

FILED

SEP 06 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 295745

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STATE OF WASHINGTON

In re the Matter of:

TONYA JORGENSON, Respondent

and

GEORGE HOUTTEKIER, Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE ANNETTE S. PLESE

BRIEF OF RESPONDENT

Robert Cossey
Attorney for Respondent
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I
STATEMENT OF THE CASE

Prior to trial, both parties stipulated that a meretricious relationship existed and that division by the court of the property acquired during that relationship was appropriate. (CP 53). Trial was held before the Honorable Judge Annette Plese on August 12, 17, and 18, 2010. (RP 1-447). The trial court did not render an oral decision but took the matter under advisement and filed the Court's Opinion on September 7, 2010. (CP 51-62). Based on the Court's Opinion, an Order of Child Support was filed on November 23, 2010 and Findings of Fact & Conclusions of Law were filed on December 6, 2010. (CP 78-84, 85-91). This appeal followed.

Mr. Houttekier raises two issues on appeal – first, that the trial court erred in valuation of his exclusive use of the shed located at the 713 S. Ralph property and second, that the trial court erred in failing to deviate from the standard child support calculation. (Brief of Appellant 21-22). During the trial it was established by both parties that the house located at 713 S. Ralph had a rental value of around \$500 per month. (RP 53, 225). Ms. Jorgenson's mother was living at the address but Ms. Jorgenson did not collect rent from her after she separated from Mr. Houttekier. (RP 224-225). A shop is also located on the 713 S. Ralph property. (RP 215).

The electricity for this shop was paid by Ms. Jorgenson's mother. (RP 215). Since separation of the parties, Ms. Jorgenson had no access to the shop located on the 713 S. Ralph property and Mr. Houttekier had the sole and exclusive use of that shop. (RP 215). The shop was described as housing Mr. Houttekier's work truck and presumably his tools. (RP 215). No testimony was provided that Mr. Houttekier paid for the use of this shop since the date of separation. (RP 1-447).

Mr. Houttekier does not argue that the court erred in determining the monthly net incomes of the parties, instead he only argues that denial of a deviation was in error and the decision of the trial court to deny a deviation was based on untenable grounds. (Brief of Appellant 22). The court determined that Mr. Houttekier made approximately twice the amount in monthly net income as Ms. Jorgenson. (CP 61, 79-80). The court also stated that Ms. Jorgenson received only \$372 in her business account while Mr. Houttekier had over \$100,000 in his business account. (RP 57). Ms. Jorgenson also provided care for the children "at her business" saving Mr. Houttekier a substantial amount in daycare costs. (RP 57). 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 daycare. (CP 61, 80-81).

It should be noted that the court found that the property located in Elk, Washington was purchased by the parties during their relationship with the intent they would one day reside and work there. (RP 87).

II ARGUMENT

RESPONSE TO APPELLANT’S ASSIGNMENT OF ERROR NO. 1

Property in a meretricious relationship must be distributed by the court in a “just and equitable” manner. In re Marriage of Lindsey, 101 Wn.2d 299, 304, 678 P.2d 328 (1984). A trial court’s discretion in the distribution of property is “wide, and will not be interfered with except for a manifest abuse of such discretion.” Id. at 307. A party who challenges a decision must demonstrate that the trial court manifestly abused its discretion. In re Marriage of Griffen, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). A manifest abuse of discretion occurs when the court bases its decision on untenable grounds. In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

Substantial evidence existed in this case to support the trial court’s Findings of Fact related to the determination that the rental value as a

community asset of the 713 S. Ralph property was offset by the husband's sole and exclusive use of the shed affixed to this property. Although no direct evidence was presented stating a specific rental value for the shed, the evidence that was presented was sufficient for the trial court to make a fair and equitable distribution of the property, including the division of the rental value of 713 S. Ralph. "The ultimate question is whether the final division of the property is fair, just and equitable." Worthington v. Worthington, 73 Wn.2d 759, 768, 440 P.2d 478 (1968). Furthermore, all that is required is that the court's valuation findings are within the range of credible evidence. In re Marriage of Sedlock, 69 Wn.App. 484, 490, 849 P.2d 1243 (1993).

Evidence was presented that the shop located on the 713 S. Ralph property was of a size that at least one work truck of Mr. Houttekier's was housed within the shed. (RP 215). It was also established that the tenant of 713 S. Ralph, Ms. Jorgenson's mother, paid for the electricity for the shop despite the fact that she had no access to the shop. (RP 215). Ms. Jorgenson also was denied all access to the shop. (RP 215). Although it was established that Ms. Jorgenson's mother was not paying rent for use of the 713 S. Ralph property, evidence was also presented that she provided unreimbursed care for the parties' children. (RP 226-227). Prior to the parties' separation, Mr. Jorgenson's mother was paying \$500 in rent

per month (RP 53) but that was waived by Ms. Jorgenson after her separation from Mr. Houttekier (RP 225). In determining a fair and equitable distribution of the 713 S. Ralph property and its rental value, the trial court specifically considered that Mr. Houttekier had access to this property and exclusive use of the shop behind the rental home while Ms. Jorgenson did not. (CP 56). Although rental income from the date of separation was determined by the court to be community property, the court considered this a “wash” for the purposes of determining lost income of the rental property versus the cost of Mr. Houttekier renting space to store his belongings. (CP 56). This was also specifically stated in the Findings of Fact & Conclusions of Law where the court found that, “[s]ince 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 rental house, where her mother resides and subsequently, the court considered this an equalization.” (CP 88).

“A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the

correct standard.” In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Nothing in the trial court’s decision was outside the range of acceptable choices, based on unsupported factual findings or an incorrect standard. Furthermore, the erroneous valuation of one particular item does not necessarily require reversal of an otherwise fair and equitable distribution of a sizeable estate. In re Marriage of Pilant, 42 Wn.App. 173, 181, 709 P.2d 1241 (1985).

The evidence presented in trial was sufficient for the court to make its determination concerning the 713 S. Ralph property and the shed of which Mr. Houttekier had exclusive use. The shed was established in testimony to be of a considerable size, large enough to house at least one work truck. Although neither party presented an estimate of the actual monetary rental value of a similar storage shed, the evidence was sufficient for the court to determine a fair and equitable distribution based on the dimensions and location of the shed, the fact that Mr. Houttekier had exclusive use of the shed, and the nature of the rent waived by Ms. Jorgenson in exchange for assistance with the care of the parties’ children. Even if it were established that the monetary rental value of the storage shed and its exclusive use were less than the rental value of the house, the court is not required to make an equal distribution. Mr. Houttekier does not contest any other aspect of the property distribution. Even if unequal, the trial

court did not manifestly abuse its discretion. The trial court did not abuse its discretion in denying Mr. Houttekier's request for deviation and the court's findings of fact are sufficient to support that decision.

RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. 2

When addressing a request for deviation of child support, the court must first determine whether a reason for deviation exists, and then if so, whether deviation is appropriate and to what extent a deviation should occur. See RCW 26.19.075. "Deviation from the standard support obligation remains the exception to the rule and should be used only where it would be inequitable not to do so." In re Marriage of Burch, 81 Wn.App. 756, 760, 916 P.2d 443 (1996).

Although the court has discretion to deviate from the standard calculation "if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment," the court is not required to deviate for this purpose. RCW 26.19.075(1)(d). In this case, the trial court did seem to find that Mr. Houttekier should have received a credit toward the standard child support calculation. (CP 61). However, after considering the financial situation of both parties and the fact that Mr. Houttekier has had no daycare costs for over 30 months due to the actions of Ms. Jorgenson, the court denied a deviation. (CP 61).

Mr. Houttekier argues in his appellate brief that it is a parent's responsibility to care for a child when he or she is at home rather than use daycare and therefore this is not a basis to deny a deviation. (Brief of Appellant 17). However, the trial court was clear that Ms. Jorgenson was keeping the children with her during the day "at her business." (CP 57). Because of the nature of her business, Ms. Jorgenson could provide care for the children without cost even while working.

The trial court clearly addressed whether a deviation would result in insufficient funds in Ms. Jorgenson's household. The court specifically stated that, "[t]hough Mr. Houttekier has the children on a regular basis, his monthly income is almost double Ms. Jorgenson's monthly income..." (CP 57). The court also considered that Mr. Houtteker received a significantly higher amount in liquid cash assets of approximately \$100,000 than Ms. Jorgenson, "which leaves a substantial amount for operating costs compared to Ms. Jorgenson's \$372 in her business checking account." (CP 57). Furthermore, the court considered that Ms. Jorgenson provided for the children's medical costs and kept the children during the day at her business, "thus saving Mr. Houttekier a substantial amount of daycare costs." (CP 57). In determining the parties' monthly incomes, it was clear that "even when her business was doing well, [Ms. Jorgenson] herself barely made a monthly income." (CP 61).

The court's findings in the Order of Child Support were sufficient to support denial of a deviation to Mr. Houttekier. (CP 80-81). It is clear that even had the court ordered a deviation in child support, the savings Ms. Jorgenson has effected by not taking the children to daycare offset the value of any deviation the court might have considered for Mr. Houttekier. (CP 80-81). Furthermore, it is without question that Mr. Houttekier does receive less than equal residential time with the children, reducing any decreased expenses Ms. Jorgenson might otherwise enjoy. (CP 80, 88). However, the court did not base its findings solely on the fact that the parenting plan is not an equal split between the parents as argued by Mr. Houttekier. Even when children spend a significant amount of time with the obligor for child support, the court "may not deviate on that basis if the deviation will result in insufficient funds in the household receiving support to meet the basic needs of the child." RCW 26.19.075. Although the trial court did not specifically include language relating to the sufficiency of funds in Ms. Jorgenson's household in the Order of Child Support, it is apparent and unambiguous that this issue was considered carefully by the court. (See CP 57, 61). The denial of a deviation was for reasons related to the incomes of both parties and the savings in daycare Mr. Houttekier enjoyed, not solely the fact that the parenting plan is not an equal split between the parties.

Mr. Houttekier also claims that the court should have granted a deviation for substantial debt not voluntarily incurred based on his mortgage liability for property in Elk, Washington. However, Mr. Houttekier's financial obligation for the Elk property was voluntarily incurred by him during the parties' relationship and was deemed pseudo-community property. (CP 54). He was awarded the property as well as the debt associated with the property. (CP 56, 87). This does not constitute substantial debt not voluntarily incurred since Mr. Houttekier chose to purchase the property during his relationship with Ms. Jorgenson and has been awarded the property to offset the debt. A request for deviation based on income of a new spouse may only be considered in conjunction with a request for deviation for any other reason. RCW 26.19.075(1)(a)(i). Additionally, no findings were made by the court that Mr. Houttekier had incurred increased expenses by having the children for additional residential time. Since the trial court denied the request for deviation by Mr. Houttekier for residential schedule reasons, there was no need for the court to address income of a new spouse.

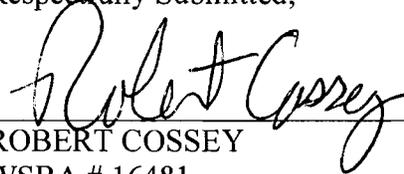
III
REQUEST FOR ATTORNEY'S FEES

Ms. Jorgenson requests reasonable lawyer's fees and expenses as allowed by RAP 18.1. Under RCW 26.09.140, "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's 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." RCW 26.09.140 goes on to state that, "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 and attorney's fees in addition to statutory costs." It is therefore requested that Ms. Jorgenson be awarded reasonable attorney's fees and expenses as allowed by RCW 26.09.140 as Ms. Jorgenson does have the need for such assistance and Mr. Houttekier has the ability to pay. An affidavit of financial need will be filed by Ms. Jorgenson in accordance with RAP 18.1(c).

**IV
CONCLUSION**

It is respectfully requested that this court deny Mr. Houttekier's assignments of error on appeal and affirm the ruling of Judge Plese.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert Cossey", is written over a horizontal line.

ROBERT COSSEY

WSBA # 16481

Attorney for Respondent