74657-0

FILED
August 18, 2016
Court of Appeals
Division I
State of Washington

74657-0

NO. 74657-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NICK BRINEY, A Washington Individual

Appellant,

and

MARGARET MORGAN, A Washington Individual

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JULIE SPECTOR

REPLY BRIEF OF APPELLANT

THE HUNSINGER LAW FIRM
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I. INTRODUCTION

The trial court[1] and Ms. Morgan[2] agree that in a committed intimate relationship ("CIR") no portion of a party's separate asset can be distributed to the other party; each asset is characterized at the date of its acquisition; any increase in the value and profits and income derived from that asset during the CIR is presumed to share the same characterization as the asset itself; and that presumption can be rebutted only if the other party proves by direct and positive/clear and convincing evidence (the terms are used interchangeably) that during the CIR contributions were made that were contrary to the initial characterization and increased the value of the asset by a proven amount.

In other words, Ms. Morgan was not entitled to any of Mr. Briney's separate assets unless she proved by direct and positive/clear and convincing evidence that any contributions made by her or Mr. Briney during the CIR caused a proven amount of an increase in the value of those assets.

The trial court erroneously concluded as a matter of law that the residence was the parties' "community property" when it was the separate asset of Appellant Nicky Briney. Moreover, the trial

[1] CP 682
[2] Response Brief, 31-32, 39-41

court erroneously imposed on Mr. Briney the burden of proving that the increase in the value of his separate assets was attributable to his separate efforts or erroneously held that Ms. Morgan met her burden of proving by direct and positive/clear and convincing evidence that community contributions increased the value of any of those assets by a proven amount.

This Court should reverse the award to Ms. Morgan, holding that the residence was Mr. Briney's separate property and that none of the increase in the value of Mr. Briney's residence, retirement or investment accounts was attributable to community funds or labor during the CIR. It should remand to the trial court only the just and equitable distribution of the $468,000 in Mr. Briney's money market and savings accounts owned by Mr. Briney at the end of the CIR that had not existed when it began.

II. ARGUMENT

A. It is Undisputed that Mr. Briney's Investment and Retirement Accounts and His One-Half Interest in Bel Air & Briney were His Separate Property.

Ms. Morgan never claimed to the contrary, as Mr. Briney owned these assets well before the CIR was created.

B. The Residence is Mr. Briney's Separate Property.

1. <u>The trial court found, and Ms. Morgan did not dispute, that Mr. Briney's net worth when the residence was</u>

purchased was $1,246,090. Mr. Briney's balance sheet as of October 31, 1995, two weeks before he purchased the residence[3], indicated that his IRA and investments accounts were worth $252,930 and $244,140 respectively, and his one-half interest in Bel Air & Briney was worth another $708,267.[4] The October 31, 1995 valuations were adopted by the trial court in its Decree and Final Judgment.[5]

2. Ms. Morgan conceded that she had no money when the residence was purchased. While Mr. Briney proved that he had almost $500,000 in liquid assets when the residence was purchased, Ms. Morgan admitted she had no savings at the time, and may even have still owed Mr. Briney the $5,000 he had earlier lent her. (CP177)

3. In its Decree and Final Judgment, the trial court found that "[t]he parties' committed intimate relationship began on [sic] November 1995, the date the parties moved in to the Ward Street residence, . . ." (CP 764)

The trial court found that the CIR began not *before* or

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[3] The statutory warranty deed was signed on November 16, 1995 and recorded the following day. (Exhibit 73)

[4] Exhibit 72, Appellant's Brief at page 14. There was some confusion in the trial court's initial Findings of Fact and Conclusions of Law, which professed to prorate the award using 1995 as the starting point but used the figures from Mr. Briney's June 30, 1994 balance sheet. (CP 685) After briefing by both parties, the trial court entered its Decree and Final Judgment, using the October 31, 1995 balance sheet. (CP 764)

[5] (CP 763)

during the CIR, but at the same time the residence was purchased by Mr. Briney and occupancy by the parties began. Ms. Morgan did not assign error to that holding.

4. In Finding of Fact 11, the trial court found and Ms. Morgan agreed that Mr. Briney made the $74,000 down payment for the November 1995 purchase of the residence, purchased it in his name only, and the mortgage for the remaining $296,000 was in his own name. (CP 673) Ms. Morgan admitted these undeniable facts at trial. (RP 113 – 114)

5 In Conclusion of Law 3, the trial court correctly held that the character of property as separate or community is determined at the point of acquisition; property acquired before a CIR is separate; and if property was purchased with separate funds during a CIR it continued to be characterized as separate property. (CP 682) Both parties agreed that these were bedrock principles of the characterization of community and separate property.

6. Because Mr. Briney's separate funds and separate credit were used to purchase the residence in his name only, at the same time as the CIR began, the residence was his separate property as a matter of law. In her Response Brief at page 33, Ms. Morgan contends that "[g]iven the trial court's determination that the parties'

relationship started before the parties purchased the Ward Street home, the presumption is that this home is community in nature." That statement is flat wrong. *No* presumption flows from the commencement of a couple's *relationship;* that occurs only when they begin a *committed intimate* relationship. which did not start here until the residence was purchased.

The trial court never explained why it erroneously held in Conclusion of Law 8 that "[t]he home is clearly a community asset", especially when it correctly held in Conclusion of Law 5 that Mr. Briney's ownership interest in Bel Air & Briney was his separate property because "the company pre-dated the parties' involvement as a CIR." (CP 684)

Perhaps the trial court believed it mattered that the residence was acquired simultaneously with, instead of before, the commencement of the CIR. That is the quintessential distinction without a difference.[6] But even if the residence was presumed to be "community property", Mr. Briney met his burden of proving by clear and convincing evidence that the funds used to purchase the residence came from his separate funds, pursuant to *In Re Marriage of*

[6] Washington community property law uniformly discusses the applicable presumptions when an asset is acquired either *before* or *during* marriage (or a CIR) but not *at the same time* as the marriage or commencement of the CIR.

Chumbley, 150 Wn. 2d 1, 5, 997 P.2d 447 (2003) and *In Re Marriage of Skarbek*, 100 Wn. App. 444, 448 (2000), cited by Respondent at page 34 of her brief.

Or perhaps the trial court held that the residence was community property because it was "supported and maintained by each party". (CP 686) In its Findings of Fact and Conclusions of Law the trial court describes the various contributions to the house made by Ms. Morgan: extensive gardening and landscaping and participation in the remodels, and providing some of the furniture and furnishings. (CP 674-676) The trial court also found that "the two agreed to buy the house", (CP 673), and "collaborated on improving the Ward Street home in quality of lifestyle and in value." (CP 681)

However, there is no legal authority for the proposition that such activities have anything to do with the characterization of an asset upon acquisition, or subsequently convert it from separate to community property.

7. Mischaracterizing the residence is reversible error in a CIR proceeding. As the Respondent states in her brief at page 36, mischaracterization of property *in a dissolution* proceeding "is not grounds for setting aside a trial court's property distribution if it is fair and equitable", citing *In*

re the Marriage of Shannon, 55 Wash. App. 137, 140, 777 P.2d 8 (1989).

However, erroneously calling a separate asset community property is terminally reversible *in a CIR* dispute, because separate property is not subject to distribution under any circumstances. *Connell v. Francisco,* 127 Wn. 2d 339, 350, 898 P.2d 831 (1995); *Soltero v. Wimer,* 159 Wn.2d 428, 434, 150 P.3d 552 (2007)[7]

Ms. Morgan implies that the trial court recognized this distinction by giving Mr. Briney credit for his $74,000 down payment, thereby limiting the amount of the distributable "quasi-community" asset to the increase in the value of the house during the CIR. However, the trial court's erroneous characterization of Mr. Briney's separate asset created an erroneous presumption which in turn imposed the burden of proof on the wrong party.

The trial court correctly held in another part of its Conclusion of Law 3 that any rents, profits, and increase in the value of separate property during the CIR are presumed to remain separate property except to the extent that the other party can show that the increase was attributable to community contributions by direct and positive evidence,

[7] In fact, even the *Shannon* court sent the case back to the trial court because the characterization of property was critical to the latter's decision. *Shannon,* at 142

citing and quoting *Marriage of Lindemann,* 92 Wn. App. 64, 69 – 70, 960 P.2d 966 (1998). (Brief of Appellant, pages 22-23)

In 2009 the Washington State Supreme Court established in *In re Estate of Borghi*, 157 Wn. 2d 480, n 4, 219 P.3d 932 (2009) that "direct and positive evidence" is the same as "clear and convincing evidence" and applies equally to rebut the presumption arising from the initial characterization of an asset as either community or separate.

The presumption that the increased value of an asset during a CIR was due to natural enhancement can be rebutted only if a party can prove by clear and convincing evidence (a) that the increase was due to the contribution of funds and/or labor of a different characterization, <u>and</u> (b) the amount which is due for reimbursement. 19 Wash. Prac. Fam. And Community Prop. L, § 11:37, citing *Elam v. Elam*, 97 Wash. 2d 811, 816, 659 P.2d 213, 216 (1982)[8]

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[8] No Washington case has defined "direct and positive" or "clear and convincing" specifically; it is logical to assume the burden is greater than preponderance of the evidence and not as stringent as beyond a reasonable doubt.

By erroneously characterizing the residence as community property, the trial court erroneously imposed upon Mr. Briney the burden of proving that the increase of the value of the residence was due to his separate contributions; it should have been Ms. Morgan's obligation to prove by direct and positive evidence that community contributions created that increase in value, per the trial court's Conclusion of Law 3.

This error renders the judgment reversible as a matter of law, as Ms. Morgan failed to meet her burden of proving that the increase in the values of the residence or Mr. Briney's investment or retirement accounts were attributable to community contributions.

C. Ms. Morgan Failed To Prove by Direct and Positive/Clear and Convincing Evidence That Any Of The Increase In The Value Of Mr. Briney's Separate Assets Was Caused by *Her* Community Contributions.

As itemized in the brief of Appellant at pages 14 and 15, the value of Mr. Briney's separate assets increased during the CIR as follows:

Asset	10/95	02/13
Bel Air & Briney	$ 708,267	$1,362,862
IRA accounts	$ 252,930	$ 654,390
Stocks and bonds	$ 244,140	$ 794,386
Home	$ 370,000	$ 787,000[9]

The trial court properly denied Ms. Morgan's claim for a portion of Mr. Briney's interest in Bel Air & Briney and properly did not find that any increase in the value of Mr. Briney's retirement and investment accounts during the CIR was the result of any contributions made by her. However, it erroneously found that some undefined portion of the increase in the value of Mr. Briney's residence during the CIR was due to her contributions.

1. It is undisputed that the parties never shared any assets, income, or expenses. Not once in her 50-page brief does Ms. Morgan contest or dispute the statements made by Mr. Briney in his Brief at pages 12-13 that the parties always kept their incomes, bank accounts, expenses and assets totally separate from each other.

2. It is also undisputed that Ms. Morgan made no contributions to any of Mr. Briney's liquid assets. She does

[9] At page 27 of Respondent's brief she inexplicably claims that Mr. Briney's net worth was "roughly six million dollars". In its Decree and Final Judgment the trial court used the correct net worth of $4,117,876, from admitted trial exhibits 37 and 5.

not contend that she made any contributions of labor or funds to or regarding Mr. Briney's investment or retirement accounts during the CIR.

3. Ms. Morgan also made no contributions to the increase in the value of the residence during the CIR. In its Conclusion of Law 4, the trial court held that Ms. Morgan's "gardening efforts certainly improved the outward appearance of the home and its value . . . Her services inside the home, as well as her efforts during all three remodels also improved the value of the home over the years . . . The market improved vastly since the purchase of the home in 1995 and the house appreciated in its value due to the improvements each party contributed to the home." (CP 683)

However, the trial court did not identify how, why, or in what amounts Ms. Morgan's "gardening efforts", or "services inside the home" contributed toward the increased value of the residence, because no such evidence – not only no ***substantial*** evidence but ***no evidence whatsoever*** – was introduced to support such a finding. As Ms. Morgan states in page 34 of her brief, she was obligated to prove that these

efforts contributed to the increase in the value of the residence with particularity, not by "self-serving statements", citing *Hamlin v. Merlino,* 44 Wash.2d 851, 862-863 272 P.2d. 125 (1954).

Nor was there any direct and positive/clear and convincing evidence that the remodels contributed to the increase in the value of the residence during the CIR, let alone that a portion of the increase was attributable to Ms. Morgan's efforts.

The assessed values of the residence during the CIR and its appraised value almost two years after it ended constitute the only evidence of the increase in its value during the CIR, and they all prove that increase was due almost entirely to the increase in the value of the land, not the improvements.

Between 1995 and 1998 (before any improvements to the residence were made) the assessed value of the residence increased by $87,000 ($315,000 to $402,000), all because of the appreciation in the value of the land. (Exhibit 85) During the next 15 years, from 1998 through 2012 when all of the improvements were made, the assessed value of

the residence increased by $312,000 (from $402,000 to $714,000); the value of the land increased by $356,000, while the value of the improvements *decreased* by $44,000. (Exhibit 85) The appraisal commissioned by Ms. Morgan's own expert indicated that the land was worth $800,000, 75% of the total value of the residence in December 2014.

As stated in the brief of Appellant at page 35, during the CIR it is undisputed that between 73% and 79% of the value of the residence was the land on which the house sits. Even if the trial court's flawed calculation of the value of the house in February 2013 of $914,100[10] were accurate, between $400,000 and $430,000 of the $544,100 increase in the residence's value during the CIR was due simply to the appreciation in its land value, ***none of which is available for distribution because it reflects the natural enhancement of his separate property.***

And although Ms. Morgan established that she and Mr. Briney spent a lot of time on the remodels, she provided no evidence that her involvement in the remodels (which were the only improvements to the residence) contributed to

[10] The December 16, 2014 appraisal value of $1,090,000 less the arbitrary reduction of $92,650. CP 764

the increase in the value of the residence during the CIR or, if so, by what amount.

It is therefore no surprise that in her Response brief Ms. Morgan makes no effort to quantify her contributions to the increase in the value of Mr. Briney's assets, calling them "immeasurable" and "incalculable" at pages 44 and 45. She acknowledges at page 44 that "[t]here is no realistic method of valuating her part in, frankly, keeping Mr. Briney alive for almost four years" and asks at page 45, "What is the monetary value of that level of therapeutic devotion?"

The answer to that question under the law of the state of Washington is "zero". The contributions made by Ms. Morgan to her relationship with Mr. Briney, and even to his own health and well-being, may certainly be taken into consideration in determining an appropriate distribution of quasi-community assets, but Ms. Morgan first had to prove by clear and convincing evidence that those assets included the residence and/or Mr. Briney's retirement and investment accounts, which she failed to do.

D. Ms. Morgan Also Failed To Prove By Direct and Positive/ Clear and Convincing Evidence That Any of The Increase In The Value Of Mr. Briney's Separate Assets Was

Caused By *His* Community Contributions.

In Re Marriage of Lindemann, 92 Wn. App. 64, 960 P.2d 966 (1998) plays a significant role in this case, as reflected in the trial court's Conclusions of Law 5 and 7[11], the brief of Appellant[12], and Respondent's brief[13], because it discusses all of the presumptions applicable here. It also presents a textbook example of the direct and positive/clear and convincing evidence that Ms. Morgan was obligated, and failed, to produce to prove that community contributions increased the value of Mr. Briney's separate assets.

Mr. Lindemann owned David's Auto Body, Inc., when his CIR with Ms. Lindemann began in 1985. *Lindemann,* at page 71. He came into the relationship virtually broke and addicted to drugs. *Id.,* at page 76 The business did not prosper until Mr. Lindemann overcame the addiction, during the CIR.[14]

A business evaluation at trial established that the

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[11] CP 684 – 686.
[12] Pages 23, 32, 36, and 38
[13] Pages 37, 38, 40, and 48
[14] In her brief at page 38 Ms. Morgan falsely claims that the "business survived (and thrived) in part because of the support provided to the man by his partner in overcoming a debilitating drug addiction." The case says not one word regarding Ms. Lindemann's role.

business increased in value by approximately $219,000 during the CIR. *Id,* at page 71. The trial court held that there was adequate support for its finding that the increase in the value of the business was entirely attributable to Mr. Lindemann's labor: he worked 65 hours per week, the business would have failed without his presence and his personal efforts, and there was no evidence that his business would have survived, appreciated or earned any income due to its inherent qualities. *Id.*

Ms. Lindemann did what Ms. Morgan did not do: present direct and positive/clear and convincing evidence that her partner's separate assets increased in value due to his labor during the CIR. Here the trial court had no idea how much money Mr. Briney earned during the CIR or what caused his assets to increase other than natural appreciation, because Ms. Morgan chose not to introduce any evidence of either.

1. <u>The trial court made it very clear that Ms. Morgan failed to prove that any community contributions caused the increase in the value of the residence or Mr. Briney's investment or retirement accounts during the CIR.</u>

During closing argument the trial court lamented that

> The problems that I'm having with this case is [sic] exactly what Mr. Hunsinger said at the beginning, which is I don't know what evidence I have, what facts I have of income by Mr. Briney . . . And I think an appellate court would have difficulty in making a determination. . . . So I have a lot of spread sheets, but I don't have income, as Mr. Hunsinger has correctly pointed out. (RP 582-583 brief of Appellant page 18)

The trial court then entered Finding of Fact 5, entirely consistent with that absence of evidence, stating that ". . . there is insufficient evidence before the court to determine what community efforts increased [the separate asset's] value from 1995 onward until the couples' [sic] split in February 2013. . . The failure of having tax returns entered into the record simply ties the court's hands to make an analysis other than what is presumed to be separate property." (CP 684)

The latter finding was made with respect to Mr. Briney's one-half interest in Bel Air & Briney, but it is equally applicable to the residence and his investment and retirement accounts: the only difference is that the trial court correctly treated his interest in Bel Air & Briney as a separate asset, and erroneously treated the others as community

property.[15]

What the trial court ***did not*** say is also important; it made no findings of fact regarding <u>any</u> contributions made by Mr. Briney during the CIR that increased the value of any of those assets except the improvements he (along with Ms. Morgan) made to the residence. (Finding of Fact 3, CP 683)

2. <u>Ms. Morgan introduced no direct and positive/clear and convincing evidence that Mr. Briney made any contributions to any of his investment, retirement, or bank accounts during the CIR.</u>

At trial Ms. Morgan chose to introduce into evidence only one of Mr. Briney's 17 federal income tax returns and six of 208 monthly account statements he generated or received during the CIR. That solitary tax return showed that in 2012 his adjusted gross income was ***minus $47,233*** (including zero earned income and minimal unearned

[15] Ms. Morgan laughably contends that the differences between the assets were that Mr. Briney "explicitly stated that these [retirement and investment] funds grew because of his community labor" and there was very little increase in the value of Bel Air & Briney during the CIR. Response Brief, pp. 46 – 47 The only "community labor" Mr. Briney spent regarding the funds was to occasionally buy or sell a stock or mutual fund, while he "expressly stated' at trial that during his 37 years with Bel Air & Briney they renovated houses and resold them or leased them out, then began buying discounted real estate notes and contracts and ultimately made real estate loans themselves. (RP 323-325) **Moreover, the value of Mr. Briney's interest in Bel Air & Briney nearly doubled – by $655,000 – during the CIR. Brief of Appellant, pages 14 - 15**

income). (Exhibit 36) Moreover, the six account statements demonstrated that no contributions were made to any of the retirement accounts; during just the first four months of 1999 the value of those accounts increased by $35,400 (7.7%.) due solely to market appreciation; and his expenditures exceeded his income. (Exhibit 35)

Ms. Morgan chose not to seek the admission of any other document containing any information regarding Mr. Briney's income, or of deposits into or the value of any of his bank, investment, or retirement accounts. Nor did she testify about Mr. Briney's income except to say that throughout the entire duration of the CIR she did not know what he earned: he never volunteered that information, and she did not ask. (CP 63, 178)

3. <u>The only "evidence" of contributions Mr. Briney might have made to his separate property during the CIR were three inconsequential sentences uttered by him.</u>

The first sentence was from Mr. Briney's Declaration in support of his Motion for Summary Judgment Dismissal, where he merely, and vaguely, stated, "[t]he value of my assets increased during those 18 years because of market

appreciation and the money and work I invested in them." (Exhibit 37, 01048)

In the other two sentences Mr. Briney testified that the increase in the value of the *IRA* accounts during the CIR was due to a combination of market appreciation and contributions. (CP 483, 500) He testified he did not know how much of the increase was attributable to either or each of the two. (CP 500)

Those three sentences do not come close to the direct and positive/clear and convincing evidence Ms. Morgan was required to produce in order to meet her burden of proving that any community funds or labor contributed to the increase in the value of any of Mr. Briney's separate assets, let alone the amount of such increase.

4. Trial Exhibit 78 cannot be considered by this Court.

Ms. Morgan intentionally chose not to introduce Exhibit 78 into evidence at trial; in fact, her counsel objected to it in the pre-trial Joint Statement of Evidence. **CP 814** It cannot be now considered on appeal.

During the trial Mr. Briney explained that Exhibit 78

was a example of the chronological list of entries he contemporaneously made using Quicken software for only one year (2006) of the 17-plus year CIR. (CP 367) These entries included, among other things, each expenditure from and each deposit into his checking account. (CP 367-370)

That testimony was elicited by Mr. Briney's counsel to explain how his June 1994, October 1995, and March 1999 net worth/balance sheets were prepared so they could be admitted into evidence to establish his pre-CIR separate property. (RP 797-798)

Ms. Morgan's attorney did not ask Mr. Briney a single question about Exhibit 78 and did not ask that it be admitted into evidence. (CP 799 – 800) When the trial ended it was returned to Mr. Briney's counsel. CP 800, CP 826-832

For the next ***12 months and three weeks*** Ms. Morgan's counsel had numerous opportunities to request that Exhibit 78 be admitted into evidence but intentionally chose not to do so. (CP 800-804, 834-835, 842-877, 884-897)

Finally, on June 24, 2016, ***ten weeks after Mr. Briney had filed his appeal brief***, Ms. Morgan's counsel

filed a Motion to Include Exhibits. (RP 800 – 803; RP 767 – 773) Over Mr. Briney's objection (CP 786 – 915), the trial court granted the motion, holding that "Exhibits 76, 77, and 78 shall be included in the court record" and forwarded to the Court of Appeals. (CP 916-917)[16]

The information in Exhibit 78 does not support the claims made by the Respondent in her brief.[17] More fundamentally, Exhibit 78 and the information contained therein cannot be considered by this Court because the exhibit was never admitted into evidence by the trial court.

For over 100 years, appellate courts in this state have refused to consider exhibits not admitted into evidence at trial. *See,* for example, *Collins v. Hoffman,* 62 Wash. 278, 282, 113 P. 625 (1911) and *State ex. rel Lyle v. Haskins,* 27 Wash. 2d 507, 511, 178 P.2d 962 (1947).

Division 1 has previously noted that it is sanctionable conduct to rely on appeal on an exhibit that was not admitted at trial. *Port Susan Chapel of the Woods v. Port Susan*

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[16] Exhibits 76 and 77 are not discussed in the Response Brief so will not be addressed here.

[17] It does not show that during the CIR Mr. Briney used funds from his investments for community purposes (pages 34, 35, 40-42), or that his investing efforts contributed to the increase in the value of his liquid assets (pages 35, 42).

Camping Club, 50 Wash. App, 176, 184-85, 746 P.2d 816 (1987). *See also*, WSBA, Appellate Practice Deskbook 14-8 (4th Ed. 2016): "Unless you are challenging the trial court's exclusion of an exhibit, make sure the exhibits you rely on [in the brief] were admitted into evidence."

The prejudice to Mr. Briney if this Court considered Exhibit 78 is obvious: he was denied the opportunity to present evidence at trial to rebut the claims Ms. Morgan now seeks to assert in her appeal based on a document that she chose not to admit it into evidence at trial.

As outlined *supra* and in the brief of Appellant, Ms. Morgan had the burden of proving by direct and positive/clear and convincing evidence that any increase in the value of Mr. Briney's separate assets was caused by community contributions during the CIR, and the amount of that increase. Had she done so, the same evidentiary burden would have shifted to Mr. Briney to rebut that evidence. Mr. Briney was ready to do so, but the evidence never came. (CP 790)

This is why when the trial court expressed its frustration during closing argument with Ms. Morgan's failure

to introduce evidence of Mr. Briney's income, it added that "I can't reopen, and I don't think that would be fair" (RP 583), meaning that it would not be fair *to Mr. Briney* to allow the case to be reopened to allow Ms. Morgan to introduce evidence after the trial ended. That was, of course, the appropriate course to take, to which her counsel appropriately did not object.

Finally, contrary to Ms. Morgan's contention at page 35 of her brief, Mr. Briney's payments on his mortgage against his residence during the CIR do not constitute community contributions because she failed to provide ***any*** evidence that ***any*** mortgage payment was made from his community earned income. The trial court did not make, and could not have made, such a finding because Ms. Morgan never demonstrated what income Mr. Briney earned during the CIR.

III. SUMMARY

The Respondent spends a great deal of her brief demonstrating why a CIR was established and why it would be fair for her for her to receive one-half of the increase in the value of Mr. Briney's net worth during the CIR. However, she makes the same

mistake that she made in the trial: she failed to prove that there were assets to be distributed in the first place.

That portion of the Judgment awarding Ms. Morgan a portion of Mr. Briney's residence, investment accounts and retirement accounts must be reversed. There need be no remand as to them because – as the trial court itself acknowledged and then ignored – Ms. Morgan failed to produce enough evidence to rebut the presumption that the increase in the value of those assets was also his separate property. The distribution of the quasi-community money market and savings accounts should be remanded for just and equitable distribution.

DATED this 17th day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 18th day of August, 2016, I caused a true and correct copy of this Reply Brief to be served on the following on August 18, 2016, in the manner indicated below:

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