IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 75846-2-I

95889-1

In re the Marriage of

MICHAEL GULIZIA, Respondent,

and

SVETLANA LAUREL, Appellant.

PETITION FOR REVIEW BY WASHINGTON SUPREME COURT

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I. IDENTITY OF PETITIONER

Svetlana Laurel, appellant before the Court of Appeals and respondent in the trial court, seeks review pursuant to RAP 13.4 by the Supreme Court of the decision identified in Part II below.

II. DECISION TERMINATING REVIEW

Laurel seeks review of the Unpublished Opinion of Division I of the Court of Appeals entered on April 23, 2018, a copy of which is included in the appendix hereto.

III. ISSUES PRESENTED FOR REVIEW

A. In a marital dissolution, does the trial court have authority to order sale of the parties' marital residence when both parties advocated distribution of the residence to the Wife, no party consented to the sale, and the trial court gave no notice of its intent to order such a sale?

B. If the trial court has such authority, by what standard is the propriety of the court's order to be judged?

C. Did the trial court abuse its discretion in ordering such a sale in this case?

IV. STATEMENT OF THE CASE

A. Background

Laurel and Gulizia married December 31, 2001.[1] They have two

[1] RP 16:17-18.

minor children,[2] who are now 14 and 11 years old.

B. Prior Residences

Well before the parties married, in 1997, Laurel bought a house in Houston in her own name as her separate property and with her own funds.[3] In 2004, she sold the Houston house and netted proceeds of $90,400 from the sale.[4] The parties moved to Costa Mesa, California, in 2004, where they used the $90,400 from the sale of Laurel's Houston home as part of the purchase price on another house.[5]

In 2005, the parties moved again, this time to Kent, Washington. They sold their Costa Mesa house and applied the proceeds to purchase the Kent Residence.[6] The purchase price of the Kent residence was $418,500.

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[2] RP 17:11-15.

[3] When asked if the house "you moved into was [Laurel's] house alone," Gulizia replied "She bought the house, yes." RP 72:10-12. Laurel testified that "I bought a house in September 1997 [the parties were married in 2001]." She affirmed that "at the time [she] bought the house, [she] used only your sole funds to buy that house." RP 273:16-20. Ex. 108 is the promissory note Laurel executed in her then name, Svetlana Slubowski. RP 275:1-15.

[4] RP 276:15-17.

[5] When asked if "you took monies from the Houston house, which was [Laurel's] separate property, and used it to buy the Costa Mesa house, ... correct?", Gulizia replied that "I think it was a hodgepodge of the proceeds from the Houston house and some cash we may have had on hand. I don't recall the exact amounts." RP 72:19-25. The purchase and sale agreement for the Costa Mesa house allowed for a loan of $440,000 and required that the parties pay $105,000 from other sources – *i.e.*, an amount in excess of that realized by Laurel upon sale of the Houston home. RP 277:2-10, 17-19. Laurel testified that "the $90,000 you got in the Houston house was used to buy this [Costa Mesa] house." RP 277:11-13.

[6] Gulizia confirmed that "the proceeds from [the Costa Mesa] house were used to buy the Kent house you currently own together." RP 73:4-7. Laurel confirmed that the proceeds from the Costa Mesa house were "eventually rolled into the house in Kent." RP 303:2-7.

C. Separation and Commencement of Divorce Proceedings

Laurel and Gulizia separated in January 2015.[7] Gulizia moved out of the Kent residence and into an apartment. The parties' children remained with Laurel. It was not until August 6, 2015, that Gulizia filed this action for dissolution of the parties' marriage.[8] Gulizia promptly moved for sole custody, claiming that Laurel was unfit. The court denied that motion and left the children primarily with Laurel.

D. Trial

This matter was tried to the court over two days, August 17-18, 2016. A parenting evaluator had recommended that Gulizia be given primary custody of the children – a substantial change. Much of the trial therefore focused on custody and the parenting plan. In the end, the trial court continued primary custody with Laurel.[9] Neither party appealed that portion of the court's rulings.

The balance of the case focused on the appropriate division of the parties' assets. At trial, Laurel sought a disproportionate share of the assets based upon the disparity between the parties' incomes.[10] As calculated by the court in the corrected child support calculation entered

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[7] RP 16:19-20.
[8] CP 1-5 (petition).
[9] CP 22-29 (parenting plan).
[10] CP 16 (Laurel trial brief); RP 13:16-14:10.

on reconsideration, Gulizia's gross monthly income was $15,681 (56.1% of the couple's earning power) and Laurel's was $12,244 (43.9%).[11]

The parties agreed as to disposition of individual items of personal property and that the Kent residence should be distributed to Laurel. They also agreed as to disposition of financial marital assets, but the disposition was subject to a "truing up" depending on the value placed on the Kent residence. Laurel argued that with her valuation, less a credit for the $90,400 representing the equity in her Houston home, less costs of needed repairs, there was no equity in the Kent Residence; indeed, she testified that Gulizia had a ***negative*** interest in the property.[12]

Gulizia submitted a proposed equal division of property.[13] That proposed division estimated the equity in the Kent residence as $304,783, based upon a Zillow.com valuation of $451,000 less a mortgage balance of $146,217.[14] Gulizia proposed that Laurel be awarded $155,800 from the equity of the Kent Residence and that Gulizia be awarded $148,983 – a difference of $6,817 in favor of Laurel.[15] In his proposed Final Divorce

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[11] CP 177-81 (corrected child support worksheet). Laurel has been unemployed since December 15, 2018.
[12] RP 302:15-303:18.
[13] Ex. 29. A copy is attached in the Appendix hereto. The parties agreed that their separate investment and retirement accounts would each be distributed to the holder and no value was assigned.
[14] *Id.*
[15] *Id.*

Order, Gulizia proposed that a judgment be entered in his favor in the amount of $148,983.

It is important to remember that $148,983 number. Laurel's trial counsel submitted a proposed Final Divorce Order[16] that mirrored Gulizia's, but left the amount of the judgment to be paid to Gulizia open. Unfortunately, counsel mistakenly left one paragraph in the proposed order that subsequently caused confusion. Although Laurel's proposed order, in the judgment summary, listed Gulizia as the judgment debtor and Laurel as the judgment creditor (leaving the amount of the judgment blank), trial counsel left a paragraph in that should have been deleted. Even though Laurel contended at trial that there was no equity in the Kent Residence and that more of the community property should be allocated to her, Laurel's trial counsel wrongly left in paragraph 8.2, which required Laurel to sell the Kent Residence within three months and pay to Gulizia the amount of $148,983.

On the first day of trial, Gulizia's counsel stated his belief, based upon Laurel's proposed order, that the property division was agreed.[17] Laurel's trial counsel immediately disagreed.[18] Gulizia's counsel

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[16] CP 190-97.
[17] RP 13:8-14; 14:14-16 ("their decree matched outs for the transfer payment, so I thought perhaps they had agreed. ***Obviously they have not, so.***" (Emphasis added.)
[18] RP 13:16-14:10.

acknowledged then that there was no agreement.[19] The value of the Kent residence, how much of a transfer payment there should be, and to whom it should be paid, were all hotly contest.

First, Laurel and Gulizia disagreed about the value of the Kent Residence. Neither party presented appraisal evidence of value. Gulizia's proffer of a Zillow.com value was properly excluded by the court.[20] Gulizia gave no opinion of value; instead, he simply requested that the court set the value at $455,000.

Laurel gave her opinion that the Kent Residence was worth $400,000 if certain repairs were made. There was a clear factual basis for this opinion. The parties paid $418,500 in 2005 for the home. Laurel also testified that the house directly across the street, which had been better-maintained than the Kent Residence, was selling at the time of trial for $40,000 ***less*** than its sale price in 2006, indicating no appreciation in the neighborhood over the relevant timeframe.[21] Laurel had prior experience

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[19] RP 14:14-16 ("their decree matched outs for the transfer payment, so I thought perhaps they had agreed. ***Obviously they have not.***" (Emphasis added.)

[20] Gulizia presented no admissible evidence of value. The court rejected his attempt to introduce a Zillow.com estimate of value as without foundation, RP 54:__; it was, moreover, classic hearsay. Gulizia did not purport to offer his opinion of value; instead, he simply asked the court to set the value at $455,000 in his testimony, *id.*, and $451,000 in his proposed division of assets. He gave no details about what he based either figure on.

[21] RP 307:11-309:21.

buying and selling homes. Finally, she consulted with two real estate firms about their estimate of value.[22]

Second, Gulizia admitted that Laurel's equity in her Houston home had been carried forward first to the Costa Mesa home, then to the Kent Residence. But he disputed Laurel's claim that she was entitled to a credit or equitable lien in the amount of equity she realized from the sale of her Houston home, which was her separate property.

Third, the parties disagreed regarding the need for repair of the Kent Residence, and therefore whether the value of the home needed to be adjusted to reflect the cost of such repairs. At trial, Laurel presented substantial (and largely unrebutted) evidence that the Kent Residence was in dire need of repairs, the cost of which reduces its fair market value.[23]

Gulizia's response was to assert, contrary to his sworn statement, that the repair of the water damage was only a fraction of the cost declared and that other repairs were unnecessary.[24] He never offered any testimony about how these defects would (or would not) affect the value of the Kent Residence.

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[22] RP 279:17-21.

[23] Gulizia and Laurel made a claim against their homeowners insurance; Ex. 118 is a "Sworn Statement of Loss" under oath, signed by Gulizia, that declares the cost of remedying the loss to be $56,727. RP 78:3-79:2. *See also* RP 285:6-286:1 (failing windows); RP 281:16-21 (stained carpets); RP 286:5-11 (painting); RP 288:23-289:13 (rotting deck and fence).

[24] RP 56:19-21; 57:10-12.

E. Trial Court's Initial Decision

On August 22, 2016, the trial court entered its final orders – Findings of Fact and Conclusions of Law,[25] Final Divorce Order,[26] Parenting Plan,[27] and Final Child Support Order[28] including Washington State Child Support Schedule Worksheets.

The Final Divorce Order divided the parties' assets equally, without regard to Laurel's claim to a disproportionate share. The Order distributed the Kent Residence to Laurel, but ordered her to pay to Gulizia the amount of $148,983. It awarded Gulizia a lien on the Kent residence in the same amount and required that Laurel refinance the home and pay off Gulizia's lien within three months.

Given that the size of the transfer payment ($148,983) was identical to Gulizia's proposal, it is easily inferred that the court based the transfer payment upon Gulizia's "evidence" of value, which the court had rejected.

F. Laurel's Motion for Reconsideration

On September 1, 2016, Laurel filed a note for motion for reconsideration along with her supporting declaration.[29] She sought recon-

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[25] CP 18-21.
[26] CP 30-39.
[27] CP 22-29.
[28] CP 40-52.
[29] CP 53-64.

sideration in part based upon the court's acceptance of Gulizia's request that the value of the Kent Residence be set at $451,000, despite the fact that Gulizia presented no admissible evidence of value.[30] She argued that her opinion of value (including needed repairs and a credit for her equity in her Houston home) was supported by substantial evidence and was unrebutted; she therefore asked the court to revise its initial orders accordingly.[31] Although Laurel had intended to file a document in the form of a motion, that document was accidentally omitted.

Gulizia objected the next day to argue that the motion was untimely under CR 59 because no "motion" was filed within 10 days, as required by CR 59.[32] It was then that Laurel discovered that only the note for motion and ***two*** copies of her declaration were filed on September 1. Laurel argued that the filing of a note for motion and her declaration, stating the basis for the motion, sufficed to meet the 10-day requirement of CR 59.[33] The "motion" that had been omitted on September 1 was filed on September 6, 2016.[34] The court rejected Gulizia's objection and

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[30] *Id.*
[31] *Id.*
[32] CP 65-66.
[33] CP 67-70.
[34] CP 71-75.

directed him to file a response to the motion for reconsideration.[35] It considered the motion on the merits.

The court granted the motion for reconsideration in part by an order entered September 21, 2016.[36] The relevant part of the order for this appeal deals with the Kent residence.

Despite the colloquy on the first day of trial, the court believed that the transfer payment of $148,983 (the same amount as proposed by Gulizia) had been proposed by Laurel, attaching the proposed but erroneous Final Divorce Order submitted by Laurel's trial counsel. But the court then stated: "Even so, the Court determines that reconsideration is appropriate in regard to the house." The court then ruled:

> The Court finds that neither party provided competent evidence of the fair market value of the house. Therefore, the Court finds and concludes that the most just and equitable resolution is for the house to be sold and the proceeds split between the parties (as ordered below). ...

The court granted Laurel's motion in part, and ordered:

> 2. By March 1, 2017, Laurel shall sell the Kent house. At the closing of the sale, the escrow agent shall pay the existing mortgage, any real-estate-agent commission(s), any property taxes owed, standard closing costs and escrow fees, and any other amounts that both parties agree to in writing, which shall result in the "net proceeds" from the sale. The escrow agent shall then pay to each party 50 percent of the net proceeds.

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[35] CP 76.
[36] CP 190-97.

The court clearly believed its August 22 Final Divorce Order to be error.

One can reasonably infer that the court entered its initial order on the erroneous assumption that Laurel agreed to the transfer payment of $148,983, and that the court was concerned about the repairs that needed to be done and their impact on the value of the property. In short, the court left it in the hands of the marketplace to determine what the fair market value of the Kent residence was.

By ordering sale and that "net proceeds" be split 50-50, the court put Laurel in an awful position – by March 1, while the parties' children were in school and Laurel worked full-time, she would have to (a) prepare the Kent residence for sale, including at least some repairs that would force her and the children out of the residence for extended periods; (b) list the property for sale and accommodate agents and potential buyers; (c) find a new home to move to; and (d) relocate herself and the children.

At no time prior to entry of the court's order on reconsideration on September 21, 2016, did any party argue for or consent to sale of the Kent residence. The trial court noted correctly that "[b]oth spouses agreed that the court should award the Kent Property to the Respondent."[37]

It came as a surprise then that the court on reconsideration ordered that the Kent residence be sold by March 1, 2017. At no time did the court

[37] CP 19 (paragraph 8)

solicit input or otherwise afford the parties an opportunity to comment upon its decision to force a sale of the Kent Residence. Neither party had the opportunity to provide input or to propose alternatives.

Had she had an opportunity to provide input, Laurel would have proposed an appraisal, rather than sale of the Kent residence, and certainly not on the schedule dictated by the court.[38]

Shortly after March 1, 2017, Gulizia filed a motion for contempt based in part upon Laurel's failure to sell the Kent Residence by March 1. On May 4, 2017, the court entered a Contempt Order finding Laurel in contempt for failing to sell the Kent Residence by March 1.

G. The Appeal Court's Opinion

The Court of Appeals affirmed the trial court. In doing so, it held that the trial court had the authority to order sale of the Kent residence and that it had not abused its discretion in doing so.

V. ARGUMENT

This Court has previously held that a trial court does not have authority to order sale of a marital asset, particularly where neither side consents or advocates for such a sale. *See, e.g., High v. High,* 41 Wn.2d

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[38] The reconsideration order was entered on September 21, the 30th day after entry of the court's initial orders on August 22, 2016. Because Gulizia challenged the timeliness of her motion for reconsideration, Laurel had no choice but to file her Notice of Appeal in this case on the same day.[38] With the filing of the Notice of Appeal, the trial court was divested of any further authority to modify its order.

811, 252 P.2d 272 (1953); *Arneson v. Arneson,* 38 Wn.2d 99, 227 P.2d 1016 (1951). In *Marriage of Sedlock,* 69 Wn. App. 484, 849 P.2d 1243 (1993), the Court of Appeals acknowledged that no Supreme Court decision had held, in a case where the point was argued, that trial courts have jurisdiction to order a sale absent the parties' consent. *Id.* 69 Wn. App. at 503. In *Byrne v. Ackerlund,* 108 Wn.2d 445, 451, 739 P.2d 1138, 1142 (1987), this Court declared that ordering sale of principal assets by a particular date was "frowned upon," citing *High.* No decision of this Court since has held that a trial court has the authority to order sale of a marital residence, and decisions of the Courts of Appeal are in conflict.

This Court should grant review to clarify the authority of a trial court to order sale of real property in a dissolution proceeding. If the trial court has such authority, then the Court should grant review to clarify when that authority may be exercised.

The jurisdiction of a court over the property of the parties in a dissolution depends upon statutory authority. The court has no power unless it can be inferred from a broad interpretation of the statutes. *Arneson v. Arneson,* 38 Wn.2d 99, 100–01, 227 P.2d 1016, 1017 (1951). There is no statute authorizing the trial court to order sale of assets of the parties absent their consent. *See, e.g., Marriage of Trubner-Biria,* 72 Wn. App. 858, 866 P.2d 675 (1994) (parties agreed to sale). Accordingly,

many Washington cases have held that the trial court has no jurisdiction to enter such an order. *See, e.g., High v. High,* 41 Wn.2d 811, 252 P.2d 272 (1953); *Arneson v. Arneson,* 38 Wn.2d 99, 227 P.2d 1016 (1951).

"One reason for these holdings is that the decision to retain or sell an asset involves personal financial choices such as the estimation of possible future profits, the tax consequences of retention or sale of the asset, and the need for liquidity. In most cases, the parties are in a better position than the court to make these decisions." HORENSTEIN, WASH. PRAC. FAMILY AND COMMUNITY PROPERTY LAW § 32:35 (2016); *see, e.g., High v. High,* 41 Wn.2d 811, 822-23, 252 P.2d 272, 278 (1953) (held it to be an abuse of discretion for trial court to order immediate sale); *Byrne v. Ackerlund,* 108 Wn.2d 445, 451, 739 P.2d 1138, 1142 (1987) (practice of ordering sale of principal assets by particular date was "frowned upon").

There are ample reasons why the parties themselves would not agree to sell the Kent residence, particularly on the timeline mandated by the reconsideration order – including the fact that the parties' children had resided there for almost their entire lives, the neighborhood is good, and selling the Kent residence between September 21, 2016 (the date of the reconsideration order) and March 1, 2017, would necessarily occur during the childrens' school year, with attendant disruption. Furthermore, ordering sale would expose the parties to substantial excise tax and

commission liability. At the very least, it was an abuse of discretion for the trial court to order sale on these terms and without input from the parties. *See, e.g., High v. High,* 41 Wn.2d 811, 822-23, 252 P.2d 272, 278 (1953) (abuse of discretion to order sale).

Despite cases such as *High* and *Arnesson,* which hold that the court has no jurisdiction to order sale of an asset, some lower appellate cases have authorized sale. The tension is illustrated by a pair of cases from Division I. In 1993, Division I decided *Marriage of Sedlock,* 69 Wn. App. 484, 503, 849 P.2d 1243 (1993), holding that the trial court had jurisdiction to order sale of the family home. The court held there was no abuse of discretion because the wife in *Sedlock* could not afford to keep the home and the court wished to equitably allocate the tax liability arising from sale of the home and at least the husband consented to sale. However, a year later, in *Marriage of Trubner-Biria,* 72 Wn. App. 858, 866 P.2d 675 (1994), Division I called the *Sedlock* decision "fact specific" and stated that the "trial court does not have unfettered discretion to compel sale of property in a dissolution of marriage."

Unlike in *Sedlock,* Laurel has substantial assets from which she could buy out Gulizia's interest, depending upon what that price might be. In both *Sedlock* and *Trubner-Biria,* the parties agreed to sell; here, however, the parties did not; they advocated distribution to Laurel and

proposed an appraisal, which the trial court had ample authority to appoint.

In its decision, the Court of Appeals relied upon *Sedlock* and *In re Marriage of Foley*, 84 Wn. App. 839, 844, 930 P.2d 929 (1997), for the proposition that the Court of Appeals had authority to order sale. *Foley* relied exclusively upon *Sedlock*, which has been discussed above. But that position ignores *High*, *Arneson*, and *Byrne*, as well as Division I's own conclusion that a trial court does not have "unfettered discretion" to compel sale.

The *Sedlock* opinion itself does not state whether either party consented to the sale. The fact that the trial court ordered sale, however, suggests that at least Mr. Sedlock advocated for sale, as the evidence of Mrs. Sedlock's inability to pay the mortgage debt was featured in the appellate decision. Critical to the *Sedlock* court's ultimate decision was the trial court's finding that Mrs. Sedlock could not afford the home. There is no evidence that Laurel could not buy out whatever interest Gulizia might have in the Kent residence, either now or eventually; indeed, Gulizia has conceded that she has that ability. *Marriage of Trubner-Biria*, 72 Wn. App. 858, 861866 P.2d 675 (1994), characterized the *Sedlock* holding as "fact specific." This Court should grant review and hold that the trial court lacked jurisdiction to order a sale.

If the trial court has the authority to order sale, then the issue becomes what the standard of review of such an order should be. This Court has said that the practice of ordering sale by a date certain is "frowned upon." *Byrne v. Ackerlund,* 108 Wn.2d 445, 451, 739 P.2d 1138, 1142 (1987). The Court of Appeals, in *Marriage of Trubner-Biria,* 72 Wn. App. 858, 866 P.2d 675 (1994), stated that the "trial court does not have unfettered discretion to compel sale of property in a dissolution of marriage." In this appeal, the Court of Appeals applied the most deferential standard of review – abuse of discretion. But that standard of review conflicts directly with *Byrne* and *Trubner-Biria.* This Court should grant review to resolve what standard of review should apply.

Even judged by the abuse of discretion standard, however, the trial court's decision was error. The court abused its discretion by imposing upon the parties a "solution" to valuation of the Kent residence (with attendant defects) without providing notice and an opportunity to be heard. Again, neither party advocated, agreed to, or anticipated a forced sale of the home. At trial, both agreed that the Kent Residence should be distributed to Laurel; the only question was value. Both sides proposed to the court that the property be appraised. Before entry of the order on reconsideration, Judge Allred gave no indication that he was considering ordering a sale. On reconsideration, both sides argued valuation. Neither

side took issue with distribution of the Kent residence to Laurel; neither advocated sale. The court's reconsideration order was the first either side knew that Judge Allred was considering a forced sale.

A court abuses its discretion when it acts without notice and an opportunity to be heard. Examples are countless. *See, e.g., Walker v. Morgan,* 386 Fed. Appx. 601 (9th Cir. 2010)[39] (court's sua sponte imposition of nonmonetary sanctions against defendant and his attorney, for twice removing putative class action to federal court, was abuse of discretion, where court did not afford defendant prior notice or opportunity to be heard); *Martens v. Thomann,* 273 F.3d 159 (2d Cir. 2001) (Sotomayor, J.) (reversing sua sponte dismissal of claims where, among other things, former employees were not given substantial opportunity to be heard on issue of failure to prosecute and district court did not expressly consider lesser sanctions); *Montrose Med. Group Participating Sav. Plan v. Bulger,* 243 F.3d 773, 780 n.5 (3d Cir. 2001); *Arce v. Douglas,* 793 F.3d 968, 976 (9th Cir. 2015) (held within the power of district court to grant summary judgment sua sponte, but court must first give parties notice and time to respond, unless party against which summary judgment is granted has already had full and fair opportunity to ventilate the issues).

[39] Fed. R. App. P. 31.1 permits citation to unpublished opinions entered on or after January 1, 2007. A copy of *Walker v. Morgan* is included in the Appendix hereto.

This Court should reverse and remand at the very least to allow the parties to brief the issue of whether the Kent residence should be sold and on what terms. Even assuming the trial court had the power to order sale, it should not have done so without input from the parties.

DATED this 23rd day of May, 2018.

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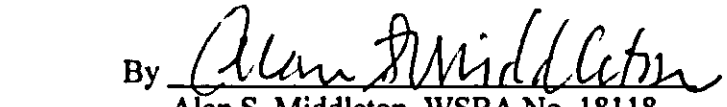
By 
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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing to be served by email upon counsel for Gulizia/respondent on the 23rd day of May, 2018, by email, as agreed by counsel, addressed as follows:

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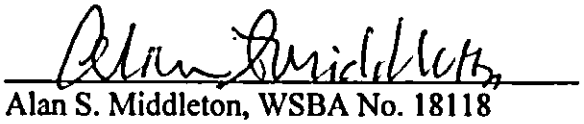

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APPENDIX A

Unpublished Opinion of Court of Appeals dated April 23, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Marriage of MICHAEL F. GULIZIA Respondent, and SVETLANA B. LAUREL Appellant.	)	No. 75846-2-I UNPUBLISHED OPINION FILED: April 23, 2018

SCHINDLER, J. — Svetlana Laurel appeals the dissolution decree, findings of fact and conclusions of law, and the order granting reconsideration. Laurel argues the court erred in characterizing the house as community property and denying her request for an equitable lien and a disproportionate share of the community property. Laurel also contends the court did not have the authority on reconsideration to order the sale of the house. We affirm in all respects.

Marriage

Svetlana Laurel has a degree in computer science. Michael Gulizia has a degree in aerospace engineering. The couple met while working at the Boeing Company in Houston, Texas and began dating in January 1998. Gulizia and Laurel married on December 31, 2001 and have two children, N.G.G. and N.M.G.

In 2004, Gulizia and Laurel relocated to California to work for Boeing. Laurel sold her house in Houston and they bought a house in Costa Mesa, California. In 2005, Gulizia and Laurel relocated to work for Boeing in Washington and bought a house in Kent.

Gulizia and Laurel separated in January 2015. On August 6, Gulizia filed a petition for dissolution. The court entered a temporary parenting plan designating Laurel the residential parent. The court appointed Lynn Tuttle to conduct a parenting evaluation. Tuttle recommended the court designate Gulizia as the residential parent.

Trial

The two-day trial began on August 17, 2016. The primary dispute was designation of the residential parent. Laurel challenged the recommendation of the parenting plan evaluator to designate Gulizia as the residential parent. Laurel also requested the court distribute the home and bank accounts based on the "56/44 income disparity between the parties."

Laurel asserted she was entitled to an equitable lien of $95,000 for her contribution of separate funds to purchase the Kent house. Laurel claimed there was "no equity in the house after you take into account the down payment that came from her separate property funds." Laurel's attorney told the court that neither party had obtained a real estate appraisal and suggested the court could order an appraisal at the end of trial. The court rejected the suggestion, stating, "I'll make a ruling based on the evidence that's presented to me."

Several witnesses testified at trial, including Tuttle, Laurel, and Gulizia. The court admitted into evidence more than 30 exhibits, including a Wells Fargo Bank account statement, a BECU account statement, two Citibank account statements,

documents related to the sale of the Houston house, the purchase agreement for the Costa Mesa house, the mortgage statement for the Kent house, Boeing retirement and pension plan statements for Gulizia, and Ameritrade and T. Rowe Price investment statements for Gulizia. Laurel did not present "any documentation" or evidence about her retirement or investment accounts at trial.

There was limited trial testimony about the house and property distribution. Laurel testified she used "only [her] sole funds" to buy the house in Houston and received "about $90,400" when she sold the house. Laurel said they used the funds from the house in Houston to buy the Costa Mesa house and the house in Kent.

Laurel testified about necessary repairs for the house in Kent. Laurel said the "water damage needs to be fixed," the carpets and hardwood floors need to be replaced, there are holes in the walls, and the house "needs to be repainted inside and out." Laurel obtained repair estimates to replace the roof, 28 double-pane windows, the concrete porch and driveway, a wood deck, and the fence. Laurel testified that as of August 16, 2015, the balance on the outstanding mortgage on the Kent house was $145,762.

Laurel admitted she did not "allow [Gulizia] to have the home appraised." Instead of a real estate appraisal, Laurel sought to introduce a "comparative market analysis" prepared by two realtors with a "suggested list price for the house." The court denied admission of the exhibits but allowed Laurel to testify as to the value of the house. Laurel testified the house "could bring about $400,000, but all of these repairs need to be done prior to that." Laurel testified she was not "planning to stay in the house" and asked the court to "include the cost of sale in the reduction of valuation" because the sale "will eventually happen."

Laurel testified that the two Citibank accounts with community funds totaled approximately $363,000 and $395,000. Laurel admitted she transferred community funds of $40,000 to her separate Wells Fargo account and in "late 2015-2016," Laurel purchased a 2015 Lexus RX450 hybrid for $55,000. Laurel testified that she has a Boeing 401(k) retirement fund, a Boeing pension plan, "Ameritrade accounts," and one E*TRADE account but did not present any evidence on valuation. Laurel asked the court to distribute all the property "[a]ccording to income."

Gulizia did not dispute Laurel owned the house in Houston. Gulizia testified he and Laurel bought the Costa Mesa house with "a hodgepodge of the proceeds from the Houston house" and joint funds. Gulizia said they used proceeds from the Costa Mesa house to buy the house in Kent.

Gulizia testified that an upstairs shower in the Kent house "leaked into the butler's pantry" in 2013 and the "hardwood floor and the walls were damaged." Gulizia said they received "6 or $7,000" from the home insurance company but Laurel would not agree to hire the contractor. Gulizia testified that other than the floors and walls, the house did not "need any other repairs." Gulizia testified that the work estimates Laurel obtained are "home improvements . . . not necessary to sell the house." Gulizia wanted to "be bought out for [his] share of the equity" in the Kent home.

Gulizia said he attempted to obtain an appraisal of the home but Laurel refused to allow the "appraiser in the house." Gulizia introduced a Zillow estimate of the value of the Kent house. The court denied admission of the exhibit but allowed Gulizia to testify about the proposed value. Gulizia testified that if sold as is, the value of the home is $455,000. Gulizia submitted a Kelley Blue Book value for his 2008 Toyota Sienna. Gulizia testified that he has savings accounts at BECU.

During closing argument, Gulizia asked the court to follow the recommendation of the parenting evaluator and designate him the residential parent. Gulizia argued Laurel did not "overcome the community property presumption" that the Kent house is community property. "There is zero evidence as to what they sold the California home for, zero evidence as to what they bought the Washington home for, [and] nothing to show how the money moved along." Gulizia asserted Laurel tried to "deflate the home's value" with optional maintenance and repair estimates. Gulizia asked the court to order Laurel to pay "one half of the . . . net value of the home."

Laurel argued the court should maintain "the current plan" and designate her as the residential parent. Laurel asserted the children have "thrived with this existing plan" because Laurel is the "sole provider of the educational benefits" and is "the sole person . . . involved in doing all of these activities." Laurel argued she was entitled to an equitable lien of approximately $90,000 and the court should divide the assets on a "disproportionate basis" because there is a "disparate amount of income."

The court entered a dissolution decree, findings of fact and conclusions of law, a parenting plan, and a child support order. The court designated Laurel the residential parent. As agreed to by the parties, the court awarded Laurel the Kent house. The court found the Kent house was a community asset and Laurel did not carry her burden of establishing the right to an equitable lien.

> The division of real property described in the order is fair, just, and equitable. Both spouses agreed that the court should award the Kent Property to the Respondent. And in their proposed orders, both spouses proposed the language that the court uses in section 8.2 of the Final Divorce Order.
>
> . . . .

> The division of community personal property described in the final order is fair, just, and equitable. In their proposed orders, both spouses proposed the property division that the court makes in sections 8 and 9 of the Final Divorce Order.

The court ordered Laurel to "refinance or sell the family home" and pay Gulizia $148,983 "to buy [him] out of his equity" in the residence.

The court awarded Laurel the two Citibank accounts and the Wells Fargo Bank account. The court awarded Gulizia the BECU bank accounts. The court awarded each party their separate retirement, pension, and investment accounts. The court awarded Gulizia the 2008 Toyota Siena and Laurel the 2015 Lexus RX450 hybrid.

Laurel filed a motion for reconsideration. Laurel argued the order to pay Gulizia $148,983 was not supported by the evidence. Laurel asserted the court ignored her contribution to the equity in the house, did not take into account the need for "substantial" repairs to the house, and erred in ordering an equal distribution of the community funds. Laurel argued the court should use the income from the "Washington Child Support Schedule Worksheet" to distribute the community property. In response, Gulizia argued Laurel did not overcome the presumption that the house community property and the evidence supported the court's "50/50 division of the assets."

The court granted reconsideration in part. The court rejected the argument that Laurel was entitled to an equitable lien.

> [Laurel] did not submit evidence of (1) whether they made a down payment when they bought the Kent house, (2) the amount of any down payment, or (3) what funds they used to make any down payment. The law presumes that the Kent house is community property and there is not competent trial evidence to overcome this presumption.

The court also rejected the argument that it erred in ordering a 50/50 distribution of community assets. The order states the court considered the factors set forth in RCW

26.09.080 in making a just and equitable distribution of property. However, based on Laurel's testimony that she planned to sell the home and move to south Seattle, the court concluded the "most just and equitable resolution is for the house to be sold and the proceeds split between the parties." The court ordered Laurel to sell the house by March 1, 2017. The order states each party shall receive "50 percent of the net proceeds." Laurel appeals.

Adequacy of the Record

Laurel has the burden of presenting an adequate record for review. In re Marriage of Rhinevault, 91 Wn. App. 688, 692, 959 P.2d 687 (1998). As an appendix to her brief, Laurel attaches trial exhibit 29, "Gulizia - Property and Debt Chart - 7/15/16." Exhibit 29 lists "Property," including the value of four bank accounts, the 2008 Toyota and the 2015 Lexus, and the Kent house. The record reflects the court admitted over 30 exhibits, including many financial documents. But Laurel did not designate any exhibits. The failure to designate exhibits and provide an adequate record compromises our review on appeal. In re Parentage & Custody of A.F.J., 161 Wn. App. 803, 806 n.2, 260 P.3d 889 (2011). Because we are unable to review the exhibits admitted at trial, our review is limited to the trial record. RAP 9.6; Happy Bunch, LLC v. Grandview N., LLC, 142 Wn. App. 81, 90, 173 P.3d 959 (2007).

Characterization of Property

Laurel argues that the court abused its discretion by characterizing the Kent residence as "wholly community property." Laurel asserts she is entitled to an equitable lien for her contribution of separate funds.

In a dissolution action, all property, both separate and community is before the court for distribution. In re Marriage of Farmer, 172 Wn.2d 616, 625, 259 P.3d 256

(2011). The court determines the character of property at the time of acquisition. In re Estate of Borghi, 167 Wn.2d 480, 484, 219 P.3d 932 (2009). A party may rebut the community property presumption by offering clear and convincing evidence that the property was acquired with separate funds. In re Marriage of Chumbley, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). "[R]eal property purchased with both community funds and clearly traceable separate funds will be divided according to the contribution of each." Chumbley, 150 Wn.2d at 8.

The court's characterization of property as separate or community presents a mixed question of law and fact. In re Marriage of Schwarz, 192 Wn. App. 180, 191-92, 368 P.3d 173 (2016). We review factual findings supporting the characterization for substantial evidence. In re Marriage of Mueller, 140 Wn. App. 498, 503-04, 167 P.3d 568 (2007). "So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it." In re Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002). The ultimate characterization of property as community or separate is a question of law we review de novo. Mueller, 140 Wn. App. at 503-04.

The court found Laurel "did not submit evidence of (1) whether they made a down payment when they bought the Kent house, (2) the amount of any down payment, or (3) what funds they used to make a down payment." Substantial evidence supports the court's characterization of the Kent house as community property. There is no dispute that Laurel owned the Houston house as her separate property. Laurel testified they used "the $90,000 that [she] got in the Houston house" to purchase the Costa Mesa house. Laurel said the purchase agreement for the Costa Mesa house includes a "reference" to a bank account that was "in [her] name only." Laurel testified the

separate funds "eventually rolled into the house in Kent." But Laurel did not provide any documentation to support her testimony.

Laurel refers to exhibits admitted at trial related to the purchase of the Costa Mesa house but she did not submit evidence about the amount or source of any down payment made on the Kent house. Because Laurel did not designate these exhibits, we accept the court's findings as verities on appeal. Happy Bunch, 142 Wn. App. at 90.

> "The requirement of clear and satisfactory evidence . . . is not met by the mere self-serving declaration of the spouse claiming the property in question that [s]he acquired it from separate funds and a showing that separate funds were available for that purpose."

Schwarz, 192 Wn. App. at 189 (quoting Berol v. Berol, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950)).

Because the findings support the conclusion that Laurel did not overcome the community property presumption, the court did not abuse its discretion in denying Laurel's request for an equitable lien.

Valuation of Property

Laurel contends substantial and unrebutted evidence supports her testimony on the value of the Kent house. Laurel argues she presented evidence that the Kent house "is in dire need of repairs" that reduce the fair market value. Laurel contends her testimony that the house "could bring about $400,000" is evidence of value. Laurel claims Gulizia's testimony does not support the value of the Kent house as $455,000.

Laurel's argument ignores the testimony of Gulizia that not all of the repairs are necessary. An owner may testify as to the value of his property. Worthington v. Worthington, 73 Wn.2d 759, 763, 440 P.2d 478 (1968). We defer to the trier of fact on issues of conflicting testimony and the credibility of a witness. Burrill, 113 Wn. App. at

863. Here, both parties testified as to the value of the house and we will not substitute our judgment for the trial court on a factual dispute over the valuation of property. Worthington, 73 Wn.2d at 762.

Distribution of Property

Laurel contends the court erred in ordering an equal distribution of the net proceeds from the sale of the Kent house. Laurel also contends she is entitled to a disproportionate share of the community assets based on income. In a dissolution proceeding, the trial court has "broad discretion to make a just and equitable distribution of property based on the factors enumerated in RCW 26.09.080."[1] In re Marriage of Wright, 179 Wn. App. 257, 261, 319 P.3d 45 (2013).

We review the distribution of assets for manifest abuse of discretion. In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). A just and equitable division " '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 parties.' " In re Marriage of Larson, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013) (quoting In re Marriage of Crosetto, 82 Wn. App. 545, 556, 918 P.2d 954 (1996)). In determining whether the distribution was just and equitable, we review the overall distribution of property. In re Marriage of Rockwell, 141 Wn.2d 235, 254-55, 170 P.3d 572 (2007). "The trial court is in the best position to assess the assets and liabilities of the parties and determine what is 'fair, just and equitable under

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[1] RCW 26.09.080 requires the trial court to consider 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 property is to become effective.

all the circumstances.' " Brewer, 137 Wn.2d at 769 (quoting In re Marriage of Hadley, 88 Wn.2d 649, 656, 565 P.2d 790 (1977)).

The record shows the court considered the factors under RCW 26.09.080. Because Laurel did not designate the exhibits admitted at trial, we cannot review the financial information that was before the court. Therefore, we accept as a verity on appeal the court finding that the distribution of real and personal property is "fair, just, and equitable." See Happy Bunch, 142 Wn. App. at 90. Further, it is the overall division of property that must be fair, just, and equitable. But here, the record on appeal does not allow us to review the division of property in its entirety. The testimony established that Gulizia and Laurel each had retirement and pension accounts and separate investment accounts. Gulizia presented documentation of the value of his retirement and investment accounts but Laurel did not submit any documentation or testify as to the value of her accounts. Without a complete record, we conclude Laurel cannot show manifest abuse of discretion in the distribution of property.[2]

Sale of Kent House

The trial court has the authority to order the sale of the family residence in a dissolution to achieve an equitable property distribution. In re Marriage of Foley, 84 Wn. App. 839, 844, 930 P.2d 929 (1997); In re Marriage of Sedlock, 69 Wn. App. 484, 503, 849 P.3d 1243 (1993).

Citing High v. High, 41 Wn.2d 811, 252 P.2d 272 (1953), and Arneson v. Arneson, 38 Wn.2d 99, 227 P.2d 1016 (1951), Laurel contends that absent consent of

[2] In her reply brief and for the first time on appeal, Laurel argues she is entitled to a disproportionate distribution of the assets because she suffers from a chronic illness, fibromyalgia. We will not address an argument raised for the first time on appeal in a reply brief. See Stelter v. Dep't of Labor & Indus., 147 Wn.2d 702, 711 n.5, 57 P.3d 248 (2002) (declining to reach an issue that was not raised or briefed below); King v. Rice, 146 Wn. App. 662, 673 n.30, 191 P.3d 946 (2008) (declining to consider argument and authority made for the first time in a reply brief).

the parties, the trial court did not have jurisdiction to order the sale of the Kent house. High and Arneson are distinguishable.

In High, the record showed "the property had been bought for speculation and was worth little now but might increase in value later." High, 41 Wn.2d at 823. The court held that under the circumstances, the trial court abused its discretion in ordering the sale of the three separate tracts of land. High, 41 Wn.2d at 823. In Arneson, the court held the trial court did not have jurisdiction in the dissolution proceeding to order the sale of property for the benefit of creditors. Arneson, 38 Wn.2d at 101.

> [T]he court has no power to compel a liquidation for the benefit of creditors as an incident to a divorce decree. Nor can any of the statutory proceedings, having that as its purpose, be consolidated with a divorce action for trial.

Arneson, 38 Wn.2d at 101.

Laurel also argues the court abused its discretion by ordering the sale of the house. We review the court's decision to order the sale of the family residence for abuse of discretion. Sedlock, 69 Wn. App. at 504-05. Laurel contends the court abused its discretion because the parties did not have an opportunity to address sale of the Kent residence. The record does not support her argument. At trial, Laurel testified she was not "planning to stay in the house." Laurel testified she retained a real estate agent and was "actually looking" for a new home in the south end of Seattle. Laurel said she wanted to move to the south end of Seattle and the sale would "eventually happen."

Consistent with the testimony at trial, the court concluded the "most just and equitable resolution is for the house to be sold and the proceeds split between the

parties." The court order states specifically:

> The Court reaches this determination after considering all relevant factors, including those in RCW 26.09.080 and including Laurel's testimony that, with the help of a real estate agent, she is looking to sell the Kent house and move to south Seattle, a sale "that will eventually happen."

Because substantial evidence supports the decision, the court did not abuse its discretion by ordering Laurel to sell the Kent residence.

Attorney Fees

Laurel requests attorney fees and costs under RAP 18.1. Laurel only requested attorney fees in the last sentence of her brief. RAP 18.1 "requires more than a bald request for attorney fees on appeal." Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). We decline to award Laurel fees on appeal.

We affirm.

WE CONCUR:

COX, J.

APPENDIX B

Exhibit 29

Gulizia - Property and Debt Chart – 7/15/16

Property	Community property Value	Awarded to wife	Wife's Sep. prop.	Awarded to Husband	Husband's sep. Prop.
Home: 23821 139th PL SE, Kent, WA 98042 Zillow 6/15/16, Mortgage as of 8/1/15 House $ 451,000 Mortg. $ 146,217 Value $ 304,783	$304,783	$155,800		$148,983	
His - 2008 Toyota Sienna	$ 7,500			$ 7,500	
Her-2015 Lexus RX450h	X	X			
Joint-Citi Bank Savings, #2971, 8/1/15	$ 363,231	$ 363,231			
Joint-Citibank Savings, #6097, 2/27/15	$ 395,133			$ 395,133	
Her-Wells Fargo Checking, #7767, 8/1/15,	$40,000	$ 40,000			
His-BECU, #7382, 6/3/16	$7,414			$7,414	
TD Ameritrade	X			X	
TD Ameritrade IRA	X			X	
TD Ameritrade Roth IRA	X			X	
T-Rowe Price IRA	X			X	
His-Boeing VIP 401K,	X			X	
Wife – Boeing VIP	X	X			
Personal Items – See attached	X	X	X	X	X
Total comm. Assets:	**$1,118,061**	**$559,031**		**$559,030**	
		50% of Comm. Assets		50% of Comm. Assets	
DEBTS	**VALUE**	**Awarded to wife**	**Wife Sep. Debt**	**Awarded to husband**	**Husband Sep. Debt**
Total Comm. Debt					
TOTAL Assets/debt result:		%		%	

APPENDIX C

Walker v. Morgan, 386 Fed. Appx. 601

(9th Cir. 2010)

386 Fed.Appx. 601
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3.
(Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Camellia WALKER, individually and on behalf of a class of similarly situated individuals,
Plaintiff-Appellee,
v.
Russell B. MORGAN; Scott K. Haynes, Appellants,
Motricity, Inc., a Delaware corporation,
Defendant-Appellant,
David F. Gross; Stephen A. Chiari; DLA Piper LLP (US), Third parties.
Camellia Walker, individually and on behalf of a class of similarly situated individuals,
Plaintiff-Appellee,
v.
Motricity, Inc., a Delaware corporation,
Defendant,
David F. Gross; Stephen A. Chiari; DLA Piper LLP (US), Third parties-Appellants.

Nos. 09-16532, 09-16535.
|
Argued and Submitted June 17, 2010.
|
Filed July 2, 2010.

Synopsis
Background: Cellular phone user brought putative class action in California state court against mobile phone content developer, alleging developer billed cellular phone users for unwanted content sent to their phones. Developer removed action to federal court and plaintiff moved to remand. After the action was remanded to state court, developer again removed action and plaintiff moved to remand. The United States District Court for the Northern District of California, 627 F.Supp.2d 1137, Marilyn H. Patel, Senior District Judge, remanded and imposed sanction on defendant and his attorney. Defendant appealed sanction.

Holding: The Court of Appeals held that defendant was not afforded notice or opportunity to be heard prior to imposition of sanctions.

Reversed.

West Headnotes (1)

[1] **Federal Civil Procedure**
Sua sponte imposition
Federal Civil Procedure
Notice and hearing

Court's sua sponte imposition of nonmonetary sanctions against defendant and his attorney, for twice removing putative class action to federal court, was an abuse of discretion, where court did not afford defendant prior notice or an opportunity to be heard.

1 Cases that cite this headnote

Attorneys and Law Firms

*601 Michael J. Aschenbener, Kamberedelson LLC, Chicago, IL, Alan Himmelfarb, Kamberedelson LLC, Los Angeles, CA, for Plaintiff-Appellee.

Jeffrey G. Knowles, Esquire, Coblentz, Patch, Duffy & Bass, LLP, San Francisco, CA, Scott K. Haynes, Russell B. Morgan, Bradley Arant Boult Cummings LLP, Nashville, TN, Courtney Huizar, Coblentz, Patch, Duffy & Bass, LLP, San Francisco, CA, for Appellants.

Appeals from the United States District Court for the Northern District of California, Marilyn H. Patel, Senior District Judge, Presiding. D.C. No. CV-09-1316 MHP.
Before: SCHROEDER and TASHIMA, Circuit Judges, and STOTLER, Senior *602 District Judge.*

MEMORANDUM**

**1 Defendant-appellant Motricity, Inc., and Motricity's counsel in the district court (collectively, "Appellants") appeal a portion of the sanctions imposed in conjunction

with the district court's order granting the motion of plaintiff Camellia Walker to remand Walker's putative class action to state court. The sanctions were imposed *sua sponte* without notice or hearing. The sanctions were imposed assertedly because Motricity removed the case for a second time without new evidence.[1] The district court imposed monetary sanctions, as well as what the parties refer to as a "notice sanction," which provided:

> Finally, in view of this repetitive and contemptuous conduct, the court orders that in all future cases where this defendant or these attorneys have removed or remove an action under CAFA defendant and/or counsel shall file a copy of this order with the court and serve it upon opposing counsel.

Appellants appeal only the notice sanction; thus, the monetary sanction is not before us. We have jurisdiction under 28 U.S.C. § 1291, *see Detabali v. St. Luke's Hosp.*, 482 F.3d 1199, 1204 (9th Cir.2007), and we reverse.[2]

It is long-established law in this circuit that a district court abuses its discretion when it imposes sanctions without first giving notice and an opportunity to be heard. *See Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198 (9th Cir.1999) ("Whenever the district court imposes sanctions on an attorney, it must at a minimum, afford the attorney notice and an opportunity to be heard."). Here, it is undisputed that such notice and an opportunity to be heard were not afforded to Appellants.

Thus, the notice sanction portion of the district court's order remanding the case to state court is **REVERSED.** Each party shall bear his, her, or its own costs on appeal.

All Citations

386 Fed.Appx. 601, 2010 WL 2725589

Footnotes

* The Honorable Alicemarie H. Stotler, United States District Judge for the Central District of California, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

1 It is disputed whether or not the second notice of removal was based on new evidence. Appellants take the position that, although the evidence they relied on in their second removal was technically before the court at the time it filed its first order of remand (because the evidence had been filed a day before the remand order), the first remand order could and should be read as having been made in ignorance of that evidence. We need not resolve this dispute.

2 We deny Appellants' request for judicial notice of certain documents filed in "other, related federal proceedings," because we do not reach the issue on which those documents bear.

End of Document