

1989

# Joseph Opheikens and Fanny Opheikens v. Arthur C. Sheron and Barbara O. Sheron : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stephen W. Farr; G. Scott Jensen; Farr, Kaufman, Hamilton, Phillips, Sullivan, Gorman and Perkins; Attorneys for Appellants.

Robert A. Echard; Gridley, Echard and Ward; Attorney for Respondent.

---

## Recommended Citation

Brief of Appellant, *Opheikens v. Sheron*, No. 890069 (Utah Court of Appeals, 1989).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/1569](https://digitalcommons.law.byu.edu/byu_ca1/1569)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**BRIEF**

UTAH  
DOCUMENT  
KFU

50

IN THE SUPREME COURT OF THE STATE OF UTAH

.A10

DOCKET NO.

**89 0069**

JOSEPH OPHEIKENS, and  
FANNY OPHEIKENS,

Plaintiffs/Appellants

vs.

ARTHUR C. SHERON and  
BARBARA O. SHERON,

Defendants/Respondents.

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**89-**

Case No. 880276

Priority No. 14(b).

BRIEF OF APPELLANT

An appeal from a judgement in the Second Judicial District  
Court of Weber County, State of Utah, rendered by the Honorable  
Judge David E. Roth.

STEPHEN W. FARR (#1042) and  
G. SCOTT JENSEN (#4990) of  
FARR, KAUFMAN, HAMILTON,  
PHILLIPS, SULLIVAN, GORMAN & PERKINS  
Attorneys for Plaintiffs/Appellants  
Bamberger Square, Building 1  
205 26th Street, Suite 34  
Ogden, Utah 84401  
Telephone: 394-5526

ROBERT A. ECHARD (#953)  
GRIDLEY, ECHARD & WARD  
Attorney for Defendants/Respondents  
635 25th Street  
Ogden, Utah 84401  
Telephone: 621-3317

**FILED**  
DEC 23 1988

JOSEPH OPHEIKENS, and	:	
FANNY OPHEIKENS,	:	
	:	
Plaintiffs/Appellants	:	
	:	
vs.	:	
	:	Case No. 880276
ARTHUR C. SHERON and	:	
BARBARA O. SHERON,	:	Priority No. 14(b).
	:	
Defendants/Respondents.	:	
	:	

An appeal from a judgement in the Second Judicial District Court of Weber County, State of Utah, rendered by the Honorable Judge David E. Roth.

ROBERT A. ECHARD (#953)  
GRIDLEY, ECHARD & WARD  
Attorney for Defendants/Respondents  
635 25th Street  
Ogden, Utah 84401  
Telephone: 621-3317

## TABLE OF AUTHORITIES

### CASES CITED

<u>Alley v. Peeso</u> , 290 P. 238, 241-42 (Oregon 1930).....	13
<u>Cornia v. Cornia</u> , 546 P.2d 890, (Utah 1976).....	13
<u>Parks v. Zions First National Bank</u> , 673 P.2d 590, (Utah 1983)...	
.....	11, 12, 15
<u>Strout v. Burgess</u> , 68 A.2d 241, 12 A.L.R. 939.....	13
<u>West v. West</u> , 403 P.2d 22, (Utah 1965).....	13

### STATUTORY AUTHORITY

Rule 3(a), Rules of the Utah Supreme Court.....	1
§78-2-2(3)(f) of the Utah Code Annotated 1988.....	1

### OTHER AUTHORITIES CITED

George G. Bogert & George T. Bogert, <u>Handbook of the Law of Trusts</u> , 303-305 (1973).....	10-11
---	-------

TABLE OF CONTENTS

JURISDICTION.....	1
NATURE OF THE PROCEEDINGS.....	1
STATEMENT OF THE ISSUES PRESENTED ON APPEAL.....	2
STATEMENT OF THE FACTS.....	2
SUMMARY OF THE ARGUMENT.....	8
ARGUMENT.....	8

POINT I

THE TRIAL COURT'S AWARD OF A REMAINDER INTEREST  
IN THE PROPERTY TO THE DEFENDANTS IS INCONSISTENT  
WITH THE IMPOSITION OF A CONSTRUCTIVE TRUST FOR  
THE BENEFIT OF THE PLAINTIFFS.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING  
A REMAINDER INTEREST TO THE DEFENDANTS WHERE  
SUCH RELIEF WAS NOT REQUESTED IN THE PLEADINGS.

POINT III

IN THE EVENT THIS COURT FINDS THAT THE TRIAL  
COURT ACTED WITHIN ITS DISCRETION IN ALLOWING  
A REMAINDER INTEREST TO FOLLOW THE IMPOSITION  
OF A CONSTRUCTIVE TRUST, PLAINTIFFS ALLEGE THAT  
THE EVIDENCE AS TO THE VALUE OF THE PROPERTY,  
AND THE CONTRIBUTIONS MADE BY THE DEFENDANTS  
WAS INSUFFICIENT TO JUSTIFY THE TRIAL COURT'S  
AWARD OF A REMAINDER INTEREST IN THE PROPERTY.

CONCLUSION.....	16
ADDENDUM.....	17

Stephen W. Farr, (#1042) and  
G. Scott Jensen, (#4990) of  
FARR, KAUFMAN, HAMILTON, PHILLIPS  
SULLIVAN, GORMAN, & PERKINS  
Attorneys for Plaintiffs  
Bamberger Square, Building 1  
205 26th Street, Suite 34  
Ogden, Utah 84401  
Telephone: (801) 394-5526

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH OPHEIKENS, and  
FANNY OPHEIKENS,

Plaintiffs/Appellants

VS.

ARTHUR C. SHERON and  
BARBARA O. SHERON,

Defendants/Respondents.

Case No. 880276

Priority No. 14(b).

## BRIEF OF APPELLANT

## JURISDICTION

Jurisdiction to hear the above entitled appeal is conferred upon the Supreme Court of Utah, pursuant to Rule 3(a) of the Rules of the Utah Supreme Court, and §78-2-2(3)(f) of the Utah Code Annotated 1988. This is an appeal from a final judgement of the Second Judicial District Court over which the Court of Appeals does not have original appellate jurisdiction.

## NATURE OF THE PROCEEDINGS

This appeal is from a final order of the Second Judicial District Court of Weber County, rendered by the Honorable David

E. Roth sitting without a jury. The trial court awarded the Plaintiffs a life estate in their home and granted the Defendants a remainder interest therein. Plaintiffs are appealing the judgement.

#### STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The Plaintiffs are appealing the judgement of the district court citing the following grounds for appeal:

1. That the trial court, after imposing a constructive trust, abused its discretion by awarding a remainder interest in the property to the Defendants.
2. That the trial court abused its discretion by awarding a remainder interest to the Defendants because the plaintiffs did not request that they be granted a remainder interest in their pleadings.
3. That the Defendants presented insufficient evidence at trial to justify the trial court's finding that they had equity in the property sufficient to purchase a remainder interest therein.

#### STATEMENT OF THE FACTS

On December 7, 1967, Joseph Opheikens and his wife Fannie, signed a quit-claim deed to their home and real property located at 141 Jefferson Avenue, consisting of Lots 14 and 15, Block 2, Cropseys, addition to Ogden City, Utah, to their daughter and son-in-law, Barbara O. and Arthur C. Sheron as joint tenants. (Exhibit D-1).

Plaintiffs allege that the quit-claim deed was to secure payment on \$1,028.00 loaned by the Sherons to the Opheikens loan to pay delinquent property taxes on the Opheiken's home. Record at 252. The Defendants contend that at the time the quit-claim deed was signed, the Opheikens intended to transfer ownership of their home to the Sherons permanently rather than have the home lost through foreclosure. Record at 372.

The following brief history of the home and who contributed to its construction is helpful in presenting a background of the circumstances leading to this action. The Opheiken's home was built on land they purchased in 1932 for \$500.00. Record at 231. In the early 1950's the Opheikens borrowed \$2,150.00 from Mr. and Mrs. William Holt to finance the construction of a new home on their land. Record at 233. The \$2,150.00 was not sufficient to complete the construction so the Opheikens borrowed \$4,500.00 from Froerer Realty to complete the house. Record at 239. In addition to the \$4,500.00, Mrs. Opheikens testified that she borrowed another \$700.00 from Froerer for their kitchen cabinets. Record at 239.

Arthur Sheron testified that he loaned the Opheikens \$700.00 in approximately 1957, and that he borrowed the Money from Beneficial Finance to loan to the Opheikens. Mr. Sheron stated that he did not know what the Opheikens intended to do with the \$700.00. Record at 364. Upon cross-examination, Mrs. Opheikens testified that the \$700.00 that Mr. Sheron borrowed from Beneficial Finance was used to purchase a 1955 Chevrolet, and



that the Opheikens never borrowed \$700.00 from the Sherons. Record at 280.

At trial the Defendants testified that they have made substantial contributions to the construction of the Opheiken's home, in addition to the \$1,028.00 which they gave to the Opheikens to pay the back taxes in 1967.

Fannie Opheikens testified at trial that her daughter, Defendant Barbara Sheron, gave the Plaintiffs \$600.00 to help build the house. Fannie stated that of the \$600.00 that Barbara contributed, \$200.00 was used to dig the foundation for the house, and \$400.00 was used to purchase lumber. Record at 234. Fannie testified that Barbara did not contribute any more than \$600.00 toward the construction of the home. Id.

Barbara Sheron testified that she contributed all of the \$1,900.00 insurance settlement which she received from the death of her first husband. Record at 316. However, the only evidence of any contribution made by Barbara Sheron to the initial construction of the house was a check for approximately \$400.00 to Hurst Lumber. Record at 336, and Exhibit P-14.

During the construction of the home, the Defendant, Barbara Sheron, was one of three children living with the Opheikens after being recently widowed when Jack Griven, her husband of a short time, died in an automobile accident. Barbara received an insurance settlement of \$1900.00 from her husband's death in addition to \$10,000.00 which she received from his life insurance policy. For ten years, Barbara received a monthly check of

\$92.90 from her husband's life insurance policy, and \$19.00 per month as Social Security benefits. While living with her parents, Barbara gave her parents \$100.00 per month from her income.

After living with her parents for approximately one year, Barbara married Arthur Sheron. Barbara and her second husband Arthur Sheron lived with the Opheikens for approximately three months prior to moving into their own home on Second Street in Ogden. Mrs. Opheikens testified at trial that Barbara and Arthur Sheron used the insurance money to make the payments on their house on Second Street. Record at 238.

At the time the quit-claim deed was signed in 1967, the Opheikens had been making mortgage payments on their home since approximately 1950. Mrs. Opheikens testified at trial that at the time the quit-claim deed was signed, the Opheikens had no intention of transferring their interest in the property to the Sherons. Record at 260. After the quit-claim deed was signed, the Opheikens continued to make each and every payment on the mortgage, taxes, utilities, insurance and any other assessments until the final payment of \$286.34 was made on June 31, 1977. Record at 243.

The Opheikens testified that since the quit-claim deed was signed they have made repeated offers to repay the \$1,028.00 to the Sherons. However, according to the testimony of Mrs. Opheikens, the Sheron's have refused to accept any money and have refused to return the quit-claim deed. Record at 244-45, 251-

52, 253.

Until approximately 1984, the Opheikens were unaware that the Sherons claimed to own their property. In about 1984, according to the testimony of Mrs. Opheikens, she realized that the Sherons were not going to willingly return the quit-claim deed. Record at 251, 253, 309-10. When the Opheikens learned that the Sherons intended to keep their home, they brought this action.

At trial, the Sherons claimed to be the owners of the property in fee simple pursuant to the quit-claim deed, and that the Opheikens relinquished all right to ownership of their home. The Sherons' contend that they have allowed the Opheikens to live in the home as a gesture of kindness, even though the Opheikens have paid all taxes, mortgage payments, insurance, utilities, property assessments, and have maintained the property. Record at 372.

The Sheron's claimed, in addition to the money loaned for back taxes and the money used during the construction of the home, that they have done yard work, snow removal, lawn care, and other odd jobs on the Opheikens property, for which they should be reimbursed. The Opheikens contended that the Sherons were not entitled to be reimbursed for their help around the house because the help was offered gratuitously at the time. The trial court concurred. Record at 472. At no time have the Sherons paid the Opheikens any consideration approximating a reasonable purchase price for the property.

This action was brought by the Opheikens against the Sherons for breaching a fiduciary relationship. At trial, the Opheikens asked the court to impose a constructive trust thereby returning the property to the Opheikens. In its decision, the trial court imposed a constructive trust. The trial court also ruled that Barbara and Arthur Sheron had contributed a total of \$3628.00 which included; (1) the \$1028.00 used to pay the delinquent taxes, (2) \$1,900.00 allegedly given to the Opheikens by Barbara Sheron while she was living with her parents during the construction of the home, and, (3) \$700.00 given to the Opheikens by Arthur Sheron. Record at 472.

The trial court went on to hold that the \$3628.00 was sufficient to purchase a remainder interest in the property on behalf of the Sherons with a life estate for the Opheikens.

Plaintiffs brought this appeal on the grounds that; (1) the trial court improperly awarded a remainder interest to the Defendants where the Defendants did not request a remainder interest be applied in their pleadings, and (2) that Defendants failed to present sufficient evidence as to the amount of money contributed toward the property which was used as a basis for awarding the remainder interest, and, (3) that there was not sufficient evidence presented as to the value of the house to establish whether the contribution of the Defendants was sufficient to purchase a remainder interest in the property.

### SUMMARY OF THE ARGUMENT

Plaintiffs argue that the trial court abused its discretion by imposing a remainder interest on the property which was returned to the Plaintiffs through a constructive trust. By imposing a remainder interest the court effectively nullified any effect the constructive trust had on the parties transaction. Plaintiffs further contend that because the Defendants did not request in their pleadings that they be awarded a remainder interest in the property, that the court acted outside the scope of its authority by granting such relief. Finally, Plaintiffs argue that insufficient evidence was presented by the Defendants to justify the trial court's award of a \$3,628.00 interest in the property.

### ARGUMENT

#### POINT I

THE TRIAL COURT'S AWARD OF A REMAINDER INTEREST IN THE PROPERTY TO THE DEFENDANTS IS INCONSISTENT WITH THE IMPOSITION OF A CONSTRUCTIVE TRUST FOR THE BENEFIT OF THE PLAINTIFFS.

A constructive trust is defined by Blacks Law Dictionary, as follows:

The constructive trust is a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust. Where the circumstances of a transaction are such that the person who takes a legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principal of equity, the court will immediately raise a constructive trust, and

fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment.

Constructive trusts do not arise by agreement or from intention, but by operation of law, and fraud, active or constructive, is their essential element, actual fraud is not necessary, but such a trust will arise whenever circumstances under which property was acquired made it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done, and such trusts are also known as 'trusts ex maleficio' or 'ex delicto' or 'involuntary trusts' and their forms and varieties are practically without limit being raised by courts of equity whenever it becomes necessary to prevent a failure of justice." Blacks Law Dictionary, 1353 (5th Ed. 1979).

The very definition of the doctrine of a constructive trust reveals the misapplication of the doctrine in the present case, the above definition states that,

Where the circumstances of a transaction are such that the person who takes a legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principal of equity, the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment. Id., emphasis added.

The trial court in this case, after holding that a constructive trust was applicable, effectively removed any equitable relief the trust may have had on the transaction by granting the Defendants a remainder interest in the Opheikens property.

Once a constructive trust has been imposed, the legal owner

under the quit-claim deed becomes a "trustee for the parties who in equity are entitled to the beneficial enjoyment." Id. In this case, the Sherons became the trustees for the Opheikens when the trial court determined that the Plaintiffs had met the burden of imposing a constructive trust. When it was determined that the Opheikens owed the Sherons for the money contributed to the construction of the home, and for the money loaned to pay the back taxes, then the Opheikens should have been ordered to repay the Sherons, with a lien in the property as security.

Although the trial court has some amount of discretion in forming an equitable remedy, by imposing a constructive trust, it confined itself to a specific form of relief. The effect of a constructive trust is clear; to return ownership to the grantors. By converting the Sherons from owners to trustees for the benefit of the Opheikens, the court may not in equity then allow the trustee to retain that which he has been entrusted to hold for the other's benefit.

In Professor George Gleason Bogert's Handbook of the Law of Trusts, 303 West Publishing, 5th ed. (1973), the author states that,

If the grantee was in a confidential or fiduciary relation with the grantor at the time of the deed and the oral promise to hold in trust, the grantee is usually made a constructive trustee for the intended beneficiary of the oral trust on account of the wrong involved in the violation of the relationship by repudiation of the promise.

Professor Bogert illustrated the principle above with the following example:

In England and a few American states it is held that after the oral trustee has refused to carry out his trust in reliance on the Statute of Frauds, if he retains the property for himself he will be attempting to enrich himself unjustly and to perpetrate a wrong on the intended beneficiary and that he ought to be charged as a constructive trustee for the intended beneficiary, whether it be the grantor or a third person. Id., at 305, citations omitted.

Professor Bogert further clarifies the effect of the imposition a constructive trust:

The constructive trust would be a mere passive trust, on the basis of which equity would decree a reconveyance of the property to the settlor. It would require a grantee pleading voidability of his oral promise to hold in trust to return the consideration which he received for making such a promise. It would require him to restore the grantor to his former position,.... Id., emphasis added.

Clearly, the imposition of a constructive trust has the effect of a "reconveyance" of the property and to "restore the grantor to his former position."

In the present case the trial court, by granting a remainder interest to the Sherons has not made a clean "reconveyance" or "restore" the Opheikens to their "former position." The Opheikens former position was that of title in fee simple subject to a mortgage. After the trial court's ruling the Opheikens became life tenants with a remainder interest going to the Sherons.

In order to find that a constructive trust is an appropriate remedy, the trial court must find among other things that:

1. The Plaintiffs must have an equitable interest in the property. Parks v. Zions First National Bank, 673 P.2d 590, 600 (Utah 1983).



2. That there will be unjust enrichment if the constructive trust is not imposed Parks v. Zions First National Bank, 673 P.2d 590, 600 (Utah 1983).

To hold on one hand that the Opheikens have an "equitable interest" in the property, and that the element of "unjust enrichment" is present, and then to hold that the Defendants are entitled to a remainder interest in the property is inconsistent with doctrine of constructive trusts.

The trial court found that there was insufficient consideration to purchase the property pursuant to the quit-claim deed, and to do so would unjustly enrich the Defendants. Therefore, the trial court imposed a constructive trust. To hold that unjust enrichment mandates the imposition of a constructive trust, then to allow the Defendants to keep the property would be contradictory.

## POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING  
A REMAINDER INTEREST TO THE DEFENDANTS WHERE SUCH  
RELIEF WAS NOT REQUESTED IN THE PLEADINGS.

At no point in the pleadings did the Defendants claim that they held a remainder interest in the property, or that they should be made remaindermen. The trial court, in an effort to compensate the Sherons for the money loaned to the Opheikens, removed any hope the Opheikens may have had of having their home back, even if they paid the Defendants all monies to which they are entitled.

Because the issue of a remainder was never raised in the pleadings by either party, the Plaintiffs were not prepared to argue at trial that there was or was not sufficient money transacted to purchase a remainder interest in the property.

There are numerous cases standing for the proposition that a trial court is not authorized to grant relief on issues neither raised in the pleadings nor tried. See, Cornia v. Cornia, 546 P.2d 890, 893 (Utah 1976); Alley v. Peeso, 290 P. 238, 241-42 (Oregon 1930); See also, Strout v. Burgess, 68 A.2d 241, 12 A.L.R. 939.

Clearly this case has some findings that are at variance with the claims of both parties, and where such is the case, the findings will be carefully scrutinized on review. See, West v. West, 403 P.2d 22, 25 (Utah 1965).

Although the trial court in forming an equitable remedy is allowed considerable discretion, to attach a remainder interest for the benefit of the Defendants, removes the possibility the Plaintiffs may have had to repay the money which they owe to the Defendants and have clear title to their home.

Where the issue of a remainder interest was not raised in the pleadings, or during the trial, both parties were unprepared to put on evidence as to the value of the property for such a purpose.

### POINT III

IN THE EVENT THIS COURT FINDS THAT THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING A REMAINDER INTEREST TO FOLLOW THE IMPOSITION OF A CONSTRUCTIVE TRUST, PLAINTIFFS ALLEGE THAT THE EVIDENCE AS TO THE VALUE OF THE PROPERTY, AND THE CONTRIBUTIONS MADE BY THE DEFENDANTS WAS INSUFFICIENT TO JUSTIFY THE TRIAL COURT'S AWARD OF A REMAINDER INTEREST IN THE PROPERTY.

At trial no evidence was put on by either of the parties as to the approximate value of the property in dispute. For the trial court to find that the \$3,628.00 was sufficient to purchase a remainder interest in the property, which the trial court estimated to be worth \$15,000.00, is without a foundation.

The home is worth much more than \$15,000.00 by today's prices, and was worth more than \$15,000.00 in 1967 as stated by the Defendant Barbara Sheron who believed the house and property were worth approximately sixty to seventy thousand dollars at the time the quit-claim deed was signed in 1967. Record at 359. The trial court stated the following regarding the value of the home:

The Plaintiffs did not present evidence of value. And I know the Plaintiffs have a burden in that regard to prove unjust enrichment. That other houses in the area were selling in the fifties and sixties for very modest amounts. I cannot find that they are comparable sales because I don't have the information. But based upon all the information I have, and finding that the Defendants contributed between three and four thousand dollars at a time when both Defendants, sic Plaintiffs, who were in their late fifties, both 59 years old, both have lived 39 years, my own experience is that people of that age have a life expectancy of twenty years or longer; three or four thousand dollars to buy a remainder interest in property valued at \$15,000.00, the likelihood of realizing it twenty plus years down the road is not unjust. Record at 473.

As the trial court stated in its decision, the Plaintiffs

did not put on evidence as to the exact value of the property. No appraisal was done. However, the trial court accepted the evidence introduced by the Plaintiffs establishing that there was sufficient equity in the property to establish that the Defendants would be unjustly enriched if allowed to keep the property subject to the quit-claim deed. The only estimate as to the approximate value of the property at the time the deed was signed was given by the Defendant Barbara Sheron, she stated that she believed the property to be worth approximately sixty or seventy thousand dollars in December of 1967. At the time of the trial the Plaintiffs did not attempt to establish the exact value of the house, only that there was sufficient equity in the house establish unjust enrichment. From the trial court's decision, it is clear that the Plaintiffs met their burden of proof. The trial court followed the standard set forth in Parks v. Zions First National Bank, 673 P.2d 590, (Utah 1983) where this Court held that where a substantial part of the marital estate was acquired from the husband's earnings, there was sufficient basis for holding that the Plaintiff had an equitable interest in the property. Under the Parks standard, it is not necessary to show actual value, only that there is an "equitable interest" sufficient to amount to an "unjust enrichment" of the Defendant.

Regarding the evidence of money contributed to the construction of the home by the Defendants, the Defendants showed no receipts, or any record of any of their alleged contributions. Clearly, the evidence presented at the trial was insufficient to

establish that the Defendants contributed \$1,900.00 plus \$700.00 prior to 1967. Because it is so easy to verify whether the Defendant took out a loan from Beneficial for \$700.00 and to learn what the loan was used for, the issue of damages should be remanded to the trial court for more in depth consideration.

The evidence which the Plaintiffs allege was not presented sufficiently was:

- a. The value of the property was never established.
- b. No receipts were provided by Defendants to substantiate any of the Defendant's claims regarding contributions to the construction of the home.
- c. No records were provided regarding the loan from Beneficial Finance that Arthur Sheron testified he took out for \$700.00 which he stated he loaned to the Opheikens, and which the Opheikens testified he used to buy a car.

#### CONCLUSION

The primary reason the Opheikens brought this action was to retain the right to determine to whom their life earnings would pass at their death. At no time have the Sherons asked their parents to leave their home. From the time the quit-claim deed was signed in 1967, it has been understood that the Opheikens would live out their lives in the home. The Opheikens brought this action to retain the right to pass on their home to the heirs of their choice, not merely to live out their lives in the home. To deny the Opheikens the right to pass their home on to

the heirs of their choice, the court would remove any benefit a constructive trust would impose. In short, the trial court's remedy does not allow the Plaintiffs the option of paying back the Sherons and retaining their house, which is the only reason they petitioned the trial court to impose a constructive trust.

ADDENDUM

No addendum is attached because all references are to the Record.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of December, 1988.

\_\_\_\_\_  
STEPHEN W. FARR

Attorney for Appellant

-----  
G. SCOTT JENSEN

Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Appellant, postage prepaid, on this \_\_\_\_\_ day of December, 1988, to the following:

ROBERT A. ECHARD #953  
Attorney for Defendant/Respondent  
635 25th Street  
Ogden, Utah 84401  
Telephone: 801-621-3317

\_\_\_\_\_  
Secretary