

1997

Grayce Hurd, Personal Representative of the Estate of Lloyd I. Hurd, Deceased v. Lewellyn J. Sherman, Connie Sherman : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970202-CA

IN THE UTAH COURT OF APPEALS

GRAYCE HURD, Personal
Representative of the Estate
of Lloyd I. Hurd, Deceased
and GRAYCE HURD, Personally,

Plaintiffs/Appellees,

vs.

LEWELLYN J. SHERMAN and
CONNIE SHERMAN,

Defendants/Appellants.

Priority No. 15

Court of Appeals No. 970202CA
Civil No: 940600001

BRIEF OF THE APPELLANTS

**AN APPEAL FROM THE SIXTH DISTRICT COURT
KANE COUNTY, KANAB DEPARTMENT, STATE OF UTAH
THE HONORABLE DAVID L. MOWER, PRESIDING**

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JUN 03 1997

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No constitutional provisions relate to this case.

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IN THE UTAH COURT OF APPEALS

GRAYCE HURD, Personal)
Representative of the Estate)
of Lloyd I. Hurd, Deceased)
and GRAYCE HURD, Personally,)
)
Plaintiffs/Appellees,)
)
vs.)
)
LEWELLYN J. SHERMAN and) Court of Appeals No. 970202CA
CONNIE SHERMAN,) Civil No: 940600001
)
Defendants/Appellants.)

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-2-2(4) (Supp. 1996) and §78-2a-3(2)(j), and pursuant to Utah R. App. P. 3.

A. Whether plaintiff, Grayce Hurd, as personal representative of the Estate of Lloyd Hurd, can bring and maintain an action against the defendants, and whether the Estate of Lloyd Hurd itself can bring and maintain an action against the defendants.

1. Standard of Review

Correction of error standard. See Bailey v. Call, 767 P.2d 138 (Utah App. 1989), cert. denied, 773 P.2d 45 (Utah 1989).

B. Whether the trial court erred when it concluded that a constructive trust had been created for the benefit of the plaintiff. See Addendum B, Conclusion of Law at ¶ 1.

1. Standard of Review

"Conclusions of law [are] accord[ed] no particular deference, but [are] review[ed] for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (citing Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc., 596 P.2d 1033, 1036 (Utah 1979) and Betenseon v. Call Auto & Equipment Sales, Inc., 645 P.2d 684, 686 (Utah 1982)).

C. Whether the trial court erred when it found there was no consideration for the quitclaim deed, the checks and the vehicle titles. See Addendum B, Amended Findings of Fact at ¶ 25.

1. Standard of Review

The standard of review is whether the finding is clearly erroneous. Ashton v. Ashton, 733 P.2d 147, 150 (Utah 1987).

D. Whether the trial court erred when it concluded that that all of the property should be immediately returned to the plaintiff.

1. Standard of Review

"Conclusions of law [are] accord[ed] no particular deference, but [are] review[ed] for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (citing Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc., 596 P.2d 1033, 1036 (Utah 1979) and Betenseon v. Call Auto & Equipment Sales, Inc., 645 P.2d 684, 686 (Utah 1982)).

E. Whether the evidence presented at trial was sufficient to prove the plaintiffs' claims?

1. Standard of Review

Correction of error standard. See Bailey v. Call, 767 P.2d 138 (Utah App. 1989), cert. denied, 773 P.2d 45 (Utah 1989).

III. CONSTITUTIONAL PROVISIONS

There are no constitutional provisions at issue in this case.

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a final Judgment and Order of the Sixth Judicial District Court, Kane County, Kanab Department, State of Utah, the Honorable David L. Mower, presiding wherein after a trial date on April 4, 1996, the Court ordered that the constructive trust created by the parties was terminated, and that the items transferred to the defendants, either of them, as

constructive trustees, shall be delivered to the plaintiff within a ten (10) day period from the date of the Court's Order. In addition to the items to be transferred from the defendants to the plaintiff, see Addendum A (subparagraphs a-e), the trial court granted judgment against the defendants in the sum of \$20,000.00 and costs. Id.

B. STATEMENT OF THE FACTS

The present appeal arises out of the conveyance of real property, the transfer of funds from a checking account, and the transfer of personal property. The plaintiffs are, Grayce Hurd ("Grayce"), as the Personal Representative of the Estate of Lloyd I. Hurd ("Mr. Hurd") and Grayce, Hurd, personally, See Addendum B at ¶ 1. The defendants are Lewellyn Sherman ("Mr. Sherman") and Connie Sherman ("Ms. Sherman"). Id. at ¶ 1.

Mr. Hurd and Grayce lived together since approximately 1964, however, they never entered into a formal marriage contract. Id. at ¶ 6. R-256, 377, 386, 392, 226, 236. No children were born during the course of their relationship. Id. At no time prior to the death or since the death of Mr. Hurd has there been any judicial proceeding or administrative proceeding wherein Grayce was declared to be the common-law wife of Mr. Hurd. R-157, 399. Mr. Hurd died on June 3, 1992, see Addendum B at ¶ 5 and, accordingly, the relationship between Mr. Hurd and Grayce ended.

Prior to Mr. Hurd's death, he met with attorney Keith Eddington ("Mr. Eddington"). R-357. This meeting occurred at the residence of Mr. Sherman, and was in response to a request that Mr. Eddington prepare, review, and advise Mr. Hurd on a Power of Attorney document. R-361, 363, 365.

During the meeting between Mr. Hurd and Mr. Eddington, Mr. Hurd was advised by Mr. Eddington of what rights he would be relinquishing by executing the Power of Attorney. R-359, 361. Essentially, Mr. Hurd was informed by Mr. Eddington that if he executed the Power of Attorney, designating Mr. Sherman as the attorney-in-fact, he would be permitting Mr. Sherman to act as though he was Mr. Hurd. R-359, 361.

Due to the legal significance of a Power of Attorney, Mr. Eddington's concern was whether Mr. Hurd understood what was happening, whether or not that was his wish, and whether the execution of the Power of Attorney was being forced upon him. R-357. Mr. Eddington's conclusion was that the Power of Attorney was not being forced upon Mr. Hurd, and that he understood what was going on. R-357, 361. In fact, Mr. Eddington testified that Mr. Hurd made it clear that it was his wish to execute the Power of Attorney; there was no hesitation on Mr. Hurd's part when he executed the Power of Attorney. R-361. With respect to the Power of Attorney, it was Mr. Hurd's desire to execute it in

favor of Mr. Sherman because he trusted him. R-359. Part of the considerations for executing the Power of Attorney in favor of Mr. Sherman was because Mr. Hurd wanted to see that Grayce was taken care of. R-365. (Power of Attorney is found at plaintiffs' Exhibit no. 23.)

During the course of their meeting, Mr. Hurd and Mr. Eddington also discussed gift taxes and the ability to transfer \$10,000.00 tax free. R-360. Mr. Hurd also inquired about what potential problems might arise if he transferred all of his property to Mr. Sherman. R-360. Mr. Eddington informed him that he did not know the value of his estate, however, if it was over \$10,000.00, he could have a gift tax problem. Id. Mr. Eddington further informed Mr. Hurd that if he wanted to disperse it between the children of Grayce, he could most likely get away with that. Id. Mr. Hurd responded by informing Mr. Eddington that he did not trust the other children, but he did trust Mr. Sherman with Grayce. Id.

Regarding the transfer of property, Mr. Hurd did not inform Mr. Eddington that he had a conversation with either Mr. Sherman or Ms. Sherman. R-361. With respect to being advised on money matters, neither defendant ever advised Mr. Hurd about these matters. R-389, 402, 407, 409. Mr. Sherman also neither induced Mr. Hurd to transfer the home into his name nor to execute the

Power of Attorney in his name. R-411, 415. Mr. Hurd had informed Lorna Guenther, his cousin (R-222), while at the V. A. Hospital (R-223) prior to his staying at the defendants' home and prior to meeting Mr. Eddington, that he was going to give Mr. Sherman Power of Attorney and to have his home and all property transferred to and to belong to Mr. Sherman. R-226-228, 230-231. These same statements were made to Kenneth and Deon Lamb at a different time at the V. A. Hospital prior to Mr. Hurd staying at the defendants' home that he, Mr. Hurd, was going to give his property and home to Mr. Sherman and give Mr. Sherman Power of Attorney over all his property. R-373, 375, 381-382. Kenneth Lamb was Mr. Hurd's cousin. R-368.

With respect to Mr. Hurd's bank account at Zions Bank, Mr. Sherman was instructed by Mr. Hurd to withdraw the money and to transfer the money into an account in his name. R-412, 413. (Note: The account was sole owned and held by Mr. Hurd.) An additional discussion occurred regarding the transfer of the funds, which was that the transfer of funds were to be as gifts. R-412, 413. First, there was to be a \$10,000.00 gift for Mr. Sherman and, second, there was to be a \$10,000.00 gift for Ms. Sherman. An additional instruction from Mr. Hurd to Mr. Sherman was that he was to transfer the home into his name. R-415. Mr. Hurd attempted to explain the gift transfer of the bank monies

but Grayce states she didn't understand what Mr. Hurd meant. R-400-401.

To effectuate the conveyance of the real property, Grayce and Mr. Sherman signed a quitclaim deed, which said deed was recorded on June 2, 1992. See Addendum B ¶ 22. See also plaintiffs' Exhibit no. 21. The grantors were Mr. Hurd and Grayce Hurd, husband and wife, and the grantees were Mr. Sherman and Ms. Sherman, as joint tenants with full rights of survivorship, and not as tenants in common. Mr. Sherman signed the quitclaim deed as the attorney-in-fact. Grayce signed the quitclaim deed after she and Mr. Hurd discussed signing the quitclaim deed, and then she signed because they (Grayce and Mr. Hurd) mutually agreed she sign. R-318, 321. In fact, all of the personal property (truck, trailer, etc.) which was signed over to Mr. Sherman by Grayce was done after she and Mr. Hurd talked about it, then mutually agreed to sign it over. R-318-321. The record is devoid of any evidence of any discussions or requests from either defendant to Grayce to transfer property held in her name to either defendant.

Regarding the trial court's Findings of Fact, the Court found that Mr. Hurd and Grayce lived in several different cities, and acquired both real and personal property over the years. See Addendum B ¶ 7(a). That the two had filed tax returns with the

IRS and the State of Utah for the calendar year of 1986, which said filing status indicated that they were filing as married, and filing jointly. Id. at ¶ 7(b). That on June 10, 1985, they received a warranty deed from Georgia Phelps in which the grantees were Mr. Hurd and Grayce, his wife. Id. at ¶ 7(c). That on that same date, they purchased title insurance in the names of Mr. Hurd and Grayce Hurd, his wife. Id. at ¶ 7(d). That in June and July of 1986, they maintained a joint checking account with Zions First National Bank, Kanab Office. Id. at ¶ 7(d). From 1984 to 1986, they maintained a joint checking account with Valley Bank and Trust, Granger-Hunter Office; the account was in the names of Mr. Lloyd Hurd and Mrs. Lloyd Hurd. Id. at ¶ 7(e).

The trial court found on June 1, 1992, Mr. Hurd and Grayce owned the following items of property:

a. A house and lot located in Kanab, Kane County, State of Utah, more particularly described as:

Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" of the official survey of Kanab Townsite, and running thence East 6.0 rods, then north 108.75⁰; thence West 6.0 rods; thence South 108.75⁰ to the point of beginning;

b. Two shares of stock in the Kanab irrigation Company;

c. A travel trailer, fifth-wheel type, Teton brand, 1978 model;

- d. A travel trailer, 18 feet long, Kit Companion brand;
- e. A 1977 Chevrolet pickup truck;
- f. A 1980 Oldsmobile automobile;
- g. A bank account at Zions First National Bank, Kanab Branch, account no: 052-50552-6, worth \$20,420.85; and
- h. A bank account at Zions First National Bank, Kanab Branch, account no: 052-33638-5, worth \$789.65. *Id.* at ¶ 9(a).

The trial court also found that on Friday, May 29, 1992, a conversation took place at Mr. Sherman's house between Mr. Hurd, Grayce, Mr. Sherman and Ms. Sherman. For the sake of brevity, the defendants incorporate those findings, see id. at ¶ 16, without setting them out. With respect to the trial court's findings regarding the conversation, it should be noted that the trial court's findings are speculative, that is, the Court found that "[t]he conversation probably went something like this[.]" Id.

The trial court further found that neither Mr. Sherman nor Ms. Sherman paid money or transferred anything of value to Grayce in exchange for the quitclaim deed, the checks, and the vehicle titles. Id. at ¶ 25.

Finally, the trial court found that one year had passed since Mr. Hurd's death, and no claims had been made by Social

Security, the Veteran's Administration, Medicare, or any long-term care provider. Id. at ¶¶ 33-34.

Based on the trial court's Findings of Fact, it made three Conclusions of Law. First, that a constructive trust had been created for the benefit of Grayce. Id. at ¶ 1. The second Conclusion of Law was that all of the property received in trust for the benefit of Grayce should be immediately returned, assigned and transferred to Grayce, including the following:

a. A house and lot located in Kanab, Kane County, State of Utah, or particularly described as:

Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" of the official survey of Kanab Townsite, and running thence East 6.0 rods, then north 108.75° ; thence West 6.0 rods; thence South 108.75° to the point of beginning;

b. Two shares of stock in the Kanab irrigation Company;

c. A travel trailer, 5th-wheel type, Teton brand, 1978 model;

d. A travel trailer, 18 feet long, Kit Companion brand;

e. A 1977 Chevrolet pickup truck;

f. A 1980 Oldsmobile automobile;

g. \$20,000.00 taken by defendants from Zions First National Bank, account no: 052-50552-6. Id. at ¶ 2.

The final Conclusion of Law by the trial court was that Grayce was entitled to a judgment against Mr. Sherman and Ms.

Sherman in the sum of \$20,000.00, together with court costs incurred. Id. at ¶ 3.

V. SUMMARY OF THE ARGUMENTS

The defendants argue that the plaintiff is not a real party in interest, as Personal Representative of the Estate of Lloyd H. Hurd, based upon her claim of being the surviving spouse of Mr. Hurd because Grayce did not, within one year, obtain either a judicial or administrative order establishing that she was the common-law wife of Mr. Hurd. Because she did not establish that she was the common-law wife of Mr. Hurd, she is not the real party in interest as the Personal Representative of the Estate of Lloyd H. Hurd and, accordingly, she cannot bring and maintain a cause of action against the defendants in that capacity. The defendants also argue that there is no person who can bring and maintain a cause of action on behalf of the Estate because no person satisfies the enumerated factors set forth in Utah Code Ann. § 75-3-203(1)(a-f) (1987).

Additionally, the defendants assert the trial court erred when it imposed a constructive trust on the conveyed real property, transferred funds, and transferred personal property. This is because the trial did not find, by clear and convincing evidence, that "certain circumstances" existed before it imposed the constructive trust. These "certain circumstances" it should

have found are twofold. First, it should have the existence of a confidential relationship and, second, the existence of an oral promise to hold property.

The defendants also argue that the trial court erred when it determined there was no consideration for the quitclaim deed, the checks and the vehicle titles. This is because in one instance, consideration is unnecessary. In the second instance, it also was unnecessary because the transfers were gifts. In the third instance, there was sufficient consideration.

The defendants further argue that the trial court erred when it concluded that all of the previously transferred property be immediately returned because the property was transferred to create a life estate, and because any reconveyance of property places Grayce and Mr. Sherman in their respective positions, that is, tenants in common.

Finally, the defendants assert that the evidence does not establish plaintiffs' claim. Plaintiffs alleged one cause of action, fraud. As previously stated, the evidence does not establish the existence of a confidential relationship. Without the evidence demonstrating the existence of a confidential relationship, that claim must fail. Additionally, regarding plaintiffs' claim sounding in fraud, the plaintiffs failed to plead then prove, by clear and convincing evidence, the essential

elements for a claim sounding in fraud and, therefore, all claims of plaintiffs fail.

VI. ARGUMENTS

A. THE PLAINTIFF, GRAYCE HURD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MR. HURD, CANNOT BRING AND MAINTAIN AN ACTION AGAINST THE DEFENDANTS NOR CAN ANY PERSON BRING AND MAINTAIN AN ACTION AGAINST THE DEFENDANTS ON BEHALF OF THE ESTATE

Mr. Hurd and Grayce lived together since approximately 1964, however, they never entered into a formal marriage contract. See Addendum B at ¶ 6. Based on that relationship, plaintiff Grayce Hurd asserted herself as the real party in interest as the Personal Representative of the Estate of Lloyd H. Hurd because she was the "surviving spouse" of Mr. Hurd. R-155, 157. See Utah Code Ann. 75-3-203(1)(d) (Supp. 1993). Grayce's assertion as the real party interest, as Personal Representative of the Estate of Lloyd H. Hurd, must fail.

Utah R. Civ. P. 17(a) states, in pertinent part, that "[e]very action shall be prosecuted in the name of the real party in interest." "Under the rule, the real party in interest is the person entitled to enforce the right asserted under the governing substantive law." Certain Interested Underwriters v. Layne, 26 F.3d 39, 42-43 (6th Cir. 1994) (citations omitted). The defendants assert that Grayce is not entitled to enforce any right of the Estate of Lloyd H. Hurd, as Personal Representative

of that Estate, on the ground that she is not the surviving spouse of Mr. Hurd.

In order for Grayce to establish the existence of a common-law marriage between herself and Mr. Hurd and, thus, be the surviving spouse of Mr. Hurd, Grayce must have obtained either a court or administrative order declaring she was the common-law wife of Mr. Hurd. See Utah Code Ann. § 30-1-4.5(1) (1987). This order must have established that the common-law marriage arose out of a contract between two consenting parties, that is, Mr. Hurd and Grayce, and the order must have also established the enumerated factors set forth in § 30-1-4.5(a-e). And, "[t]he determination or establishment of a marriage . . . must [have] occur[ed] . . . within one year following the termination of that relationship." § 30-1-4.5(2). See also Whyte v. Blair, 885 P.2d 791, 793 (Utah 1994) ("Subsection (2) states that the court or administrative order must be entered 'within one year following the termination of that relationship.'"). Also Buach v. Englehom, 906 P.2d 918 (Utah.App. 1995).

Mr. Hurd died on June 3, 1992, (see Addendum B at ¶ 5), and, accordingly, the relationship between Mr. Hurd and Grayce ended. Pursuant to § 30-1-4.5(2), Grayce had until June 3, 1993 to establish the existence of a common-law marriage between herself and Mr. Hurd. No such determination was made. Because Grayce

did not establish, within one year, that she was the common-law wife of Mr. Hurd, she cannot now act as a real party in interest, as the Personal Representative of the Estate of Lloyd H. Hurd, based upon her assertion that she is the surviving spouse of Mr. Hurd under § 75-3-203(1)(d). Therefore, Grayce, acting in the capacity as Personal Representative of the Estate of Lloyd H. Hurd, cannot bring and maintain an action against the defendants.

Because Grayce is not the surviving spouse of Mr. Hurd, and cannot act as a Personal Representative of the Estate of Lloyd Hurd based upon her surviving spouse claim, and there having been no person duly appointed as a Personal Representative of the Estate of Lloyd H. Hurd who meets one of the requirements set forth in § 75-3-203(1)(a-f), there is no person who is a real party in interest who can bring and maintain an action on behalf of the Estate of Lloyd H. Hurd against the defendants.

B. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT A CONSTRUCTIVE TRUST HAD BEEN CREATED FOR THE BENEFIT OF THE PLAINTIFF

"A constructive trust is an equitable remedy to prevent unjust enrichment in the absence of any express or implied intention to form a trust." Mattes v. Olearain, 759 P.2d 1117, 1179 (Utah App. 1988) (citing Matter of Estate of Hock, 655 P.2d 1111 (Utah 1982)). And, "under certain circumstances that equity will impress a constructive trust upon property." Nielson v. Rasmussen, 558 P.2d 511, 513 (Utah 1976). These certain

circumstances must be found to exist "by clear and convincing evidence." Id. (citing Jewell v. Horner, 366 P.2d 594 (Utah 1961) and Chambers v. Emery, 45 P. 192 (Utah 1896)). However, before a constructive trust will be impressed upon property, there must be a finding of the existence of a confidential relationship. see id. (citing Restatement (Second) of Trusts § Sec. 45(b) (1959)). See also Ashton, 733 P.2d at 151 ("The transferee at the time of the transfer was in a confidential relationship to the transferor.") (quoting Restatement (Second) of Trusts § 45(b) (1957)).

In order to find the existence of a confidential relationship, it is insufficient to find a "relationship based upon sincere affection, confidence, and trust . . . [because] such characteristics alone do not establish a confidential relationship in its legal sense." Mattes, 759 P.2d at 1179 (citing Blodgett v. Martsch, 590 P.2d 298 (Utah 1978) and Bradbury v. Rasmussen, 401 P.2d 710 (Utah 1965)) (ellipsis inserted) (bracket inserted). Instead, "[t]he doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other[.]" id (citing Webster v. Lehmer, 742 P.2d 1203, 1206 (Utah 1987) (quoting Bradbury, 401 P.2d at 713)) (other citations omitted).

The defendants herein assert that before the trial court could impose a constructive trust on the conveyed real property, the transfer of funds as gifts, and the transfer of personal property, it should have found, first, that a confidential relationship existed between Mr. Sherman and Mr. Lloyd and, second, it should have found there was an oral promise by Mr. Sherman to Mr. Hurd to hold property.

These "certain circumstances" must exist as to Mr. Hurd and Mr. Sherman because Mr. Hurd executed a Power of Attorney designating Mr. Sherman as the attorney-in-fact, (R-359) and it was through this status Mr. Sherman signed the quitclaim deed as Mr. Hurd, which conveyed the real property, see Addendum B at ¶ 22; and it was through this status that Mr. Sherman transferred the funds from Mr. Hurd's personal account as gifts to himself and Ms. Sherman. R-413. As to the transfer of vehicle titles, there must also be a showing of a confidential relationship between Mr. Hurd and Mr. Sherman because Mr. Hurd and Grayce had discussions concerning the transfer of those titles and, therefore, there should have been a finding that Mr. Sherman occupied a position of superiority over Mr. Hurd which caused Mr. Hurd to discuss the transfer of the vehicle titles with Grayce whereby Mr. Hurd could convince Grayce to transfer those titles.

With respect to the existence of a confidential relationship between Mr. Hurd and Mr. Sherman, the trial court made no such finding. See Addendum B. Moreover, the record is devoid of evidence of a clear and convincing nature which would establish the existence of a confidential relationship between Mr. Hurd and Mr. Sherman.

For instance, during direct examination, Mr. Kenneth Lamb when asked if there were any directives given by Mr. Sherman to transfer the property testified as follows: "No. Lloyd done that his self. Lloyd wanted that, that's the way Lloyd wanted it. He was his own mind until he died." R-375:10-11. Similarly, Mrs. Lamb testified that Mr. Hurd had his own mind, his own thoughts. Id. at 381. She also testified that he was not easily induced into doing things by others, and that he was kind of stubborn. Id. It is apparent from the Lambs testimony that Mr. Hurd was a head-strong, independent and stubborn individual. According to the Lambs testimony, it is very unlikely that Mr. Sherman occupied a position of dominance over Mr. Hurd.

Additionally, Mr. Eddington's conclusion was that the Power of Attorney was not being forced upon Mr. Hurd, Id. at 359:13, but, rather, it was Mr. Hurd's desire to execute the Power of Attorney. Id. at 361:25. This was evident because there was no hesitation on Mr. Hurd's part when he signed the Power of

Attorney. Id. at line 24. Therefore, according to Mr. Eddington's testimony, Mr. Sherman could not have occupied a position of dominance over Mr. Hurd because it was Mr. Hurd's desire to sign the Power of Attorney.

Finally, plaintiffs' own testimony refutes any claim of a confidential relationship between Mr. Hurd and Mr. Sherman. This is because Grayce and Mr. Hurd discussed signing the quitclaim deed, and then they both came to a mutual agreement regarding the signing of the quitclaim deed based upon their discussions. Id. at 318. In fact, with respect to the transfer of personal property, Grayce and Mr. Hurd discussed the transfers, and then both mutually agreed on the transfers based upon their discussions. Id. at 318-319. Accordingly, plaintiffs' own testimony clearly shows no position of superiority by Mr. Sherman over Mr. Hurd because the decisions to transfer both real property and personal property were mutual agreements between Grayce and Mr. Hurd based upon those discussions.

Regarding the transfer of property, the evidence demonstrates that Mr. Hurd transferred his interest to Mr. Sherman because "that is the way [he] wanted it." Id. at 375. He also transferred his interest after discussing it with Grayce. Grayce voluntarily transferred her interest after she discussed the transfer with Mr. Hurd. "'In Barlow Society v. Commercial

Security Bank, 723 P.2d 398, 401 (Utah 1986), [this Court] held, "Absent fraud, duress, mistake, or the like attributable to the grantee, a competent grantor will not be permitted to attack or impeach his own deed."'" Mattes, 759 P.2d at 1179. Because the transfer was voluntarily made by the plaintiffs, and because plaintiffs cannot show the existence of fraud, see infra, subsection D, the plaintiff cannot attack or impeach her own deed.

Regarding an oral promise to hold property, the trial court did find there might have been such a conversation between Mr. Sherman to Mr. Hurd. The trial court found that the following conversation "probably" occurred. From Mr Sherman: "Let's do this: I'll keep all of the property for a year. Mom can apply for social security. If nobody says anything for a year, then we should be safe and I'll give all of the property back to her. In the meantime, she can continue living in the house. See Addendum B at ¶ 16. From Mr. Hurd: That sounds good to me, but I'm not dead yet." Id. This finding by the trial court is speculative because its finding notes that "[t]he conversation probably went something like this[.]" Id. This is speculation and conjecture by the trial court which does not satisfy the clear and convincing burden of proof. Nielson, 558 P.2d at 513.

The record is devoid of any clear and convincing evidence, Nielson, 558 P.2d at 513, which would demonstrate the existence of a confidential relationship between Mr. Hurd and Mr. Sherman. The record also fails to demonstrate, by the same burden of proof, the existence of an oral promise to hold property given by either defendant to Mr. Hurd or by either defendant to Grayce. Because the record does not establish that "certain circumstances" existed, by clear and convincing proof, the trial court erred when it imposed a constructive trust on the conveyed real property, the transfer of funds as gifts, and the transfer of personal property.

C. THE TRIAL COURT ERRED WHEN IT FOUND THERE WAS NO CONSIDERATION FOR THE QUITCLAIM DEED, THE CHECK OR THE VEHICLE TITLES

The trial court found that neither Mr. Sherman nor Ms. Sherman paid money or transferred anything of value to Grayce in exchange for the quitclaim deed, the checks and the vehicle titles. See Addendum B at ¶ 25. The defendants assert that the trial court erred in its finding.

With respect to the quitclaim deed, "[a]s between the parties a deed is good, with or without consideration." See Barlow Soc. v. Commercial Security Bank, 723 P.2d 398, 401 (Utah 1986) (citing Brown v. Peterson Development Co., 622 P.2d 1175 (Utah 1980)).

Regarding the trial court's finding of no consideration for the transfer of the funds, those transfer were gifts. R-413 The evidence establishes this because Mr. Hurd discussed this topic with Mr. Eddington. Id. at 360. The testimony of Kenneth Lamb, Deon Lamb and Lorna Guenther specifically set forth that Mr. Sherman was to receive the truck, trailer and house. R-225, 229, 230, 231, 373, 381-382. Mr. Hurd's conversation with Mr. Eddington was to transfer his property to Mr. Sherman and how to make a gift of property he owned to Mr. and Ms. Sherman and what the problems would be if he made the transfers. R-360. Mr. Eddington informed Mr. Hurd of the gift tax problems and other ramifications of transferring his property to Mr. Sherman. Grayce also testified that Mr. Hurd wanted his bank account monies transferred to the defendants as gifts and as gifts no consideration is necessary. R-400. (Note: Grayce's name was not on the bank accounts and she did not sign any documents for their transfer to defendants.)

With respect to the consideration for the transfer of vehicle titles, the consideration was to see that Grayce was taken care of. Id. at 365. This has in fact occurred. Defendants have allowed Grayce to remain living in the home and even have made some repairs to the home. R-412, 416. Mr. Hurd did not trust Paul Sherman or Iris Meir and believed that they

would wrongfully "steal" the property from Grayce. Nor did Mr. Hurd believe Grayce should have the property. R-226, 227, 231, 360, 365. This testimony is objective testimony because it came from objective witnesses, Mr. Eddington, Kenneth Lamb, Deon Lamb and Lorna Guenther. Id. The plaintiff also testified that there was consideration for the transfers. During examination by plaintiffs' counsel, plaintiff testified to the following: "Lloyd also talked to Lewellyn about it, and he said, I want to know that Grayce will be taken care of?" Thus, the trial court erred when it found there was no consideration for the transfer of real property, checks and vehicle titles.

Further, the plaintiffs failed to allege in their complaint any constructive trust and never moved to modify their complaint to assert a claim of constructive trust. The defendants at the close of plaintiffs' case moved to dismiss the action in part on the failure to plead, allege or move the court to request a constructive trust. R-347. This was again raised in closing argument. R-434. The plaintiffs' claim of fraud was an "all or nothing" type of claim. Grayce didn't want a life estate in the property. She wanted all of the property or nothing. This is why she alleged fraud as the basis of her complaint.

D. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT ALL THE PROPERTY SHOULD BE IMMEDIATELY RETURNED

The trial court concluded that the following should be returned to Grayce immediately:

a. A house and lot located in Kanab, Kane County, State of Utah, or particularly described as:

Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" of the official survey of Kanab Townsite, and running thence East 6.0 rods, then north 108.75° ; thence West 6.0 rods; thence South 108.75° to the point of beginning.

b. Two shares of stock in the Kanab irrigation Company;

c. A travel trailer, 5th-wheel type, Teton brand, 1978 model;

d. A travel trailer, 18 feet long, Kit Companion brand;

e. A 1977 Chevrolet pickup truck;

f. A 1980 Oldsmobile automobile;

g. \$20,000.00 taken by defendants from Zions First National Bank, account no: 052-50552-6. Id. at ¶ 2.

The trial court incorrectly concluded that the foregoing should be returned immediately to Grayce for two distinct reasons. First, the facts in this case would at best state that it was Mr. Hurd's intention to create a life estate with respect to the home for the benefit of Grayce with the remainder of the property to be owned and held by the defendants. Second, Grayce could not immediately take possession because any reconveyance

places Grayce and Mr. Sherman in their respective positions, which is as tenants in common.

1. The Creation of a Life Estate

Mr. Eddington testified that part of the consideration for executing the Power of Attorney in favor of Mr. Sherman was because Mr. Hurd wanted to see that Grayce was taken care of. Id. at 365.

Plaintiff testified as follows:

* * *

Q. Are you sure it was a quit-claim deed?

A. To give Lewellyn the power of attorney.

Q. I See. Now, after that telephone call, was there some discussions before the attorney came that you recall?

A. We just talked about the same thing and everybody agreed on it. And Lloyd asked me if I would go along with it, and I said, "Lloyd, if that's what you want, why, we would trust him with that."

Q. Now, did you talk to Lewellyn about what was to be done with the property?

A. Yes.

Q. And who said what to Lewellyn or Connie?

A. Lloyd also talked to Lewellyn about it, and he said, I want to know that Grayce will be taken care of.

Q. And did Lewellyn or Connie respond when he said that?

A. Lewellyn did. He said, I'll see she's taken care of.

* * *

R-291 (emphasis provided).

The foregoing testimony, the defendants assert, demonstrate at best that it was Mr. Hurd's intention to create a life estate in the real property for the benefit of Grayce. Therefore, the property would not be returned to Grayce but she would be allowed to live at the home during her lifetime.

2. The Severance of the Joint Tenancy

"When a joint tenant makes 'a bona fide conveyance of his interest in property to a third party, . . . this has the effect of terminating the joint tenancy, and converting the ownership into a tenancy in common." Crowther v. Mower, 876 P.2d 876, 878 (Utah App. 1994) (quoting Nelson v. Davis, 592 P.2d 594, 596 (Utah 1979)) (other citations omitted) (ellipsis in original).

Grayce and Mr. Sherman signed a quitclaim deed regarding the real property, which said deed was recorded on June 2, 1992. See Addendum B ¶ 22, also plaintiffs' Exhibit no. 21. Mr. Sherman signed the quitclaim deed as the attorney-in-fact. Id. Grayce signed the quitclaim after she and Mr. Hurd discussed signing the quitclaim deed, and then mutually agreed she sign. R-318. The grantors were Mr. Hurd and Grayce Hurd, husband and wife, and the grantees were Mr. Sherman and Ms. Sherman, as joint tenants with full rights of survivorship, and not as tenants in common. Id.

When Mr. Sherman signed the quitclaim deed, as Mr. Hurd, which was Mr. Hurd's instruction to Mr. Sherman, (R-415), that had the effect of conveying Mr. Hurd's interest in the real property to Mr. Sherman, and the joint tenancy was severed. Whether or not Grayce consented to it is immaterial. "[E]ither party to a joint tenancy may terminate it . . . and . . . the consent of the other tenants to the severance or termination is not required." Id. (quoting 48A C.J.S. Joint Tenancy § 16 at 343 (1981) (citing Nelson, 592 P.2d at 596-97 and Clearfield State Bank v. Contos, 562 P.2d 622, 624-25 (Utah 1977))). The real property did not need to be returned because the joint tenancy has been severed. Also, because Grayce conveyed her interest to Mr. Sherman, Mr. Sherman owns the whole of the property.

E. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH PLAINTIFFS' CLAIMS

Plaintiffs' Complaint (R-9-5) does not specifically set forth causes of actions against the defendants. A reading of the Complaint, however, shows the plaintiffs alleged a cause of action based on fraud.

1. Evidence Supporting Plaintiffs' Claim of Confidential Advisors

With respect to the plaintiffs' claim regarding "confidential advisors," that claim may relate to the imposition of a constructive trust because a finding of a confidential

relationship is a prerequisite to the imposition of a constructive trust. See Ashton, 733 P.2d at 151 ("The transferee at the time of the transfer was in a confidential relationship to the transferor") (quoting Restatement (Second) of Trusts § 45(b) (1957)). This issue has already been discussed by the defendants in subsection B. The plaintiffs did not prove the existence of a confidential relationship (confidential advisors) by clear and convincing evidence. Because the plaintiffs failed to prove the existence of a confidential relationship, a requisite to a constructive trust, the evidence does not support plaintiffs' claim of constructive trust.

2. Evidence Supporting Plaintiffs' Claim of Fraud

Under Utah law, to bring a claim sounding in fraud, a party must allege (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representator either (a) knew to be false or (b) made recklessly, knowing there was insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1066-67 (Utah 1996) (citations omitted). "A misrepresentation of intended future performance is not a 'presently existing fact' upon which a claim of fraud can be based unless a plaintiff can prove that the representator, at the time of the representation,

did not intend to perform and made the representation for the purpose of deceiving the promisee." Andalex Resources, Inc. v. Myers, 891 P.2d 1041, 1046 (Utah App. 1994) (citing Applied Genetics, Int's, Inc. v. First Affiliated Securities, Inc., 912 F.2d 1238, 1243 (10th Cir. 1990)). "Fraud claims must be proven by clear and convincing evidence." Id.

Defendants assert that plaintiffs' cause of action sounding in fraud must also fail because the plaintiff did not plead the enumerated factors set forth in Gold Standard, Inc. v. Getty Oil Co., 915 P.2d at 1066-67, then prove those factors by clear and convincing evidence, Andalex Resources, Inc., 891 P.2d at 1046. Not only did the plaintiffs not plead and prove the essential elements of fraud, the trial court did not find fraud. See Addendum B. The reason for this is because the evidence does not support a claim sounding in fraud. The plaintiffs did, however, alleged certain terms which could be attributable to a claim sounding in fraud. Because the plaintiffs did use certain terms, as to a claim sounding in fraud, the defendants will analyze those certain representations which the plaintiffs alleged were "false and fraudulent." Pl.'s Compl. at ¶¶ 10, 11. R-9-5.

a. a representation was made

The plaintiffs alleged that the defendants represented that "the transfers must be made . . . in order to avoid probate and

inheritance problems which would result because of the impending death of Lloyd H. Hurd[.]" Pl.'s Compl. ¶ 10. The plaintiffs also allege that the defendants represented "that there was an additional need to avoid creditors which made it urgent that all of the plaintiffs' property be transferred to defendants where it would be held in safekeeping for their benefit." Id. at ¶ 11.

With respect to representation concerning transfers to avoid probate and inheritance problems, plaintiffs' own testimony refutes this allegation. On direct examination, plaintiff testified as follows:

* * *

Q. Okay. And then what was said and who said it, do you remember?

A. In the discussion?

Q. Yes.

A. That we had to get something done with the property and--

Q. Who said that?

A. And all our things that was, everything, the vehicles and everything was in both of our names had to be transferred out of our names because if we put Lloyd in the rest home, they would--the State would take everything.

* * *

R-288 (emphasis provided). (Note: defendants objected to this response on grounds of 'not being responsive' which was sustained by the court.)

Additional testimony from the plaintiff consisted of the following:

* * *

Q. Now did you discuss the need for transferring the property on the trip down?

A. Oh, I think there was something said, yes.

Q. Do you recall what was said?

A. Well, that we have to get down to Kanab and get that taken care of.

Q. Was there any other statements about why you had to take care of it?

A. Yes. I was afraid I was going to lose my Social Security if it wasn't taken care of.

Q. And who told you that?

A. Lewellyn and Connie.

* * *

R-294 (emphasis provided).

There was no testimony from the plaintiffs regarding an alleged representation that "the transfers must be made . . . in order to avoid probate and inheritance problems." Therefore, even if the plaintiffs allege that "the transfers must be made . . . in order to avoid probate and inheritance problems," the

plaintiffs failed to prove, by clear and convincing evidence, that this representation was made. Because the plaintiffs failed to prove the existence of an alleged representation that "the transfers must be made . . . in order to avoid probate and inheritance problems," it is unnecessary to discuss the other factors and, accordingly, plaintiffs' claim of fraud based upon this alleged representation must fail.

The plaintiffs also allege that the defendants represented "that there was an additional need to avoid creditors which made it urgent that all of the plaintiffs' property be transferred to defendants where it would be held in safekeeping for their benefit." Pl.'s Compl. ¶ 11. The foregoing testimony from the plaintiffs also show that, although the plaintiffs allege there was a representation there was a need to transfer to avoid creditors, the plaintiffs, again, fail to prove, by clear and convincing evidence, that this representation was made. Because the plaintiffs fail to prove this alleged representation, it is unnecessary to discuss the other factors and, hence, plaintiffs' claim of fraud based upon this alleged representation must fail.

In sum, because the plaintiffs failed to prove, by clear and convincing evidence, the existence of a confidential relationship, that claim must fail. Similarly, because the plaintiffs fail to plead the essential elements of a claim

sounding in fraud, then prove these elements by clear and convincing evidence, plaintiffs' claim of fraud must also fail. Thus, the evidence was insufficient to prove plaintiffs' claims.

VII. CONCLUSION

Because Grayce is not a real party in interest based upon her claim of surviving spouse of Mr. Hurd, she cannot bring and maintain a cause of action against the defendants in the capacity of Personal Representative of the Estate of Lloyd H. Hurd. In fact, no person can bring and maintain a cause of action against the defendants in behalf of the Estate because no person satisfies the enumerated factors.

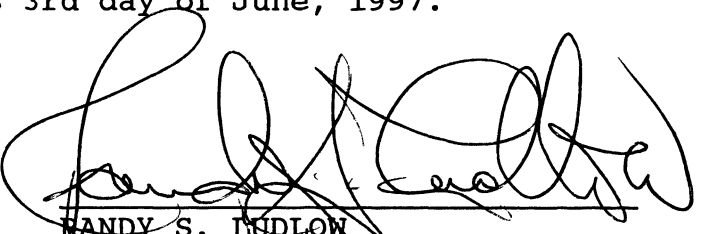
Additionally, because the trial court did not find, by clear and convincing proof, the existence of either a confidential relationship and an oral promise to hold property, the trial court erred when it imposed a constructive trust on the conveyed real property, the transfer of funds, and the transfer of personal property.

The trial court also erred when it found there was no consideration for the transfer of the real property, checks and vehicle titles. This is because, as previously demonstrated, either no consideration was necessary or there was sufficient consideration.

The trial court also erred when it concluded that all of the property be immediately returned to the plaintiffs because Grayce's claim at best would have been to create a life estate in one-half of the real property because she voluntarily transferred her own interest to Mr. Sherman, and because the transfer of the properties severed the joint tenancy.

Finally, the evidence does not support plaintiffs' claims of constructive trust and fraud. With respect to plaintiffs' constructive trust claim, no confidential relationship existed and, moreover, the evidence would not support such a finding. Without this finding, plaintiffs' claim must fail. Regarding plaintiffs' claim of fraud, plaintiffs did not, by clear and convincing evidence, prove the essential elements of fraud and, therefore, this claim must also fail. Therefore, there was insufficient evidence to support plaintiffs' claims. A constructive trust was never requested by plaintiffs and fraud was never established.

RESPECTFULLY SUBMITTED this 3rd day of June, 1997.



RANDY S. LUDLOW
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that I caused to be mailed two true and correct copies of the foregoing **BRIEF OF THE APPELLANTS**, by placing the same in the United States Mail, in a postage pre-paid sealed envelope, this 3rd day of June, 1997 to the following:

Tex R. Olsen
OLSEN & CHAMBERLAIN
225 North 100 East
P.O. Box 100
Richfield, UT 84701
Attorney for Appellees


Leslie Christofferson

ADDENDUM A

LAW OFFICES
OLSEN & CHAMBERLAIN
225 NORTH 100 EAST, P.O. BOX 100
RICHFIELD, UTAH 84701

TEX R. OLSEN No. 2467
OLSEN & CHAMBERLAIN
225 NORTH 100 EAST, P.O. BOX 100
RICHFIELD, UTAH 84701
ATTORNEYS FOR PLAINTIFF
TELEPHONE: 896-4461

FILED
KANE COUNTY

APR 01 1996

SIXTH JUDICIAL DISTRICT

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

* * * * *

GRAYCE HURD)	
Plaintiff,)	
)	
-vs-	)	AMENDED
	)	DECREE, JUDGMENT AND
	)	ORDER
LLEWELLYN J. SHERMAN and CONNIE)	
SHERMAN,)	
Defendants.	)	Civil No. 940600001
)	
	)	Judge: David L. Mower

* * * * *

The above entitled matter came on regularly for hearing before the Honorable David L. Mower, District Judge, city of Kanab, Utah on 4th day of April, 1996. Plaintiff appeared in person with her counsel, Tex R. Olsen of Richfield, Utah and the Defendants appeared in person their counsel Randy S. Ludlow, 311 South State #280 Salt Lake City, Utah and the court having heard various witnesses testifying or the parties and having examined evidence received and the court having made its Findings of Fact and Conclusions of Law does now Decree an Order:

1. The constructive trust created by the parties is hereby terminated and the items transferred to the Defendants or either of them as constructive trustees shall be delivered to Plaintiff within a period of 10 days from the date of this Order. In addition to delivery of the items said forth, in this order,

3D 2467 43
RK 142

Defendants shall execute such assignments and conveyances as are necessary to transfer title thereof to Plaintiff, Grayce Hurd:

a. Defendant's shall deed and convey unincumbered title to the home located in Kanab, Kane County, Utah and particularly described as follows:

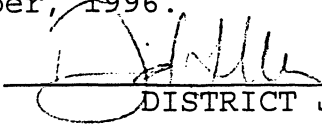
Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" of the official survey of Kanab Townsite, and running thence East 6.0 rods; thence North 108.75'; thence West 6.0 rods; thence South 108.75' to the point of beginning.

Together with 2 shares of stock in the Kanab Irrigation Company.

- b. travel trailer, 5th-wheel type, Teton Brand, 1978 model
- c. A house trailer, 18 foot ling, Kit companion brand;
- d. 1977 Chevrolet pickup truck
- e. 1980 Oldsmobile Automobile If the Oldsmobile is in the possession of Plaintiff the Defendants shall execute such assignments as are necessary to clear title of the property in Plaintiff.

2. Further Plaintiff, is granted judgment against the Defendants, and each of them in the sum of \$20,000 and costs.

DATED this 27 day of September, 1996.



DISTRICT JUDGE

ADDENDUM B

LAW OFFICES
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RICHFIELD, UTAH 84701

TEX R. OLSEN No. 2467
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225 NORTH 100 EAST, P.O. BOX 100
RICHFIELD, UTAH 84701
ATTORNEYS FOR PLAINTIFF
TELEPHONE: 896-4461

FILED
KANE COUNTY
APR 01 1996
SIXTH DISTRICT COURT

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

* * * * *

GRAYCE HURD)	
Plaintiff,)	
)	
-vs-	)	AMENDED FINDINGS OF
	)	FACT AND CONCLUSIONS
	)	OF LAW
LLEWELLYN J. SHERMAN and CONNIE)	
SHERMAN,)	
Defendants.	)	Civil No. 940600001
)	
	)	Judge: David L. Mower
)	

* * * * *

The above entitled matter came on regularly for hearing before the Honorable David L. Mower, District Judge, city of Kanab, Utah on April 4, 1996. Plaintiff was present with her attorney, Tex R. Olsen of Richfield, Utah and the Defendants were present with their attorney Randy S. Ludlow, 311 South State #280, Salt Lake City, Utah and the court having heard the witnesses who testified and having examined the various items of evidence entered and being fully advised and having considered objections of Defendant does now make the following Findings of Fact:

FINDINGS OF FACT

1. The parties to this action are individuals. Their names

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are Grayce Hurd, Llewellyn J. Sherman and Connie Sherman. Grayce was born on July 26, 1914. She lives at 123 East 100 North, Kanab, Utah. Llewellyn lives in West Valley City, Utah.

2. Grayce Hurd is the mother of four living children, 2 boys, Paul and Llewellyn, and 2 girls, Iris and Dorothy. All are adults. Their father was Rupert Sherman. The son Llewellyn is the same person as Defendant Llewellyn J. Sherman.

3. Defendants Llewellyn and Connie were married together, but are now divorced.

4. Grayce Hurd is currently acting as the personal representative of the Estate of Lloyd I. Hurd, deceased. The estate is being probated in this Court.

5. Lloyd died on June 3, 1992. He was a veteran of the U.S. Military Forces.

6. Lloyd and Grayce lived together since 1964, but never entered into formal marriage contract. They never had any children.

7. Lloyd and Grayce did the following while living together:

- a. Lived in several different cities and acquired both real and personal property over the years;
- b. Filed tax returns with the IRS and the State of Utah for the calendar year 1986; the filing status on the returns show "married, filing jointly;"

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c. On June 10, 1985, they received a warranty deed from Georgia Phelps in which the grantees are "Lloyd I. Hurd and Grayce Hurd, his wife,...;"

d. On July 10, 1985 they purchased title insurance in the names of "Lloyd I. Hurd and Grayce Hurd, his wife...;"

e. In June and July of 1986 they maintained a joint checking account with Zions First National Bank, Kanab Office.

f. From 1984 to 1986 they maintained a joint checking account with Valley Bank and Trust, Granger-Hunter Office. The account was in the names of Mr. Lloyd Hurd or Mrs. Lloyd Hurd..

8. In 1992 Lloyd became ill with cancer.

9. On June 1, 1992, Lloyd and Grayce owned the following items of property:

a. A house and lot located in Kanab, Kane County, State of Utah, more particularly described as:

Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" of the official survey of Kanab Townsite, and running thence East 6.0 rods, thence north 108.75'; thence West 6.0 rods; thence South 108.75' to the point of beginning.

b. Two shares of stock in the Kanab Irrigation Company.

- c. a travel trailer, fifth-heel type, Teton brand, 1978 model;
- d. A travel trailer, 18 feet long, Kit Companion brand;
- e. a 1977 Chevrolet pickup truck;
- f. A 1980 Oldsmobile automobile;
- g. A bank account a Zions First National Bank, Kanab Branch, account number 052-50552-6, worth \$20,420.85;
- h. A bank account at Zions First National Bank, Kanab Branch, account number 052-33638-5, worth \$789.65.

10. On May 4, 1992, Grayce took Lloyd to Veterans Administration Hospital in Salt Lake City, Utah for treatment. He had cancer and was dying. Grayce stayed at Llewellyn's for a couple of days and then returned to Kanab.

11. Kenneth Lamb of West Jordan, Utah, who is Lloyd's cousin, visited him in the hospital, Lloyd said, "Llewellyn is the only one I trust."

12. On May 14, 1992, Lloyd left the V.A. Hospital and went to Llewellyn's home. Grayce had come from Kanab and was there with them.

13. Kenneth Lamb and his wife, Deon, visited. there was a conversation about Lloyd's need for care. Kenneth mentioned the name of a rest home. Connie called a relative who worked at

another rest home. Part of the conversation had to do with protecting Lloyd and Grayce's property from being dissipated to pay or long-term care.

14. On about May 15, 1992 iris, Llewellyn and another family member went to the office of Mr. Keith E. Eddington, an attorney. The topics of gift taxes and transfer of documents were discussed.

15. On about May 20, 1992 Connie went to a document supplier or perhaps, an office supply store, and purchased a fill-in-the-blank power of attorney form and took it to Mr. Eddington who filled in the blanks.

16. On Friday, May 29, 1992 Lloyd, Grayce, Llewellyn and Connie met in Llewellyn's home and had a conversation. The conversation probably went something like this:

Grayce: Lloyd, you're very ill. We should have you live someplace where you can get proper care, like a care center or a rest home.

Lloyd: The only rest home where I would ever go is the same one where my sister Ruth is.

Connie: (makes a phone call to the rest home where Ruth is and then reports:) There is no room there, and besides there is a waiting list to get in. My uncle works at the care center in Richfield, Utah. I'll call him and find out about their program.

Lloyd: Who will pay for all this. Will Medicare pay? Will I lose my home to help pay for all these expenses?

Connie: I just spoke with my uncle, Rodney Rasmussen, he says that Medicare will pay for rest home expenses, but they

will want you to use up all our money and property first before they will pay anything. He also said something about setting aside transfers to defraud creditors. I didn't understand it all, but something about being able to cancel transactions that had taken place for up to 18 months before admission to the rest home.

Lloyd: I don't want any of my property to go to the government. I want Grayce to have it. I'm just afraid that if she has it, Paul and Iris will try to take it from her and that she will allow them to do it. Llewellyn, why don't I give it all to you, then you can make sure that Grayce will be taken care of. Grace, is that ok with you?

Grayce: It that's what you want, whatever you say.

Lloyd: Grace and I have been together for almost 30 years, but we never did get married. Still, I think I should treat her as my wife.

Grayce: What about social security, Lloyd. Will I be able to collect under your name, even though we never got married?

Connie: That worries me. What if Mom collects social security under Dad's name and then the government discovers they weren't married. They'll want her to pay it back. If she's spent the money, then maybe the home would be in danger.

Llewellyn: Let's do this: I'll keep all the property for a year. Mom can apply for social security. If nobody says anything for a year, then we should be safe and I'll give all the property back to her. In the meantime, she can continue living in the house.

Lloyd: That sounds good to me, but I'm not dead yet. I want to go back home.

Llewellyn; I know, I know. But, let's call that lawyer and get the power of attorney signed. Then if anything should happen to you then you and Mom will be protected.

17. Mr. Eddington came, met with Lloyd, who signed the power of attorney. It was left with Llewellyn. Grayce paid Mr.

Eddington \$50.00.

18. Llewellyn made arrangements for Lloyd to stay with Kenneth and Deon Lamb. Lloyd went to their home on May 29, 1992.

19. Llewellyn and Grayce left for Kanab on Saturday, May 30, 1992.

20. Lloyd took a turn for the worse on Tuesday, June 2, 1992 while at the Lambs home. Mr. Lamb called someone and then took Lloyd back to the Veterans Administration hospital.

21. On Tuesday, June 2, 1992, Llewellyn had blank checks for account 052-50552-6. He filled out two as follows:

<u>Check #</u>	<u>Payee</u>	<u>Amount</u>	<u>Signature</u>	<u>For</u>
101	Llewellyn Sherman	\$10,000.00	Lloyd I. Hurd Llewellyn Sherman	Gift
102	Connie Sherman	\$10,000.00	Lloyd I. Hurd Llewellyn Sherman	Gift

Llewellyn presented these checks for payment along with a copy of the power of attorney. They were at the bank until noon when they left without having negotiated the checks.

22. They went to a title company. Grayce paid to have a quitclaim deed prepared. Grayce and Llewellyn signed the deed and offered it for recording at the County Recorder's office. It was recorded on June 2, 1992 at 2:55 p.m. at book 0120 page 777 of the official records of Kane County. Grayce paid the recording fee. The grantors in the deed are "Lloyd I. Hurd and Grayce Hurd, husband and wife." The grantees in the deed are "Llewellyn J.

Sherman and Connie Sherman, husband and wife, as joint tenants with full rights of survivorship, and not as tenants in common." Llewellyn signed the deed for Lloyd as his attorney in fact.

23. They went to the State Tax Commission office in Kanab where Grayce signed the titles to the 1977 Chevrolet pickup, the 5th wheel and the 18-foot travel trailers. The titles were transferred. Grayce paid all the transfer fees.

24. They returned to the bank. Llewellyn opened an account there in the name of him and Connie. A bank officer agreed to negotiate the checks and deposit them into this new account.

25. Neither Llewellyn nor Connie paid money nor transferred anything of value to Grayce in exchange or the quitclaim deed, the checks or the vehicle titles.

26. Lloyd died on June 3, 1992

27. On June 5, 1992 the Salt Lake City - County Health Department issued a Certificate of Death for Lloyd. The information listed therein is "Wife - Grayce N. Hurd \ 123 East 100 North Street #61 \ Kanab, Utah 84741."

28. Lloyd's funeral was held on June 8, 1992 in Kanab. After the services, Llewellyn and Grayce had a conversation. He said, "Let's wait a year and see what happens with Social Security. Then I'll give all the property back to you."

29. Llewellyn paid Lloyd's funeral and burial expenses and

has purchases headstones or both Lloyd and Grace. There was no evidence given at trial concerning values.

30. In July of 1993, Llewellyn bought some materials and helped install them on the roof of the home in Kanab. There was no evidence given at trial concerning values.

31. In the spring of 1993, Llewellyn transferred the title to the 1978 Teton 5th-wheel to Grayce. She has possession of it in Kanab.

32. Connie testified that she claims no interest in the home and lot in Kanab. She said that she and Llewellyn were recently divorced in Salt Lake County and that the decree awards all of her interest in that property to him.

33. More than one year has passed since Lloyd's death.

34. No claims have been made by Social Security, Veterans' Administration nor any Medicare or long term care provider.

Based upon the foregoing Findings of Fact the court now enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. A constructive trust was created for the benefit of the Plaintiff.

2. All of the property received in trust for the benefit of the Plaintiff should be immediately returned, assigned and transferred to Plaintiff including the following:


- a. A house and lot located in Kanab, Kane County, Utah
or particularly described as:

Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" of the official survey of Kanab Townsite, and running thence East 6.0 rods; thence North 108.75'; thence West 6.0 rods; thence south 108.75' to the point of beginning.

- b. 2 shares of stock in the Kanab Irrigation Company.
c. A house trailer, 5th-wheel type, Teton Brand, 1978 model
d. A travel trailer, 18 foot long, Kit Companion brand;
e. 1977 Chevrolet pickup truck
f. 1980 Oldsmobile Automobile
g. \$20,000.00 taken by Defendants from Zions First National Bank, account number 052-50552-6;

3. Plaintiff is entitled to judgment against the Defendants in the sum of \$20,000.00 together with costs of court incurred.

DATED this 27 day of September, 1996.



DISTRICT JUDGE