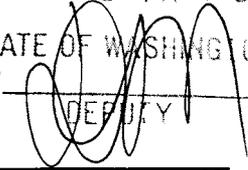


FILED
COURT OF APPEALS
DIVISION II

08 JUN 16 PM 4:35

STATE OF WASHINGTON

BY  DEPUTY

NO. 36749-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LEONARD SIMPSON
Appellant

V.

SHIRLEY SIMPSON
Respondent

REPLY BRIEF OF APPELLANT
LEONARD SIMPSON

Jacqueline McMahon
Attorney for Appellant, WSBA#19321
102 Bridge Street,
Orting, WA. 98360
(360) 893-2527

TABLE OF CONTENTS

Table of Authorities ii-iv

A. INTRODUCTION1

B. REPLY TO RESPONDENT’S
STATEMENT OF THE CASE1

C. ARGUMENT IN REPLY3

(1) The trial Court erred when it refused to continue the trial because the appellant had not previously requested a continuance and to allow the same would have enabled the appellant to gather additional significant evidence of the respondent’s conduct and violation of the trial court’s previous rulings

(2) The Trial court’s division of the parties debts and assets was err

(3) The Trial Court did not question the appellant regarding his three previous motions for contempt and did not rule on the same thus amounting to err.

(4) There is no legal basis or theory which obligates the appellant to pay child support for his great grandchildren and to so obligate him was err.

(5) An award of attorney’s fees to the respondent is not warranted, but it is to the appellant

D. CONCLUSION..... 13

TABLE OF AUTHORITIES
TABLE OF CASES

Balandizch v. Demeroto, 10 Wn.App. 718, 519 P.2d 994 (1974) 4

City of Spokane v. Spokane Police Guild, 553 P. 2d 1316 (1976).....6

Ex Rel Gilroy v. Superior Court for King County, 37 Wn.2d 926,
226 P2d 882 (1951)11

In re Marriage of Meyers, 92 Wn.2d 113, 594 P.2d 902 (1979)12

In re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999) 5

In State ex rel DRM and Wood and McDonald, 109 Wn.App.182(2001).12

Kulko v. California Superior Court, 436 U.S. 84 (1978), reh. Denied,
438 U.S. 908 (1978)12

Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)..... 7

Northern State Const., Co. v. Banchemo, 63 Wn.2d 245, 386, P.2d 625
(1963).....3,5

Rehak v. Rehak, 1 Wn. App. 963, 465 P.2d 687 (1970)..... 7

Shay v. Shay, 33 Wn. 2d 408, 205 P.2d 901 (1949) 6

State v. Lewis, 21 Wn. App. 779, 586 P.2d (1978).....3

Turner v. Kohler, 54 Wn. App. 688, 775 P.2d 474 (1989).....4, 5

Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 271, 840 P.2d 860
(1992)..... 2

Willapa Trading v. Muscanto, Inc., 45 Wn.App. 779, 727 P.2d 687
(1986)4

COURT RULE

CR 60.....4, 7
Rule 59(b);..... 4, 7

STATUTES

R.C.W. 26.09.080.....6

TREATISES

*K. Tegland, 19 Washington Practice, Family Law Practice and
Procedure, 21.2 (2007)*.....11

RESTATEMENT (SECOND) of CONFLICT OF LAWS, Section 79 (1971)

A. INTRODUCTION

In its opening brief, appellant Leonard Simpson enumerated several reasons, fully supported by statutory and case law, why the trial court's award of all residential properties to the respondent, its order obligating the petitioner to pay child support and its refusal to grant a continuance and to rule on the respondent's multiple motions for contempt is error. In response, the respondent, Mrs. Simpson, filed a "reply" brief that misstates much of the testimony at trial and cites cases that do not support her position. As requested in Mr. Simpson's opening brief, the appellant requests that the division of debts and assets be reversed, that the respondent be found in contempt, that the respondent be prohibited from seeking child support from the appellant for his great grandchildren and that reasonable attorney's fees and costs be awarded the appellant.

B. REPLY TO MRS. SIMPSON' STATEMENT OF THE CASE

Mrs. Simpson's four paragraph statement of the case is incomplete and inaccurate. Some of the "facts" used by the respondent seem to be used for the sole purpose of misleading this Court. For example, Mrs. Simpson states that the trial was continued on three separate occasions, "once when his former attorney withdrew..."¹ However, the record does not support this allegation. Every motion for continuance was at the courts action – not the parties. Not one Motion for Continuance is found in the file. Indeed, the only motion for continuance was the appellant's oral request made on

¹ Br. Of Respondent at p. 1

March 1, 2006, the first day of trial. (RP page 3, lines 9-11- March 1, 07) Moreover, *not one* of respondent's purported factual statements is accompanied by a citation to the record as required by RAP 10.3.

Mr. Simpson refers this Court to his statement of the case contained in his opening brief for a complete and accurate discussion of the facts supported by the record. Mrs. Simpson is incorrect when she says there were only two motions for contempt filed – there were three. Additionally, Mrs. Simpson fails to discuss any of the motions for contempt filed except to say that she does not believe she violated the original temporary orders by the court.²

Mrs. Simpson's discussion of Mr. Simpson's financial ability to hire or not hire an attorney is irrelevant to the issue of whether a continuance should have been granted. Mr. Simpson said that it would take him approximately two months to get a continuance based on the bills he was obligated to pay (RP page 8, line 19- page 9, line 2 – March 1, 07) Mrs. Simpson, in failing to respond to Mr. Simpson's descriptions of the underlying litigation and of the ancillary proceeding on attorney fees, has conceded the accuracy of the descriptions. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 271, 840 P.2d 860 (1992).

C. ARGUMENT IN REPLY

(1). The trial Court erred when it refused to continue the trial because the appellant had not previously requested a continuance and to allow the same would have enabled the appellant to gather additional significant evidence of the respondent's conduct and violation of the trial court's previous rulings.

² Br. of respondent page 1

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). In the case at hand, the respondent did not provide evidence to the court regarding the finances of the two towing companies that she had been running for years, despite the courts order. (CP 37-39) The respondent did not put the money into William Morgan's trust account as ordered on April 19, 2006. (CP 129-130) Mr. Morgan's trust records were not offered into evidence at trial to prove that his client had complied with the court order of 2006. However, Mr. Simpson provided proof to the court of Mrs. Simpson's pilfering of funds from the parties towing company. For example at trial, the respondent state the following:

"Q: Did you write yourself a check for cash from the tow yard bank account?

A: Yes

Q: For \$3,500.00 dollars?

A: Yes.

Q: And was that after the business was closed?

A: Yes." (RP page 126, line 20 – page 127, line1 – March 1, 07)

Later during trial Mrs. Simpson admitted to continuing to keep the \$2,000.00 in violation of the September 2005 temporary order. (RP page 127 – March 1, 07)

The appellant produced checks in the respondent's hand writing for the towing business at an address that the appellant did not know and which was not connected to the business. (CP 171-185) The appellant testified that he had to sell the towing company because the respondent would not leave the towing company alone and took all the

monies from the company bank account. (RP page 5, line 6 – page 8, line 8; RP page 17, lines 19-22 – March 1, 07) Yet, even with this additional evidence, the trial court refused to grant Mr. Simpson’s request pursuant to CR 59 or in the alternative CR 60. (CP 155-185) Such decision by the superior court was an abuse of discretion and hence reversible error.

The court in *Willapa Trading v. Muscanto, Inc.*, 45 Wn.App. 779, 727 P.2d 687 (1986), looked to *Balandizch v. Demeroto*, 10 Wn.App 718, 519 P.2d 994 (1974), a case also dealing with the issue of continuance which held as follows:

“In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.”

In the case at hand, the appellant had not previously requested a continuance (RP page 3, lines 8-10 – March 1, 07); there were huge gaps in the evidence that was being offered and a continuance would have likely provided the appellant the ability to gather the information or at least an attorney to assist him. (RP page 7, line 20 – page 9, line 17 – March 1, 07) The fact that the respondent refused to provide financial documentation, was taking money from the towing company as late as December 2006, and was using a different address for the towing business of which the appellant did not have knowledge, each evidences there was a genuine issue of material fact justifying Mr. Simpson’s request for a continuance. Even the judge at the conclusion of the trial felt that he had not received enough information to really make a decision as to the assets and debts of the parties. (RP page 150, line 18-21- March 1, 07) For the foregoing reasons under

Turner v. Kohler, 54 Wn. App. 688, 775 P.2d 474 (1989), it was err for the trial court to refuse to grant a continuance.

Contrary to the assertion of the respondent, Mr. Simpson's December 26, 2006, letter to the court amounted to his request for continuance.³ In that letter, Mr. Simpson stated his concerns that his estranged wife was depleting the assets of the community by failing to pay the Department of Labor and Industries and the Department of Revenue in violation of the court order of September, 2006. 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, 3867 P.2d 625 (1963); *Turner v. Kohler*, 54 Wn.App 688, 775 P.2d 474 (1989).

In the present case, substantial justice was not done by denying the appellants motion to continue – his first such request. Such denial was reversible err by the trial court.

(2). The Trial court's division of the parties debts and assets was err.

The respondent cites *In Re Marriage of Zahm*, 138 Wn.2d 213, 978 P.2d 498 (1999), to support her position that the division of assets and debts should not be disturbed on appeal. While the court did not alter the trial courts division of assets and debts on appeal, the court nonetheless provides guidance relevant here:

“A fair and equitable division by a trail court does not require mathematical precision, but rather **fairness**, based upon a consideration of **all the circumstances** of the marriage, both past and present and an evaluation of the **future needs of the parties.**”[emphasis added]

³ The appellant filed a letter dated December 26, 2006 with the superior court. This document was not identified in the appellants original designation of clerks papers but has since in its Amended Designation.

In the case at hand, the trial court did not consider the likelihood that Mr. Simpson's business would not be as viable as it had in previous years based on the economics of the country. The award of the parties business to Mr. Simpson without requiring Mrs. Simpson to account for the funds she had taken from the towing company violated the requirements of RCW 26.09.080. Mr. Simpson requested that all assets be sold and the money used to pay debts and then divide the remainder. (RP page 12, lines 6-14; RP page 20, lines 11-20; RP page 21, line 5-15 – March 1, 07) The word "shall" became a suggestion rather than a mandate in violation of the statute. *City of Spokane v. Spokane Police Guild*, 553 P. 2d 1316 (1976).

Contrary to the assertions of the respondent, the appellant did not shut down two "successful" towing businesses. (RP page 7, line 20 – page 8, line 8 – March 1, 07) Despite the representation by the respondent that she could not work, she had been working for years keeping the records and books of the parties companies – thus the reason for contempt.

In *Shay v. Shay*, 33 Wn.2d 408, 205 P.2d 901 (1949), Mrs. Shay had her physician testify on her behalf at trial. In the present case, the respondent's alleged medical condition was only briefly mentioned. What the respondent did admit is that for 26 years she performed all the bookkeeping for the companies owned by the parties. (RP page 67, line 19-22; page 50, line 16-18; RP page 57, line 10-23; RP page 121, line 18-22 – March 1, 07) Even after the court ordered her to turn over the management of the companies to Mr. Simpson, she nonetheless continued her involvement. Obviously, her medical condition did not prohibit her from working. The respondent did not have any medical

expert testify regarding her alleged inability to work and no medical documentation of any kind whatsoever was produced at trial.

As the court held in *Rehak v. Rehak*, 1 Wn. App. 963, 465 P.2d 687 (1970); *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.

In the case at hand, the trial court relied upon mistaken, incomplete, inaccurate and even missing information in reaching a decision hence, the division of debts and assets was an abuse of discretion and was exercised on untenable grounds or for untenable reasons and constituted an abuse of discretion for which reversal, or at a minimum remand, is appropriate.

(3). The Trial Court did not question the appellant regarding his three previous motions for contempt and did not rule on the same thus amounting to err.

The respondent's statement: "[T]he court heard evidence and ruled on the contempt issue which was proffered before the court during the trial of the action in the above matter," is incorrect.⁴

By refusing to rule on the appellants multiple motions for contempt beginning in September 2005, when he filed the first motion until the time of trial, the court allowed the *respondent* not the appellant, to deplete the assets of the community, as proven by the canceled checks produced in Mr. Simpson's CR 59/ CR 60 motion. (CP 155 – 185)

⁴ Br. of respondent page 8

Respondent suggests that Mr. Simpson simply did not provide the evidence necessary at trial to persuade the trial court to find Mrs. Simpson in contempt. This suggestion is outrageous. Mr. Simpson was answering questions posed to him by Mr. Morgan and then was attempting to provide his own information to refute the assertions made by his estranged wife. The appellant provided the court multiple instances of the respondent's contempt at the trial. From the record, it is clear that the court forgot about the motions and failed to rule on the same.

1995 Ford Winstar: The appellant testified that this vehicle was sold approximately the time this action was commenced and no payments were made and the respondent sold her the car (RP page 29, line 19 – page 30, line 3 – March 1, 07)

Ford Mustang: The respondent misstates the testimony of the appellant. He did not state at trial that the mustang had been sitting at the property (i.e. home) since this matter began – only the motor home (RP trial page 47, lines 18-23 – March 1, 07). He did testify that someone had taken the heads off the engine and that he was told the heads were at the respondent's daughter's house. (RP trial page 47, line 24 – page 48, line 20 – March 1, 07). Mr. Simpson testified that the respondent and her daughter brought the vehicle to Montesano to get licensed in her name (RP trial page 24, line 10-16 – March 1, 07), and that when he sold this car he had to apply for a lost title because the respondent had possession of the same. (RP trial page 26, line 11-16 – March 1, 07). He also testified that the sale and lost title application occurred approximately six – eight months ago. (page 26, line 17-18 – March 1, 07)

1992 Buick: Mrs. Simpson put this vehicle in her name while it was located at Friendly Auto Sales lot for sale. (RP page 49, lines 4-12; page 26, line 20-22 – March 1, 07) Mr. Simpson testified that the respondent took paperwork on this vehicle from the car lot. (RP page 28, line 6-15 – March 1, 07)

1989 Chevrolet Celebrity: The respondent never cites any authority for the alleged title that Mr. Simpson was to have picked up at the Department of Licensing.⁵ What the appellant testified to at trial is that the respondent had the title in her possession in violation of the court order and transferred the title the day before trial. (RP page 34, line 16- page 35, line 3 – March 1, 07)

Counter Check: the appellant testified that she took \$3,586 from the Friendly Auto Sales (RP page 30, line 25 – page 31, line 13 – March 1, 07)

Additional testimony as to the respondent's contemptuous behavior was as follows: The appellant's paperwork was disappearing and titles to vehicles were showing up in the respondent's mail box. (RP page 22, line 20 – 25 – March 1, 07) Mr. Simpson provided documentation to the court (i.e. titles to vehicles) that had his signature forged. (RP page 24, line 22 – page 25, line 1- March 1, 07) He also testified that some of the vehicles for sale on the lot were missing titles and when he ran the license numbers they came back in Shirley Simpson's name. (RP page 27, 7-13 – March 1, 07) The testimony of the appellant was that his estranged wife had been writing checks using the company account as recent as December 2006, and he provided cancelled checks evidencing this fact. (RP page 35, line 9- 24 – March 1, 07; CP 155-185) The appellant also testified that the respondent was selling vehicles out of the tow yard. (RP page 37, line 10-19 –

⁵ Br of respondent page 10.

March 1, 07) The respondent was also bidding against the appellant for vehicles at auction causing the profit from the business to be greatly diminished. (RP page 37, line 21- page 39, line 4 – March 1, 07)

On direct examination, the respondent admitted taking money from the tow company in violation of the trial court's order. (RP page 60, line 6-11 – March 1, 07) She admitted to forging the appellants name to get money; (RP page 68, line 6-9 – March 1, 07) she admitted to writing herself a check from the towing company for \$3,500.00 *after* the business was closed! (RP 126, line 20-25 – March 1, 07)

Yet at the April 16, 2007 hearing,⁶ the court, when confronted about its failure to rule on the motions for contempt, said that nothing was mentioned about it at trial. (RP page 8, line 2-18 – April 16, 07) The trial court later in that proceeding said that there was no argument on contempt so he did not find her in contempt (RP page 15, line 16-25 – April 16, 07). However, there was substantial testimony at trial about each of the respondent's contemptuous behavior. Consequently, the court's failure to rule on the appellants three motions for contempt was err.

(4). There is no legal basis or theory which obligates the appellant to pay child support for his great grandchildren and to so obligate him was err.

Once again, the respondent quotes a series of facts without citing one reference to the clerk's papers as it regards the issue of child support. Remarkably, the respondent cites cases in its brief regarding child support that justify and support the position of the appellant.

⁶ The record of proceedings from the April 16, 07 hearing was not originally identified in the Clerks Designation of Papers but has been subsequently identified in the appellant's Supplemental Designation of Clerks Papers.

The respondent cites *Ex Rel Gilroy v. Superior Court for King County*, 37 Wn.2d 926, 226 P.2d 882 (1951), in an effort to support her argument that the appellant should be responsible to pay child support for his great grandchildren. However, her reliance on this case is misplaced. In *Gilroy*, an infant child was put up for adoption by its biological mother and but the potential adoptive parents terminated the adoption. The child was returned to the maternity hospital where the child was born. The court held that the doctrine of *in loco parentis* was not applicable. Consequently, the holding of *Gilroy* is clearly not helpful to the respondent but serves to aid the appellant. Additionally, *Gilroy* is easily distinguishable from the case at hand because unlike the *Gilroy* matter, the minor children to this marriage have biological parents for whom orders of child support remain in place.

The respondent has failed to cite one case similar to the matter at hand where an order of child support was entered against a non-custodial individual who at one time was acting *in loco parentis* but who no longer resided with the dependent child(ren). The reason? No such cases exist in this state. The biological parents of Kimberly and Breana have not relinquished their parental rights. (CP 28-32; 118-120; 210-221; 229-285) They remain obligated to pay child support. The duty of support rests on biological parents, and should not and cannot be transferred to distant relatives who have taken a child into their home voluntarily and are temporarily standing in a supervisory capacity to the child. *K. Tegland, 19 Washington Practice, Family Law Practice and Procedure, 21.2 (2007)*

Even the court recognized that appellant's argument that there was probably no legal basis for an obligation to pay child support (RP page 28 18-25 – April 16, 07)

Whether an individual desires to remain a *de facto parent* is irrelevant and has no basis for obligating that individual to pay child support. Indeed to force an individual who has cared for a child to pay child support would have negative social ramifications. Such action would cause a chilling effect on distant relatives and even strangers who out of kindness, have chosen to care for a child while not legally obligated to do so. (RP page 3 – 14 – September 10, 07; *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).

The respondent's references and attempt to tie RCW 26 to the current situation is an incorrect application of the statute. Title 26 is not relevant to this case because Mr. Simpson is not a parent or a step-parent to Kimberly or Breana.

The only possible argument the respondent can make to obligate the appellant to pay child support is based on the doctrine of *in loco parentis*. However, a person standing in the shoes of a parent can abandon that status at any time. Such status is temporary. Regardless of the passage of time, a voluntarily relationship to a child cannot ripen into a quasi-adoption obligating one to pay support. The respondent ignores the firmly established statutes and bodies of case law and instead relies on cases that affirm the position of the appellant. The court erred when obligating Mr. Simpson to pay child support and the respondent should be prohibited from bringing such issue before the superior court again.

(5) An award of attorney's fees to the respondent is not warranted but an award of attorney fees and costs to the appellant is justified.

The appellant respectfully requests that he be awarded reasonable attorneys fees and costs pursuant to RAP 18.1 and further, that the respondent's request for fees be denied.

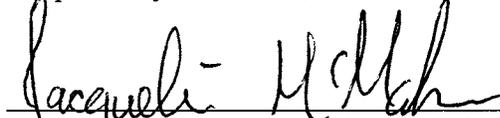
D. CONCLUSION

The trial court's failure to grant Mr. Simpson a continuance, its award of child support to the respondent for his great grandchildren, its failure to rule on Mr. Simpson's three motions for contempt and its division of the parties assets were each an abuse of discretion for the reasons provided herein. For these reasons, this Court should vacate the trial courts division of assets and debts, prohibit the trial court from entering additional orders of child support for the appellant's great grandchildren and find the respondent in contempt for violating its temporary order. At a minimum, this Court should remand this matter to the trial court for a new trial based on appellants CR 60 motion and order the court to rule on the appellant's motions for contempt.

Costs on appeal should be awarded the Petitioner.

DATED this 13th day of June, 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

08 JUN 16 PM 4:35

STATE OF WASHINGTON
BY _____
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 16th day of June, 2008, she placed a true copy of the Appellant's Reply Brief, Supplemental Designation of Clerk's Papers and this Affidavit on file in the above-entitled matter, in an envelope addressed to William E. Morgan and Rebecca Lynne Bernard at the addresses below stated:

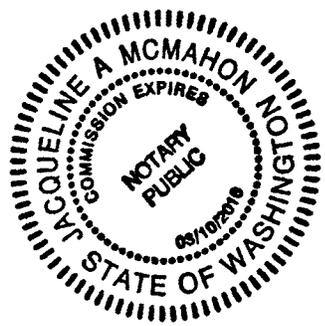
Mr. William E. Morgan
Attorney at Law
407 - 8th Street
Hoquiam, WA 98550

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

1 That she placed and affixed proper postage to the said envelope, sealed the same, and placed it
2 in a receptacle maintained by the United States Post Office for the deposit of letters for mailing
3 in the City of Orting, County of Pierce, State of Washington.
4

5
6 Rhonda Ryan
Rhonda Ryan
7

8
9 SUBSCRIBED AND SWORN to before me this 16th day of June, 2008.



15
16
17
18
19
20
21
22
23
24
25

Jacqueline McMahon
NOTARY PUBLIC in and for the State of
Washington, Residing at Puyallup
My Commission Expires: 3/10/2010
Printed Name: Jacqueline A. McMahon