

1975

# Matthew Pagano, Carmen Pagano, and Milleo Pagano v. Mary P. Walker : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *Pagano v. Walker*, No. 13864.00 (Utah Supreme Court, 1975).

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UTAH SUPREME COURT

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BRIEF

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STATE OF UTAH

BRIEF

UNIVERSITY

Law School

MATTHEW PAGANO, CARMEN  
PAGANO and MILLEO PAGANO,

*Plaintiffs and Respondents,*

vs.

MARY P. WALKER,

*Defendant and Appellant.*

Case No.

13864

APPELLANT'S BRIEF

Appeal from the Judgment of the Second District  
Court for Weber County  
HONORABLE CALVIN GOULD, JUDGE

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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MATTHEW PAGANO, CARMEN PAGANO and MILLEO PAGANO, <i>Plaintiffs and Respondents,</i>	}	Case No.  13864
vs.		
MARY P. WALKER, <i>Defendant and Appellant.</i>		

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APPELLANT'S BRIEF

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STATEMENT OF KIND OF CASE

This is an action brought by Plaintiffs against their sister, the Defendant, to impress a constructive trust upon certain proceeds placed in joint-tenancy accounts by Plaintiffs' and Defendant's mother in her own name and in the name of the Defendant, Mary P. Walker.

DISPOSITION IN LOWER COURT

The case was tried to the Court with an advisory jury. From a verdict by the Jury and Judgment by the Court in favor of the Plaintiffs, Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the Judgment of the

Lower Court and for a Judgment in her favor as a matter of law, or that failing for a new trial.

### STATEMENT OF FACTS

Plaintiffs and Defendant are sons and daughter of one Lucy Pagano who died on the 12th day of June, 1972. Lucy and her husband immigrated to Utah where they, by hard labor and shrewd investments, accumulated a sizeable estate in joint tenancy between them. At the death of Lucy's husband, Lucy then became the sole owner of all of the accumulations of property as the surviving joint tenant. Lucy was thus familiar with the legal implications of a joint-tenant estate. All of the children had worked with their parents during part of their lives (TR 24 L 21-30; TR 25, L 1-12). After the death of Lucy's husband, Lucy then caused certain accounts to be set up between herself and her daughter, the Defendant Mary P. Walker, as joint tenants with full rights of survivorship and nothing more. The only evidence offered in this respect was the pass books and the statement by the Defendant that as each one of the accounts were set up they were explained to Lucy and Mary by the bank officials receiving the deposit (TR 49 L 16-30; TR 50 L 1-11; TR 181 L 12-30; TR 182 L 1-16). *There were no reservations or representations made by Lucy as each of the accounts were established* altering or limiting the joint tenancy arrangements. Lucy also placed some water stock in her name and one of the Plaintiffs as joint tenants. She also caused to be made a Last Will and Testament, and left an estate to

be probated and divided among her children (TR 50 L 17-30).

The evidence shows that Plaintiffs from time to time visited with their mother, and Lucy from time to time made certain gifts to Plaintiffs and Defendant in differing sums. Evidence further shows that Mary was and is suffering from arthritis, which is progressively becoming more and more serious; and that Lucy was aware of her condition (TR 18 L 14-21). Mary spent a great deal of time with Lucy — took her to the banks, assisted her in all of her business ventures, called her almost every day, and spent much more time with her than any of the Plaintiffs (TR 30 L 1-24). Defendant made withdrawals during Lucy's lifetime and afterward. Lucy died in 1972 and the Will of Lucy was duly admitted to probate in the District Court of Weber County and is now in the process of being probated, involving the property designated in her will (TR 50 L 17-30; TR 51, L 1-17). The joint-tenancy accounts between Lucy and the Defendant were not listed in the probate and Defendant claimed to be the owner of the same as the surviving joint tenant. Shortly after Lucy's death Plaintiffs claim that Defendant stated to them, "Mother told me to pay her personal bills, keep a little out for my arthritis and divide up the rest." Defendant denies that she ever made this statement, but rather told her brothers, the Plaintiffs, that if they would not cause trouble she would consider giving them a part of the money she claimed by right of survivorship in the joint-tenancy bank ac-



counts *on her own*, but that she would decide if, when, and how much (TR 193 L 17-29; TR 194 L 1-7; TR 54 L 8-14; TR 59 L 19-28). The Court submitted the matter to the Jury on the question: "Do you find it proven by clear and convincing evidence that the Defendant, Mary P. Walker, shortly after her mother's death, made the following statement in the presence of other family members, 'Mother told me to pay her personal bills, keep a little out for my arthritis and divide up the rest.'?" The Jury then returned the verdict unanimously as "yes." The Court then requested written memoranda from counsel, and set the matter for further hearing on the 29th day of July, 1974, where evidence was taken showing that Defendant did in fact have arthritis to a rather serious degree. That the doctor would anticipate it would become progressively worse and the cost of treatment would become progressively higher (Dr. Ward TR 277-290). The matter was again submitted to the Court; the Court made its Judgment accepting the answer of the July to the interrogatory, impressed a trust upon the funds in joint tenancy with Defendant, denied Defendant any amount for her arthritis, and ordered the money in the accounts to be divided equally among the parties.

During the course of the trial Defendant offered evidence through her witness, Lynn A. Walker, husband of the Defendant and co-administrator of the Lucy Pagano Estate, concerning whether or not Lucy had ever stated that she did not want her sons to know about the bank accounts in question (TR 253 L 14-19), and again made

a proffer of evidence to the effect that the said Lynn A. Walker would testify that prior to her death Lucy had stated: "Here are the books, Mary. The boys are just waiting for me to die; they want to get their hands on some of this money, but I want you to pay my personal bills. And after that the rest of the money is yours." The Court refused the proffer of evidence on the theory that he was an interested party and, hence, disqualified under the provisions of the Deadman's Statute (TR 55 L 1-8; TR 269 L 16-29).

## ARGUMENT

### POINT I.

THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE COURT BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT, MARY P. WALKER, STATED: "MOTHER TOLD ME TO PAY HER PERSONAL BILLS, KEEP A LITTLE OUT FOR MY ARTHRITIS AND DIVIDE UP THE REST."

In reviewing all of the testimony offered and received in this matter, the only evidence that could support the Court's finding is that testimony of Plaintiffs, Carmen, Pagano, Matthew Pagano, Milleo Pagano, and the wife of Milleo Pagano, Margaret, alleging that Mary Walker, the Defendant, stated to them the words set out above. Mary Walker has vigorously denied ever making the statement attributed to her above, and her husband,

Lynn A. Walker, testified that he had never heard her make this statement although he had been with her during the times referred to by the Plaintiffs.

It is well established in Utah, that in order to alter or avoid the terms of a written, joint-tenancy account, or to impress a trust upon such accounts as against the surviving joint tenant, that the evidence must be clear and convincing. It is also well established that the clear and convincing evidence must be evidence of the intent of the parties establishing the joint-tenancy accounts from their own funds at the date of the creation of the joint-tenancy account. In other words, if Lucy Pagano established a joint-tenancy account with the Defendant, Mary Walker, by signing the joint-tenancy contracts with the various banking institutions and there is no evidence of any other intent at the time of the creation of such accounts, as is the case here, then such accounts must stand. We submit there is nothing further offered by Plaintiffs to substantiate their admission, and to the contrary, other evidence indicated that it was extremely unlikely that the Defendant, Mary P. Walker, had made this statement.

In reviewing the evidence, it should be noted, and this was not controverted by any of the parties to this suit, (1) that Lucy, the mother of the parties, received most of her property by way of joint tenancy with her deceased husband; (2) it was admitted that during her lifetime Lucy had made various gifts to each of her children and the gifts were never made in the exact amount

to each of them; (3) each of the children spent varying times with their mother, both in personal visitations and work on the farm; (4) Lucy Pagano not only created the joint-tenancy accounts in the Defendant, Mary P. Walker,, and her alone, but also in addition, left an estate to be probated where the property was in her name alone, so that all of her children, Plaintiffs and Defendant Mary P. Walker, would receive properties from such estate; and (5) the only evidence brought before the Court was that at the time Lucy Pagano created the joint-tenancy accounts and signed the agreements with the banks, each time one was created the official handling the transaction read the joint-tenancy agreement to Lucy and she understood the same and signed each of them, and made no written or verbal limitation on any of them. There was no other evidence of a contrary intent offered by Plaintiffs at any time. All of these facts, together with the reasonable inferences arising therefrom, we feel should make it obvious that Lucy did not, at the time she created the joint-tenancy accounts with the Defendant, Mary P. Walker, intend to divide all of her property equally among her children. It seems obvious that she did not create a constructive trust with the funds in said joint bank accounts, and with this in mind it would seem obvious that Mary P. Walker would not have said the words put into her mouth by individuals who would profit by such words. Mary vigorously denied having made the alleged statement, stating that she had, in effect, told them that if they did not cause trouble for her she would consider setting

aside some of the funds left to her in the joint-tenancy accounts and divide them with her brothers as she saw fit. It would seem that Defendant, Mary P. Walker, rightfully anticipated that if her brothers found that she was left funds outside of the estate of Lucy Pagano they would cause her trouble, and her fears were borne out, as is evidenced by their conduct. We submit that as a matter of law the Plaintiffs did not prove this necessary allegation by clear and convincing evidence or even by a preponderance of the evidence. The law is not such that the Court must give a Judgment based upon the number of witnesses testifying for versus the number of witnesses testifying against, and it is our position that had the Court given proper consideration to the admitted facts and circumstances surrounding this case its ruling would have been different. The testimony of Lynn Walker should have been admitted, since he was not a disqualified witness and his offered testimony was relevant and competent.

## POINT II.

THE EVIDENCE DOES NOT SUPPORT  
THE FINDING OF THE TRIAL COURT  
THAT THERE WAS A CONSTRUCTIVE  
TRUST ON THE FUNDS PLACED IN  
JOINT - TENANCY BY LUCY PAGANO  
WITH HERSELF AND THE DEFENDANT,  
MARY P. WALKER.

The only possible basis for the establishment of a

constructive trust on the joint-tenancy funds would be the statement allegedly made by Mary P. Walker, the Defendant. If it is determined that Mary did not in fact make such a statement, then the claim by Plaintiffs that a constructive trust was established must fail. There was absolutely no other evidence to support such a claim.

Even if it is found that Mary did make such a statement, the claim of a constructive trust still must fail as a matter of law.

Plaintiffs, at the time of trial, amended their Complaint and admitted that Lucy Pagano did in fact set up joint-tenancy accounts with Defendant, Mary P. Walker, and that Mary became the owner of the money, but then claim that sometime later her ownership became that of a trustee. We respectfully submit that at this time the transfer was made to Lucy and Mary and they in fact were the joint owners of the funds and could not later change the legal relationship to one of a trust without Mary's consent.

There is absolutely no evidence offered by Plaintiffs to show that Lucy later attempted to set up a trust, or that Mary agreed to a trust relationship. There is no evidence as to when Lucy might have tried to do so, or that Mary might have consented to do so.

In Restatement of Trusts, 2d, ch. 2 §25, the rule is stated as follows:

“(a) The test. The rule stated in this section is applicable although the settlor has called the

transaction a trust. No trust is created unless he manifests an intention to impose duties which are enforceable in the Courts.

(b) Precatory words. On the one hand a settlor may manifest an intention to create a trust; on the other hand his manifestation of intention may amount merely to a suggestion or a wish that the transferee should use or dispose of the property in a certain manner leaving it to the transferee to follow the suggestion or comply with the wish only if the transferee desires to do so. No trust is created if the settlor manifests an intention to impose a merely, moral obligation. In determining the intention of the settlor the following circumstances, among others, are considered: (1) the imperative or precatory character of the words used; (2) the definiteness or indefiniteness of the property; (3) the definiteness or the indefiniteness of the beneficiaries or of the extent of their interest \* \* \*."

In Restatements of Trusts, 2d, ch. 2 §38 (1), the text states as follows:

"If the owner of property transfers it *intervivos* to another person by an instrument in which it is declared that the transferee is to take the property for his own benefit, extrinsic evidence, in the absence of fraud, duress, mistake, or other ground for reformation or recession is not admissible to show that he was intended to hold the property in trust."

If the owner of property transferred it *intervivos* to another person as trustee, a trust may be created, but

no evidence was introduced by plaintiffs to this effect. All of the deposits were made by Lucy to herself and Mary Walker as individuals with no reservation or indication of trusteeship or declaration thereof. Defendant's testimony was that at no time did she ever understand or intend the money in the joint-tenancy accounts to be held in trust. To the contrary, she stated, according to her testimony which was never disputed, that the money was hers and that if there was no trouble she would see about giving the plaintiffs, on her own, some of it. This is a far cry from a statement or declaration of trust. She stated further that she had done everything her mother had asked her to do — keep it (TR 193 L 15-22).

A gift once made remains a gift and cannot be retrieved in whole or in part without the consent of the giver and the givee.

Giving full credence to the evidence offered by plaintiffs we feel their allegation that Mary holds the funds in trust must fail. They have shown that their mother understood the implications of joint-tenancy accounts through her husband's estate; that she had made previous gifts to the children in unequal amounts; had placed other property in her name and one of the sons as joint tenants; and had left other property in her name alone to be distributed under the terms of her will.

To alter or defeat the creation of a joint-tenancy account as established by Lucy agano with the Defen-



dant, Mary Walker, and to create a constructive trust from such a joint-tenancy account, Plaintiffs must do so by clear and convincing evidence.

There have been a great number of cases defining "clear and convincing proof." In Words and Phrases, Vol. 7, p. 603, and in the pocket supplement there is quoted many cases, including a Utah case defining the words "clear and convincing" as "*evidence to be clear and convincing must be such that there is no serious or substantial doubt as to the correctness of the conclusion.*" [Emphasis ours.] *Northcrest, Inc. v. Walker Bank and Trust Company*, (1950), 122 Utah 268, 248 P. 2d 692, 698.

The Colorado Supreme Court has defined "clear and convincing evidence" as follows: "Clear and convincing evidence is evidence which is stronger than a preponderance of the evidence *and which is unmistakable and free from serious or substantial doubt.*" [Emphasis ours.] *Dahman v. Ford Leasing Development Company*, 492 P. 2d 875, 877.

New Mexico — "Evidence is clear and convincing in support of the essential elements of deceit *only if it instantly tilts the scales in the affirmative on each element, when weighed against evidence in opposition and fact finders mind is left with an abiding conviction that charges as to each element are proved.*" *Hackett v. Winks*, 485 P. 2d 353, 355. [Emphasis ours.]

Illinois — “Clear and convincing evidence is that quantum of proof *which leaves no reasonable doubt in the minds of the trier of facts of truth of facts in issue.*” *In re Weaver’s Estate*, 220 N. E. 2d 321, 322. [Emphasis ours.]

California — “Clear and convincing evidence is *that evidence which is so clear, explicit and unequivocal as to leave no substantial doubt which is sufficiently strong to command the unhesitating assent of every reasonable mind.*” *Petition of Jost*, 256 P. 2d 71, 74.

These definitions of “clear and convincing” evidence seem to be generally within the definitions accepted and required by our law.

In a recent and similar case decided by the Utah Supreme Court in 1972 — *Del Porto v. Nicola*, 27 Utah 2d 286, 495 P. 2d 811, the facts were as follows: Angelina and Delbert Del Porto were of Italian origin, came into this country from Italy and were frugal and industrious. They had reared their family of three children and had acquired a rather sizeable estate. The children had worked with their parents in accumulating the property. (These facts are almost exactly the facts in the case before this Court at this time.) Angelina had deeded certain real property to her son and daughter-in-law. Subsequently, her husband, Delbert, passed away and a suit was filed by Delbert’s administrator against the deced-

ent's son and daughter-in-law to recover certain of the real property theretofore deeded to them by Angelina. The Court, in refusing to impose a constructive trust for the other heirs of the Del Portos noted "a plenitude of conflicting evidence" but found that all of the deeds were made by Angelina while she was competent and there was no fraud, duress, or undue influence involved; that they were properly delivered and therefore there was no intent to create a trust for the other heirs. There was a considerable amount of evidence in support of Plaintiff's contention in the *Del Porto* case, but virtually none in the instant case before this Court.

In another similar case our Supreme Court stated: "It is true that where an intention to create a joint-tenancy is clearly expressed in a written contract executed by the parties which remains unaltered, and there is no evidence of fraud, undue influence, mistake or other infirmity, the question of intention ceases to be an issue and the courts are bound by the agreement." *First Security Bank of Utah v. Burgi*, 122 Utah 445, 251 P. 2d 297. Once again, this case is similar to the one before the Court at this time. The contracts were clear, they were written, executed by the parties, and there is absolutely no evidence of fraud, undue influence, mistake, or other infirmity. This case presents merely a question of law, and the Court need not accord any favored position to the trial court. *Makoff, Trustees, v. Makoff*, ..... Utah 2d ....., Case No. 13577 (Filed Nov. 19, 1974).

In *Jewel v. Horner*, 12 Utah 2d 328, 366 P. 2d 594, decided by our Supreme Court in 1961, the facts show that Plaintiffs were brothers of the Defendant, Ethel Horner. The parties' father had deeded property to the Defendant at the time he was considering remarriage after the death of his wife. The deed from the father to the Defendant, Ethel, purported to convey the property to Ethel for Ten Dollars (\$10.00) and other good and valuable consideration, subject to a life estate reserved to the grantor, and in the event of remarriage a life estate in his wife. The evidence adduced by Plaintiffs was testimony from a Mr. Jensen, a realtor and friend of the Jewel family, that Mr. Jewel had stated that he wanted to keep the property away from his proposed second wife and he wanted the property to go to his children. One of the Plaintiffs, Clarence Jewel, Jr., testified to three conversations with his father — once again as in the present case, self-serving, wherein the father purportedly told him that the home would eventually go to the boys. That he, the father, was going to divide up the property among the boys and that he was going to put the deed in Ethel's name for safekeeping for her and the boys, so that his proposed wife would not be able to touch it. Clarence's testimony was also to the effect that there had been a number of discussions prior to the father's death that it was the general understanding that the deed was given to Ethel to insure that the property would remain in the family and equally shared

by all. The Plaintiff, Jessie M. Jewel, testified as to two specific conversations with the father. One was to the effect that the father was planning to get married and would make a deed out to Ethel for safe-keeping, or to be held so that the second wife would not have a chance to ge in on it, and to keep the property for the family — for Ethel and the boys. The second conversation was allegedly to the effect that the father was happy that he had taken care of the deed to keep the property for the family so that the children of his second wife could not claim an interest therein. Plaintiff, Argel Jewel stated that he had conversations with the father, wherein his father indicated that he would split up the ground between the boys and give Ethel the portion with the home on it. Jewel also testified that the father stated he had placed the home in Ethel's name in trust for all of the children, and over the years there had been many conversations, in substance — that the house was left in Ethel's name in trust for the whole family with a home for her to live in as long as she wished. In behalf of Defendant, Ethel, Plaintiff's witness, Vaughn Soffe, a funeral director, stated that he had had a conversation with the father, and Mr. Soffe stated that the father led him to believe Ethel was to have the home. Ethel herself denied that her father had ever stated she was to have the property in safe-keeping or trust for herself and her brothers. She stated the deed was made exactly as her father had desired, with no trust to be imposed upon the same. The trial court imposed the trust upon the

property and this Court reversed the same; in so doing, the Court stated:

“This case is one in equity, the dominant question here is whether the Plaintiffs by clear, convincing, and satisfactory proof established the alleged parole trust with respect to the real property. The trial court so found and this Court upon review should not set aside the finding of the lower Court unless it manifestly appears that the lower court has misapplied proven facts or that the finding is clearly against the weight of the evidence. For the reasons to be stated we are of the opinion that the trial court’s finding of a parole trust is clearly against the weight of the evidence and must be set aside.

“The transfer of his home by father to Ethel was made by a deed absolute subject to life estates and authorities are practically uniform to the point that to justify a court in determining from oral testimony that a deed which purports to convey land absolutely in fee simple was intended to be something different, such as a trust, such testimony must be clear and convincing. The proof must be something more than that modicum of evidence which this Court sometimes holds to be sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly expressed deed solemnly executed and delivered.

“With respect to the standard and quality of evidence required to establish an oral trust, the court in the case of *Chambers v. Emery* stated: ‘In such even the proof must be strong, clear and convincing such as to leave no doubt as to the existence of the trust. Such a case is simi-

lar to one where it is attempted to convert a deed absolute into a mortgage or where the reformation of a written instrument is sought on the grounds of accident, mistake or fraud. In all such cases the court will scrutinize parole evidence with great caution and the Plaintiff must fail unless it is clear, definitely unequivocal, and conclusive. Public policy and the safety and security of titles to real estate demand this rule because such evidence is offered to overcome the strong presumption arising from problems and conditions of an instrument in writing, which is always the best evidence of title. *If it were once established that the effect of the terms of a written instrument could be avoided by a bare preponderance of parole evidence the gates to perjury would soon be wide open and no person could longer rest in the security of title to his property, however solemn might be the instrument upon which it was founded.'*" [Emphasis ours.]

The Court also reflected upon the fact that much of the testimony was vague and self-serving and was subject to the infirmities enumerated in the case of *Chambers v. Emery*, 13 Utah 374, 45 P. 192, where the Court stated that it is unsatisfactory and dangerous to depend wholly upon recollection of witnesses who might have improper or corrupt motives and may represent the deceased as having expressed ideas precisely reverse of that which was intended by him.

It appears that the *Jewel v. Horner* case, supra, had facts much stronger to support Plaintiffs' contentions than those found in this particular case, and yet this

Court reversed the lower court. Once again, in this instant case the only evidence to show a contrary intention on the part of Lucy Pagano is the alleged statement claimed to have been made by Mary, the Defendant, after the death of Lucy, which statement is vigorously denied. There was no evidence at all adduced by Plaintiffs that Lucy intended other than a joint-tenancy account with all of the legal implications thereof at the time of the creation of the joint-tenancy accounts with Defendant. Even if in fact Lucy Pagano later had indicated a desire that Mary keep a little out for her arthritis and divide up the rest, this would not amount to a legal over-throwing of the once established joint-tenancy account. Once that account had been established, legally, with no reservations in the written instrument between Lucy Pagano, Defendant, and the banks, they could only be modified by an agreement by all three parties, and there was absolutely no evidence of this happening offered into this case; certainly there was no evidence offered that Defendant ever accepted any trust, or that she held the deposits in trust.

In a case very similar to this one at issue, decided by our Supreme Court December 22, 1969, *Woodward v. Monson*, 23 Utah 2d 318, 462 P. 2d 715, wherein the heirs of a decedent brought an action to obtain their proportionate share of a bank account which had been created by the decedent with his daughter named as a joint tenant, the Court reversed the lower court and once again stated the law in Utah:



“There is a presumption that joint-tenancy survivorship bank accounts create joint-tenancy with full rights of survivorship, and that the heirs of the decedent had failed to establish that joint-tenancy survivorship account opened by the decedent prior to his death with his daughter named as a joint tenant was intended for convenience or business necessities of the decedent, and therefore the balance of the account became the sole property of the daughter through rights of survivorship at the decedent’s death.”

In a very recent Utah Supreme Court case entitled *Nelson v. Nelson, Administrator*, 30 Utah 2d 80, 513 P. 2d 1011, the Court made the following statement:

“The relationship of parent and child does not constitute such confidential relationship as to create a presumption of fraud or undue influence. The evidence in this case is insufficient to show a reposal of confidence by one party and the resulting superiority and influence on the other party.”

In refusing to set aside a conveyance from the deceased to his daughter, the Court stated:

“The Plaintiff has the burden of proof proving with *clear and convincing proof* that the conveyance from Virgil to Teresa was obtained by fraud and that Homer either participated in the fraud or had knowledge of it.” [Emphasis ours.]

The significance of this case is the fact that the Court has once again stated that the Plaintiff has the burden of proving by a clear and convincing proof.

Our Supreme Court, in *Spader v. Newbold*, 29 Utah 2d 433, 511 P. 2d 153, reaffirmed the position in previous cases and refused to set aside a joint-tenancy account for the other heirs. The Court stated:

“Since she was protected by the prerogative of relying on the universally accepted principle that joint-tenancy documents be they bonds, bank or savings accounts, deeds, negotiable instrument, or the like, mean what they say and are invulnerable to any other meaning until attacked by someone. The latter, representing the Plaintiffs here, carries the burden of proving otherwise. Such proof must be by clear and convincing evidence \* \* \*.”

We submit that the Plaintiffs, as a matter of law, failed to prove a constructive trust and the trial court erred in finding such.

### POINT III.

THE COURT ERRED IN ITS ORDER OF DISTRIBUTION OF THE FUNDS IN JOINT TENANCY WITH LUCY PAGANO AND DEFENDANT, MARY P. WALKER, AND REFUSAL TO AWARD ANY SUM TO DEFENDANT FOR HER ARTHRITIS.

If, for the sake of the argument, Mary P. Walker did in fact make the statement attributed to her by Plaintiffs, and if as the Court decided that there resulted a constructive trust, it is the Defendant's position that the Court erred in making a distribution as it did in the

joint-tenancy accounts. Furthermore if the Court did not err in distributing said funds ,then it is the position of the Defendant that the Court erred in refusing to set aside a sum to the Defendant for her arthritis before dividing up the accounts as it did.

We claim that the statement allegedly made by the Defendant, Mary P. Walker, which she categorically denies: "Mother told me to pay the bills, keep a little out for my arthritis and divide up the rest," is (1) so vague and indefinite that it is unenforceable, and (2) such words are precatory only and would only contribute an expression of a hope or a desire rather than a legal mandate to do so. See *In re Milton's Estate*, 294 P. 2d 412.

Before giving effect to the alleged statement, the Court must be able from competent evidence admitted to determine (1) how much is "a little for my arthritis" and determine the intent of Lucy if she made the statement "divide up the rest." The record is devoid of any evidence upon which the Court could determine Lucy's intent if she in fact made this statement, and if the statement is to be given any legal effect; we submit that the finding was arbitrary, capricious, and not based on competent evidence.

The evidence is that Lucy knew that Mary had arthritis; that she was being medically treated for the same; that it would probably worsen as Mary grew older. The only other evidence bearing on it at all was the fact that Lucy had from time to time during her lifetime made gifts not in equal amounts to her children and that

she left a Will covering a part of her estate to be probated and divided among her children. No mention of these deposits was made in the Will. All of these factors together would make it necessary for the Court to guess and pull out of thin air, its own interpretation what was meant by the statement. We submit the Court did not have sufficient or any facts upon which to make its ruling. The phrase "keep a little out for my arthritis" could mean anything from one cent up, (whose guess would be correct?) and if the Court accepts the statement allegedly made by Mary it must give credence to all of the statement. The Court arbitrarily gave credence to one part of the claimed statement, but arbitrarily refused to give credence to the other.

The phrase "divide up the rest" is likewise vague and ambiguous. Does this mean divide up the rest equally or does it mean divide up the rest upon the percentages or with the differences as evidenced by past gifts given by Lucy to her children during her lifetime — does it mean among all of her children or some of her children, or if one of her children had died leaving issue were they to be included? We submit there is no evidence from which the Court could make a determination as to what this phrase meant in the absence of evidence bearing upon it. The Court's finding was based upon an arbitrary, capricious, or conjectural construction by the Court, not upon evidence of the party allegedly making the statement.

With respect to the Court's right to second guess the parties or give legal effect to a situation which is so vague

and ambiguous, one of the early cases is an Illinois case, *Young v. Farewell*, (1892), 146 Ill. App. 299. In this case the Court was called upon to decide the meaning of the following words: "We will divide with you all of the profits made over the last percentages," and "I will divide with you all of the profits which your department makes over your past average percentages of profit." In its attempt to determine the meaning of the word "divide" as well as the meaning of the phrases themselves, the Court stated that an agreement to divide does not necessarily mean to divide equally and it is uncertain from the whole contract that such was the intention of the parties. Also the Court, in commenting upon the uncertainties of the verbal statement, commented as follows:

"The Courts may and should in cases of doubt give to words contractually employed, such meaning as will effectuate the intention of the parties when such intention may be gathered from all of the circumstances surrounding the transaction, but when from a consideration of all the circumstances it is impossible to determine when the minds of the contracting parties met, the contract must fail. We also think the contract must fail because of other indefiniteness."

The final statement made by the Court which we feel was and is the law, and properly so, was as follows:

"It is not the province of the Courts to make contracts for parties, nor to make certain and definite what parties have left uncertain and indefinite unless their intention is clearly and satisfactorily proven."

We feel this law, although decided long ago, is the proper law in this case.

Although we have been unable to find a case exactly in point with the instant case, we feel there have been a number of Utah decisions analogous to it. *In re Beals Estate*, 117 Utah 189, 214 P. 2d 525, construing a Will, this Court said:

“The rule of construction that the intent of the testator must be carried out does not authorize courts to make a new Will to conform to what they think the testator intended, *but the intent of the testator must be ascertained in a Will as it stands.*” [Emphasis ours.]

The logical conclusion would be, then, that should the intent of the testator not be determinable then that must fail.

In a landmark Utah case, *Chambers v. Emery*, *supra*, the Court set forth the rule with respect to giving legal effect to vague and uncertain statements, and especially with the dangers of parol evidence. The Court said:

“In such event the proof must be strong, clear and convincing such as to leave no doubt as to the existence of the trusts \* \* \*. In all such cases the court will scrutinize all parol evidence with great caution and the plaintiff must fail unless it is clear, definite, unequivocal and conclusive \* \* \*. *If it were once established that the effects of the terms of a written instrument could be avoided by bare preponderance of parol evidence the gates to*

*perjury would soon be wide open and no person could longer rest in the security of his title to property however solemn might be the instrument upon which it was founded.*" [Emphasis ours.]

We submit this case is completely in point with the case before this Court where written joint-tenancy contracts were discussed, explained and made; Plaintiffs now are attempting to modify the terms or destroy the creation of the joint-tenancy accounts by parol evidence, which was completely self-serving.

In *Valcarce v. Bitters*, 12 Utah 2d 61, 362 P. 2d 427, the Court said:

"A condition precedent to the enforcement of any contract is that there is a meeting of the minds of the parties which must be spelled out either expressly or impliedly *with sufficient definiteness to be enforced* \* \* \*. The Court cannot fabricate the kind of contract the parties ought to have made and then enforce it." [Emphasis ours.]

A North Carolina case, *Broadhurst v. Newborn*, 88 S. E. 628, the Court held that it was the intention of the testator that governs and it is not the Court's duty nor its right to second guess the intent of the testator.

A Washington case, *In re Milton's Estate*, supra, the Court held that a statement in the Will that it was "contemplated that the money for the debts of the estate would come from the proceeds of insurance" were

mere precatory words of the testator and insufficient to be binding, and that such were nothing more than a wish or a desire or expectation by the testator.

In *Breckenridge v. Krock*, (Cal.), 21 P. 179, the Court stated as follows:

“But to whatever form of action resort may be had, the burden is on the plaintiff to show by the writings that a contract definite and certain by its terms was entered into by the parties, and failing to do that he must fail to obtain relief.”

In a California case, *Inn Association v. Phillips*, 56 Cal. 546, the Court stated: “A Court of equity will not specifically enforce any contract unless it is completed and certain.”

Another California case, *McGee v. McManus*, 12 P. 451, states as follows:

“A thing agreed to be done must be definite and certain in its terms and in itself and the party who claims performance must make out by clear and satisfactory proof the existence of the contract as he alleges it.”

In *Pitcher v. Lauritzen*, 18 Utah 2d 368, 423 P. 2d 491, the Court said:

“Specific performance cannot be required unless all terms of the agreement are clear. The Court cannot compel the performance of a contract which the parties did not *mutually* agree upon.” [Emphasis ours.]



The Court cited a Colorado case, *Boman v. Rayburn*, 170 P. 2d 271, and quoted 71 American Jurisprudence 2d, Specific Performance, §22 p. 35, as follows:

"A contract must be free from doubt, vagueness and ambiguities so as to leave nothing to conjecture or to be supplied by the Court. It must be sufficiently certain and definite in its terms as to leave no reasonable doubt as to what the parties intended and no reasonable doubt of the specific thing equity is called upon to have performed, and it must be sufficiently certain as to its terms so the court may enforce it as actually made by the parties."

In *Young v. Farewell*, supra, the Court said:

"When from a consideration of all of the circumstances it is impossible to determine what is in the mind of the contracting parties the contract must fail."

In *Stoddard v. Montgomery*, a Nebraska case, 98 N. W. 2d 875, the Court was called upon to construe the meaning of a *statute* requiring the trial court to "divide" the attorneys' fees awarded in real property partition case among the attorneys of record. The Court after some learned discussion held that the word "divide" does not necessarily mean separate and equal parts.

We submit that if somehow this Court should find that the Defendant did in fact make the statement attributed to by her brothers and the wife of one brother, and if somehow a constructive trust was intended, even

so the Court could not properly make a division of the monies in the joint-tenancy accounts because in order to do so the Court would have to flip a coin, draw a number out of a hat, or make some other arbitrary determination as to how much is "a little for my arthritis" and then guess as to what Lucy Pagano meant when she said "divide up the rest" — on what share basis, and with whom? We submit the Court should not and could not substitute its own thinking in order to cure a deficiency created by one of the parties to an action, and as this Supreme Court has stated, *In re Beal's Estate*, supra, the Court does not have the right to make a new Will to conform to what they think the testator intended, or in the *Broadhurst* case, supra, it is not the Court's right nor its duty to second guess the intent of the testator, or as stated in *Young v. Farewell*, supra, decided before the turn of the century:

"It is not the province of the Courts to make contracts for the parties and to make certain and definite what parties have left uncertain and indefinite, unless their intention is clearly and satisfactorily proven."

#### POINT IV.

#### THE TRIAL COURT ERRED IN SUSTAINING OBJECTIONS TO DEFENDANT'S PROFFERED EVIDENCE.

Defendant offered into evidence testimony concerning the statements of Lucy Pagano relating to Lucy's

intentions with respect to the ownership of the funds placed in the joint-tenancy accounts by her with the Defendant. The evidence was offered through Lynn A. Walker, husband of the Defendant, and son-in-law of the deceased, Lucy Pagano. Mr. Walker was not directly interested in the outcome of the proceedings as contemplated by our deadman's statute. He would receive no money regardless of the outcome of this case and was not an heir or devisee of Lucy Pagano.

Mr. Walker was first asked if Lucy had ever told him that she did not want her sons to know about the joint bank accounts involved. The Court sustained the objection of Plaintiff's Counsel, based upon the deadman's statute. Later Defendant made an offer of evidence to the Court out of the hearing of the Jury. The offer of evidence being substantially that Lucy Pagano had stated to Mary and himself, as she gave Mary the pass books, that the boys were just waiting for her to die, that they wanted to get their hands on some of this money, that she wanted Mary to pay her personal bills, and after that, the balance of the money was to be hers, meaning Mary's. Once again the Court sustained the objection of Plaintiffs' Counsel to this offer of evidence, stating that it came within the purview of the dead-man's statute. Mr. Walker had testified that he had been with Mary Walker, the Defendant, on the occasions described by Plaintiffs, and Mary had never stated that she was told by her mother that she was to divide up the rest of the monies in the joint-tenancy accounts, and that

Mary had always indicated that her mother had given her the money — the only limitation was that Mary pay her personal bills.

Our Deadman's Statute, 78-24-2 (3) Utah Code Annotated, 1953, states as follows:

“Who may not be witnesses. — The following persons cannot be witnesses \* \* \* (3) a party to any civil action, suit, or pleading and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derived his interest or title or any part thereof when the adverse party in such action or proceedings claims or opposes, sues or defends as guardian of an insane or incompetent person, or as the executor, or administrator, heir, legatee or devisee of any deceased person, or as guardian, assignee, or grantee directly or remotely of such heir, legatee or devisee as to any statement by or transaction with such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending in such action, suit or proceeding.”

It is our position that Lynn A. Walker, who was not suing or defending, as guardian or Administrator, or Executor, or an heir and who would not receive any of the proceeds of the accounts in question is not precluded from testifying under this Statute. He had not received

any property that was involved in this action from Lucy Pagano and he would not receive any property involved in this suit regardless of the outcome thereof. As was stated in *Maxfield v. Sainsbury*, 110 Utah 280, 172 P. 2d 122, 125, the purpose of the Statute was to get to the truth of the matters:

“It was never intended that this section should be used for the purpose of suppressing the truth. On the contrary, the Statute’s sole purpose is to prevent the proving by false testimony of claims against the estate of the deceased person.”

In this same case the Court went on to say:

“If the witness is opposing or suing the Executor, or if the witness has a direct interest in the event of the suit a prohibition of the Statute applies.”

And further:

“We think the legislature intended by the term ‘adverse party’ to disqualify only those witnesses who have a direct interest in the event of that particular action, adverse to the interests of the estate. See *Mower v. Mower*, 64 Utah 260, 228 P. 911 \* \* \*.”

In *Cook v. Gardner*, 14 Utah 2d 193, 381 P. 2d 78, decided by the Supreme Court in 1963, Plaintiff brought an action against the Executrix of the Estate of Leonard Derle Gardner. A witness, Blake Probert, was precluded from testifying as to facts that must have been equally

in the knowledge of both the witness and the deceased person. The witness also, had a similar claim against the estate. The trial Court permitted Probert to testify and the Court upheld the trial Court's ruling, stating:

"While this Statute obviously has a salutary purpose in many instances its effect is to suppress inquiry into the truth rather than to assist in its discovery. For that reason this Court has heretofore indicated that it should be construed and applied strictly, and that it will only disqualify a witness who has an interest in the particular subject matter of the action in which he is challenged as a witness. More specifically applicable to the issue before us is the holding in our case of *Clark v. George*, that in an action for specific performance the challenged witness must have a direct interest in the contract which was the subject matter of the action in order to fall under the ban of this Statute.

The trial court correctly ruled that the fact that Probert had a claim of a similar nature against this estate would not disqualify him as a witness."

### CONCLUSION

It is our contention that Lucy Pagano, mother of Plaintiffs and Defendant, was a knowledgeable person knowing full well the legal implications of a joint-tenancy account, she herself having received her property through joint-tenancy accounts with her husband. Lucy opened the various joint-tenancy accounts (the subject matter of this suit) with the Defendant, her daughter Mary P. Walker, and at the time of the creation of these

joint-tenancy accounts there was no declaration or other indication they were to be held in trust for the Plaintiffs or any other person. We contend, the only evidence that the moneys in the said joint-tenancy accounts were to be held in trust for the Plaintiffs was the alleged statement made by Mary, which she vigorously denies. This evidence was, of course, self-serving on the part of Plaintiffs. When Defendant offered evidence through Lynn A. Walker of statements showing the true intent of Lucy Pagano with respect to the joint-tenancy accounts, the Court refused to permit this evidence, which we feel was the only independent evidence to help ascertain the truth of the matter and what justice is all about. We feel the refusal to admit the evidence was error in that this was not a suit by or against an estate of the deceased person and the witness had no direct interest in the outcome of the case. Plaintiffs did not offer any evidence as to when their mother was supposed to have made this statement to Mary, and it is our feeling that once the joint-tenancy was established with no showing of a trust relationship this could not be modified without the consent of Lucy, Mary, and the banks, on which point there was no evidence whatsoever. Even if this statement was made, it is our contention that it would not change the original terms of the joint-tenancy accounts; that the statement would be so vague and ambiguous as to be unenforceable even if made and that at the most the statement would have been a precatory statement rather than a legally enforceable trust.

If the ruling of the lower Court should be upheld, there would be, as a practical matter, no joint-tenancy account enforceable in the State of Utah — no joint-tenancy account that could be enforced if contested by any interested party. In this matter there was no clear and convincing evidence found in the transcript of the proceedings and not even a preponderance of the evidence; that from either standpoint — eventuary or under the legal aspect — a trust could be found.

If such a trust is found to be legally established, then it is <sup>APPELLANT'S</sup> ~~Plaintiff's~~ contention that the Court would be unable to determine the intent of the trustor from the evidence offered and such could not be enforced. The Court cannot substitute its intention for that of the trustor. If, however, the Court finds a valid trust and is able to ascertain the intention of the trustor from the evidence, then Defendant contends that the Court was arbitrary and capricious in distributing the funds in equal shares to each of the children and refusing to give credence to the alleged statement "Mary is to have a little for her arthritis." Her arthritis is real and becoming progressively worse and more expensive. This could amount to large sums over the period of her life span and the Court should have made a determination as to what a reasonable amount would have been.

It seems obvious that Lucy created exactly what she wanted to — a joint-tenancy account with Mary P. Walker. Lucy left an estate in addition to the joint-tenancy accounts at her death, which said estate is in the



process of being probated and will be distributed to her children. There would be no logical reason to leave part in joint-tenancy to be divided among her children and a separate estate to be divided among her children.

We respectfully submit that the trial court should be reversed and that Mary P. Walker, the Defendant, declared to be the sole owner of the joint-tenancy funds; or that failing, the case be remanded to the lower court for a new trial, for the purpose of determining what is a reasonable sum for Mary's arthritis and based upon competent evidence in what proportions and to whom the balance should be divided.

Respectfully submitted,

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