “Any other reason justifying relief from the operation of the judgment.”

“Other reasons” justifying relief from operation of the judgment are generally consist of extraordinary circumstances not covered by any other section of the rule, such as situations, which typically involve reliance on mistaken information, *In re Marriage of Tang*, 57 Wn. App. 648, 789 P.2d 118 (1990).

Here, the circumstances under which the judgment of the court was reached were extraordinary. The Court relied upon mistaken, incomplete, inaccurate and even missing information in reaching a decision and entering judgment, hence; denial of the Motion to Vacate was exercised on untenable grounds or for untenable reasons and constituted an abuse of discretion.

Decisions to vacate a judgment under the rule providing for vacation of judgments will be overturned on appeal where it plainly appears that the trial court has abused its discretion. CR 60(b); *In re Marriage Tang*, 57 Wn. App. 648, 789 P.2d 118 (1990)

(4). The Trial Court erred in not ruling on the Petitioner's/Appellant's Motion for Contempt.

A court's power to punish contempt is inherent in order to enable it

to preserve the dignity and to duly administer justice in cases pending for them. *State v. Duddress*, 63 Wash. 26, 114 P. 879; *State v. North Shore Boom & Driving Co.*, 55 Wash. 1, 107 P. 196 (1911)

As previously indicated, on or about January 2007, the Petitioner/Appellant brought two separate motions to Show Cause re: Contempt before the Grays Harbor County Superior Court against the Respondent alleging violations of the prior orders of the Superior Court.(CP 132-134;137-138) The Grays Harbor County Superior Court reserved ruling on that Motion until trial. (CP 135- 138)

At the time of trial, reference to the issue of the prior order of the Grays Harbor County Superior Court was raised (RP 4 – March 1, 07); however, in spite of it's own prior order that it would reserve ruling on this issue at the time of trial, the Court stated that the only issue for decision by the Court was whether or not to continue the trial, and the Court disregarded the issue of Contempt completely. (RP 7 – March 1, 07)

The Gray's Harbor County Superior court also verbalized a pretrial order, which recited the action taken at the time of pretrial, and the agreements made by the parties as to any of the matters to be considered at the time of trial consistent with CR 16.

The pre-trial order is an indispensable mechanism, and its purpose is to determine which of the claims pleaded will actually be tried. The

claims, issues, and evidence are limited by the order, and the course of the trial is thereby narrowed to expedite the proceeding. The general rule is that unless modified, new theories will not be entertained, and the parties are bound by the facts agreed to and established after a pretrial order has been issued. *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997)

CR 16(b) provides in relevant part that:

“The court shall make an order, which recites the action taken at the time of pre-trial, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admission or agreements of counsel; and such order once entered controls the scope and course of the trial, unless modified at the trial to prevent manifest injustice.”

Only if claims or issues are omitted from the order will they be waived. *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 115, 508 P.2d 166 (1973); *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) Where a trial court has ruled before trial that the court or the jury would consider certain matters, and has sufficient notice of the issue, the court must not refuse to consider the issue, and failure to so consider constitutes an abuse of discretion. *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); *Osborn v. Public Hosp. dist. 1*, 80 Wn.2d 201, 492 P.2d 1025 (1972); *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 753-54, 875 P.2d 1228 (1994)

Here, the Court had the power to punish contempt. The Court

verbalized a pretrial order, which recited the matters to be considered, and which limited the issues for trial to those not disposed of by admission or agreements of counsel. The order of the court was not subsequently modified, and the Appellant did not raise any new theories to be entertained. Once entered, and absent subsequent modification, that order controlled the scope and course of the trial. The court could not refuse to consider the issue, and failure to so consider constituted an abuse of discretion

(5). The Trial Court erred in finding the Petitioner/Appellant legally responsible for payment of child support

Facts in the instant case indicate that the parties named herein were married for 48 years prior to initiation of the action by Mr. Simpson, and that during the course of their marriage, the Respondent, Shirley Simpson obtained a non-parental custody decree for her great grandchildren Kimberly, and Breana. The biological parents of Kimberly and Breana did not relinquish their parental rights and were and continue to be under a court order, which obligates them to pay child support. (CP 28-32; 118-120; 210-221; 229-285) However, at the conclusion of the trial in this cause, the Petitioner was order by the trial court to pay child support to the great grand-children in violation our State Statutes. (RP 151-152 – March 1, 07)

Title 26 of RCW contains the statutory authority for the issuance of

child support. Chapter 26.09 of RCW provides however, that an order of child support brought under this chapter must be a child born of the marriage. RCW 26.16.205 provides for family support from a **step parent until the decree of dissolution is entered**. However, RCW 26.26.205 is not applicable to great grandparents.

The obligation to pay child support is imposed under common law and by statute. The Family Expense statute is the closest Washington comes to a general statutory obligation to provide child support. However, any statutory obligation is limited to children born of the marriage or to stepparents and excludes any children born out of marriage or to whom a third party custody order has not issued. Moreover, the Family Expense Statute does not authorize future or current support, but only provides for the recovery of past expenditures.

Not only does the creation of an obligation to pay child support cause a chilling effect on those that choose to assist children in need but in the case at hand, the Court has exceeded its power by obligating the Petitioner to pay support for his great grandchildren. The creation of an obligation of a great grandparent to pay child support is not what the legislature had in mind when RCW 26. et. seq. was drafted. (*In State ex rel DRM and Wood and McDonald*, 109 Wn. App. 182 (2001); *In re Marriage of Myers*, 92 Wn.2d 113, 594 P.2d 902, (1979), and RESTATEMENT (SECOND) of CONFLICT OF LAWS,

section 79 (1971); and *Kulko v. California Superior Court*, 436 U.S. 84 (1978), *reh. Denied*, 438 U.S. 908 (1978).

In the present case, the non-parental custody decree did not terminate the rights of the parents. Moreover, the biological parents were court ordered to pay child support for their children which they ignored. The Respondent, if indeed she is the individual has a third party custody order, is entitled to reimbursement of the “necessities” provided to a child by the child’s biological parent(s) – not the Petitioner to whom a third party custody order does not apply. *Miller v. Lewis*, 138 Wash. 167, 244 P. 400 (1926).

The Respondent incorrectly argues that the doctrine of *in loco parentis* is applicable in this situation. That doctrine is not only voluntary but more than likely terminated when the Appellant vacated the family home where the great grandchildren reside. Consequently, the Courts reliance on the doctrine of *in loco parentis* is not only misplaced but is an improper use of the doctrine.

The duty of support rests on both parents, and liability therefore is joint and several and until the Department of Social and Health Services directs otherwise, or the court orders otherwise in an appropriate judicial proceeding. *K. Tegland*, 19 *Washington Practice, Family Law Practice and Procedure*, 21.2 (2007)

While Washington courts have recognized such a relationship, and

that some legal responsibility often attaches to such a relationship, Washington Courts and statutes have never considered the same actual parents or akin to actual parents. *In re Parentage of L.B.*, 121 Wn. App. 475-76, 89 P.3d 271 (2005)

“In Loco Parentis” is Latin for “in the place of a parent”. This term is temporary by definition and ceases on withdrawal of consent by the legal parent or parents. *Blacks Law Dictionary 803 (8th Ed. 2004)*

Here, the biological parents of Kimberly and Breana did not relinquish their parental rights and were, at the time of trial under a court order obligating them to pay child support. By not relinquishing their parental rights, the biological parents are deemed to have essentially withdrawn their consent to the establishment of such a relationship.

Additionally, a third party acting in loco parentis has a duty to provide support only if he or she actually intends to assume the role of a parent. Even if a duty of support exists, it is tenuous at best. In most of the reported cases, the courts have held that the third party may abandon his or her support obligation at any time, and may even be entitled to a contribution from the child’s parents. *K. Tegland, 19 Washington Practice, Family Law Practice and Procedure, 21.2 (2007)*

In *In re Parentage of L.B.*, 121 Wn. App. 475-76, 89 P.3d 271 (2005), the court of Appeals held that evidence sufficient to prove the existence of a “de facto” parent consists of a showing that: (1) the natural

or legal parent consented to and fostered the parent –like relationship; (2) petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

The ruling of the court in finding the existence of such a relationship was not supported by substantial evidence, and the court erred in ordering the Petitioner/Appellant to pay child support. (RP 151-152 – March 1. 07) While the order of child support has been vacated, it was so done only on the basis that the State was not notified of the proceedings. (CP 229-248; 249) Ruling on this issue is necessary to avoid any future arguments by the Respondent, that she is entitled to child support under the analysis provided herein.

D. CONCLUSION

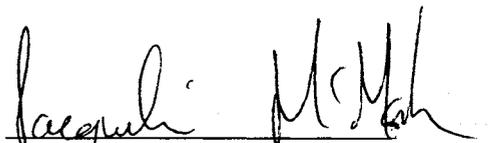
It was an abuse of discretion and the trial court erred in failing to grant the Petitioner/Appellant's request for a continuance in order to obtain counsel and in its failure to rule on the Petitioner's Motion for Contempt that was reserved for trial. Likewise, it was an abuse of discretion and err for the Court to divide the assets and debts of the parties in the manner in which it did without having valuations or complete records and accountings. Finally, entry of an Order of Child Support

against the Petitioner was err and while the order has been subsequently vacated, it was only based on the failure of the Respondent to notify the State. The trial court did not rule on the issue of whether entry of an order of child support is proper based on the doctrine of in loco parentis and has left for possible further argument, this issue. Consequently, the need for a ruling from this Court on the issue of child support is necessary to avoid additional trips to the courthouse.

For the reasons set forth herein, the Court should reverse the trial court's order and remand this matter to the trial court. Costs on appeal should be awarded the Petitioner.

DATED this 7th day of March, 2008.

Respectfully submitted,



Jacqueline McMahon, WSBA #19321
P.O. Box 1569
Orting, WA 98360
(360) 893-2527

Attorney for Appellant, Leonard Simpson

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SHIRLEY SIMPSON,

Respondent,

NO. 36749-1-II

And

AFFIDAVIT OF MAILING

LEONARD SIMPSON,

Appellant.

STATE OF WASHINGTON)

: ss

COUNTY OF PIERCE)

The undersigned, being first duly sworn on oath, deposes and says:

That on the 7th day of March, 2008, she placed a true copy of the Appellant's Brief on file in the above-entitled matter, in an envelope addressed to William E. Morgan and Rebecca Lynne

Bernard at the addresses below stated:

Mr. William E. Morgan
Attorney at Law
407 - 8th Street
Hoquiam, WA 98550

Rebecca Lynne Bernard
Grays Harbor Co Pros Office
102 W Broadway Ave Rm 102
Montesano, WA 98563-3621

ORIGINAL