

1986

Kathleen S. Pusey v. Robert O. Pusey : Reply Brief

Utah Supreme Court

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Valden P. Livingston; D.R. Chambers; Parsons, Behle & Latimer; Attorneys for Appellant.

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

KATHLEEN S. PUSEY,

Plaintiff/Respondent
and Cross-Appellant,

vs.

ROBERT O. PUSEY,

Defendant/Appellant
and Cross-Respondent.

Case No. ~~34603~~
20934

REPLY BRIEF OF APPELLANT, KATHLEEN S. PUSEY

APPEAL FROM AN ORDER REMOVING LIS PENDENS
OF THE SECOND JUDICIAL DISTRICT
COURT FOR DAVIS COUNTY
THE HONORABLE DOUGLAS CORNABY, JUDGE

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FILED

MAR 21 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHLEEN S. PUSEY,)	
)	
Plaintiff/Respondent)	
and Cross-Appellant,)	Case No. 34603
)	
vs.)	
)	
ROBERT O. PURSEY,)	
)	
Defendant/Appellant)	
and Cross-Respondent.)	

REPLY BRIEF OF APPELLANT, KATHLEEN S. PUSEY

APPEAL FROM AN ORDER REMOVING LIS PENDENS
OF THE SECOND JUDICIAL DISTRICT
COURT FOR DAVIS COUNTY
THE HONORABLE DOUGLAS CORNABY, JUDGE

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Attorneys for Appellant

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INTRODUCTION

In the divorce action filed by Kathleen S. Pusey ("Kathy") as against Robert O. Pusey ("Robert") in the Second District Court in and for Davis County, State of Utah, presently on appeal before the Utah Supreme Court as Case No. 20365, the lower court determined that certain real property located in Bountiful, Utah, known as the Western General Dairy Facility and titled in the name of a Utah corporation, Load Alert, Inc. had a value of \$125,000. The court further determined that the stock of Load Alert, Inc. was a marital asset, that Load Alert, Inc. had other assets valued at \$2,587.00 and that the corporation had debts of \$4,000, making the stock worth \$123,587 (Tr. Vol. II at 138-39; R. at 269-70, paragraphs 21-24.).¹ As part of an equitable distribution of the marital estate, the lower court awarded Kathy certain property and a judgment as against Robert which resulted in Kathy receiving approximatey one-half or \$61,793.50 of the value of such stock. (R. at 275-77, paragraphs 11-13.)

Upon conclusion of the divorce trial, the lower court determined that Load Alert, Inc. and another corporation formed by Robert, Fun Fair, Inc. were both alter egos of Robert.

¹References herein to the Transcript and Record are to the transcript and record in the divorce case on appeal before the Utah Supreme Court as Case No. 20365.

(R. at 274, paragraph 6.) Robert testified at the trial that \$69,000 obtained from the sale of or loans against certain real property, located in Salt Lake and titled in Fun Fair, Inc. and his mother, was used to acquire, discharge liens upon or pay for improvements to the dairy facility in Bountiful. (Tr. Vol. I at 40-41.) The lower court disregarded that testimony because Robert was unable to provide sufficient evidence that such was the case and that an equitable lien in the amount of \$69,000 should be placed upon the dairy facility. (Tr., Vol. I at 138-39; R. at 270, paragraph 23.) Neither did the lower court award Kathy any interest in the real estate owned by Robert's alter ego, Fun Fair, Inc. or his mother. (R. at 268, paragraphs 17-18 and R. at 274, paragraphs 7-8) This was in spite of the fact that the evidence in the lower court was voluminous to the effect that the parties resided, during the marriage, in the home located on one of those parcels of real property, made significant improvements to all such property during the marriage from marital assets and that such real property significantly appreciated during the marriage. (Tr., Vol. II at 13-18; 23-24; 24-26; 35-37; 45 and 48-49.)

The lower court failed to award Kathy an interest in the Salt Lake City property, in part, as a trade off for its refusal to find an equitable lien in the amount of \$69,000 on the dairy property. (Tr., Vol. II at 143-44). The finding of

an equitable lien would have reduced the value of her share of the marital estate by \$34,500. In effect, the lower court took away Kathy's interest in the real property located in Salt Lake in exchange for a greater interest in the dairy facility and the stock of Load Alert, Inc. Id.

Robert appealed the divorce decree and the refusal of the lower court to find a \$69,000 equitable lien upon the dairy property on the basis of the same constituted error. Robert seeks on appeal in Case No. 20365 to have the \$69,000 lien imposed upon the dairy facility and the value of Kathy's share of the property distribution reduced by one-half of that amount or \$34,500. (Brief of Robert in Case No. 20365 at 2.) In the event this Court requires the finding of an equitable lien and a corresponding decrease in Kathy's share of the marital estate, the lower court should have an opportunity to re-evaluate its decision refusing to award Kathy an interest in any of the Salt Lake City real estate. For that reason, Kathy resisted Robert's motion to have the lis pendens filed in the early stages of this litigation removed as an encumbrance upon the Salt Lake City real property. When Robert's motion to have said lis pendens removed from such real property was granted, Kathy filed new lis pendens stating that the lower court had ordered the lis pendens removed, but Kathy was appealing that order to the Utah Supreme Court. Certified copies of the lis

pendens currently on file with the Salt Lake County Recorder's Office are attached hereto as Exhibits A and B and incorporated herein by this reference.

ARGUMENT

I. THE LIS PENDENS CURRENTLY ON FILE ARE APPROPRIATE IN THESE PROCEEDINGS

In the event that Robert prevails on the appeal in the divorce action, Kathy's interest in the marital estate will be reduced by \$34,500. In that event, there is a strong likelihood that, on remand, an equitable distribution of the marital estate would require that Kathy be awarded an interest in the real property located in Salt Lake City titled in Robert's alter ego, Fun Fair, Inc. and his mother. The lower court certainly has jurisdiction subsequent to the divorce decree and the appeal therefrom, " . . . to make subsequent changes or new orders for . . . the distribution of the property as is reasonable and necessary." Utah Code Ann. § 30-3-5 (1953); Sundquist v. Sundquist, 639 P.2d 181 (Utah 1981); Peters v. Peters, 15 Utah 2d 413, 394 P.2d 71 (1964).

In the Sundquist case, the parties to a divorce settlement agreed that income from an investment in certain real property would be placed in trust for the children of the marriage to pay for their education and other expenses. Because of a conflict between the parties to the divorce as to how the trust property should be used, a motion was made in the

lower court requesting termination of the trust and distribution of the proceeds between the divorced parties. The lower court granted the request and terminated the trust. On appeal, the Utah Supreme Court held that the purpose of the trust had not been fulfilled and that the judge could not alter the property rights therein of the children as they had already vested. The court held, however, at 186 that the lower court under Utah Code Ann. § 30-3-5 (1953), had authority:

. . . to reallocate property rights between the parties to the divorce, such as by modifying the early decree as to the parties' interest in the [real property investment] including installment payments not yet received. This matter can be pursued on remand.

In this action, Robert seeks, in an appeal from the divorce case, a significant redistribution of the marital estate. In the event that the Supreme Court grants his request on appeal and orders the lower court to find an equitable lien upon the dairy facility resulting in a reduction of Kathy's interest in the marital estate, the lower court has continuing jurisdiction to modify the property distribution presently contained in the divorce decree. In the event this occurs, Kathy may very well be entitled to an interest in the Salt Lake City real property titled in Robert's alter ego, Fun Fair, Inc. and his mother. For that purpose, the lis pendens currently of record should be allowed to remain so as to protect Kathy's

interest in such real property as against bona fide purchasers. This is especially true in light of the fact that said lis pendens merely alerts persons acquiring an interest in said real property that the order removing the lis pendens has been appealed to the Utah Supreme Court. Otherwise, Kathy's interest in the Salt Lake property could be sold, during the appeal, to a good faith purchaser, cutting off her rights therein.

II. THE LIS PENDENS SHOULD NOT BE REMOVED AS TO
DO SO WOULD DENY KATHY RIGHTS IN THE REAL
PROPERTY ENCUMBERED THEREBY

In Argument II of Respondent's Brief, Robert argues that Kathy's equitable lien on the dairy facility in the amount of \$40,293.50 is adequately secured and that the lis pendens on additional real property is improper. If Robert had not appealed the original property distribution, Kathy would agree. The issue is not whether Kathy is presently adequately protected. The issue is whether an equitable distribution of the marital estate can be made in the event that Robert prevails in his appeal and in effect has the marital estate under the current divorce decree reduced by \$69,000 resulting in a reduction of Kathy's share in the amount of \$34,500.

As discussed in point I, if Robert prevails in the appeal, Kathy will be left without a remedy should a third party acquire an interest in the real property located in Salt

Lake City if she has no lis pendens thereon. It would be entirely inequitable to allow Robert to prevail on his claim that the \$69,000 equitable lien should have been imposed upon the dairy property and then refuse Kathy an interest in the Salt Lake City property when the lower court refused her an interest therein, in part, because of its disallowance of the \$69,000 equitable lien.

The fact that the court disregarded Kathy's interest in the Salt Lake City property in exchange for his refusal to grant an equitable lien is evidenced by the following discussion between counsel and the lower court:

MS. DENHOLM: Your Honor, I do have a question. In regards to the Load Alert property and to the two parcels that were sold, the testimony, I believe, it was contradicted that the proceeds of both of those sales were applied to the purchase of the property reducing the debt and that --

THE COURT: But I will not make that finding and the reason I will not, I tried to explain why I would not make that finding. It was because all through this marriage the defendant was totally intermingled funds without respect to private or corporation.

Now, I don't doubt that each of the -- At the end of each year he made a tax form that made certain representations on it, but no records can back up any of those transactions so far as the Court is concerned. I am just not willing to find, you see. If I find the way he would like me to, then he can very carefully trace all of those funds so that there's a \$69,000 debt against the corporation and, in fact, if I follow his line of

thinking it would have \$31,000 equity that I would then divide equally between the parties. I am just not willing to do that because he is the bookkeeper and he has totally failed to keep any books.

MS. DENHOLM: Well, your Honor, I think it's granted that his bookkeeping is, however, if the court has found, as I believe it has, that the plaintiff has no interest in that asset of Fun Fair and those assets have been mortgaged, then the proceeds of those mortgages should be returned to him as a credit, we submit.

THE COURT: Why should they be?

MS. DENHOLM: Because they belong to him and they are his separate assets.

THE COURT: Of course. That's part of the reason the Court ignored the growth is because he did what he did and it's impossible to trace anything because of what he did. I can't trace the \$11,000 that he claims he put in. You know, he claims he borrowed the \$17,000 and put 11 in. Probably he did, but no bookkeeping. He claims he borrowed the \$44,000 and put it into this. I don't have a thing to follow it. I cannot find it as a fact and I am not willing to find it. He borrowed it and he did something, but it's his debt and they are his corporation debts just like the books say and I'm not going to put the burden on Load Alert because even though he would like the burden on Load Alert.

MS. DENHOLM: Well, the burden, I suppose, goes back down to him. Trickles down.

THE COURT: That's true. That's precisely what I am making it do. Trickle down. That appears to be fair and reasonable. . . . (Emphasis added.)

(Tr., Vol. II at 143-44.)

III. ROBERT IS NOT ENTITLED TO AN AWARD OF DAMAGES
AND ATTORNEYS' FEES ON APPEAL.

Robert argues in his brief in Argument III that he is entitled to attorneys' fees and damages incurred because the lis pendens in accordance with Utah Code Ann. § 38-9-4 (1953) which provides as follows:

A person who claims an interest in, or a lien or encumbrance against real property, who causes or who has caused a document asserting that claim to be recorded or filed in the office of the County Recorder, who knows or has reason to know that the document is forged, groundless or contains a material misstatement or false claim, is liable to the holder or title holders for \$1,000 or for treble actual damages, whichever is greater, and for reasonable attorneys' fees and costs, as provided in this chapter, if he willfully refuses to release or correct such document of record within twenty (20) days from the date of written request from the owner or beneficial title holder of the real property

By its very language, the above statutory provision does not apply in these circumstances. It only applies if a document is forged, groundless or contains a material misstatement or false claim. The lis pendens attached hereto as Exhibits A and B are not forged, groundless and do not contain material misstatements or false claims. They merely recite the facts that: (a) a divorce action was commenced in the Second District Court; (b) lis pendens were filed on real property in Salt Lake in connection with that divorce; (c) the Honorable Judge Douglas Cornaby ordered the lis pendens

removed; and (d) Kathy has appealed the order removing said lis pendens.

Certainly Robert would not deny a litigant an opportunity for review by a higher court as to do so would deprive him of his appeal which is the foundation for this controversy. In addition, Robert's argument totally ignores the absolute privilege for recording a lis pendens even where the claim of an interest in the real property encumbered thereby is totally without merit and groundless. Hansen v. Kohler, 550 P.2d 186 (Utah 1976); Boyce v. Boyce, 609 P.2d 928 (Utah 1980).

Finally, the original lis pendens which were ordered removed by the lower court were filed in May of 1984, one year prior to the effective date of the statute relied upon by Robert and passed by the Utah Legislature in 1985. See certified copies of original lis pendens attached hereto as Exhibits D and E. Inasmuch as the original lis pendens were recorded approximately one year prior to the effective date of the statute relied upon by Robert, it is inapplicable as Utah statutes are not, "retroactive, unless expressly so declared." Utah Code Ann. § 68-3-3 (1953).

CONCLUSION

For the foregoing reasons, Kathy respectfully requests that the court reverse and allow the lis pendens previously

recorded to remain of record on the official records of Salt Lake County pending the divorce action between Robert and Kathy, including all appeals therefrom. Kathy further requests that the court deny any request by Robert for damages and attorneys' fees as set forth in his brief.

DATED this 21 day of March, 1986.

Valden P. Livingston
VALDEN P. LIVINGSTON
D. R. CHAMBERS
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Attorneys for Respondent
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Salt Lake City, UT 84147-0898
Telephone: (801) 532-1234

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing REPLY BRIEF OF APPELLANT, KATHLEEN S. PUSEY to the following on this 21 day of March, 1986:

Robert O. Pusey, Pro se
11 North 200 West
Bountiful, UT 84010

Valden P. Livingston

8815M

4137385

VALDEN P. LIVINGSTON
D. R. CHAMBERS
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Plaintiff
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, UT 84147-0898
Telephone: (801) 532-1234

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UTAH
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Pusey - Behle & Latimer
Opel Hatt
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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

ROBERT O. PUSEY

* * * * *

KATHLEEN S. PUSEY,

Plaintiff/Respondent
and Cross-Appellant,

vs.

ROBERT O. PUSEY,

Defendant/Appellant
and Cross-Respondent.

LIS PENDENS

Civil No. 20365

* * * * *

PLEASE TAKE NOTICE that the above entitled action was commenced in the Second Judicial District Court in and for Davis County, State of Utah, wherein plaintiff sought to have a decree of divorce entered in her favor and against defendant Robert O. Pusey making an equitable distribution of defendant's real property described below and located at 1248 South 300 East, in Salt Lake City, Utah, on plaintiff's claim that said defendant is the equitable fee owner of said real property and that record title is held by Fun Fair, Inc., a Utah corporation, or Mary L. Hunter, as nominee for said defendant.

56909 2274

On November 30, 1984, the Honorable Douglas Cornaby, Second District Court Judge, entered an Amended Divorce Decree determining that plaintiff did not own any right title or interest in said real property. The defendant Robert O. Pusey has appealed said Amended Divorce Decree to the Utah Supreme Court. On September 3, 1985, defendant Robert O. Pusey moved the above-entitled Court for an order removing the Lis Pendens recorded on such real property by plaintiff and the same was granted at the hearing thereon by the Honorable Douglas Cornaby, Second District Court Judge.

This Lis Pendens is recorded to give notice that the order of Judge Cornaby removing said Lis Pendens from the real property described below is being appealed to the Utah Supreme Court. All persons claiming any right, title or interest in said real property legally described below or who wish to purchase the same at any sale, or otherwise, should take notice of such litigation and the appeal of the order of the Honorable Douglas Cornaby, Second District Court Judge, removing the Lis Pendens therefrom. Such real property is legally described as follows:

Lot 1, JACKSON SQUARE, according to the official plat thereof on file and of record in the office of the county recorder of Salt Lake County, State of Utah.

DATED this 16th day of September, 1985.

Valden P. Livingston
VALDEN P. LIVINGSTON

NOV 5690 12275

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 16th day of Sept., 1985, personally appeared before me Valden P. Livingston, the signer of the within instrument, who duly acknowledged to me that he executed the same.



Layna M. Lofgren
NOTARY PUBLIC
Residing at: Salt Lake City, Utah

My Commission Expires:

August 7, 1988

7575M

5690, 2276

4137384

VALDEN P. LIVINGSTON
D. R. CHAMBERS
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Telephone: (801) 532-1234

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Opik Hatt
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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

ROBERT O. PUSEY

KATHLEEN S. PUSEY,

Plaintiff/Respondent
and Cross-Appellant,

vs.

ROBERT O. PUSEY,

Defendant/Appellant
and Cross-Respondent.

LIS PENDENS

Civil No. 20365

PLEASE TAKE NOTICE that the above entitled action was commenced in the Second Judicial District Court in and for Davis County, State of Utah, wherein plaintiff sought to have a decree of divorce entered in her favor and against defendant Robert O. Pusey making an equitable distribution of defendant's real property described below and located at 251 Edith Avenue in Salt Lake City, Utah, on plaintiff's claim that defendant Robert O. Pusey is the equitable fee owner of said real property and that record title is held by Viria O. Woolstenhulme, his mother, as nominee for said defendant.

~~IN WITNESS WHEREOF~~

On November 30, 1984, the Honorable Douglas Cornaby, Second District Court Judge, entered an Amended Divorce Decree determining that plaintiff did not own any right title or interest in said real property. The defendant Robert O. Pusey has appealed said Amended Divorce Decree to the Utah Supreme Court. On September 3, 1985, defendant Robert O. Pusey moved the above-entitled Court for an order removing the Lis Pendens recorded on such real property by plaintiff and the same was granted at the hearing thereon by the Honorable Douglas Cornaby, Second District Court Judge.

This Lis Pendens is recorded to give notice that the order of Judge Cornaby removing said Lis Pendens from the real property described below is being appealed to the Utah Supreme Court. All persons claiming any right, title or interest in said real property legally described below or who wish to purchase the same at any sale, or otherwise, should take notice of such litigation and the appeal of the order of the Honorable Douglas Cornaby, Second District Court Judge, removing the Lis Pendens therefrom. Such real property is legally described as follows:

All of lot 43, JACKSON SQUARE, according to the official plat thereof on file and of record in the office of the Salt Lake County Recorder, State of Utah.

DATED this 16th day of September, 1985.

Valden P. Livingston
VALDEN P. LIVINGSTON

STATE OF UTAH

)

ss.

COUNTY OF SALT LAKE

)

On the 16th day of Sept., 1985, personally appeared before me Valden P. Livingston, the signer of the within instrument, who duly acknowledged to me that he executed the same.



John M. Lofgren
NOTARY PUBLIC

Residing at: Salt Lake City, Utah

My Commission Expires:

August 7, 1988

7576N

3946973

William G. Fowler
Valden F. Livingston
ROE AND FOWLER
Attorneys for Plaintiff
340 East Fourth South
Salt Lake City, Utah 84111
Telephone (801) 328-9841

600
May 25 4 30 PM '84
RECEIVED
CLERK
COUNTY
of Salt Lake
City

IN THE SECOND JUDICIAL DISTRICT COURT

OF DAVIS COUNTY

STATE OF UTAH

KATHLEEN S. PUSEY,)	
)	LIS PENDENS
Plaintiff,)	
vs)	
ROBERT O. PUSEY,)	Civil No. 34603
Defendant)	

PLEASE TAKE NOTICE that the above entitled action has been commenced in the Second Judicial District Court in and for Davis County, State of Utah wherein said plaintiff seeks to have a decree of divorce entered in her favor and against defendant Robert O. Pusey making an equitable distribution of defendant's real property described below and located at 1248 South 300 East in Salt Lake City Utah on plaintiff's claim that said defendant is the equitable fee owner of said real property and that record title is held by Fun Fair, Inc. or Mary L. Hunter as a nominee for said defendant. All persons claiming any right, title or interest in said real property legally described below who wish to purchase the same at any sale, should take notice of such litigation and the position claimed by plaintiff. Such real property is legally described as follows:

600-55539-1110

34N2

Lot 1, Jackson Square, according to the official plat thereof
on file and of record in the office of the County Recorder of
Salt Lake County, State of Utah

DATED this 24 day of May, 1984

Valden P Livingston
William G Fowler
Valden P Livingston
ROF AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Plaintiff

STATE OF UTAH)
COUNTY OF SALT LAKE) s,

On this 24th day of May 1984 personally appeared before me
Valden P Livingston, the signer of the within instrument who duly
acknowledged to me that he executed the same

William G Fowler
Notary Public residing at
Salt Lake County Utah

My Commission Expires

6/4/86

•5559
111

3946974

William G Fowler
Valden P Livingston
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340 East Fourth South
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May 25 4 30 PM '84
REC'D - Roe & Fowler
DIXON
CLERK
COUNTY
Wm. G. Fowler

IN THE SECOND JUDICIAL DISTRICT COURT

OF DAVIS COUNTY

STATE OF UTAH

KATHLEEN S PUSEY,)	
)	LIS PENDENS
Plaintiff,)	
)	
vs)	
)	
ROBERT O PUSEY,)	Civil No 34603
)	
Defendant)	

PLEASE TAKE NOTICE that the above entitled action has been commenced in the Second Judicial District Court in and for Davis County, State of Utah, wherein said plaintiff seeks to have a decree of divorce entered in her favor and against defendant Robert O Pusey making an equitable distribution of defendant's real property described below and located at 251 Edith in Salt Lake City, Utah, on plaintiff's claim that said defendant is the equitable fee owner of said real property and that record title is held by Virla O Woolstenhulme his mother, as a nominee for said defendant All persons claiming any right, title or interest in said real property legally described below or who wish to purchase the same at any sale, should take notice of such litigation and the position claimed by plaintiff Such real property is legally described as follows

8005559 11112

34M2

All of Lot 43, JACKSON SQUARE, according to the official plat thereof on file and of record in the office of the Salt Lake County Recorder.

DATED this 24 day of May, 1984

Valden P. Livingston
William G. Fowler
Valden P. Livingston
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Plaintiff

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

On this 24th day of May, 1984, personally appeared before me Valden P. Livingston, the signer of the within instrument, who duly acknowledged to me that he executed the same.

Kathleen A. Owen
Notary Public, residing at
Salt Lake County, Utah

My Commission Expires:
6/4/86