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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBYN MICHELLE HOGGAN,

Plaintiff/Appellant,

vs.

RANEE BOLEY FLEMING aka RENEE B. FLEMING, KAREN B. GAMONAL aka KAREN HALTERMAN, JOYCE H. CROCKETT, JOHN D. HOGGAN, LEO V. JOLLEY, ROSALEE J. KEELE aka ROSALEE M. HASLAM, THE ESTATE OF KRISTE H. STREET, THE ESTATE OF ELIZABETH D. JOLLEY GARDNER aka ELIZABETH DUNCAN JOLLEY, aka ELIZABETH DUNCAN, and JOHN DOES 1-100,

Defendants/Appellees.

District Court No.070902181

Appellate No. 20090399

BRIEF OF APPELLANT

APPEAL FROM FINAL ORDER GRANTING DEFENDANTS/APPELLEES' MOTION TO DISMISS, OF THE UTAH THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,
THE HONORABLE DENISE P. LINDBERG PRESIDING

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IN THE UTAH COURT OF APPEALS

ROBYN MICHELLE HOGGAN, Plaintiff/Appellant, vs. RANEE BOLEY FLEMING aka RENEE B. FLEMING, KAREN B. GAMONAL aka KAREN HALTERMAN, JOYCE H. CROCKETT, JOHN D. HOGGAN, LEO V. JOLLEY, ROSALEE J. KEELE aka ROSALEE M. HASLAM, THE ESTATE OF KRISTE H. STREET, THE ESTATE OF ELIZABETH D. JOLLEY GARDNER aka ELIZABETH DUNCAN JOLLEY, aka ELIZABETH DUNCAN, and JOHN DOES 1-100, Defendants/Appellees.	District Court No.070902181 Appellate No. 20090399

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SECONDARY AUTHORITIES

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IN THE UTAH COURT OF APPEALS

ROBYN MICHELLE HOGGAN, Plaintiff/Appellant, vs. RANEE BOLEY FLEMING aka RENEE B. FLEMING, KAREN B. GAMONAL aka KAREN HALTERMAN, JOYCE H. CROCKETT, JOHN D. HOGGAN, LEO V. JOLLEY, ROSALEE J. KEELE aka ROSALEE M. HASLAM, THE ESTATE OF KRISTE H. STREET, THE ESTATE OF ELIZABETH D. JOLLEY GARDNER aka ELIZABETH DUNCAN JOLLEY, aka ELIZABETH DUNCAN, and JOHN DOES 1-100, Defendants/Appellees.	District Court No.070902181 Appellate No. 20090399

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the Final Order Granting Defendants/Appellees' Motion to Dismiss, of the Utah Third Judicial District Court, in and for Salt Lake County, the Honorable Denise P. Lindberg presiding. Jurisdiction to hear this appeal is conferred upon the Utah Court of Appeals pursuant to Utah Code Annotated Section 78A-4-103(2)(j) (1953 as amended) and Rule 3(a), Utah Rules of Appellate Procedure.

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STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Issue: Did the trial court err when it found that a quit claim deed executed by Elizabeth D. Jolley aka Elizabeth D. Jolley Gardner aka Elizabeth Duncan to transfer title to Elizabeth D. Jolley aka Elizabeth D. Jolley Gardner aka Elizabeth Duncan and John D. Hoggan in joint tenancy, which was duly recorded in 1991, did not convey any interest to John D. Hoggan a married man, and subsequently granted Defendants' motion to dismiss?

Standard of Review: Under Utah R. Civ. P. 41(b), the court may dismiss if "(1) the claimant has failed to introduce sufficient evidence to establish a prima facie case, or (2) the trial court is not persuaded by that evidence." *Grossen v. DeWitt*, 1999 UT App. 167 ¶ 8, 982 P.2d 581 (quoting, *Walker v. Union Pac. R.R.*, 844 P.2d 335, 340 (Utah Ct. App. 1993)). When a court sits as fact finder, it "may weigh the evidence, consider credibility, and dismiss if it finds that although plaintiff's evidence establishes a prima facie case in the technical sense, it is unpersuasive." *Grossen*, 1999 UT App. 167, ¶ 9. Courts "'give great weight to the findings made and the inferences drawn by the trial judge,' and reverse those findings only if clearly erroneous." *Id.* at ¶ 10 quoting *Southern Title Guar. Co. v. Bethers*, 761 P.2d 951, 954 (Utah Ct. App. 1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following Constitutional Provisions, Statutes and Rules are relevant to this appeal:

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Statutes:

1. Utah Code Ann. § 57-1-13 (2009)

A quitclaim deed when executed as required by law shall have the effect of a conveyance of all right, title, interest, and estate of the grantor in and to the premises therein described and all rights, privileges, and appurtenances thereunto belonging, at the date of the conveyance.

2. Utah Code Ann. § 57-1-5 (2)(a) and (3)(a) and (b) (2009)

(2) (a) Use of words "joint tenancy" or "with rights of survivorship" or "and to the survivor of them" or words of similar import means a joint tenancy.

(3) A sole owner of real property creates a joint tenancy in himself and another or others: (a) by making a transfer to himself and another or others as joint tenants by use of the words as provided in Subsection (2)(a); or (b) by conveying to another person or persons an interest in land in which an interest is retained by the grantor and by declaring the creation of a joint tenancy by use of the words as provided in Subsection (2)(a).

3. Utah Code Annotated § 57-3-103 (2009)

Effect of failure to record. Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if: (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and (2) the subsequent purchaser's document is first duly recorded.

4. Utah code Annotated § 57-4a-4(1)(a) and (d) (2009)

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A recorded document creates the following presumptions regarding title to the real property affected:

(a) the document is genuine and was executed voluntarily by the person purporting to execute it;

(d) delivery occurred notwithstanding any lapse of time between dates on the document and the date of recording.

Rules:

1. Utah Rule of Appellate Procedure 24(a)(9):

A party challenging a fact finding must first marshal all record evidence that supports the challenged finding . . .

STATEMENT OF THE CASE

On or about October 22, 1991 the then owner of real property located at 687 East 3rd Avenue, Salt Lake City, Utah, 84103, (the "real property") Elizabeth D. Jolley aka Elizabeth D. Jolley Gardner aka Elizabeth Duncan ("Elizabeth D. Jolley Gardner"), transferred her interest in the real property to Elizabeth D. Jolley aka Elizabeth D. Jolley Gardner aka Elizabeth Duncan and Defendant John D. Hoggan by way of a document titled Quit-Claim Deed as Joint Tenants with Rights of Survivorship. R. at 241-242.[1] (See also Trial Exhibit "1" a copy of which is attached hereto as Addendum "C"). That

[1] There will be two separate citations to the Record on Appeal in this Brief. The court record of pleadings and papers shall be referred to as "R. page number." The Transcript of Proceedings shall be referred to as "Tr. Page number."

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quitclaim deed was recorded with the Salt Lake County Recorder's Office on October 23, 1991. Trial Exhibit 1.

On March 2nd, 2003, Elizabeth D. Jolley Gardner passed away. R. at 243.

Subsequent to her death, on or about November 19, 2003 a document was recorded entitled, Quit-Claim Deed, regarding the real property. R. at 244. (See also Trial Exhibit "3" a copy of which is attached hereto as Addendum "E"). This document allegedly transferred interest in the real property to RaNee Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, Jon D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common. R. at 244 and Trial Exhibit 3. This Quit-Claim Deed is dated December 11, 1978, but until November 19, 2003 had not been recorded. R. at 225, 244 and Trial Exhibit 3.

Plaintiff filed a Complaint in the Third Judicial District Court, in and for Salt Lake County, State of Utah, on February 7, 2007, asking the trial court primarily to quiet title as to the two deeds. See R. at 1-17. Plaintiff's First Amended Complaint was filed on March 28, 2007. See R. at 20-36.

A bench trial was held before Honorable Denise P. Lindberg to quiet title to the real property located at 687 East 3rd Avenue, Salt Lake City, Utah, 84103 on December 3, 2008. R. at 239. The trial court granted Respondents motion to dismiss at the end of Petitioners case in chief. Tr. at 49: 2-25 and 50: 1-17. Findings of Fact and Conclusions of Law were signed and entered April 14, 2009 and entered on April 15, 2009. R. at 239-248. In those findings, the trial court found:

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> 13. *That the placing of Defendant John Hoggan's name on the title to the America First Credit Union was not intended to convey an interest to the property to Defendant John Hoggan* and Defendant John Hoggan's mother's [sic] had previously executed a Quit Claim Deed to the home and real property conveying the property to "Rance Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common."

R. at 242 (emphasis added).

The trial court determined that the deed executed on October 23, 1991 was not intended to convey a real property interest to Defendant John Hoggan. R at 246. Based on that finding, the trial court concluded that the "Estate [of Elizabeth D. Jolley Gardner] is the legal owner" of the real property at issue. R. at 247. A Notice of Appeal was filed on May 7, 2009. R. at 250-251.

STATEMENT OF FACTS

Plaintiff and Defendant John Hoggan were married on July 14, 1978. R. at 240. Subsequently they moved to a home owned by Defendant John Hoggan's mother, Elizabeth D. Jolley Gardner, located at 687 East 3rd Avenue, Salt Lake City, Utah, 84103. R. at 241. Plaintiff, Defendant John Hoggan and his mother sought a loan to make needed repairs to the property. R. at 241. The bank refused to lend the money unless an interest in the real property was conveyed to Defendant John Hoggan. R. at 241. On October 22, 1991 Elizabeth D. Jolley Gardner transferred her interest in the real property to Elizabeth D. Jolley aka Elizabeth D. Jolley Gardner and Defendant John Hoggan as joint tenants with full rights of survivorship, by way of a document titled Quit-Claim Deed. R. at 241-242 and Trial Exhibit 1. That quitclaim deed was recorded with the Salt

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Lake County Recorder's Office on October 23, 1991. Trial Exhibit 1. The equity line of credit was obtained, and Plaintiff, Defendant John Hoggan and his mother were the obligated parties. Tr. at 22: 17-25. (See also Trial Exhibit "2" a copy of which is attached hereto as Addendum "D"). The loan documents state in part, "[t]his Agreement is secured by a Deed of Trust ("Security Instrument") upon property ("The Collateral") which you own and now occupy and continue to occupy as your principal residence." Trial Exhibit 2. The individuals referred to were Plaintiff, Defendant John Hoggan and Elizabeth D. Jolley Gardner. See Trial Exhibit 2 and Tr. at 22: 7-10. At the time of trial there was still a balance due and owing on the home equity line of credit. Tr. at 23: 4-8. Plaintiff is still obligated on the home equity line of credit. Tr. at 23:9-13.

On August 12, 2002, a divorce action regarding Plaintiff and Defendant John D. Hoggan, was filed in the Third District Court, in and for Salt Lake County, State of Utah. R. at 243. On September 17, 2002, Plaintiff filed a Notice of Interest with the Salt Lake County Recorder's Office regarding the real property. R. at 243. On or about March 2nd, 2003, Elizabeth D. Jolley Gardner passed away. R. at 243. Subsequent to her death, on or about November 19, 2003 a document was recorded regarding the real property, entitled, Quit-Claim Deed. R. at 244. See also Trial Exhibit 3. This document allegedly transferred interest in the real property to RaNee Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common. R. at 244 and Trial Exhibit 3. The Quit-Claim Deed is dated

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December 11, 1978, but until November 19, 2003 had not been recorded. R. at 225, 244 and Trial Exhibit 3.

At the conclusion of Plaintiff's case in chief Defendants moved for a dismissal of the action. Tr. at 48: 18-25 and 49: 1. The trial court granted that motion. Tr. at 49: 2-25 and 50: 1-17.

ARGUMENT SUMMARY

The trial court's decision to grant Defendants' motion was in error and should be reversed. A trial court may dismiss an action if (1) the claimant has failed to introduce sufficient evidence to establish a prima facie case, or (2) the trial court is not persuaded by that evidence. In coming to its conclusion, the trial court may weigh the evidence, consider credibility, and dismiss if it finds that although plaintiff's evidence establishes a prima facie case in the technical sense, it is unpersuasive. In regard to findings of fact, the trial court will be reversed if clearly erroneous. In regard to the intent of a party to create a joint tenancy in real property, when title to property is held in joint tenancy with right of survivorship, a rebuttable presumption arises that the title holders intended to create a valid joint tenancy. A party challenging this presumption must show by clear and convincing evidence that the decedent did not intend to create a joint tenancy.

In this case, the evidence before the trial court did not show by clear and convincing evidence that Elizabeth D. Jolley Gardner did not intend to convey to Defendant John Hoggan an interest in the real property at issue as a joint tenant with rights of survivorship. As a result, the findings of the trial court in that regard were

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clearly erroneous and its ultimate conclusion to grant Defendants' motion should be reversed.

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ARGUMENT

I. THE TRIAL COURT'S DECISION TO GRANT THE MOTION TO DISMISS WAS IN ERROR AND SHOULD BE REVERSED.

It was error for the trial court to grant the motion for dismissal; therefore, the trial court should be reversed. Tr. at 50:16-17. Pursuant to the authority granted under Rule 41 of the Utah Rules of Civil Procedure, a trial court may dismiss an action if "(1) the claimant has failed to introduce sufficient evidence to establish a prima facie case, or (2) the trial court is not persuaded by that evidence." *Grossen v. DeWitt*, 1999 UT App. 167 ¶ 8, 982 P.2d 581 (quoting, *Walker v. Union Pacific R.R.*, 844 P.2d 335, 340 (Utah Ct. App. 1993)). In coming to its conclusion, the court "may weigh the evidence, consider credibility, and dismiss if it finds that although plaintiff's evidence establishes a prima facie case in the technical sense, it is unpersuasive." *Grossen*, 1999 UT App. 167, ¶ 9. In regard to findings of fact, the trial court will be reversed "if clearly erroneous." *Id.* at ¶ 10 quoting *Southern Title Guar. Co. v. Bethers*, 761 P.2d 951, 954 (Utah Ct. App. 1988). In this case, the trial court's findings that the intent of Elizabeth D. Jolley Gardner was not to convey an interest in real property to Defendant John Hoggan, were clearly erroneous and the ruling of the trial court should be reversed. *See* R. at 239-249.

In regard to the intent of a party to create a joint tenancy in real property, the Utah Court of Appeals has stated "[w]hen title to property is held in joint tenancy with right of survivorship, a rebuttable presumption arises that the title holders intended to create a valid joint tenancy." *Matter of Estate of Ashton v. Ashton*, 898 P.2d 824, 826 (Utah Ct.

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App. 1995). A party challenging this presumption must show by clear and convincing evidence that the decedent did not intend to create a joint tenancy. See *Id.* In this case, the evidence before the trial court did not show by clear and convincing evidence that Elizabeth D. Jolley Gardner did not intend to convey to Defendant John Hoggan an interest in the real property at issue as a joint tenant. The trial court's findings in that regard were clearly erroneous as a result, and the trial court's decision should be reversed.

A. THE TRIAL COURT'S FINDINGS OF FACT SUPPORTING ITS CONCLUSION TO GRANT THE MOTION TO DISMISS ARE CLEARLY ERRONEOUS AND SHOULD BE REVERSED.

Plaintiff challenges the findings of fact made by the trial court that there was no intent to convey an interest in real property on the part of Elizabeth D. Jolley Gardner to Defendant John Hoggan. Specifically, Plaintiff challenges the following finding:

> 13. *That the placing of Defendant John Hoggan's name on the title to the America First Credit Union was not intended to convey an interest to the property to Defendant John Hoggan* and Defendant John Hoggan's mother's [sic] had previously executed a Quit Claim Deed to the home and real property conveying the property to "Ranee Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common."[2]

R. at 242: 13 (emphasis added).

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[2] It should be noted that Plaintiff is challenging only the italicized portion of this particular finding. The italicized portion has been set apart for that purpose only; italics do not appear in the original.

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The Rules of Appellate Procedure state "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." Utah R. App. P. 24(a)(9). Further, Plaintiff must "marshal all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact." *Peterson v. Peterson*, 818 P.2d 1305, 1308 (Utah Ct. App. 1991).After marshaling the evidence, it is clear that the trial court's findings of fact in regard to Elizabeth D. Jolley Gardner's intent to convey an interest in real property to Defendant John Hoggan are clearly erroneous. Therefore, the trial court's decision to grant the motion to dismiss was incorrect and the trial court should be reversed.

The Marshaled Evidence in Support of the Finding:

Cross Examination of Plaintiff:

Examiner: Mr. Olsen:

Mr. Olsen: Mrs. Hoggan, you make an issue about the fact that again nobody else has made any improvements to this property. Have any of these other family members lived in this property, or did they live in this property for 16 years?

Plaintiff: No.

Mr. Olsen: Did they have the right and use of enjoyment of this property for the last 16 years?

Plaintiff: No.

Mr. Olsen: And, in fact, did you not enjoy the use of this house from 1986 until

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2002?

Plaintiff: Did I enjoy the use of it?

Mr. Olsen: Correct, right.

Plaintiff: I lived there.

Mr. Olsen: And so again, you had the right to live there? You had the right to enjoy it with your family?

Plaintiff: Yes.

Mr. Olsen: So that was the agreement? That gave you the right to live there, right?

Plaintiff: That's correct.

Mr. Olsen: So it didn't give you ownership, right? It gave you the right to live there? No rent, correct?

Plaintiff: Correct.

Mr. Olsen: So again, may I ask you, do you have any documentation today that would show in any way that you ever purchased this property?

Plaintiff: There wasn't a purchase agreement.

Mr. Olsen: So there's nothing – there was no agreement to ever purchase this property; is that correct?

Plaintiff: Not to purchase it.

Tr. at 31: 12-25 and 32: 1-2; 9-21.

Mr. Olsen: Okay. I'm going to ask you to look at – what's the date on that

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document? When was that dated?

Plaintiff: The 22nd of October.

Mr. Olsen: Okay, and then look over on Exhibit 2. When is that document dated?

Plaintiff: The 22nd of October.

Mr. Olsen: So what was the purpose of the quit claim deed?

Plaintiff: So that we could get our equity line of credit.

Mr. Olsen: So you could get the equity line of credit?

Plaintiff: Uh-huh (affirmative).

Mr. Olsen: That's what the purpose was behind the quit claim deed; is that correct?

Plaintiff: That's correct.

Mr. Olsen: The purpose behind the quit claim deed was not to convey John the house.

Plaintiff: Not at that time, no.

Tr. at 33: 25 and 34: 1-15.

Mr. Olsen: So again, the understanding was to you and John living in the house was that you were going to maintain it, and you were going to pay the taxes?

Plaintiff: Uh-huh (affirmative).

Mr. Olsen: So by 1991, you hadn't even done that; is that correct?

Plaintiff: That's correct.

Mr. Olsen: So, in fact, you have to go in and get this loan so that you can fulfill

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what your responsibility was to your mother-in-law to maintain the taxes on it, correct?

Plaintiff: Uh-huh (affirmative).

Mr. Olsen: Now, may I ask you? Look on that – you've noted that, again something on that Exhibit 2. I'm going to ask you to turn to that back page of Exhibit 2. Now, again, does your name personally again – I'll ask you that question. Does your name personally appear on that deed of trust?

Tr. at 35: 10-25.

Plaintiff: On number two?

Mr. Olsen: Correct.

Plaintiff: Yes.

Mr. Olsen: Do you see anywhere where your name personally appears? Do you see Robyn Hoggan on that at all?

Plaintiff: In – oh, written inside this?

Mr. Olsen: On the deed of trust, the home equity line of trust?

Plaintiff: Yes.

Mr. Olsen: Again, look at the last document on that exhibit if you would for me, please?

Plaintiff: I'm sorry. I see a signature on the first page, and then my name's on the –

Mr. Olsen: Again, but your attached deed of trust which is a separate document.

Plaintiff: Oh, I'm sorry.

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Mr. Olsen: Do you see anywhere where your name personally appears on that?

Plaintiff: Not Robyn Hoggan, no. It does say a married man, though, and I was married to him.

Mr. Olsen: Okay.

Plaintiff: I am married to him.

Tr. at 36: 1-22.

Mr. Olsen: Mrs. Hoggan, again I'm just asking you, do you have any order of the court in your divorce action that says that you have an interest in that property?

Plaintiff: I don't have a court order, no. I have the home equity line.

Tr. 39: 10-14.

Examiner, Mr. Anderson:

Mr. Anderson: Ms. Hoggan, you testified that you did not – your name did not appear on the quit claim deed dated October 22nd, 1991, correct?

Plaintiff: Not my physical name, no.

Mr. Anderson: And at the time the deed was dated, you did not have an ownership interest in that home, correct?

Plaintiff: No.

Tr. 42: 4-10.

Mr. Anderson: That you did not actually own or have an ownership interest in the property at the time you signed this home equity line of credit?

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Plaintiff: No, I did not.

Tr. 43: 21-24.

Evidence that does not Support the Finding:

Examiner: Samuel M. Barker

Witness: Robyn Michelle Hoggan

Mr. Barker: All right. Now, I just want to switch [inaudible]. This – as you know, this litigation is about the Third Avenue home. Can I ask you, when did you begin living in the Third Avenue house?

Plaintiff: We moved in in 1986.

Mr. Barker: Okay, and who owned the home in 1986 when you moved in?

Plaintiff: To my knowledge, it was Elizabeth Gardner.

Mr. Barker: Okay, and was she – was the home paid off when you moved in?

Plaintiff: Yes it was.

Mr. Barker: All right, and can you just tell us briefly what condition the home was in when you – was it in good condition, or was it habitable or --

Plaintiff: No. It was in terrible condition. Actually, it had been a nursing home, and it wasn't safe for my kids to be on the floor and in certain parts of the house.

Mr. Barker: Okay. So in '85 – 19 – or '86, I'm sorry, when you moved in, did you do anything at that time to try to fix the home up?

Plaintiff: In 19 – from 1986 when we moved in?

Mr. Barker: Right.

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Plaintiff: Yes. We started making repairs immediately.

Tr. 16: 20-24 and 17: 2-19.

Mr. Barker: All right. And eventually in 1991, you're aware – again, we've all talked about this in opening statement about the '91 quit claim deed. Did you have any part of that?

Plaintiff: Yes, I did. I was there.

Mr. Barker: Okay, and you said you were there. Where did this happen? 1991 – this is five years after you had been living in the house?

Plaintiff: Right.

Mr. Barker: What happened in 1991? What – with the quit claim deed, if you can explain?

Plaintiff: Well, John and I went, and we picked up Elizabeth, and we went that day and took all the measures that we needed to do to accomplish taking care of the deed as well as going to the credit union and signing that – the equity line of – or the equity loan.

Mr. Barker: Okay. And at the time that the – of the executing of the quit claim deed, did you, yourself, sign any documents?

Plaintiff: Yes, I did. Uh-huh (affirmative).

Tr. at 17: 20-25 and 18:1-9, 14-17.

Mr. Barker: Again, Mrs. Hoggan, if you can look at Exhibit 1 there and read it over and tell me if you can identify the document.

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Plaintiff: Uh-huh (affirmative). Yeah, I can.

Mr. Barker: And what is it?

Plaintiff: It's a quit claim deed.

Mr. Barker: Is this the one that was executed, that you recall, in 1991?

Plaintiff: Yes, it is.

Mr. Barker: Now, Robyn, that exhibit you have in front of you, can you just list to us – just state what it states here on the front. How Mrs. Gardner – how she conveyed her land? What it states?

Plaintiff: Just read from the top?

Mr. Barker: Well, just from the part where it just talks about what she's conveying.

Plaintiff: Okay. "Elizabeth Jolley a.k.a. Elizabeth Jolley Gardner and John D. Hoggan, a married man, as joint tenants, but not tenants in common with full rights of survivorship."

Mr. Barker: Okay. That's good. Now, let me – you, yourself, signed another document, right? At the time of –

Plaintiff: Yes, I did. The same day, uh-huh (affirmative).

Tr. at 19: 10-18 and 20:7-19.

Mr. Barker: And, Ms. Hoggan, I just handed you Plaintiff's Exhibit 2 and ask you if you can identify that document.

Plaintiff: Yes, I can.

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Mr. Barker: And what is that? Do you recall?

Plaintiff: This is the home equity line agreement that we all signed.

Mr. Barker: Okay. Now, I want you to look at the second page of that agreement.

Plaintiff: Uh-huh (affirmative).

Mr. Barker: Who – when you say, all signed. Who –

Plaintiff: Uh-huh (affirmative).

Mr. Barker: -- signed it?

Plaintiff: John Hoggan, Robyn Hoggan, and Elizabeth Gardner.

Mr. Barker: Okay. I want you to go back to the front page.

Plaintiff: Uh-huh (affirmative).

Mr. Barker: Robyn, I want you to look down in the middle of that front page of the document there. It says, security.

Plaintiff: Uh-huh (affirmative).

Tr. at 21:2-17, 22-25.

Mr. Barker: Can you read what it says on the security line there on this document you all signed?

Plaintiff: Yes. "This agreement is secured by a deed of trust security instrument upon property, the collateral, which you own, and now occupy, and continue to occupy as your principal residence."

Mr. Barker: So you, and John, and Mrs. Gardner at that time signed this document stating that all three of you owned this property, right?

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Plaintiff: Uh-huh (affirmative).

Mr. Barker: And again, this was done on the date that you went in-

Plaintiff: October 22nd.

Mr. Barker: Okay. And the other defendants in this matter, John's siblings, did they sign off on this document at all?

Plaintiff: No. They were not there.

Mr. Barker: Okay. And once you signed this document, were you able to get a home equity line of credit?

Plaintiff: Yes, uh-huh (affirmative).

Mr. Barker: Okay.

Plaintiff: Yeah.

Mr. Barker: And under the home equity line of credit, were you obligated to pay money if you borrow money? Were you obligated on there to pay the money back?

Plaintiff: Absolutely, uh-huh (affirmative).

Tr. at 22: 1-25.

Mr. Barker: Okay. And do you know as of today – and that's the second document there with this group.

Plaintiff: Uh-huh (affirmative).

Mr. Barker: Do you know today if there's still any money owing to America First Credit Union?

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Plaintiff: Yes, there is.

Mr. Barker: And –

Plaintiff: There's – it's $11,844.33 as of last month.

Mr. Barker: Okay. And again, if something were to happen to Mr. Hoggan –

Plaintiff: Uh-huh (affirmative). I am responsible for that.

Mr. Barker: You'd have to pay; is that right?

Plaintiff: Uh-huh (affirmative), yes.

Mr. Barker: And you're not living in the house anymore, correct?

Plaintiff: No, I'm not.

Mr. Barker: Okay. And did Mrs. Gardner pay any money on this loan?

Plaintiff: No, she did not.

Mr. Barker: And then can you tell the court – tell us the reason – what was the reason you had to go and get a home equity line of credit for the Third Avenue property? What was your purpose in doing that?

Plaintiff: We needed to make further improvements to the home. That's why we did that.

Tr. at 23: 1-25.

Mr. Barker: Okay. And so from '86 up to '91, was it -- if I recall your testimony, you had been making steady improvement, but you needed more extensive money for more improvements; is that correct?

Plaintiff: That's correct.

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Mr. Barker: And just to -- just again just – the home was a – what? Was it a rest home? Is that what it was?

Plaintiff: Yes. It had been a nursing home. It needed – well, actually, you know, led us to the equity line and why we needed so much at one time was that it needed a new roof really bad. I mean, it was past that point. We needed to put a roof on immediately and make some immediate repairs.

Mr. Barker: Okay, and so there – it needed a new roof? It needed some extensive repairs; is that right?

Plaintiff: Uh-huh (affirmative).

Mr. Barker: So you were – were you continuously borrowing from this home equity line or –

Plaintiff: Yes, uh-huh (affirmative). We topped it our right away, and then continued to make –

Mr. Barker: Okay. Well, did you have a job during this time, 1986 to 2002?

Plaintiff: Yes.

Mr. Barker: During that period, were you working?

Plaintiff: Yeah. I worked the full length of the marriage – the full 24 years I have held a job. Part time most of the time.

Tr. at 24: 1-25.

Plaintiff: I didn't, you know, go full time until my kids were more in high school. My oldest was in high school, and so I always brought in an income and

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contributed. All of that went into a joint checking account where John and I shared, and all of my income, which I calculated, was over $180,000 from 1985 through 2002, it was contributed into that income, which a good deal of that went into the home as well.

Mr. Barker: Okay. Was there any – I guess, you call it sweat equity also, and did you –

Plaintiff: Absolutely.

Mr. Barker: -- work on the house without paying –

Plaintiff: Absolutely.

Mr. Barker: Okay. Can you just tell the Court some of the things you did on –

Plaintiff: Uh-huh (affirmative), sure. On my own, I was – I wallpapered. I painted walls. I painted trim. I -- I'm a seamstress, and so I furnished the home with draperies, and curtains, and blinds that would have cost thousands of dollars --- up to thousands of dollars. When – of course, you know, being a female and I can't do everything on my own. Of course, I assisted John with all the cleanup, preparations. We worked elbow-to-elbow –

Mr. Barker: Okay.

Plaintiff: -- on most of the things that happened in that home. Elbow --to-elbow.

Tr. at 25: 1-25.

Mr. Barker: Now, since this was rest home, did you -- was there like sprinklers --

Plaintiff: Oh, it was – yes. When we first moved in, it was in terrible condition.

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It looked somewhat – the floors were like what you would see in an old warehouse or something – in a – I'm trying to think what - old K-Mart is what comes to mind. But tiles, hundreds of tiles, and we had to scrape those off with spackle knives, I guess, they're called. I don't know. And we scraped all those off, and then those had all bee glued down. And then there was like a particle board, and we had to break that up. Then we – when we broke that, that had all been nailed — or and stapled down. So there were thousands of those in the floor, and we had to pull those off with pliers, and there was tar paper in between these layers as well. And so having to be very careful so that we could preserve the hardwood floors, which we eventually finished.

Mr. Barker: Now, you - - I think you testified that you put a lot of money into this – fixing this house up, and you had, of course, had to pay the home equity line back?

Plaintiff: Uh-huh (affirmative).

Mr. Barker: Did any of the other defendants, besides John, in this matter – did they help on any of these improvements or did they contribute money toward this house at all?

Tr. at 26: 1-24.

Mr. Barker: Did any of the other defendants in this matter – the – John's siblings, did they give you any money or contribute toward --

Plaintiff: None, no.

Mr. Barker: Did they come help do any of the –

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Plaintiff: No.

Mr. Barker: -- sweat equity work?

Plaintiff: No, none. John and I – this came from all of our own money.

Mr. Barker: Okay. And the house, I assume, had taxes due on it? Who would pay the property taxes on the home?

Plaintiff: The property taxes came from John and I.

Mr. Barker: Did you have any homeowner's insurance or anything on the house?

Plaintiff: Yes, we did.

Mr. Barker: And you maintained – you and John maintained that?

Plaintiff: Yes, we did. Uh-huh (affirmative).

Mr. Barker: Okay. And did John ever tell you ever that there was a prior quit claim deed prior to the 1991 quit claim deed that gave John joint tenancy with rights of survivorship?

Plaintiff: No. I'd never heard of anything like this or seen anything about that until 2005. I think an attorney of mine had told me about it.

Mr. Barker: Okay. So you never – that was never brought up at all?

Tr. at 27:1-25.

Plaintiff: Never.

Mr. Barker: Your Honor, my last exhibit here. I think this is one of the defendant's exhibits as well. Robyn, I just showed you what's been marked as Plaintiff's Exhibit 3 and ask you if you can identify that exhibit.

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Plaintiff: Uh-huh (affirmative), yes. It's a quit claim deed.

Mr. Barker: Okay, and this is a quit claim deed that was recorded in November of 2003; is that right?

Plaintiff: Uh-huh (affirmative).

Mr. Barker: Okay, but you see when it was drawn up or signed by Mrs. Gardner down below, that was December of 1978, correct?

Plaintiff: That's correct.

Mr. Barker: Robyn, when's the first time you saw this Exhibit 3, this deed?

Plaintiff: In 2005.

Tr. at 28: 1-13, 23-25.

Mr. Barker: And you had already filed for divorce by 2005 when you first saw this, right?

Plaintiff: Yes, in 2002.

Mr. Barker: From 1986 when you moved in up until 2005, did you even hear any talk about there was another deed, or the house was going to be awarded to somebody else or –

Plaintiff: Never.

Mr. Barker: Did you and John ever have any conversations about the house and how it was going to be – who was going to be the owner of the house?

Plaintiff: Yes. I always expressed a, you know, worry. I'm a worrier by nature. I'm born that way. I worry about everything and because – you know, I just – I

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would express that to him, and he would reassure me, and smooth my head, and tell me that it's okay. The home is ours. It's set up that way. My mom has taken care of that, and you don't need to worry about it.

Tr. at 29: 1-17.

Mr. Olsen: Did you ever pay any rent?

Plaintiff: It wasn't -- that was not ever set up for us. Our –

Mr. Olsen: So what was the agreement?

Plaintiff: The agreement was that we improve the home.

Mr. Olsen: Okay, and so –

Plaintiff: And improve her assets as well as ours.

Mr. Olsen: And, in fact, this house was placed for sale at one time. Do you remember that?

Plaintiff: Of course.

Mr. Olsen: And what was the understanding if that house sold?

Tr. at 32:3-8, 22-25.

Plaintiff: That we would split.

Mr. Olsen: So your understanding was that it was going to be a split? You didn't understand it was going to be a third to you, and that the two-thirds to your mother-in law?

Plaintiff: That was never told to me, no.

Mr. Olsen: So again, that was again to be further compensation for what you had

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done to the house; is that correct?

Plaintiff: Yes. With us putting all of our incomes into it, of course.

Tr. at 33:1-9

Mr. Olsen: Do you have anything to date, Mrs. Hoggan, that would basically show this Court that you own this property?

Plaintiff: The only thing I have to show is an equity line and a deed.

Tr. at 40: 8-11.

Mr. Anderson: You testified that – or you read the lines that stated that you owned and occupied the property?

Plaintiff: Uh-huh (affirmative).

Mr. Anderson: Isn't it true, Mrs. Hoggan, at the time you signed this home equity line of credit that you did not own the property?

Plaintiff: We owned the property. The deed had just been changed and it was into our names now.

Mr. Anderson: Was it in - - it wasn't into your name, though, correct?

Tr. at 42: 16-25.

Plaintiff: John Hoggan.

Mr. Anderson: It was in John's name?

Plaintiff: Elizabeth and John, yes.

Mr. Anderson: And not yours?

Plaintiff: Yes.

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Mr. Anderson: You testified that the house was actually listed to be sold, correct?

Plaintiff: At one time.

Mr. Anderson: And that the proceeds from the sale of the house would have been split?

Plaintiff: Yes.

Mr. Anderson: Who would have been the recipients of the proceeds?

Plaintiff: John and I, and -- would have split and Betty – or Elizabeth.

Mr. Anderson: And, in fact, the listing occurred in approximately 1995, correct?

Plaintiff: Uh-huh (affirmative).

Tr. at 43: 1-5, 25 and 44: 1-11.

Mr. Barker: And again, I want to - - I think we're just a little confused here. There was never an agreement – you said there was never an agreement for you to purchase the house, but you were going to get the line of credit, fix it up, and then sale the house, but that never – you never did sell it?

Plaintiff: No.

Tr. at 45: 20-25.

Mr. Barker: Do you know why that never happened?

Plaintiff: We fell in love with the home. We fell in love with the home, and his mom knew it. And she was okay with it, and we just stayed.

Mr. Barker: Okay and – okay. So you didn't – and you kept – did you keep making improvements on the home from –

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Plaintiff: Yes. We continued.

Mr. Barker: Okay. And again, I think you misstated this, but I don't -- how much do you think of yourself of putting into this house over those years? How much money?

Plaintiff: I have – all my W-2's I have figured over $180,000.

Mr. Barker: Okay. And again, that doesn't include the sweat equity also, right?

Plaintiff: No, that does not.

Tr. at 46: 1-15.

Additionally, the only three exhibits admitted at trial do not support the finding. See Trial Exhibits 1 – 3. These exhibits and the relevant testimony will be discussed in more detail below.

*   *   *

The marshaled evidence simply does not support the contested finding of the trial court, and subsequently its ultimate conclusion. A Quit Claim Deed was executed on October 22, 1991, showing Elizabeth D. Jolley aka Elizabeth D. Jolley Gardner as grantor and John D. Hoggan as Grantee. See Exhibit 1. The Quit Claim deed states that the grantor and grantee would hold the real property described therein as "joint tenants, but not as tenants in common, with full rights of survivorship." *Id.* This deed was properly recorded on October 23, 1991, with the Salt Lake County Recorders Office. *Id.*

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Defendants argue that an earlier Quit Claim Deed, appearing to be dated December 11, 1978, but not recorded until November 19, 2003 controls. See Exhibit 3. However, there was no delivery of that deed.

The Utah Supreme Court stated "[t]he rule is well settled that a deed, to be operative as a transfer of the ownership of land, or an interest or estate therein, must be delivered." *Wiggill v. Cheney*, 597 P.2d 1351, 1352 (Utah 1979). In addition, "[t]he recording of a deed raises a presumption of delivery, which presumption is entitled to great and controlling weight and which can only be overcome by clear and convincing evidence." *Controlled Receivables, Inc. v. Harman*, 413 P.2d 807, 809 (Utah 1966). Utah Code is also clear in this regard and supports the conclusion that the 1991 deed controls. Specifically, "[a] recorded document creates the following presumptions regarding title to the real property affected: (a) the document is genuine and was executed voluntarily by the person purporting to execute it; (d) delivery occurred notwithstanding any lapse of time between dates on the document and the date of recording." Utah Code Ann. Section 57-4a-4(1)(a) and (d). However, despite the above section, "[e]ach document not recorded as provided in this title is void as against any subsequent purchaser, if (2) the subsequent purchaser's document is first duly recorded." Utah Code Ann. Section 57-3-103(2). Further, "nondelivery is presumed if the grantor retains possession of the deed." David A. Thomas & James H. Backman, Thomas and Backman on Utah Real Property Law 621 (Lexis Law Publishing 1999) (citing to *Controlled*

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Receivables, Inc., 413 P.2d 807 and *Fuller v. First Security Bank of Utah*, 348 P.2d 930 (Utah 1960)).

Consider the facts in *Fuller*. In that case, a husband and wife had decided to divorce. See *Fuller*, 348 P.2d 930. As part of the divorce, the husband was to convey real property to his wife. See *Id.* The husband executed a deed and left it with his attorney. See *Id.* For reasons not on the record, the divorce never occurred and the deed remained with the husband's attorney. See *Id.* The wife later died and the attorney provided the deed to her son. See *Id.* The Utah Supreme Court held that in the circumstances of that case "that the recording of the deed by her son after the wife's death, which son had obtained after her death from the attorney, was not a valid delivery, and that the court did not err in finding that there had been no effective delivery." *Id.*

Similarly here, the later recordation of the December 11, 1978 deed cannot create delivery and as a result, the October 22, 1991 deed controls. After Elizabeth D. Jolley Gardner's death, presumably one or several individuals discovered the 1978 deed and then recorded the same. See Trial Exhibit 3. Plaintiff had never seen the 1978 deed until 2005. Tr. at 25:23-25 and 29: 4-7. This delayed act in recordation cannot now establish delivery of the December 11, 1978 deed. See Utah Code Ann. Sections 57-4a-4(1)(a) and 57-3-103. As a result, it cannot be used to invalidate the October 22, 1991 deed that was properly recorded on October 23, 1991. See *Id.* and Trial Exhibits 1 and 3. This is true, especially in light of the instruction provided by the Utah Supreme Court that "[t]he recording of a deed raises a presumption of delivery, which presumption is entitled to

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great and controlling weight and which can only be overcome by clear and convincing evidence." *Controlled Receivables, Inc.*, 413 P.2d at 809. Utah Code Ann. Sections 57-3-103 and 57-4a-4 also clearly establish that the December 11, 1978 deed is void as to the subsequent property interest conveyed in the October 22, 1991 deed by Defendant John Hoggan, and that the October 22, 1991 deed is presumed to be valid, executed voluntarily and delivered, as it was properly recorded before the December 11, 1978 deed.

When the equity line of credit was obtained, Plaintiff, Defendant John Hoggan and his mother were the obligated parties. Tr. at 22: 17-19, 23: 4-13 and Trial Exhibit 2. That document states "[t]his Agreement is secured by a Deed of Trust ("Security Instrument") upon property ("The Collateral") which you own and now occupy and continue to occupy as your principal residence." Trial Exhibit 2. The individuals referred to were Plaintiff, Defendant John Hoggan and Elizabeth D. Jolley Gardner. See Trial Exhibit 2 and Tr. at 22: 7-10. Clearly, this document shows that a property interest was given, in fact it was required. Trial Exhibit 2. To allow the trial court's ruling to stand will essentially sanction fraud against the lender. Further, it would create an inequitable situation between Plaintiff and Defendants. Specifically, at the time of trial there was still a balance due and owing on the home equity line of credit. Tr. at 23: 4-13. Plaintiff is still obligated on the home equity line of credit, but under the trial court's ruling, she has no interest in the real property. Tr. at 23:9-13 and R. at 247.

Because the documentary evidence does not support the trial court's finding, the only evidence that could be considered as supporting the trial court's finding is the

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testimony of Plaintiff herself. Plaintiff stated in her testimony that there was no purchase agreement in regard to the real property at issue. *See* Tr. at 32: 15-21. However, a purchase agreement is not required to show that a property interest was conveyed to Defendant John Hoggan; the 1991 deed shows the conveyance of the interest. See Trial Exhibit 1. Plaintiff also testified that the purpose of the 1991 deed was to allow Plaintiff, Defendant John Hoggan and Elizabeth D. Jolley Gardner to acquire the home equity line of credit. *See* Tr. at 34:6-12. This is true; the 1991 deed did allow them to obtain the line of credit. However, in order to effectuate that acquisition, a property interest had to be, and was, conveyed to Defendant John Hoggan. *See* Tr. at 34:6-12 and Trial Exhibits 1 and 2. The two purposes cannot be separated from each other. This situation could be considered similar to that of an individual who sells real property to a buyer in exchange for a certain sum of money. When asked why that seller sold the real property a potential answer may be because the seller wished to obtain a certain amount of money in return. While the stated purpose may have been to obtain money, an interest in the property was conveyed in exchange. The conveyance of the real property interest and the desire to obtain the money in exchange are inseparable. So too here, the goal may have been to obtain an equity line of credit and repair the residence, but an interest was conveyed to achieve this goal and to try to separate the interest from the goal is nonsensical. It is important to note as well that the home equity loan was obtained in part to make needed repairs to the real property. Tr. at 23: 20-25 and 24:1-19. Had Defendant John Hoggan passed away before Elizabeth D. Jolley Gardner, she would have taken his interest in the

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real property and been the sole beneficiary of the repairs to the real property. See Trial Exhibit 1.

Further, the following exchange on cross examination must be considered.

Mr. Olsen: The purpose behind the quit claim deed was not to convey John the house.

Plaintiff: Not at that time, no.

Tr. at 34:13-15. Exhibits 1 and 2 stand in stark contrast to any simplified analysis of that exchange. Those documents clearly state that a property interest was conveyed. Further, the quit claim deed referred to did not convey Defendant John Hoggan the house. He and his mother were holding the house as joint tenants and presumably both had equal access. What is missing is a direct connection between the conclusion that the purpose of the quit claim deed was not to convey a property interest. Another point to be considered is the absence of any evidence on the record that Elizabeth D. Jolley Gardner ever rescinded or changed the 1991 deed. If the purpose of the quit claim deed was not to convey any property interest to Defendant John Hoggan, it would follow that Elizabeth D. Jolley Gardner could have simply executed another deed mirroring the 1978 deed and had that recorded, and Defendant John Hoggan would have aided in that activity because the 1991 deed would have been nothing more than an instrument to defraud the lender. Instead what did occur was that after Elizabeth D. Jolley Gardner's death, the 1978 deed was recorded by another individual or individuals, other than herself. See Trial Exhibit 3. As was discussed above, the 1978 deed is invalid. It is also important to note that Plaintiff

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later testified that the real property was in Defendant John Hoggan's name. See Tr. at 42: 16-25.

Finally, there were several instances where Plaintiff was asked if her name appeared anywhere on the deed or the trust deed. See Tr. at 35: 21-25, 36: 1-22, 42: 4-10, 43: 21-24. While Plaintiff's name did not appear on the deed or deed of trust, her interest is claimed through her husband, Defendant John Hoggan. See *Thomas v. Thomas*, 1999 UT App. 239 ¶ 22, 987 P.2d 603 ("[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property.") See also *Dunn v. Dunn*, 802 P.2d 1314, 1317-1318 (Utah Ct. App. 1990) *quoting Gardner v. Gardner*, 748 P.2d 1076, 1079 (Utah 1988) ("[m]arital property is ordinarily all property acquired during marriage and it 'encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.'") Therefore, it is irrelevant that Plaintiff's name does not appear on the 1991 deed or deed of trust. See Trial Exhibit 1 and Trial Exhibit 2.

Stated simply, the most credible and clear evidence, including the 1991 deed and documents executed in conjunction with the home equity line of credit, clearly show that a property interest was intended to be given, and was in fact, given. Therefore, the trial court's finding is clearly erroneous and its action to grant the motion for dismissal should be reversed.

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CONCLUSION

Based on the foregoing, Plaintiff requests that the decision of the trial court to grant the motion to dismiss be reversed.

DATED this 25th day of November, 2009

Samuel M. Barker
Jeffrey A. Callister
Attorneys for Plaintiff and Appellant

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MAILING CERTIFICATE

I hereby certify that on this 30th day of November 2009, I caused a true and correct copy of the foregoing **BRIEF OF APPELLANT** to be mailed in the United States mail, first class postage prepaid, to the following:

Thomas Christensen, Jr.
Brett N. Anderson
BLACKBURN & STOLL
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Attorney for Defendants/Appellees
Rance Boley Fleming aka Renee B. Fleming,
Karen B. Gamonal aka Karen Halterman,
Joyce H. Crockett, Leo V. Jolley,
Rosalee J. Keele aka Rosalee M. Haslam,
Estate of Kriste H. Street,
Estate of Elizabeth D. Jolley Gardner aka
Elizabeth Duncan Jolley aka Elizabeth Duncan

Matthew N. Olsen
OLSEN & OLSEN
8142 South State Street
Midvale, Utah 84047
Attorney for Defendant/Appellee John D. Hoggan

Secretary

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ADDENDUM "A"

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FILED DISTRICT COURT
Third Judicial District

APR 15 2009

SALT LAKE COUNTY
By ________ Deputy Clerk

MATTHEW N. OLSEN
Utah State Bar No. 4239
OLSEN & OLSEN, L.L.C.
Attorneys for Defendant John Hoggan
8142 South State Street
Midvale, Utah 84047
Telephone: 255-7176

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBYN MICHELLE HOGGAN, Plaintiff, vs. RANEE BOLEY FLEMING aka RENEE B. FLEMING; KAREN B. GAMONAL aka KAREN HALTERMAN; JOYCE H. CROCKETT; JOHN D. HOGGAN; LEO V. JOLLEY; ROSALEE J. KEELE aka ROSALEE M. HASLAM; THE ESTATE OF KRISTE H. STREET; THE ESTATE OF ELIZABETH D. JOLLEY GARDNER aka ELIZABETH DUNCAN JOLLEY aka ELIZABETH DUNCAN; and JOHN DOES 1-100, Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 070902131 Honorable Denise L. Lindberg

The Trial in the above matter, having come on regularly for hearing on the 3rd day of December, 2008, before the above-entitled Court, before Honorable Denise P. Lindberg; Plaintiff appearing in person and by her attorney, Samuel M. Barker; and Defendant John Hoggan appearing in person and by his attorney, Matthew N. Olsen;

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and the remaining defendants appearing and being represented by Brett N. Anderson, and the parties having argued and presented evidence in Court and the Court having been fully advised in the premises, and upon motion of Matthew N. Olsen, attorney for Defendant John Hoggan, the Court makes the following:

FINDINGS OF FACT

1. That the Defendant John Hoggan's grandmother purchased the home and real property located at 687 3rd Avenue, Salt Lake City, Utah, during the 1960's.

2. That the Defendant John Hoggan's grandmother and mother operated a care center in the home and the Defendant John Hoggan and his siblings worked in the care center.

3. That following the death of the Defendant John Hoggan's grandmother, the Defendant John Hoggan's mother received ownership of the home and real property.

4. That on July 14, 1978, the Plaintiff and the Defendant John Hoggan married.

5. That the Plaintiff and the Defendant John Hoggan lived in an apartment after their marriage and shortly thereafter moved into a home located at 1564 South 600 East that was owned by the Defendant John Hoggan's mother.

6. That prior to the marriage of the Plaintiff and Defendant John Hoggan, the Defendant John Hoggan assisted his mother in the maintenance and repair of the home located at 687 3rd Avenue.

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7. That in 1986, the Defendant John Hoggan's mother allowed the Plaintiff and the Defendant John Hoggan to move into the property located at 687 3rd Avenue with the understanding that the Plaintiff and Defendant John Hoggan would rent the property by maintaining the property and paying the property taxes.

8. That from approximately 1986 until 1991, the parties discussed purchasing the home and real property from the Defendant John Hoggan's mother but, due to limited income, the Plaintiff and Defendant John Hoggan did not qualify to purchase the home.

9. That in approximately 1991, the home and real property was in need of additional repairs and back taxes were owed on the home and real property.

10. That due to the income of the Defendant, John Hoggan, and the age and income of John Hoggan's mother, the Defendant John Hoggan, and the Defendant John Hoggan's mother were unable to individually qualify for a loan.

11. That in October of 1991, the Defendant John Hoggan and his mother went to America First Credit Union to obtain a home equity line of credit on the home and real property in the amount of $25,000.00 and again, due to the Defendant John Hoggan's income and his mother's age and limited income, the Defendant John Hoggan was required to be placed on the home equity line of credit and the Deed to the home and real property.

12. That at the time the home equity line of credit was obtained, America First Credit Union prepared a Quit Claim Deed which states as follows: "ELIZABETH

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D. JOLLEY AKA ELIZABETH D. JOLLEY GARDNER and JOHN D. HOGGAN, a married man, as joint tenants, but not as tenants in common, with full rights of survivorship."

13. That the placing of Defendant John Hoggan's name on the title to the property by America First Credit Union was not intended to convey an interest to the property to Defendant John Hoggan and Defendant John Hoggan's mother's had previously executed a Quit Claim Deed to the home and real property conveying the property to "Ranee Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common."

14. That the proceeds from the home equity line of credit were used by Defendant John Hoggan and the Plaintiff to pay the back taxes on the property, make additional repairs to the property, and pay other expenses applicable to the home and real property and the parties.

15. That the Defendant John Hoggan continued to pay the home equity line, property taxes, and maintain the property as the parties' payment of rent on the home and real property.

16. That in approximately 1995, the Defendant John Hoggan and his mother attempted to sell the real property with the understanding that if the home and real property was sold, that the Defendant John Hoggan would receive one-third of the proceeds from the sale of the home and real property.

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17. That the Defendant John Hoggan and his mother were unsuccessful in selling the property and the Plaintiff and Defendant John Hoggan continued to rent the property from Defendant John Hoggan's mother.

18. That in approximately 1998, the Plaintiff and Defendant John Hoggan were in arrears on the property taxes on the home and real property in the approximate amount of $13,500.00.

19. That Defendant John Hoggan was required to pay the back taxes on a credit card and the Plaintiff was unwilling to assist Defendant John Hoggan in paying the taxes due to Plaintiff's continued understanding that the parties maintained no ownership interest in the home.

20. That also during early 1998, the Plaintiff became involved with an individual at Continental Airlines and maintained an affair with this individual until approximately August 1998.

21. That on August 12, 2002, the Plaintiff filed a divorce petition against Defendant John Hoggan. The initial Petition for Divorce was dismissed on July 16, 2008. The Plaintiff again filed a Petition for Divorce on August 13, 2008.

22. That the Plaintiff filed a Notice of Interest on the home and real property on September 17, 2002.

23. That on March 2, 2003, the Defendant John Hoggan's mother passed away.

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24. That prior to the Defendant John Hoggan's mother passing away, the Defendant John Hoggan's mother executed a holographic Will wherein she specifically provided "If I still have the property at 687 3rd Avenue, Salt Lake City, UT. With one third going to John Hoggan. He has improved and lived in the house."

25. That prior to Defendant John Hoggan's mother's passing, she had prepared a Quit Claim Deed to the home and real property conveying the property to "Ranee Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common."

26. That the Quit Claim Deed prepared by Defendant John Hoggan's mother was recorded on November 19, 2003.

27. That subsequent to the Quit Claim Deed being recorded, Ranee Boley Fleming aka Renee B. Fleming, Karen B. Gamonal aka KarenHalterman, Joyce H. Crockett, John D. Hoggan, Leo V. Jolley, Rosalee J. Keele aka Rosalee M. Haslam, the Estate of Kriste H. Street, by and through its personal representative, Shannon S. Bachman, transferred their respective interest in the property at issue to the Estate of Elizabeth D. Jolley Gardner aka Elizabeth Duncan Jolley aka Elizabeth Duncan, whose personal representatives are Ranee Boley Fleming aka Renee B. Fleming and Karen B. Gamonal aka Karen Halterman.

28. That on or about March 28, 2007, the Plaintiff filed an Amended Complaint in the above-captioned matter.

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29. That the home and real property is titled in the name of "Estate of Elizabeth D. Jolley Gardner aka Elizabeth Duncan Jolley aka Elizabeth Duncan, whose personal representatives are Ranee Boley Fleming aka Renee B. Fleming and Karen B. Gamonal aka Karen Halterman."

30. That the Defendant John Hoggan and the Plaintiff Robyn Hoggan remain obligated on the America First Credit Union line of credit.

31. That the Defendant John Hoggan and the Plaintiff Robyn Hoggan contributed labor to the repair of the home and real property. The Plaintiff is unable to quantify a monetary investment to the property.

CONCLUSIONS OF LAW

1. That the Defendant John Hoggan's grandmother purchased the home and real property located at 687 3rd Avenue, Salt Lake City, Utah, during the 1960's.

2. That following the death of the Defendant John Hoggan's grandmother, the Defendant John Hoggan's mother received ownership of the home and real property.

3. That on July 14, 1978, the Plaintiff and the Defendant John Hoggan married.

4. That in 1986, the Defendant John Hoggan's mother allowed the Plaintiff and the Defendant John Hoggan to move into the property located at 687 3rd Avenue with the understanding that the Plaintiff and Defendant John Hoggan would rent the property by maintaining the property and paying the property taxes.

5. That in October of 1991, the Defendant John Hoggan and his mother went to America First Credit Union to obtain a home equity line of credit on the home and

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real property in the amount of $25,000.00 and again, due to the Defendant John Hoggan's mother's age and limited income, the Defendant John Hoggan was required to be placed on the home equity line of credit and the Deed to the home and real property.

6. That at the time the home equity line of credit was obtained, America First Credit Union prepared a Quit Claim Deed and placed the title of the property as follows: "ELIZABETH D. JOLLEY AKA ELIZABETH D. JOLLEY GARDNER and JOHN D. HOGGAN, a married man, as joint tenants, but not as tenants in common, with full rights of survivorship."

7. That the placing of Defendant John Hoggan's name on the title to the property by America First Credit Union was not intended to convey an interest to the property to Defendant John Hoggan and Defendant John Hoggan's mother's had previously executed a Quit Claim Deed to the home and real property conveying the property to "Rance Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common."

8. That prior to the Defendant John Hoggan's mother passing away, the Defendant John Hoggan's mother executed a holographic Will wherein she specifically provided "If I still have the property at 687 3rd Avenue, Salt Lake City, UT. With one third going to John Hoggan. He has improved and lived in the house."

9. That prior to Defendant John Hoggan's mother's passing, she had prepared a Quit Claim Deed to the home and real property conveying the property to "Rance Boley

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Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common."

10. That the Quit Claim Deed prepared by Defendant John Hoggan's mother was recorded on November 19, 2003.

11. That subsequent to the Quit Claim Deed being recorded, Ranee Boley Fleming aka Renee B. Fleming, Karen B. Gamonal aka KarenHalterman, Joyce H. Crockett, John D. Hoggan, Leo V. Jolley, Rosalee J. Keele aka Rosalee M. Haslam, the Estate of Kriste H. Street, by and through its personal representative, Shannon S. Bachman, transferred their respective interest in the property at issue to the Estate of Elizabeth D. Jolley Gardner aka Elizabeth Duncan Jolley aka Elizabeth Duncan, whose personal representatives are Ranee Boley Fleming aka Renee B. Fleming and Karen B. Gamonal aka Karen Halterman.

12. That the home and real property is titled in the name of "Estate of Elizabeth D. Jolley Gardner aka Elizabeth Duncan Jolley aka Elizabeth Duncan, whose personal representatives are Ranee Boley Fleming aka Renee B. Fleming and Karen B. Gamonal aka Karen Halterman" and the Estate is the legal owner of the real property.

13. That the Plaintiff's Amended Complaint to Quiet Title is dismissed.

14. That the Plaintiff is hereby ordered to remove the Notice of Interest filed against the property located at 687 3rd Avenue, Salt Lake City, Utah.

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DATED this 14 day of ~~January~~ April, 2009.

BY THE COURT

HONORABLE DENISE P. LINDBERG
Third District Court Judge

APPROVED AS TO FORM:

Samuel M. Barker, Attorney for Plaintiff

Brett N. Anderson
Attorney for Defendants Renee B. Fleming
and Karen Halterman

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to be sent via United States Mail, first class, postage prepaid, on the 23 day of January, 2009, to the following:

Samuel M. Barker
SMART, SCHOFIELD, SHORTER & LUNCEFORD
5295 South Commerce Drive, Suite 200
Murray, UT 84107
Attorney for Plaintiff

Thomas Christensen, Jr.
Brett N. Anderson
BLACKBURN & STOLL
257 East 200 South, Suite 800
Salt Lake City, UT 84111
Attorney for Renee Fleming and
Karen Halterman

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ADDENDUM "B"

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FILED DISTRICT COURT
Third Judicial District

APR 15 2009

SALT LAKE COUNTY

By _______ Deputy Clerk

MATTHEW N. OLSEN
Utah State Bar No. 4239
OLSEN & OLSEN, L.L.C.
Attorneys for Defendant John Hoggan
8142 South State Street
Midvale, Utah 84047
Telephone: 255-7176

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBYN MICHELLE HOGGAN, Plaintiff, vs. RANEE BOLEY FLEMING aka RENEE B. FLEMING; KAREN B. GAMONAL aka KAREN HALTERMAN; JOYCE H. CROCKETT; JOHN D. HOGGAN; LEO V. JOLLEY; ROSALEE J. KEELE aka ROSALEE M. HASLAM; THE ESTATE OF KRISTE H. STREET; THE ESTATE OF ELIZABETH D. JOLLEY GARDNER aka ELIZABETH DUNCAN JOLLEY aka ELIZABETH DUNCAN; and JOHN DOES 1-100, Defendants.	**ORDER** Civil No. 070902181 Honorable Denise L. Lindberg

The Trial in the above matter, having come on regularly for hearing on the 3rd day of December, 2008, before the above-entitled Court, before Honorable Denise P. Lindberg; Plaintiff appearing in person and by her attorney, Samuel M. Barker; and Defendant John Hoggan appearing in person and by his attorney, Matthew N. Olsen;

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and the remaining defendants appearing and being represented by Brett N. Anderson, and the parties having argued and presented evidence in Court and the Court having been fully advised in the premises, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, and upon motion of Matthew N. Olsen, attorney for Defendant John Hoggan,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Defendant John Hoggan's grandmother purchased the home and real property located at 687 3rd Avenue, Salt Lake City, Utah, during the 1960's.

2. That following the death of the Defendant John Hoggan's grandmother, the Defendant John Hoggan's mother received ownership of the home and real property.

3. That on July 14, 1978, the Plaintiff and the Defendant John Hoggan married.

4. That in 1986, the Defendant John Hoggan's mother allowed the Plaintiff and the Defendant John Hoggan to move into the property located at 687 3rd Avenue with the understanding that the Plaintiff and Defendant John Hoggan would rent the property by maintaining the property and paying the property taxes.

5. That in October of 1991, the Defendant John Hoggan and his mother went to America First Credit Union to obtain a home equity line of credit on the home and real property in the amount of $25,000.00 and again, due to the Defendant John Hoggan's mother's age and limited income, the Defendant John Hoggan was required to be placed on the home equity line of credit and the Deed to the home and real property.

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6. That at the time the home equity line of credit was obtained, America First Credit Union prepared a Quit Claim Deed and placed the title of the property as follows: "ELIZABETH D. JOLLEY AKA ELIZABETH D. JOLLEY GARDNER and JOHN D. HOGGAN, a married man, as joint tenants, but not as tenants in common, with full rights of survivorship."

7. That the placing of Defendant John Hoggan's name on the title to the property by America First Credit Union was not intended to convey an interest to the property to Defendant John Hoggan and Defendant John Hoggan's mother's had previously executed a Quit Claim Deed to the home and real property conveying the property to "Rance Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common."

8. That on August 12, 2002, the Plaintiff filed a divorce petition against Defendant John Hoggan. The initial Petition for Divorce was dismissed on July 16, 2008. The Plaintiff again filed a Petition for Divorce on August 13, 2008.

9. That on March 2, 2003, the Defendant John Hoggan's mother passed away.

10. That prior to the Defendant John Hoggan's mother passing away, the Defendant John Hoggan's mother executed a holographic Will wherein she specifically provided "If I still have the property at 687 3rd Avenue, Salt Lake City, UT. With one third going to John Hoggan. He has improved and lived in the house."

11. That prior to Defendant John Hoggan's mother's passing, she had prepared a Quit Claim Deed to the home and real property conveying the property to "Ranee

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Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, Kriste H. Street, John D. Hoggan, Leo V. Jolley, and Rosalee J. Keele, as tenants in common."

12. That the Quit Claim Deed prepared by Defendant John Hoggan's mother was recorded on November 19, 2003.

13. That subsequent to the Quit Claim Deed being recorded, Rance Boley Fleming aka Renee B. Fleming, Karen B. Gamonal aka KarenHalterman, Joyce H. Crockett, John D. Hoggan, Leo V. Jolley, Rosalee J. Keele aka Rosalee M. Haslam, the Estate of Kriste H. Street, by and through its personal representative, Shannon S. Bachman, transferred their respective interest in the property at issue to the Estate of Elizabeth D. Jolley Gardner aka Elizabeth Duncan Jolley aka Elizabeth Duncan, whose personal representatives are Ranee Boley Fleming aka Renee B. Fleming and Karen B. Gamonal aka Karen Halterman.

14. That the home and real property is titled in the name of "Estate of Elizabeth D. Jolley Gardner aka Elizabeth Duncan Jolley aka Elizabeth Duncan, whose personal representatives are Rance Boley Fleming aka Renee B. Fleming and Karen B. Gamonal aka Karen Halterman" and the Estate is the legal owner of the real property.

15. That the Plaintiff's Amended Complaint to Quiet Title be and the same is hereby dismissed.

16. That the Plaintiff be and she is hereby ordered to remove the Notice of Interest filed against the property located at 687 3rd Avenue, Salt Lake City, Utah.

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DATED this 14 day of April, 2009.

BY THE COURT

HONORABLE DENISE P. LINDBERG
Third District Court Judge

APPROVED AS TO FORM:

Samuel M. Barker, Attorney for Plaintiff

Brett N. Anderson
Attorney for Defendants Renee B. Fleming
and Karen Halterman

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DATED this ____ day of ______________, 2009.

BY THE COURT

____
HONORABLE DENISE P. LINDBERG
Third District Court Judge

APPROVED AS TO FORM:

____
Samuel M. Barker, Attorney for Plaintiff

____
Brett N. Anderson
Attorney for Defendants Renee B. Fleming
and Karen Halterman

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing ORDER to be hand-delivered on the 4 day of March, 2009, to the following:

Samuel M. Barker
SMART, SCHOFIELD, SHORTER & LUNCEFORD
5295 South Commerce Drive, Suite 200
Murray, UT 84107
Attorney for Plaintiff

Thomas Christensen, Jr.
Brett N. Anderson
BLACKBURN & STOLL
257 East 200 South, Suite 800
Salt Lake City, UT 84111
Attorney for Renee Fleming and
Karen Halterman

[signature]

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ADDENDUM "C"

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5142632

PLAINTIFF'S EXHIBIT 1

Recorded at Request of

at ______ M. Fee Paid $

by ______ Dep. Book ______ Page ______ Ref.: ______

Mail tax notice to JOHN HOGGAN Address 687 East 3rd AVE SLC, UT 84103

QUIT-CLAIM DEED

ELIZABETH D JOLLEY AKA ELIZABETH D JOLLEY GARDNER

grantor

of SALT LAKE CITY , County of SALT LAKE , State of Utah, hereby QUIT-CLAIM to

ELIZABETH D JOLLEY AKA ELIZABETH D JOLLEY GARDNER and JOHN D HOGGAN, a married man, as joint tenants, but not as tenants in common, with full rights of survivorship

grantee

of SALT LAKE CITY, COUNTY OF SALT LAKE, STATE OF UTAH for the sum of OTHER GOOD AND VALUABLE CONSIDERATION AND TEN AND NO/100------- DOLLARS,

the following described tract of land in SALT LAKE County, State of Utah:

COMMENCING AT THE SOUTHEAST CORNER OF LOT 1, BLOCK 53, PLAT "D", SALT LAKE CITY, SURVEY, AND RUNNING THENCE WEST 41.5 FEET; THENCE NORTH 7 RODS; THENCE EAST 41.5 FEET; THENCE SOUTH 7 RODS TO THE PLACE OF BEGINNING.

FIRST AMERICAN TITLE No. 26887

WITNESS the hand of said grantor , this 22nd day of OCTOBER , A. D. one thousand nine hundred and 91

Signed in the presence of

Elizabeth D Jolley aka Elizabeth D Jolley Gardner

STATE OF UTAH,
County of SALT LAKE } ss.

On the 22nd day of OCTOBER A. D. one thousand nine hundred and 91 personally appeared before me Elizabeth D Jolley aka Elizabeth D Jolley Gardner

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5143632
25 OCTOBER 91 11:47 AM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
FIRST AMERICAN TITLE
REC BY: REBECCA GRAY , DEPUTY

BK 63

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ADDENDUM "D"

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AMERICA F[illegible]
CREDIT UN[illegible]

PLAINTIFF'S EXHIBIT 2

HOME E[illegible]
AGREEMENT, NOTE AN[illegible] [illegible]ATEMENT

Account # 327223-4.

Date 10/22/91

Name & Address: JOHN D HOGGAN and ROBYN [illegible] and ELIZABETH D GARDNER

687 EAST 3RD AVENUE,

SALT LAKE CITY, UTAH 84103

lex (See Section 14): 5.5 %
Above Index: 3.8 %
ting ANNUAL PERCENTAGE RATE: 9.3 %

Current Daily Periodic Rate: .02548 %
Credit Limit: $ 25,000.00
Last Advance Date: 10/22/2001

our America First Home Equity Line Revolving Credit Agreement, Note, and Truth-In-Lending Disclosure Statement ("Agreement"). It spells out the conditions of your variable rate revolving credit plan ("Account") with America First, as disclosed above. In this Agreement, the words "you" and "your" and all persons who sign this Agreement, and all persons who use the account, each and all of whom will be bound to the terms and conditions of tent. The words "we", "us", "our", and "Credit Union" mean America First Credit Union, Creditor.

Promise to Lend Money. Once this Agreement is executed, we agree to establish your Account with the Credit Limit shown above. We agree to make o long as the terms of this contract are being met.

to Use Your Account. You can obtain advances by any method(s) the Credit Union authorizes from time to time. If authorized you can write a Home check by using the special numbered checks that we will supply to you; or you can arrange for the transfer of funds from your Account into your cking account. The full amount paid by us on each Home Equity Line check or transfer will be added to the outstanding principal balance of your of the date of payment or transfer. We are not obligated to accept your Home Equity Line checks in payment of amounts that are due under your more than one person can obtain loan advances under this Agreement, we will pay Home Equity Line checks or honor Account transfer requests y of you, but if you make conflicting demands on us, we, at our option, may choose not to pay any Home Equity Line check or honor any Account uest. You agree to abide by any applicable terms and agreements to effect if you use Loan Checks, a VISA Debit Card, Automated Teller Machines, or other methods authorized by the Credit Union from time to time to access your account. No minimum advance amount is required.

Promise to Pay. The payments under this plan will vary according to your balance. The payment amount due is computed at 1.25% of the unpaid ance owing on the first day of each month, or $50 whichever is greater. Payments are due and payable by the 20th of each month. The first payment e 20th day of the month following the creation of your Home Equity Line. The payment computation formula may be increased in increments of .25% to prevent negative amortization of your principal balance. You will be given advance notice of any required changes in the payment computation r promise to pay all loan advances extended to you or to any other person authorized to use your Account, along with all finance charges and any and charges according to this Agreement. All payments must be made in U.S. dollars.

dvance Date; Final Payment Date. The last advance date shown is the last date that loan advances can be obtained on this account, unless future e cancelled earlier as provided in this Agreement. The final payment date may be many years after the last advance date, depending on whether ay more than the required payment. The final payment date is a function of the amount advanced, the interest rates, and the payment computation effect over the duration of the loan. If you desire to pay the balance off by the last advance date, you must discontinue additional advances, and y payment amounts greater than that required under the plan. Your payments must be sufficiently large to liquidate the outstanding balance plus rest. You realize that if during the term of your Home Equity Line Loan you make only the required payments, and do not make additional repayments hat the total amount outstanding at the last advance date may be significantly larger, than any previous balance. You agree to continue making payments ired during the draw period or greater, throughout the repayment period until the entire unpaid balance plus accrued interest has been paid in full. of the repayment period will depend on the balance owed at the end of the draw period.

Person Liable. If more than one person has signed or is otherwise bound by the terms of this Agreement, then each will be jointly and severally entire amount due under this Agreement.

ty. This Agreement is secured by a Deed of Trust ("Security Instrument") upon property (The "Collateral") which you own and now occupy and to occupy as your principal residence. Which property is located at 687 EAST 3RD AVENUE, SALT LAKE CITY, UTAH 84103. The Security Instrument secures all future amounts under al up to and including the full amount of your Credit Limit. The Collateral, and our rights with respect to it, are more fully described in the Security Instrument.

ty Insurance. Property Insurance is required by us against loss or damage to the Collateral. Fire insurance coverage for all structures is required t equal to the total available limits of all loans (regardless of lender) for which a security interest in the Collateral is outstanding. You must obtain such required insurance at your cost and expense in full force until the unpaid balance of your Account is paid in full and this Agreement is ter- d insurance may also be required by us against flood damage if the Collateral is in a flood danger area. If required, you are responsible for obtaining ing it. You may obtain property, fire and flood insurance from anyone you want who is acceptable to us. If you fail to provide insurance as required ment, the Credit Union can add the cost of insurance to protect its security interest.

redit Limit. Your Credit Limit is set forth above. We are not obligated to honor any Home Equity Line check or Account transfer request that would ncipal balance of your Account to exceed the amount of your Credit Limit. We may elect to advance, however, the full amount of such Home Equity Account transfer and treat such advance as a loan advance under this Agreement without thereby increasing your Credit Limit. You agree to repay upon demand any such advance, together with any applicable Finance Charge.

se in Your Credit Limit. Your credit limit is set at a particular amount. New loan documentation must be signed and a three-day rescission period e any funds above the original limit can be advanced.

ment. You may pay early and you may pay extra or larger payments without any penalty. However, any larger or additional payments will not relieve r obligation to make the next succeeding minimum monthly payment when due.

y Statements. Each month in which there is an outstanding balance on your Account, you will receive a monthly statement from us. The statement ing other things, your "New Balance," the minimum amount you must pay, when you must pay it, your current periodic rate, and your Annual Percen- u agree to pay us the minimum payment due on or before the due date shown on your statement. The "New Balance" includes the outstanding nce and other costs and charges according to this Agreement.

e Charges on Daily Balance. The finance charge is the cost you pay for credit. The annual percentage rate does not include costs other than inance charge on each new advance begins on the date of the advance and continues until the advance has been repaid in full. The finance charge using the "daily balance" method. To compute the finance charge, the unpaid balance for each day since your last payment (or since an advance t yet made a payment) is multiplied by the applicable daily periodic rate. The sum of these amounts is the finance charge listed. The balance used [illegible]

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Charge. You will pay a late fee on payments 10 days or more delinquent. The late fee charged will be 4% of the monthly payment or a $4.00 minimum. The maximum fee charged will not exceed $15.00.

...ble Interest Rate. The line has a variable rate feature. The annual percentage rate (corresponding to the periodic rate) and the minimum monthly ... can change. The annual percentage rate includes only interest and not other costs. The interest rate for variable rate advances is based on the New ...al Reserve Discount Rate plus a margin. The index is determined quarterly by averaging the New York Federal Reserve Discount Rate on the third ... each month in the preceding quarter and rounding it up to the next .5%. The interest rate on existing balances will be adjusted on the first day of ...ril, July and October. The maximum interest rate will not exceed 21%. In the event that the maximum rate of 21% is reached, we have the right to ... limit or to freeze your limit and prohibit any further advances. However, once the rate drops below the cap of 21%, your limit will be reinstated. The "Annual Percentage Rate" shown on the reverse side of this agreement is the rate in effect on the date of this agreement. This initial base rate may ... each quarter according to the movement of the Federal Reserve Discount Rate. An increase or decrease in the index will increase or decrease your ...rage and may affect the minimum payment amount.

Charges. Our annual maintenance fee is $50.00. We are currently waiving this fee. However, we have the right to charge this fee or a portion of ...e in the future. We also reserve the right to charge fees for stop payments and returned checks.

...lar Payments. We can accept and deposit late payments or partial payments, or drafts, checks or money orders marked "payment in full" without ...f our rights under this Agreement.

...t. We can terminate your line, require you to pay us the entire outstanding balance in one payment, and charge you certain fees if:

...engage in fraud or material misrepresentation in connection with the line.
...do not meet the repayment terms.
... action or inaction adversely affects the collateral or our rights in the collateral.

...g Your Limit. We can refuse to make additional extensions of credit or reduce your credit limit if:

...value of the dwelling securing the line declines significantly below its appraised value for purposes of the line.
...easonably believe you will not be able to meet the repayment requirements due to a material change in your financial circumstances.
...are in default of a material obligation in the agreement.
...rnment action prevents us from imposing the annual percentage rate provided for or impairs our security interest such that the value of the interest ...s than 120 percent of the credit line.
...gulatory agency has notified us that continued advances would constitute an unsafe and unsound practice.
...maximum annual percentage rate is reached.

...ation of Your Account. If an event of termination occurs and we simultaneously or later declare in writing said event to be a default under this ...is Agreement shall terminate and amounts owing to us shall become due and payable in full. We may refuse to declare a particular event to be ...aive our right to do so, but our refusal to declare an event to be a default or waiver of our right to do so does not bind us if a similar or different ...ater. At that time, we have the right to decide whether to declare that event to be a default. Our obligation to make advances will stop at the time ...itten declaration of default even if we have not notified you of that declaration prior to that time. If we declare a default, all sums due and owing ...count are due and payable. Upon default, you cannot use your Account and the default could result in the loss of your home, which is the Collateral ...nent, and/or judgment against you.

...tion of Your Account by You. You may terminate your Account at any time by sending written notice to us and returning any outstanding Home ...ecks in your possession. The termination will be effective as soon as we can reasonably act to stop new advances from being made on your Account. ...ill not be obligated to honor all Home Equity Line checks received by us before the termination becomes effective. In addition, we have the right ...quired) to honor after termination all Home Equity Line checks dated before the termination becomes effective.

...e Equity Line Checks and VISA Debit Card. If your Account is terminated you agree to immediately return to us any Home Equity Line checks, ...A cards which we have previously provided to you. These items remain our property even in your possession.

...rror Notice. See the attached statement for important information regarding your right to dispute a billing error.

...ic Fund Transfers. Telephone requests for advances, or transfers on your Account may be limited as required by the "Electronic Fund Transfers ...posed upon us by law. This regulation may also be applied to requests made through the "Accessline" audio response system.

...n Costs - Foreclosure. If this Agreement and/or the Security Instrument is referred to an attorney for collection, you agree to pay reasonable ...d costs, whether or not a lawsuit is filed, and attorney fees and costs on appeal, as provided by law. If suit is filed for a deficiency judgment, ...te will be the same as the contract rate. If suit is filed for a judgment, Weber County is the proper venue.

...ale. If you sell or transfer an interest in the property covered by the Security Instrument, we may terminate this Agreement and accelerate the ...e of your Account, which means that all amounts owing to us shall become due and payable.

...ou agree to pay when due all federal, state or local taxes and other charges on the Collateral securing this Agreement. If you fail to do so, we ...uired taxes and add all expenses to your Account payable on demand at the interest rate then in effect.

...f Terms. The terms of this Agreement may only be modified through the signing of a Change in Terms Agreement by all parties associated ...ent.

...oss. You will be bound by this Agreement even if the Collateral is damaged or destroyed.

...ction. The interest you pay on this loan may or may not be tax deductible. You agree to consult with the Internal Revenue Service or a tax ...mine what portion of the interest paid on the loan may be tax deductible.

...eous. Our rules for stopping payment on ordinary checks will apply to stopping payments on Home Equity Line checks including the charge ...t fee. You will immediately notify us of any changes in your address. Upon our request, you will provide us with a financial or credit statement ...story to us. A waiver of any terms or conditions in this Agreement by us is not a waiver of the same or of any other term or condition on any ...f any part of this Agreement is invalid, it shall not make any other provision of this Agreement invalid. You will immediately notify us in writing ...ne Equity Line checks and VISA cards are lost or stolen or if an unauthorized person uses your Account. Notices will be sent to us at the address ...last billing statement, to be effective upon receipt. Notices to you will be sent to your address as indicated on your last billing statement, to be ...ailed unless differently stated in the notice. If more than one person is bound to the terms of the agreement, a notice to any one of you will be ...you except for notices that affect the right of rescission, which will be sent to each person affected.

...reement. The undersigned have entered into a credit agreement with the credit union. The written agreement is a final expression of the agree... undersigned and the credit union. This written agreement may not be contradicted by evidence of any oral agreement or alleged oral agreement. ...acknowledge receiving a copy of this Notice and agree that the written credit agreement contains the terms applicable to the credit transaction.

...OWLEDGE RECEIPT OF THE ABOVE DISCLOSURE STATEMENT.

Borrowers:

[signature] ID#512344?

[signature] ID# 529-76-0871

[signature] ID# 529-24-5898

ID#

[signature]

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AERICAN TITLE COMPANY 206857
FIRST CREDIT UNION 327223-4
CEL NUMBER 09-32-316-024-0000

RECORDED, MAIL TO:
AMERICA FIRST CREDIT UNION
P.O. Box 9199 Ogden, Utah 84409

K-306-2222

5143633
23 OCTOBER 91 11:42 AM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
FIRST AMERICAN TITLE
REC BY: REBECCA GRAY , DEPUTY

HOME EQUITY LINE TRUST DEED

ED OF TRUST CONTAINS A DUE-ON-SALE PROVISION AND SECURES INDEBTEDNESS UNDER A CREDIT IENT WHICH PROVIDES FOR A REVOLVING LINE OF CREDIT AND A VARIABLE RATE OF INTEREST.

JST DEED, made this 22nd day of OCTOBER, 19 91, between

ELIZABETH D JOLLEY aka ELIZABETH D JOLLEY GARDNER and

JOHN D HUGGAN, a married man, as joint tenants, as TRUSTOR, whose address is

687 EAST 3RD AVENUE, SALT LAKE CITY, UTAH 84103
(Street and Number) (City) (State)

TIMOTHY W BLACKBURN, attorney at law, as TRUSTEE, and FIRST CREDIT UNION a Utah Corporation, as BENEFICIARY.

SETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the ascribed property, situated in SALT LAKE County, State of Utah:

-316-024

COMMENCING AT THE SOUTHEAST CORNER OF LOT 1, BLOCK 53, PLAT "D", SALT LAKE CITY SURVEY, AND RUNNING THENCE WEST 41.5 FEET; THENCE NORTH 7 RODS; THENCE EAST 41.5 FEET; THENCE SOUTH 7 RODS TO THE PLACE OF BEGINNING.

e estate, right, title and interest, including insurance, which Trustor now has or may hereafter acquire, either in law or in equity in and to said premises; to the same, together with the buildings and improvements thereon and all alterations, additions or improvements now or hereafter made thereto, including all ces and fixtures now or hereafter installed or placed in said buildings or on said real property for the generation or distribution of air, water, heat, electricity, iation or for ventilating or air conditioning purposes, or for sanitary or drainage purposes, and including stoves, ranges, cabinets, awnings, window shades, ipery rods and brackets, screens, floor coverings (including all rugs and carpets attached to floors) and all other similar items and things; all of the items lied and all other similar items or things, whether now or hereafter placed on the property, being hereby declared to be, and in all circumstances, shall be used in connection with the purposes and powers of this Trust Deed, always affixed to and a part of the realty described herein; the specific enumerations f the general, and together with all singular lands, tenements, hereditaments, reversion(s), remainder(s), privileges, water rights and appurtenances of every ravuls belonging or in any way appertaining to, or which may be hereafter acquired and used or enjoyed with, said property, or any part thereof.
OSE OF SECURING (1) payment of all obligations now or hereafter pursuant to or otherwise related or connected to that certain "Home Equity Line nd Disclosure Statement" of even date herewith executed by the Trustor) the "Agreement"), which Agreement evidences a revolving credit line in the sum of TWENTY FIVE THOUSAND DOLLARS AND NO CENTS-------------------

BK 6385

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ADDENDUM "E"

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889948B

PLAINTIFF'S EXHIBIT 3

Recorded at Request of

at ______ M. Fee Paid $

by ______ Dep. Book ______ Page ______ Ref.:

Mail tax notice to ______ Address

QUIT-CLAIM DEED

ELIZABETH DUNCAN, aka ELIZABETH DUNCAN JOLLEY, aka ELIZABETH D. JOLLEY GARDNER

grantor of Salt Lake City, County of Salt Lake, State of Utah, hereby QUIT-CLAIM to

RaNEE BOLEY FLEMING, KAREN B. GAMONAL, JOYCE H. CROCKETT, KRISTE H. STREET, JOHN D. HOGGAN, LEO V. JOLLEY, and ROSALEE J. KEELE, as tenants in common

grantee of Salt Lake County, State of Utah for the sum of ----TEN AND 00/100---------------($10.00)------------------ DOLLARS, and other good and valuable consideration the following described tracts of land in Salt Lake County, State of Utah:

Commencing at a point 33 feet West and 141.4 feet South of the Northeast Corner of Lot 4, Block 14, Five Acre Plat "A", Big Field Survey, and running thence South 54 1/3 feet; thence West 160 feet; thence North 54 1/3 feet; thence East 160 feet to the place of beginning.

PROOF READ

ALSO commencing at the Southeast corner of Lot 1, Block 53, Plat "D", Salt Lake City, Survey, thence West 41.5 feet; thence North 7 rods; thence East 41.5 feet; thence South 7 rods to the place of beginning.

TAX ID # 16-18-277-026

8899488
11/19/2003 02:18 PM 16.00
Book - 8913 Pg - 5217
GARY W. OTT
RECORDER, SALT LAKE COUNTY, UTAH
JOHN HOGGAN
637 3RD AVE
SLC UT 84103
BY: ZJH, DEPUTY - WI 1 P.

WITNESS the hand of said grantor, this 11 26 day of December, A. D. one thousand nine hundred and seventy-eight.

Signed in the presence of

Elizabeth Duncan Jolley

STATE OF UTAH, County of Salt Lake } ss.

11th day of DECEMBER A. D. one thousand nine hundred and seventy-eight personally appeared before me ELIZABETH DUNCAN, aka ELIZABETH DUNCAN JOLLEY, AKA ELIZABETH D. JOLLEY GARDNER

NOTARY PUBLIC

the signer of the foregoing instrument, who duly acknowledge to me that she executed the

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ADDENDUM "F"

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78A-4-103. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63G-3-602;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 344, 2009 General Session
Download Code Section Zipped WordPerfect 78A04_010300.ZIP 2,947 Bytes

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ADDENDUM “G”

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57-1-13. ***Form of quitclaim deed -- Effect.***

Conveyances of land may also be substantially in the following form:

QUITCLAIM DEED

____ (here insert name), grantor, of ____ (insert place of residence), hereby quitclaims to ____ (insert name), grantee, of ____ (here insert place of residence), for the sum of ____ dollars, the following described tract ____ of land in ____ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor this __________(month\day\year).

A quitclaim deed when executed as required by law shall have the effect of a conveyance of all right, title, interest, and estate of the grantor in and to the premises therein described and all rights, privileges, and appurtenances thereunto belonging, at the date of the conveyance.

Amended by Chapter 75, 2000 General Session
Download Code Section Zipped WordPerfect 57_01_001300.ZIP 10,286 Bytes

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ADDENDUM “H”

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57-1-5. Creation of joint tenancy presumed -- Tenancy in common -- Severance of joint tenancy -- Tenants by the entirety.

(1) (a) Beginning on May 5, 1997, every ownership interest in real estate granted to two persons in their own right who are designated as husband and wife in the granting documents is presumed to be a joint tenancy interest with rights of survivorship, unless severed, converted, or expressly declared in the grant to be otherwise.

(b) Every ownership interest in real estate that does not qualify for the joint tenancy presumption as provided in Subsection (1)(a) is presumed to be a tenancy in common interest unless expressly declared in the grant to be otherwise.

(2) (a) Use of words "joint tenancy" or "with rights of survivorship" or "and to the survivor of them" or words of similar import means a joint tenancy.

(b) Use of words "tenancy in common" or "with no rights of survivorship" or "undivided interest" or words of similar import declare a tenancy in common.

(3) A sole owner of real property creates a joint tenancy in himself and another or others:

(a) by making a transfer to himself and another or others as joint tenants by use of the words as provided in Subsection (2)(a); or

(b) by conveying to another person or persons an interest in land in which an interest is retained by the grantor and by declaring the creation of a joint tenancy by use of the words as provided in Subsection (2)(a).

(4) In all cases, the interest of joint tenants shall be equal and undivided.

(5) (a) Except as provided in Subsection (5)(b), if a joint tenant makes a bona fide conveyance of the joint tenant's interest in property held in joint tenancy to himself or another, the joint tenancy is severed and converted into a tenancy in common.

(b) If there is more than one joint tenant remaining after a joint tenant severs a joint tenancy under Subsection (5)(a), the remaining joint tenants continue to hold their interest in joint tenancy.

(6) The amendments to this section in Laws of Utah 1997, Chapter 124, have no retrospective operation and shall govern instruments executed and recorded on or after May 5, 1997.

(7) Tenants by the entirety are considered to be joint tenants.

Amended by Chapter 97, 2008 General Session
Amended by Chapter 250, 2008 General Session
Download Code Section Zipped WordPerfect 57_01_000500.ZIP 10,996 Bytes

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ADDENDUM "I"

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57-3-103. Effect of failure to record.

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

(1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and

(2) the subsequent purchaser's document is first duly recorded.

Renumbered and Amended by Chapter 61, 1998 General Session
Download Code Section Zipped WordPerfect 57_03_010300.ZIP 1,645 Bytes

<< Previous Section (57-3-102) Next Section (57-3-104) >>

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ADDENDUM "J"

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57-4a-4. Presumptions.

(1) A recorded document creates the following presumptions regarding title to the real property affected:

(a) the document is genuine and was executed voluntarily by the person purporting to execute it;

(b) the person executing the document and the person on whose behalf it is executed are the persons they purport to be;

(c) the person executing the document was neither incompetent nor a minor at any relevant time;

(d) delivery occurred notwithstanding any lapse of time between dates on the document and the date of recording;

(e) any necessary consideration was given;

(f) the grantee, transferee, or beneficiary of an interest created or described by the document acted in good faith at all relevant times;

(g) a person executing a document as an agent, attorney in fact, officer of an organization, or in a fiduciary or official capacity:

(i) held the position he purported to hold and acted within the scope of his authority;

(ii) in the case of an officer of an organization, was authorized under all applicable laws to act on behalf of the organization; and

(iii) in the case of an agent, his agency was not revoked, and he acted for a principal who was neither incompetent nor a minor at any relevant time;

(h) a person executing the document as an individual:

(i) was unmarried on the effective date of the document; or

(ii) if it otherwise appears from the document that the person was married on the effective date of the document, the grantee was a bona fide purchaser and the grantor received adequate and full consideration in money or money's worth so that the joinder of the nonexecuting spouse was not required under Sections **75-2-201** through **75-2-207**;

(i) if the document purports to be executed pursuant to or to be a final determination in a judicial or administrative proceeding, or to be executed pursuant to a power of eminent domain, the court, official body, or condemnor acted within its jurisdiction and all steps required for the execution of the document were taken; and

(j) recitals and other statements of fact in a document, including without limitation recitals concerning mergers or name changes of organizations, are true.

(2) The presumptions stated in Subsection (1) arise even though the document purports only to release a claim or to convey any right, title, or interest of the person executing it or the person on whose behalf it is executed.

Amended by Chapter 88, 1989 General Session
Download Code Section Zipped WordPerfect 57_04a000400.ZIP 2,922 Bytes

<< Previous Section (57-4a-3)

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ADDENDUM “K”

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Rule 3. Appeal as of right: how taken.

(a) Filing appeal from final orders and judgments. An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) Joint or consolidated appeals. If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) Designation of parties. The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) Content of notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) Service of notice of appeal. The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address. A certificate evidencing such service shall be filed with the notice of appeal. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(f) Filing fee in civil appeals. At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court the filing fee established by law. The clerk of the trial court shall not accept a notice of appeal regardless of whether the filing fee has been paid. Failure to pay the filing fee within a reasonable time may result in dismissal.

(g) Docketing of appeal. Upon the filing of the notice of appeal, the clerk of the trial court shall immediately transmit a certified copy of the notice of appeal, showing the date of its filing, and a statement by the clerk indicating whether the filing fee was paid and whether the cost bond required by Rule 6 was filed. Upon receipt of the copy of the notice of appeal, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Advisory Committee Notes

The designation of parties is changed to conform to the designation of parties in the federal appellate courts.

The rule is amended to make clear that the mere designation of an appeal as a "cross

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appeal" does not eliminate liability for payment of the filing and docketing fees. But for the order of filing, the cross-appellant would have been the appellant and so should be required to pay the established fees.

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ADDENDUM "L"

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Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references. (a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this

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unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or

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appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-

Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against

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Advisory Committee Notes

Rule 24(a)(9) now reflects what Utah appellate courts have long held. See In re Beesley, 883 P.2d 1343, 1349 (Utah 1994); Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original) (quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991)). See also State ex rel. M.S. v. Salata, 806 P.2d 1216, 1218 (Utah App. 1991); Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989); State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

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ADDENDUM "M"

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Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof.

(a)(1) By plaintiff. Subject to the provisions of Rule 23(e) and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(a)(2) By order of court. Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or

(a)(2)(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of previously-dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Bond or undertaking to be delivered to adverse party. Should a party dismiss his

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complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

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