

2009

Goggin v. Goggin : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TAMARA RAE GOGGIN also known as Tam-
my Goggin,

Plaintiff/Appellee,

v.

DENNIS MICHAEL GOGGIN also known as
DENNIS M. GOGGIN also known as Dennis
Goggin; ROSALIE J. HENDRICKSON, Trustee
of the Living Trust of Ed Hendrickson, doing
business as Construction Industrial and doing
business as Construction and Industrial; CON-
STRUCT TECH CORPORATION, a Utah cor-
poration; ROSALIE J. HENDRICKSON, Trus-
tee of West One Trust of Edward C. and Rosalie
J. Hendrickson; ROSALIE J. HENDRICKSON,

Defendants/Appellants.

Case No. 20090294-CA

District Ct. Civil No. 060917219

JOINT REPLY BRIEF OF APPELLANTS

Appeal from the Third Judicial District Court, Salt Lake County, Utah
Honorable Denise Posse Lindberg, Presiding

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CORRECTION

On page 9 of Appellants' opening brief, a statement is made that Rosalie began contributing funds to Construct Tech to pay legal fees "[b]eginning on February 2, 2004, less than two months after Ed's death." In fact, those payments began in 1994. Ed died December 17, 2003, a fact which was intended to have been inserted in the following paragraph as a preface to a discussion of partnership dissolution.

ARGUMENT

I. ROSALIE'S NOTICE OF APPEAL GIVES THIS COURT JURISDICTION TO DECIDE ALL OF THE MATTERS RAISED BY APPELLANTS ON THIS APPEAL.

A. *Rosalie's Notice Perfected an Appeal in Her Individual Capacity.*

The recitation of "Trustee of the Hendrickson Family Trust" following Rosalie's name in her Notice is presumed under Utah law to be mere *descriptio personae* without any legal effect. Accordingly, the Notice must be construed as having perfected Rosalie's appeal in her personal capacity, unless the presumption is rebutted by restrictive language relating to the title or extrinsic evidence that clearly and unambiguously shows that Rosalie was named in the Notice only in her fiduciary capacity of trustee.

The application of *descriptio personae* to a notice of appeal is a question of first impression in Utah. In applying the doctrine to other legal documents, however, the Utah courts have developed a straightforward test that governs such application: (1) fiduciary or representative titles following a person's name or signature in a legal document are presumed to be merely descriptive and without legal effect; unless (2) there is either (a) language accompanying the title which unambiguously specifies that the party was

acting solely in a fiduciary or representative rather than a personal capacity; or (b) evidence extrinsic to the signature and title which unambiguously shows that the party was acting in a fiduciary or representative rather than a personal capacity. *TWN, Inc. v. Michel* (“*TWN II*”), 2006 UT App 70, ¶ 24, 131 P.3d 882; *Forest Meadow Ranch Property Owners Ass’n v. Pine Meadow Ranch Home Ass’n*, 2005 UT App 294, ¶¶ 27-28, 118 P.3d 871; *TWN, Inc. v. Michel* (“*TWN I*”), 2003 UT App 70, ¶ 14, 66 P.3d 1031.¹

Rosalie’s title is not preceded by “as,” “in my capacity as,” or other such limiting words or phrases that would rebut the presumption. To the contrary, Rosalie’s title appears without any introductory restriction whatsoever, as a mere appositive or synonym for Rosalie herself. Under Utah law, therefore, the language of the Notice does not rebut the presumption that its recitation of Rosalie’s title is mere *descriptio personae*.

B. *Dennis’s and Rosalie’s Notices Together Perfected an Appeal by Construction Industrial.*

Neither the Utah Partnership Act, nor the Uniform Partnership Act of 1914 (the “UPA”) on which the Utah Act is based, expressly addresses how claims held by a gener-

¹ See also R. Collin Mangrum & Dee Benson, MANGRUM & BENSON ON UTAH EVIDENCE 115 (2009) (summarizing the Utah *descriptio personae* doctrine).

Where a contract or deed exists binding an individual, but the individual inexplicably signs as an agent, trustee, or as an officer, then the added or qualified reference is presumptively *descriptio personae* or mere surplusage and the obligation or grant is extended to the individual personally unless the named person can rebut the presumption. To rebut this presumption, the person should either add additional language in the contract or deed indicating that he is only signing in a representative capacity or resort to extrinsic evidence to show that he indeed signed in a representative capacity.

al partnership are to be pleaded.² *Cottonwood Mall Co. v. Sine*, 767 P.2d 499, 500 (Utah 1988). At common law, however, it was mandatory that partnership claims be pleaded in the individual names of all of the partners rather than in the name of the partnership. William A. Gregory, *THE LAW OF AGENCY AND PARTNERSHIP* § 207, at 336 (3rd ed. 2001) (“The basic common law rule is that partnerships must sue in the names of all of the partners, and that a suit against a partnership must name all of the partners.”); *e.g.*, *Kemp v. Murray*, 680 P.2d 758, 759-60 (Utah 1984); *Wall Investment Co. v. Garden Gate Distrib., Inc.*, 593 P.2d 542, 544 (Utah 1979).

This mandatory joinder rule has been criticized in Utah and other jurisdictions as harsh and inflexible. *See Wall Investment*, 593 P.2d at 544 (quoting or citing *Loucks v. Albuquerque Nat’l Bank*, 76 N.M. 735, 418 P.2d 191 (1966); ELEVENTH ANNUAL REPORT OF NEW YORK JUDICIAL COUNCIL (1945)). Accordingly, the mandatory character of the joinder rule has been relaxed in most jurisdictions, including Utah, to additionally permit suit in the partnership’s name alone. *See Cottonwood Mall*, 767 P.2d at 501 (holding that general partnership may sue in its own name) (adopting analysis of *Gary Energy Corp. v. Metro Oil Prods.*, 114 F.R.D. 69, 70-71 (D. Utah 1987) (predicting how Utah courts would rule on this question)); *Decker Coal Co. v. Commonwealth Edison Co.*, 714 P.2d 155, 157 (Mont. 1986)).

² The Utah Partnership Act is a nearly *verbatim* enactment of the UPA. *See* UTAH PARTNERSHIP ACT, UTAH CODE ANN, § 48-1-1 & pp. 135-37 (2004) (listing Utah among states that have adopted the UPA); *id.* at 35 (Supp. 2009) (same).

There is nothing in the Utah decisions relaxing the common law joinder rule, however, to suggest that it is anything other than permissive. Utah common law *permits* a partnership to sue in its own name, but does not *require* it; it displaces the former common law requirement that a partnership sue only in the individual names of all of its partners, but continues to allow a partnership to sue in the individual names of all of its partners, if it wishes. *See Cottonwood Mall*, 767 P.2d at 500 (observing that the Utah Partnership Act and the UPA “are silent on whether a partnership *may* sue in its own name”) (emphasis added); *Kemp*, 680 P.2d at 760 (concluding that to properly bring a partnership claim, the plaintiff-partner “was required *either* to name the partnership as the real party in interest *or* to join his co-partner as a necessary party”) (emphasis added); *cf. Gary Energy*, 114 F.R.D. at 70 (holding that partnership may sue in its own name because the failure of the Utah Rules of Civil Procedure to expressly authorize it “is not indicative of an intent to prohibit such a suit”).

Utah common law thus incorporates the universally accepted proposition that a partnership claim may be pursued in the individual names of all of its partners, even in those jurisdictions that permit suit by a partnership in its name alone. *See* II Alan R. Bromberg & Larry E. Ribstein, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 5.02(b), at 5:11 (2010) (“All partners together *can* enforce a partnership right in virtually every U.S. jurisdiction. This follows from their management rights, which can be exercised un-animously even in extraordinary matters”) (emphasis in original) (citing and discussing UPA); Alan R. Bromberg, *Enforcement of Partnership Rights—Who Sues for the Partnership?*, 70 NEB. L. REV. 1, 3-4 (1991) (“An action by all of the partners in their own

names . . . is permitted in almost all states and required in a few.”); *id.* at 5-6 (“[E]nforcement of partnership rights by all the partners together, which was the common law practice . . . is sufficient almost everywhere and necessary in a relatively small number of states. [] All partners together can enforce a partnership right in virtually every jurisdiction in the United States.”).

The Utah cases cited by Tammy for the proposition that partnerships may sue only in their own names are inapposite because her cases apply only to limited partnerships. Utah law draws a sharp distinction between limited partnerships, which are purely creatures of statute akin to corporations, and general partnerships, which are governed by common law except where displaced by statute. In *Wall Investment*, for example, the court found it unnecessary to decide “whether a general partnership can sue in its own name” because the

plaintiff here is a limited partnership, not a general one. Limited partnerships were unknown to the common law and are, like corporations, creatures of statute. The quasi-corporate aspects of a limited partnership and the quasi-shareholder status of a limited partner are obvious. The same reasoning and policy considerations which justify recognition of corporations as proper parties plaintiff apply as well to limited partners. Moreover, there is specific legislative recognition that a limited partnership, as an entity distinct from its partners, can bring suit.

593 P.2d at 544 (footnotes omitted).

Assuming that Construction Industrial was a legally formed and validly existing partnership under the Utah Partnership Act, as Appellants argue, Construction Industrial was dissolved upon Ed’s death, but continued to exist as a partnership among Rosalie and Dennis pending the winding up of its affairs. *See* UTAH CODE ANN. § 48-1-27 (“On dissolution a partnership is not terminated, but continues until the winding up of partnership

affairs is completed.”); *id.*, § 48-1-28(4) (“Dissolution is caused . . . [b]y the death of any partner.”); *e.g.*, *Hurley v. Hurley*, 91 A.2d 674, 675 (Del. Ch. Ct. 1952) (holding that partnership dissolved by death of partner continued as partnership among surviving partners during winding up process); *cf.* *Wanlass v. D Land Title*, 790 P.2d 568, 571 (Utah Ct. App. 1990) (“Upon dissolution, the surviving partner, in the absence of an agreement stating otherwise, has the duty to wind up the partnership”).

Accordingly, Dennis’s and Rosalie’s respective notices of appeal filed in their personal capacities perfected an appeal on behalf of Construction Industrial because they comprised all of the partners of Construction Industrial at the time that the notices were filed.

C. *Dennis and Rosalie Have Standing to Challenge the District Court’s Imposition of Alter-Ego and Veil-Piercing Remedies on Construct Tech.*

The effect of piercing the corporate veil because the owner of a corporation has treated the corporation as his or her alter ego is to deprive the owner of the benefits of the corporate form, notably limited liability. By making the owners personally liable for corporate debts and obligations, and by exposing corporate assets to liability for the personal debts and obligations of any owner, piercing or reverse-piercing of the corporate veil imposes a harm on the owners that is different in kind from the harm that this remedy imposes on the corporation.

Ownership interests do not vanish into thin air. Either Rosalie is an owner of Construct Tech as Appellants argue, or Dennis is the owner as the District Court found. It is elemental that the shareholders of a corporation have standing to bring suit in their indi-

vidual capacities when they suffer harm from corporate wrongdoing that is different in kind from the harm such wrongdoing inflicts on the corporation. *Aurora Credit Services, Inc. v. Liberty West Development, Inc.*, 970 P.2d 1273, 1280 (Utah 1998). Accordingly, either Rosalie or Dennis may bring an action challenging the District Court's conclusion to pierce Construct Tech's corporate veil on the ground that it is Dennis's alter ego.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FAILING TO EXPLAIN WHY IT IMPOSED A CONSTRUCTIVE TRUST ON THE PROPERTY.

A primary responsibility of the trial court is to articulate a consistent legal justification, based on the facts that it finds, for the result that it reaches in a case. The District Court failed to meet this responsibility in this case. Specifically, its Findings of Fact and Conclusions of Law failed to offer any legal explanation for its imposition of a constructive trust on title to the Property.

After concluding that the record owner of the Property, Construction Industrial, was Dennis's alter ego and that neither Ed, Rosalie, nor the Trust had any ownership interest in Construction Industrial, the Court stated: "Based on the foregoing, the Court concludes that Tammy has proven, by clear and convincing evidence, that the Court should disregard how record title to the Riverbend property is presently held (that is, in the name of Construction Industrial), and should instead impress a constructive trust upon the property for Tammy's benefit." (Findings & Conclusions, R. 1029 ¶ 103.)

This is a complete *non sequitur*. The Court's conclusion that Tammy is entitled to an equitable lien on the Property as a co-beneficiary of a constructive trust simply does not follow from the finding that Construction Industrial is Dennis's alter ego. As set

forth in Appellants' opening brief, the requirements for a constructive trust are a wrongful act suffered by the claimant leading to a resulting unjust enrichment of the record title holder. Dennis's failure to observe the separate existence of Construction Industrial, if it was a wrong at all, was a wrong suffered by Rosalie, not Tammy. Accordingly, it provides no basis for imposition of a constructive trust in Tammy's favor.

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN IMPOSING A CONSTRUCTIVE TRUST BECAUSE TAMMY KNEW SHE HAD NO CLAIM OF OWNERSHIP WHEN SHE WORKED TO IMPROVE IT.

A. *Constructive Trust Is Not a Permissible Remedy for Uncompensated Investment in or Labor Performed on Real Estate by One with Actual Knowledge That the Property Is Legally Owned by Another.*

The District Court did not explain why it imposed a constructive trust on the Property. Tammy has argued that the trust was justified to protect Tammy's unrecognized financial investment in the Property represented by the \$15,900 commission that she waived, and her uncompensated contributions to its improvement and operation as a business. Brief of Appellee, at 42. Utah law is clear, however, that a plaintiff's enrichment of a property owner by his or her investment or labor is not by itself sufficient to justify imposition of a constructive trust on the property; the enrichment must additionally be proven to have been *unjust*, as when a person works without compensation to improve property whose legal owner has encouraged the belief that the person has a share of the ownership interest. Brief of Appellants, at 41-42.

Accordingly, appellants have argued that Tammy could not have reasonably believed that she had a claim of ownership to the Property, because at the time that she

worked on it she possessed (i) actual knowledge that the Property was titled in the names of businesses to which she had no claim of ownership, and (ii) actual knowledge that whoever owned the Property, it was not her. Brief of Appellants, at 42-43. In response, Tammy argues that she was misled by Dennis into thinking that in 1998 the Property was deeded by Construct Tech to Dennis, and that she subsequently worked on the Property in the reasonable but mistaken belief that it belonged to her husband rather than one of her husband's companies.³ Brief of Appellee, at 42-43. The record does not support this argument.

B. *Tammy's Contradictory Testimony That She Thought Dennis Was the Owner of the Property Was Not Believable.*

Tammy accuses Appellants of failing to “marshal as evidence her testimony that Dennis . . . told her in 1998 that the quit claim deed to the property which she prepared would be used to transfer record title from Construct Tech to himself.” Brief of Appellee, at 42. This testimony, however, is inconsequential because ultimately Tammy testified to facts putting her, at minimum, on inquiry notice that the deed had not been prepared as she allegedly expected.

At her deposition, Tammy testified under oath that she prepared the quitclaim deeds because “Dennis said that it would be advantageous for us to quickclaim [*sic*] the property from Construct Tech Corporation to *Construction Industrial*.” (See R. 994, p.

³ It is undisputed that when Tammy prepared the quitclaim deeds to transfer title from Construct Tech to Construction Industrial, she left the grantee block blank, and it was Dennis who later wrote in “Construction Industrial” as the grantee before filing them.

302 (quoting Dep. of Tamara Rae Goggin, Nov. 7, 2007), p. 67.) When asked by her counsel what caused her to change her testimony, Tammy stated that:

I – I realized – there has been – because there has been so many companies and bank accounts that I remembered specifically when Dennis and I sat at the kitchen table in the Draper home and how he specifically told me he was going to put it in Dennis Goggin. *And then when it came to writing the grantee in, he said, “Just leave it blank.”* (R. 994, p. 313 (emphasis added).)

The record shows, therefore, that at the time of her deposition Tamara remembered Dennis unambiguously explaining to her that he was going to deed the Property to Construction Industrial, while less than a year later she was able to call forth a vivid recollection of Dennis explaining something entirely different that was much more helpful to her case at trial. Either way, she was on notice to inquire in order to protect her alleged interest. The record is otherwise devoid of any evidence that Tammy was unaware or otherwise mistaken about who owned the Property when she worked on it.

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING AN EXPRESS ORAL AGREEMENT BETWEEN DENNIS AND TAMMY.

A. *There Was Insufficient Evidence of a Meeting of the Minds.*

Appellants argued that, even after marshaling all the evidence, the record did not support of District Court’s conclusion that Dennis and Tammy entered into an express oral agreement to acquire and improve the Property together. Brief of Appellants, at 33-38. Appellants specifically pointed to Tammy’s general lack of credibility, documentary and other objective evidence that contradicted Tammy’s testimony about her financial contributions to acquiring and improving the Property, Tammy’s actual knowledge that

the Property was acquired with Dennis's separate premarital funds and titled in the names of businesses in which she had no claim of ownership, and Tammy's documented concerns about the fact that her name did not appear on the title, including the retention of an attorney to force a retitling of the Property. Brief of Appellants, at 36-38. Tammy responded that her lack of credibility was confined to a piece of real property not at issue on this appeal, that there is no evidence that she did not fulfill her financial obligations under the purported contract, that she waived her real estate commission when Construct Tech acquired the Property, that she deeded her home to Construction Industrial, and that she and Dennis both spent money out of the Construction Builders account for their own personal expenses.

1. Lack of Evidence Negating an Oral Contract Is Not Evidence of the Contract's Existence.

The District Court observed in passing that Tammy waived commissions totaling \$107,444 on real estate transactions unrelated to the Property that she undertook with Dennis. (Findings and Conclusions, R. 1009 n.14.) Although it is undisputed that there is literally no documentary evidence that any of those funds went to the purchase or improvement of the Property, Tammy argues that that those monies should be assumed to have been contributed to the Property because "there was no evidence that they were not so used." Brief of Appellee, at 46. This, of course, contradicts the Court's express finding that the Property was acquired with Dennis's premarital funds, and that Tammy understood and agreed to this before the transaction closed. (Findings & Conclusions, R. 996 ¶¶ 29, 104.)

A party cannot establish an *express* oral contract by an appeal to silence, especially in the face of contrary findings by the court. Although it should go without saying, *silence* cannot count as evidence of contractual *expression*. The only reasonable inference that can be drawn from the lack of documentary evidence on this question is that those other waived commissions were not used to acquire or to improve the Property.

2. Neither the Draper Home nor the Proceeds From Its Sale Went to Acquire or Improve the Property.

Tammy argues that her quitclaim of the Draper home to Construction Builders constituted performance of her financial obligations under the purported oral agreement. Brief of Appellee, at 46, 47. This reflects a regrettable lack of candor on her part. As appellants documented in detail, Brief of Appellants, at 16-18, the record irrefutably shows that Tammy deeded the home to Construction Builders because Dennis had used his separate funds in that account to pay off her mortgage, and that when the home was finally sold—long after the completion of all improvements to the Property—Dennis and Tammy both took care to ensure that the funds remained under Tammy’s control and were segregated as her separate premarital property.

In short, there is no basis for Tammy’s contention that she used her Draper home or any proceeds from its sale to acquire or improve the Property in satisfaction of her obligations to do so under the purported oral agreement.

3. Dennis Generally Denied the Existence of the Purported Oral Agreement.

Tammy argues that Dennis offered no evidence of the terms of the oral agreement, concluding from this that Tammy’s self-serving testimony was “uncontradicted” and thus

definitively established the terms. Brief of Appellees, at 46. Obviously, Dennis did not offer testimony on the terms of the purported oral agreement because there was no such agreement.

B. *The Purported Agreement Was Too Vague to Be Enforceable as a Contract.*

Given the District Court's finding that the oral agreement was "express," one would expect to find quotations by either the District Court or Tammy to specific "expressions" of contractual terms to which the parties mutually assented. Yet, the only content that the District Court was able to give to the purportedly "express" contract was the legalistic "Tammy and Dennis reached an express oral agreement to purchase, hold, and develop the property, and the equestrian business therein, for their mutual enjoyment and benefit"—words that one can hardly imagine Tammy and Dennis to have said to each other. Moreover, even this formulation is too vague to enforce as a contract. Even assuming that Tammy and Dennis agreed to acquire and improve the Property "together," the record does not disclose such crucially material terms as what they each agree to contribute in the way of money and labor, how they would be compensated for those contributions, or who would actually own the Property. Accordingly, there is simply no basis on which the District Court could have made a judgment that Dennis breached this purported contract, or that Tammy did not.

Appellants rested their argument on this point on *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, 94 P.3d 179, which is squarely on point. Brief of Appellants, at 39-40. Although the purported contract in *Prince, Yeates* had many more documented terms

than the purported oral agreement here, the Utah Supreme Court refused to enforce it, reasoning that there was simply no evidence of what would have constituted performance. *Id.*, ¶¶ 13-14, 94 P.3d at 183.

Tammy chose not to discuss *Prince, Yeates* despite its obvious relevance here. Appellants submit that Tammy's vague references to joint acquisition and development of the Property simply do not pass the test established in that case.

V. THE TRIAL COURT ERRED IN HOLDING THAT THE RIVERBEND PROPERTY IS PART OF THE MARITAL ESTATE.

Tammy expends little effort attempting to defend the trial court's decision to include the Riverbend Property in the marital estate. In fact, her only defense of it is the conclusory statement that "[t]he issue was pled and consequently the court was entitled from the evidence to find that the Riverbend Property constituted marital property." (Brief, p. 48.)

In fact, the issue was not framed by the pleadings. The claims for relief in the Amended Complaint were constructive trust, declaratory judgment that Dennis held title alone or in constructive trust, quiet title in Dennis Goggin, breach of contract, and specific performance. (R. 276-79.) The record citation references upon which Tammy relies are not in the claims for relief, but rather are simple statements in the factual allegations of the Amended complaint. The only one which described the property as marital property says:

The Riverbend Ranch was acquired during The Marriage and thereafter was jointly occupied, used and maintained by Plaintiff and Dennis Goggin during The Marriage as their marital property and was so acquired,

maintained and used with their joint and mutual contribution of money, work and services. (R. 268, ¶ 24.)⁴

This statement is not linked to any claim for relief, and is not a necessary factual predicate for any claim for relief asserted in the Amended Complaint. The Amended Complaint also contains a detailed prayer for relief, which again makes no mention that a declaration that the Riverbend Property is marital is part of the requested relief. (R. 280-81.)

At trial, when Tammy attempted to introduce evidence of her contribution of time and effort to development of the property, the question of the purpose of the evidence specifically came up. In response to an objection as to its purpose, Tammy's counsel explained that it was relevant to the constructive trust claim, and the trial court adopted that position:

MR, PARKER: Your Honor, I'm going to object to this line of questioning on the grounds of relevance. The—her involvement in improving the property or putting up the fence or any of these kinds of things are . . . not relevant to the question of ownership as it's framed in the pleadings. . . .

MR, WESTON: Your Honor, obviously, it is relevant. It has to do, beginning first of all, with why she was there, what she and Dennis were doing together, her participation. The primary thrust of this lawsuit is the imposition of constructive trust. We cited this case, the Zions Bank/Park case, which is similar, which then the husband was attempting there to establish what he had done with regard to the acquisition property. We're now here talking about what Tammy Larsen was doing with regard to the improvement, the development, the planning of the property. All of which represented her contribution, which the Court must, of course, take into ac-

⁴ Tammy also refers to ¶ 27 of the Amended Complaint, which mentions "construction of the marital home;" and ¶ 30, which avers that she and Dennis occupied and used Riverbend Ranch "as their marital property." Viewed in the context of the specific claims for relief alleged in the Amended Complaint, neither of those reference is sufficient to place Dennis on notice that the issue of transmutation of separate property is to be decided in this case, rather than the divorce case.

count in determining whether there was a constructive trust and whether she had any involvement in that. And therefore, has a protected interest.

MR PARKER: [T]his may be very relevant testimony in the divorce case if she's trying to establish exceptional circumstances with regard to separate property with Dennis, but I don't think it's relevant here where the question is—is the—the relationship between Dennis and the Hendrickson Trust.

THE COURT: I disagree. I think it is relevant to the extent that, as I read their pleadings, there is presumably some kind of arrangement or conspiracy or at a minimum the use of—I guess they don't use the word “conspiracy,” but the use of, by Mr. Goggin, of other entities to shield assets essentially from—from Tammy. I think that there is relevance. And I—to the extent that the trust is or was—or wasn't aware of the contributions, I still think it is relevant to what claims there may be for what benefits Mr. Goggin may have received and—and—and who would be, in fact, unjustly enriched on this matter. (R. 993, pp. 126-29.)

After trial, the court requested that the parties submit proposed findings of fact and conclusions of law to the court for consideration. Tellingly, Tammy's proposed findings and conclusions make no mention of marital property and no request that the court delve into the divorce issues by holding the Riverbend Property to be marital property. (R. 924-60.) To the contrary, the proposed findings note that the “determination and allocation of the marital property” was reserved for decision by the judge in the divorce case. (R. 926, ¶ 6.)

Although issues not expressly raised in the pleadings may be tried by consent, “[a] trial court may not base its decision on an issue that was tried inadvertently.” *Colman v. Colman*, 743 P.2d 782, 785 (Utah Ct. App. 1987). To do otherwise is a violation of due process. *In re Adoption of S.L.F.*, 2001 UT App 183, ¶ 10, 27 P.3d 583.

Parties to a judicial proceeding are entitled to notice that a particular issue is being considered by a court and must be given an opportunity to

present evidence and argument on that issue before decision. To be sufficient, the notice must advise the parties of the specific issues which they must prepare to meet. Thus, the party must be given a reasonable opportunity to know the claims of the opposing party and to meet them.

W. & G. Co. v. Redevelopment Agency, 802 P.2d 755, 761 (Utah Ct. App. 1990) (citations and internal quotation marks omitted).

It is error to adjudicate issues not raised before or during trial and unsupported by the record. The trial court is not privileged to determine matters outside the issues of the case, and if he does, his findings will have no force or effect. In law or in equity, a judgment must be responsive to the issues framed by the pleadings, and a trial court has no authority to render a decision on issues not presented for determination. Any findings rendered outside the issues are a nullity. A court may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried, whether that theory was expressly stated or implied by the proof adduced. Parties may limit the scope of the litigation if they choose, and if an issue is clearly withheld, the court cannot nevertheless adjudicate it and grant corresponding relief. The limitation to try the issues presented obtains whether the action is one in law or in equity and includes declaratory judgments as well.

Combe v. Warren's Family Drive-Inns, Inc., 680 P. 2d 733, 739 (Utah 1984) (citations omitted).

In the present case, even if this Court upholds all of the predicate findings that the Riverbend Property is presently owned by Dennis, it remains undisputed that the funds used to acquire it were premarital. The issue of transmutation of separate property into marital property requires a careful balancing of factors in an effort to determine whether commingling has occurred or exceptional circumstances exist. *Dunn v. Dunn*, 802 P.2d 1314, 1319 (Utah Ct. App. 1990) (citation omitted). *Accord, Burt v. Burt*, 799 P.2d 1166, 1168 (Utah Ct. App. 1990). Even if the issue had been properly before the court, it did

not engage in the proper analysis of the issue and its gratuitous resolution of the issue cannot withstand scrutiny.

Tammy can point to nothing in the record which may fairly be said to place Dennis on notice that the question of whether the Riverbend Ranch should be included in the marital estate would be tried in this case. Indeed, all indications were to the contrary, the court ruled to the contrary in response to an objection, and such relief was never requested by any party, including Tammy. The District Court court did it *sua sponte*. Its judgment on this point “does not respond to any of the issues presented for determination,” *Combe*, 680 P.2d at 736, and therefore must be reversed.

CONCLUSION

For the foregoing reasons, appellants request that this Court reverse the judgment of the District Court as to the Riverbend Property and remand the case with instructions to enter judgment in favor of the Hendrickson defendants on their counterclaims.

DATED this 21st day of April, 2010.

SNOW, CHRISTENSEN & MARTINEAU

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing JOINT REPLY
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