

1993

# Mary M. Hamilton v. Stuart and Vincent Hamilton : Petition for Writ of Certiorari

Utah Court of Appeals

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IN THE SUPREME COURT

STATE OF UTAH

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In Re: )  
 )  
IN THE MATTER OF THE ESTATE OF )  
GORDON DEAN HAMILTON, DECEASED. ) Case No. 930065-CA  
 )  
MARY M. HAMILTON, )  
 )  
Respondent, )  
 )  
vs. )  
 )  
STUART HAMILTON AND VINCENT )  
HAMILTON, )  
 )  
Petitioners. )

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PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI  
FROM THE DECISION OF THE COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . iii

QUESTIONS FOR REVIEW . . . . . 1

OPINION OF COURT OF APPEALS . . . . . 2

STATEMENT OF JURISDICTION . . . . . 3

CONTROLLING STATUTES . . . . . 3

STATEMENT OF THE CASE . . . . . 3

STATEMENT OF FACTS . . . . . 4

ARGUMENT . . . . . 6

    POINT I     Gordon Dean Hamilton Did Not Create a  
                  Life Estate in the Home and the Decision  
                  of the Court of Appeals Effectively  
                  Overrules the Case Law of Supreme Court . . . . 6

    POINT II    The Record Is Devoid of Evidence of  
                  Any Joint Tenancy Agreement and the  
                  Giving to Each Other Four Bronzes Does  
                  Not Equate to the Creation of Joint Tenancy . 13

CONCLUSION . . . . . 15

APPENDIX:

    ANTENUPTIAL AGREEMENT . . . . . A

    LAST WILL AND TESTAMENT OF GORDON DEAN HAMILTON . . . . . B

    FEBRUARY 11, 1994 DECISION OF COURT OF APPEALS . . . . . C

**TABLE OF AUTHORITIES**

**CASES**

Crowther v. Carter, 767 p.2d 129 (Ut. App. 1989) . . . . . 12

Estate of Gorrell, 765 P.2d 878 (Utah 1988) . . . . . 15, 16

Hartman v. Potter, 596 P.2d 653 (Utah 1979) . . . . . 10

LDS Hospital v. Capitol Life Insurance Co.,  
765 P.2d 857 (Ut. 1988) . . . . . 12

Prairie Producing Co. v. Schlachter,  
786 S.W.2d 409 (Tex. Ct. App. 1990) . . . . . 12

Provo City Corp. v. Nielson Scott Co.,  
603 P.2d 802 (Utah 1979) . . . . . 12

Remington v. Landolt, 541 P.2d 472 (Or. 1975) . . . . . 15

Watson v. Watson, 837 P.2d 1 (Utah App. 1992) . . . . . 3, 15

**STATUTES**

Utah Code Annotated, Section 25-5-1,  
1953, as amended . . . . . 3, 9, 10

Utah Code Annotated, Section 25-5-2,  
1953, as amended . . . . . 3, 10

Utah Code Annotated, Section 78-2-2(3)(1),  
1953, as amended . . . . . 3

Utah Code Annotated, Section 78-2-2(4),  
1953, as amended . . . . . 4

Utah Code Annotated, Section 78-2a-3(2)(k),  
1953, as amended . . . . . 4

**RULES**

Utah Rules of Appellate Procedure, Rule 45 . . . . . 3  
Utah Rules of Appellate Procedure, Rule 47(a) . . . . . 3

**MISCELLANEOUS**

23 Am. Jur. 2d § 19 . . . . . 11

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Respondent,	)	
	)	
vs.	)	
	)	
STUART HAMILTON AND VINCENT	)	
HAMILTON,	)	
	)	
Petitioners.	)	

---

QUESTIONS FOR REVIEW

When the intent is clear that Gordon Dean Hamilton, hereinafter "Gordon," intended to grant to Mary Hamilton, hereinafter "Mary," a life estate in Gordon's home, but there is no deed wherein Gordon conveyed to Mary a life estate, and Gordon, in his Last Will and Testament, states that he has made provisions outside of the Will for Mary, and Mary is not devised any property

under the Will, is the clear intent of Gordon sufficient, without any words of grant or devise, to convey a life estate?

Does the gifting, each to the other, of the four bronzes, create a joint tenancy estate in the four bronzes in favor of Mary?

#### OPINION OF COURT OF APPEALS

The Court of Appeals, on February 11, 1994, filed its opinion, which opinion is annexed in the Appendix in full, wherein the Court of Appeals found at pages 5 and 6 of the opinion:

In the case at bar, Gordon Hamilton's intent is plainly revealed in the language of paragraphs 3 and 4 of the will. Paragraph 3 provides: "It is my intent to leave a life estate to my wife Mary M. Hamilton in the residence we have in Springville, Utah." Paragraph 4 states that his children's rights to the marital home are "subject to a life estate my wife Mary M. Hamilton who [sic] shall have unless she remarries." Additionally, the language of section IV of the antenuptial agreement states: "In the event, however, that Gordon predeceases Mary, it is the intent of the parties that she be given a life estate in the residence and building lot so long as she does not cohabit therein with any other person." Thus, even though the will does not contain specific granting language, strict construction must yield to Gordon Hamilton's intent, which is apparent from the language quoted above. Accordingly, the trial court's finding that Gordon Hamilton granted Mary Hamilton a life estate provided that she not remarry or cohabit with anyone in the marital home is not clearly erroneous.

At pages 7 and 8 of the opinion, the Court of Appeals found:

As to the four bronzes, both Mary Hamilton and the Hamiltons' neighbors, Richard and Sandra

Tretheway, testified that Gordon and Mary Hamilton had given the four bronzes to each other as a Christmas gift, and Stuart and Vincent Hamilton have failed to marshal any evidence to the contrary. Thus, we must assume the record supports the trial court's finding that Mary Hamilton is entitled to a joint tenancy interest in the four bronzes, *Watson v. Watson*, 837 P.2d 1, 4 (Utah App. 1992), and therefore conclude that such finding is not clearly erroneous.

#### STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari is being made pursuant to Rules 45 and 47(a) of the Utah Rules of Appellate Procedure.

A. The Court of Appeals filed for entry its decision on February 11, 1994.

B. No request for rehearing was filed by either party.

C. Jurisdiction of the Supreme Court is found in § 78-2-2(3)(a), Utah Code Annotated, 1953, as amended.

#### CONTROLLING STATUTES

The controlling statutes necessary for a determination of the question presented for review are:

Sections 25-5-1 and 25-5-2, Utah Code Annotated, 1953, as amended.

### STATEMENT OF CASE

The trial court, the Honorable Cullen Y. Christensen, sitting without a jury, heard the matter on October 15 and 16, 1991, and entered its Memorandum Decision on December 11, 1991.

Petitioners, the personal representatives, made a Motion to Amend, to Make Additional Findings, for a New Trial and the Insufficiency of Evidence to Support the Memorandum Decision on December 19, 1991.

Mary filed Proposed Findings of Fact and Conclusions of Law, together with a Proposed Judgment on January 22, 1992. Petitioners filed an Objection to Proposed Findings of Fact and Conclusions of Law and the Proposed Judgment on February 6, 1992. On February 7, 1992, Petitioners filed a Motion to Strike.

Mary filed a Motion to Amend the Proposed Findings of Fact and Conclusions of Law and Judgment on April 13, 1992. The trial court heard all post trial motions on April 17, 1992, and entered its ruling and signed the Findings of Fact and Conclusions of Law, together with the Judgment on May 6, 1992.

The Notice of Appeal was filed on June 3, 1992, appealing the final Judgment of May 6, 1992.

This Court assigned the case to the Court of Appeals under § 78-2-2(4) and § 78-2a-3(2)(k). The matter was argued before the Court of Appeals before Judges Russon, Billings and

Greenwood on November 16, 1993, and the Court of Appeals rendered its decision on February 11, 1994.

STATEMENT OF FACTS

Gordon Dean Hamilton, deceased, hereinafter "Gordon," married Mary Hamilton, hereinafter "Mary," on September 26, 1986. Prior to the marriage, the parties entered into an Antenuptial Agreement. (Mary Transcript, p. 2.) The effect of the Antenuptial Agreement allowed each party to retain ownership of the property which each owned prior to the marriage. (Exhibit 2.) The Antenuptial Agreement further expressed Gordon's future desire of granting a life estate in Gordon's home by the following language found in Section IV:

It is the intent of the parties to dwell at the residence located at 1907 Spring Oaks Drive, Springville, Utah. Said residence and the building lot upon which it is situated shall remain titled in the name of the respective husband. In the event, however, that Gordon predeceases Mary, it is the intent of the parties that she be given a life estate in the residence and building lot so long as she does not cohabit therein with any other person.

Gordon ratified the Antenuptial Agreement in his Last Will and Testament executed on December 7, 1989. (Exhibit 1.) On January 17, 1990, Gordon died.

In the Will, Gordon stated:

I, Gordon D. Hamilton, of Springville, Utah County, State of Utah, declare this to be my last will and hereby revoke any earlier wills

and codicils. I declare that I am a married man. I state that I was married to Marie Hamilton and had as issue of that marriage my 5 children. I divorced Marie Hamilton who is not to take under this will. I married Lola Shurtleff Hamilton and we had no children of that marriage and she is not to take under this will. I then married Mary M. Hamilton, my present wife who is to be mentioned in this will and is subject to a prenuptial agreement which I hereby ratify. I have tried to make the transfers to Mary Hamilton outside of this will in the form of life insurance policies and a life estate in the house, no children have been born as issue of said marriage to Mary Hamilton. (emphasis supplied)

In paragraph 3 of the Will, Gordon stated:

It is my intent to leave a life estate to my wife Mary A. Hamilton in the residence we have in Springville, Utah.

Then the Will proceeds to actually give to the five children the properties by the following language:

I give to my children all my personal and household property . . . . (paragraph 3.1)

I give to my children any interest which I may own in any single family residential property which I shall be using as a primary or secondary residence at the time of my death subject to a life estate my wife Mary M. Hamilton who shall have unless she remarries. (emphasis supplied) (paragraph 4)

I give my residuary estate as follows . . . . (paragraph 5)

There are no other documents other than the Antenuptial Agreement and the Will.

Subsequent to the marriage, Gordon either personally or through Hamilton Brothers Electric, Inc., purchased numerous other items of personal property. (See Exhibit 4, 5, 6, 7, 8, 9, 10, 11, 12, 14; Mary Transcript, pp. 3, 8, 9, 3, 14, 15, 23, 27.) Mary made a claim by way of gift to her and Gordon, from each other, of four bronzes. (See Mary Transcript, pp. 19, 22, 23, 117.) The four bronzes consisted of the Stage Coach, the Caba, the Little Boy and the Little Girl. (See Mary Transcript, p. 19.)

#### ARGUMENT

##### POINT I

**GORDON DEAN HAMILTON DID NOT CREATE  
A LIFE ESTATE IN THE HOME AND  
THE DECISION OF THE COURT OF APPEALS  
EFFECTIVELY OVERRULES THE CASE LAW  
OF THE SUPREME COURT.**

There is no question that Gordon intended to grant a life estate to Mary in the home. Both the Will and the Antenuptial Agreement memorializes that intent. In the Antenuptial Agreement, Section IV, the following language appears:

It is the intent of the parties to dwell at the residence located at 1907 Spring Oaks Drive, Springville, Utah. Said residence and the building lot upon which it is situated shall remain titled in the name of the respective husband. In the event, however, that Gordon predeceases Mary, it is the intent of the parties that she be given a life estate in the residence and building lot so long as she does not cohabit therein with any other person. (emphasis supplied)

The language used does not effectuate the granting of a life estate, but merely expresses the intent to grant a life estate sometime in the future.

The Will is equally defective in granting a life estate, but does express the intent of Gordon by the following language in the introductory paragraph of the Will:

I, Gordon D. Hamilton, of Springville, Utah County, State of Utah, declare this to be my last will and hereby revoke any earlier wills and codicils. I declare that I am a married man. I state that I was married to Marie Hamilton and had as issue of that marriage my 5 children. I divorced Marie Hamilton who is not to take under this will. I married Lola Shurtleff Hamilton and we had no children of that marriage and she is not to take under this will. I then married Mary M. Hamilton, my present wife who is to be mentioned in this will and is subject to a prenuptial agreement which I hereby ratify. I have tried to make the transfers to Mary Hamilton outside of this will in the form of life insurance policies and a life estate in the house, no children have been born as issue of said marriage to Mary Hamilton. (emphasis supplied)

In paragraph 3 of the Will, Gordon stated:

It is my intent to leave a life estate to my wife Mary A. Hamilton in the residence we have in Springville, Utah.

Then the Will proceeds to actually give to the five children all of the properties by the following language:

I give to my children all my personal and household property . . . . (paragraph 3.1)

I give to my children . . . . (paragraph 4)

I give my residuary estate as follows . . . .  
(paragraph 5)

The contrast of the expression of intent versus the actual giving is readily apparent. Gordon has expressed his intent to leave a life estate to Mary, but has not made the actual gift, devise or deed granting the same.

One other provision of the Will mentions the life estate. It is found in paragraph 4 wherein Mr. Hamilton devises to his five children the remainder by the following language:

I give to my children any interest which I may own in any single family residential property which I shall be using as a primary or secondary residence at the time of my death subject to a life estate my wife Mary M. Hamilton who shall have unless she remarries.  
(emphasis supplied)

The foregoing is a devise of the remainder to the five children and simply describes the remainder. It is not a devise to Mary. There is no bequest to Mary in the Will. There is no deed granting a life estate to Mary. Gordon stated ". . . I have tried to make transfers outside of this Will in the form of life insurance policies and a life estate in the house . . . ." His intent is clear, his execution of that intent is non-existent.

An interest in real property, the purported life estate, must be created by a writing subscribed to by Gordon. The provisions of § 25-5-1, U.C.A. 1953, as amended, provides in pertinent part:

No estate or interest in real property . . . shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

There is an exception for a decedent under a Will to transfer real property under § 25-5-2, which provides in pertinent part:

The next preceding section [25-5-1] shall not be construed to affect the power of a testator in the disposition of his real estate by last will and testament . . . .

The only two written documents that exist to create or effectuate the life estate are the Antenuptial Agreement and the Will. Neither instrument actually grants a life estate to Mary.

Even the Court of Appeals acknowledges that the Will does not devise Mary a life estate. At page 6, the Appeals Court declared:

Thus, even though the will does not contain specific granting language, strict construction must yield to Gordon Hamilton's intent, which is apparent from the language quoted above.

This Court has consistently held that the interpretation of an unambiguous agreement is a matter of law and that no deference is to be given to the trial court. In *Hartman v. Potter*, 596 P.2d 653 (Utah 1979), this court declared at page 656:

In the absence of ambiguity, the construction of deeds is a question of law for the court, and the main object in construing a deed is to

ascertain the intention of the parties, especially that of the grantor, from the language used. The description of the property in a deed is prima facie an expression of the intention of the grantor and the term "intention," as applied to the construction of a deed, is to be distinguished from its usual connotation. When so applied, it is a term of art and signifies a meaning of the writing.

Deeds are to be construed like other written instruments, and where a deed is plain and unambiguous, parol evidence is not admissible to vary its terms. It is the court's duty to construe a deed as it is written, and in the final analysis, each instrument must be construed in the light of its own language and peculiar facts. It is also well known that the intention of the parties to a conveyance is open to interpretation only when the words used are ambiguous.

Where the issue involved is solely one of law, as in the instant case, this Court is capable of determining the question as was the trial court and we are not bound by its conclusions. (emphasis by the Court)

The clear intent of Gordon cannot be a substitute for words of grant. See 23 Am. Jur. 2d § 19 Deeds, p. 91:

In order to transfer title, an instrument must contain apt words of grant which manifest the grantor's intent to make a present conveyance of the land by his deed, as distinguished from an intention to convey it at some future time.

The absence of words of conveyance cannot be supplied, and if no words importing a grant can be found in the deed, it is void although in other respects formal and regular.

The language ". . . it is the intent of the parties that she be given a life estate . . ." is not a present conveyance.

The plain and concise language of the Will did not convey a life estate to Mary. As stated in *LDS Hospital v. Capitol Life Insurance Co.*, 765 P.2d 857 (Ut. 1988), page 858:

. . . [A] cardinal rule in construing the contract is to give effect to the intentions of the parties and, if possible, these intentions should be gleaned from an examination of the text of the contract itself.

This position is further supported by the Court of Appeals case of *Crowther v. Carter*, 767 p.2d 129 (Ut. App. 1989), page 132, where the Court said:

But it is not the function of a court to rewrite an unambiguous contract. *Provo City Corp. v. Nielson Scott Co.*, 603 P.2d 802 (Utah 1979).

A recent Texas case, involving the interpretation of a deed, *Prairie Producing Co. v. Schlachter*, 786 S.W. 2d 409 (Tex. Ct. App. 1990) expressed the question, at page 412:

In interpreting a deed we must ascertain and enforce the intention of the parties. . . . However, the controlling intention is not the subjective intention the parties may have had but failed to express, but the intention actually expressed in the deed; that is, the question is not what the parties meant to say, but the meaning of what they did say. (citations omitted) (emphasis supplied)

The Court of Appeals, in its decision, at pages 5 and 6 declared:

In the case at bar, Gordon Hamilton's intent is plainly revealed in the language of paragraphs 3 and 4 of the will. Paragraph 3 provides: "It is my intent to leave a life estate to my wife Mary M. Hamilton in the

residence we have in Springville, Utah." Paragraph 4 states that his children's rights to the marital home are "subject to a life estate my wife Mary M. Hamilton who [sic] shall have unless she remarries." Additionally, the language of section IV of the antenuptial agreement states: "In the event, however, that Gordon predeceases Mary, it is the intent of the parties that she be given a life estate in the residence and building lot so long as she does not cohabit herein with any other person." Thus, even though the will does not contain specific granting language, strict construction must yield to Gordon Hamilton's intent, which is apparent from the language quoted above. Accordingly, the trial court's finding that Gordon Hamilton granted Mary Hamilton a life estate provided that she not remarry or cohabit with anyone in the marital home is not clearly erroneous.

The Court of Appeals applied the "clearly erroneous" standard when it is the interpretation of an unambiguous document, which is a matter of law and no particular deference should be given to the trial court.

Second, the Court of Appeals effectively ". . . [rewrote] an unambiguous contract" by rewriting Gordon's Will through the guise of giving effect to Gordon's intent but not the meaning of what was actually said. **THE NET EFFECT OF THE COURT OF APPEALS' DECISION IS TO NEGATE (A) THE STATUTE OF FRAUDS IN RE DEEDS AND WILLS, (B) REWRITING OF A WILL, and (C) THE OVERRULING OF THIS COURT'S PRIOR DECISIONS IN RE: (1) STANDARD OF REVIEW (clearly erroneous v. matter of law) and (2) ADDING WORDS OF GRANT WHEN NONE ARE PRESENT (rewriting a contract through interpretation).**

Further, a Writ of Certiorari should be granted to have this Court consider the question of whether clear intent is sufficient, absent words of grant to convey an interest in real property.

#### POINT II

**THE RECORD IS TOTALLY DEVOID OF EVIDENCE  
OF ANY JOINT TENANCY AGREEMENT AND THE GIVING  
TO EACH OTHER FOUR BRONZES DOES NOT EQUATE  
TO THE CREATION OF JOINT TENANCY.**

Petitioners did not challenge the sufficiency of the evidence that the four bronzes were given by Gordon to each other as Christmas gifts. The giving to each other of the four bronzes, however, does not create a joint tenancy estate in the four bronzes. It creates a tenancy in common. There is absolutely no testimony in the entire record about joint tenancy. The terms of the Antenuptial Agreement are in force and effect, which provides that whatever Gordon received by gift is Gordon's and does not belong to Mary.

Mary argued that the bronze statuary of the "Stagecoach," the "Caba," the "Little Boy" and the "Little Girl" were owned as joint property, not to be confused as joint tenancy property, as a result of gifts between Mary and Gordon. (Brief of Appellee, p. 22-24.) "We decided that we [Mary and Gordon] would buy those [bronzes] and give them to each other as presents, Christmas presents, birthdays, whatever." (Mary Transcript, p. 20.)

Further, Mary states the four bronzes were not solely a gift to her, but a gift to both Mary and Gordon Hamilton and that she claimed no further interest in any of the other bronzes. (Mary Transcript, pp. 22-23.) Mary, in her brief, further supports the proposition that the four bronzes were a joint gift with the testimony of Richard and Sandra Tretheway. (See Brief of Mary, p. 22-23.) In the absence of proof of actual ownership, property in the marital home is presumed to be held in tenancy in common, half by the husband, half by the wife. *Estate of Gorrell*, 765 P.2d 878, 879 (Utah 1988). See also *Remington v. Landolt*, 541 P.2d 472 (Or. 1975), wherein the Oregon court held that husbands and wives do not own personal property as tenants by the entirety or, in absence of a special agreement, as joint tenants; instead, ownership of husband and wife in personal property is ordinarily by tenancy in common.

The Court of Appeals, at pages 7 and 8, stated:

As to the four bronzes, both Mary Hamilton and the Hamiltons' neighbors, Richard and Sandra Tretheway, testified that Gordon and Mary Hamilton had given the four bronzes to each other as a Christmas gift, and Stuart and Vincent Hamilton have failed to marshal any evidence to the contrary. Thus, we must assume the record supports the trial court's finding that Mary Hamilton is entitled to a joint tenancy interest in the four bronzes, *Watson v. Watson*, 837 P.2d 1, 4 (Utah App. 1992), and therefore conclude that such finding is not clearly erroneous.

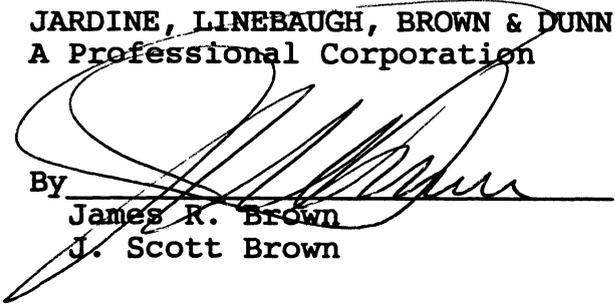
The Court of Appeals decision attempts to overrule this Court's decision in *Gorrell, supra*, and ignores the marshalling of the lack of evidence, which is non-existent, about joint tenancy. NO EVIDENCE WAS EVER SUBMITTED BY ANY PARTY ABOUT JOINT TENANCY. THE ONLY REFERENCE ABOUT JOINT TENANCY WAS THE TRIAL COURT'S CONCLUSIONS (Pages 208 and 210 of the record), WHICH CONCLUSIONS ARE NOT SUPPORTED BY THE RECORD.

CONCLUSION

Petitioners seek a Writ of Certiorari to determine the Questions for Review inasmuch as the decision of the Court of Appeals effectively negates the statute of frauds, and overrules existing case law and decisions by this Court. Further, there is a substantial question of whether the clear intent, per se, is sufficient, absent words of grant, to convey a life estate under Utah law.

DATED this 10 day of March, 1994.

JARDINE, LINEBAUGH, BROWN & DUNN  
A Professional Corporation

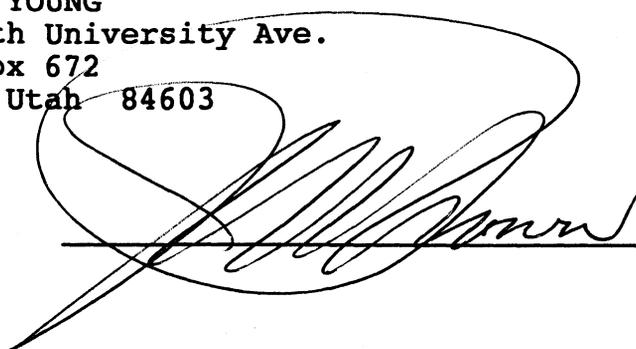
By 

James R. Brown  
J. Scott Brown

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 1994, I caused two true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI to be served by first-class United States mail, postage prepaid, to the following:

Dallas H. Young, Jr.  
IVIE & YOUNG  
48 North University Ave.  
P.O. Box 672  
Provo, Utah 84603

A handwritten signature in black ink, appearing to read "Dallas H. Young, Jr.", is written over a horizontal line. The signature is stylized and somewhat cursive.

jrbp1836

**APPENDIX A**

ANTENUPTIAL AGREEMENT

Antenuptial property agreement made this 26<sup>th</sup> day of Sept., 1986, between Gordon D. Hamilton of Springville, Utah County, State of Utah, and Mary M. Allman of Springville, Utah County, State of Utah.

This agreement is made in consideration of the contemplated marriage of the parties hereto. This Antenuptial Agreement supercedes and replaces in its entirety that certain Antenuptial Agreement previously executed by the parties on the 16th day of September, 1986. The parties hereto acknowledge that said agreement hereto has been executed prior to the marriage which is contemplated for Sept. 26, 1986. at 7:30 PM

SECTION I

PROPERTY OF THE PARTIES

Each party to this agreement owns property as follows:

A. Gordon D. Hamilton owns real property described as follows:

<u>Description</u>	<u>Location</u>	<u>Estimated Value</u>
Residence and real property	Spring Oaks Drive Springville, UT	\$380,000.00
Business property leased to Hamilton Bros. Electric, Inc.	South State Street Springville, UT	325,000.00
one-acre lot	Vicinity Spanish Fork airport	50,000.00
3 building lots	Adjoining Springville residence Spring Oaks Drive	15,000.00 ea. total 45,000.00
3 acres pasture ground	South Springville	

B. The parties each own personal property which shall remain their individual property.

SECTION II

CHILDREN BY PRIOR MARRIAGES

Each of the parties has children from a previous marriage, all of which have attained the age of majority.

### SECTION III

#### INTENT OF PARTIES

A. The parties hereto have the intent and desire to define and set forth the respective rights of each in the property of the other after their marriage.

B. The parties intend and desire that all property owned respectively by each of them at the time of their marriage, and all property that may be acquired by each of them from any source during their marriage, shall be respectively their separate property except as otherwise provided herein.

### SECTION IV

#### REAL PROPERTY

It is the intent of the parties to dwell at the residence located at 1907 Spring Oaks Drive, Springville, Utah. Said residence and the building lot upon which it is situated shall remain titled in the name of the respective husband. In the event, however, that Gordon predeceases Mary, it is the intent of the parties that she be given a life estate in the residence and building lot so long as she does not cohabit therein with any other person.

In the event the parties relocate the marital residence, it is the intention of the parties that the life estate provided for Mary shall be in whatever marital residence is occupied at the time Gordon becomes deceased, so long as she does not cohabit therein with any other person.

### SECTION V

#### PERSONAL PROPERTY

It is understood by the parties hereto that Gordon D. Hamilton owns all stock in Hamilton Brothers Electric, Inc. Said stock is to remain his sole and separate property, and he may disburse as he sees fit to his children or any other persons whatsoever. In addition thereto, Hamilton Brothers Electric, Inc. of which Gordon is the sole stockholder, owns various other items of personal property as assets of the corporation. It is clearly understood by the parties that such assets shall remain so owned and titled.

SECTION VI

LIFE INSURANCE POLICIES

A. The parties acknowledge that the respective husband has life insurance policies presently designating his children of a prior marriage as beneficiaries. It is not the intention of the parties to modify said schedule, but the parties may consider the acquisition of additional term insurance designating prospective wife as beneficiary.

SECTION VII

STATUS OF PROPERTY

All real and personal property owned by either of the parties at the time of their marriage, and all real and personal property that either may acquire from any source whatsoever during their marriage, shall be their respective separate property, except if unless specifically otherwise designated at the time of acquisition thereof, or other individual separate agreement of the parties.

SECTION VIII

LIABILITY OF DEBTS

The debts contracted by each party hereto prior to their marriage are to be paid by the party who shall have contracted the same, and the property of the other party shall not in any respect be liable for payment thereof.

SECTION IX

EFFECTIVE DATE

This agreement shall take effect on the date the marriage contemplated by the parties has been solemnized under the laws of the State of Utah.

SECTION X

The parties hereto stipulate that they have read this agreement and have had its contents explained to them and each of them fully understand the terms, provisions, and legal consequences of this agreement and execute it freely and voluntarily.

This agreement has been signed the date and month first above written.

*Gordon D. Hamilton* 11:00 AM Sep. 26, 1986  
GORDON D. HAMILTON

*Mary M. Allman* 11:00 AM 9-26-86  
MARY M. ALLMAN

STATE OF UTAH )  
                  ) :ss.  
COUNTY OF UTAH )

On the 26 day of September, 1986, personally appeared before me, Gordon D. Hamilton, who duly acknowledged to me that he executed the above documentation.

*Martin Lundberg*  
NOTARY PUBLIC

My Commission Expires: 10-31-87  
Residing at: Provo, Ut.

STATE OF UTAH )  
                  ) :ss.  
COUNTY OF UTAH )

On the 26 day of September, 1986, personally appeared before me, Mary M. Allman, who duly acknowledged to me that she executed the above documentation.

*Martin Lundberg*  
NOTARY PUBLIC

My Commission Expires: 10-31-87  
Residing at: Provo, Ut

## **APPENDIX B**

7/19

# Last Will and Testament

OF

GORDON D. HAMILTON

I, Gordon D. Hamilton, of Springville, Utah County, State of Utah, declare this to be my last will and hereby revoke any earlier wills and codicils. I declare that I am a married man. I state that I was married to Marie Hamilton and had as issue of that marriage my 5 children. I divorced Marie Hamilton who is not to take under this will. I married Lola Shurtleff Hamilton and we had no children of that marriage and she is not to take under this will. I then married Mary M. Hamilton, my present wife who is to be mentioned in this will and is subject to a prenuptial agreement which I hereby ratify. I have tried to make the transfers to Mary Hamilton outside of this will in the form of life insurance policies and a life estate in the house, no children have been born of issue of said marriage to Mary Hamilton.

1. I appoint Stuart G. Hamilton and Vincent C. Hamilton as my personal co-representatives. My personal representatives shall be as free and independent of court supervision as the law shall allow. My estate shall have all the advantages of informal administration and I direct that no other action be had in the probate court in relation to the settlement of my estate than that minimally required by law, unless my personal representatives deem more formal administration to be advantageous to my estate. The judgment of my personal representatives in such matters shall be conclusive, except as may be otherwise provided by law.

No bond or other security shall ever be required of my personal representatives or their successor. If despite my

directions, a bond is required by law, insofar as it lies within my power, I direct that no surety be required on such bond.

2. In determining beneficiaries of this will or trusts created herein, a beneficiary shall be deemed to have survived me, any other person, a point in time, or an event, as the case may be, only if such survivorship is for a period of thirty (30) days. Provided, however, the preceding sentence shall not apply in any case where its application would cause any otherwise valid provision of this will to be void under the rule against perpetuities or any similar rule.

3. It is my intent that my property except for those items listed on deeds and life insurance policies be divided among my five children, share and share alike, per stirpes. I realize that there are some difficulties with making the shares equal and that the shares will be entirely dependant upon the wants and desires of the children. I realize that there will have to be some negotiation between my children to make the shares equal particularly in view of the fact that the corporation would not involve all heirs and the house would probably not involve all heirs. It is my intent to leave a life estate to my wife Mary M. Hamilton in the residence we have in Springville, Utah.

3.1. I give to my children all my personal and household effects of a tangible personal property nature, such as jewelry, clothing, furniture, silver, books, and pictures and my automobiles to be divided among my issue in equal shares by my personal representative on a substantially per stirpes basis. Any tangible personal property of a business or investment nature shall not be governed by this paragraph but shall be part of my residuary estate.

4. I give to my children any interest which I may own in any single family residential property which I shall be using as a primary or secondary residence at the time of my death subject to a life estate my wife Mary M. Hamilton who shall have unless she remarries. Note that I do not intend by this paragraph to override any joint tenancy which may exist in such property

5. My residuary estate shall include all real and personal property, including my business whether community or separate and wherever situated, which I may own at my death (excluding property over which I may have a power of appointment) and which I have not disposed of by other paragraphs of this will. I give my residuary estate as follows:

5.1 My unsecured debts, secured debts, administration expenses, funeral expenses, and all federal and state estate and inheritance taxes shall be paid out of my residuary estate. Any taxes owed or incurred before my death shall be treated as a debt of my estate for all purposes. Provided, however, my personal representative shall have the power to determine whether or not any or all of my secured debts shall be paid (including debts secured by property passing by joint tenancy) and thus exonerate certain property from debts. Hence, my personal representative may pay secured debts, may obtain renewals of secured debts, may distribute such property subject to such debts, or may distribute such property with the distributees assuming such debts. I specifically direct that if prior to my death I gave, sold, exchanged, or otherwise transferred any property in such a manner as to demonstrate an intention that the transferee thereof would be the ultimate payor of any debt secured thereby (whether the transferee assumed the debt or merely took subject thereto), then said debt shall not be borne by my estate, but shall be borne by the transferee; but if said transferee fails to pay the debt and my estate must pay the same, then said debt shall be paid from my residuary estate and my executor shall proceed to recover the payment from the transferee. Provided further, it is my intention that all nonprobate property creating a federal or state estate or inheritance tax burden upon my estate will share proportionately with my residuary estate the respective burden of such taxes. Therefore, I direct that any of the hereinbefore described taxes payable by reason of the taxability of any gifts in contemplation of death, retained life estates, transfers taking effect at death, revocable transfers, annuities, joint tenancies, powers of appointment, life insurance proceeds, or

other nonprobate assets shall be paid by the recipient of such assets and that any of such taxes payable because of the taxability of any part of my residuary estate shall be paid out of my residuary estate, subject to two exceptions: (1) The recipients of life insurance proceeds and power of appointment property shall pay their share of federal estate taxes as provided by federal law. (2) None of the hereinbefore described taxes shall be borne by my wife with respect to any probate or nonprobate assets passing to her and qualifying for the federal estate tax marital deduction.

5.2 The remainder of my residuary shall be divided equally among my five children per stirpes shares.

6. My personal representative, in addition to the powers that may be provided by law, shall have the power to sell and exchange property, real or personal, for cash or on time, with or without an order of the court, as such times and upon such conditions as shall be deemed advisable; and the purchaser shall have no duty to follow the proceeds of the sale. My personal representative shall have the power to postpone for a reasonable time such part of the final distribution of my estate as is reasonable in light of tax audits, lawsuits, disputed claims, or similar matters remaining unresolved. The distribution of the whole of any part of my estate, except as to gifts of special property, may be made in cash or in kind, or partly in cash and partly in kind, as my personal representative shall deem advisable.

7. As used in this will, "my wife" shall mean Mary M. Hamilton. "My children" shall mean Stuart G. Hamilton, Vincent C. Hamilton, Amber Hamilton McKelvey, Lisa Hamilton, Tonua Hamilton, and any other child of mine born after the date of this will.

I, GORDON D. HAMILTON, the testator, sign my name to this instrument this 7th day of December, 1989, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and testament and that I sign it willingly, that I execute it as my free and voluntary act for the purposes expressed in it, and that I am 18 years of age or older, of sound mind, and under no constraint of undue influence.

Gordon D. Hamilton  
GORDON D. HAMILTON, Testator

We, Sherri Calder and Don R. Strong,  
the witnesses, sign our names to this instrument, being first  
duly sworn, and do hereby declare to the undersigned authority  
that the testator signs and executes this instrument as his last  
will and that he signs it willingly, and that each of us, in the  
presence and hearing of testator and of each other, hereby signs  
this will as witness to the testator's signing, and that to the  
best of our knowledge the testator is 18 years of age or older,  
of sound mind and under no constraint or undue influence.

Don R. Strong  
WITNESS

Sherri Calder  
WITNESS

STATE OF UTAH        )  
                              : ss.  
COUNTY OF UTAH    )

Subscribed, sworn to, and acknowledged before me by GORDON  
D. HAMILTON, the testator, and subscribed and sworn to before me  
by Sherri Calder and Don R. Strong, the  
witnesses, this 7th day of December, 1989.



Harold D. Mitchell  
NOTARY PUBLIC

Residing at:  
Springville, Utah

**APPENDIX C**

This opinion is subject to revision before  
publication in the Pacific Reporter.

FEB 11 1994

IN THE UTAH COURT OF APPEALS

  
Mary T. Noonan  
Clerk of the Court

-----ooOoo-----

In the Matter of the Estate of )  
Gordon Dean Hamilton, )  
deceased, )  
)  
Mary M. Hamilton, )  
)  
Appellee, )  
)  
v. )  
)  
Stuart Hamilton and Vincent )  
Hamilton, )  
)  
Appellants. )

OPINION  
(For Publication)

Case No. 930065-CA

F I L E D  
(February 11, 1994)

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Fourth District, Utah County  
The Honorable Cullen Y. Christensen

Attorneys: James R. Brown, Salt Lake City, for Appellants  
Dallas H. Young, Jr. and Jerry L. Reynolds, Provo,  
for Appellee

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Before Judges Billings, Greenwood, and Russon.<sup>1</sup>

RUSSON, Associate Presiding Judge:

Gordon Dean Hamilton's sons, Stuart and Vincent Hamilton, appeal the trial court's final judgment awarding Mary Hamilton, Gordon Hamilton's widow, a life estate in the marital home subject to certain conditions, \$4000 in cash, \$43,394 in personal property, and a family allowance of \$1000 per month for twenty-four months. Stuart and Vincent Hamilton further appeal the trial court's denial of their claim that Mary Hamilton be required to pay her pro rata portion of the inheritance taxes. We affirm in part, and vacate and remand in part.

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1. Judge Russon authored this opinion prior to his appointment to the Utah Supreme Court.

Finally, section VII states:

All real and personal property owned by either of the parties at the time of their marriage, and all real and personal property that either may acquire from any source whatsoever during their marriage, shall be their respective separate property, except if unless specifically otherwise designated at the time of acquisition thereof, or other individual separate agreement of the parties.

During the marriage, Gordon Hamilton purchased numerous items of personal property both personally and through Hamilton Brothers Electric, Inc.

On December 7, 1989, Gordon Hamilton executed his last will, ratifying therein the antenuptial agreement. Paragraph 3 of the will states, in part: "It is my intent to leave a life estate to my wife Mary M. Hamilton in the residence we have in Springville, Utah." Paragraph 4 grants his children any rights he has in his marital home "subject to a life estate my wife Mary M. Hamilton who [sic] shall have unless she remarries." However, the will makes no mention of joint tenancy in personal property to Mary Hamilton. Further, paragraph 5.1 of the will provides that:

My unsecured debts, secured debts, administration expenses, funeral expenses, and all federal and state estate and inheritance taxes shall be paid out of my residuary estate. . . . Provided further, it is my intention that all nonprobate property creating a federal or state estate or inheritance tax burden upon my estate will share proportionately with my residuary estate the respective burden of such taxes. Therefore, I direct that any of the hereinbefore described taxes payable by reason of the taxability of any gifts in contemplation of death, retained life estates, transfers taking effect at death, revocable transfers, annuities, joint tenancies, powers of appointment, life insurance proceeds, or other nonprobate assets shall be paid by the recipient of such assets and that any of such taxes payable because of the taxability of any part of my residuary estate shall be paid out of my residuary estate, subject to two exceptions: (1) The recipients of life insurance proceeds

Hamilton a life estate subject to certain conditions. Specifically, they assert that since the will contains no clear and unequivocal granting language, Mary Hamilton is not entitled to any interest in the marital home. Mary Hamilton responds that the language of the will supports the trial court's finding that she is entitled to a life estate in the home, subject to certain conditions, and therefore, the trial court did not err in so finding.

In construing a will, we are bound by the fundamental principle that "a court must look to the testator's intent as expressed in the will." Estate of Ashton v. Ashton, 804 P.2d 540, 542 (Utah App. 1990) (citing Utah Code Ann. § 75-2-603 (1978); In re Estate of Gardner, 615 P.2d 1215, 1217 (Utah 1980)). Moreover, if the will is ambiguous, any rule of construction normally used in other writings must yield to the intention of the testator as revealed in the instrument. In re Johnson's Estate, 64 Utah 114, 117, 228 P. 748, 749 (1924); In re Poppleton's Estate, 34 Utah 285, 293, 97 P. 138, 140 (1908). The factual issue of the decedent's intent is one we review with deference to the trial court's findings, if adequate, and we reverse only upon a finding of clear error. Utah R. Civ. P. 52(a); In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). In order to show clear error, the appellant "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" Bartell, 776 P.2d at 886 (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

A testator's intent may be "ascertained not alone from the provision itself, but from a scrutiny of the entire instrument of which it is a part, and in the light of the conditions and circumstances in which the instrument came into existence." Poppleton, 34 Utah at 294, 97 P. at 140 (quoting Adams v. First Baptist Church, 148 Mich. 140, 111 N.W. 757, 11 L.R.A. (N.S.) 509, 515 (1907)); accord Gardner, 615 P.2d at 1217; Ashton, 804 P.2d at 542. Thus, extrinsic evidence may be used to ascertain what the testator intended.

In the case at bar, Gordon Hamilton's intent is plainly revealed in the language of paragraphs 3 and 4 of the will. Paragraph 3 provides: "It is my intent to leave a life estate to my wife Mary M. Hamilton in the residence we have in Springville, Utah." Paragraph 4 states that his children's rights to the marital home are "subject to a life estate my wife Mary M. Hamilton who [sic] shall have unless she remarries." Additionally, the language of section IV of the antenuptial agreement states: "In the event, however, that Gordon predeceases Mary, it is the intent of the parties that she be

However, "sanctions for frivolous appeals should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions.'" Hinckley v. Hinckley, 815 P.2d 1352, 1355 (Utah App. 1991) (quoting Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988)). "Egregious cases may include those obviously without merit, with no reasonable likelihood of success, and which result in the delay of a proper judgment." Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989) (citing Porco, 752 P.2d at 369). While we hold in favor of Mary Hamilton on this issue, we are unable to say that Stuart and Vincent Hamilton's appeal was obviously without merit or filed merely for the purpose of delay. Accordingly, we decline to award Rule 33 sanctions on this issue.

#### JOINT TENANCY

Stuart and Vincent Hamilton assail the trial court's finding that Mary Hamilton was entitled to a joint tenancy interest in the marital home's furnishings, asserting that there is no indication in the will or in the antenuptial agreement of the creation of a joint tenancy in the personal property of the home. Mary Hamilton concedes that the trial court's finding is not supported by the evidence, but argues that: (1) since she and Gordon Hamilton gave the four bronzes as a gift to each other, the trial court's finding as to the four bronzes is supported by the evidence and should be affirmed; and (2) as to the other property in question, this court should modify the trial court's ruling to provide her with a life estate in the marital home's furnishings.

A trial court's findings of fact are not to be disturbed unless they are clearly erroneous. Utah R. Civ. P. 52(a). "Under this standard, we do not set aside the trial court's factual findings unless they are against the great weight of the evidence or we otherwise reach a firm and definite conviction that a mistake has been made." Southland Corp. v. Potter, 760 P.2d 320, 321 (Utah App. 1988) (citing Western Kane County Spec. Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987)). Moreover, it is the responsibility of the party challenging a finding of fact to marshal the evidence supporting that finding and demonstrate that such finding is clearly erroneous. In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

As to the four bronzes, both Mary Hamilton and the Hamiltons' neighbors, Richard and Sandra Tretheway, testified that Gordon and Mary Hamilton had given the four bronzes to each other as a Christmas gift, and Stuart and Vincent Hamilton have failed to marshal any evidence to the contrary. Thus, we must

month for twenty-four months following Gordon Hamilton's death. Mary Hamilton responds that the evidence before the trial court supports its award of a family allowance, and thus, such award should be affirmed.

Utah Code Ann. § 75-2-403(1) (1993) provides, in pertinent part:

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration.

In other words, section 75-2-403(1) entitles a surviving spouse to an allowance for his or her maintenance during the period of administration of the will.

However, such an allowance is not an absolute right. In re Bundy's Estate, 121 Utah 299, 304, 241 P.2d 462, 464 (1952). The trial court may, in its discretion, determine whether a family allowance is needed on the basis of the specific facts in the case before it. See id. The factors to be used in determining the amount of the family allowance during administration include the age of the surviving spouse, the surviving spouse's health, the surviving spouse's previous standard of living, the value of the estate, and the value and nature of the surviving spouse's own separate property. Id. Thus, we review the trial court's award of a family allowance to Mary Hamilton under the facts of this case for an abuse of discretion.

In the case at bar, the trial court made the following findings of fact, which the parties do not dispute on appeal: (1) Mary Hamilton's net worth as of the date of Gordon Hamilton's death was \$2215; (2) After Gordon Hamilton's death, Mary Hamilton received \$50,000 in life insurance proceeds, \$23,353 in pension benefits, and a \$10,000 insurance settlement; (3) At the time of trial, Gordon Hamilton's estate was valued at \$1,681,745; (4) During Mary and Gordon Hamilton's marriage, they traveled extensively and enjoyed "a handsome lifestyle"; (5) Following Gordon Hamilton's death, Mary Hamilton's claimed living expenses were approximately \$2382 per month, which were not unreasonable in light of the lifestyle that the Hamiltons had previously enjoyed; (6) Mary Hamilton has disposable income of approximately \$1300 per month from her employment with Hamilton Brothers Electric, Inc; and (7) "[I]n order to obviate the necessity of

and all federal and state estate and inheritance taxes shall be paid out of my residuary estate. . . . (2) None of the hereinbefore described taxes shall be borne by my wife with respect to any probate or nonprobate assets passing to her and qualifying for the federal estate tax marital deduction.

Not only does this section of the will fail to clearly and specifically order division of inheritance taxes contrary to section 75-3-916, but it clearly and specifically supports that section's imposition of taxes on the corpus of the estate. This is especially true in light of Gordon Hamilton's apparent intent in section 5.1(2) to keep Mary Hamilton from having to pay inheritance taxes. Accordingly, we hold that the trial court correctly determined that Mary Hamilton did not owe a pro rata share of inheritance taxes.

#### CONCLUSION

The trial court properly awarded Mary Hamilton (1) a life estate in the marital home subject to certain conditions, (2) a joint tenancy interest in the four bronzes, and (3) a family allowance under Utah Code Ann. § 75-2-403(1) (1993). Moreover, it correctly determined that Mary Hamilton did not owe a pro rata portion of the inheritance taxes. Accordingly, as to these issues, the trial court's final judgment is affirmed. We vacate and remand the trial court's joint tenancy determination as to the remainder of the marital home's furnishings for further proceedings consistent with this opinion.

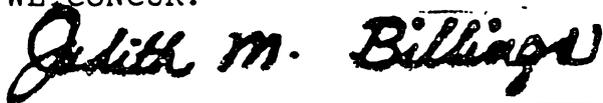


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Leonard H. Russon,  
Associate Presiding Judge

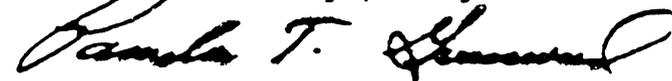
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WE CONCUR:



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Judith M. Billings, Judge



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Pamela T. Greenwood, Judge