

**IN THE SUPREME COURT**

**Appeal from the Court of Appeals, Hon. K. F. Kelly, Presiding**

SUSAN TKACHIK, Successor Personal Representative  
of the Estate of Janet Elaine Mandeville, Deceased,

Appellant,

**Supreme Court Case No. 138460  
Court of Appeals Case No. 280879  
Macomb County Probate Case No: 03-178658CZ**

vs.

FRANK MANDEVILLE, JR.,

Appellee.

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**BRIEF ON APPEAL – APPELLANT**

**ORAL ARGUMENT REQUESTED**

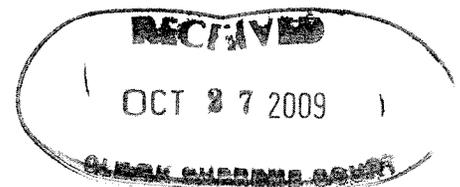


TABLE OF CONTENTS

Index of Authorities ..... ii

Statement of the Basis of Jurisdiction..... iv

Statement of Questions Involved.....v

Statement of Facts.....1

Standard of Review.....5

Argument .....6

    I. This Court Should Reverse the Lower Courts Ruling and Grant The Appellant  
    Contribution From the Appellee For The Amounts Paid in Excess of Their  
    Equitable Shares of Joint Obligations.....6

        A. Equity Dictates That the Estate of Janet Mandeville is Entitled to Contribution  
        from Defendant/Counter-Plaintiff.....6

        B. Equitable Principles Regarding Contribution Permeate Michigan Family Law  
        and Should be Applied to the Case at Hand.....8

        C. The Court of Appeals failed to recognize the equities which clearly exist in  
        the facts of the present case.....11

    II. The Court of Appeals has misconstrued the Estate’s argument as “tantamount to a  
    posthumous divorce” and in so doing has failed to recognize that there is a  
    compelling state interest and previously established public policy which supports  
    the estate’s argument.....13

Relief Requested .....15

## INDEX OF AUTHORITIES

### **Cases**

<u>Bailey v. Bailey</u> , 1998 Mich App LEXIS 1553 (Mich. App. 1998).....	6
<u>Cagan v. Cagan</u> , 291 NYS2d 211 (NY Sup Ct, 1968).....	6
<u>Christofferson v Christofferson</u> , 363 Mich 421 (1961) .....	9
<u>Crawford v. Crawford</u> , 293 Md. 307, 443 A.2d 599 (Md., 1982) .....	6
<u>Hanaway v. Hanaway</u> , 208 Mich App 278 (1995). .....	9
<u>Heinemann v. Heinemann</u> , 314 So.2d 220 (Fla. App., 1975).....	7
<u>Horner v McNamara</u> , 249 Mich App 177 (2002) .....	9
<u>Jansen v Jansen</u> , 205 Mich App 169 (1994), .....	9
<u>Katzer v. Katzer</u> , 130 Ill. App. 2d 762, 266 N.E.2d 419 (Ill. App. 1971). .....	7
<u>Kuntze v Kuntze</u> , 351 Mich 144 (1958) .....	9
<u>Maiden v Rozwood</u> , 461 Mich 109 (1999).....	5
<u>Nobile v Bartletta</u> , 156 A 483 (N.J. 1931).....	11
<u>Raymond v Raymond</u> , 345 Mich 563 (1956). .....	9
<u>Re Keil's Estate</u> , 145 A2d 563 (Del 1958) .....	10
<u>Strohm v. Keopke</u> , 362 Mich. 659 (1958) .....	6
<u>Wachovia Bank &amp; Trust Co. v Black</u> 151 SE 269 (N.C. 1930) .....	11

### **Statutes**

MCL 700.2801 .....	3, 12, 13
MCL 700.2801(2)(e)(i).....	12

**Other Authorities**

C.C. Marvel, Annotation, *Right of Surviving Spouse to Contribution, Exoneration, or Other Reimbursement Out of Decedent’s Estate Respecting Liens on Estate by Entirety or Joint Tenancy*, 76 A.L.R.2d 1004 (2004) ..... 9

**Rules**

MCR 2.116 (C)(8)..... 3, 4, 8  
MCR 2.116 (10)..... 3  
MCR 7.301(A)(2) ..... iv  
MCR 7.302(G)(1). ..... iv

## **STATEMENT OF THE BASIS OF JURISDICTION**

Appellant filed a timely application for leave to appeal from a decision of the Court of Appeals dated February 5, 2009 (51a). This Court granted the application for leave to appeal on September 1, 2009 (59a). Jurisdiction is proper in this Court under MCR 7.301(A)(2) and MCR 7.302(G)(1).

**STATEMENT OF QUESTIONS INVOLVED**

Whether an estate may be entitled to contribution from a decedent's husband or wife based on the decedent's maintenance of property which was held as a tenancy by the entirety with their spouse.

The Michigan Court of Appeals answered "No."

The Macomb County Probate Court answered "No."

Plaintiff/Appellant answers "Yes"

Defendant/Appellee answers "No"

## STATEMENT OF FACTS

This case stems from a dispute over the distribution of the estate of Janet Mandeville (“Janet”) who passed away on July 13, 2002, after a battle with breast cancer. After a long battle with cancer, Janet Mandeville developed a necrosis in her hip and had a hip replacement in June 2002. Approximately two weeks after surgery Janet developed blood clots that eventually went to her lungs and took her life on July 13, 2002.

Susan Tkachik (“Susan”), the Appellant in this series of cases, was Janet’s sister and provided Janet with comfort and care throughout the long period of illness preceding Janet’s death. Frank Mandeville, Jr., the Appellee, was Janet’s estranged husband at the time of her death, and had no contact with his ill wife in the 18 months preceding her death. Moreover, Frank Mandeville, Jr. was often absent from the marriage for years at a time in the decade or so preceding Janet Mandeville’s death.

Central to this case has been a disagreement over how the ownership interests in two pieces of property purchased by Janet and Frank Mandeville should be divided, and a disagreement over the manner in which Janet’s estate should be compensated for Janet’s sole maintenance of the property in the years preceding her death. The first piece of property at issue is located in Macomb Township, Macomb County, Michigan, and was acquired by Janet and Frank Mandeville on January 9, 1984. The second property is located in the Township of Hill, Ogemaw County, Michigan, and was acquired by Janet and Frank Mandeville on December 22, 1987. The 1984 and 1987 property acquisitions created tenancies in the entirety held by Janet and Frank Mandeville. (19a)

Despite Frank Mandeville’s legal interest in the Macomb and Ogemaw County properties and his joint and several liability for the obligations respective of each, it was Janet who

maintained them and was responsible for the payment of the taxes, insurance premiums, and mortgage payments associated with the properties. Janet was forced to unilaterally shoulder the costs of she and Frank's property ownership due to Frank Mandeville's frequent physical absences from the property. Although Mr. Mandeville has been less than forthcoming in describing his numerous travels, residences, and employers, he has acknowledged that he was physically absent from the Macomb and Ogemaw County properties for the 18 months preceding his wife's death. (52a) Despite his acknowledged awareness of Janet's serious illness, during these 18 months, Mr. Mandeville never spoke to Janet on the telephone, let alone visited her, and the only contact between the two was via telephone messages. What's more, Mr. Mandeville did not even attend Janet's funeral.

In the months preceding her passing, Janet began to prepare for the inevitable and retained attorney Thomas Cavanaugh of Cox, Hodgman & Giamarco, P.C., to assist her in creating an estate plan. On June 27, 2002, Janet executed and signed the Janet E. Mandeville Living Trust (the "Trust") and Janet's last will and testament (the "Will"). The Will and the Trust both contained the following language which clearly expresses Janet's desire that her husband take nothing under the Will or Trust, "It is my [Janet's] specific intent to give nothing to my husband under this Trust Agreement. If I am survived by my husband, for the purposes of this Trust Agreement, he will be deemed to have predeceased me." In addition, the Will established that upon Janet's death all of her property would be distributed to the Trust and Susan Tkachik was named personal representative of the Will.

Approximately five months after Janet's death, Frank Mandeville filed a Petition for Probate and Appointment of personal Representative, Intestate estate, and was appointed Special Fiduciary with restrictions to only marshal assets. On the same day, Mr. Mandeville as Special

Fiduciary filed a Complaint against Susan to require Susan to account for the assets received from Janet and set aside any transfers made by Janet prior to her death, and to obtain a temporary restraining order. A temporary restraining order barring Susan from disposing of Janet's property was issued. Frank Mandeville was thereafter removed as personal representative by the probate court and Mr. Robert Huth, Jr., a local attorney, was appointed in his place. Subsequently, Susan was appointed successor personal representative, removing Robert Huth Jr. Eventually, the temporary restraining order obtained by Frank Mandeville was replaced by a preliminary injunction barring Frank Mandeville and Susan from moving, selling, or otherwise disposing of Janet's assets. A dispute began over the proper division of Janet's estate, which was represented by Susan, and Frank Mandeville. A critical issue in this dispute was the effect of Frank Mandeville's absence on his status as a spouse pursuant to MCL 700.2801. The estate brought a motion for summary disposition to establish that Frank Mandeville should not be considered a "spouse" pursuant to MCL 700.2801, and on October 8, 2003, the Macomb County Probate Court admitted the Will, and granted Susan's Motion for Summary Disposition.

On November 10, 2003, Susan filed a Complaint seeking a determination that the real property located in Macomb and Ogemaw Counties was owned by Janet's estate and Frank Mandeville as tenants in common with each party owning an undivided 50% interest in said properties. (10a) Frank Mandeville responded to the estate's Complaint by filing a Motion For Summary Disposition Regarding Determination of Title pursuant to MCR 2.116 (C)(8) and (10). (17a) The estate filed a response to Mr. Mandeville's motion and both sides filed supplemental briefs in support of their respective positions. On January 29, 2004 the Macomb County Probate Court issued an order granting Frank Mandeville's Motion For Summary Disposition based on its conclusion that, "Defendant became the sole owner of the Real Property upon the death of

Mrs. Mandeville. Pursuant to the terms of the Order, the determination that Defendant is not the surviving spouse of Mrs. Mandeville is limited to intestate succession, spousal entitlements, and priority among persons seeking appointment as personal representative.” After filing a Complaint whose sole Count was dismissed on November 19, 2003, Plaintiff/Counter-Defendant filed an Amended Complaint seeking contribution from Frank Mandeville. (10a) On September 27, 2004 Defendant/Counter-Plaintiff filed a Motion for Summary Judgment pursuant to MCR 2.116 (C)(8). (17a) The Probate Court subsequently granted Defendant/Counter-Plaintiff’s Motion for Summary Judgment, dismissing Plaintiff/Counter-Defendant’s last remaining claim for contribution. (22a, 44a)

Plaintiff/Counter-Defendant then filed an appeal to the Court of Appeals addressing the two issues dismissed upon Summary Judgment. The Court of Appeals denied the appeal of right on the grounds that it was not made timely and subsequently also denied an application for leave to appeal. The Supreme Court also initially denied an application for leave to appeal however reconsidered its position in the context of a motion for reconsideration which resulted in the September 2007 order (50a) remanding the matter to the Court of Appeals for consideration of the contribution issue. Subsequently the Court of Appeals issued its Opinion on February 5, 2009 (51a) and an Application for Leave to Appeal to this Court followed. That application was thereafter granted on September 1, 2009. (59a)

### **STANDARD OF REVIEW**

A grant or denial of summary disposition is reviewed *de novo* on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. Maiden v Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999).

## ARGUMENT

### **I. This Court Should Reverse the Lower Courts Ruling and Grant The Appellant Contribution From the Appellee For The Amounts Paid in Excess of Their Equitable Shares of Joint Obligations.**

#### ***A. Equity Dictates That the Estate of Janet Mandeville is Entitled to Contribution from Defendant/Counter-Plaintiff***

In Strohm v. Keopke, 362 Mich. 659 (1958), the Michigan Supreme Court recognized that a co-tenant has the right to bring a contribution claim against another co-tenant to recover the costs of taxes, mortgage payments, and insurance. Id. 622-623. In determining whether or not contribution was warranted, the Strohm court emphasized that equitable considerations were dispositive. In 1998, the Court of Appeals reaffirmed the holding of Strohm in an unpublished opinion. Bailey v. Bailey, 1998 Mich App LEXIS 1553 (Mich. App. 1998).

Although the issue of contribution in the context of a tenancy by the entirety in the State of Michigan has not been directly addressed by the Michigan Courts, the issue has been addressed in other jurisdictions. For example in Crawford v. Crawford, 293 Md. 307, 443 A.2d 599 (Md., 1982), the Maryland Court held that a contribution claim can be asserted against a co-tenant where the real property happens to be held in a tenancy by the entireties.

The Crawford decision also deals with the general argument that payments toward the real property made by one spouse is generally considered a gift to the other spouse. In that regard the Crawford court concluded that such a presumption can only be made where a husband and wife are living together as husband and wife. Where they are not, the presumption related to a gift would not apply. Crawford v. Crawford, 293 Md. 307, 311-312; 443 A.2d 599, 601 (Md., 1982).

The New York Court also applied the rule in Crawford in Cagan v. Cagan, 291 NYS2d 211 (NY Sup Ct, 1968) by holding that a spouse is entitled to contribution where that spouse

made payments necessary to preserve the parties' interest in the real property.

The Florida Appellate Court in Heinemann v. Heinemann, 314 So.2d 220 (Fla. App., 1975), also addressed the issue regarding the question of whether or not one spouse's payments related to real property would be considered a gift. The court held that it would not be considered a gift where there had been a separation. A similar result was also found in Katzer v. Katzer, 130 Ill. App. 2d 762, 266 N.E.2d 419 (Ill. App. 1971).

When the principles espoused by the Supreme Court in Strohm and the cases from the other jurisdictions are applied to the present case, it becomes clear that the equities weigh in the favor of the Estate. Prior to her death, Janet Mandeville was solely responsible for the maintenance, insurance costs, taxes, and mortgage payments on the Macomb and Ogemaw County properties. Frank Mandeville himself has admitted that he did not see his wife on not even one occasion in the 18 months prior to her death, despite his knowledge of her rapidly declining health. If allowed to gain sole ownership of the properties at issue in this case, in effect Frank Mandeville will have managed to benefit economically from the desertion of his wife for over a year and a half, without so much as a phone call in the days prior to her death, while she and those who cared for her towards the end continued to maintain and make the necessary payments on these properties. Equity demands that Frank Mandeville, having made no contribution of any kind whatsoever with regards to the properties at issue in this matter during the eighteen months for which he had abandoned his wife and home, and for that matter the better part of the preceding decade, should be required to pay contribution to the estate of Janet Mandeville in such an amount as is necessary to reimburse the estate for the share of the payments made by the decedent during Mr. Mandeville's lengthy absence with regard to the Macomb and Ogemaw County properties. In reimbursing the decedent's estate for his share of

costs paid by Janet Mandeville during her husband's absence, the intent of the decedent would be effectuated, allowing such funds to be distributed to the people who did in fact remain with her throughout her illness, as she has expressed in her will.

While Frank Mandeville traveled the United States and the world, living at various times in Las Vegas and South East Asia, his wife incurred the significant costs inherent in owning the properties at issue. Prior to her death, Janet Mandeville specifically created an estate plan that provided for those who offered her care and comfort during the course of her illness, at the exclusion of her estranged absentee husband who showed little interest in her life, and who evidenced no desire to visit her or even speak to her prior to her death. In the pursuit of equity, Janet Mandeville's last wishes must be respected and her estate must be compensated for the costs which she bore without any help from Frank Mandeville.

In light of this, Appellant clearly stated a claim upon which relief may be granted. As such, it is obvious that the trial court committed error in dismissing Appellant's claims under MCR 2.116(C)(8). Therefore we ask this court to reverse both the Court of Appeals and the trial courts grant of Summary Disposition in favor of Defendant/Counter-Plaintiff.

***B. Equitable Principles Regarding Contribution Permeate Michigan Family Law and Should be Applied to the Case at Hand***

Just as the Strohm Court emphasized that a disparity of effort, energy, and resources expended on a given piece of property could lead to a co-tenant being liable to another co-tenant for contribution based on equitable principles, Michigan family law recognizes that an important factor in dividing marital property in the event of a divorce is the involved parties' contribution to the marital estate.

Traditionally, when Michigan courts considered contribution in the family law context, they tended to place a strong emphasis on a given spouse's economic contributions to the marital

estate. See Christofferson v Christofferson, 363 Mich 421 (1961); Kuntze v Kuntze, 351 Mich 144 (1958); Raymond v Raymond, 345 Mich 563 (1956). In more recent family law cases in which Michigan courts have considered contribution, the courts seem to have moved past an economic-based approach to contribution and instead have focused their analysis on the respective spouse's contribution to the marriage as a whole. For example, in Jansen v Jansen, 205 Mich App 169 (1994), the Court Of Appeals held that although the Plaintiff had contributed vastly more economic assets to the marital estate, a divorce judgment granting him roughly seventy five percent of the estate was inequitable. Id. at 171. Moreover, the court in Jansen emphasized that, generally, property divisions in divorces should be "roughly congruent." Id. The Jansen Court's emphasis on "congruence" is in harmony with the well established "partnership theory of marriage in which marriage is seen as a partnership where each party contributes to the marriage in different ways and where each party's efforts are presumed to benefit both parties and the marriage as a whole.<sup>1</sup> However, despite its focus on congruence/partnership, the Jansen court emphasized that a clear exposition of a trial court's rationale could justify a division of property in which the assets were not congruently/equally divided. Id. Accordingly, despite the "partnership theory" of marriage which has been adopted in Michigan, Michigan trial courts still have the discretion to divide property in an unequal way based on equitable principles so long as the trial court clearly expresses the basis for its decision. Furthermore, as has long been the case under Michigan law, one of the key factors to be considered by the trial courts in reaching an equitable division of property is the respective parties' efforts to acquire, maintain, and increase the value of the property at issue. See Horner v McNamara, 249 Mich App 177, 186 (2002).

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<sup>1</sup> The "partnership theory" of marriage was expressly adopted by the Court of Appeals one year later in Hanaway v. Hanaway, 208 Mich App 278, 294 (1995).

It goes without saying that in the last years Frank Mandeville's contributions to his marriage, both economic and emotional, have been meager at best, and were this court considering a distribution of the Mandeville's marital property in the context of a divorce, these meager contributions would play a critical role in helping the court reach an equitable judgment. It is Plaintiff/Counter-Defendant's contention that the same far reaching principles of fairness and equity which have led the courts in Michigan to consider contribution, broadly construed, of a spouse to the marital estate as a whole, as a critical factor in determining the division of marital assets should also be applied with regard to the equitable remedy of contribution in the context of properties held by the entirety.

A majority of jurisdictions have taken the view that, absent evidence to the contrary or special circumstances, a surviving spouse will be "entitled to equitable contribution out of the estate of the deceased in reimbursement of the payment by the survivor of more than his equitable share of their joint obligations, even though the debt is secured by real property which was held by them as tenants by the entirety . . . ." C.C. Marvel, Annotation, *Right of Surviving Spouse to Contribution, Exoneration, or Other Reimbursement Out of Decedent's Estate Respecting Liens on Estate by Entirety or Joint Tenancy*, 76 A.L.R.2d 1004 (2004). One or more of the following principles or factors underlies this reasoning:

(1) the joint and several nature of the obligation, combined with the application of the ordinary rule that payment by one joint debtor of more than his share of the obligation equitably entitles him to contribution from those jointly liable with him; (2) the separation of the obligation from the property by which it is secured, and for the purchase or improvement of which it was undertaken; and (3) the benefit to the decedent's estate of the payment of an obligation upon which it otherwise could be found liable.

Id.; see also, Re Keil's Estate, 145 A2d 563 (Del 1958) (the right of contribution flows from the debt and a joint and several obligation of two parties, whether or not husband and wife,

creates an obligation which is, on its face, for the benefit of both); Nobile v Bartletta, 156 A 483 (N.J. 1931) (where a husband and wife own property as tenants by the entirety, their respective rights are those of tenants in common, and a cotenant who discharges any valid liens against the common property is entitled to contribution for the amount which he pays beyond his just proportion); Wachovia Bank & Trust Co. v Black 151 SE 269 (N.C. 1930) (unity of person is an incident of the estate but not an incident of the note evidencing its indebtedness, and that as the makers were jointly and severally liable, payment of the whole amount by either would entitle the other, of his representative, to contribution). As such, it is apparent that there is a strong force supporting the notion that a surviving spouse is entitled to contribution for any amounts paid on joint obligations in excess of their equitable share. It should therefore carry equal weight that the decedent's estate should be entitled to contribution from the surviving spouse for any amounts contributed in excess of the decedent's equitable share. It flies in the face of equity to allow a surviving spouse the benefit of contribution such that they may be able to continue on with life, made whole on the joint obligations they have shouldered, while leaving the estate of a deceased spouse remediless under identical circumstances, ultimately denying their final wishes seeking to provide for those who they cared for and who cared for them.

In conclusion, the equitable principles which have led the courts to recognize contribution claims among co-tenants and to consider contribution to the marital estate in the family law context, should also be applied in the area of tenancies in the entirety. Should equitable principles be afforded their proper weight by this Court, the estate of Janet Mandeville will be protected and Frank Mandeville will be ordered to properly contribute to her estate.

***C. The Court of Appeals failed to recognize the equities which clearly exist in the facts of the present case.***

In its Opinion, the Court of Appeals fails to recognize the equities which are particular to

this particular situation and refuses to apply the body of law that has developed with respect to application of the doctrine of contribution to a tenancy by the entireties. In so doing, the Court of Appeals has committed an error which should be corrected by this Court.

With respect to the body of law that has developed, the Court of Appeals simply refuses to apply it to the facts at hand. In so doing, the Court simply states that it will “not adopt that framework here.” In support of its position, the Court of Appeals attempts to distinguish the facts of the present situation from the facts contained in the cases it was directed to consider by this Court. In that regard the Court of Appeals suggests that the situations differ in that other states have allowed the application of contribution to situations where living parties are involved in separations but had not yet gotten divorced.

The Court of Appeals seems to suggest that it will not apply the contribution claim to the facts in the present case because to do so would be to interfere with the manner in which the parties at issue chose to conduct their marriage and the manner in which they chose to hold property. Moreover, the Court of Appeals goes on to state that they will not become involved in such an issue absent a compelling state interest.

In so holding however the Court of Appeals ignores the fact that the State is already involved in analyzing the conduct of the marriage at issue. As this Court will recall, Frank Mandeville was determined by the trial court to be barred from receiving any share of the deceased estate because he had been absent from the marriage as provided in MCL 700.2801(2)(e)(i). In short, the State of Michigan and the trial court had already become involved in determining the manner in which the parties involved conducted their marriage. To suggest that they should not conduct such an examination is ignoring a fact of this case. Moreover, the Legislature has already determined that a compelling state interest does exist in

that it has passed a statute which states that spouses that are willfully absent from a marriage are barred from receiving any share of their spouse's estate.

A refusal to apply the equities of the contribution claim to the facts of this case would be a serious injustice and should therefore be corrected by this Court.

**II. The Court of Appeals has misconstrued the Estate's argument as "tantamount to a posthumous divorce" and in so doing has failed to recognize that there is a compelling state interest and previously established public policy which supports the estate's argument.**

In the conclusion section of its Opinion (58a), the Court of Appeals suggests that the estate's argument in this matter is tantamount to a posthumous divorce. The Court of Appeals suggests that it would be imprudent to allow courts to destroy what is otherwise an indivisible estate created by a husband and wife in jointly held property. Judge Kelly, in writing for the Court, goes on to state that Michigan law would not recognize such an action under these circumstances.

Unfortunately, the logic of the Court of Appeals, conflicts with the compelling state interest that can be found in MCL 700.2801 which was also at issue in this case. As stated in the fact section of this brief, the trial court had applied this statute to the estate property that was owned by Janet Mandeville at the time of her death. In so doing, the Macomb Probate Court held that Frank Mandeville was not entitled to receive any portion of the probate estate because he had been willfully absent from the decedent for more than one year. In enacting this statute the legislature has clearly announced the public policy that a spouse absent from a marriage for more than a year should not benefit from the decedent's estate. Such a spouse should not be rewarded for their conduct.

Obviously, the Court of Appeals' decision in the instant matter does not recognize the compelling state interest or public policy that prevents a spouse that has been absent from a

marriage from benefiting from that absence. Although this Court has elected not to reach the issue of whether or not such conduct would destroy the tenancy by the entireties, it certainly would support a finding that the equities would support a finding that such an absent spouse should be required to contribute to the expenses associated with the maintenance of the property during his or her absence.

As such, the Court of Appeals decision should be reversed and the contribution claim should be permitted to move forward.

**RELIEF REQUESTED**

**WHEREFORE**, Appellant respectfully requests that this Honorable Court enter an order granting the Appellant the following relief:

- A. Reversing the holdings of the Court of Appeals and the Trial Court with respect to the application of contribution to a tenancy by the entireties property; and
- B. Ordering that the Trial Court consider the contribution claim asserted by Plaintiff.

Dated: October 25, 2009

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