

1998

# Holley Wells, Shirley Sontag, Lucille Ditzenberger v. Joel Parker v. Lloyd Webb and the Estate of Fred E. Parker : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 980323-CA

HOLLEY WELLS, SHIRLEY SONTAG,  
and LUCILLE DITZENBERGER,  
individuals,

Plaintiffs/Appellants/  
Cross-Appellees,

v.

JOEL PARKER, an individual

Defendant/Third-Party  
Plaintiff/Appellee/  
Cross-Appellant,

v.

LLOYD J. WEBB, individually  
and in his capacity as  
personal representative of the  
Estate of Fred E. Parker, and  
THE ESTATE OF FRED E. PARKER,

Third-Party Defendants.

Case No. 980323-CA

Priority No. 15

REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES

APPEAL OF JUDGMENT OF THE SECOND DISTRICT COURT,  
WEBER COUNTY, UTAH  
THE HONORABLE PARLEY R. BALDWIN

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ED  
Utah Court of Appeals  
DEC 10 1998

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

HOLLEY WELLS, SHIRLEY SONTAG, and LUCILLE DITZENBERGER, individuals,  Plaintiffs/Appellants/ Cross-Appellees,  v.  JOEL PARKER, an individual  Defendant/Third-Party Plaintiff/Appellee/ Cross-Appellant,  v.  LLOYD J. WEBB, individually and in his capacity as personal representative of the Estate of Fred E. Parker, and THE ESTATE OF FRED E. PARKER,  Third-Party Defendants.	Case No. 980323-CA  Priority No. 15
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## ARGUMENT

- I. BECAUSE JOEL FAILED TO REBUT THE PRESUMPTION THAT FRED, AS TITLE HOLDER, OWNED THE RANCH PROPERTY, THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE RANCH PROPERTY WAS A PARTNERSHIP ASSET.

Joel argues that, because a partnership agreement to hold land as a partnership asset need not be in writing, the trial court properly determined that the ranch was a partnership asset. (Joel's Brief at 26.)<sup>1</sup> As described below, however, Joel failed to rebut the presumption that Fred, as the holder of title to the property, owned the property at his death.

A. Joel Failed to Rebut the Presumption that Fred, as Titleholder, Owned the Property.

Under the general rule in the jurisdictions, Fred's holding of title to the ranch property created a presumption that Fred owned the property. See Alan R. Bramberg & Larry E. Ribstein, 1 *Bramberg and Ribstein on Partnership*, § 3.02(d)(3), at 3:20 (Supp. 1998); 59 Am. Jur.2d *Partnership* § 373 (1987). Although the presumption of individual ownership may be rebutted by a clear showing of the parties' intent to include the property as a partnership asset, "this intent must include the intent of the titleholder of the property involved." *Mischke v. Mischke*, 530

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<sup>1</sup> The opening brief of the Appellants/Daughters will be referred to as the "Daughters' Brief."

N.W.2d 235, 240 (Neb. 1995). "Use of the property alone is not sufficient because an owner may intend to contribute only the use, as distinguished from the ownership, to the partnership." *Id.*

Here, Fred's actions during his lifetime do not reflect his intent that the ranch property belong to the partnership. Only Fred held title to the property and claimed deductions for depreciation on the property. (Plaintiffs' Exhibit 27; R. 282, pg. 42.) Fred, his estate, or his heirs have paid all property taxes, which totaled over \$20,000. (*Id.* at 38, 139, 179, 194.) Although Fred's affidavit stated that a partnership was buying the property, the affidavit was required under federal law to complete the purchase of the land. (*Id.* at 92-93; Plaintiffs' Exhibit 30.)

Joel argues that he and Fred's "business decision" to title the property in Fred's name did not alter their intent to include the ranch property as a partnership asset. (Joel's Brief at 31.) Joel testified that Fred decided to put the ranch in Fred's name to protect the property against creditors in case Joel got into trouble. (R. 282, pgs. 93-94.) Fred's decision to hold title individually for creditor protection, however, suggests that he

intended to own the land himself and merely allow the partnership to use the land for cattle ranching. Indeed, Fred's actions compel the same conclusion reached in *Mischke*: the partnership between Joel and Fred merely enjoyed the use, rather than the ownership, of the ranch property. See 530 N.W.2d at 240. The evidence of Fred's alleged intent that the partnership own the property is not sufficiently clear to rebut the legal presumption that Fred, as the titleholder, owned the property. See *Pendleton v. Strange*, 381 S.W.2d 617, 619 (Ky. Ct. App. 1964). Thus, this Court should reject the trial court's conclusion that the property is a partnership asset, and reverse the judgment of the trial court. See Utah Code Ann. § 48-1-5 (1998).

B. In the Event this Court Reverses the Trial Court's Judgment that the Ranch Property is a Partnership Asset, this Court Should Reject Joel's Request for Reversal of the Judgment Regarding the Corner Parcel.

Joel argues that, if this Court reverses the trial court's judgment regarding ownership of the property, this Court should also "reverse the trial court's determination that the corner parcel . . . was partnership property." (Joel's Brief at 32.) This Court, however, will not reverse "on errors claimed for the first time on appeal." *Limb v. Federated Milk Producers Ass'n*, 461 P.2d 290, 293 n.2 (Utah 1969). At trial, Joel testified that

if a **partnership** did not exist, then he was entitled to the corner property.<sup>2</sup> (R. 282, pg. 65.) Joel maintained at trial that he "purchased the [corner] property with his own funds and intended it to be a part of his contribution to a land-and-cattle partnership." (Joel's Brief at 32.) Thus, because Joel's argument regarding the corner parcel was not preserved below, this Court should refuse to address it. *See id.*

In any event, even assuming that Joel preserved the issue below, reversal of the trial court's judgment regarding the corner parcel would require a cross-appeal of that issue. Joel's cross-appeal, however, is limited to the issue of labor as a capital contribution. In *State v. South*, 924 P.2d 354 (Utah 1996), the supreme court established that it is the "result" or "outcome" of a trial court's judgment or decision that requires a cross-appeal. *Id.* at 357.

In this case, reversal of the trial court's judgment regarding the corner property would change the ultimate outcome

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<sup>2</sup> Joel argues, without citation to the record, that the trial court's decision regarding the corner parcel was premised on its finding that the ranch property was a partnership asset. (Joel's Brief at 13 n.3.) To the contrary, the trial court ruled that "[t]he testimony was that [the corner parcel] was part of the partnership. He was purchasing it for the partnership." (R. 282, pg. 209.)

or result of the court's decision: the corner parcel would no longer be deemed a partnership asset. The effect of this Court's reversal on ownership of the corner property would be to enlarge Joel's rights and lessen the Daughters' rights. That result requires a cross-appeal of the issue. See *id.* at 355-56. Thus, in the event this Court reverses the trial court's judgment regarding the ranch property, it should reject Joel's invitation to consider issues related to the corner property because those issues are not properly before this Court on appeal.

II. BECAUSE JOEL FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE THAT FRED INTENDED TO GIVE AND IRREVOCABLY DELIVERED TO JOEL ONE HALF OF HIS CAPITAL CONTRIBUTION, THIS COURT SHOULD REVERSE THE TRIAL COURT'S JUDGMENT REGARDING THE GIFT.

Joel argues that clear and convincing evidence supports the trial court's determination that Fred made a legal gift to Joel of one half of his capital contribution. (Joel's Brief at 34-35.) Joel quotes portions of *Lovett v. Continental Bank & Trust Co.*, 4 Utah 2d 76, 286 P.2d 1065 (1955), arguing that "'it rests primarily with the trial court to determine whether the evidence is clear and convincing.'" *Id.* at 1068 (citation omitted). The remainder of the quoted statement, however, emphasizes that the trial court's "finding is not necessarily conclusive." *Id.*

The *Lovett* court discussed at length the heightened standard

governing appellate review of the trial court's determination of whether "clear and convincing" evidence was presented at trial: "'the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of [the "clear and convincing" evidence standard].'" *Id.* (citation omitted). The court stated that "where a higher degree of evidence is required to establish a fact a proportionately greater degree of proof is required to sustain a finding of the existence of such fact." *Id.* Regarding the quantum of proof necessary to meet the standard, the supreme court stated that "clear and convincing evidence" approaches the criminal standard of "proof beyond a reasonable doubt."<sup>3</sup> *Id.* at 1067; *see also Jardine v. Archibald*, 3 Utah 2d 88, 279 P.2d 454, 457 (1955) ("'Clear and convincing evidence clinches what might be otherwise only probable to the mind.'" (citation omitted)). In view of the *Lovett* standard of appellate review, this Court will not, as in the typical case, affirm the judgment if any evidence exists to support the trial

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<sup>3</sup> Joel suggests that, under *Lovett*, undisputed collateral evidence is sufficient to support a finding of an inter vivos gift. (Joel's Brief at 34.) *Lovett*, however, does not support that assertion. In its decision, the *Lovett* court relied in part on direct evidence in the form of statements made by the decedent clearly expressing donative intent. *See* 286 P.2d at 1068.

court's judgment. Rather, "[i]t requires a higher degree of proof to sustain a finding of fact which must be established by 'clear and convincing evidence' . . . than where mere proof by a preponderance of the evidence is sufficient." *Lovett*, 286 P.2d at 1067.

A. The Evidence Before the Trial Court Does Not "Clinch" the Finding that Fred Intended to Give to Joel One Half of His Capital Contribution.

Joel correctly notes that, to find an inter vivos gift, the trial court must find the following elements by clear and convincing evidence: donative intent, irrevocable delivery, and acceptance. (Joel's Brief at 35.) The burden of persuasion on these elements rests with Joel, "as the claiming donee." *Sims v. George*, 466 P.2d 831, 933 (Utah 1970). The courts recognize a clear distinction between the lay definition of a "gift" and the legal standard for finding a valid gift inter vivos. See *Scto v. First Gibraltar Bank, FSB San Antonio*, 868 S.W.2d 400, 403-04 (Tex. Ct. App. 1993) (noting that, although the alleged donors believed, in lay terms, that a valid gift had been made, the gift was legally insufficient because the donors retained the right to revoke the gift).

Citing *West v. West*, 16 Utah 2d 411, 403 P.2d 22 (1965),

Joel argues that his family relationship with Fred is a "significant" factor in determining the validity of the gift. (Joel's Brief at 35.) West, however, states only that a trial court may place "some reliance on the fact that it is natural to make a gift to a member of one's family." *Id.* at 25 (emphasis added). Standing alone, the family relationship is insufficient. Joel goes on to highlight the trial court's finding that Fred and Joel developed a close relationship, while "Fred's relationship with his heirs was estranged and lacked any contact."<sup>4</sup> (Joel's Brief at 36.) Joel himself, however, testified that Fred's relationship with his children had nothing to do with this case. (R. 282, pgs. 58-59.)

Citing *Sims*, Joel further points to Fred and Joel's friendship as evidence supporting a gift. In *Sims*, however, the donor had written a note expressly stating his delivery of certain shares of stock as a gift. 466 P.2d at 832. The supreme court noted that the friendship existing between the donor and

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<sup>4</sup> Joel also points to the trial court's references regarding his credibility as a witness at trial. (Joel's Brief at 35.) Although Joel correctly notes that credibility is a determination for the trial court, even taking Joel's testimony at face value fails to establish the necessary evidence to support the trial court's "gift" determination.



donee was consistent with the jury's finding of a gift. *Id.*

Joel relies heavily on evidence before the trial court supporting Joel's assertion that Fred contributed money to the cattle business in an effort to help Joel in his future career. (Joel's Brief at 37-38.) Even assuming, however, that Fred's primary motivation for entering into the cattle operation was to help Joel establish a career, an assumption not truly supported by the evidence,<sup>5</sup> that evidence merely reflects Fred's **motivation** to contribute to the **business**. Significantly, Joel testified as follows regarding Fred's participation in the business: "If it wasn't a good deal for Fred, do you think he would have did it? No. It was a **beneficial deal for both of us**. (R. 282, pg. 183.) (Emphasis added.) Fred's contribution of money to the business to help Joel get started in his ranching career simply does not

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<sup>5</sup> Joel testified that Fred had told him "with your youth and my wisdom and age and cold hard cash on the corner of the table, there isn't nothing **we** can't do." (R. 282, pg. 148.) (Emphasis added.) Fred also told Joel that they were "together" on purchasing the property. (*Id.* at 35-36.) Significantly, at the beginning of their business relationship when Joel told Fred that he had bought a cow, Fred's "eyes kind of lit up." (*Id.* at 9.) When Joel asked Fred if he wanted to "get into it" [the business], Fred said "yes." (*Id.*) Their cattle business gave Fred "something to wake up in the morning for. . . . He could think about things, plan things out. It gave him, you know, thoughts again." (*Id.* at 183.)

"clinch" an otherwise "probable" finding that Fred intended to make a legal gift to Joel of one half of his capital contributions. *Jardine*, 279 P.2d at 457.<sup>6</sup> Because the evidence does not show that it is "highly probable" that Fred intended to give one half of his contributions to Joel, the trial court erred in its finding. *Lovett*, 286 P.2d at 1067.

**B. Joel Failed to Meet His Burden to Establish that Fred Irrevocably Parted With and Gave Up All Control Over One Half of His Capital Contribution.**

Joel contends that Fred's retention of one half of the capital contributions distinguishes the facts of this case from those cited in the Daughters' Brief. (Joel's Brief at 38.) Although the court found that Fred gave Joel only one half of his capital contribution, (R. 255), Fred was still required to irrevocably part with the portion given to Joel such that delivery of the fifty-percent interest reached the "'point of no return.'" *In re Lefrak*, 215 B.R. 930, 934 (Bankr. S.D.N.Y.) (citation omitted) (stating that donor alleged to have given a fifty-percent interest in certain real property was required to "surrender dominion and control irrevocably to the donee"),

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<sup>6</sup> As noted in the Daughters' Brief, Fred did not file any gift tax return. See *Burnett v. Burnett*, 471 S.E.2d 649, 651 (N.C. Ct. App. 1996) (stating that "whether a gift tax return was filed" is "evidence relative to donative intent").

*aff'd*, 1998 WL 809527 (S.D.N.Y. 1998). Indeed, the donee must part with "present and future dominion and control over [the gift] **beyond any power on his part to recall.**" *Dial v. Dial*, 603 So. 2d 1020, 1023 (Ala. 1992) (emphasis added).

Fred's retention of title to the **entire** property does not show an irrevocable delivery of one half of the property to Joel. (R. 282, pg. 37.) Fred did not claim deductions for depreciation on only one half of the property or losses on feed; he claimed deductions for the entire property and all losses. (*Id.* at 42; Plaintiffs' Exhibit 17-18.) Fred, his estate, or his heirs have paid all the property taxes. (R. 282, pgs. 38, 139, 179, 194.) See *Estate of Kennedy v. May*, 318 N.Y.S.2d 759, 761 (App. Div. 1971) (affirming finding of no gift because alleged donor "continued to pay taxes, insurance, maintenance and improvements to the property").

Joel suggests, however, that Fred and Joel's "purposeful business decisions" surrounding title, tax returns, and property taxes "dispel any inferences contrary" to a gift. (Joel's Brief at 39.) To the contrary, that the decisions were "business" related dispels all inferences supporting the trial court's gift determination. Fred did not irrevocably deliver one half of his

contribution to Joel; he contributed the money to the cattle business. (See Daughters' Brief, at 28-31.) The evidence does not show that Joel could reasonably have taken "his" half of the contribution and used it in any manner at his discretion, an inference that must be supported by the evidence if Fred irrevocably parted with all dominion over one half of the assets. Indeed, Joel himself testified that he treated Fred's cash contributions as "business" funds, carefully avoiding commingling of business and personal funds in the Key Bank checking account. (R. 282, pg. 45.)

At most, Joel presented some evidence consistent with the trial court's finding of a gift. (See Joel's Brief at 35-38; Daughter's Brief at 27-28.) Joel failed, however, to meet his burden of persuasion in presenting clear and convincing evidence of the elements of an inter vivos gift. See *Lovett*, 286 P.2d at 1067; *Sims*, 466 P.2d at 833. For these reasons, this Court should reverse the judgment of the trial court finding that Fred made an inter vivos gift to Joel of one half of his capital contributions.

III. BECAUSE THE RECORD DOES NOT SUPPORT JOEL'S ASSERTED THEORIES OF PROMISSORY ESTOPPEL AND IMPLIED AGREEMENT AS ALTERNATIVE GROUNDS FOR AFFIRMING THE GIFT DETERMINATION, THIS COURT SHOULD REFUSE TO AFFIRM ON EITHER OF THESE GROUNDS.

In the event this Court reverses the judgment of the trial court on the gift issue, Joel offers the theories of promissory estoppel and implied agreement as alternative grounds for this Court to affirm the trial court's judgment awarding one half of the partnership assets to the Daughters and one half to Joel.

(Joel's Brief at 40.) Joel did not argue either of these theories at trial.<sup>7</sup> Although the supreme court has held that an appellate court may affirm on grounds not argued below, it recently has noted that "our previous opinions on that question have been somewhat inconsistent." *South*, 924 P.2d at 355 n.3. Similarly, this Court has refused to consider alternative grounds for affirmance that were not argued before the trial court. See *Werner-Jacobsen v. Bednarik*, 946 P.2d 744, 748 (Utah Ct. App. 1997).

Should this Court reach the merits of the alternative

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<sup>7</sup> Joel did argue that, in the event the trial court did not find that a partnership existed, he should be compensated for the reasonable value of his services under a contract implied in law (quantum meruit). (R. 124-25.) As discussed below, however, Joel's present argument amounts to a request for this Court to find a contract implied in fact governing disposition of the assets upon dissolution of the partnership.

grounds, however, affirmance on either of these grounds is improper because the elements of these theories are not "'apparent on the record.'" *State v. Montoya*, 937 P.2d 145, 149 (Utah Ct. App. 1997). In *Montoya*, this Court recognized that, "[i]f, in any way, the ground or theory urged for the first time on appeal is not **apparent** on the record, the principle of affirming on any proper ground has no application." *Id.* (emphasis in original). "[T]he record must contain **sufficient** and **uncontroverted** evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal." *Id.* at 149-50 (emphasis added). Thus, for this Court to affirm on either of the asserted grounds, the elements of promissory estoppel or implied agreement must be apparent on the record and supported by "sufficient and uncontroverted evidence." *Id.*

A. The Evidence Does Not Establish the Elements of Promissory Estoppel.

The elements of promissory estoppel are as follows: (1) a promise "'reasonably expected to induce reliance,'" (2) reasonable reliance "'inducing action or forbearance on the part of the promisee or a third person,'" and (3) detriment "'to the promisee or third person.'" *Andreason v. Aetna Cas. & Sur. Co.*,

848 P.2d 171, 174-75 (Utah Ct. App. 1993) (citation omitted).

Because evidence supporting these elements is not apparent on the record, this Court should reject Joel's arguments regarding promissory estoppel.

1. The Evidence Does Not Reflect A Definite and Certain Promise by Fred that Joel's Labor Would Be Valued Equally With Fred's Money Contributions.

Joel argues that Fred and Joel's "agreement" to build a business out of money and labor is "essentially" a promise by Fred that Joel's labor would receive equal treatment with Fred's money. (Joel's Brief at 41-42.) The "promise" under promissory estoppel, however, must be "sufficiently definite and certain that the plaintiff acting as a reasonable and prudent person under the circumstances would be justified in placing reliance thereon." *Petty v. Gindy Mfg. Corp.*, 17 Utah 2d 32, 404 P.2d 30, 32 (1965). Joel's argument that Fred "essentially" and "implicitly" made a promise that labor equals money dispels the conclusion that the alleged promise was sufficiently definite or certain to induce reasonable reliance. See *id.*

Joel relies on his testimony that "the agreement" between he and Fred was that "he was financing it and I was doing the work."

(R. 282, pg. 85.)<sup>8</sup> That testimony, however, reflects only an agreement, made at some unidentified time, regarding the identity of the contributions to be made by each partner. It does not, with sufficient certainty, reflect a promise by Fred that Joel's labor would be treated as equivalent to Fred's money contributions. See *Petty*, 404 P.2d at 32; see also *Rose v. Allied Develop. Co.*, 719 P.2d 83, 87 (Utah 1986) (discussing prior decision in which court refused to imply a promise in employment contract "to which the employer had not **expressly** agreed" (emphasis added)). Also, Joel does not explain how Fred's "horror stories about lawyers" amounted to a promise that Joel's labor would equal Fred's capital contributions. Although Joel argues that Fred led him to believe that his "ownership rights were secure," he identifies no specific promise that "ownership rights" meant an equalization of labor and money at the time of dissolution of the partnership. The evidence cited

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<sup>8</sup> Joel further relies on his "understanding" that Fred "was supplying the money and some of the wisdom, and I was supplying my youth and my ability to get things done." (R. 282, pg. 148.) This testimony of Joel's subjective understanding, however, does not establish Fred's assent to the terms of the promise alleged by Joel. See *Rose v. Allied Develop. Co.*, 719 P.2d 83, 87 (Utah 1986) (stating that promissory estoppel requires more than "subjective understanding" of alleged promisee).



by Joel simply fails to establish the first element of promissory estoppel.

**2. Joel Has Failed to Establish that the Alleged Promise Induced Reasonable Reliance On His Part.**

Even assuming that Fred made the promise as Joel alleges, Joel cannot show reasonable reliance induced by the promise.

"'Damages in promissory estoppel are limited to those which are sustained because the plaintiffs have changed their position to their detriment in reasonable reliance upon the defendant's representations.'" *Andreason*, 848 P.2d at 175-76 (emphasis added) (citation omitted).

As noted above, Joel does not identify when Fred allegedly promised him that Joel's labor would equal Fred's money contributions. (R. 282, pgs. 73-74, 85, 148.) On these grounds alone, Joel has failed to establish that Fred's alleged promise induced him to detrimentally rely on the promise. Also, even if Fred's comments about attorneys could somehow be construed as a promise to Joel that his labor equaled Fred's money, Joel's testimony that "I was really very dumb not to go hire an attorney" confirms his own belief that reliance on the alleged promise was not reasonable. (*Id.* at 102.) Joel himself admitted that he really "wasn't looking for legal advice." (*Id.*)

The record further establishes that it was Joel who bought the first cow and that Joel asked Fred whether he would like to "get into it." (*Id.* at 9.) Finally, Joel cannot argue that Fred's ambiguous statement not to "worry" about his kids caused Joel to incur injury. (*Id.* at 55-56.) The record establishes only that this conversation took place "[a]fter the land was purchased." (*Id.*) The record is unclear whether the conversation took place before Joel expended the efforts he now claims were induced by reliance on Fred's alleged promise. Because, on the record before the trial court, Joel cannot establish reasonable reliance that resulted from a clear promise made by Fred that labor would be treated equally with money, this Court should reject Joel's arguments regarding promissory estoppel.

**B. The Record Contains No Grounds To Affirm the "Gift" Determination on the Basis of An Implied Contract Overcoming the Presumptions of the Uniform Partnership Act.**

Joel argues that this Court may affirm the trial court's determination regarding disposition of assets on the basis of an implied contract between Fred and Joel that altered the statutory presumptions set forth in Utah Code Ann. § 48-1-37 (1998). Joel cites *Petersen v. Petersen*, 169 N.W.2d 228 (Minn. 1969), in which

the trial court found an implied agreement between partners that, upon dissolution, each was entitled to receive one half of the assets and profits. See *id.* at 230. The court noted that, although such agreements need not be in writing, they must be established by reference to the law governing contracts implied in fact. See *id.*

In Utah, "[a] contract is express or implied by reason of the expression of offer and acceptance, -- whether there is a manifestation of **mutual assent**, by words or actions or both, which reasonably are interpretable as indicating an intention to make a bargain with **certain terms** or terms which reasonably may be made certain." *Rasmussen v. United States Steel Co.*, 1 Utah 2d 291, 265 P.2d 1002, 1004 (1954) (emphasis added). The supreme court has rejected a finding of implied contract when there was "no evidence of any action or conduct that reasonably could be construed as a manifestation of mutual assent indicating an intention to be bound on a contract whose terms were certain." *Fowler v. Taylor*, 554 P.2d 205, 208 (Utah 1976).<sup>9</sup>

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<sup>9</sup> More recent Utah decisions on contracts implied in fact set forth three necessary elements: "(1) the defendant requested the plaintiff to perform work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff

Joel argues that the "record unequivocally demonstrates" that his labor would be equal to Fred's money. (Joel's Brief at 43.) Without record support, Joel makes the assertion that "[w]hatever they gave was immediately equal." (*Id.*) To the contrary, however, Joel cites no evidence in the record showing Fred's assent "indicating an intention to be bound on a contract" containing the "certain" term that all assets and profits were to be divided equally upon dissolution of the partnership. *Fowler*, 554 P.2d at 208. Because Fred's assent to a binding contract on the terms alleged by Joel is not "apparent on the record," this Court should reject Joel's arguments. *Montoya*, 937 P.2d at 149.

In view of the standard applied to the determination of implied contracts, the cases cited by Joel are unhelpful. In *Kuhl v. Gardner*, 894 P.2d 525 (Or. Ct. App. 1995), the defendant did not dispute that the plaintiffs were entitled to one half of the partnership assets and profits. See *id.* at 532. Only the timing and conditions of the distribution were at issue. See *id.* In *Citizens Bank of Clovis v. Williams*, 630 P.2d 1228 (N.M.

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expected compensation." *Davies v. Olson*, 746 P.2d 264, 269 (Utah Ct. App. 1987). To the extent that this test applies here, Joel does not argue that the record supports a finding of these elements.

1981), the trial court found a valid "oral" agreement, unlike the alleged implied agreement here, that all assets were to be divided equally upon dissolution. *Id.* at 1229. Neither of the cases analyzed the "agreement" in the light of principles similar to those governing implied contracts under Utah law. The cases and the evidence on the record simply do not support a determination that Fred and Joel entered into a binding contract sufficient to rebut the presumption, set forth in section 48-1-37, that Fred was entitled to a return of his capital contributions. For these reasons, this Court should refuse to affirm the trial court's judgment on grounds of an implied contract.

IV. BECAUSE JOEL HAS FAILED TO ESTABLISH THAT THE TRIAL COURT CLEARLY ERRED IN FINDING THAT JOEL'S LABOR WAS NOT A CAPITAL CONTRIBUTION, THIS COURT SHOULD REJECT JOEL'S REQUEST TO AFFIRM ON THESE GROUNDS.

Joel has cross-appealed the trial court's finding that Joel's labor did not constitute a capital contribution. (Joel's Brief at 47.) Joel asks this Court to address the cross-appealed issue, however, only if the Court reverses on the gift issue. (*Id.*) Thus, Joel does not seek to enlarge the rights granted to him by the trial court, see *South*, 924 P.2d at 355-56, but asserts the cross-appealed issue only to preserve the result

obtained at trial. For the reasons set forth below, Joel has failed to carry his burden on appeal to show the error of the trial court's finding.

**A. Joel Has Failed to Marshal the Evidence Supporting the Trial Court's Determination That Joel and Fred Did Not Agree to Treat Joel's Labor As a Capital Contribution.**

Joel asserts that, because the trial court's decision on this point "came from reading the case law cited" by the parties, the trial court's decision is purely a question of law requiring no marshaling of the evidence. (Joel's Brief at 48.) To the contrary, the trial court stated that "[i]n this situation I think both of them participated in the partnership, as should most partners. That should be the participation. However as I have considered the case, I now find that the labor of Joel did not constitute a capital contribution." (R. 282, pgs. 204-05.) (Emphasis added.)

Indeed, the very cases relied upon by Joel state that the determination of whether an agreement exists to treat labor as capital is a finding of fact. See *Schymanski v. Conventz*, 674 P.2d 281, 285 (Alaska 1983) (remanding for "additional findings" on whether partners agreed to treat personal services as a capital contribution). The only principle of law stated in the

cases considered by the trial court is that, absent an agreement to the contrary, the labor or personal services of a partner is not a capital contribution. See, e.g., *id.* Thus, in rejecting Joel's arguments, the trial court implicitly "found" that Fred and Joel did not agree to treat Joel's labor as capital. See *Mower v. McCarthy*, 122 Utah 1, 245 P.2d 224, 227 (1952) ("[W]e assume that the trial court found the facts in accord with its decision in all cases where under the evidence it could reasonably so find."). The trial court's label of this determination as a "conclusion of law" is not binding on this Court. See *Gillmor v. Wright*, 850 P.2d 431, 453 (Utah 1993) ("On appeal, we disregard the labels attached to findings and conclusions and look to the substance.").

Under these circumstances, Joel was required to marshal the evidence supporting the trial court's finding and show that, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the finding. See *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180, 186 (Utah Ct. App. 1997). Because Joel makes no attempt to marshal the evidence supporting the trial court's finding that Joel and Fred did not agree to treat labor as a capital contribution, this Court should refuse

to consider the merits of his cross-appeal.

**B. Even On The Merits, Joel's Cross-Appeal Should Be Rejected Because The Record Reflects Neither An Agreement That Joel's Labor Would Be Treated As a Capital Contribution Nor An Undisputed Value of Joel's Services.**

Should this Court proceed to the merits on this issue, however, Joel's arguments fail because the record does not support the existence of an agreement to treat Joel's labor as a capital contribution. Joel's actions in failing to keep records of time worked or demanding wages, however, do not reflect his or Fred's understanding that Joel was to receive capital credit for services rendered to the partnership. (R. 282, pg. 55.) Significantly, the trial court made no findings regarding the value of Joel's services and the Daughters questioned the accuracy of Joel's "estimate" on the value. (*Id.* at 70-75.)<sup>10</sup> In view of the lack of evidence supporting the existence of an agreement to treat labor as a capital contribution, and the

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<sup>10</sup> The case law cited by Joel is distinguishable. In *Eardley v. Sammons*, 8 Utah 2d 159, 330 P.2d 122 (1958), the partners clearly provided that the defendant was to receive a certain amount as wages for services rendered to the partnership. *Id.* at 123. In *Farris v. Commissioner of Internal Revenue*, 222 F.2d 320, 322 (10th Cir. 1955), the parties had prepared a written partnership agreement that clearly set forth the value of the partner's personal services and contemplated the treatment of labor as a capital contribution.



existence of conflicting evidence on the value of Joel's services, this Court should refuse to affirm the judgment on the alternative grounds that Joel's labor was a capital contribution. *See Montoya*, 937 P.2d at 149.

#### CONCLUSION

The Daughters respectfully request that this Court reverse the judgment of the trial court determining that Fred and Joel entered into a partnership. In the alternative, the Daughters request reversal of the judgment on grounds that the ranch property was not a partnership asset. Finally, even assuming that Fred and Joel entered into a partnership that included the property, this Court should reverse the judgment on grounds that Fred did not make a legally valid gift to Joel of one half of his capital contributions. The case should then be remanded with instructions to award to the Daughters the full value of Fred's capital contributions.

DATED this 10th day of December 1998.

SUITTER AXLAND



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served two true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES by depositing the same in the United States mail, postage prepaid, this 10th day of December 1998 to the following:

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