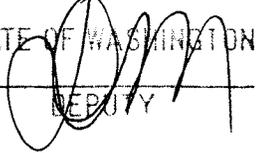


FILED
COURT OF APPEALS
DIVISION II

08 MAY 16 PM 12:15

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

BRIEF OF RESPONDENT, SHIRLEY SIMPSON

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P.M. 5/15/2008

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I. STATEMENT OF CASE

At the time of trial Appellant and Respondent had been married forty-eight years. At the time of filing the dissolution the parties owned and operated three businesses, a used car lot and two towing companies. The parties were purchasing a residence and six rental properties. While the matter was pending trial, Appellant brought two motions for contempt of court alleging that the Respondent was not obeying the original temporary orders issued by the court. This was denied by the Respondent. The court ordered that the evidence concerning the contempt would be heard at the same time as the trial of the marriage.

The Appellant commenced this action for dissolution of marriage pro se. Shortly after the matter was at issue, he hired an attorney. The attorney later withdrew. Appellant continued on with the lawsuit representing himself pro se. The trial had been continued three previous times. Once after his lawyer had withdrawn and on two other occasions. On the day set for trial, Appellant appeared in court and requested another continuance on the grounds that he felt he needed an attorney. Upon questioning, he had not looked for an attorney until the week prior to the date set for the trial. Although he claimed that he was financially unable to hire a lawyer, he provided no proof of his income or financial situation and inability to hire a lawyer.

The parties had one adopted son, who was graduating from high

school shortly after the trial. In addition, Respondent had obtained third party custody of the parties' two great-grandchildren shortly after their birth and they had been cared for by Appellant and Respondent since shortly after their birth and were now 10 and 13 years of age. Both Respondent and Appellant filed parenting plans asking for placement of the children with them.

During the course of the trial evidence was presented regarding the value of the parties' real properties, the mortgage amounts and the parties' debts. Appellant, how operated the businesses of the parties was unable to come up with any substantial income figures or amounts during the course of the trial.

II. ISSUES

A. The trial court did not err when it denied Appellant's motion to continue the trial date on the morning of trial when the trial had been continued several times and Appellant's motion for continuance was not supported by declarations or affidavits of good cause.

B. The trial court did not abuse its discretion in the award of property and liabilities to the parties.

C. The court did take into consideration Respondent's motion for contempt and heard evidence concerning contempt motions.

D. That the trial court did not err in finding the Appellant legally responsible for payment of child support.

E. Reasonable attorney fees of the defense of this action should be

awarded to Respondent.

III. ARGUMENT

A. Appellant commenced this action for dissolution of marriage July 21, 2005 when he filed a petition for dissolution of marriage pro se (CP2). In September, Appellant retained an attorney to represent him after Respondent had filed their response (CP12). On May 6, 2006 Appellant's attorney withdrew (CP42). Shortly thereafter the trial date of June 22, 2006 was stricken (CP43). The matter was reset for October 5, 2006 (CP44). That trial date was bumped and on November 15, 2006 the trial was again reset to March 1, 2007 (CP46). Without notice on the morning of trial, Appellant made an oral motion to continue the trial date because he did not have an attorney to represent him (RP page 1, line5). He claimed to have talked to an attorney a week before the court who wanted \$5,000.00, but that he didn't have the cash. Respondent objected to any continuance on the grounds that the Respondent felt that Mr. Simpson was dissipating assets of the community (RP page 5, line 3)(RP page 7, line 5).

Continuances in the present case are governed by Civil Rules for Superior Court. CR40(5)(e) provides that a motion to continue a trial on the grounds of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained and due diligence has been used to procure it. . . CR40(5)(d) provides the court shall not grant a continuance unless good cause is shown for a continuance.

A party does not have an absolute right to a continuance. In the granting or denial of a motion for continuance is reversible error only if the ruling was a manifest abuse of discretion. Willapa Trading Company Inc. v. Muscanto, Inc., 45 Wn.App 779, 785, 727 P.2d 687 (1986) The court abuses its discretion where the discretion was manifestly unreasonable based on untenable grounds or for untenable reasons. Morman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). In Balandzich v. Demeroto, 10 Wn.App 718, 720, 519 P.2d 994 (1974) the court discussed some of the factors bearing upon the decision:

In exercising its discretion, the trial court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudices 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 Turner v. Kohler, 54 Wn.App 688, 693, 775 P.2d 474 (1989) the appellate court sustained the trial court's denial of a motion for continuance where the requesting party did not offer a good reason for a delay in obtaining the desired evidence or did not state what evidence would be established through the additional discovery and the desired evidence would not raise a genuine issue of fact. The court further stated that "the trial court's grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of discretion. See Lewis v. Bell, 45 Wn.App 192, 196, 724

P.2d 425 (1986).

The Respondent objected to a continuance on the grounds that assets were beginning to dissipate which was even admitted by Mr. Simpson that he had closed 2 towing businesses three months prior to the trial date. (RP page 17, line 17-24) and had fired a salesman that had worked for him for 23 or 24 years (RP page 55, lines 10-12) and leased out a portion of his car lot to his daughter.

Here the court had ample reason to deny Appellant's last minute motion for a continuance. The reasons for the continuance were not set forth by affidavit or with notice, nor did Appellant's remarks indicate that he acted with diligence in attempting to get an attorney or any of the requested information that he declared he did not have.

B. The disposition of property and liabilities in a dissolution action is governed by RCW 26.09.080 which provides:

In a proceeding for dissolution of marriage . . . the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

1. The nature and extent of the community property;
2. The nature and extent of the separate property;
3. The duration of the marriage; and
4. The economic circumstances of each

spouse at the time the division of the property is to become effective, including the desirability of awarding the family home or the right to live there for reasonable periods to a spouse with whom the children reside the majority of the time.

In awarding the property in the present case, the trial judge took into effect Respondent's medical situation and the fact that she may never get another job and the fact that Appellant, in spite of his age, was continuing to work, together with the inequality of the social security benefits of the parties. (RP page 155, lines 1-14)

Before the court was the Appellant, who three months prior to the trial, had closed down two successful towing businesses. (RP page 17, lines 8-23). He had been transferring titles of vehicles into an alias. (RP page 47, lines 8-22) He fired his main salesman of twenty four years. (RP page 55, lines 5-11). He leased out a portion of his business to his daughter and placed one of the tow trucks in her name without consideration. (RP page 55, lines 11-18). When asked what his gross sales were for 2006, his answer was "not a clue". (RP page 57, lines 9-12) When asked how much money he made in 2006 his answer was "don't have a clue". (RP page 57, lines 19-22) He had not filed income tax returns for the two years that the dissolution action was pending. (RP page 73, lines 10-23).

Evidence of the income of the business did come in through the direct

testimony of the Respondent. She testified that the best year they had was 1991 when they made over half a million dollars. (RP page 108, lines 10-15) The total gross sales for 2006 were \$367,728.21. (RP page 109, lines 3-5) She further testified that December was one of their slowest months, but that in the preceding December, Mr. Simpson had sold ten cars for a total gross sales of \$16,070.00 and that the cost of those vehicles was \$7,415.00, leaving him with a gross profit of \$9,455.00. (RP page 109, lines 15-25) The Respondent did not agree with Appellant that the inventory had a value at cost of \$57,000.00 because she thought it was valued at a higher amount and that he had cars hidden, including between 75 and 100 cars, buses, boats and trucks parked at the family residence. (RP page 118, lines 15-25) The court had before it, the income from the rental homes, (RP page 79, lines 4-10) which was uncontroverted by Appellant. Appellant agreed with Respondent's opinion as to the value of the "car lot", family home and the and the rentals. (RP page 19, lines 5-20). Appellant agreed with the mortgage balances owing on the rentals and the home. (RP page 21, lines 1-7)

It is obvious from the testimony that Appellant was playing fast and loose with a major portion of the assets of the community. This may properly be considered by the court in making an equitable division of property in the dissolution proceeding. In Re Marriage of Nicholson, 17 Wn.App 110, 561 P.2d 1116 (1977)

In addition, the physical condition of the parties may be properly considered by the court in dividing property in a divorce action. Shay v. Shay, 33 Wn.2d 408, 205 P.2d 901 (1949) Here the court found that in spite of his age, Mr. Simpson was able to work and earn a considerable income while Mrs. Simpson was unable to work and was in poor health.

In effectuating RCW 26.09.080 the court in In Re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999) stated as follows:

The statute's non-exclusive list of factors for consideration by the trial court include the nature and the extent of the community property, the nature and extent of the separate property, the duration of the marriage, and the resulting economic circumstances of each spouse when the property is divided. (Citations Omitted) A fair and equitable division by a trial 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.

C. The court in determining contempt stated at the commencement of the trial to Appellant that he would take evidence of the contempt issue at the same time as he heard the evidence for the trial. (RP page 11, line 1-4).

The 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. The Appellant filed a motion for an order to show cause to have the Respondent show cause why she had not "obeyed any of the court's order issued September 26, 2005" (CP 47). Respondent filed an affidavit denying any violation of the order of September 26, 2005. The court entered an order

on February 5, 2007 that the contempt matter would be held at the same time as the trial for the dissolution. (CP 53) The Appellant's declaration and his motion for an order to show cause indicated only the Respondent had not obeyed any portion of the court order of September 26th. In part, the order of the 26th was alleged to have been disobeyed by the Respondent not paying any debts owing to the Department of Revenue, which were owing in September, 2005 and Respondent was ordered to give Appellant a \$5,000.00 check which had been issued by his daughter, that Respondent was to produce the titles for the automobiles in the business that were in her possession. That she was not to come on to the premises of the used car lot, Friendly Auto Sales, or take checks from the business and was to make an accounting of rents she collected and that upon request she would provide a monthly accounting from the towing company.

The trial judge advised Mr. Simpson, prior to the start of the trial, he would take evidence on the contempt issue at the same time as the trial (RP page 11, lines 2-4) (RP page 14, line 6-15). Mr. Simpson proffered testimony that he thought his wife had placed the parties' motor home in her sister's name, but that he had gotten the paper work and transferred it back into his alias by forging his sister-in-law's name. (RP page 23, line 6-11) The same procedure was done for a Ford Mustang race car. (RP page 24, lines 12-18). Neither of these vehicles had ever left the premises. (RP page 25, lines 6, 7) Under cross examination, Mr. Simpson admitted that the motor home title

was transferred to his sister-in-law in 2004 prior to the filing of the petition for dissolution of marriage. (RP page 47, lines 6-8) The next vehicle that he complained about is a 1995 Ford Windstar, which he testified to that they had sold to their granddaughter approximately two and a half years before the trial, which of course, would have preceded the filing of the dissolution action. (RP page 28, lines 16-25) (RP page 29, lines 17-25).

The next item was a counter check for \$3,586.00. Mr. Simpson said that he didn't know what happened to it, that it came into the tow yard, but he didn't know where it went. There is no evidence to indicate that the Respondent had taken the money. Mr. Simpson was unable to tell the court any more about the check other than it went through the towing company bank account. (RP page 31, lines 4-19)

The next item complained about by Mr. Simpson was that he had sold a 1989 Chevrolet Celebrity about a month prior to the trial. He was unable to find the title. He then testified that he picked up the title that morning. He picked it up from the Department of Licensing, which would indicate that the Respondent did not have possession of the title. On cross examination he admitted that the Mustang automobile and motor home had been sitting at his residence since the action had begun, (RP page 47, lines 21-24) also the Buick that Respondent had put into her name had never left his used car lot, and as a matter of fact, he had sold it, including the 1989 Chevrolet Celebrity. (RP page 48, lines 1-25, page 49 lines 1-23)

Mr. Simpson then called the Respondent to the stand and questioned her about the money that was taken on counter checks. Mrs. Simpson's answer was that she had paid wages to one of the employees and that Appellant had drawn out money, apparently to buy inventory at the car auction. (RP page 59, lines 17-25). In addition, she testified that she paid insurance. When Mrs. Simpson testified, she testified that she did have the \$3,500.00 left over from the tow yard business, that she had been in charge of. She had paid \$1,500.00 to an employee and still had \$2,000.00 in her possession. It was her desire to use that money to pay the business debts. (RP page 127, lines 1-25).

At the close of the case, Mr. Simpson did not make an argument. (RP page 142, lines 21-22).

When the trial judge rendered his opinion, he made the following statement:

I feel like I have been fed a full meal, but I am still hungry. There is a lot I didn't know here. In fact, most of it is a mystery. It looks a bit like Mr. Simpson has in his terms, wiped out his businesses, and now he wants to wipe out the rentals which are her income.

(RP page 150, lines 18-25).

Of all the issues raised by Appellant in his action for contempt against the Respondent, the judge only referred to the \$3,000 check. The judge stated that Mrs. Simpson did not end up with any more than \$2,000.00 of it and that she had the balance of the money and that balance should be applied to the

business debts. (RP page 154, lines 1-7).

Contempt of court is defined in RCW 7.21.010(1)(b) as disobedience of any lawful judgment, decree, order or process of the court. RCW 7.21.030 provides that if the court finds that a person has failed or refused to perform an act, the court may find the person in contempt and impose remedial sanctions. However, the determination of whether or not contempt has been committed is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. In Re Marriage of Matthews, 71 Wn.App 116, 126, 853 P.2d 462, review denied 122 Wn.2d 1021, 863 P.2d 1353 (1993).

Here Appellant's proof of contempt was incomplete, rambling and completely ineffective. The court took all of Appellant's testimony into consideration and obviously was unable to make a determination that the Respondent had committed a violation of the court's order.

D. At the time of the filing of the decree of dissolution in this matter, Appellant and Respondent had three children living with them; a 19 year old senior in high school who graduated shortly after the trial in this matter and is not a factor in this action, and two great-grandchildren who had been living with the parties since shortly after their birth, and were at the time of the trial ages 10 and 13.

Respondent had obtained custody of the children pursuant to a third

party custody action in Grays Harbor County Superior Court. Appellant did not take part in the third party custody (RP page 98, lines 7-12). The trial court found that Appellant had approved and supported the Respondent in obtaining the third party custody orders and that the Appellant and the Respondent had been the sole support of the children since birth and the biological parents had little or no contact with the children and the parties acted jointly as the defacto parents of the children since their birth. (Findings of Fact, page 5, lines 6-7).

Appellant in his petition for dissolution of marriage submitted a parenting plan asking for custody of the children. During the course of the trial, he did not disclaim the children, but advocated that he approved the parenting plan submitted by Respondent and wished to have enforceable parenting rights to the great-grandchildren.

Washington court have long recognized that individuals who are not biologically nor legally related to children whom they "parent" may nevertheless be considered a child's psychological parent. Washington has adopted various forms of theories of *in loco parentis* and *defecto parenthood*. In Ex Rel Gilroy v. Superior Court for King County, 37 Wn.2d 926, 226 P.2d 882 (1951).

In Gilroy, supra at 753, it was stated that the determination of whether a parent is a parent or a guardian as those terms are used will depend on the particular facts and circumstances of the case. They also adopted the

definition of a person *in loco parentis* as “one who means to put himself in the situation of a lawful parent to the child with respect to the office and duty of making provision for it; one assuming the parental character and discharging parental duties; a person standing *in loco parentis* to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption. Gilroy, supra at 753.

In In Re: Montell, 54 Wn.App 708, 775 P.2d 976 (1989) the Court of Appeals applied common law principals holding that a step-father did not stand *in loco parentis* to his step children because he never intended to have the children reside with him permanently and did not intend to take on the responsibility of a custodial step-parent.

Taylor v. Taylor, 58 Wn.2d 510, 513, 364 P.2d 44 (1961) held that at common law, the status of one standing *in loco parentis* is voluntary and temporary and may be abrogated at will by either the person standing *in loco parentis* or by the child. Nor is a step-parent obligated to pay to support a step-child after petition for dissolution of marriage has been filed. RCW 26.16.205.

In the present case, however, the great-grandchildren cared for by Respondent under third party custody action were supported and raised by Appellant with little or no input at all from the biological parents of the children. When the divorce was filed by Appellant, he wished to continue in

his status as a *defecto parent* by filing a parenting plan and asking for custody. Throughout the trial, it was his desire to have visitation with the children and agreed to Respondent's proposed parenting plan which included an enforceable right to visitation and other enforceable rights. The relationship of *defecto parent* or *in loco parentis* did not cease by reason of the dissolution and Appellant asked for and was granted enforceable parental rights. This continues the *defecto parental* relationship and as such should subject Appellant to an obligation for child support.

E. Pursuant to RAP 18.1 Respondent requests reasonable attorney fees to be paid to her by Appellant in the above matter. RCW 26.09.140 provides as follows:

The court from time to time after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the Appellate Court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal in attorney fees in addition to statutory costs.

IV. CONCLUSION

Appellants appeal should be denied. He complains that a continuance should have been granted in order to allow him to hire an attorney. However, he waited a substantial period of time before he made the request. The trial had been continued three times. He did not request a continuance until the day of the trial. He presented no evidence by declaration or affidavit regarding his financial inability to hire a lawyer and the request was made over the objection of the Respondent who complained that Appellant was dissipating assets and had three months prior to the trial closed two of the businesses and had given away or sold the assets of those businesses.

The court did not err in its distribution of the property. It only distributed the property which was before it in evidence. There was no property alleged by the Appellant that was owned by the parties that was not distributed in the decree. The court took into account the Respondent's age, health, income and the fact that she would be raising the children. It also took into account, in spite of Appellant's age, that he was still working and earning money and probably would be for some time in the future, together with his greater amount of social security.

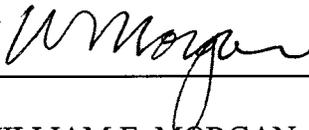
The court did not err when it did not find the Respondent in contempt. Although the Appellant made many accusations, he was considerably short on evidence that the Respondent had violated any of the court orders. He complained about transfers of titles that took place prior to not only to the

issuance of the order, but to the filing of the dissolution action. Respondent did testify that she had one check for \$3,000.00, but had paid an employee wages from it and still had the balance. The court took this into consideration and ordered that the balance of the money she was holding be applied to the business debts.

The court did not err when it ordered the Appellant to pay child support for the great-grandchildren that they were raising and had been raising since shortly after their birth when both Appellant and Respondent were the only people who had cared for the children their entire lives, there were no other available persons to act as their parents or care for the children and where the Appellant actively sought enforceable parental rights through a parenting plan in the dissolution proceeding.

Finally, the court should award Respondent reasonable attorney fees incurred in the defense of this action based upon her income, health and the obligations that she has assumed.

Respectfully submitted:



WILLIAM E. MORGAN, WSBA #4529

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SHIRLEY SIMPSON

Respondent

DECLARATION OF MAILING

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WILLIAM E. MORGAN declares as follows:

That I am a citizen of the United States of America and of the State of Washington, living and residing in Grays Harbor County, in said State; that I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein; that on May 15, 2008 declarant deposited in the United States mail a properly stamped and addressed envelope, postage prepaid, regular/certified mail directed to:

Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Jacqueline McMahon
Attorney at Law
PO Box 1569
Orting, WA 98360

said envelope containing: Brief of Respondent and Declaration of Mailing

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Hoquiam, Washington on May 15, 2008



WILLIAM E. MORGAN