

**FILED**

OCT 15 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Appellate Court No. 308286-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

Division III

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JESUS CISNEROS,

Appellant

v.

PERLA CISNEROS,

Respondent

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BRIEF OF APPELLANT

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Nathan P. Albright  
Attorney for Respondent  
312 Balsam, Suite C  
Moses Lake, WA 98837  
WSBA# 30511

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**A. Assignments of Error**

The trial court erred in entering a decree of dissolution which made an unjustifiably disproportionate awards in favor of the wife without explanation or justification.

**Issues Pertaining to Assignments of Error**

The parties entered trial with stipulated values to the marital property. RP 5. The parties had a dispute as to which of their two homes would go to the wife and which to the husband. RP 7. If the family home were awarded to the wife, under the stipulated values, the wife would receive a net total of \$88,700 more than the husband. Exhibit 9. If the husband received the family home, the wife would receive a net total of \$81,300 more than the husband. Exhibit 9. In either case, there should be an equalizing payment made to the husband to make an equitable division of property. May the court award the family home and farm to the husband, but not award an equalizing payment, citing a basis which is contradictory to the record, establishing a grossly disparate division of property?

**B. Statement of the Case**

The parties married on June 13, 1996 in Othello, Washington. CP 2. The separated on December 17, 2009. CP 2. There are five children of the marriage, ranging in age from twelve to one at the time of filing. CP 2.

Mr. Cisneros is a famer by trade, and had worked for Washington Fruit in Othello. RP 17. He also operated a small farm

located on the family home located at 2130 Yesley Road in Othello. RP 17. Ms. Cisneros worked for McCain foods in Othello. RP 37.

By the time the case had reached trial, the parties had managed to reach an agreement as to the values of all assets and debts of the parties, leaving the only issue to be determined by the trial court who would reside in the family home with its adjoining farm and, consequently, how much of an equitable setoff would be awarded to the husband. RP 5-8. The attorney for the mother, as well as the judge, referred to a memorandum which was filed purporting to argue for the husband to receive no equitable setoff, but such a brief was never served on the attorney for the husband, nor does it appear to have been formally filed with the court. RP 7.

The trial court, in its decision, awarded the family farm to the mother, who stipulated on testimony that she had no farming experience. RP 45. The trial court awarded all farm equipment to the husband, who now had no farm upon which to use his farm equipment. RP 65. Upon clarification with the court, the trial judge stated that the mother did not ask for the farm equipment, and that's why he didn't award it to her. RP 66.

The resulting property and debt division left the parties with the following division of assets & debts:

	<b>Husband</b>	<b>Wife</b>
<b>Assets</b>	\$112,800.00	\$181,500.00
<b>Debts</b>	\$20,000.00	\$0.00
<b>Net</b>	\$92,800.00	\$181,500.00 <sup>1</sup>

The trial court then order that there be no equalizing transfer, reasoning:

In light of the financial situation the parties, in light of the future which the court is required to look to the future as one of the many factors that are to be considered, and I've considered all that apply that are set forth either in the statute or case law, it appears to me that a disproportionate distribution of property in this case is both just and equitable because it allows the respondent here the ability to earn some additional money from the farm itself which is gonna be necessary for those five children. So there will not be any arising payment.. I think in light of all of the equities here that is the most appropriate way to deal with this somewhat unusual situation." RP 65.

The conclusions of the trial judge are in contradiction to the testimony, in which it was testified that the farm never produced income at the hands of an experienced farmer (Mr. Cisneros) with farm equipment. RP 24. Mrs. Cisneros admits to having not farming experience, and has not received any farm equipment in the distribution. RP 45

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<sup>1</sup> Based on values set forth in Exhibit 9.

### C. Summary of Argument

The court erred in awarding a disproportionate share of assets to the wife, when there has been no equities specified which

### D. Argument

The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors include (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.<sup>2</sup> In weighing these factors, the court must make a "just and equitable" distribution of the marital property.<sup>3</sup> In doing so, the trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion.<sup>4</sup> A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds.<sup>5</sup> If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred.<sup>6,7</sup>

According to Black's Law Dictionary, equitable is that which is "[j]ust; conformable to the principles of justice and right."<sup>8</sup> Fair is

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<sup>2</sup> RCW 26.09.080.

<sup>3</sup> RCW 26.09.080.

<sup>4</sup> *In re Griswold*, 112 Wash. App. at 339, 48 P.3d 1018 (citing *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992)).

<sup>5</sup> *In re Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005).

<sup>6</sup> *In re Marriage of Pea*, 17 Wash. App. 728, 731, 566 P.2d 212 (1977).

<sup>7</sup> *In re Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007).

<sup>8</sup> Black's Law Dictionary 537 (6th ed.1990).

"[h]aving the qualities of impartiality and honesty; free from prejudice, favoritism and self-interest. Just; equitable; even-handed; equal, as between conflicting interests."<sup>9</sup>

The trial court has authority to award disproportionate property awards, in some cases as much as 75% to 25%.<sup>10</sup> The statute requires that only that a "just and equitable" division of property be made by the trial judge, not necessarily an equal division. In those cases which award disproportionate awards, however, factors such as health concerns, advancing age, long-term employment or unemployment, or one spouses' unusually large amount of separate property tip the scales toward a disproportionate division of property. None of those factors exist in the present case.

**Unjustifiably** disproportionate awards, however, are subject to reversal.<sup>11</sup> The court in *Marriage of Tower*<sup>12</sup> considered various distributions and settled on one that it believed would not threaten the wife's social security benefits. That court wrote:

The record here reveals that the trial court considered alternatives to its ultimate property distribution and endeavored to fairly distribute the parties' limited assets without jeopardizing Theresa's eligibility to receive social security disability benefits. In his oral opinion, the trial judge acknowledged:

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<sup>9</sup> Black's Law Dictionary 595 (6th ed.1990).

<sup>10</sup> See, e.g., *In re Marriage of Davison*, 112 Wn. App. 251, 258-59, 48 P.3d 358 (2002), *In re Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462, review denied, 122 Wn.2d 1021 (1993), and *In re Marriage of Dessauer*, 97 Wn.2d 831, 650 P.2d 1099 (1982).

<sup>11</sup> See, e.g., *In re Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002 (1990), *In re Marriage of Pea*, 17 Wn. App. 728, 566 P.2d 212 (1977), and *Wills v. Wills*, 50 Wn.2d 439, 312 P.2d 661 (1957).

<sup>12</sup> 55 Wn. App. 697, 780 P.2d 863 (1989),

that there are alternative ways in which the court might elect to attempt an equitable division. It could include some lien on the home in favor of Mr. Tower, representing a more immediate asset to him, or it could represent a potential encumbrance on the retirement benefit in favor of Mrs. Tower. But there are some problems associated with them in terms of executing on those and really calculating the net result, having in mind social security benefits and some other uncertainties.

The net result of the entire decree, including maintenance and child support provisions, is that the parties will probably have approximately equal monthly disposable incomes, at least until the youngest child is emancipated. Hugh has 63 percent of the property; Theresa has only 37 percent. Such a disproportionate community property award in favor of the only spouse with any significant earning capacity would be an abuse of discretion were it not balanced by long-term maintenance.<sup>13</sup>

While that court did ultimately confirm the award of property, it did so only after concluding that the trial court at least had a justification for the disproportionate distribution. Such a justification was never given in the present case.

When questioned about these issues under oath, Mrs. Cisneros stated:

Q. Okay, if the court were to give you the farm and with our stipulated assets,

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<sup>13</sup> *In re Marriage of Tower*, 55 Wn. App. 697, 700-01, 780 P.2d 863 (1989), citing *See In re Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). The property division is affirmed.

you would have about forty-five-thousand dollars more or that you would have to give Mr. Cisneros to balance it out, where would you come up with the forty-five-thousand dollars to do that?

A. I would request for a loan.

Q. Okay are you the one that's done most of the finances like that or has Mr. Cisneros been the one to do that?

A. Well he was the one who did that.

Q. Okay so you're gonna borrow money without credit so you can operate a farm with no farm experience is that right?

A. Right. RP 47-48.

The rationale used by the trial judge is completely unsupported by the record. Mr. Cisneros has made no income on the farm despite his hard work. The factor the trial judge appeared to be concerned about, the parties' five children, is addressed in the order of the child support.

#### **E. Conclusion**

The court erred in awarding a farm to a person with no farming experience, taking it away from the farmer in the family, and awarding the farm equipment to the parties who is not being awarded the farm. Even if this were an appropriate, equitable division of assets, the court should have ordered an equitable setoff to balance the loss of property to Mr. Cisneros. Such an award in violation of all principles of equity, with no rationale supported by the record, should be remanded for an appropriate award. In the alternative, the Court of Appeals should award an equitable setoff to the husband in the amount of \$44,350.00 to equalize the position of the parties.

Respectfully submitted this 15th day of October, 2012.



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