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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Case Number 69031-1-1

SHELLEY GOLLARD MIDKIFF, Respondent

v

STEVEN LINVEL MIDKIFF, Appellant

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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REPLY BRIEF OF APPELLANT

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## I ARGUMENT IN REPLY TO RESPONSE

### STANDARD OF REVIEW

It is uncontested that RCW 26.09.080 sets the standard as to how property in a dissolution of marriage action is to be considered. The statute does not simply state that you consider separate and community property but also the nature and extent of that property. The nature of that property deals with the statutory and case law defining the manner in which the property should be awarded. This makes it necessary for the court to characterize the property before making such an award. Characterization may not be the controlling factor but is a relevant factor In re Marriage of Irwin 64 Wn. App. 38, 822 P.2d 797.

It is the contention of Appellant that in making the “equitable award” the court ignored the nature and extent of the property and the existing law with regard to the distribution of property, thereby substituting an equal distribution for an equitable distribution. The court ignored the nature of the Appellant’s separate property as a depreciating separate asset while characterizing the marital home as a depreciating separate asset. The court inequitably required a contribution from his separate property and ignored his community contributions to both the marital home and to his separate property home which also was depreciating. Though the court may award the property regardless of characterization it must be an equitable award

The court awarded over \$160,000 to place the Respondent in nearly the same position she was in prior to the marriage with regard to her separate estate. In doing so the court reduced the separate estate of the Appellant by a lump sum amount of \$81,200 and awarded \$86,000.00 to the Respondent from the equity realized from the sale of the marital home. It was stipulated that Respondent would receive the equity from the sale of the marital home and appellant made no claim upon it.

In this case the court valued the property based on the values at the time of trial but awarded judgments based on the value at the time of marriage and acquisition. The court used what was identified as the “current market value of the equity purchased with the wife’s down payment” to value the marital home as opposed to the current fair market value of the home as required by case law.. CP 22. Lucker v. Lucker 71Wn. 2d 165. 426 P.2d 981 (1967) Though the court may make what it believes to be an equitable distribution of the assets herein, if they are based on misappropriation of statutes and case law, what would seem to be an equitable award becomes an inequitable award and constitutes an abuse of the courts discretion.

## **CHARACTERIZATION AND MISCHARACTERIZATION OF PROPERTY**

The court ruled that the wife had traced her separate property to the marital real estate and that Appellant had contributed to the “home equity”

through monthly payments as community property. CP 22. The case law indicates that the character of property is determined at the time of acquisition In re Marriage of Janovich, 30 Wn. App. 169, 632 P.2d 889. At the time of acquisition not only were separate funds of the Respondent used to acquire the home but the income and credit of both parties in order to secure the mortgage. Neither party would have qualified for the mortgage alone. RP 46 II 12-18.

The case of Estate of Borghi 167 Wn. 2d 480, 219 P.3 932 involve the purchase of property on a real estate contract and the subsequent marriage of the contract holder. In determining the character of the property the court ruled that mere addition of a spouses name to a deed did not change the character if the property. In that case shortly after the marriage a fulfillment deed was issued to the purchaser in both spouses names. The deed fulfilled a real estate contract acquired before the wife's marriage to her current husband. There is no indication that the husband paid any sums toward the purchase. Upon the death of the original purchaser a dispute arose as to the character of the property. The court ruled that it was the separate property of the original purchaser and that the deed did not change the character. That case is easily distinguishable from the case at bar as the character in Borghi was not determined at the time of acquisition and nothing took place to change the character. During the opening statements in the present case the judge specifically stated.

I'm sure that you're and that you have informed your client that an investment of separate property into a community home is presumed to be a gift to the community and that you're prepared to present evidence to rebut that presumption RP 14

Counsel answered by citing the Borghi case cited above. I do not believe that that case being factually different or any other case presented at trial rebuts the presumption of character being determined at acquisition. In fact, reliance on the Appellant's credit and income would mitigate towards a gift to the community as opposed to rebutting the presumption.

Granting the fact that tracing separate funds allows the contributor of those funds to divide the property at a later date based on the contributions of each party's separate or community contribution it does not indicate that therefore the entire amount of separate funds should be awarded to the Respondent at the purchase value. In this case the asset depreciated as opposed to appreciated. Whether the funds were community or separate there is no precedent for awarding the entire purchase price as opposed to the fair market value at the time of the trial. It can certainly be inferred that if the increases in value accrue to the party who provided separate funds that they should accrue the losses as well. Marriage of Chumbley 150 Wn.2d. 1, 74 P. 3d 129.

"If the property is to be valued as of the date of trial rather than the date of separation, appreciation as well as depreciation in value should be considered in making an equitable division." Lucker v. Lucker 71 Wn 2d 166, 426 P.2d 981

In order for the court to equitably divide the property of the parties it must first characterize. The mere fact of characterizing is an exercise by which the

court begins its process of awarding property and obligations to each party. The situation is much different in this case as Mr. Midkiff had stipulated that the equity value of the marital home should go to Ms. Midkiff. Therefore the award was decided without the necessity of a characterization.

Had the court found that the property was community as is arguable here the depreciation would have been shared equally by both parties and there would have been little if any reason to award the property in any manner other than one half to each.

Since Ms. Midkiff is contending that the property was correctly characterizes as her separate property there is no reason to believe that she should not be awarded the entirety of the equity. Characterization only applies to the property to be awarded at trial and not expectancies or property which did exist but no longer does exists. In this case the former market value of the home does not exist due to depreciation of the asset. The court mischaracterized the property in that it characterized property which does not exist. RCW 26.09.080

#### **DEDUCTION OF COSTS OF SALE FROM VALUE OF HOME.**

The Appellant does not question the authority of the court to reduce the equity in the home by the costs of sale. The marital home was indeed sold and costs of sale were paid from the sales price of the home. The Appellants home

was not sold and was not intended for sale and no deduction from equity was requested in its evaluation.

## PROPERTY DIVISION

If the property of a marital community is to be divided at the time of trial instead of the time of separation the trial court should consider each parties contributions to and depletion of the community asset both increases and decreases both at trial and .during the separation. Lucker v. Lucker 71 Wn. 2d. 165, 168 P.2d 981 There is no indication that there was any consideration given this obligation though testimony showed that Appellant paid all of the mortgage payments from the time of purchase until the sale of the property, both during the marriage and after separation. CP 21. From purchase to sale the husband had contributed \$156,457.00 to the payments on a depreciating asset. Had he simply walked away from the home and allowed it to be foreclosed as the Respondent had done she would have been responsible for making the payments herself in order to protect the equity in the home or face foreclosure. In fact Appellant took over the payments, protected the equity and is now expected to reimburse Respondent for the depreciation in the home with a payment of \$81,000.00. CP 17. There was no agreement between the parties as to who would assume the entire mortgage payment upon the wife's abandonment of the home. The Respondent simply expected Appellant to continue with the payments. CP 45 II 9-25 and 46 II 8-18

The court is to use the fair market value of assets to be distributed and will be overturned if the value is not within the scope of the evidence. In re the Marriage of Mathews 70 Wn. App. 116, 863 P.2d 462. The court did not use the fair market value in determining the disposition of both the marital home and the home of the Appellant. In a strange calculation of value the court wrote the following:

“Market forces drove down the value of the marital home by approximately 14%. The current market value of the equity purchased with the Wife’s down payment is thus \$167,700. CP 22.

The valuation of the home was not made at the fair market value, as testified to by a certified appraiser, of \$560,000.00 but based on the “**current market value of the equity of (Respondent’s) down payment**” CP 22 RP 64 ll 6-7.(emphasis added) That evaluation takes into account the purchase price and ignores the decrease in the value of the asset.

The court then states: “Husband’s pre marital home has a current equity of approximately \$240,000. During the marriage Husband rented his pre-marital home and received income approximately equal to the mortgage payments providing him with a cost free asset of substantial value.” CP 22

In making that finding the court has valued the properties on two different bases. The marital home based on the “down payment equity” and the purchase price and not on the depreciated fair market value at time of trial. Appellant’s home was valued at the current fair market value without any consideration as to the

loss of value it has suffered due to the same “market forces” that the court attributed to the marital home. CP 22

Appellant testified to the fact that his home had decreased in value over the time of the marriage from “. . . the high \$300,000’s to about 340. RP 137. The home, however, is not cost free as the court had indicated The home underwent some renovation after the marriage which was paid for by a line of credit in the sum of \$30,00.00. The court has awarded Respondent compensation from the Appellant to cover her separate property losses due to market forces but has failed to consider the same market force losses sustained by appellant.

For the court to consider an award based on inconsistent market values using purchase prices and equities for one home and current market values for the other is neither fair nor equitable. The court did not take into account the decrease in the value of Appellant’s separate property and based the Respondent’s losses on purchase prices. The inequality of those evaluations are only exacerbated by the courts order requiring Appellant to provide over \$160.000.00 to “equalize” the loss of the respondent. CP 21. The court then required Appellant to continue to pay the mortgage on a depreciating asset until it was sold to protect from any further losses due to foreclosure. The Appellant was given no credit for his now separate contribution to mitigate the separate losses of the Respondent. CP 22

## **ECONOMIC CIRCUMSTANCES OF THE PARTIES.**

Neither party has made any demand on the other for distribution of funds or an award of separate property. Appellant has agreed to provide Respondent with the equity in the marital home. The home has been sold and Respondent has received the proceeds. She has made no demand for any maintenance or any separate or community property nor has Appellant from her. Respondent has received the equity from the sale of the home. RP 55 II15-16, RP 74 II 14-16.

The requirements for the award of maintenance and the factors for disposition of assets in a dissolution proceeding are very similar though not identical in their respective statutes. RCW 28.09.080 states in setting out the factors in the awarding of assets: The nature and extent of community and separate property, duration of the marriage, economic circumstances of the parties are found in RCW 26.09.080. In settling out the factors involved in awarding maintenance those factors set out above are included and additionally a spouses ability to meet their financial needs, the time necessary to obtain education, the standard of living established during marriage, and the age physical and emotional condition of the spouse seeking maintenance. RCW 26.09.090. Neither spouse requested maintenance or contended that maintenance was at issue though the same or very similar factors are to be

considered in both disposition of assets and maintenance. The financial situations would seem to be very similar.

In evaluating the financial situation of each party the record reflects the fair market value of the marital home is \$560,000.00. RP 64 II 6-7. "Specifically the parties anticipate a net equity in the property of approximately \$86,500." CP 21 II 19-21. The net equity from the sale of the home was awarded to the Respondent as separate property by agreement and stipulation between the parties and by the operation of law. In re Marriage of Pearson–Maines, 70 Wn. App. 860, 855 P.2d 1210. Respondent has by way of current income \$59,000.00 per year from long term employment at the University of Washington. Her retirement which is vested will pay her \$1,360.00 per month \$16,320.00 per year were she to retire today, and presumptively more if she continues to work. Ex 7. She has a Roth IRA valued at \$33,661.00 Ex 8, a Vanguard investment fund of \$17,223.57, Ex 9 an AIM Investment fund of \$30,516, EX 10. She will receive her social security if and when she is eligible and chooses to receive it.

In addition to those liquid assets she receives employment benefits, a medical plan for which she pays only \$87.00 per month Ex. 1. Dental coverage is free with the employer paying \$79.17 per month. She has a life insurance policy and optional life insurance, and AD&D coverage, both regular and optional long term disability coverage. Ex 5 and CP 21.

Both the cash assets and the employment benefits are separate property both by agreement and operation of law. The cash assets total \$167,900 while the employment benefits are not subject to a dollar value they are certainly beneficial to her entire economic circumstances. Employment benefits are also completely unavailable to the Appellant unless he purchases them for himself. The Appellant was covered under the wife's medical but that ended with the entry of the decree of dissolution. Respondent also stated that during the marriage I was able to put \$1,200.00 to \$1,500.00 a month into a savings account for vacations and home maintenance etc. RP 29 II. 5-9. She also stated that Appellant paid the entire mortgage. RP 29 II 13-14. Any alleged decrease in Respondent's economic circumstances regarding her separate property interest in the marital home are the result of "market forces" which caused her separate estate to decline and had nothing to do with her marriage or any action taken by the Appellant. In fact his separate asset suffered from the same decline.

Appellant's economic situation is substantially less beneficial. At present he earns between \$60,000.00 and \$68,000.00 per year or about the same amount as Respondent. RP 80 II 6-8. His separate assets which will presumptively be available for his retirement are an IRA worth \$1,500.00 and a cash value life insurance policy of about \$17,000.00. CP 21 and 22. He will have his social security benefit which will be about the same as Respondent's. That leaves his major source of retirement financing the equity in this Bothell home. The allegation that is made by Respondent that Appellant has a business

worth \$250,000.00 is completely unsustainable. The business is a sole proprietorship or Subchapter S Corporation. The sole owner, Mr. Midkiff, earns between \$60,000.00 and \$68,000.00 per year. At trial he was asked if the business was worth \$25,000.00 and the following testimony was given.

And do you recall in your responses to interrogatories that the petitioner sent stating that you believe the worth of the business is \$250,000.00?

I did say that at the time. I wish I still believed that. RP 111 II 4-9

The court never attributed any value to the business nor was there further testimony or any information or foundation to indicate a \$250,000.00 value for the business. Counsel for Respondent attempted to establish value added to the business with further questioning but was unable to do so. RP 111 II 10-25 and 112 II 1-113

The court found that the equity in the Appellant's home in Bothell to be \$240,000.00. CP 22. That asset, just as the marital home, has lost value due to "market forces." RP 137 II 4-15. If one considers the equity in the Bothell home to be Appellant's pension and equalizes it with Respondents actual vested pension at \$1,360.00 per month Appellant would need to sell the home to realize that equity. He would then be able to pay himself \$1,360.00 for the next 14.71 years were he to retire today without deducting costs of sale from the equity. If he is required to pay the sum of \$81,200.00 to Respondent the remaining equity in his Bothell home will pay him the \$1,360.00 sum for only 9.73 years. CP 22

If Appellant were to retire or become disabled today and begin collecting his pseudo pension from his Bothell home his “. . . economic circumstances at the time of the division of property. . . ” as set out in RCW 26.09.080(4) would leave him with an incredible deficit economically as compared to the Respondent. Respondent on the other hand would have a lifetime pension of \$1,360.00 plus her social security plus \$167,900.00 and any and all of the employment benefits and insurances which may continue as a benefit after retirement. Respondent’s retirement benefits today from her pension are \$1,360.00 per month.

The court is obligated to determine the nature and extent of the community property and the nature and extent of the separate property. The nature of the separate property of the Appellant is either a residence now that the marital home has been sold or a source of retirement funds. The court seems to have ruled against the presumption that separate funds used to purchase property in the names of both parties constitutes those funds as a gift to the community. In re Marriage of Olivares, 69 Wn. App 324, 848 P.2d 627. With that ruling any increase in the value of separate property is assumed to be separate. In re Pearson-Maines, 70 Wn. App. 860, 855 P.2d 1210., In re the Marriage of Elam, 97 Wa. 2d. 811, 650 P.2d 213. Appellant is presumably entitled to reimbursement for community contributions but that presumption is negated by the case of In re Marriage of Miricle, 101 Wn 2d 137. 675 P.2d 1229.. Miricle sets off the community contributions against the rental value of the premises and

awards nothing for the community contributions to the mortgage. This case differs to some extent to those cited above in that from the time of the purchase of the home until the time of the sale of the home Appellant had made all the payments on the mortgage, a total of \$156,000.00.

From the time of purchase to the time of separation there is no dispute that the payments were made from community funds to benefit a separate asset. On March 12, 2011 the parties separated RP 17 II 1-2. From that date until the home was sold comprised 17 months. During that time Appellant contributed \$54,281.00 from his now post separation separate funds. All contributions were to the depreciating asset of the marital home, the home which the Respondent had abandoned. Not only did he contribute that sum he was ordered to make those payments by the court CP 21 and 22.

Appellant didn't ask for consideration for contribution from separate funds or for community funds he paid on the home and he was given none, even for the contributions from separate funds after separation. What he did in fact was contribute well over \$156,000.00 toward an asset he didn't "own" and from which he would never receive any appreciation from for his contributions. He also contributed that sum to an asset that not only depreciated despite his contributions but also would have been foreclosed had he not continued to make payments. RP 45 II 9-25

RCW 26.16 .030 sets out all the actions a spouse may or may not take regarding community property. By inference is a spouse may do all of those things prohibited and allowed by the statute and case law with his or her own separate funds. Case and statute law certainly set out how the increases in value of separate property are to be handled. They inure to the separate property owner. Estate of Hickman 41 WA n.2d. 519 250 P.2d 524, In re Marriage of Pearson–Maines 70 Wn. App. 860, 855 P.2d 1210, It seems only an afterthought and then only by inference do we find anything approaching a decision that explains what is to be done with separate property which decreases in value. The case of Lucker v. Lucker 71 Wn 2d. 165, 426 P.2d 981 Indicates that an asset is to be valued at the time of separation but if not at the time of trial. If valuation takes place at the time of trial there should be taken into consideration both appreciation and depreciation of the assets. The case states at page 617

The formula by which the court divided the property considering only the value at the time of trial and ignored depreciation during the 7 year period in which the parties were separated and during which the respondent had use of the property. The furniture, appliances ,boat motor and trailer were acquired and paid during the time the parties were living together and respondent had the use and enjoyment of them for a period of years after the separation yet appellant was given nothing for her interest in the boat motor and trailer although she contributed to their purchase as a member of the community. Likewise appellant was awarded nothing for any enhancement in value of the Hood Canal Property during the years following the separation, though it increased in value to some \$5,000. If the property is to be valued as to the date of the trial rather than the date of separation , appreciation as well as depreciation in value should be considered in making an equitable division. We believe that a larger judgment than \$509 should be awarded to appellant.

In the current case the property was awarded as of the time of trial but in awarding a judgment the court took into consideration the decrease in value during the marriage on the marital home. The court considered all of the decrease in value of the marital home and required the Appellant to reimburse Respondent for that loss. The court did not give the same consideration to the value lost in the Bothell home of Appellant. What was awarded was the actual equity value of the assets available at the time of trial of the marital home. The court overstepped its authority when it awarded the asset based on what the home was worth at the time of acquisition by awarding the separate property of the Appellant to the Respondent in addition to the actual equity value at trial. While the reduced value of the separate property of the wife was recognized and reimbursed the reduced value of the appellants home was not reimbursed nor recognized.

In re the Marriage of Pearson-Maines 70 Wn. App. 860, 855 P.2d 1210

States at page 864:

“Under In re Marriage of Elam 97 Wa 2d 811, 650 P.2d 213 any increase in the value of separate property is also presumed to be separate. The presumption may be rebutted by evidence that the increase was attributable to community effort. The community receives that portion of the increase attributable to community effort. The community receives that portion of the increase attributable to community contributions. Elam 97 Wn. 2d at 816-817. In addition, any increase due to inflation is divided consistently with the proportions of community and separate contributions.”

Again the cases discuss increases and inflation as opposed to decreases and deflation. All the cases speak to the value of the property at the time of

separation or trial. If the Respondent is entitled to increases in value due to the separate character of her property it is only logical that she is also responsible for the decreases in value.

It is unreasonable and completely unfair and inequitable to require a spouse to reimburse the other because a separate asset has lost value during the time of the marriage. In the Lucker case above they spoke of boat motor and trailer as well as real property and concluded that depreciation as well as appreciation must be taken into consideration. In Pearson-Maines above, they specifically state that inflation in the same proportions to ownership must be considered. Though it is not specifically stated, the logical inference is that any decreases in value will be suffered by the proportion of ownership as well.

The rule that the increase in value due to contributions of community assets or labor should inure only to the extent they increase the value of the separate property of the asset holder should also work in reverse. To apply the sums dollar for dollar would allow one to "improve the other spouse out of his or her separate property." . In re the Marriage of Pearson-Maines 70 Wn. App. 860, 855 P.2d 1210 at 864. The reverse would seem to be true. If one cannot improve one out of her interest in separate property how is it fair and equitable for a spouse to decrease the other out of his or her separate property. The ruling in this case does exactly that. After paying \$156,000.00 most of said sum being community contributions but \$54,000 being from separate funds the

court has ruled that Appellant must now contribute \$81,200.00 to return the separate asset of the Respondent to its purchase value. He is to do that by contributing from his separate property which has depreciated as well. The spouse is thereby contributing the other back into her separate property as opposed to improving her out of it.

The inequity of the situation is that the Appellant is replacing the value of a depreciated separate asset of the Respondent from funds based on his separate asset, his Bothell home, which has depreciated as did the Respondent's. The Bothell home is the only source of funds he has from which to pay the \$81,000.00 judgment. That payment will compromise his retirement and reward him, not at all, for the \$156,000 he expended on the marital home. That \$156,000 not only bought him the use and enjoyment of the home but also the wife's use and enjoyment during the marriage. An additional inequity is the fact that when the wife abandoned the home with no intent to make the mortgage payments, it was only the fact that Appellant kept the mortgage current that avoided a foreclosure on the marital home. RP 45 II9-25.

There is no indication in any of the cases that I have reviewed that a spouse is responsible for reimbursing the other for a depreciated asset without some culpability on the part of the spouse for the decreased value. In fact it usually requires someone to waste community asset before any type of reimbursement would be ordered and that would certainly be the case with

separate property since the non-owner has absolutely no control over the asset. RCW 26.16.030. In fact there is a fiduciary duty for spouses to control community assets for the benefit of the community. Peters v. Skalman 27 Wn. App. 247, 617 p. 2D 448. There is no such relationship with separate property. If there was such a duty, however, Appellant did everything he could to protect the asset for his wife even as she abandoned the asset. He demonstrated his good faith in making the efforts he did while the wife played fast and loose with her investment in thinking whatever happened she would be entitled to all her money back

In fact the wife seems to have believed that she was entering into an investment that had no risk. What she was actually doing was investing in an expectation that the value of the property would increase. The court cannot award to the wife what she thought the property would be worth at the time of trial but only that which is actual property value. In the instant case the property is gone to a certain degree. In re Marriage of Leland 69 Wn. App. 57, 847 P.2D 518 review denied 121 Wn 2d. 1033

It is not possible to imagine a situation by which the separate property of a spouse which decreases in value during a marriage would be subject to reimbursement from the other spouse absent some wrongdoing, destruction or fraud. Neither party hereto engaged in any wrong doing and both entered the mortgage with the best of intentions. Both presumed that their investment would

be a profitable one and that they entered into it with their best interests in mind. Both of them lost considerable sums from their separate property assets. RP 46 II 8-18. Had Respondent invested in a different home the result given the market forces that existed to decrease the value of both parties separate property.

Had respondent purchased a yacht, a car, a mutual fund, a vacation home a, business or any other asset, as her separate property, it would be hard to understand the court awarding reimbursement from Appellant due to a decrease in value of the asset. It is especially hard to comprehend when community funds from the non-owner are contributed in such large amounts.

#### **APPELLANT'S REQUEST FOR ATTORNEYS FEES AND COSTS.**

Appellant request the award of attorney's fees based on the statutory provisions of RCW 26.09.140, and RAP 18.1. Appellant will provide time computations and affidavits of the time and efforts expended in proceeding with this appeal and defending Respondent's request for sanctions for an extension of the time for filing his initial brief.

A financial declaration has been filed with Appellant's Response to the Motion for Sanctions as well as a sworn statement answering Respondent's motion and setting out his financial need as well. It should also be known that the funds to proceed with this affidavit have been borrowed.

## CONCLUSIONS

Because the court has misapplied, improperly valued and misinterpreted several statutes and case law precedents the presumption that the ruling based on those errors is fair and equitable is in error.

It is settled law that the contribution of separate funds to community property is a gift to the community. That is exactly what has happened here as the mortgage that was taken on the marital home was a community debt and taken in both the parties names and would not have been attained but for the credit and income of both parties. Character of an asset is determined at the time of acquisition. The court has held, however, that the of community gift has been overcome by the process of tracing to separate funds the down payment by the Respondent.

If the community property presumption is followed the award of the property in a short term marriage would probably have been a 50/50 split of the equity available in the marital home of the parties. Each party would have shared in one half the value of the equity left in the home and one half of the loss in value. It was stipulated that Appellant would agree to the award of the entire equity remaining in the marital home would be awarded to respondent as a fair and equitable award.

With the court ruling that the down payment was traceable as the separate property of the Respondent it became necessary to divide the property differently. Presumptively the respondent would be awarded the entirety of her separate party and all or at least a major portion of the asset and its increased value. Appellant does not disagree that the award made in that manner would be appropriate. Unfortunately instead of the asset increasing in value it decreased in value. Respondent contended she was entitled to not only the entirety of the remaining equity in the home but an additional award from the Appellant.

The property that exists at the time of the trial or separation is to be awarded in a fair and equitable manner and valued at a fair market value. At the time of trial there was equity in the home of some \$86,000.00 which actually existed in the marital home. Appellant was willing and stipulated to the award of the entirety of that asset to the Respondent. Instead of valuing the property at the fair market value (\$86,000.00) the court valued it at what was called, the fair market value of the equity of Respondent's down payment. That was opposed to the actual appraised fair market value of the asset at time of trial. The court took into consideration the actual funds expended by the Respondent as opposed to awarding the asset which actually existed at the time at its fair market value which was much less due to the diminution of the asset at the time of trial.

The court then exacerbated the inequity in its decision by valuing the Appellants separate asset, his Bothell home, at its current market value without giving him credit for the fact that the same market forces which decreased the value of Respondent's separate asset also decreased the value of his. After the improper evaluations the court ordered the appellant to pay the sum of \$81,200.00 in addition to the \$86,000.00 she was awarded from the existing equity. From the \$195,000.00 down payment made by Respondent she will receive \$167,200.00 from a separate investment that lost \$90,000.00 in value from the time of purchase to the time of trial. If the decision stands the Appellant will be required to pay \$81,200.00, which must come from his only significant asset his Bothell home. The court has completely ignored the fact that the Appellant has also lost about \$50,000.00 to \$60,000.00 in value from the asset he is to pay the \$81,200.00. It is completely inequitable and unfair and an abuse of discretion to award funds from the Appellant in the amount of \$130,200.00 to \$140,200.00 when the Respondent is the one who made an investment of \$195,000.00 and lost funds she contends are separate.

The case law indicates that when community property or labor is contributed to the separate property of a spouse that the only amount the contributor is entitled to is the proportional increase attributable to the ownership interest of the separate owner. That is to insure that the community contributor does not improve the separate property owner out of her asset. The separate owner is to receive the increases due to inflation. Separate property owner is to

receive the increased value from contributions and improvements to their separate property. There is no doubt that the case law and statutes all indicate that in the case of an appreciating asset.

The cases cited do not indicate what is to be done in the case of a depreciating asset. It is only by inference from cases dealing with increases that the one may infer the opposite is true. The separate property owner who is entitled to appreciation should also suffer the losses which accrue to a depreciating asset. While a separate property owner should not be "improved out of their asset" a contributor should not be forced to be the guarantor against losses by a separate property investor. Appellant is in this case a guarantor or insurer against loss by the Respondent while Respondent is not required to contribute to protect from losses to the Appellant's separate property. Not only has the Appellant been ordered to pay \$81,200.00 but he has lost \$50 to \$60,000.00 himself and agreed to take none of the equity from the marital home. He has paid over \$156,000.00 in mortgage payments from purchase to sale on the separate investment of the Respondent..

The Appellant has had nothing to do with the loss of value to the separate property of the Respondent. In fairness and equity he has saved the marital home from foreclosure made the mortgage payment from purchase to sale and should not be held responsible for either the loss in value or for reimbursement for the losses. He has engaged in no fraud or wrongdoing, wasting of assets or

anything that would require him to be responsible for the losses suffered by Respondent. It is neither fair nor equitable to require Appellant to reimburse Respondent for losses she suffered based on her own actions taken by her own free will with no compulsion by anyone and particularly by Appellant. This is especially true given the reduction of value in the Appellant's separate property

The court has indicated that in fairness and equity the financial conditions of the parties should be considered. In addition to the \$167,000.00 respondent would receive from this judgment she is in a much more favorable position with current pensions, investments and retirement benefits totaling an additional \$167,900.00 combined with employment benefits and a \$1,360.00 monthly pension. Appellant has a \$17,000.00 insurance policy a \$1,500.00 401K and his Bothell home.

If the court has found that the characterization of assets does not include the Respondent bearing the risk of losses that then the financial conditions in which these parties are left is clearly an indication of an abuse of discretion and leaves the Appellant in an untenable financial position in comparison to the Respondent.

Appellant hereby respectfully request the court to overturn the judgment of the trial court and remand the same to the Superior Court for a division of

property which is fair and equitable and in compliance with statutes and case law.

Dated May 13, 2013

Respectively Submitted,

A handwritten signature in black ink, appearing to read "Dan Evich", written over a horizontal line.

Dan Evich  
Attorney for Appellant

COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 MAY 13 PM 4:03

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Case Number 69031-1-1

SHELLEY GOLLARD MIDKIFF, Respondent

v

STEVEN LINVEL MIDKIFF, Appellant

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PROOF OF SERVICE OF REPLY BRIEF

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I Am Dan Evich the attorney for the Appellant Steven Linvel Midkiff. I

served a copy of the Reply Brief I upon Laurie G. Robinson by leaving said notice at her office at:

Law Office of Jason S. Newcombe  
1218 3<sup>rd</sup> Ave.  
Suite 500  
Seattle WA 98101

on May 13, 2013.

I am making this statement pursuant to the laws of the state of Washington and subject to the penalties for perjury there under and swear the same to be true.

Signed and dated this 13th. day of May 2013

A handwritten signature in black ink, appearing to read "Dan Evich", written over a horizontal line.

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