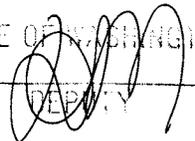


FILED
COURT OF APPEALS
DIVISION II

No. 37372-6-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
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In re the Marriage of:

CHRISTOPHER NEIL GUDJOHNSEN,

Respondent,

vs.

LOUISE ANN ABRAMS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE JAMES E. RULLI

REPLY BRIEF OF APPELLANT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

MILES & MILES, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

By: Marcine Miller Miles
WSBA No. 9100

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

1220 Main Street, Suite 455
Vancouver, WA 98660
(360) 696-4280

Attorneys for Appellant

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I. REPLY ARGUMENT

A. The Trial Court Erred In Failing To Acknowledge The Effect Of The Quit Claim Deed On The Character Of The Real Property.

Separate property may be converted to that of community property by the voluntary act of the spouse owning it. *Volz v. Zang*, 113 Wash. 378, 383-84, 194 P.409 (1920); see also RCW 26.16.120. Here, the trial court erred in characterizing the Camas property, including the mobile home, as the husband's separate property when the husband knowingly titled the property in the names of both parties as community property.

Under *Marriage of Hurd*, 69 Wn. App. 38, 51, 848 P.2d 185, rev. denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993), the husband's execution of a quit claim deed to the community permitted a presumption that the husband intended to gift to the community, property that would otherwise be his separate property. The wife acknowledges that Division One's decision in *Estate of Borghi*, 141 Wn. App. 294, 169 P.3d 847 (2007), has called this presumption into question. (App. Br. 17) However, the Supreme Court has granted review of the Court of Appeals decision in *Borghi*. 163 Wn.2d 1052, 187 P.3d 751 (2008). Even the *Borghi* court noted that the community gift presumption "appropriately

protects separate property from inadvertent changes in character but allows for gifts by deed. When the separate property owner has expressed a desire to add their spouse to the title to the separate property, a presumption should arise that the names of both spouses on the title of property acquired by separate funds changes the character of the property to community.” *Borghi*, 141 Wn. App. at 303, ¶ 16.

Here, the husband executed a quit claim deed to the community knowing that doing so would “give [the wife] a portion of the property.” (RP 135) The deed was executed in part because the parties jointly refinanced the property, and as a result both became liable on the mortgage. The parties did not refinance for purposes of getting a “cheaper monthly payment,” as the trial court opined (RP 308-09), but to pay off the husband’s separate obligation on the property and to obtain additional proceeds to begin developing the property so that they could make it their home. (See RP 67-68, 72-74)

The trial court erred in failing to consider the effect of the quit claim deed on the nature of the property, which at a minimum should have created a presumption that the husband gifted his separate interest in the property to the community.

B. The Trial Court Erred In Failing To Acknowledge The Community Contributions To The Property.

Even if the trial court properly concluded that the real property remained the husband's separate property after he executed the quit claim deed, the trial court erred in failing to acknowledge the community contributions to the Camas property. In 2000, the parties paid off the underlying loan on the Camas property by using community credit to refinance the property. (RP 67-68, 72-74) Using the remaining loan proceeds, the parties made improvements to the property. (RP 67-68, 69, 72-74) These improvements could not have been made without the parties undertaking the 2000 loan that was paid down using community funds. (RP 136)

The husband is wrong when he claims that the wife failed to prove any contributions to the real property. (Resp. Br. 7) It is undisputed that the community improved and maintained the Camas property. (RP 136) The property was bare land when purchased before the marriage. (RP 121, 207) During the marriage, the property was improved with a pump house, a garden shed, a 36 by 48 foot workshop, and the double-wide trailer, purchased in both parties' names in which the parties resided for

part of the marriage. (RP 129, 138, 230) These improvements were largely made with the loan proceeds from the parties' refinance. (RP 67-69)

The parties' use of community credit to pay off the husband's separate obligation and to make improvements on the property cannot be ignored in determining the proper characterization of property. The test of character is "whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof." **Marriage of Chumbley**, 150 Wn.2d 1, 7, 74 P.3d 129 (2003) (quoting **Marriage of Sedlock**, 69 Wn. App. 484, 506, 849 P.2d 1243 (1993)). The fact that the parties lived on the property for "less than the rental value of the property" (Resp. Br. 7) is not a proper basis for completely ignoring the community contributions.

The trial court apparently relied on **Marriage of Miracle**, 101 Wn.2d 137, 675 P.2d 1229 (1984), in finding that the community acquired no interest in the property despite its contributions, because the community received the benefit of residing on the property. (See FF 2.9, CP 54; App. Br. 20-22) But the main thrust of the Supreme Court's decision in **Miracle** was that the trial court must "do equity." 101 Wn.2d at 139. In **Miracle**, the court found

that it was not equitable to provide the community with a lien on the wife's separate property home for its contributions toward the *existing* mortgage when the parties lived in the home rent-free during their short marriage. **Miracle**, 101 Wn.2d at 138. Here, the community did more than just contribute towards a mortgage. The parties jointly undertook a loan to pay off the husband's separate obligation and used the community loan proceeds to improve the property allowing them to live on the property. (RP 67-69, 72-74) To "do equity" would be to at a minimum grant the community an equitable lien in the property.

C. The Trial Court Should Have Awarded Spousal Maintenance For A Longer Duration And In An Amount Adequate To Meet The Wife's Monthly Expenses.

It is not apparent, as the husband asserts, that the maintenance award in this case "evidences a fair consideration of the statutory factors." (Resp. Br. 10) While the wife does not challenge the discretionary nature of maintenance awards (Resp. Br. 9-10), where, as in this case, the parties' "disparity in earning power and potential is great," the appellate court "must closely examine the maintenance award to see whether it is equitable in light of the post-dissolution economic situations of the parties." **Marriage of Sheffer**, 60 Wn. App. 51, 56, 802 P.2d 817 (1990)

(remanding on issue of maintenance to more nearly equalize parties' post-dissolution standard of living).

The husband acknowledges that he earns nearly three times the income as the wife. (Resp. Br. 9) In light of the disparity in the parties' incomes and the property distribution, which gave the husband nearly all of the marital estate, the trial court should have provided the wife with a more meaningful maintenance award.

Here, the trial court found that the wife's physical infirmities affected her ability to be employed. (FF 2.12, CP 54) In all likelihood, the wife will only have her Social Security disability payments of \$1,066 per month and no other income until the husband retires and she is able to access his pension. (RP 196) Because the husband is younger than the wife it is likely that he will work for several more years, preventing the wife from obtaining any payments from his pension until he retires. This court should reverse the trial court's maintenance award and remand for the trial court to provide the wife with a more meaningful maintenance award to balance the parties' economic circumstances.

D. This Court Should Deny The Husband's Request For Attorney Fees And Award Fees To The Wife.

The husband's request for attorney fees under RCW 26.09.140 based on his need and the wife's ability to pay is completely unsupportable. (Resp. Br. 10) The trial court awarded nearly all of the marital estate to the husband, who has three times the income as the wife. The husband does not have a need for his attorney fees to be paid and the wife certainly does not have the ability to pay his fees, or even her own. This court should deny the husband's request for attorney fees and should instead award the wife her attorney fees.

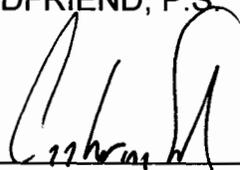
II. CONCLUSION.

This court should reverse and remand for a redistribution of the marital estate based on proper consideration of the factors in RCW 26.09.080. This court should remand for reconsideration of the maintenance award in light of the property distribution and considering the factors under RCW 26.09.090. This court should also award appellant her fees on appeal.

Dated this 17th day of October, 2008.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: _____



Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 17, 2008, I arranged for service of the foregoing Reply Brief of Appellant to the court and the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Marcine Miles Miles & Miles, P.S. 1220 Main St., Suite 455 Vancouver WA 98660	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Suzan L. Clark Attorney at Law 1101 Broadway St., Suite 250 Vancouver, WA 98660	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 17th day of October, 2008.



Carrie O'Brien

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