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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Matter of:	)	**No. 29574-5-III**
	)	
GEORGE A. HOUTTEKIER,	)	
	)	
Appellant,	)	
	)	**Division Three**
and	)	
	)	
TONYA JORGENSON,	)	
	)	
Respondent.	)	**UNPUBLISHED OPINION**

Korsmo, J. — This is an appeal from the trial court's equitable distribution of property following the end of a committed intimate relationship. We affirm the property distribution but remand for the trial court to reconsider the father's request for a deviation from the child support schedule.

FACTS

Appellant George Houttekier and respondent Tonya Jorgenson were involved in a committed intimate relationship[1] between late 1994 and January 2008. Two daughters were born of that relationship.

The couple purchased several homes during their relationship. The first property,

however, was acquired by quitclaim deed from Ms. Jorgenson's parents. That property, located at 717 S. Ralph Street, had been used by Ms. Jorgenson's mother for a day-care facility. Ms. Jorgenson worked with her mother in that business. When transferred to the couple, the property was in need of significant remodeling and had no equity value.

The couple remodeled the building so that it could be used as a residence and a day-care facility; both worked in that business. They also purchased the house next door, 713 S. Ralph Street, as a rental property. The mortgages on both Ralph Street properties were paid off by January 2005. Beginning in 2003, Ms. Jorgenson's mother lived in the 713 S. Ralph Street rental property; she paid $500 per month in rent. The couple also built a 30-by-30-foot shop on the property. Mr. Houttekier used it to store his business equipment, including a truck.

In 2001, Mr. Houttekier started a dial-up Internet access business. Ms. Jorgenson continued to run the day-care business without his assistance. The facility is licensed for 12 children, but she had only 7 children enrolled at the time of trial.

The couple purchased a vacant lot at 712 S. Thor Street. In May 2007, the couple

[1] The parties stipulated to the existence of a "meretricious relationship" and used that term throughout the trial and appellate proceedings. However, our courts prefer use of the term "committed intimate relationship." *Olver v. Fowler*, 161 Wn.2d 655, 657 n.1, 168 P.3d 348 (2007). We will use that terminology in this opinion.

purchased an old school in Elk, Washington, with the idea of fixing the property and using it as the family home and day care. They soon abandoned the idea, but have been unable to sell the property. The monthly mortgage and maintenance cost is $2,500. Later in 2007 the couple purchased a house at 716 S. Thor with the intention of making it the family home. That house is across the alley from the family house on Ralph Street.

Ms. Jorgenson commenced a paternity action in December 2007 seeking to set a residential schedule and support. Mr. Houttekier moved to the Thor Street home in January 2008. When the parties separated, Ms. Jorgenson waived her mother's rental obligations on the 713 S. Ralph Street house. Mr. Houttekier continued to store his business equipment in the shop on that property.

The parties stipulated in July 2009 to a residential schedule and left the support issue for decision during the property settlement trial. The support schedule named Ms. Jorgenson as the primary residential parent. Each parent has the children on alternating weekends from Friday afternoon until Monday morning. The children also stay with Mr. Houttekier on Tuesdays from 3:00 p.m. until 9:00 p.m. and overnight on Wednesdays.

Trial commenced on the property and support issues in August 2010. By that time, Ms. Jorgenson had married. Mr. Houttekier asked the court to deviate from the

child support schedules due to Ms. Jorgenson's marriage giving her additional income and the fact that the residential placement was nearly evenly divided. He argued that if the children stayed overnight at his house on Tuesdays, as they sometimes did, residential time would be evenly divided.

The accounting required for support calculation was complicated by the fact that both parties ran substantial expenses through their businesses, making it difficult to ascertain their actual earnings. Ultimately, the court decided that Mr. Houttekier's monthly income was $5,000. The court imputed $2,700 per month to Ms. Jorgenson.

The court awarded both parties their respective businesses. It also awarded the Ralph Street properties to Ms. Jorgenson and the Thor Street and Elk properties to Mr. Houttekier, who was responsible for the mortgages associated with all three. Because the Ralph Street properties were debt free, Ms. Jorgenson received substantially more equity than Mr. Houttekier, which required transfer payments from her to equalize.

The court declined to deviate from the support schedule. It rejected the argument that the parties had nearly equal residential time, noting that if the Wednesday morning period had been attributed to Mr. Houttekier, he would be receiving a benefit in day-care savings due to the fact that Ms. Jorgenson actually watched the children at that time. The

court calculated back child support of just over $36,000 for 32 months and subtracted that from the amount Ms. Jorgenson needed to pay to equalize the property settlement. The result was that Ms. Jorgenson was required to repay Mr. Houttekier slightly over $37,000 to equalize the property settlement.

Mr. Houttekier also asked the trial court to consider the rent Ms. Jorgenson had waived in distributing the property. The court considered the rent a "wash" because of Mr. Houttekier's exclusive use of the shop on the premises during the same time.

Appropriate findings and a judgment were entered. Mr. Houttekier then timely appealed to this court.

ANALYSIS

This appeal presents two issues regarding the trial court's rulings. First, Mr. Houttekier challenges the court's decision on the waiver of rent. He next takes issue with the trial court's reasoning denying his request to deviate from the child support schedule. We will address each claim in turn.

Waiver of Rent. Mr. Houttekier argues that there was no evidence from which to assign value to his use of the shop behind the Ralph Street rental home, so there was no basis for the trial court to equate his use of the shop with the $500 rental value of the

house. Whether or not he is correct, this argument is of no consequence because the overall property settlement, which he does not challenge, was equitable.

In an oft-quoted passage, our Washington Supreme Court has stressed the need for finality in domestic relations cases:

> We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.

In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). This emphasis on finality and moving forward is reflected in the well-settled standards that govern our review of this appeal.

The division of property following the dissolution of a committed intimate relationship must be just and equitable. *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984). Once the trial court makes a determination that a committed intimate relationship exists, it then (1) evaluates the interest each party has in the property acquired during the relationship, and (2) distributes the property in a just and equitable manner. *Id.* The distribution does not have to be equal. *In re Marriage of Washburn*,

101 Wn.2d 168, 179, 677 P.2d 152 (1984). When making an equitable property division, the court is not required to use a precise formula or calculate the distribution with mathematical precision. *In re Marriage of Martin*, 22 Wn. App. 295, 298, 588 P.2d 1235 (1979). However, the court is required to present valuation findings that are "within the range of credible evidence." *In re Marriage of Sedlock*, 69 Wn. App. 484, 490, 849 P.2d 1243, *review denied*, 122 Wn.2d 1014 (1993).

This court will not disturb the trial court's approval of a property distribution unless there is a clear and manifest abuse of discretion. *Baird v. Baird*, 6 Wn. App. 587, 591, 494 P.2d 1387 (1972). A trial court abuses its discretion when its discretion is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This court will not disturb a property valuation having reasonable support in the trial record. *In re Marriage of Hadley*, 88 Wn.2d 649, 658-59, 565, P.2d 790 (1977). "A court's decision . . . is based on untenable grounds if the factual findings are unsupported by the record." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Mr. Houttekier is correct in his claim that no evidence was presented at trial as to the rental value of the shop. However, the trial court was required to make a just and

equitable distribution, not an equal one. *Lindsey*, 101 Wn.2d at 304. Mr. Houttekier does not argue that the overall distribution is unfair, and we do not believe that even if the trial court erred in this aspect that it would make the distribution inequitable. Accordingly, even if we assume that the court erred, we do not see an abuse of discretion.[2]

The rental value of the shop does not present an issue of such significance that we will require further tinkering with the property distribution.

Deviation Request. Next, Mr. Houttekier argues that the trial court's stated reason for denying his deviation request is erroneous. We agree.

Child support is set by statute and the statutory scheme divides the support obligation proportionately to the parents' respective income levels. RCW 26.19.001, .080(1). Using the calculated income levels of $5,000 for Mr. Houttekier and $2,700 for Ms. Jorgenson, the result is that Mr. Houttekier is responsible for approximately 65 percent of the support obligation.

The statutes allow the trial court to deviate from the standard schedule and provide a nonexclusive list of reasons for deviation. RCW 26.19.075. One of those reasons,

[2] We are not prepared to say that the court did err. Both parties had exclusive access to portions of the property after the separation and we cannot say that this rough evaluation was erroneous.

relied upon by Mr. Houttekier at trial and on appeal, is that the residential schedule leaves the children with the obligor parent for "a significant amount of time." RCW 26.19.075(1)(d).[3] A deviation under that rationale must not leave the recipient spouse with insufficient funds to meet the needs of the children. *Id*.

Whenever asked to consider a deviation request, the trial court must explain its rationale for ruling:

> The court shall enter findings that specify reasons for any deviation or any denial of a party's request for deviation from the standard calculation made by the court. The court shall not consider reasons for deviation until the court determines the standard calculation for each parent.

RCW 26.19.075(3). We review the court's deviation ruling for abuse of discretion. RCW 26.19.075(4); *In re Marriage of Rusch*, 124 Wn. App. 226, 236, 98 P.3d 1216 (2004), *overruled in part on other grounds by In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

The trial court explained its reasoning for denying the deviation in its letter decision and again in the trial findings:

> 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

[3] Mr. Houttekier also argues that Ms. Jorgenson's spouse's income should be considered. However, the statute authorizes consideration of this factor only when the newly married spouse is the one seeking the deviation. RCW 26.19.075(1)(a)(i).

> 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.

Clerk's Papers at 80-81.

Mr. Houttekier correctly argues that this passage, emphasizing the mere two hours per week difference in residential time, suggests that the trial court thought the deviation was available only when the parties *equally* shared residential time rather than whether the father had *substantial* residential time. We agree. We also disagree with the trial court's reasoning. The record does not suggest that Ms. Jorgenson was saving Mr. Houttekier any money by having care of the children on Wednesday mornings before school or that he would incur day-care expenses if he had residential custody at that time. More importantly, the emphasis on 2 particular hours of the 168 hours in a week obscures the true argument. If equality was the true issue, then any 2 hours of the week could have been shifted, not merely the time on Wednesday morning before the children went to school.[4]

[4] It appears this analysis arose out of an argument by Mr. Houttekier that the children frequently spent Tuesday nights with him and that if that time were accounted for, he had essentially equal residential time.

Because this rationale is not responsive to the statutory factor and is not supported in the record, we remand this case to the trial court for reconsideration of the deviation request. The parties present additional arguments in support or in opposition to the ruling. Ms. Jorgenson argues that reducing the support would leave her insufficient funds to care for the children. She made this argument to the trial court, which did not expressly address it in its ruling. The court may have had the same concerns since it imputed only the minimum income to Ms. Jorgenson, but it also does not appear to have considered the transfer payment in assessing her monthly income, so any reduction would not appear to lower her income below the poverty standards. This argument can be raised again on remand.

Mr. Houttekier also argues that the court's rationale was flawed because day-care cost is not considered a basic support obligation. RCW 26.19.080(3). Thus, he reasons, any day-care expenses saved by the fact that Ms. Jorgenson runs a day-care business that can accommodate their daughters was improperly considered by the trial court. Again, we agree with that analysis.

An informative case on this issue is *In re Johnson-Skay*, 81 Wn. App. 202, 913 P.2d 834 (1996). There the residential parent, as here, also operated a day-care business.

Her business had the maximum allowed number of children, but one of those slots was used to care for her child, resulting in loss of income. *Id*. at 203. The court concluded that because of the lost income, the father was required to pay for the cost of the day care. *Id*. at 204. Since that payment would amount to income to the mother, the trial court was required to recalculate her support obligation. *Id*. at 205.

We read *Johnson-Skay* to mean that one parent can be obligated when the residential child care obligation of the residential spouse negatively impacts the family's day-care business. That payment, however, must be treated as income for purposes of support obligations. This case, of course, is not that case. The day-care business here is not operating at full capacity. Also, there is no showing that day care was required for the children.

Mr. Houttekier also argues that he was entitled to a deviation due to extraordinary expenses related to the children (medical and dental costs, horseback riding lessons, tutoring) and the fact that the couple's mortgage debt for the Elk property was assigned to him. He also argues that the waiver of the rent payments should be imputed income to Ms. Jorgenson. These arguments were not made below, but can be considered on remand.[5]

[5] Due to the unusual posture of this case—where support obligation was tried in

Finally, Ms. Jorgenson requests that she be awarded attorney fees for this appeal. RCW 26.09.140. However, attorney fee awards under that statute are not available in actions arising from committed intimate relationships. *W. Comm'ty Bank v. Helmer*, 48 Wn. App. 694, 699, 740 P.2d 359 (1987).[6]

Affirmed in part and remanded.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.

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conjunction with the property division and the fact that the income levels were in dispute and thus unknown to the parties—it was not possible to apply the income and settlement divisions to the deviation request, so it is understandable that the parties could not raise those arguments to the trial court. Those issues can be considered on remand.

[6] The Washington Supreme Courts subsequently cited *Helmer* favorably on this point in *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d 831 (1995).