

2008

# John Nikols v. Goodman & Chesnoff, David Z. Chesnoff : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

Brief of Appellee, *John Nikols v. Goodman & Chesnoff, David Z. Chesnoff*, No. 20080503 (Utah Court of Appeals, 2008).  
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IN THE UTAH COURT OF APPEALS

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JOHN NIKOLS,

Plaintiff and Appellant,

v.

GOODMAN & CHESNOFF, a Nevada  
corporation; and DAVID Z. CHESNOFF,

Defendants and Appellees.

BRIEF OF APPELLEES GOODMAN &  
CHESNOFF AND DAVID Z. CHESNOFF

Appellate Case No. 20080503-CA

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APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE JUDGE JOHN PAUL KENNEDY PRESIDING

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### **STATEMENT OF JURISDICTION**

The Utah Supreme Court, which has jurisdiction pursuant to Utah Code Ann. § 78A-3-102, transferred this appeal to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-4-103. Therefore, jurisdiction is proper in the Utah Court of Appeals.

### **APPLICABLE STATUTES AND RULES**

The following rules are of central importance to the appeal: Utah Rule of Evidence 404; Utah Rule of Evidence 608; and Utah Rule of Appellate Procedure 24. Their text is included verbatim in the Addendum attached hereto.

### **STATEMENT OF THE CASE**

On or about August 31, 2007, Appellees Goodman & Chesnoff and David Chesnoff (hereinafter “Chesnoff”) obtained a judgment for unpaid attorney fees against Michael Nikols (hereinafter “Michael”) in the Third District Court for Salt Lake County. Early in the case, Chesnoff obtained a prejudgment writ of attachment against four parcels of real property located in Murray, Utah, which parcels were titled in Michael’s name (the “Properties”). John Nikols (hereinafter “John”), Michael’s father, brought a third-party action against Chesnoff demanding, among other things, the discharge of Chesnoff’s writ of attachment. John contended that he was the owner of the Properties under the theory of a purchase money resulting trust.

The lower court held that Chesnoff could not execute his judgment against the attached Properties until John had the opportunity to present his resulting trust claim in a



post-judgment evidentiary hearing. At that hearing, on April 1, 2008, the lower court found that John failed to meet his clear and convincing burden of establishing a purchase money resulting trust. John appealed the lower court's ruling from that post-judgment hearing.

### **STATEMENT OF THE FACTS**

In 1988, John purchased three of the four Properties but caused them to be titled in Michael's name. R. 2953: 58-59. John stipulated at the evidentiary hearing that the Properties were titled in Michael's name for the express purpose of avoiding John's then-existing creditors who had liens and judgments against him totaling over \$300,000.00. R. 2953: 41 (3-12); 63-69. John also stipulated that the "lion's share" of his outstanding tax liens and judgments were not paid until sometime in 1991. R. 2953: 60-62. This stipulation contradicted John's statements to the court in an earlier hearing that he had paid all of his creditors at the time of the 1988 conveyance to Michael. R. 2953: 71. In 1994, John purchased the fourth parcel of the four Properties which, once again, was titled in Michael's name. R. 2953: 59-60.

At the evidentiary hearing, John and Michael proffered testimony that John was the true owner of the Properties because he paid the purchase price for them. R. 2953: 35-36. Scott Mercer, counsel for Chesnoff, cross-examined John with respect to his resulting trust claim. R. 2953: 41. However, when Mr. Mercer sought to cross-examine Michael, Michael asserted, prior to taking the witness stand, that he would exercise his Fifth Amendment right to remain silent. R. 2953: 119-120. Furthermore, when Mr. Mercer sought to put Chesnoff

on the stand to rebut John's claims, John and Michael announced that Michael would not waive the attorney-client privilege, since Chesnoff's testimony might be prejudicial to Michael's pending criminal charges. R. 2953: 156 (24-25); 157 (1-6).

The lower court held that "John Nikols failed to meet his burden of establishing that a resulting trust existed with respect to the Murray properties." R. 2930. The lower court based its finding on the following: (1) John's failure to present adequate evidence to support his resulting trust claim (R. 2930); (2) a misrepresentation John had made to the Court in an earlier proceeding (R. 2930); and (3) the impact Michael's refusal to testify and Chesnoff's inability to testify had on Chesnoff's ability to present his case and to determine the credibility of John and Michael (R. 2930). John appealed this decision.

### **SUMMARY OF THE ARGUMENT**

John failed to marshal the evidence. John failed to prove the existence of a purchase money resulting trust by clear and convincing evidence. John stipulated that the express purpose of putting title to the Properties in Michael's name was to avoid John's then-existing creditors. John further stipulated that this constituted an improper purpose. Utah law does not allow one with unclean hands to seek aid from a court in equity. Thus, John's scheme to avoid his creditors precluded him from establishing the equitable remedy of a resulting trust.

Even assuming *arguendo* that John did have clean hands, he still did not satisfy the clear and convincing burden necessary to establish a resulting trust. When John purchased

the Properties but had them titled in Michael's name, it created a presumption under Utah law that John intended to gift the Properties to his son. Utah law does not allow John to overcome this presumption merely by showing that he paid the purchase price, taxes, and maintenance on the Properties. Furthermore, John failed to provide testimony from Michael – the only other party to the alleged resulting trust – that the purchase was anything other than a gift to Michael. The lower court properly discounted John's testimony on the basis that John had earlier misrepresented key facts to the Court.

The lower court correctly drew an adverse inference against John when John did not call Michael as a witness at the evidentiary hearing. Chesnoff's right to cross-examine Michael was absolute and Chesnoff's case would have been materially prejudiced had the lower court allowed Michael to testify and then avoid meaningful cross-examination by asserting the Fifth Amendment. Michael, as John's son, was a witness that was peculiarly in John's control to produce. The fact that John did not produce Michael as a witness created an inference that Michael's testimony would have been adverse to John's resulting trust claim.

The lower court also correctly drew an adverse inference against John when John objected to Chesnoff's being called as a witness. Michael and John refused to waive Michael's attorney-client privilege, effectively preventing Chesnoff from testifying. John denied Chesnoff the right to put on his evidence and rebut John's resulting trust claim.

## ARGUMENT

### **I. JOHN COMPLETELY FAILED TO MARSHAL THE FACTUAL EVIDENCE AS REQUIRED BY UTAH RULE OF APPELLATE PROCEDURE 24(a)(9).**

John failed to marshal all of the relevant evidence introduced at trial with respect to his resulting trust claim. For this reason alone, the lower court's ruling should be upheld.

Utah Rule of Appellate Procedure 24(a)(9) states in relevant part: "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." This Court has described the marshaling process as "arduous and painstaking." West Valley City v. Majestic Investment Company, 818 P.2d 1311, 1313 (Ut. App. 1991). It involves detailing all of the facts and evidence presented at trial that tends to support the lower court's findings and then showing why those findings are clearly erroneous. Id. at 1313.

The court in Majestic further stated "[t]he marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position...[T]he challenger must present...every scrap of competent evidence introduced at trial which supports the very findings appellant resists." Id. at 1315. Merely rearguing all of the evidence supporting one's position does not constitute proper marshaling. C.E. Butters Realty and Const., Inc. v. McFarland, 2004 WL 1368145 at \*1 (Utah App. 2004) (unreported).

Mentioning relevant facts throughout an appellant's brief does not satisfy the marshaling requirement. To comply with the marshaling requirement, "appellants must marshal all the favorable evidence at the point which they challenge the factual finding." Roderick v. Ricks, 2002 UT 84, fn. 11, 54 P.3d 1119; *see also* Tanner v. Carter, 2001 UT 18 ¶¶ 18-19, 20 P.3d 332 (concluding appellant's listing of favorable facts in fact section did not meet marshaling requirement). A failure to do so creates an assumption "that all the trial court's findings are supported by the evidence." Utah Med. Prods. v. Searcy, 958 P.2d 228, 233 (Utah 1998). For this reason, Utah courts have "shown no reluctance to affirm when the appellant fails to adequately marshal the evidence." Majestic, 818 P.2d at 1313. (citations omitted).

In his appellate brief, John failed to properly marshal, or even mention, at least nine key points of evidence which supported the lower court's finding that John had failed to establish the existence of a purchase money resulting trust at trial:

1. At trial, the parties stipulated on the record that the titling of the properties to Michael in 1988 was for an improper purpose – to avoid John's creditors. Judge Kennedy and John's counsel, Rebecca Hyde, had the following exchange:

THE COURT: Well, I asked him for a stipulation. Are you willing to stipulate to that or not?

MS HYDE: To avoid the creditors, if the Court characterizes that as an improper purpose, yes, he did.

THE COURT: Okay. And this was to avoid John's creditors.

MS HYDE: John's creditors, that's correct.

THE COURT: All right. Well, we'll accept that as a further stipulation then to what we've already received.

R. 2953: 41.

2. Michael was made president of John's restaurant, Coachman's, about the same time Michael took title to the Properties. R. 2953: 49. This evidence reasonably infers that John was beginning to give the responsibility for his assets to his children at this time.

3. On cross examination, John further admitted he had outstanding tax liens and judgments against him at the time the Properties were titled in Michael's name. R. 2953: 57-58. This demonstrates the true reason for putting title to the Properties in Michael's name.

4. In 1994, John purchased the last of the four Properties. R. 2953: 59. The parties stipulated at trial that most of the tax liens and other judgments against John had been satisfied three years earlier, in 1991. R. 2953: 71. That John titled the fourth Property in Michael's name even after the majority of creditors had been paid is further evidence of his intent to gift the Properties to Michael.

5. John admitted at trial that he had not paid his creditors at the time the 1988 conveyance occurred. R. 2953: 64. However, John had told the Court in an earlier proceeding that those creditors had been paid prior to 1988. R. 2953: 60 (21-25); 61-62.

6. Michael transferred the Properties back to John only after Chesnoff's pre-judgment writ of attachment, some 18 years after the original conveyance to Michael.

According to John's testimony, the various tax liens and judgments had all been paid about fifteen years earlier. R. 2953: 76.

7. John admitted that he paid all of the attorney fees for Michael's other lawyers. John told Chesnoff that John would help his son "to the maximum." R. 2953: 114. This evidences John's custom of gifting things to Michael.

8. John stated that the source of income he used to pay the mortgages on the Properties was from Coachman's Restaurant. R. 2953: 115-116. However, Michael had taken over the management of Coachman's from John at the time. R. 2953: 49. The lower court could have concluded Michael was indirectly paying for the Properties through his management of Coachman's.

9. On October 18, 2005, Michael pled guilty in federal court to a count of conspiracy to distribute narcotics.

John also failed to marshal several of the lower court's relevant findings as detailed in its order:

1. The April 1, 2008, evidentiary hearing was the time and place for John Nikols to present evidence supporting his opposition to the Writ of Attachment and, specifically, to present evidence supporting his claim that a resulting trust in his favor existed. R. 2930.
2. At the February 2008 hearing in this matter, John Nikols stated to the Court that he had paid all of the judgments and liens against him as of April 13, 1988, when the first of the Murray Properties was purchased in the name of Michael Nikols. R. 2930.

3. The Stipulation of Facts presented to the Court on April 1, 2008, together with the testimony of John Nikols established that John Nikols' previous claim of having paid his liens and judgments was not accurate. R. 2930.
4. Michael Nikols refused to waive his Fifth Amendment right to remain silent if he were called to be cross-examined in this proceeding. Thus, Chesnoff would not be able fully to cross-examine Michael Nikols with regard to the claim of the existence of a resulting trust. R. 2930.
5. The credibility of John Nikols and Michael Nikols regarding the existence of a resulting trust is a fundamental issue in this proceeding. Chesnoff's inability to cross-examine Michael Nikols to assist in determining Michael Nikols' credibility as well as that of his father John Nikols was prejudicial to Chesnoff. R. 2930.

John either completely omits the foregoing evidence or scatters references to it throughout his brief. In either case, John clearly fails to marshal "all the favorable evidence at the point which [he] challenge[s] the factual finding." Roderick 54 P.3d at 1129. John has not assumed the position of devil's advocate, and he has not stated every "scrap" of evidence that supports the lower court's findings. Majestic, 818 P.2d at 1313. Because John has failed to adequately marshal the evidence, this Court should "show[] no reluctance to affirm" the lower court's finding that John failed to establish a resulting trust. Id.

## **II. JOHN NIKOLS FAILED TO PROVE THE EXISTENCE OF A PURCHASE MONEY RESULTING TRUST.**

### **A. John Nikols' unclean hands preclude him from obtaining equitable relief.**

A purchase money resulting trust is an equitable remedy "designed to implement what the law assumes to be the intentions of the putative trustor." Matter of Hock's Estate, 655



P.2d 1111, 1114 (Utah 1982). It is axiomatic that a party seeking equity must come to the court with clean hands. Park v. Jameson, 364 P.2d 1, 3 (Utah 1961). This means that “a party who seeks an equitable remedy must have acted in good faith and not in violation of equitable principles.” Hone v. Hone, 2004 UT App 241, ¶ 7, 95 P.3d 1221; *see also* Jacobsen v. Jacobsen, 557 P.2d 156, 158 (Utah 1976) (party who engaged in fraud or deceit in business under consideration will be denied equitable relief when fairness and good conscience so demand).

Section § 444 of the Restatement (Second) of Trusts states that a resulting trust cannot be established for an illegal purpose:

Where a transfer of property is made to one person and another pays the purchase price in order to accomplish an illegal purpose, a resulting trust does not arise if the policy against unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction.

The phrase “illegal purpose” is not limited to instances where a party has broken the law. Rather, § 444 most commonly applies in situations where “the purchaser of property takes title in the name of another for the purpose of defrauding his creditors.” Id. at § 444, cmt. a; *see also* In re Valente, 360 F.3d 256, 264 (1st Cir. 2004) (upholding this interpretation of § 444). Indeed, “[t]he law will not permit a party to deliberately place his property out of his control for a fraudulent purpose and then, through the intervention of a court of equity, assist him in regaining the property after the fraudulent purpose has been accomplished. Rather,

it will leave the parties as it finds them.” Peric v. Chicago Title & Trust Co., 411 N.E.2d 934, 935 (Ill. App. 1980).

Utah courts have consistently refused to establish resulting trusts where the party seeking the remedy has engaged in acts against public policy. For example, in Olsen v. Bank of Ephraim, a husband purchased land and sheep, but took title in his wife’s name in order to evade certain United States Forest Service regulations. 68 P.2d 195 (Utah 1937). The Utah Supreme Court held that the husband could not assert an equitable interest in the land, on the basis that a resulting trust will not arise out of acts against public policy. Id. at 198. The Court further stated that “[a] court of equity will not lend its aid to relieve a party from the consequences of his fraud, but will leave him where his fraudulent undertaking has placed him.” Id.

In Hone v. Hone, a home was owned by a Trust. 2004 UT App 241, ¶2. Alta Hone lived in the home and was the beneficiary of the Trust and her two sons, Alton and Lloyd, were the trustees. Id. at ¶3-4. All desired for Alta to receive Medicaid benefits but did not want a Medicaid lien to attach to the home. Id. at 1222. Under Medicaid rules, if all property rights in the homestead were transferred to Lloyd, who had lived in the home for the requisite period under Medicaid laws, then a lien could be avoided. Id. However, Alton and Lloyd further agreed that when their mother passed away, the property would be transferred back to the Trust. Id. The practical effect of this agreement was that Lloyd continued to hold the property in trust for the Trust, and thus the transfer did not comply with

the Medicaid rule that all interest in the property be transferred to Lloyd. *Id.* at ¶8. Later, when Lloyd refused to transfer the home back into the Trust, Alton sued. The Utah Court of Appeals held that “Alton Hone did not act in good faith when he participated in the original transfer of the Homestead to avoid a Medicaid lien,” and thus was not entitled to the equitable remedy of having the Court reform the deed. *Id.* at ¶7.

In the instant case, it is undisputed that title to the Properties was taken in Michael’s name in order to avoid John’s creditors. John stipulated to that fact at trial. R. 2953: 41. John further stipulated that John had outstanding creditors and judgments against him in 1988 when the first three Properties were put in Michael’s name. R. 2953: 64. These judgments and liens amounted to well over \$300,000.00. R. 2953: 41 (3-12); 63-69. As such, John comes to the Court with unclean hands. For several years, John avoided his creditors by shifting assets to his son, Michael. Now that, some 20 years later, Michael has a judgment against him, John seeks the imposition of an equitable trust to protect the Properties from Michael’s creditor. Because John comes before this Court with unclean hands, the Court should “leave the parties as it finds them,” and allow Chesnoff to proceed with his writ of attachment. *Peric*, 411 N.E.2d at 935; *Olsen*, 68 P.2d at 198.

**B. Assuming, *arguendo*, that John Nikols has clean hands, he did not establish a purchase money resulting trust by clear and convincing evidence.**

When a court is “called upon to alter a deed or other writing which is regular in form and is presumed to convey a clear and unambiguous title...the party alleging the variance

must prove the claim by clear and convincing evidence.” Matter of Hock's Estate, 655 P.2d 1111, 1114 (Utah 1982) (citing Jacobson, 557 P.2d 156 and Pagano v. Walker, 539 P.2d 452 (Utah 1975); *see also* Mattes v. Olearain, 759 P.2d 1177, 1179 (Utah App. 1988) and Baker v. Pattee, 684 P.2d 632, 634 (Utah 1984) (party attacking validity of written instrument must do so by clear and convincing evidence)). That is an onerous burden, greater than the preponderance of the evidence standard typically found in civil cases. Tanner, 2001 UT 18 at ¶33. Clear and convincing evidence “clinches what might be otherwise only probable to the mind.” Sine v. Harper, 222 P.2d 571, 581 (Utah 1950). It must be convincing to the point that “there remains no serious or substantial doubt as to the correctness of the conclusion.” Id.

Generally, conveyances from parent to child give rise to an inference that a gift was intended:

[A] conveyance on a consideration from a husband, parent, or other person, where title is taken in the name of the wife, child or other natural object of the purchaser’s bounty, generally does not raise, but on the contrary rebuts, a resulting trust, and raises a presumption of a gratuitous settlement on the grantee.

In re Clemens, 472 F.2d 939, 943 (6th Cir. 1972) (citation omitted); *see also* Matter of Hock's Estate, 655 P.2d at 1114; and §§ 442 and 443 of *Restatement (Second) of Trusts*. Thus, in familial transactions, the advocate of the trust must establish “by clear, strong, unequivocal evidence which convinces the trier of fact beyond doubt that such trust was

created.” Hocking v. Hocking, 394 N.E.2d 653, 658 (Ill. App. 1979). If the transaction is “susceptive of any other reasonable interpretation, then no trust will be found.” Id.

Because John is Michael’s father, the Properties are assumed to be a gift. It is John’s burden to rebut this presumption with clear and convincing evidence. In re Clemens, 472 F.2d at 943. John did not meet his burden. It was impossible to do so without the son’s testimony. Michael might have testified that the Properties belonged to him. Furthermore, while John claims title was placed in Michael’s name in order to avoid creditors, he cannot explain why the Properties remained in Michael’s name until 2006, 18 years after the initial purchases, and many years after John’s judgment creditors had been paid. In fact, while John’s various liens and judgments had been paid years earlier, Michael only conveyed the Properties to John after Michael’s creditors attached the Properties. Moreover, while John may have paid the mortgages on the Properties, this does not preclude the possibility that he did so for Michael’s benefit, especially where Michael was employed by John at the time.

It was John’s burden to show a “manifest intention” to create a resulting trust with Michael. However, John’s testimony, standing alone, without any testimony from the other prong of the alleged resulting trust, did not meet the clear and convincing burden of proof. Furthermore, the lower court was skeptical of John’s credibility, noting that John had stated facts directly to the Court in an earlier proceeding that were “not accurate.” R. 2930. Thus, the lower court had reason to discount John’s self-serving testimony, which is the only evidence John offered at trial. While Michael’s testimony could have bolstered John’s claim,

it also could have established Michael's belief that the Properties were a gift and no resulting trust was ever intended.

The law unquestionably presumes that a transaction involving a father who pays the purchase price for real property and puts the title in his son's name is intended as a gift. John ultimately failed to provide clear and convincing evidence to the contrary. It should also be noted that the lower court was in the best position to "view the witnesses and assess their credibility" and, as such, its findings should be given great deference. Hocking, 394 N.E.2d at 658. For these reasons, there can be no resulting trust and the lower court's ruling should be affirmed.

John cites several cases which he claims support his position that the lower court should have found a resulting trust in his favor. His reliance on those cases is misplaced. For example, the ruling in Woodard v. Funderburk actually favors Chesnoff's position. 846 So.2d 363 (Ala. App. 2002). In Woodard, a man named Larry purchased property but caused it to be titled in the name of his son, Jason, to avoid a judgment against him and in favor of the Mississippi Tax Commission. Later, one of Jason's creditors, Sabrina, attempted to attach the property. The court held that "a fraudulent conveyance is valid as to all the world except creditors of the grantor." Id. (citation omitted). Thus, with respect to the conveyance to Jason, the court concluded, "[a]s to Sabrina (and anyone other than the Mississippi State Tax Commission), the 1994 conveyance was valid" and was therefore attachable. Id. In other words, only the Tax Commission, as Larry's creditor, would have standing to contest the conveyance to Jason.

Similarly, in the instant case John had judgments against him when he purchased the Properties. John caused the Properties to be titled in Michael's name in order to avoid his creditors. According to Woodard, only John's creditors that existed at the time the Properties were titled in Michael's name have standing to contest the transactions. As to everyone else, including Michael's creditors (and therefore Chesnoff), the 1988 and 1994 conveyances were valid. Indeed, "what might be considered a fraudulent conveyance is valid as to all the world except creditors of the grantor". Id. In attaching the Properties, Chesnoff is properly relying on the conveyances to Michael, just as Sabrina relied on Larry's conveyance to Jason.

John also cites to Capital Assets Financial Services v. Lindsay, 956 P.2d 1090, 1095 (Utah App.1998). In Capital Assets, Lott, the owner of real property, quit claimed certain property to Christensen, intending to convey enough interest for Christensen to secure financing with the property as collateral. Id. at 1096. Lott then intended for Christensen to transfer to Capital Assets the power to sell the land for an unpaid debt. Id. It was undisputed that neither party intended Christensen to have any "right, title, interest or claim" to the property. Id. at 1090. While Christensen held title to the property, a judgment lien against Christensen attached. Id. This Court held that Christensen's ownership interest in the property was sufficient to uphold the attachment, stating:

It was not within the trial court's power to alter the judgment lien's quality on equitable grounds. As a matter of law, where an undisputed owner of fee simple title to real property conveys that real property to another by a standard form of quitclaim deed that contains no express reservation or exception to the title transferred, the grantee takes fee simple title.

Id. at 1096; *see also* Jacobson v. Jacobson, 557 P.2d 156, 158 (Utah 1976).

In the instant case, John caused Michael to take title to the Properties by standard warranty deeds. There is no evidence that those deeds contained any express reservations or exceptions to the title transferred. Thus, it is assumed Michael took title in fee simple. Capital Assets, 956 P.2d at 1096. According to Capital Assets, this is clearly a sufficient interest in the real property for a creditor of Michael's, such as Chesnoff, to attach. Id.

In Bill Nay & Sons Excavating v. Neeley Const., the court found that the defendant had fraudulently conveyed certain property to another entity to avoid a creditor. 677 P.2d 1120, 1121 (Utah 1984). The court then held that a resulting trust had been established in the defendant's favor for the sole purpose of allowing the creditor, in equity, to attach to the transferred property. Id. at 1123.

Again, Chesnoff does not dispute that the equitable remedy of a resulting trust was available to John's creditors when the Properties were titled in Michael's name. That is the holding in Neeley. However, Neeley does not stand for the proposition that John, after working a fraud on his creditors, can come in equity and claim the remedy of resulting trust to avoid Michael's creditors.

The facts in Hergenreter v. Sommers are inapposite to the instant case. 535 S.W.2d 513 (Mo. App. 1976). In Hergenreter, children had paid for property but their parents took title because of the children's status as minors. The parents' creditors attempted to attach to the property. The court found that a gift was not presumed when children, rather than a



parent, paid the consideration. In addition, the transferor, the Hergenreter children, had not attempted to avoid creditors and thus came to court with clean hands.

**III. THE LOWER COURT CORRECTLY PRESUMED AN ADVERSE INFERENCE WITH RESPECT TO MICHAEL NIKOLS' REFUSAL TO TESTIFY.**

**A. Evidence of Michael Nikols' drug trafficking would have been admissible in certain contexts.**

To say that evidence of drug trafficking is categorically inadmissible is contrary to Utah law. "Evidence of any fact which rationally tends to prove any material issue is admissible unless forbidden by some specific rule, and should be received if offered for an admissible purpose although it would be inadmissible if offered for some other purpose." State v. Neal, 254 P.2d 1053, 1056 (Utah 1953).

Specifically, Utah Rule of Evidence 608(c) states "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." This rule gives "broad discretion to the trial court to allow or disallow inquiry concerning any witness's prior bad acts..." State v. Valdez, 141 P.3d 614, 617 (Utah App. 2006).

Utah Rule of Evidence 404(b) states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

John frames this issue by stating “[Mr. Mercer] wanted to cross examine Michael about the pending trafficking charge in order to impeach his credibility.” Brief of Appellant, pg. 23. John further argues that “nothing Mr. Chesnoff wanted to ask Michael Nikols would have been admissible.” *Id.* at 22-23. Framing the issue in this light is far too limiting. Mr. Mercer did not necessarily intend to bring up Michael’s crimes for impeachment purposes only. That line of questioning could have been used to show the parties’ motive for transferring properties back and forth. It could have been used to establish the parties’ true intentions concerning the transactions, as well as their knowledge that a resulting trust was not intended. It also could have been used to show bias, motive to lie or misrepresent, or to show a plan or scheme pursuant to URE 404(b) and 608(c), all of which can be proper uses of character evidence. Finally, Michael could have opened the door for Mr. Mercer by volunteering information regarding his drug trafficking, thus putting it at issue.

John cites Crimm v. Missouri Pacific R. Co. for the proposition that “illegal drug use or transactions, without more, do not show untruthfulness” and thus may not be used to impeach. 750 F.2d 703 (8th Cir. 1984). However, the key phrase is “without more.” In Crimm, the witness’s only involvement with drugs was that he had used marijuana two or three years prior to trial. *Id.* Here, Michael’s alleged actions are significantly more extensive than those in Crimm. Michael is accused of being the kingpin in a multi-person drug ring to distribute narcotics. R. 2953: 129; 155 (10-17). The drug ring was based out of Coachman’s Restaurant, owned by John. Mr. Mercer’s questioning about these actions,

including what properties were involved in the trafficking, could have revealed circumstances about the alleged resulting trust, thus making the evidence admissible. It is possible that John knew about the drug trafficking in his restaurant and that his titling of some property in his name and some in Michael's name was a scheme to protect both of their assets from the consequences of their illegal activity.

Moreover, the credibility of the witnesses was a core component of this case. Michael is John's son, and they have been in business together for over 18 years. Their business interests are interconnected and thus Michael had a serious potential bias and motive to lie on his father's behalf. Without the opportunity to impeach Michael, Chesnoff's case would have been severely prejudiced. As the lower court stated: "I don't feel I can accept the testimony presented without making the witnesses available to be cross-examined. I think credibility is a very important issue here. There's serious issues – questions about credibility..." R. 2953: 156 (15-18).

Neither party can accurately predict what testimony would have been elicited had Michael testified and been subject to cross-examination. Evidence "should be received if offered for an admissible purpose although it would be inadmissible if offered for some other purpose." Neal, 254 P.2d at 1056. John cannot hypothetically declare that information regarding Michael's drug trafficking would have been categorically inadmissible without knowing the context and purpose for which that evidence was to be elicited.

**B. The lower court properly presumed an adverse inference against John Nikols with respect to Michael Nikols' refusal to testify.**

Courts have recognized the missing witness inference for over a century. See Graves v. United States, 150 U.S. 118, 121 (1893). Essentially, the doctrine is that if a party has the power to produce a witness whose testimony would elucidate a transaction but does not, his failure to produce the witness permits an inference that, had the testimony been produced, it would have been unfavorable. State v. Smith, 706 P.2d 1052, 1057 (Utah 1985); *see also* Wigmore, Evidence (3d Ed. 1940) § 285, 162 (“The failure to bring before the tribunal some circumstance, document or witness ... serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to that party.”). For purposes of this inference, a party has power to produce a witness if “the witness is physically available only to the opponent, or that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party.” Smith, 706 P.2d at 1057-1058; *see also* State v. Thompson, 776 P.2d 48 (Utah 1989).

The missing witness inference extends to civil cases and a witness's invocation of his Fifth Amendment right to silence.

[T]he proposition is well established that in civil cases a party's failure to respond to valid inquiries on the basis of the privilege against self-incrimination can give rise to an adverse inference against that party at trial.

First Federal Sav. & Loan Ass'n of Salt Lake City v. Schamanek, 684 P.2d 1257, 1267 (Utah 1984). Indeed, “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them[.]” Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

In this case, Michael has been an employee of Coachman's Restaurant since he was 14 years old. R. 2953: 87 (17-20). At one point, Michael was president of the restaurant and actively ran the business for his father. R. 2953: 49. Michael and John were also, at one point, represented by the same legal counsel. R. 147: (10-12). Michael was clearly a witness that was “peculiarly” within John's power to produce because they enjoy “the type of relationship...that pragmatically renders [Michael's] testimony unavailable” to Chesnoff. Smith, 706 P.2d at 105 8. Furthermore, Michael's status as long time employee of Coachman's makes his refusal to testify (without waiving his Fifth Amendment rights) attributable to John, his employer. Rad Services, Inc. v. Aetna Casualty and Surety Company, 808 F.2d 271, 275 (3rd Cir. 1986); *see also* Brink's Inc. v. City of New York, 171 F.2d 700 (2d Cir. 1983).

Therefore, the lower court's inference that Michael's testimony would have been adverse to John was appropriate under the circumstances.

**IV. THE COURT CORRECTLY IMPOSED AN ADVERSE INFERENCE AGAINST JOHN NIKOLS WITH RESPECT TO MIKE NIKOLS' REFUSAL TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE.**

In his brief, John incorrectly states that “John Nikols established his case before submitting it to Mr. Chesnoff’s witnesses, at which point Mr. Chesnoff chose not to testify.” App. Brief 34. In reality, Chesnoff was prohibited from effectively presenting his case by John and Michael’s refusal to waive the attorney-client privilege.

At trial, counsel for Chesnoff stated:

It’s Mr. Chesnoff who informed me at the break that he is concerned about Mr. Nikols and what he is about to say. And this is his idea. *He’s willing to testify.* I know what his testimony is going to be,... and I think it causes Mr. Michael Nikols some problems.

R. 2953: 125 (1-5) (emphasis added). Chesnoff was clearly ready and willing to testify at trial. At that point, the lower court asked Michael if he was willing to waive the attorney-client privilege created while Michael was represented by Chesnoff. R. 2953: 156-157 (1-6). Michael refused. John’s counsel also made it clear that she did not want Michael to waive his attorney-client privilege as to Chesnoff’s testimony. R. 2953: 156 (24-25); 157 (1-6). As a result, Chesnoff was effectively prevented from putting on his case, because he was unable to testify about Michael and John and about any improper purpose regarding the Properties.

The missing witness inference, discussed *supra*, also applies to John’s failure to allow Chesnoff to testify as to what he knew. Chesnoff was present at the hearing and more than willing to testify as to discussions he had with Michael and John regarding the Properties. Chesnoff’s testimony would have been probative of whether there was a purchase money resulting trust. However, Michael refused to waive the attorney-client privilege, both on his

own and via John's legal counsel. The attorney-client privilege could not have been waived unilaterally by Chesnoff.

John, the suppressing party, had control of Chesnoff's testimony in the sense that Michael is John's son and business partner and their interests in the outcome of the case were interconnected. Michael (and John's counsel) refused to waive Michael's attorney-client privilege, thus preventing Chesnoff from putting on his evidence. For these reasons, the lower court properly inferred that Chesnoff's testimony would have been adverse to John's case.

John cites Roth v. New Hotel Monteleone for the proposition that the adverse inference is not intended to penalize parties who do not have the power to produce witnesses to testify. 978 So.2d 1008 (La. Ct. App. 2008). However, Roth is readily distinguishable. In that case, the court held that the missing witness inference did not apply where "evidence in the record indicates that there were witnesses who were no longer in the [suppressing party's] employ and were dispersed by Hurricane Katrina..." Id. at 1012. In this case, Chesnoff was in the courtroom and ready to take the stand.

**V. CHESNOFF COULD NOT HAVE ESTABLISHED HIS CLAIMS AGAINST JOHN NIKOLS WITHOUT DISCLOSING PRIVILEGED COMMUNICATIONS WITH MICHAEL NIKOLS.**

At trial, John sought to limit Chesnoff's testimony exclusively to issues dealing with the Properties. R. 2953: 125 (6-18). However, it is fundamental that "either party is entitled to introduce testimony to rebut evidence introduced by his adversary." Panhandle Construction Co. v. City of Spearman, 89 S.W.2d 1053, 1055 (Tex. Civ. App. 1954). Indeed,

a basic principle of justice is that “a party seeking adjudication of his rights should be neither prevented nor dissuaded from presenting any evidence he desires which is competent and material to the issues.” Cooper v. Industrial Commission, 387 P.2d 689, 690 (Utah 1963).

The lower court was clearly concerned about John’s request to limit Chesnoff’s testimony. Judge Kennedy stated:

I can conceive of a number of different scenarios during the course of a conversation with a client where different subjects are discussed and one thing leads to another... and discussing different matters during the course of that, where – where the money might come from, where he wouldn’t want it to come from, etcetera, etcetera...I can’t say that ... they only were going to talk about four properties and that’s all.

R. 2953: 125-126. The lower court also pointed out that John was “picking and choosing what [Chesnoff] can testify to... . But he may say ‘Well, the first thing I said to John was, well, John, I don’t want to receive any drug money here’ and there was an ensuing discussion regarding the receipt of drug money.” R. 2953: 135.

The lower court further reasoned as follows:

I don’t feel I can accept the testimony presented without making the witnesses available to be cross-examined. I think credibility is a very important issue here. There’s serious issues – questions about credibility and – and we’re trying to go back 18 years and have the Court believe that this is what was done and this is the reason it was done, and you should accept our version, the Nikols version, without being able to cross-examine it or call the opposing witnesses...*I’ve got to hear the whole – the whole ball of wax or none of it.*

R. 2953: 156; 144 (2-14); 145 (2-3) (emphasis added). The lower court then concluded: “If [counsel for John] is willing to let Mr. Chesnoff testify, I’ll be happy to – to



have him testify and hear and waive it. Absent letting him testify, I am going to presume...that the evidence would go against [John].” R. 2953: 157 (1-6).

As the lower court noted, a key issue in the federal seizure proceeding was whether drug money was used to acquire the Properties. R. 2953: 139-140. As counsel for John and Michael on this issue, Chesnoff had direct communications with them about how the Properties were purchased. That evidence would have been directly relevant to John’s resulting trust claim. Furthermore, Chesnoff had discussions with John and Michael about the payment of his legal retainer, which included discussions about who owned the Properties. Because John and Michael were unwilling to waive the attorney-client privilege, Chesnoff was unfairly limited in his testimony and therefore could not have put on his entire case.

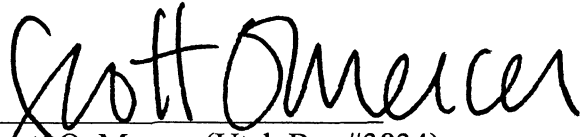
The lower court correctly ruled that if Chesnoff testified, all relevant issues would be open for questioning and he should not be limited by the attorney client privilege. However, John refused to allow Chesnoff to testify under those terms. Thus, while Chesnoff was ready and willing to testify as to the conversations he had with John and Michael regarding the Properties, he was prohibited from doing so by John. On that basis, the lower court correctly inferred that Chesnoff’s testimony would have been adverse to John’s resulting trust claim.

### CONCLUSION

Based on the foregoing arguments, evidence, and case law, Appellees respectfully request that the Court affirm the lower court's findings of fact and conclusions of law and affirm that court's ruling to allow Appellees to proceed with their writ of attachment.

**DATED** this 30<sup>th</sup> day of October 2008.

KESLER & RUST

A handwritten signature in black ink that reads "Scott O. Mercer". The signature is written in a cursive style with a large, looping "S" at the beginning.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing **BRIEF OF APPELLEES**, in, postage prepaid, this 30<sup>th</sup> day of October 2008, to:

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/s/ Scott O. Mercer

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# **ADDENDUM**

Westlaw

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Utah Rules of Evidence, Rule 404

**C**

WEST'S UTAH CODE ANNOTATED

STATE COURT RULES

UTAH RULES OF EVIDENCE

ARTICLE IV. RELEVANCY AND ITS LIMITS

→RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS;  
OTHER CRIMES

**(a) Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(a)(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(a)(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(a)(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

**(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

**(c) Evidence of similar crimes in child molestation cases.**

(c)(1) In a criminal case in which the accused is charged with child molestation, evidence of the commission of other acts of child molestation may be admissible to prove a propensity to commit the crime charged provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

Utah Rules of Evidence, Rule 404

(c)(2) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c)(3) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

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Utah Rules of Evidence, Rule 608

**C**

WEST'S UTAH CODE ANNOTATED

STATE COURT RULES

UTAH RULES OF EVIDENCE

ARTICLE VI. WITNESSES

→ **RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS**

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(c) **Evidence of bias.** Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

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## Rules App.Proc., Rule 24

**C**

WEST'S UTAH COURT RULES ANNOTATED  
 STATE COURT RULES  
 UTAH RULES OF APPELLATE PROCEDURE  
 TITLE V. GENERAL PROVISIONS  
 →RULE 24. BRIEFS

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

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

(a)(2) A table of contents, including the contents of the addendum, with page references.

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

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

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

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

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

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

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



## Rules App.Proc., Rule 24

rule.

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

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

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

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

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

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

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

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

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

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

**(c) Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements

of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

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

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

**(f) Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

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

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

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

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

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall

reply to the Brief of Cross-Appellee.

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

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

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

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

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 Restatement (Second) of Trusts § 442 (1959)

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Chapter 12. Resulting Trusts

Topic 4. Where Property Is Transferred To One Person And The Purchase Price Is Paid By Another

§ 442. Purchase In The Name Of A Relative

[Link to Case Citations](#)

**Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property.**

See Reporter's Note.

**Comment:**

*a. To what relatives rule is applicable.* The application of the rule stated in this Section is not determined by the closeness of the relationship or the extent of natural affection between the payor and transferee. It is rather a question of whether the transferee stands in such a relationship to the payor that it is probable that the payor intends to make a gift to the transferee. It is inferred that he does intend to make a gift if the transferee is by virtue of the relationship a natural object of his bounty.

The rule stated in this Section is applicable where the payor and transferee respectively are in the relation of husband and wife; father and child; mother and child; father-in-law and son-in-law; grandparent and grandchild. It applies to the relation of parent and child although the child is an illegitimate or an adopted child. It is immaterial that the child is an adult. It applies also where the payor stands in loco parentis to the transferee; that is, where the payor whether or not related to the transferee has assumed to act in the place of a parent of the transferee.

It does not apply where the payor and transferee respectively are wife and husband, or child and parent. It does not apply where the payor does not stand in loco parentis to the transferee merely because the payor and transferee respectively are brothers and sisters, uncle or aunt and nephew or niece.

It applies where the payor is a man and is engaged to be married to the transferee, but not where the transferee is already married to another person. It does not apply to unmarried persons unlawfully cohabiting.

*b. Effect of the rule.* The fact that the transferee is a wife, child or other natural object of bounty of the payor is more than merely a circumstance tending to rebut the inference of a resulting trust. It is of itself a circumstance sufficient to raise an inference that a gift was intended, and the burden is upon the payor seeking to enforce a resulting trust to prove that he did not intend to make a gift to the transferee. See § 443. If the transferee

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is related to the payor, but is not in such a relation as to be a natural object of bounty of the payor, this circumstance is not enough to raise an inference that a gift was intended, but it is a circumstance which can be shown with other circumstances as tending to rebut the inference that a resulting trust arises. See § 441, Comment *b*.

#### Case Citations

Reporter's Notes & Cross References through December 1958

— June 1986 Case Citations January 1959 — June 1986

— June 2007 Case Citations July 1986 — June 2007

— April 2008 Case Citations July 2007 — April 2008

Reporter's Notes & Cross References through December 1958:

#### REPORTER'S NOTES

In the absence of evidence of a contrary intention, a resulting trust does not arise where the grantee is a natural object of bounty of the payor. See the following cases which cite the Restatement of Trusts, § 442. *Blaine v. Blaine*, 63 Ariz. 100, 159 P.2d 786 (1945); *Altramano v. Swan*, 20 Cal.2d 622, 128 P.2d 353 (1942); *State v. One Buick Sedan Automobile*, 216 Minn. 129, 12 N.W.2d 1 (1943); *Mott v. Iossa*, 119 N.J.Eq. 185, 181 A. 689 (1935); *Dahl v. Simonsen*, 157 Or. 238, 70 P.2d 49 (1937); *Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg*, 136 Pa.Super. 413, 7 A.2d 519 (1939); *Dunning v. Dunning*, 30 Del.Co.Rep. 361 (Pa.1941); *Caulk v. Caulk*, 211 S.C. 57, 43 S.E.2d 600 (1947); *Norman v. Kernan*, 226 Wis. 78, 276 N.W. 127 (1937); *Hanus v. Jankowski*, 256 Wis. 187, 40 N.W.2d 573 (1949).

In general as to the effect of the purchase of property in the name of a relative, see 4 Scott on Trusts (2d ed.1956) § 442; Bogert, Trusts and Trustees, §§ 459, 460.

#### Cross References to

##### 1. Digest System Key Numbers

Descent and Distribution  115

Trusts  81(1-4)

##### 2. A.L.R. Annotation

Presumption as to advancement or trust where property is purchased with money of parent and title taken in name of child. 26 A.L.R. 1126, s. 31 A.L.R.2d 1036.

Marital misconduct as raising trust in property paid for by one spouse but conveyed to the other. 29 A.L.R. 218.

Resulting trust in respect of property accumulated by a man and woman living together in illicit relations or under void marriage. 31 A.L.R.2d 1255.



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Restatement (Second) of Trusts § 443 (1959)

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Chapter 12. Resulting Trusts

Topic 4. Where Property Is Transferred To One Person And The Purchase Price Is Paid By Another

§ 443. Rebutting The Presumption Of A Gift To A Relative

[Link to Case Citations](#)

**Where a transfer of property is made to one person and the purchase price is paid by another, and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, and the latter manifests an intention that the transferee should not have the beneficial interest in the property, a resulting trust arises.**

See Reporter's Note.

**Comment:**

*a. Admissibility of parol evidence to rebut the inference of a gift.* Where one person pays the purchase price for property which is transferred at his direction to another who is a natural object of his bounty, parol evidence is admissible to show that the payor intended that the transferee should not have the beneficial interest in the property, even though the property transferred was an interest in land and the Statute of Frauds is in force. The intention of the payor not to make a gift to the transferee may be shown not only by oral declarations of his intention, but also by the circumstances under which the transfer is made. Thus, the fact that it would be improvident for the payor to make a gift to the transferee is an indication that he did not intend to make a gift. So also, the fact that the circumstances are such that the payor would have a reason for taking title in the name of another other than an intention to give him the beneficial interest is an indication that he did not intend to make a gift; as, for example, where the payor had reasons for wishing that it should not be known that he was purchasing the property.

It is the intention of the payor at the time of the transfer and not at some subsequent time which determines whether a resulting trust arises. Compare § 457. The conduct of the payor and of the transferee subsequent to the transfer, however, may be such as to show that at the time of the transfer the payor did not intend to make a gift to the transferee. Thus, the fact that the payor manages the property, collects rents, pays taxes and insurance, pays for repairs and improvements, or otherwise asserts ownership, and the acquiescence by the transferee in such assertion of ownership, is evidence to rebut the inference of an intention by the payor to make a gift to the transferee.

*b. Rebutting in part the inference of a gift.* Where one person pays the purchase price for property which is transferred at his direction to another who is a natural object of his bounty, and it is shown that the payor intended to have a partial interest in the property, a resulting trust arises in favor of the payor as to such interest but

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only as to such interest. Compare § 441, Comment *f*.

*c. Resulting trust on condition precedent or subsequent.* Where one person pays the purchase price for property which is transferred at his direction to another who is a natural object of his bounty, and it is shown that the payor intended to have the beneficial interest only upon the happening of a designated event, a resulting trust arises in his favor upon the happening of the event, but only upon the happening of the event. Compare § 441, Comment *g*. So also, if it is shown that the payor intended that he should have the beneficial interest but that his interest should terminate upon the happening of a designated event, the transferee upon the happening of the event can hold the property free of trust. Compare § 441, Comment *h*.

*d. Where the payor manifests an intention to create an express trust for a third person.* Where one person pays the purchase price for property which is transferred at his direction to another who is a natural object of his bounty, and the payor properly manifests an intention to create an express trust for a third person, neither can the transferee keep the property nor will a resulting trust arise in favor of the payor, but there is an express trust for the third person. Compare § 441, Comment *k*. If the intention of the payor to create an express trust for a third person is not properly manifested and the transferee refuses to perform the trust or to bind himself to perform it, a constructive trust arises in favor of the payor. Compare § 441, Comment *l*.

#### Case Citations

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
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#### REPORTER'S NOTES

Even though the grantee is a natural object of bounty of the payor, a resulting trust arises if it appears that the payor of the purchase price did not intend to make a gift to the grantee. See the following cases citing the Restatement of Trusts, § 443. *Nolan v. American Telephone & Telegraph Co.*, 326 Ill.App. 328, 61 N.E.2d 876 (1945); *Rebel v. Lunsford*, 216 S.W.2d 68 (Mo.1949); *Warford v. Smoot*, 361 Mo. 879, 237 S.W.2d 184 (1951).

#### Cross References to

#### Digest System Key Numbers

Trusts  81(1), 89(1)

— June 1986: Case Citations January 1959 — June 1986:

**C.A.3**, 1963. Cit. in fn. in sup. Where wife paid purchase price and property was transferred to the husband, a resulting trust arose in favor of the wife where no contrary intention was manifested. *Wallace v. Kil-*



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## Chapter 12. Resulting Trusts

### Topic 4. Where Property Is Transferred To One Person And The Purchase Price Is Paid By Another

#### § 444. Illegal Purpose

[Link to Case Citations](#)

**Where a transfer of property is made to one person and another pays the purchase price in order to accomplish an illegal purpose, a resulting trust does not arise if the policy against unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction.**

See Reporter's Note.

#### **Comment:**

*a.* The rule stated in this Section is based upon the same policy as that upon which § 422 is based. Whether the owner of property transfers it upon a trust which fails for illegality (see § 422), or whether property is purchased and title is taken in the name of another to accomplish an illegal purpose, a resulting trust arises unless the circumstances are such that it is against public policy to enforce such a resulting trust.

As to the circumstances under which an intended trust fails for illegality, see §§ 60-65.

*b. Fraud on creditors.* The most common situation in which the principle stated in this Section is applied is that in which the purchaser of property takes title in the name of another for the purpose of defrauding his creditors. See §§ 63, 422.

*c.* In several States it is provided by statute that when a conveyance of land is made to one person and the consideration is paid by another, no trust shall result to the latter (see § 440, Comment *i*), and that such a conveyance shall be presumed fraudulent as against creditors of the person paying the consideration, and that a trust shall result in favor of such creditors to the extent necessary to pay their just demands, unless a fraudulent intent is disproved.

The property is, in fact, subject to a constructive trust, rather than a resulting trust, for the creditors.

*d. Defrauding the government.* If a person who is not entitled to acquire government land pays the purchase price for such land and takes title to the land in the name of another for the purpose of defrauding the government, he cannot enforce a resulting trust in his favor, even though the government does not take any steps to set aside the transaction for fraud.

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*e. Savings bank trusts.* If a person deposits money in a savings account in a bank in the name of another person, and it appears that the depositor already had on deposit the maximum amount permitted to a single depositor by statute or by the by-laws of the bank, and the deposit was made in the name of another for the purpose of evading the statute or by-law, the person in whose name the deposit was made holds his claim against the bank upon a resulting trust for the depositor. The purpose of the depositor is not so seriously against public policy as to prevent him from enforcing the resulting trust.

*f. Aliens.* By statute in a few States land acquired by aliens or certain classes of aliens is subject to forfeiture to the State. In such States the equitable interest of an alien beneficiary of a trust of land is likewise subject to forfeiture. See § 117, Comment *b*. In such States if an alien pays the purchase price for land and at his direction the land is transferred to another under such circumstances that a resulting trust would arise if the payor were not an alien, a resulting trust arises in favor of the alien, and his interest is subject to forfeiture to the State.

#### Case Citations

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#### REPORTER'S NOTES

Where a person purchases property in the name of another for the purpose of defrauding the purchaser's creditors, it is generally held that he is precluded from enforcing a resulting trust. *Harrell v. Fiveash*, 182 Ga. 362, 185 S.E. 327 (1936); *Stamper v. Stamper*, 227 Ind. 15, 83 N.E.2d 184 (1949) (semble); *Ford's Ex'rs v. Lewis*, 10 B.Mon. (Ky.) 127 (1849); *Pollock v. Pollock*, 223 Mass. 382, 111 N.E. 963 (1916); *Sell v. West*, 125 Mo. 621, 28 S.W. 969 (1894); *Keener v. Williams*, 307 Mo. 682, 271 S.W. 489 (1925); *Baldwin v. Campfield*, 4 Halst. (N.J.) 600, 891 (1853); *Sayre v. Lemberger*, 92 N.J.Eq. 656, 114 A. 454 (1921); *Culley v. Carr*, 137 N.J.Eq. 516, 45 A.2d 850 (1946); *Pope v. Bain*, 8 N.J.Super. 263, 74 A.2d 317 (1950), reversed on other grounds 6 N.J. 351, 78 A.2d 820 (1951); *Proseus v. McIntyre*, 5 Barb. (N.Y.) 424 (1849); *McClintock v. Loisseau*, 31 W.Va. 865, 8 S.E. 612 (1888); *Gascoigne v. Gascoigne*, [1918] 1 K.B. 223.

#### Cross References to

##### 1. Digest System Key Numbers

Fraudulent Conveyances  174(3)

Trusts  80

##### 2. A.L.R. Annotation