

NO. 35051-3-II

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

CHRISTINA PALMERSTON-BOWMAN, Respondent

adv.

DARREL E. BOWMAN, Appellant

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RESPONDENT'S OPENING BRIEF

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ORIGINAL

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I. STATEMENT OF THE CASE

The parties to this appeal were divorced on June 10, 2005. Paragraph 3.3 of their Decree of Dissolution awarded to Christina Palmerston-Bowman the family home and required her to pay the first and second mortgage on the home. CP 11, 24. The Decree provided that if Ms. Bowman's payments on the mortgages became more than sixty (60) days past due in an amount equal or greater than one month's payment, then Ms. Bowman would list the family home for sale. CP 11, 24.

In addition to the home, the Decree awarded Ms. Bowman 100% of Mr. Bowman's interest in his City of University Place deferred compensation 457 account, 100% of his TIAA-CREFF retirement account, and 100% of his PERS 2 retirement account. CP 12, 24. The Decree provides that "The parties shall cooperate in transferring or rolling the account balance to the wife through the use of a Qualified Domestic Relations Order or other document that may be necessary to complete the transfer of interest". CP 12, 24.

The City of UP 457 account and the TIAA-CREFF account had to be transferred by QDRO's. The PERS 2 account was to be transferred by a Supplemental Decree. CP 12, 24. Ms. Bowman understood that her attorney would prepare the Supplemental Decree to transfer the PERS 2

account, and that Mr. Bowman's attorney would prepare the QDROs to transfer the City of UP 457 account and the TIAA-CREFF account. CP 24. Ms. Bowman's counsel prepared the Supplemental Decree for the PERS 2 account and the same was entered with the court on June 10, 2006. CP 15-16, 24-25. Ms. Bowman never received the QDRO's from Mr. Bowman for the transfer of the other two retirement accounts awarded to her. CP 25; RP 5.

At the time of the entry of the Decree, Ms. Bowman's income was barely sufficient to meet the needs of herself and her children. To meet her expenses, Ms. Bowman planned to cash in some of the retirement funds that the court awarded her. CP 25, RP 6. Without the QDROs to transfer the City of UP 457 account and the TIAA-CREFF account, Ms. Bowman did not have access to these funds. As a result, she had some financial difficulty shortly after the Decree was entered. CP 25.

The first mortgage on the family home was due on the 1st day of each month. A review of transaction history for the 1st mortgage shows that on one occasion shortly after the entry of the Decree, Ms. Bowman's payment became 62 days past due. More specifically, the payment due August 1, 2005, was paid on September 1 and posted on September 6, 2005. The payment due September 1, 2005 was not paid until November 2, 2005, and not posted until November 3, 2005. CP 25-26, 30-34.

Ms. Bowman paid all other past due payments before they became more than 60 days past due. She paid an extra \$700 on the account in November 2005. CP 26. Thereafter, the payments remained approximately 30 days late until March 2006, when Ms. Bowman made two payments of \$1,200 each, bringing the account current. The April 1 payment was posted April 4, 2006. The May payment was posted on May 2, 2006. Thereafter, the payments on the first mortgage remained current. Ms. Bowman always paid the 2nd mortgage on time. CP 26, 30-36.

The parties have two sons, who were ages 17 and 15 at the time of the dissolution. The Order of Child Support provided in paragraph 3.18 that Mr. Bowman was required to provide health insurance for the children; however, health insurance was less expensive through Mrs. Bowman's employment. CP 26. Thus, upon Mr. Bowman's promise to promptly reimburse Mrs. Bowman each month, Mrs. Bowman agreed to obtain health insurance through her employment. The cost of the insurance was approximately \$222 per month at the time of the Decree. CP 26.

Mr. Bowman did not timely pay the insurance reimbursements due September 30 and October 31. In fact, these payments were not made until November 16, 2005. CP 26; RP 7. Mr. Bowman's failure to timely make these payments caused Mrs. Bowman to have a financial shortage

right after the entry of the Decree and delayed her payments on the first mortgage. CP 27.

Mr. Bowman received a deviation in his standard child support obligation from \$900 per month to \$520 per month because “The children reside equally with both of the parents.” CP 27. In fact, after the dissolution, the parties oldest son, Stephen did not reside equally with both parents. Because of Mr. Bowman’s hostile and intimidating attitude and physical behavior towards the parties oldest son, Stephen, saw his father only a couple of days each month after July of 2005. He rarely spent the night with Mr. Bowman. Mr. Bowman took away Stephen’s keys to his house and told Stephen he was not welcome there unless Mr. Bowman was home. CP 27. Mrs. Bowman asked Mr. Bowman about adjusting support because Stephen is never in his home, but Mr. Bowman told Mrs. Bowman that she would have to take him to court. CP 28.

On May 19, 2006, Mr. Bowman filed a motion with the court requesting that the court require Mrs. Bowman to list the home for sale because the September 2005 payment was 62 days past due. CP 18-20. In response, Ms. Bowman acknowledged that the September 2005 payment went 62 days past due; she asserted, however, that the late payments were caused by Mr. Bowman’s failure to reimburse her for health insurance and his failure to provide her with the QDROs necessary to transfer the

retirement accounts. Ms. Bowman had anticipated using that money to help pay her obligations, including the mortgages on her home. CP 24-27; RP 7.

Mr. Bowman claimed that he was ready to transfer the retirement funds to the Mrs. Bowman, but that she has failed to provide him with an IRA or other retirement account number into which to the retirement funds can be transferred. CP 19. Mr. Bowman, however, never provided Mrs. Bowman with the necessary QDROs. Mrs. Bowman did not have the money to pay her attorney to prepared the required QDROs, which Mr. Bowman was to have done after the decree of dissolution was entered. CP 19. On the morning of the hearing on Mr. Bowman's motion to enforce the decree, his counsel provided Mrs. Bowman's counsel with a copy of the QDRO with respect to one of the accounts. RP 3.

The court denied Mr. Bowman's motion to enforce the decree. CP 39. The court instead required Mr. Bowman to have the second QDRO order prepared and to Mrs. Bowman for review within thirty days. RP 11; CP 40. In so ruling, the court stated: "I'm taking into consideration all of the circumstances surrounding what happened in this situation." RP 11. Mr. Bowman appealed.

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II. ARGUMENT

A. THE TRIAL COURT WAS REQUIRED TO “DO EQUITY” AND THEREFORE IT PROPERLY DENIED MR. BOWMAN’S MOTION SEEKING TO REQUIRE MRS. BOWMAN TO SELL HER HOME BECAUSE MR. BOWMAN FAILED TO MEET HIS OWN OBLIGATIONS

A trial court is required to “do equity” in a dissolution proceeding. *Marriage of Marshall*, 86 Wn. App. 878, 881, 940 P.2d 283 (1997); *Miracle v. Miracle*, 101 Wn. App. 2d 137, 139, 675 P.2d 1229 (1984); RCW 26.09.080. The power of equity has been construed “as broad as equity and justice require.” *Agronic Corp. v. deBough*, 21 Wn. App. 459, 463-464, 585 P.2d 821 (1978) (quoting 27 Am. Jur.2d Equity § 103 (1966)). “[A] court of equity has power not only to decree, but to enforce its decrees in its own way, in the absence of a definite procedure.” *Marriage of Crossland*, 49 Wn. App. 874, 877, 746 P.2d 842 (1987)(quoting *State ex rel Martin v. Superior Court for King Cy.*, 101 Wash. 81, 84, 172 P.257, 4 A.L.R. 572 (1918)). An appellate court reviews a trial court’s decision whether or not to grant equitable relief only for an abuse of discretion. *Rabey v. Dept. of Labor & Indus.*, 101 Wn. App. 390, 396, 3 P.3d 217 (2000).

Here, the trial court properly took into consideration all the circumstances that caused Mrs. Bowman to be 62 days late in making one of her mortgage payments. Those circumstances included Mr. Bowman’s

failure to timely reimburse her for health insurance costs for the parties' children for the months of September and October of 2005 , and his failure to provide the QDROs for his two retirement accounts. Under such circumstances, it would be inequitable and unjust to require Mrs. Bowman to sell her home based upon the fact that one mortgage payment was posted two days late.

Although Mr. Bowman claims that his credit has been damaged, it is Mr. Bowman's own conduct that substantially contributed to Mrs. Bowman being in the difficult financial situation where she could not make her mortgage payment in a timely manner. Because Mr. Bowman does not have clean hands, the trial court properly exercised its discretion in denying to him the equitable relief that he requested.

Contrary to Mr. Bowman's argument, the trial court did not modify the property division in violation of RCW 26.09.170(1). By denying Mr. Bowman's motion for an order requiring Mrs. Bowman to sell her home, the trial court did increase or alter the amount or character of property awarded to Mrs. Bowman. Nor did it decrease or alter the amount or character of property awarded to Mr. Bowman.

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B. MR. BOWMAN HAS NOT SHOWN THAT THE TRIAL COURT WAS BIASED AGAINST HIM

The appearance of fairness doctrine will not be applied to overturn the decision of a trial court unless there is “evidence of a judge’s . . . actual or potential bias.” *State v. Carter*, 77 Wn. App. 8, 11, 888 P.2d 1230 (1995). Here, there is no evidence that the trial court was biased *against* Mr. Bowman. The mere fact that the judge made a comment that she herself had experienced the situation where a loan payment does not get posted immediately does not demonstrate bias *against* Mr. Bowman. In fact, it was completely irrelevant to the court’s decision because Mrs. Bowman fully acknowledged that her payment was two days late.

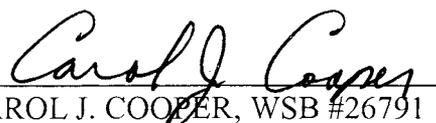
The trial court properly took into consideration “all the circumstances.” RP 11. All the circumstances demonstrated that there were reasonable grounds in equity to deny Mr. Bowman’s motion. Mr. Bowman himself had not complied with the Order of Child Support requiring him to pay for the health insurance. Nor had Mr. Bowman provided the QDRO’s necessary to transfer his retirement accounts to Mrs. Bowman. If he had done these things, Mrs. Bowman would have had access to sufficient funds to meet her obligations. Because Mr. Bowman substantially contributed to Mrs. Bowman’s inability to timely make her

mortgage payments, the trial court properly exercised its discretion to deny Mr. Bowman's motion.

III. CONCLUSION

For the foregoing reasons, Mrs. Bowman respectfully requests that this Court affirm the trial court's decision denying Mr. Bowman's motion for an order requiring Mrs. Bowman to sell her home. As a court of equity, the trial court was required to "do equity." The trial court considered "all the circumstances" and properly concluded that it would not be equitable to require Mrs. Bowman to sell her home. In doing so, the trial court did not demonstrate any bias against Mr. Bowman.

DATED this 13th day of February, 2007.


CAROL J. COOPER, WSB #26791
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CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of February, 2006, I caused a copy of the original of **Respondent's Opening Brief** to be delivered to the below listed at their respective addresses:

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Signed at Tacoma, Washington on February 14, 2007.



SARAH TICHY
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STATE OF WASHINGTON
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