

No. 295745  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

IN RE THE MATTER OF:

TONYA JORGENSON.

Respondent

and

GEORGE HOUTTEKER,  
Appellant

APPEAL FROM THE SUPERIOR COURT  
FROM SPOKANE COUNTY

---

THE HONORABLE ANNETTE S. PLESE, Trial Judge

---

BRIEF OF APPELLANT

By: Allen M. Gauper  
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## INTRODUCTION

The parties agreed that they were in a meretricious relationship/equity relationship between 1994 and 2008. During the parties' relationship, two children were born, Jade, being born in February of 1997, and Morgan, being born in November of 2002.

During the course of the parties' relationship, four adjacent properties were purchased, one being the family home, which also served as the parties' day care facility at 717 S. Ralph, a home immediately adjacent thereto, the "rental property" at 713 S. Ralph, and upon which the parties subsequently erected a storage garage, a vacant lot immediately across from the rental home/shop, and upon separation, a home subsequently resided in by Mr. Houttekier at 716 . Thor, which is adjacent to the vacant lot and directly across the alley from the (former) family home/day care.

Also during their relationship, Mr. Houttekier started various dial-up internet companies.

The parties also purchased property at Elk, Washington, that was intended on becoming the ultimate family home and site of the day care business. The Elk property was never developed into a home or business site, has been listed for sale, and has substantial mortgage/carrying costs that were funded by Mr. Houttekier throughout the parties' separation.

The parties separated in January, 2008. Ms. Jorgenson filed a paternity action, paternity was established, but the issue of child support was reserved, given the ambiguity of the parties' incomes.

Mr. Houttekier subsequently filed an action to divide property acquired during the parties' equity relationship.

The parties, through mediation, entered into a final Parenting Plan (CP 20-29), doing so in July of 2009. That Plan provided that the children would reside with Ms. Jorgenson on a "primary" basis, while Mr. Houttekier had placement with the children every Tuesday afternoon, from 3:00 until 9:00 p.m., every Wednesday overnight, from Wednesday at 3:00 to

Thursday morning, and on alternating weekends, from Friday afternoon until Monday morning.

Winter vacation was divided equally, spring vacation was divided equally. During the summer, the school schedule continued, with each party's being entitled to take two weeks of vacation. The Plan further provided that, if a parent was unable to care for a child for a period greater than four hours, they would provide the first opportunity to the other parent to care for the children during the other parent's unavailability.

Mr. Houttekier contended that, but for the fact that the children slept at Ms. Jorgenson's home Tuesday overnights (a theoretic period of approximately 12 hours, i.e., the period between bedtime and the resumption of school), the Plan would be exactly co-equal. He did have the children on an overnight basis 10 overnights every 28 days, and, as indicated, four complete afternoon/evenings (every Tuesday), which, if these Tuesdays were extended to an overnight, would be result in an exactly co-equal Parenting Plan. He testified that, on occasion, the children did, by agreement, spend Tuesday

overnights with him. As a result of the parties' Final Order Parenting Plan, Mr. Houttekier contended he provided equally for meeting the children's daily needs.

During the pendency of the action, Ms. Jorgenson resided in the former family home and the site of the day care business, without any mortgage liability thereon, as the parties had previously fully paid off the mortgage. Thus, her housing expenses were minimal. Mr. Houttekier, correspondingly, had mortgage obligation on the home he occupied, at some \$843.03 per month. Further, during the pendency of the action, Ms. Jorgenson waived rent on the parties' rental property, which was some \$500 per month. Mr. Houttekier asked the court to "charge" Ms. Jorgenson with receipt of some \$16,000, attributable to her waiver of rental ("community") income during the pendency of the action.

In conjunction with the determination of child support, Mr. Houttekier asked the court to consider the parties' residential schedule, his "costs" of effectuating the residential schedule, as well as the substantial carrying costs he had

on the parties' Elk property. (During the pendency of the action, the Elk property was listed for sale, no offers had been received, and he had substantial mortgage responsibility on the same.

Ultimately, the court determined that Mr. Houttekier had underpaid child support in the amount of \$36,519. Given the court's award of property, whereby Ms. Jorgenson owed Mr. Houttekier some \$74,143, a judgment was entered against Ms. Jorgenson for \$37,624. The court indicated the judgment was not payable for three years.

During the pendency of this action, Ms. Jorgenson married a Spokane County Sheriff's officer.

#### ASSIGNMENTS OF ERROR

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Since separation, Mr. Houttekier had the sole and exclusive use of the shop for his equipment on the same property as the rental house at 713 S. Ralph. Ms. Jorgenson had sole and exclusive use of the house where her mother resides and subsequently, the court considered this as equalization. (CP 88)

II. Unpaid child support shall be set off against the equalizing judgment payable by Ms. Jorgenson to Mr. Houttekier. Interest shall accrue on the balance at the standard rate. Ms. Jorgenson shall either refinance or pay off the debt to Mr. Houttekier or begin making monthly payments on the amount owed within three years from this opinion.  
(CP 88)

#### JUDGMENT AND ORDER

III. Tonya Jorgenson is awarded back child support against George Houttekier in the amount of \$36,519 for the period from January 1, 2008, to November 30, 2010. This amount shall be used to offset the property equalization payment ordered by the court in paragraph 3.4 below. (CP 93)

IV. The assets and liabilities of the parties shall be allocated as set forth in the attached Exhibit A and Exhibit B. (CP 93)

V. As and for an equalizing award, the defendant shall pay to plaintiff \$74,143, offset by child support underpayment calculated in cause number 07-3-02824-1. (which is 36,519 back support).  
(CP 93)

VI. Tonya Jorgenson shall begin making payments against the judgment within three (3) years of the date of the entry of this Order. The Judgment is a result of the court's Findings of Fact and Conclusions of Law entered herewith, determining a meretricious relationship existed between the parties and the ordered Judgment is a fair and equitable award to the plaintiff. (CP 93)

#### ORDER OF CHILD SUPPORT

VII. Transfer Payment.  
The obligor parent shall pay \$1,224.01 beginning December 2010 (CP 80)

VIII. Standard Calculation.  
Standard calculation January 2008 through February 2009 is \$995.57 (CP 80)

Standard calculation March 2009 through October 2009 is \$1,111.74. (CP 80)

Standard calculation November 2009 and forward is \$1,224.01 (CP 80)

IX. Reasons for Deviation from Standard Calculation

The child support amount ordered in paragraph 3.5 does not deviate from the standard calculation. (CP 80)

X. Reasons why Request for Deviation was Denied.

The obligor sought a deviation based upon the parties' residential schedule, where the children spend ten overnights with him and an additional four evenings, from approximately 3:00 to 9:00. The obligor has "saved" day care costs, therefore, one day a week, i.e., on Wednesday mornings, between the period of time that the children wake up and when they go to school, approximately two hours per week. The eight hours a month, then, when the children would otherwise "require" day care expenses, has created a savings for the father, as the mother does not have outside employment; rather, is at home during the time the children are home. Said request for deviation was denied on that basis. (CP 80)

STATEMENT OF THE CASE

With minor exception, the court's Findings of Fact and Conclusions of Law (CP 85-91) are unchallenged. The salient facts, gleaned from said Findings and Conclusions are as follows: (Finding of Fact 2.5):

1. The parties acquired the 717 S. Ralph property, which ultimately became their residence

and day care, in 1994. (Finding of Fact 2.5) (CP 86)

2. The parties lived in the 717 S. Ralph property continuously since 1995. (Finding of Fact 2.5) (CP 86)

3. The parties acquired the 713 S. Ralph property for \$55,000, made improvements in order to rent the home out. (Finding of Fact 2.5) (CP 86)

4. The 713 S. Ralph property was rented, beginning in 2003, for \$500 per month. (CP 86)

5. Both the 717 and 713 S. Ralph properties were free of any mortgage encumbrance as of January 2005. (Findings of Fact 2.5) (CP 87)

6. The parties built a 30 by 30 shop on 713 S. Ralph in December of 2006 to use for storage. (Findings of Fact 2.5) (CP 87)

7. In May of 2007, the parties purchased the 9611 Bridges Road, Elk, property to house their businesses, and as their primary residence. (CP 87)

8. In May of 2007, the parties purchased the 716 S. Thor property as their new family home, as the Elk property was no long feasible for a

home/business, and in January of 2008, the parties separated, with Mr. Houttekier moving to the 716 S. Thor home, and Ms. Jorgenson residing in the 716 S. Ralph home. (CP 87)

9. Mr. Houttekier paid the monthly mortgage expense and maintained the Elk property during the parties' separation. (CP 87)

10. Notwithstanding the fact that Mr. Houttekier asked that the 713 S. Ralph property be awarded to him at a value of \$70,000, the court awarded the same to Ms. Jorgenson at a value of \$60,000. (CP 87)

11. The Elk property has been listed for sale, and a sale is unlikely. (CP 87)

12. Ms. Jorgenson had not been receiving rent on the 713 S. Ralph property, as her mother (continues) to live in it. (CP 88)

13. The property at 713 S. Ralph was purchased and rehabilitated to make the same available for rent, and rent was initially set at \$550. Subsequently, the parties lowered the rent to \$500 to accommodate Ms. Jorgenson's mother, the then tenant. (RP 51,52)

14. The mortgage on this property had been

fully paid off by December, 2004. (RP 52)

15. Rental charge on the property, as of separation, was \$500 per month. (RP 53)

16. The rental property was purchased at a cost of some \$55,000. (RP 57)

17. The property was assessed, for taxation purposes, at \$101,008. (RP 57) Mr. Houttekier contended he would like to be awarded the property in the action at \$70,000, while Ms. Jorgenson contended it was worth \$60,000. (RP 57)

18. The Elk property was purchased in 2005, with two separate mortgage encumbrances of approximately \$216,532 and \$37,599. (RP 59, 60, 61)

19. The property was to be purchased to move the day care, Ms. Jorgenson's parents, and Mr. Houttekier's business. (RP 61)

20. The same was a joint purchase by the parties. (RP 62)

21. Efforts were made by the parties to start renovating the property, (RP 63) although the property was never utilized or resided in by the parties. (RP 64)

22. Abandoning the idea, the home was placed

on the market in 2006. (RP 65)

23. During the parties' separation, i.e., from January of 2008 through trial in August of 2010, Mr. Houttekier has maintained the property, principally through mortgage payments in the amount in excess of \$70,000. (RP 67)

24. The South Thor property was purchased when the Elk property was determined to not be feasible, with the parties paying \$120,000 in the summer of 2007. (RP 69)

25. Mr. Houttekier had credit card debt of approximately \$17,000 to rehabilitate said property. (RP 71)

26. Prior to the parties' separation, Mr. Houttekier began leasing space for his businesses, and hired a remodeling contractor, who claimed unpaid debt of \$115,000. (RP 108)

27. Mr. Houttekier exercises residential placement Tuesday afternoons from 3:00 until 9:00, every Wednesday overnight to Thursday morning, and alternating weekends from Friday afternoon to Monday morning. (RP 110)

28. Mr. Houttekier testified that, if the children on Tuesdays at 9:00 "spent the night"

rather than being returned to their mother at 9:00, the plan would be exactly co-equal. He did testify, however, that, about half of the time, the parties actually agreed to have the children remain in his home Tuesday overnights (RP 111)

29. Mr. Houttekier provides a duplicate household. (RP 112)

30. During the pendency of the action, Mr. Houttekier paid the children's medical expenses of approximately \$160 per month, dental expenses of approximately \$200 per month, math tutoring of approximately \$800 total, and horseback riding lessons totaling \$2,800. (RP 112, 113, 114)

31. Mr. Houttekier indicated that, during the parties' separation, Ms. Jorgenson had no mortgage obligation, car payment. (RP 118)

32. Ms. Jorgenson married a Mr. Mulholland in October of 2009. (RP 167)

33. Ms. Jorgenson works in the family home/day care from 5:30 in the morning until 5:30 at night. (RP 178, 192, 290)

34. Seven children were enrolled in her facility. (RP 179)

35. Mr. Houttekier stores his work truck in

the shop on the back of the 713 lot. (RP 215)

36. Ms. Jorgenson obtained a loan on the residence/day care in the early part of last year, i.e., apparently 2009, without advising Mr. Houttekier. (RP 222)

37. Ms. Jorgenson is not collecting rent from her mother, although rent was \$500. (RP 224, 225)

38. Ms. Jorgenson admitted that Mr. Houttekier was maintaining the Elk property. (RP 230)

39. The 717 S. Ralph property had no mortgage indebtedness at the time of separation. Ms. Jorgenson, with her then fiancé, now husband, obtained a mortgage on the home/day care in the amount of \$60,000. Twenty thousand dollars thereof was used to buy a car, and some \$30,000 for a hay crop, joint venture with her fiancé/husband to maintain "their" horses and cows. (RP 300, 309, 310, 327, 328) Ms. Jorgenson acknowledges the same was a separate debt. (RP 346)

40. Ms. Jorgenson does not charge her mother rent, although her mother is employed on a full-

time basis. (RP 307, 309)

41. Ms. Jorgenson acknowledges that Mr. Houttekier has been paying all of the costs of the Elk property. (RP 310)

42. Mortgage payments on Elk are \$1,800 per month, that were funded by the "family" prior to separation, and only by Mr. Houttekier post separation. (RP 355)

43. No offers have been made on the Elk property in five years. (RP 369)

44. The Elk property mortgage and miscellaneous maintenance costs totaled approximately \$2,500 per month during the pendency of the action. (RP 370)

#### ARGUMENT

I. THERE WAS NO EVIDENCE TO SUPPORT THE COURT'S FINDING THAT THE RENTAL VALUE OF THE SHOP WAS EQUAL TO THE RENTAL VALUE OF THE HOME.

Evidence was clear and certain that the parties' rental property at 713 S. Ralph had been rehabilitated and rented for some \$500 to \$550 per month. Subsequent to renting the home out, a storage shop was built on the back of the property, where Mr. Houttekier stored business related equipment. Mr. Houttekier sought to

impose the reasonable rental value, waived by Ms. Jorgenson, in the amount of \$500 per month, during the pendency of the action, i.e., January, 2008, through trial of August, 2010, a period of 32 months, for a total of approximately \$16,000. This is akin to a valuation of assets, which is a question of fact. *Clark v. Clark*, 72 Wn.2d 487, 433 P.2d 687 (1967). An appellate court reviews the trial court's Findings of Fact on asset valuation for substantial evidence. *Robblee v. Robblee*, 68 Wn. App. 69, 841 P.2d 1289 (1992). Substantial evidence exists, if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Marriage of Monaghan*, 78 Wn. App. 918, 899 P.2d 841 (1995). Here, there was no evidence presented by any party as to the rental value of a storage garage. This Finding of Fact cannot be sustained, as there is no evidence of the same. The Finding of Fact which is without any support in the record cannot stand. *Worthington v. Worthington*, 73 Wn.2d 759, 765, 440 P.2d 478 (1968).

II. THE COURT ABUSED ITS DISCRETION IN FAILING TO  
DEVIATE FROM THE CHILD SUPPORT STANDARD  
CALCULATION.

The court did construe the parties' Parenting Plan (CP 20-29), which can be independently reviewed by this court. The Parenting Plan, obviously, is based upon a four-week (not month) rotation. Mr. Houttekier has the children overnight Wednesday afternoons to Thursday mornings, and on alternating weekends, from Friday afternoon to Monday morning, for a total of 10 overnights every 28 days. He has the children, additionally, every Tuesday, from after school until 9:00 p.m. Mr. Houttekier is therefore providing for their daily needs during 19 days in any given 28 day period, and, but for the children's being provided breakfast on Wednesday mornings, the maintenance of their daily needs is equal. The court seemed to believe that, since the Parenting Plan is not a 50/50 split, a deviation is not appropriate. (CP 88)

During the pendency of the action, Ms. Jorgenson had the benefit of living in the parties' home, without any mortgage encumbrance, while Mr. Houttekier resided in a residence with

mortgage encumbrance. Ms. Jorgenson could have, and should have, had income of \$500 per month attributable to the rental residence. Mr. Houttekier indicated that he provided a duplicate household for the children, and, additionally, provided additional support for them, by way of payment of medical and dental expense, educational tutoring, and horseback riding lessons. (RP 112-114) Additionally, the court indicated that, since the mother is at her home/the day care Wednesday mornings, and the children do not require day care at that time, this has created a "savings" for the father. (CP 80)

Clearly, the children did not have any day care expense at any time. There was no testimony by any party that there were any third-party day care expenses. The court seemingly believed then that, because a parent is at home when the children are en route to, or from, school, and no day care is thus required, this constitutes a "savings." This is, rather, a parent's right and responsibility to care for a child, if they are at home.

Child support is reviewed for a manifest

abuse of discretion. *Marriage of Booth*, 114 Wn.2d 772, 791 P.2d 519 (1990). The court abuses its discretion if its decision is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In Re Marriage of Fiorito*, 112 Wn. App. 657, 50 P.3d 298 (2002). The court abuses its discretion if a decision is manifestly unreasonable, is based upon untenable grounds, or is based upon untenable reasons. *Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362, (1997). The court allocated child support between separation and trial, based upon three different time periods, due to the fact that one of the children, during the pendency of the action, turned 12, and additionally the child support schedule changed (Child Support Calculation Worksheets, CP 63-77). During the pendency of this action, the court failed to not only properly consider the residential schedule, but also the fact that Mr. Houttekier exclusively bore the costs of the parties' joint debt, i.e., the Elk property mortgage and carrying costs and the disparity of the parties' home mortgage obligations.

As to prospective support, the court seemed to base its decision that a deviation was not appropriate, on the basis that the mother was at home during her residential time, therefore saving the father day care costs. Interestingly, the court did not "charge" the mother with reduced child care expenses, as Mr. Houttekier also was home during his residential placement, and no day care costs were incurred at that time either.

The court, in its Findings of Fact and Conclusions of Law, at 2.5, status of the parties, stated:

The parenting plan is not a 50/50 split.

(CP 88) The court seemingly believed, then, that, absent an exact co-equal schedule, deviation could not be ordered. This is, of course, inconsistent with the law. The court abused its discretion, as the decision is manifestly unreasonable.

The decision is based on untenable grounds, as a court is not required, under RCW 26.19.075(d), that only co-equal plans justify a deviation. The decision is based on untenable reasons, i.e., the absence of day care for a "at-

home" parent.

Here the court applied an incorrect standard, indicating that, in essence, since there was not an absolute co-equal 50/50 plan, deviation was not appropriate. Further, indicating that because a parent is at home, not at work, and there are therefore cost savings, i.e., no day care, the same does not support a deviation. In *Marriage of Kireger and Walker*, 147 Wn. App. 952, 199 P.3d 450 (2009), the court deviated upward, as the father failed to spend any residential time with the father. The court found that said failure to spend time was a basis for a support award above the advisory amount.

Again, Mr. Houttekier has, virtually, an equal amount of time with the children. He testified to his care of the children and his costs of caring for the children. The court applied an incorrect standard, and should have deviated. Additionally, the court can deviate based upon substantial debt, not voluntarily incurred. Here, Mr. Houttekier is "saddled" with the mortgage liability on a joint purchase, i.e., the Elk property, and is forced to carry the same

until sale. The property is not used by the parties, has been listed for sale for multiple years, and has substantial debt. These bases are adequate for the court to properly apply its discretion and provide for a substantial residential deviation credit.

Deviation was appropriate under RCW 26.19.075, income of new spouse, extraordinary debt not voluntarily incurred, and as the children spend a significant amount of time with the parent obligated to make the support transfer payment. Further deviation from the standard support obligation is appropriate when it would be inequitable not to do so. *Marriage of Pollard*, 99 Wn. App. 48, 991 P.2d 1201 (2000).

Additionally, Ms. Jorgenson provided no evidence that there would be insufficient funds in her household, with her husband's income, if the court deviated. *Rusch v. Rusch*, 124 Wn.App. 226, 98 P.3d 1216 (2004).

#### **CONCLUSION**

There was no evidence submitted to the court that the rental value of the garage was equal to

the (waived) rental value of an occupied residence. Reversal is required.

The court abused its discretion in failing to deviate from the child support standard calculation, as its decision was manifestly unreasonable, was based on untenable grounds, and on untenable reasons. Reversal is, likewise, required.

DATED this 20 day of June, 2011.

SALINA, SANGER & GAUPER

By:   
ALLEN M. GAUPER  
WSBA #6884  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

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

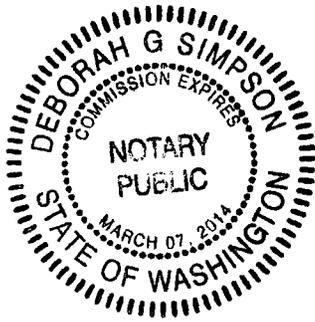
That on the 20 day of June, 2011, she served a copy of the Brief of Appellant to the person hereinafter named at the place of address below which is the last known address via regular U.S. Mail.

**ATTORNEY FOR RESPONDENT**

Robert Cossey  
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902 N. Monroe Street  
Spokane, WA 99205

  
BEVERLY J. HOLYOAK

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup>  
day of June, 2011.





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