

FILED

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No. 295745

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

IN RE THE MATTER OF:

TONYA JORGENSON,
Respondent,

and

GEORGE HOUTTEKIER,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FROM SPOKANE COUNTY

THE HONORABLE ANNETTE S. PLESE, Trial Judge

REPLY BRIEF OF APPELLANT

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**REPLY TO
STATEMENT OF THE CASE**

Ms. Jorgenson makes certain representations that are inconsistent with the record. She seems to infer that the status of the parties' checking accounts at the time of separation (June 2008) had some significance in the court's determination of incomes. The court found the parties' incomes at the time of trial (August 2010), at some \$2,700 to Ms. Jorgenson (imputed) and some \$5,000 to Mr. Houttekier. The fact that they each had cash at the time of separation could have had some significance in terms of the court's property division. However, the court's Findings of Fact and Conclusions of Law (which the court itself had prepared (CP 85-91)) clearly indicate that any property of any value (the court ascribed values to personal property having as little value as some \$4,815) were considered. Allegations of cash assets bore no relation then, nor should it now, to the income of the parties.

The court calculated the value of any property of significance and divided the parties' estate equally. The Findings of Fact and

Conclusions of Law (CP 85-90) and specifically Attachment A (CP 91) indicate, in essence, that Ms. Jorgenson received property valued at some \$205,000, which the court, according to its methodology, required her to "pay" Mr. Houttekier some \$102,500. Correspondingly, Mr. Houttekier was awarded property valued at some \$56,715 which required him to "pay" Ms. Jorgenson some \$28,357. The amount owing then, by way of an equalizing judgment, was some \$74,143. The court offset that amount by the \$36,500 of unpaid child support, causing an ultimate judgment in the amount of \$37,624 owing from Ms. Jorgenson to Mr. Houttekier. As the record reflects, the trial court did not ascribe any value to Mr. Houttekier's business, as there was none, nor did it ascribe any value to Ms. Jorgenson's business, as there was none. (CP 91)

ARGUMENT

There is no evidence to sustain the court's offset regarding rental value of the shop.

Mr. Houttekier has assigned error to the court's equating the lost ("community") rent on the parties' rental home with the rental value

"received" by Mr. Houttekier, using the shop adjacent to the rental property. The record shows that the rental home was purchased for \$55,000 in 1999 (CP 86), and the parties subsequently rehabilitated it and rented it for \$500 per month (CP 86). The court awarded said property, with the shop, to Ms. Jorgenson, at a value of \$60,000 (CP 87). Ms. Jorgenson admits there was no direct evidence pertaining to the rental value of the shop (Respondent's Brief, page four), and that "neither party presented an estimate of the actual monetary rental value of a similar storage shed" (Respondent's Brief, page six), but the court "knew" that the shop was 30 x 30 and was used for storage.

Ms. Jorgenson correctly cites *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997), for the proposition that:

[a] court's decision... is based on untenable grounds if the factual findings are unsupported by the record.

Ms. Jorgenson has conceded there is no factual support for the offset, as no one testified to the rental value for the use of a garage, as being

equal to the rental value of a home.

Ms. Jorgenson asserts that valuation findings must simply be within the range of credible evidence pursuant to *Marriage of Sedlock*, 69 Wn. App. 484, 849 P.2d 1243 (1993). Both parties here, however, acknowledge that there was no credible evidence offered which the court could rely upon to determine the rental value of a garage, as there was no "range" given by the parties.

Ms. Jorgenson further cites *Worthington v. Worthington*, 73 Wn.2d 759, 440 P.2d 478 (1968), for the proposition that the ultimate question is whether a final division of property is fair, just, and equitable. In that case, however, the appellate court remanded, finding as follows at 765:

We could agree with the court's reasoning in this case if there was evidence to support it. The trial court's findings are determinative of the factual issues involved only when there is evidence in the record to sustain them. In the instance case, we find no evidence in the record to support the \$50 valuation placed by the court upon the timber lands owned in common by the plaintiff and his brother.

(In that particular case, the court determined that certain lands, held in common with a brother, had lesser value than similar lands owned individually.)

Ms. Jorgenson cites *Marriage of Pilant*, 42 Wn. App. 173, 709 P.2d 1241 (1985), for the proposition that an erroneous valuation does not require reversal of an otherwise fair and equitable division of a sizeable estate. In that case, the court noted that the estate in question was worth between \$546,000 and \$675,000, and that the appellant wife was receiving property worth \$100,000 more than her husband. The actual issue was whether the court could disregard an expert's valuation of a pension, utilizing a standard mortality calculation, which valued the pension at some \$94,500, when the court valued the same at some \$47,000, attributable to the court's determination that a standard mortality table was inappropriate, given the husband's apparent reduced life expectancy. The court then found there was no abuse of discretion, as the court's division was otherwise fair.

Ms. Jorgenson asserts that her mother

provides unreimbursed care for the children (Respondent's Brief, page four). The testimony was simply that her mother "helps me out; taking "my kids" to and from school and is there when needed" (RP 226).

THE COURT ERRED IN ITS FAILURE TO DEVIATE

Mr. Houttekier contends that the court's failure to deviate is manifestly unreasonable based upon untenable grounds, untenable reasons, and based on an incorrect standard.

Ms. Jorgenson states (Respondent's Brief, pages two and three) as follows:

Ms. Jorgenson also provided care for the children "at her business" saving Mr. Houttekier a substantial amount in day care costs. (RP 57) (sic) The court conceded that Mr. Houttekier qualified for a deviation based on the amount of time he had with the children, but denied a deviation based on the savings he received by Ms. Jorgenson watching the children at her business rather than placing them in day care. (CP 61, 80-81)

Mr. Houttekier indicated, in his Brief, that each parent is providing equally for the children, but for the fact that he returns the children Tuesday at 9:00 p.m., rather than returning them

to school Wednesday at 9:00 a.m. Thus, in a two-week period of time, the children are in his care exactly 24 hours less than they are in Ms.

Jorgenson's care. There are no day care costs, as Mr. Houttekier is home when the children are in his care and not in school, while, likewise there are no day care costs for Ms. Jorgenson, as she is home when the children are in her care and not in school.

Mr. Houttekier contends that Ms. Jorgenson has the children in her care for approximately two more waking hours per week than him. There was no testimony as to the "savings" Mr. Houttekier received by virtue of the fact that the children's mother was home when she had her court-ordered residential placement.

The question is, theoretically, can one parent "charge" the other parent for providing for the children during their residential time. No case authority has been found where one parent "charges" the other parent for caring for their children. Ms. Jorgenson did not testify that she had fewer available slots in her home-based day care because her own children were physically

present. To the contrary, she indicated that she considered herself "full" probably half of the time (RP 180), and some days has no children at all (RP 285). Relative to the theoretic savings for caring for her own children during her residential time, Ms. Jorgenson did testify that she has one (day care) child in her day care two days per week, and her charge for that child is \$110 per month (RP 181). Thus, when the court (or Ms. Jorgenson) contends that there has been a substantial savings to Mr. Houttekier, the savings could not, for avoiding day care one morning a week for two hours, be greater than, or even equal to, her charge for a non-biological child in her home two days per week.

Ms. Jorgenson correctly cites *Marriage of Littlefield*, 133 Wn. 2d 39, 46-47, 940 P.2d 1362 (1997) for the proposition that the court's decision is:

[b]ased on untenable grounds if the factual findings are unsupported by the record.

The court assessed child support failing to take into account the following:

1. Ms. Jorgenson had no housing cost

(mortgage/rent on the home owned by the parties and occupied exclusively by her during the pendency of the action). If, for instance, Mr. Houttekier is "charged" for using a garage during the pendency of the action, should Ms. Jorgenson be "charged" for free housing and reduced business overhead by exclusively occupying the parties' home?

2. Ms. Jorgenson waived receipt of \$500 per month on a "community" asset (CP 87);

3. The parties lived across the alley from one another, and they had a virtually co-equal residential schedule (CP 86-87);

4. Mr. Houttekier provided a duplicate household for the children (RP 112);

5. Mr. Houttekier paid the children's medical expense, dental expense, and tutoring expenses without contribution from Ms. Jorgenson (RP 112-114). (Ms. Jorgenson did not provide for the children's medical costs during the pendency of this action as asserted by Ms. Jorgenson in her brief; rather, Mr. Houttekier did. Once Ms. Jorgenson married, Mr. Moholand, a Spokane County Sheriff's Officer, earning approximately \$57,000

per year (Exhibit 103), the children were covered under his medical policy. Medical expenses were paid, exclusively, by Mr. Houttekier.)

Pursuant to RCW 26.19.080(2), health care costs are not included in the economic table. Monthly health care costs shall be shared by the parents in the same proportion as the basic child support obligation. Health care costs shall include, but not be limited to, medical, dental, orthodontia, vision, chiropractic, mental health treatment, prescription medication, other similar costs for care, and treatment.

Tutoring is also considered a special child rearing expense. While Mr. Houttekier proved his expenditure, he received no credit whatsoever.

During the pendency of this action, Mr. Houttekier solely paid the carrying expenses of the parties' property, again, with no consideration of the same. (CP 87)

ATTORNEY FEES

Ms. Jorgenson has requested attorney fees under RCW 26.09.140. This is not a dissolution of

marriage action. Attorney fees to date have not been authorized under the dissolution statute, meretricious/equity relationship cases, *Western Community Bank v. Helmer*, 48 Wn. App. 694, 699, 740 P.2d 359 (1987).

DATED this 12 day of October, 2011.

SALINA, SANGER & GAUPER

By: 

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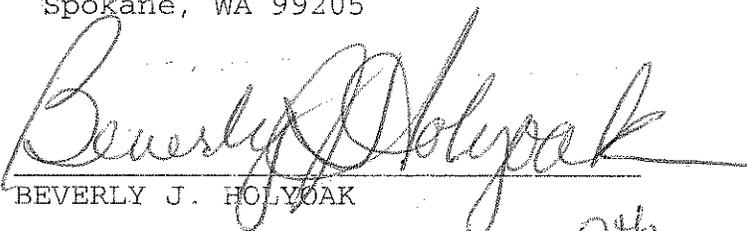
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on the 13 day of October, 2011, she served a copy of the Reply Brief of Appellant to the person hereinafter named at the place of address below which is the last known address via regular U.S. Mail.

ATTORNEY FOR RESPONDENT

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BEVERLY J. HOLYOAK

SUBSCRIBED AND SWORN to before me this 13th day of October, 2011.


NOTARY PUBLIC in and for the
state of Washington, residing at
Spokane County
Commission Expires: 3-7-2014