

1998

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

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,
THE ESTATE OF FRED E. PARKER,

Third-Party Defendants.

CASE NO. 980323-CA

Priority No. 15

APPELLEE/CROSS-APPELLANT'S BRIEF

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

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ORAL ARGUMENT REQUESTED

FILED
Utah Court of Appeals

OCT 28 1998

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PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT

All the parties to the proceedings before the District Court are listed in the caption. The parties involved in this appeal are Holly, Wells, Shirley Sontag, and Lucille Ditzenberger as Appellants/Cross-Appellees and Joel Parker as Appellee/Cross-Appellant. The third-party claims against Lloyd J. Webb and The Estate of Fred E. Parker have been settled.

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JURISDICTION

This Court has appellate jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j) (1998).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. **Issue:** Whether the trial court properly determined that the parties had entered into a partnership agreement.

Standard of Review: The applicable standard of review to determine whether parties had created a partnership is as follows: "On review, this Court is obligated to view the evidence and all inferences that may be drawn therefrom in a light most supportive of the findings of the trier of fact. The findings and judgment of the trial court will not be distributed when they are based on substantial, competent, admissible evidence. Nupetco Associates v. Jenkins, 669 P.2d 877, 881 (Utah 1983).

2. **Issue:** Whether the trial court properly determined that the real property used by the partnership prior to the death of Fred Parker was a partnership asset.

Standard of Review: Whether a particular asset belongs to a partnership enterprise is a finding of fact. Cutler v. Bowen, 543 P.2d 1349, 1352 (Utah 1975)

3. **Issue:** Whether the trial court properly determined that there was clear and convincing evidence that Fred Parker gave to Joel as a gift one-half of the capital contributions that he has made to the partnership.

Standard of Review: "It rests primarily with the trial court to determine whether the evidence is clear and convincing" and the test of the sufficiency of evidence to sustain a finding under the clear and convincing standard is whether the evidence is reasonably sufficient. Lovett v. Continental Bank and Trust Co., 4 Utah 2d 76, 286 P.2d 1065, 1068 (1955).

4. **Issue:** Whether the trial court erred in concluding that, despite the unique facts of this case, Joel's labor was not a capital contribution to the partnership.

Standard of Review: The trial court's interpretation of statutes is a question of law reviewed for correctness. State v. Larsen, 865 P.2d 1335, 1337 (Utah 1993). In interpreting common law, the appellate court affords no deference to the lower court. Trujillo v. Jenkins, 840 P.2d 777, 778-79 (Utah 1992).

Reference to Record Showing Preservation of Issue for Appeal: Defendant's Trial Brief, R. 122-23.

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. §§ 48-1-3, -4, -5, - 22, -37(2) (1998).

STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of a dispute between a decedent's grandnephew, Joel Parker ("Joel"), and the decedent's legal heirs (the "heirs") over whether the decedent, Fred Parker ("Fred"), had entered into a partnership with Joel to carry on a cattle ranching business ("the partnership") and how that partnership should be wound up as a result of Fred's death. Joel filed an

action against the legal heirs, daughters of the decedent; Lloyd J. Webb (individually and as Personal Representative of the Estate of Fred E. Parker) ("the executor"); and the Estate of Fred E. Parker. Joel alleged that he and his granduncle had entered into a partnership which included in its scope both cattle and certain real property located in Weber County, Utah ("the property"). He, therefore, sought declaratory relief and damages under theories of unjust enrichment, promissory estoppel, wrongful distribution and retention of property. R. 1-17. The heirs brought an action against Joel seeking declaratory relief, quiet title, accounting for partnership profits, profits or a fair rental value of the property, and slander of title. R. 31-37.

After a bench trial on the merits, the trial court found that a partnership existed between Joel and Fred, which partnership included both the cattle and property. The Court also declared that based upon clear and convincing evidence, Fred had gifted to Joel one-half of any money that he infused into the partnership thereby giving the partners equal capital contributions in the partnership. The Court ordered the cattle and the property sold and the net proceeds equally divided between the parties. The heirs appealed the trial court's decision.

B. Courts of Proceedings and Disposition in the Court Below

Joel Parker adopts the heirs description of the course of proceedings and disposition in the court below.

C. Statement of Facts

The record establishes the following undisputed facts that are material to the issues on appeal:

The parties to this litigation are all relatives of Fred Parker ("Fred") who was an eighty-year-old man living in Hailey, Idaho, until he died on October 25, 1992. R. 252, 254. Defendant/appellee Joel Parker ("Joel") was Fred's grandnephew who lived in Ogden, Utah, and was approximately twenty-seven years old at the time pertinent to this litigation. R. 252, 254. Plaintiffs/appellants Holly Wells, Shirley Sontag and Lucille Ditzengerger were Fred's daughters and legal heirs ("the heirs") who were respectively residents of California, Hawaii and Texas. R. 252.

The trial court considered the quality of the parties' personal relationships to Fred pivotal in analyzing the issues raised in the bench trial. R. 282, pp. 201-02. Fred had been married on numerous occasions and had children from one or more of those marriages. R. 253. The relationship between Fred and his heirs was estranged and not close. Id. The heirs had no contact with Fred and did not attend his funeral. Id. When Joel's father called Shirley Sontag, one of Fred's heirs, to notify her of Fred's funeral she replied "I don't feel I should

even be there because I did not come and see him when he was alive." R. 282, p. 56. While the court found there was no obligation for the heirs to remain in contact with Fred or attend his funeral, it determined the estrangement in this relationship to be "a critical fact when looking at the case." R. 282, pp. 201-02.

By contrast, the relationship between Fred and Joel became as close as that of a father to his son. R. 253. Although Joel had known Fred since he was four or five years old, his relationship with his grand uncle really developed in 1988 or 1989 when Joel went to the hospital to care for Fred after a bout of pneumonia. R. 282, p. 6. Every other family member Fred had called to take care of him had declined. Id.

For a year or two, during and after Fred's recovery, Fred and Joel spent time together discussing which of Joel's various interests Fred might help Joel develop into a career. Id. at 6-7. Fred initially was more serious than Joel in this quest. Fred asked constantly, "What do you want to do? . . . You know, we could get you going." Id. at 147-48. Fred's words were "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." Id. at 148. Although Fred and Joel discussed careers in trucking and farming, Fred repeatedly mentioned ranching as an option because it was a profession that he had "loved . . . with all his heart and mind." Id. at 6-9.

In about 1990, Joel purchased his first heifer and began raising it on a neighbor's property. Id. at 10-11. When Joel was considering buying more cows, he invited Fred to come into the business with him. Id. at 9. "I go, do you want to get into it? And he said yes, and how much money do you need?" Id. When Joel responded that the heifers he intended to purchase would cost about \$2,000, Fred said, "Will \$5,000 do?" He said, "Who knows, maybe you will see something else." Id.

When Joel realized that the cows he had selected were already sold, he asked Fred what to do with the \$5,000 Fred had sent him. Id. at 12. Because Fred instructed him to just hold onto it, Joel created a checking account and deposited the money. Id. at 12 & 45. Joel understood at that time that he and Fred had formed a partnership: "My understanding is we were going to start into the cattle and ranch business." Id. at 13 & 19, 144-49. Their business plan was to reinvest any profits and "try to build or establish something big." Id. at 149.

From the inception of the partnership, Fred and Joel operated on the premise that Fred would contribute all the money while Joel contributed all the labor. Id. at 148 & 85. "That's what I had, my youth, my work I am able to do, the stuff, that was the value of me. He had the money." Id. at 73-74. If Joel needed more money, he only needed to ask Fred for it. Id. at 45. If work needed to be done, Joel always did it: "I was the one that was doing the deal, the work, handling everything. He was the money man. Because there is no way he could do the work I

was doing or set-up the things I set-up, or any of that." Id. at 96. Thus, Joel and Fred realized they were totally interdependent and that their partnership would not work without a full commitment from each of them. Id. at 148-49.

Between March and May of 1990, Fred bought a total of thirty-five heifers and a bull, which he sent to Joel for use in their cattle operation. Id. at 14-15 In August of 1990, Fred purchased and sent another seven cows and eight calves. Fred elected to title all of the cattle in Joel's name. R. 254; R. 282, pp. 37, 150. Plaintiff's Exhibits 14, 29. Fred then sent Joel \$3,300 for feed and expenses. R. 282, p. 20.

From the inception of the cattle partnership, Joel labored single-handedly to care for the cattle and to perform tasks that would minimize Fred's expenses. Id. at 17. He bartered extensively to eliminate costs for the care, feed and pasturing of the cattle. Id. at 17 & 54. Although he worked seven days a week and was, at times, "on call" twenty-four hours a day, Joel never kept track of his time nor did he ask Fred for compensation for his labor. Id. at 55 & 128.

Neither Joel nor Fred set-up books or records to keep track of expenses for their cattle operation, but they did discuss those expenses. Id. at 21, 87-88. Joel had no training in any farm record-keeping method, although he was a high school graduate. Id. at 9. Joel testified that, at that time, he just did what he felt was right, and Fred had no problem with it. Id. at 105 & 87. When Joel asked Fred about the need for record-

keeping, Fred "would always basically just tell me don't worry about it, we will take care of it, you know." Id. at 21-22.

In 1990, Fred and Joel did discuss how to handle their cattle partnership on their tax returns. Joel suggested his taking a third of the deduction on his taxes and allowing Fred two-thirds because Joel believed that he did not need further deductions. Id. at 77. Both Joel and Fred believed that in dealing with the IRS, some taxes were preferable to none because "humongous losses" became a red flag to the IRS. Id. at 78.

As soon as Joel and Fred accumulated their first cows, Fred told Joel that their next step in the project was to locate property. Id. at 182-83. Joel contacted real estate agents, and Joel and Fred would look at any property that sounded promising. Id. In Joel's mind, it was "just implied that we was going to grow into a cattle ranch, ranching cows, you know. Fred knew he was on his way out. He didn't have a lot more years." Id. at 182 & 13.

In the fall of 1990, after they determined that a 1000 acre parcel in Weber County ("the property") would meet their needs, Joel contacted the railroad that owned the property. Id. at 152. Fred told Joel, "You see what you can get worked out. If you can put together a good enough deal, we got the money." Id. at 154 & 35. Joel did all of the negotiating and successfully reduced the purchase price from about \$300,000 to \$116,700. Id. at 153 & 91. Upon receiving the Offer to Purchase from the railroad, Joel informed Fred that the sellers wanted to know what kind of entity

intended to purchase the property. Id. at 33. After Fred elected "partnership" as purchaser, he voluntarily filled out an Affidavit Exhibit C

143-44. Fred had told him: "Well, it was just Joel and I are in this partnership together and he turned and just waved, you know,

at 22 & 83-84. He did, however, treat the business account as personal money because he could not get any direction from Fred's estate. Id. at 26. Joel had his father fax Fred's executor a copy of the Offer to Purchase and Affidavit indicating Joel's interest in the property. Id. at 28 & 104. Joel did not, however, hear anything from the executor for over a year when the executor instructed him to "hold tight" and carry on as before Fred's death. Id. at 27 & 79. The heir's and the executor knew that Joel was managing the cattle, but never provided him any guidance, offered any compensation, or complained. Id. at 90, 165 & 170.

In 1994, Joel purchased a five-acre parcel adjoining the property ("the corner parcel") from Weber County for \$1,500.³ Id. at 67. Although he was already involved in a dispute with the heirs over his rights, he believed that if the property was a partnership asset, this corner parcel would provide better access. Id. at 65. If not, then he believed that the corner parcel was his. Id.

and no agreement with the heirs was forthcoming. Id. at 73 & 79-80. Joel also acknowledged in the cattle sale contract that Fred might hold an equitable interest in the cattle as a result of their partnership before Fred's death. R. 282, p. 86; Agreement of Purchase and Sale, ¶4, Exhibit 28 (Addendum B).

Joel recognized that there were delays in winding up the partnership, but he attributed these delays to Fred's executor's refusal to acknowledge the existence of the partnership. Id. at 62. From the inception of the partnership until the time of trial, Joel calculated that the fair value of his work, less \$5,000-10,000 for personal use, came to approximately \$101,000. Id. at 70-72. Joel's calculation of \$101,000 for his contribution to the partnership included taking care of the cattle, negotiating for the property, bartering, trading with other people, reducing the taxes and miscellaneous contributions to the partnership. Id. at 98. His estimates were supported by third-party testimony concerning reasonable compensation for his workload given by an experienced dairyman. Id. at 123 & 128-30. The heirs presented no contrary testimony.

Despite all Joel's efforts, the heirs denied that any partnership was formed and denied that Joel was entitled to any compensation for his labor. R. 141, 145-151; R. 282, pp. 186-88. Joel, therefore, filed a Notice of Interest on the property, but the executor transferred the property to the heirs through a Personal Representative's Deed. R. 117. When Joel and the heirs

were unable to resolve issues of ownership of the cattle and land, this lawsuit followed.

At trial, Joel argued that a partnership existed which included the cattle and the property. R. 113-124; R. 282, pp. 186-88. Joel argued in the alternative that: (1) his pre-dissolution labor was compensable based upon the partnership understanding; (2) his labor was his capital contribution; (3) Fred gave Joel part of his capital contribution as a gift⁴; and (4) or if no partnership was found, that Joel should be compensated for his labor in quantum meruit. R. 121-23. The heirs argued that no partnership existed, the property was not a partnership asset, and that they were entitled to a return of Fred's capital contribution which consisted of the amounts paid for cattle, land, property taxes, and expenses. R. 152-154; R. 282, p 194. (Appellant's Br. at 12).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the trial court on all issues appealed by the heirs/appellants. Undisputed material facts demonstrate that the cattle and ranching business established by Fred and Joel was a partnership which included

⁴ Appellants cite argument in their own memorandum for the alleged "fact" that Joel presented no evidence that any portion of Fred's capital contribution was a gift. Appellant's Br. at 12 (citing R. 185). Their legal argument is not a fact. Further, it is for the court to determine whether testimony presented at trial constitutes "fact" supporting a particular legal theory.

both land and cattle, and that half of Fred's capital contribution to the partnership was a gift to Joel.

The trial court's decision on the existence of partnership is supported by substantial evidence concerning Fred's and Joel's intentions and conduct. The partnership was premised on the reality that each partner possessed an essential resource that the other entirely lacked. Fred could provide only money and wisdom, while Joel could add labor and management, barter for services, negotiate contracts, and physically oversee their cattle operation. To make their partnership succeed under these restrictions, Fred explained and implicitly promised to Joel that all their partnership purposes, Joel's labor would be equal to Fred's money. Under this premise, Fred infused into the partnership sufficient funds to purchase the property and cattle, while Joel committed uncompensated labor which he estimated to valued at over \$100,000.

While their informal partnership did not conform to standard commercial practices for recordkeeping, tax allocation, and titling, the parties executed these responsibilities without complaint and in a manner that served their business purposes. They agreed to title all the cattle in Joel's name, and the property in Fred's name to avoid problems with creditors.

The trial court correctly determined that the property was a partnership asset because Fred and Joel intended to acquire the property for partnership purposes and they devoted it exclusively to partnership use. Single-handedly and without compensation,

Joel selected the property, negotiated an affordable price, and decreased the property taxes. Although Fred financed the property's purchase, he never saw it until a year afterwards.

Although Fred and Joel ultimately titled the property in Fred's name for creditor protection, they fully intended that the property belong to the partnership. Fred verified this intent in a sworn affidavit sent to the property's seller.

The court also correctly concluded that because of Fred's death, the partnership should be dissolved and woundup by selling the land and cattle and dividing the proceeds equally between the parties, Joel, as Fred's partner, and Fred's heirs. The trial court concluded that the heirs were not entitled to a return of Fred's capital contribution because "clear and convincing" evidence demonstrated Fred had given one-half (1/2) of his capital contribution to Joel.

In its gift determination, the trial court relied upon a totality of the evidence and the credibility and candor of Joel to find the elements of donative intent, delivery and acceptance. Donative intent was supported by Fred and Joel's family relationship and their close friendship. Substantial evidence supported the finding that Fred had no intent that upon his death Joel would not be entitled to any partnership asset because of a lack of capital contribution. Fred's words and conduct demonstrated his intent to contribute to Joel personally as opposed to merely investing in a business. Facts material to acceptance and delivery are colored by the reality that Fred only

intended to give Joel one-half (1/2) of the money he contributed and he intended to remain a one-half (1/2) owner of assets purchased with that money. Thus, the conduct of Fred and Joel, fully acting as co-owners of the property and cattle, was consistent with the gift theory adopted by the trial court.

If this Court should reverse the gift determination, there exists alternative grounds on which to affirm the trial court's conclusions on winding-up, which grounds include promissory estoppel or an agreement contrary to the statutory priority accorded capital contribution. This Court could agree with precedent that an oral partnership agreement equating one's labor with another's money justifies equal division of all assets on distribution without regard to capital contribution.

Finally, this Court could find that the trial court erred in concluding that Joel's labor was not a capital contribution under the unique and limited circumstances of this case. Even if labor is generally not a capital contribution, where there exists an expressed or implied agreement that "sweat equity" by the laboring partner equals "dollar equity" of the financing partner, that agreement converts labor into a capital contribution for purposes of partnership dissolution.

Because appellants failed to meet their burden on appeal to overturn the trial court's decisions, this Court should promptly affirm the decision below.

ARGUMENT

The heirs have appealed the trial court's decision challenging determinations that a partnership existed between Fred and his grand nephew Joel, that the partnership included property used for the ranch, and that half of Fred's capital contribution was a gift to Joel. Because these issues are interrelated and fact-sensitive, this Court should be aware of certain findings and comments that the trial court considered critical to all three issues.

The trial court described Joel as a candid witness who did not stretch the facts during his testimony. R. 283, p. 13. This observation on credibility is critical because Joel was called as a witness by his opponents, his testimony was uncontroverted, and he testified heavily, without objection, about his past conversations with his deceased grand-uncle Fred.

In assessing testimony that is uncontroverted because certain central parties were no longer alive at the time of trial, the trial court nevertheless will determine whether testimony concerning the deceased was "self-serving and not believable in view of the witness's conduct, demeanor and substantive testimony during trial." Homer v Smith, 866 P.2d 622, 627 (Utah App. 1993). An appellate court defers to the fact finder who is "in the best position to judge the credibility of witnesses and is free to disbelieve their testimony." Id. The trial court believed Joel.

The trial court also found that Fred was a capable, coherent, and astute elderly gentleman who was not a person that Joel could take advantage of. R. 253. It declared the "father/son" relationship between Fred and Joel to be pivotal to its decision. R. 253. It also considered Fred's estranged relationship with his heirs to be critical in analyzing the very issues raised in this appeal. R. 282, pg. 201-02.

POINT I

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION THAT FRED'S AND JOEL'S BUSINESS RELATIONSHIP WAS A PARTNERSHIP.

A. This Court should review with deference the trial court's decision that a partnership existed.

In reviewing a determination about the existence of a partnership, an appellate court "is obliged to view the evidence and all inferences that may be drawn therefrom in a light most supportive of the findings of the trier of fact. The findings and judgment of the trial court will not be disturbed when they are based on substantial, competent, admissible evidence." Nupetco Assoc. v. Jenkins, 669 P.2d 877, 881 (Utah 1983); Cutler v. Bowen, 543 P.2d 1349, 1350-51 (Utah 1975), (affirming partnership existence as finding of fact). "On conflicting evidence, the question of whether a partnership exists is one for the trier of fact." Murphy v Stevens, 645 P.2d 82, 85 (Wyo. 1982) (finding oral agreement constituted partnership). "Persons who intend to do the things that constitute a partnership are partners whether their express purpose was to create or avoid the relationship." Id.

Even if this Court reviews the issue of partnership existence as a mixed question of law and fact, the trial court's decision should be reviewed with "broad discretion." State v. Pena, 869 P.2d 932, 937 (Utah 1994). Substantial deference to the trial court is appropriate because (1) the facts to which these legal rules would be applied are "so complex and varying" that no rule could adequately address their relevance; (2) appellate judges have not definitively determined outcome determinative factors; and (3) the trial judge observed witnesses' demeanor and appearance which cannot be sufficiently reflected on the record. Id. at 939. These factors dictate that the trial court had discretion "to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal." Id. at 937.

B. The facts more than adequately demonstrate that the business relationship was a partnership.

The trial court found that Fred's and Joel's cattle and ranch business constituted a partnership in which both partners actively participated from the inception of the partnership arrangement. R. 253-254. The Utah Code defines partnership as "an association of two or more persons to carry on as co-owners a business for profit." Utah Code Ann. § 48-1-3 (1998). "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a

community of interest in the profits." Bentley v. Brossard, 94 P.736, 741 (Utah 1908).

1. Joel and Fred intended to create a partnership and carried on as co-owners in their business.

"Whether the parties were partners depends on their intentions and conduct." Holmes v. Holmes, 849 P.2d 1140, 1143 (Or. App.) (affirming finding of partnership); adhered to as modified, 855 P.2d 1164 (Or. App.); rev. denied, 862 P.2d 1305 (Or. 1993). "When there is no written agreement, the court looks primarily to the parties' conduct and course of dealing to determine whether a partnership existed." Id.

The trial court found that it was Fred's intent that Joel would be his 50/50 partner. R. 255. Fred and Joel acted as co-owners in that they actively participated in the partnership, contacted each other on a regular basis, and each kept apprised of their business. R. 253.

The trial court also found Joel's and Fred's statements to third parties consistent with their intent that their business relationship was a partnership. R. 254. Joel eventually sold the cattle after Fred's death through a contract acknowledging the potential interest of Fred's estate because of the partnership. Agreement of Purchase and Sale #4, Exhibit 28 (Addendum B). Fred described his relationship with Joel to a neighbor as a partnership relationship. R. 254. He swore in an affidavit to the railroad that property he was financing was being purchased by a "partnership" with Joel. R. 254.

2. The contributions of Fred and Joel to the business enterprise indicate that their relationship was a partnership.

"One of the primary matters to consider in determining whether a partnership exists is the nature of the contribution each party makes to the enterprise." Cutler v Bowen, 543 P.2d 1349, 1351 (Utah 1975) "It need not be in the form of tangible assets or capital, but, as is frequently done, one partner may make such a contribution, and this may be balanced by the other's performance of services and the shouldering of responsibility." Id.

The trial court found that both Fred and Joel actively contributed to the partnership. R. 253. They acted consistently with their repeatedly expressed premise that Fred would supply the funding and wisdom while Joel contributed energy, labor, and legwork. R. 282, pp. 85, 148, 73-74, 96. Based upon this premise, Fred infused money to purchase land and cattle without any provision for repayment while Joel committed uncompensated labor which he estimated to be valued at over \$100,000. Id. at 14, 20, 153, 70-72.

3. Fred and Joel had a common interest in the profits of their partnership.

Fred and Joel expressed common interests in both the short term and long term profits of their business. Their business plan was to reinvest any profits and "try to build or establish something big." Id. at 149. They also discussed their ultimate profit making goal: "And like me and Fred talked, we always

figured we would never let the place go until it was worth over a million dollars, you know." Id. at 155.

4. The conduct of Fred and Joel regarding partnership records, taxes, and titling of property was consistent with their own purposefully individualized business plan.

Although the recordkeeping for the partnership did not conform to model commercial partnership-business practices, the trial court was persuaded that their informal approach to business matters was consistent with partnership. R. 254. The trial court found that the responsibility to keep partnership records fell equally on both of them. R. 256. But, Fred and Joel's trust in each other made record keeping unnecessary. R. 282, P. 21-22. Fred never asked for an account of Joel's labor nor an account of his expenditures of Fred's money. Id. at 87, 105. In fact, Fred expressed an aversion to help from business professionals. Id. at 102.

Contrary to the heirs' contention in their appeal, Appellant's Br. at 17-18, the above-described actions Fred and Joel clearly distinguish the instant case from Johanson Bros. v. Industrial Comm'n., 118 Utah 384, 222 P.2d 563, 567 (1950) as to the elements of partnership that court deemed material. In Johanson, some of the workmen did not even know they were partners; they had no rights in management or control; they had no ownership in any business equipment; only the employer could contract for jobs; they were not consulted on methods of operation or the identity of copartners or results to be accomplished; and there was no settling of affairs when an

employee was released. Id. at 567. Thus, the Johanson decision provides no support for the heirs' appeal of the trial court's decision finding partnership.

C. If this Court should reverse the trial court's decision recognizing a partnership, then it should award Joel compensation for his services through quantum meruit.

If this Court should reverse the trial court's decision on partnership, Joel should be compensated fairly for all his efforts through the theory of Quantum Meruit. Under that theory, Joel could receive the value of his services if (1) Fred received a benefit from Joel's labors; (2) Fred knew of or appreciated that benefit; and (3) circumstances would make it unjust for Fred to retain the benefit without paying for it. See Davies v. Olson, 746 P.2d 264, 269 (Utah App. 1987). Contrary to Appellant's contention, recovery in quantum meruit would not contravene Utah partnership law, denying compensation for partner's services to a partnership, because Joel's claim under quantum meruit arises only if the trial court's decision finding partnership is reversed.

This Court, however, should never have to reach the issue of recovery under Quantum Meruit because evidence of a partnership was compelling. During the bench trial, even counsel for the heirs admitted the existence of partnership, stating in closing argument, "We believe there is a partnership here. . . We don't dispute that." R. 282, p.188. Instead, it was only "the extent of the partnership" that the heirs actually considered at issue.

POINT II

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION THAT THE PROPERTY PURCHASED BY FRED WAS A PARTNERSHIP ASSET.

Approximately a year after the creation of their cattle partnership, Fred and Joel purchased the property, a thousand acres in Weber County that the trial court found was a partnership asset. R. 254, 257-58. According to state statute, "All property originally brought into the partnership's stock or subsequently acquired by purchase or otherwise on account of the partnership is partnership property." Utah Code Ann. § 48-1-5 (1998). A partnership agreement to hold and use land as a partnership asset need not be in writing. An oral agreement is valid and may be enforced between the parties. Swarthout v Gentry, 144 P.2d 38, 43 (Ca. 1943). Thus, the trial court's finding that the property was a partnership asset should be affirmed.

A. This Court should defer to the trial court's decision that the property was a partnership asset.

Whether a particular asset belongs to a partnership enterprise is a finding of fact. See Cutler v. Bowen, 543 P.2d 1349, 1352 (Utah 1975) (affirming good will as partnership asset). More particularly, in reviewing a trial court's decision as to whether a particular piece of real property titled in one partner's name is actually partnership property, the Supreme Court of Utah declared:

[W]e do not disturb his findings and judgment merely because we might have viewed the matter differently, but would do so only if

it appeared that the evidence clearly preponderates against them, or that he has so abused his discretion or misapplied the law, that an injustice has resulted.

Corbet v Corbet, 472 P.2d 430, 432-33 (Utah, 1970); see also Dotson v Grice, 647 P.2d 409, 411 (N.M. 1982) (whether real property is partnership asset remains question of fact even when the partners have not changed record title into the partnership); Lutz v Schmillen, 899 P.2d 861, 864 (Wyo. 1995) (appellate court should refuse to set aside findings about whether real property is partnership asset unless they are clearly erroneous and leave definite and firm conviction that a mistake has been committed).⁵

B. The facts indicating "partnership asset" clearly overcome any alleged presumption of individual ownership created by title.

The heirs, as appellants, argue that there exists a presumption that ownership of real property vests in the individual titleholder, not the partnership. Appellant's Br. at 19-20. They note that the intent of the parties controls the issue and cite cases from foreign jurisdictions in alleging that overcoming this presumption requires clear and convincing evidence of intent to include real property as a partnership asset.⁶ Id. Their Brief cites a Colorado decision for the

⁵ As noted in Section A of Point I, if this Court determines that the partnerships asset issue is a mixed question of fact and law, nevertheless, the trial court's decision should be reviewed with "broad discretion."

⁶Whether this presumption exists in Utah and the burden of proof to overcome the presumption is uncertain.

factors indicative of intent. Id. Significantly, that decision notes: "The intent of the parties with respect to the issue of contribution of the property is a question of fact which is binding upon appeal unless there is no competent evidence to support that finding. See Standring v. Standring, 794 P.2d 1089, 1091, (Colo. App. 1990). Utah courts not only consider intent as a question of fact, Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991), but, also consider that "it rests primarily with the trial court to determine whether the evidence was clear and convincing. Lovett v. Continental Bank and Trust Co., 286 P.2d 1065, 1068 (Utah 1955).

The trial court in this case not only found that the partnership purchased the property, but also that both Fred and Joel desired to obtain the property for the partnership. R. 254. Although the trial court did not use the words "clear and convincing" it stated: "There is no question in my mind, and I find as fact, that the intent of Fred was that this property and the cows be considered as part of the partnership between the parties." R. 282, p. 189.

The interrelationship between the presumption that "ownership vests with a titled party" and "partnership property" has been explained as follows: Whereas purchasers and creditors "have the right to rely on the title to the real estate as shown by the record," as between the parties, the controlling factor to determine whether real property belongs to a partnership is the parties' intent. In Re Pearies Estate, 192 P.2d 532, 536 (Mont.

1948) (implying agreement that real estate is firm asset from parties' conduct, circumstances attending the land transaction, and treating the real estate as partnership property.) See also, Swarthout v Gentry, 144 P.2d 38, 44 (Ca. 1943) (finding land not purchased with partnership funds to be partnership property because titled partner contributed land as firm asset); Lutz v Schmillen, 899 P.2d 861, 864 (Wyo. 1995) (declaring ranch to be partnership asset despite one party's acquiring financing and title because of conduct, property's use, and purpose of acquisition to devote the property to partnership purposes).

C. Fred and Joel intended the scope of their ranching partnership to encompass both cattle and land, and they used the property for partnership purposes.

[T]he chief criterion to determine whether property belongs to a partnership is "the intent of the partners to devote it to partnership purposes." Zanetti v. Zanetti, 175 P.2d 603, 606 (Ca. App. 1947). Thus by finding that it was Fred's desire that the property be held by the partnership and used for the cattle ranching business, the trial court correctly determined that the property was a partnership asset. R. 255.

Fred's and Joel's acquisition and use of the property was entirely for the partnership purposes of cattle ranching. R. 282, P. 161. Each in their own way contributed to remodeling and cleanups for this purpose. Id. at 38, 161-62. Furthermore, both Joel and Fred intended that their ultimate partnership profit would occur when the property was sold. Joel believed, and it was Fred's own experience, that an eventual sale for

subdivision purposes was the only way a cattle ranching operation ever actually succeeded. R. 282, p.8. They, therefore intended to hold on to the property until they could sell it for a million dollars." Id. at 155.

Joel's uncompensated efforts relating to the property only make sense if the property was a partnership asset. A partner donating considerable time to an alleged partnership asset without compensation, indicates that the partnership includes that alleged asset. See Kimball v McCornick, 259 P. 313, 316 (Utah 1927). Single-handedly and without any remuneration, Joel selected the property, negotiated its purchase and price, and decreased taxes. R. 282, pp. 35, 153, 91-92, 159-60. He alone made acquisition of the property an affordable reality for the partnership and a useable asset. Id. at 35, 154. Fred relied entirely upon Joel. In fact, Fred did not even see the property until a year after its purchase. Id. at 162-63.

At the critical time during the purchasing process, Joel permitted Fred to determine whether the partnership or Fred individually would be "purchaser" of the property. Id. at 33-36, 92. Fred swore to the third-party sellers in an affidavit that the purchaser was the partnership. See Affidavit, Exhibit C to Offer to Purchase Real Property, Exhibit 30 (Addendum A). Although Fred made later business judgments about titling, this affidavit is the only document wherein he gives his oath to truthfully setting forth his intent as to ownership of the property.

D. Fred and Joel did not intend their business decision to title the property in Fred's name to change the status of the property from a partnership asset.

In the process of purchasing the property, Fred and Joel initially signed an Offer to Purchase describing their partnership as purchaser of the property. Id. Later, they agreed to title the property in Fred's name. R. 282, P. 37, 94.

The trial court found that this decision conformed to personal business needs and was not intended to change the property from a partnership asset. R. 254-55. This decision, made without assistance of lawyers, was intended for creditor protection: the cattle were titled in Joel's name, and the property in Fred's. Id. at 255. The trial court noted: "I think [Fred] was doing what many men want to do without a lawyer, looking at a young man and saying if he gets into trouble I don't want it to come back against the property." R. 282, p. 189.

Similarly, in Holmes, 849 P.2d at 1143, the title to certain Oregon ranch property was transferred to the father individually to accomplish the partners' business purpose of lessening the partnership's over-all expenses. The Holmes court found the ranch remained a partnership asset. Id. Despite Fred's and Joel's business decision judgment about titling, this Court should affirm the trial court's decision that the property was a partnership asset.

Finally, contrary to the heirs' contentions in their Brief, Appellant's Br. at 23, Frandsen v. Holladay, 739 P.2d 1111 (Utah App. 1987), provides no support for a reversal of the trial

court's finding that the property was partnership property. Notably, the Frandsen court, without detailing any facts, upheld the trial court's "ultimate finding" about the partnership asset issue as supported by "substantial, competent evidence on the record." Id. at 1113. It noted that the trial court had (1) obviously recognized that the deed title was "not conclusive on the issue of whether the land was or was not partnership property for purposes of [Utah Code Ann.] section 48-1-22;" and (2) instead examined the conduct of the parties to determine their intent. Id. Thus, the Frandsen decision merely supports an appellate court's upholding a trial court's decision and provides no factual analogy supportive of this Court's reversing the trial court.

E. If this Court reverses the trial court's decision finding that the property was a partnership asset, then it should also reverse its finding that the corner parcel was partnership property.

If this Court reverses either the trial court's decision finding a partnership or its determination that the property is a partnership asset, it should also reverse the trial court's determination that the corner parcel, a five-acre parcel of land in Weber County that Joel purchased in 1994, was partnership property. R. 258. Joel purchased the corner parcel with his own funds and intended it to be part of his contribution to a land-and-cattle partnership. R. 257-58. The corner parcel was purchased to provide improved access to existing partnership property and to increase the value of the entire partnership

property. R. 282, pp. 65-66. When Joel purchased the corner parcel, however, he was already involved in a controversy with the heirs. He believed that "[i]f it was not a partnership, then that ground was mine." Id. at 65.

As discussed previously, a decision that real property, financed by and titled in one partner, is a partnership asset depends largely upon intent and the purpose of acquisition to devote the property to partnership purposes. Lutz, 899 P.2d at 864. All of the partnership purposes for which Joel intended the purchase the corner parcel are defeated if the property is not first declared partnership property. Setting aside the findings and conclusion declaring the corner parcel as a partnership asset would be appropriate because a reversal negating the property's status as a partnership asset would create a "definite and firm conviction that a mistake has been committed." Id. Therefore, if "partnership" including the property does not exist, then the corner parcel should be declared Joel's property.

Nevertheless, the overwhelming evidence demonstrates that this Court should not have to reach this sub-issue because substantial evidence supports affirming the trial court's decision declaring a partnership including land and cattle.

POINT III

THE TRIAL COURT CORRECTLY DETERMINED THAT ONE-HALF OF FRED'S CAPITAL CONTRIBUTION TO THE PARTNERSHIP WAS A GIFT TO JOEL.

This Court should affirm the trial court's decision finding one-half of Fred's capital contribution to be a gift to Joel and

implicitly denying the heirs' demand for a return of the entire capital contribution.⁷ The trial court found clear and convincing evidence that the "contributions of cash to the partnership were 50/50. The 50% for Joel being contributed by Fred as a gift to Joel."⁸ R. 255, 258.

In reviewing this decision, this Court should be aware that in the context of gift, "it rests primarily with the trial court to determine whether the evidence is clear and convincing." Lovett v. Continental Bank & Trust Co., 286 P.2d 1065, 1068 (Utah 1955). Undisputed collateral evidence is sufficient to prove "gift" at the clear and convincing standard. Id. For purposes of appellate review of this issue, "the test of the sufficiency

⁷ The heirs have requested that this Court remand this case with instructions to award them "the property at issue, including the real property." Appellants' Br. at 34-35. However, as a matter of clarification, Fred's actual capital contribution was money, not land or cattle. All conversations about their partnership stated that while Joel would provide labor, Fred would provide start-up money. R. 1-2; R. 282, pp. 13-14. Nowhere in the transcript is Fred described as an independent cattle owner or landowner who would, or did, contribute these personal assets to a partnership. Thus even if this Court reverses the trial court on the "gift" issue, the heirs are not entitled to the property.

⁸ Appellants were misleading in stating that the "gift" issue was only superficially raised. Appellant's Br. at 25 n.3. The gift theory was clearly set forth in Joel's Trial Brief. R. 123-24. At trial, based upon the trial court's having thoroughly reviewed the Trial Briefs, counsel for both parties elected to forego opening arguments. R. 282, pp. 3, 185. Closing arguments were only to supplement the Briefs. Id. at 185, 186. Thus, the trial was conducted with minimal legal oral argument. Counsel left it to the trial court to evaluate testimony in terms of proffered legal theories, including "gift."

of the evidence is "whether the evidence is reasonably sufficient." Id.

The trial court determined that the burden to prove "gift" was satisfied through the totality of the evidence and Joel's credibility and candid testimony. During the hearing on Motion to Reconsider the trial court stated, "I heard throughout the whole trial without the use of the word gift that [the capital contribution] was a gift." R. 283, p. 13. In assessing Joel's testimony in terms of the gift issue, the trial court noted, "He could obviously have stretched it. I thought he was extremely candid in his testimony." R. 283, p. 13. This Court consistently defers to trial court decisions based upon these grounds because an appellate court cannot garner a sense of the proceeding as a whole from the cold record. Poulsen v. Frear, 946 P.2d 738 (Utah App. 1997).

A. Fred intended that 50% of anything that he contributed to the partnership belong to Joel.

To find an intervivos gift, a trial court must find clear and convincing evidence of the donor's intent, delivery, and acceptance. Estate of Ross v. Ross, 626 P.2d 489, 491 (Utah 1981). In assessing Fred's intent, it is important to revisit the trial court's findings about his character. Fred was fully aware of what he was doing and was conscious of the reality that his life expectancy was limited. R. 253, 256.

For purposes of proving gift, Joel's family relationship with Fred is significant. West v. West, 403 P.2d 22, 25 (Utah

1965) (trial court may rely on "the fact that it is natural to make a gift to a member of one's family.") Joel and Fred had a "clear family relationship" that was as close as a father/son relationship. R. 255-56, 253. By contrast, Fred's relationship with his heirs was estranged and lacked any contact. R. 253.

Fred and Joel's close friendship can also become a factor in finding clear and convincing evidence of gift. Sims v. George, 466 P.2d 831, 833 (Utah 1970) (validating gift of stocks from elderly gentleman to long-term friend). Friendship constituted a reasonable basis for believing that "there were reasons best known to [the elderly gentleman] himself why because of the long-time special friendship he wanted to have the privilege of giving part of his property to the defendant instead of keeping it all until his death." Id. Similarly, the trial court found, "Joel's cash contribution was given to Joel by Fred as Joel was one of the only individuals Fred had a great caring for." R. 255-56.

The evidence supports the trial court's finding that Fred had "no intent that upon his death, Joel would not be entitled to any of the partnership assets because of a lack of capital contribution." R. 256. "Fred had no intention that his money that was given to Joel would in some way come back to him other than a . . . 50/50 relationship." R. 283 pg. 13. These findings are logical inferences from Fred's conduct and statements such as, "If you can put together a good enough deal, we got the money," R. 282, p. 154. (emphasis added), and his assuring Joel that Joel need not worry about Fred's heirs taking away Joel's

ownership interest in the property because Fred's heirs had no interest in him or his property. Id. at 55-56.

These findings are also consistent with Joel's and Fred's partnership premise that each would give the best of what they had. R. 1-2; R. 282, pp. 13-14. Joel believed that he contributed "the value of me." R. 282, p. 73-74. In reality, Joel and Fred each gave to the other in a manner more like "The Gift of the Maji" than a business transaction.

As Joel testified, the partnership's buying land was not a condition of his continuing to provide labor and Fred providing the money. Id. at 182. Instead, as Joel testified, the relationship with Joel had a much deeper meaning to Fred

And I felt bad for him sitting up there in that chair and not anybody, anyone call him or do anything for him. It gave him life. I mean it gave him something to wake up in the morning for. And, yea, this is what we can do. He could think about things, plan things out. It gave him, you know, thoughts again.

Id. at 183.

Clearly, neither Fred nor Joel operated on the expectation that during their partnership either one's contribution should receive preferential status. Unfortunately, they did not foresee that, upon dissolution after Fred's death, Fred's heirs would insist on preferential treatment for Fred's contributions in a manner that would enrich them at Joel's expense. This result is contrary to any testimony from which Fred's intent might be inferred.

Furthermore, contrary to Appellant's contention, the facts demonstrate that Fred intended to contribute to Joel personally as opposed to investing in a business. Initially it was Fred who provided the impetus behind Joel's seriously exploring career options. Fred committed himself to enhancing Joel's future by offering him advice and money to establish any career. R. 253, R. 283 pg. 14. Once the cattle operation began, Fred desired to obtain land because he "desired to continue to assist his grandnephew Joel in business." R. 254. All of the testimony indicated that Fred's primary concern was Joel.

Thus, the facts clearly and convincingly demonstrate Fred's intent to execute an intervivos gift to Joel of one-half of the capital he contributed to the partnership.

B. Assessing the elements of "delivery" and "acceptance" requires a recognition that Fred's giving Joel only one-half of the purchase price permitted him to complete delivery of this gift while retaining equal control over the assets purchased.

For purposes of analyzing delivery and acceptance, Fred's gift to Joel of only a one-half interest in his capital contribution distinguishes this case from decisions where a donor allegedly relinquished 100% ownership. Fred intended to remain an equal one-half owner of any assets purchased with his retained half of his capital contribution monies.

In the cases cited in Brief by the heirs/Appellants, Appellants' Br. at 31-32, because the donor allegedly gave up full ownership, delivery required irrevocable parting of title and control so complete that use without permission would

constitute trespassing. Hopping v. Wood, 526 N.E.2d 1205 (Ind. Ct. App. 1988). Utah courts, however, recognize that delivery can only be as complete "as the nature of the thing will admit of." Ross, 626 P.2d at 492. It would, therefore, be inappropriate to require that Fred, as a half-owner of purchased assets be treated like a trespasser if he makes use of the cattle or property he shares.

Fred's gift of only a one-half interest in the money for purchase of the cattle and the property also dictated the manner of the gift's delivery and acceptance. Fred sent money and purchased cattle which he had delivered to Joel who accepted sole possession of the cattle titled in his name only. R. 254. Joel sold the cattle without accounting to Fred. R. 282, pp. 21, 87-88. After the property was purchased, Joel accepted it as his shared estate. Id. He did not feel the need to consult Fred on decisions regarding the property's use. Id. at 162. Like Fred, he dreamed of building a home on the property. Id. at 100-01. Like Fred, he dreamed of becoming rich when the property was eventually sold for a million dollars. Id. at 155. Fred and Joel's purposeful business decisions as to title, tax returns and property taxes dispel any inferences contrary to "gift." See supra. Point II, Section D.

Thus, the trial court correctly determined that Fred's completed gifts to Joel equalized their capital contributions for purposes of Utah Code Ann. § 48-1-37 (1998). This court should therefore affirm the trial court's conclusions that (1) Joel and

the heirs are each entitled to one-half of the partnership assets and (2) the property and cattle should be sold and the net proceeds equally divided between the heirs and Joel.⁹ R. 258.

POINT IV

EVEN IF THIS COURT REVERSES THE GIFT DECISION IT CAN AFFIRM THE TRIAL COURT'S CONCLUSION ON WINDING UP THE PARTNERSHIP ON ALTERNATIVE THEORIES.

If this Court should reverse the trial court's decision that half of Fred's capital contribution was a gift to Joel, then it may affirm on several alternative theories. An appellate court may affirm on any theory supportable on the record, even if that theory differs from the one stated by the trial court and "even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.'" Goodsel v. Dept. of Bus. Reg., 523 P.2d 1230, 1232 (Utah 1974) (citation omitted); State v. Montoya, 937 P.2d 145, 149 (Utah App. 1997).

A. Promissory estoppel provides an alternative basis for declaring that within this partnership labor and capital should be treated equally for purposes of distribution between partners.

The doctrine of promissory estoppel requires proof that plaintiff acted in reasonable reliance on defendant's promise, defendant knew plaintiff relied on the promise which should reasonably induce action or forbearance, defendant was aware of the facts, and plaintiff's reliance resulted in plaintiff's loss.

⁹The trial court also decided that Joel's wind-up labor was approximately equal to the heirs' tax payments. R. 258.

See Skanchy v. Calcados Orthope SA, 952 P.2d 1071, 1077 (Utah 1998). Each of these elements can be found in the facts of this case.

Fred's and Joel's threshold agreement that they would build a business out of Fred's money and Joel's labor is essentially a promise by Fred that, for all business purposes, Joel's labor would be treated equally with his money. R. 282, pp. 148, 85, 73-74. Fred also promised to advise Joel with his wisdom. Id. at 148, 21-22. When Joel became nervous that their partnership relationship was not adequately formalized, Fred assured him that accurate record keeping was unnecessary. Id. at 21-22. Fred dissuaded Joel from seeking professional business advice with horror stories about lawyers. Id. at 102. Specifically, Fred persuaded Joel that he need not worry about protecting his ownership interest in the property after Fred's death: Joel had expressed the concern that "[t]he first thing that would happen is your kids would come and take everything I got." Id. at 55-56. Fred responded:

He looked at me and said, "Joel, don't worry about that." He goes, "if you died tomorrow, I would be in a hell of a mess. And he says, not only that, you are the only one that I see, ever talks to me. My kids they all have successful jobs. There [sic] all doing their own thing. There [sic] not even going to be around when I die." He was correct on that point. When he died, they were not around.

Id. Thus, Fred promised, and convinced Joel to believe, that Joel's ownership rights were secure. Joel relied on this promise

by continuing to labor for the partnership and forbearing pursuit of formal, legalized agreements. And, Fred knew it.

Joel estimated the value of his uncompensated efforts at \$101,000. Id. at 70-72. He believed that he was half owner of an increasing herd of cattle and an appreciating piece of property. It would now be an unconscionable detriment to Joel not to enforce Fred's implicit promise that Joel owned half of the cattle and the property. During his life, Fred made no exceptions to this promise to Joel. This Court should not countenance the heirs creating an exception after Fred's death by according Fred's money protected status as a capital contribution with priority over Joel's labor contribution.

B. Joel's and Fred's partnership understanding constituted an exception to the statutory priority accorded capital contributions in settling accounts between partners after dissolution.

Fred and Joel expressly created a partnership understanding that was broad enough to override statutory provisions otherwise controlling the distribution of the partnership capital and assets upon dissolution. Utah Code Ann. § 48-1-37 (1998), which sets forth rules for distribution, states: "In settling accounts between the partners after dissolution the following rules shall be observed, subject to any agreement to the contrary."

(emphasis added). Because there is no requirement that a contrary agreement be written, this Court may find such agreement expressly or by implication from the record.

The record unequivocally demonstrates that the terms of the partnership agreement were that, for all business purposes, Joel's labor would be equivalent to Fred's money. R. 282, pp. 85, 148, 73-74, 96. It is appropriate on appeal to honor the partners' commitment to each other and to their partnership.

The intended breadth of the partnership understanding, FULLY equating labor with money, arose out of the partners' respect for each others' unique and essential personal assets. Id. at 96. Both partners accepted the reality that the partnership could not exist without total interdependence. Id. For the partnership to survive, each partner had to count on the other to contribute freely whenever needed. Id. at 45. Between themselves, Joel and Fred needed no record keeping to compare their contributions. Id. at 21-22. Whatever they gave was immediately equal. Thus, the premise of "equal contributions through money or labor" became more than mere words. It controlled each partners' actions and each one's appreciation for the other's contribution.

Fred recognized that Joel's labor was necessary for more than the daily needs of their partnership. Without Joel's efforts to locate property and negotiate an affordable price, Fred's available funds would be totally insufficient. Id. at 35, 91, 152-54. Joel negotiated to reduce the property's price by almost \$200,000 and to reduce taxes by \$15,000 per year. Id. at 91, 153, 159-60.

Joel received no compensation for this effort despite the tremendous amount of money Fred saved, and Joel's efforts to save

money increased his own daily work load. When the cattle moved to the property, Joel had to work harder to care for them in two locations and access to the property was inadequate. Id. at 74, 181.

There is precedent supporting the theory that a partnership agreement equalizing labor and money justifies equal division of all assets on dissolution. Kuhl v Gardner, 894 P.2d 525 (Or. App. 1995). In this convoluted dispute, the parties had operated under the expressed agreement that defendant, a distant businessman, would put up all the money to purchase low income rentals properties while plaintiffs, a husband/wife team, would do all of the work to manage and maintain the rentals. The appellate court affirmed: (1) reestablishment of partnership including real estate titled in defendant's name; and (2) the order for accounting, dissolution, and equal division of assets including proceeds of all real estate sales. Id. at 526

Analogous to the instant case, plaintiffs in Kuhl had placed no monetary value on time invested and kept no records (defendant asked for none). Id. at 532. Just as Joel and Fred intended to reinvest and keep the property until it had substantially appreciated, the Oregon partnership agreed no profits would be distributed until dissolution after defendant's retirement in ten years when the properties would be liquidated. Id.

Similarly, when defendant argued that the paper record showed no partnership was ever created, plaintiffs explained that

all properties were titled in defendants' name as a business decision. Id. at 528-30 (plaintiffs had declared bankruptcy).

Ultimately, the trial court, noting the credibility of plaintiffs, believed the plaintiffs' theory of partnership: an agreement that plaintiffs' work equaled defendant's money. Id. at 532. The appellate court affirmed finding that "defendant got what he bargained for: "local management and servicing of the numerous properties, leaving him free to engage in his business 1,000 miles away." Id. Thus, an oral agreement that one party provide all services while the other party provided all funds justifies equal distribution of proceeds of the sale of real estate without regard for capital contribution.

An appellate court in New Mexico also affirmed the trial court's decision that the decedent and his partner had entered into an oral agreement that partnership assets of a ranching business would be equally divided regardless of their respective capital contributions. Citizens Bank of Clovis v. Williams, 630 P.2d 1228 (N.M. 1981) (personal representative of deceased's estate brought action for partnership accounting). The partners were old friends and their partnership was based upon the deceased partner contributing most of the capital while the surviving partner did most of the labor. Id. at 1229.

The Citizens Bank court noted the statutory provision giving priority to return of capital contributions absent contrary agreement. Id. at 1230. It also noted that the terms of a partnership agreement need not be written or "formally expressed,

but may be inferred or established, in whole or in part, from the acts of the parties." Id. at 1230-31. "This general principal applies with equal force to agreements to divide assets upon dissolution without repayment of capital contributions." Id. at 1231.

In applying these legal precepts to facts similar to the instant case, the appellate court stated:

If there was ever a case which called upon the trial judge to exercise his discretion and apply equitable powers, it is this one. The record is replete with testimony that [the deceased wanted [his partner] to be taken care of; that [the deceased] felt [his partner] should eventually own the ranch; that [the partner] and his wife took care of the deceased and the ranch for many years.

Id. at 1231. Noting "very imposing arguments" in opposition to the trial court's decision, the appellate court stated:

However, we feel that as an appellate court, we should not retry this case. The trial judge hears the witnesses in person and has the opportunity to observe their demeanor and manner of testifying and has a much better grasp of the evidence in its entirety than we have. Based upon a cold record on appeal and absent an erroneous application of the law, we will not interfere with the trial court's decision.

Id. The same law, the same facts, the same equities, and the same analysis applies in this case.

Under the same legal principles, a Minnesota court affirmed a decision that an implied, oral agreement negated the right to return of capital contribution prior to division of partnership assets. Peterson v. Peterson, 169 N.W.2d 228 (Minn. 1969). A surviving partner, the father of a deceased partner, had contributed capital to a chicken-hatchery partnership primarily

operated by the son. Upon his son's death, the father sought return of his capital, partly because he did not like his son's wife. Id. at 229. Based largely on the conduct of the partners, the father's fondness for his son, and the son's having done most of the labor in the business, the Peterson court affirmed that it was "entirely reasonable to infer that [the father] put up the capital and [the son] provided the labor under an agreement by which each was to own half of the business, including both capital and profits." Id. at 231.

In essence, the trial court in this instant made the same determination in finding that upon dissolution, Joel was entitled to half of the cattle ranching partnership, including both capital and profits. The evidence so overwhelmingly supports this determination that, for this Court, it becomes a matter of determining the appropriate legal handle to support this equitable result.

POINT V

THE TRIAL COURT ERRED IN DECLARING THAT LABOR WAS NOT A CAPITAL CONTRIBUTION UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

The trial court erred in its conclusion that "Joel's labor was not a capital contribution." R. 258. This Court need only reach this issue if it reverses the trial court's decision that Fred gifted Joel one half of his capital contribution. Under those circumstances, the cross-appealed conclusion should be reviewed de novo as a question of law. See State v. Richardson, 843 P.2d 517, 518 (Utah App. 1992) ("'[w]e consider the trial

court's interpretation of binding case law as presenting a question of law and review the trial court's interpretation of that law for correctness").

For purposes of this issue there is no marshalling of contrary evidence. The trial court noted that its decision came from reading the case law cited in the parties' Trial Briefs. R. 282, p. 204-05. The trial court noted that a majority of the cited cases weighed against labor being a capital contribution. Id.

Joel has cross-appealed based upon his contention that the trial court should have recognized that the partnership agreement, along with the partners' intent and actions, created a limited, well-defined exception to the rule. First Fred and Joel agreed that Joel would contribute all the labor while Fred contributed all the money for their partnership. R. 73-74, 85, 96, 148. The entire testimony demonstrates that, in conformance with this agreement, the partners conducted themselves as if Joel's labor equaled Fred's money for all business purposes. Therefore, any protected status that Fred's money achieved as a capital contribution should also be accorded to Joel's labor.

Utah courts have determined that in partnerships where one partner contributes labor and the other money, the value of the working partner's services can be declared his capital contributions to the partnership. See Eardley v. Sammons, 330 P.2d 122, 126 (Utah 1958). The Court recognized that it was reasonable for the laboring partner to expect compensation for

his services. However, upon dissolution, in the absence of a specific agreement about salaries, the court declared that the contribution of the partner risking money and the other risking his labor were both capital contributions. Id.

The Tenth Circuit has also addressed this issue in reviewing a decision of the tax court. Farris v. Commissioner of Internal Revenue, 222 F.2d 320 (10th Cir. 1995). The Farris court assessed the partnership agreement between a silent partner who contributed \$50,000 to a partnership and two other partners who contributed their personal services, expert skill and knowledge, stating:

In the absence of a contrary provision in the agreement where one partner contributes money or physical assets and the other contributes personal services, skill and knowledge, they share in the capital assets according to the value placed on each contribution.

Id. at 322 (citing Paul v. Cullum, 132 U.S. 539 (1889) (holding "contribution of services by one partner constituted a contribution to the capital structure and made him one of the joint owners and possessors of the property of the partnership."))

Other state courts have also recognized that under appropriate circumstances, personal services of a laboring partner "may constitute a capital contribution to the partnership." Schymanski v. Conventz, 674 P.2d 281, 284 (Alaska 1983) (emphasis original). Personal services may be capital contributions if there exists an express or implied agreement to that effect. Id.

In the instant case, treating Joel's sweat equity as a capital contribution would be consistent with the above-described, limited exceptions to the general rule. Recognizing that the exception should apply in this case would not jeopardize the stability of the general rule. Joel's situation involved a clearly expressed and undisputed understanding between the partners that one's labor equals the other's money. Because Fred and Joel honored this commitment throughout Fred's life, it is appropriate, if necessary, to recognize and honor that commitment in dissolving the partnership because of Fred's death. Therefore, if this Court reaches this issue, it should declare Joel's labor a capital contribution that is equal to Fred's capital contribution. This determination would permit this Court to affirm the trial court's conclusions as to dissolution of the partnership assets.


CONCLUSION

This Court should affirm the trial court's decisions finding a partnership between Fred and Joel that includes the property and declaring one-half of Fred's capital contributions a gift to Joel. If the gift decision is reversed, this Court may affirm the trial court's conclusions on winding up and dissolving the partnership by alternative theories, including reversing the trial court's conclusion that Joel's labor was not a capital contribution.

RESPECTFULLY SUBMITTED this 28th day of October, 1998.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By

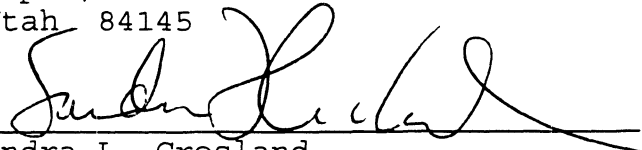


Douglas A. Taggart
Sandra L. Crosland
Attorneys for Appellee/
Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing Appellee/Cross-Appellant's Brief to be hand delivered this 28th day of October, 1998, to the following:

Charles P. Sampson
Craig H. Howe
Switter Axland
175 South West Temple, Suite 700
Salt Lake City, Utah 84145



Sandra L. Crosland

ADDENDA

ADDENDUM A

Offer to Purchase Real Property

OFFER TO PURCHASE REAL PROPERTY

30
950900459

1. **BUYER.** Joel C. Parker and Fred E. Parker, ("Buyer") hereby offers to purchase from SF Pacific Properties Inc., ("Seller"), the real property hereinafter described upon the following terms and conditions.

2. **PROPERTY.** The real property ("Property") which is the subject of this offer consists of 973.26 acres, more or less, located near Little Mountain, County of Weber, State of Utah, together with all appurtenances thereto and improvements thereon, if any. The Property is more particularly described on Exhibit "A".

3. **PURCHASE PRICE.**

3.1 The Purchase Price to be paid by Buyer to Seller for the Property is \$116,893.00.

4. **DEPOSITS.**

4.1 Within five (5) calendar days of acceptance of this offer by Seller, Buyer shall deliver to Escrow Holder (as defined in Paragraph 5), a cashier's check in the sum of \$2,500.00, which shall apply toward the Purchase Price. All deposits required under this paragraph 4 shall be hereinafter referred to as the "Deposit".

4.2 Escrow Holder is hereby authorized and instructed to disburse to Seller the total of the Deposit, less \$500.00, as provided in Paragraph 7.2. Buyer hereby releases Escrow Holder for any claims arising out of Escrow Holder's compliance with the provisions of this Paragraph 4.2 and Paragraph 7.2.

BUYER'S INITIALS J.C.P.

SELLER'S INITIALS Rgm

4.3 The balance of the Purchase Price, including Buyer's Escrow fees and other closing costs, if any, shall be deposited with Escrow Holder, by cashier's check no later than 2:00 o'clock P.M. on the business day prior to the Closing Date (as defined in Paragraph 8.1).

4.4 In the event Buyer shall fail to deliver the Deposit on or before the dates set forth in this Paragraph 4 or promptly to perform any other covenant or obligation contained in this Agreement, Seller may elect to specifically enforce this Agreement or to terminate this Agreement and retain as liquidated damages the amounts provided in Paragraph 4.5 of this Agreement. No waiver by Seller of any delinquency or default on the part of Buyer shall be construed as a waiver of any subsequent delinquency or default.

4.5 IN THE EVENT SELLER ELECTS TO TERMINATE THIS AGREEMENT AS A RESULT OF A DELINQUENCY OR DEFAULT BY BUYER AS PROVIDED IN PARAGRAPH 4.4, OR, IN THE ALTERNATIVE, IN THE EVENT BUYER FAILS TO PERFORM ANY COVENANT OR OBLIGATION PURSUANT TO THIS AGREEMENT, IT IS EXPRESSLY ACKNOWLEDGED THAT SELLER WILL INCUR SUBSTANTIAL DAMAGES AS A RESULT OF SUCH DELINQUENCY, DEFAULT OR FAILURE OF PERFORMANCE, AND IT IS FURTHER ACKNOWLEDGED THAT SUCH DAMAGES WILL BE EXTREMELY DIFFICULT TO CALCULATE AND ASCERTAIN. THEREFORE, IT IS EXPRESSLY AGREED THAT BUYER SHALL PAY TO SELLER LIQUIDATED DAMAGES IN THE SUM OF \$2,000.00, WHICH BUYER AND SELLER AGREE ARE REASONABLE IN LIGHT OF ALL THE FACTS KNOWN TO THEM ON THE DATE OF THE AGREEMENT, AND SUCH DAMAGES SHALL BE RETAINED BY SELLER FROM THE DEPOSIT.

BUYER'S INITIALS J.C.P.

SELLER'S INITIALS Rgm

5. ESCROW.

5.1 The purchase and sale of the Property shall be consummated by means of an escrow ("Escrow") to be opened by Buyer within five (5) calendar days of acceptance of this offer by Seller at the office of Associated Title Company, 4105 Harrison Blvd., Suite 200, Ogden, Utah 84403 ("Escrow Holder").

5.2 Upon acceptance of this offer by Seller, Buyer shall request that Escrow Holder promptly prepare escrow instructions, on its customary form, for the purchase and sale of the Property upon the terms and provisions hereof. The escrow instructions shall be promptly signed by Buyer and Seller. The escrow instructions shall not modify or amend the provisions of this Agreement unless otherwise expressly set forth therein. At the option of Escrow Holder this document may be considered as its escrow instructions, with such further instructions as Escrow Holder shall require in order to clarify the duties and responsibilities of the Escrow Holder.

6. **PRELIMINARY TITLE REPORT AND DOCUMENTS.** Within a reasonable period of time after the opening of escrow, Seller shall furnish Buyer with a preliminary title report ("PTR") concerning the Property issued by Associated Title Company ("Title Company") together with copies of all documents referred to in such PTR.

7. CONDITIONS PRECEDENT TO FINAL PERFORMANCE OF THIS AGREEMENT.

7.1 The following are conditions precedent to the final performance of this Agreement, and are not conditions precedent to its formation:

- (a) Buyer's approval of the PTR, including legal description of the Property, which approval or disapproval shall be given within ten (10) calendar days of receipt thereof.

7.2 In the event that such written approvals or disapprovals as required in Paragraph 7.1 above are not received by Seller and Escrow Holder on or before the date due, it shall be conclusively presumed that Buyer has unconditionally approved each of said matters. Upon approval of such matters, by either express written approval or by failure to deliver timely disapproval, Escrow Holder shall disburse to the Seller the Deposit, less \$500.00, as provided in Paragraph 4.2.

7.3 In the event that Buyer delivers timely disapproval or conditional approval of the PTR, or any part thereof, or any of the items referred to in Paragraph 7.1, then for a period of ten days after receipt of such written notice by Seller, Seller, by written notice to Buyer, may elect to cure said disapproved or conditionally approved items prior to the close of escrow. If Seller does not elect to cure all of said items, then for a period of ten days after said written notice to Buyer, Buyer shall have the right either to accept title to the Property subject to said items, thereby waiving any and all claims against Seller by reason thereof, or to terminate this Agreement. Buyer shall give written notice to Seller of Buyer's election within ten days after either (i) receipt of Notice of Seller's election not to cure, or (ii) the expiration of the time in which Seller shall have been required to respond to Buyer's notice of disapproval or conditional approval. If Buyer shall fail to give Seller such written notice of Buyer's election within the time specified, it shall be conclusively presumed that Buyer has elected to terminate this Agreement. If Buyer elects to terminate this Agreement, thereafter neither Buyer nor Seller shall have any further liability hereunder, except that Buyer shall be entitled to the prompt return of all funds deposited by Buyer with

Escrow Holder, less only escrow cancellation fees and costs and title company charges, all of which Buyer hereby agrees to pay.

8. CLOSING.

8.1 Escrow Holder shall close the escrow on or before June 28, 1991 ("Closing Date").

8.2 Seller shall deliver or cause to be delivered to Buyer through escrow:

- (a) A Grant Deed in proper form duly executed and recordable conveying to Buyer fee title to the Property subject only to (i) the exceptions approved by Buyer pursuant to Paragraph 7 hereof, and (ii) a reservation by Seller of all mineral rights and certain other covenants in the form attached hereto as Exhibit "B".
- (b) A standard coverage owner's form policy of title insurance issued by the Title Company in the full amount of the Purchase Price insuring title vested in Buyer subject only to the printed provisions of such policy and to the exceptions approved by Buyer pursuant to Paragraph 7 hereof.

8.3 Buyer shall deliver or cause to be delivered to Seller through escrow the Purchase Price as set forth in Paragraph 3 hereof.

8.4 Both parties shall execute and deliver through escrow any other documents or instruments which are reasonably necessary in order to consummate the purchase and sale of the Property.

9. CONDITION OF PROPERTY; BUYER'S INTENDED USE.

9.1 Buyer acknowledges that it offers and desires to purchase the Property "as is" and without representation or warranty from Seller with respect to the condition of the Property including, but not limited to, the condition of the soil, presence of hazardous materials or contaminants, and other physical characteristics. Buyer shall perform and rely solely upon its own independent investigation concerning the physical condition of the Property.

9.2 Seller has not and does not hereby make any representation or warranty to Buyer concerning the Property or its compliance with any statutes, ordinance or regulation. Buyer shall perform and rely solely upon its own independent investigation concerning the Property's compliance with any applicable law.

9.3 Buyer represents that its intended use of the Property is grazing. Buyer shall perform and rely solely upon its own investigation concerning its intended use of the Property, the Property's fitness therefore, and the availability of such intended use under applicable statutes, ordinances and regulations.

10. PRORATIONS AND EXPENSES.

10.1 Real property taxes shall be prorated as of the Closing Date, based upon the latest tax bill available. Assessments of record which are not yet due shall be assumed by Buyer, or paid off by Seller, at Buyer's option.

10.2 All title report and title insurance costs, recording fees, documentary transfer taxes, escrow fees and any costs connected with the closing of this sale shall be charged to or divided between the Seller and Buyer by the Escrow Holder as is customary in the County of Ogden.

11. **POSSESSION.** Possession of the Property shall be delivered to Buyer at the Closing Date.

12. **INTEGRATION.** The contract resulting from Seller's acceptance hereof contains the entire agreement of the parties and cannot be amended or modified except by a written agreement.

13. **BROKERAGE COMMISSIONS.** The parties acknowledge and represent that there is no person who is entitled to a commission, finder's fee or other like compensation arising in any matter from this Agreement. Each party agrees to defend, indemnify and hold the other party harmless from and against each claim for commission or finder's fee, and the costs and expense incurred by the other party in connection with such claims which are asserted against the other party by a person or party other than the Broker who alleges that it was engaged or retained by such party, or that it was the procuring cause for instrumental in consummating this Agreement.

14. **INTERPRETATION.** This Agreement shall be construed, interpreted and applied in accordance with the laws of the State Utah.

15. **ASSIGNABILITY.** Buyer shall not assign its rights or interests under this Agreement without the express written consent of Seller. In the event Seller's consent to an assignment by Buyer of its rights and interest pursuant to this Agreement is given, such consent shall not relieve or excuse Buyer of any of its obligations arising under this Agreement unless such written consent shall expressly so provide.

16. **TIME.** Time is of the essence of this Agreement.

17. **SEVERABILITY.** In the event that any provision of this Agreement is found to be invalid or unenforceable, such determination shall not affect the validity and enforceability of any other provision of this Agreement.

18. **RIGHT OF ENTRY.**

18.1 Buyer and its Agents may enter on the Property at all reasonable times while this Agreement is in effect to plant grass, make tests, surveys, studies and inspections in connection with the Property, provided that prior to the exercise of said right and at all times while Buyer or its agents are present upon the Property, Buyer shall arrange for, keep and maintain in full force and effect a policy of comprehensive general liability insurance with a combined single limit of not less than \$2,000,000, and shall furnish to Seller a certificate of such insurance which names Seller as an additional insured and provides that such policy shall not be cancelled or amended without thirty (30) days prior written notice to Seller. Buyer shall indemnify and defend Seller against and hold Seller harmless from, any and all liability, cost and expense for loss of or damage to any property or injury to or death of any person, arising out of or in any way related to the exercise of the right to enter the Property granted hereunder unless such liability, cost and expense is caused by the sole, active negligence of Seller.

All costs incurred in connection with tests, surveys, studies,

inspections, reviews, approvals, determinations and applications made by or on behalf of Buyer under this Agreement or in connection with Buyer's proposed use of the Property shall be paid by Buyer. In the event of the recordation of any claim of lien for materials supplied or labor or professional services performed on behalf of Buyer, Buyer shall promptly satisfy and discharge such lien at Buyer's sole cost and expense upon demand therefore by Seller.

18.2 Reports and Studies. Buyer shall provide to Seller a copy of each report, study, regulation or ordinance obtained by Buyer in connection with its approvals under Paragraph 7. In addition, if the purchase and sale of the Property is not consummated for any reason, Buyer shall deliver to Seller free of charge all of the engineering, architectural, financial and other studies, drawings, reports, surveys and similar materials prepared by or on behalf of Buyer with respect to the Property and Buyer's proposed project to the extent Buyer is legally entitled to do so.

19. INTERNAL REVENUE CODE SECTION 1445. Seller is not a "foreign person" as that term is used in Internal Revenue Code Section 1445 ("IRC Section 1445") and Seller agrees to furnish Buyer, prior to Close of Escrow, a Non-Foreign Certification or any other documentation required under IRC Section 1445 to evidence that Seller is not a "foreign person."

20. INTERSTATE LAND SALES FULL DISCLOSURE ACT. Seller conducts its operation in accordance with the requirements of the Interstate Land Sales Full Disclosure Act, and, in this connection, Buyer shall execute and deliver to Seller an affidavit in the form attached hereto as Exhibit "C" in order to qualify the sale of the Property for exemption from said Act.

21. PRELIMINARY CHANGE OF OWNERSHIP. Buyer shall execute and deliver to Escrow Holder an appropriate Preliminary Change of Ownership Form.

22. NOTICES. Any notice required or permitted to be given hereunder shall be in writing and shall be effective upon personal delivery or upon three (3) days after deposit in the United States Mail, postage prepaid and addressed as follows:

TO SELLER:

SF Pacific Properties Inc.
c/o Catellus Development Corporation
Attn: Regional Sales Manager
201 Mission Street - Suite 250
San Francisco, CA 94105

TO BUYER:

Joel C. Parker and Fred E. Parker
4343 West 1800 South
Ogden, Utah 84401

The foregoing addresses may be changed by written notice.

23. ACCEPTANCE.

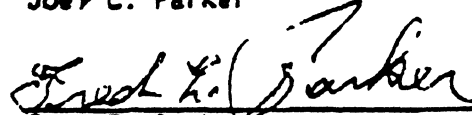
23.1 This offer to purchase by Buyer shall remain irrevocably open until 5:00 p.m. on April 5, 1991, and if not accepted by Seller by said date shall be deemed revoked.

23.2 Seller may accept this offer to purchase by delivering to Buyer in person or depositing into the United States mail one copy of this Agreement executed by Seller on or before the date set forth in Paragraph 23.1.

BUYER:

Dated: Mar 28, 19 71.

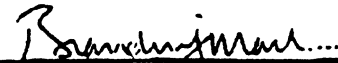

Joe V. C. Parker


Fred E. Parker

SELLER:

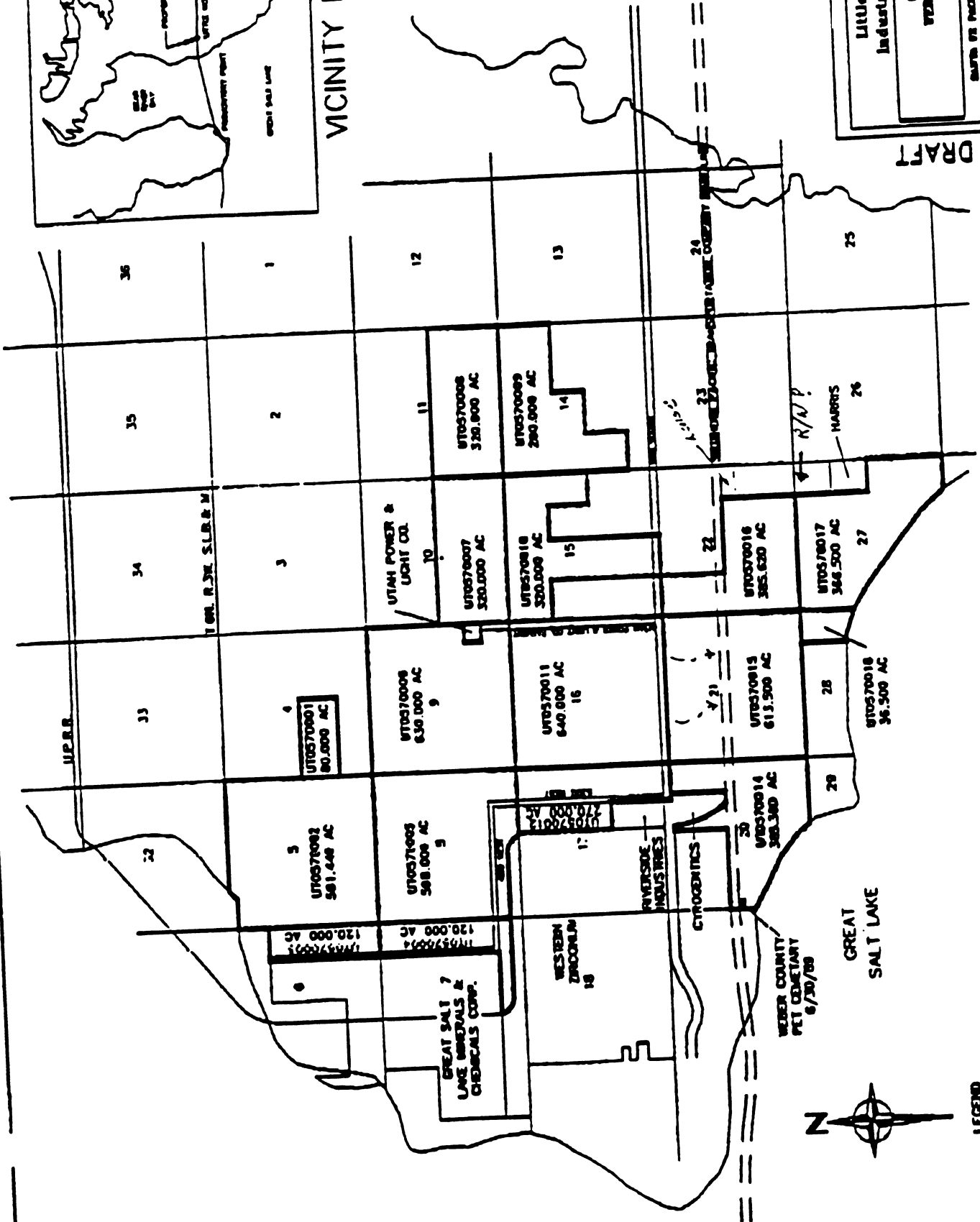
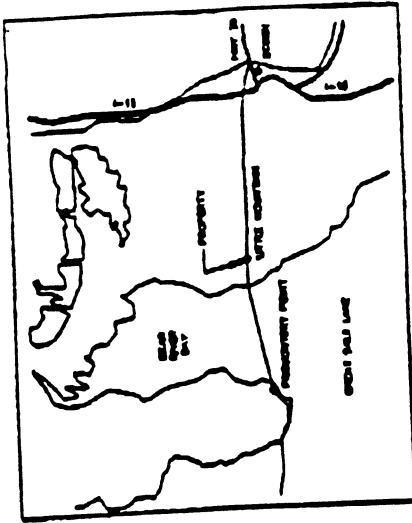
Accepted this 4th day of April, 19 71.

SF Pacific Properties Inc.,
By Catellus Development Corporation, its agent

By: 
REGIONAL SALES MANAGER
Title: SALES & LAND MANAGEMENT

UT0570006P, UT0570014P, UT0570015P
WPPCXF43

EXHIBIT A



DRAFT

Little Mountain
Industrial Property
OGDEN
WEBER COUNTY
UTAH

OGDEN PACIFIC SALT CORPORATION
JANUARY 1, 1981



LEGEND

7000

WHEN RECORDED, MAIL TO:

EXHIBIT B

Space Above for Recorder's Use

SPECIAL WARRANTY DEED

[CORPORATE FORM]

organized and existing under the laws of the State of Utah, with its principal office at _____
of County of _____ State of Utah
grantor, hereby CONVEYS AND WARRANTS against the Acts of the Grantor only to

of _____
the following described tract of land in
State of Utah:

grantee
for the sum of
DOLLARS
County.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this _____ day of _____, A. D. 19____

Attest:

Secretary.

[CORPORATE SEAL]

STATE OF UTAH

County of _____

By _____

President

as _____

On the _____ day of _____, A. D. _____
personally appeared before me _____ and _____
who being by me duly sworn did say, each for himself, that he, the said _____
is the _____ president, and he, the said _____ is the secretary
of _____ and that the within and foregoing
instrument was signed in behalf of said corporation by authority of a resolution of its board of
directors and said _____ and
each duly acknowledged to me that said corporation executed the same and that the seal affixed
is the seal of said corporation.

Notary Public.

My commission expires _____

My residence is _____

EXHIBIT C

AFFIDAVIT

State of Tennessee)
) ss.
County of Blaine)

Fred F. Parker (name of affiant), being first duly sworn hereby declares:

1. That Fred F. PARKER (name of purchaser or lessee) is a duly organized and validly existing Partnership (corporation, partnership, trust or other business entity).

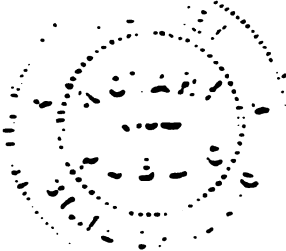
2. That said Partnership (corporation, partnership, trust or other business entity) is purchasing or leasing the real property described in Exhibit "A" attached hereto and by this reference incorporated herein, substantially for its own use, or has a binding commitment to sell, lease or sublease such real estate to an entity which is engaged in commercial or industrial business.

3. That said Partnership (corporation, partnership, trust or other business entity) has been represented in the negotiation of the sale or lease of said property by a representative of its own choosing.

Executed on this 28 day of March, 1991.
at Hamlet, Tennessee.

Fred F. Parker

Subscribed and sworn to before me on March 28, 1991.



Janet K. [Signature]
Notary Public

Commission Expires 10-6-94

ADDENDUM B

Agreement of Purchase and Sale

AGREEMENT OF PURCHASE AND SALE

THIS AGREEMENT OF PURCHASE AND SALE (hereinafter sometimes referred to as the "Agreement"), made and entered into this 27th day of December, 1995, by and between JOEL PARKER (hereinafter sometimes referred to as the "Seller") and TIM GOOCH, an individual, and GOOCH LAND AND LIVESTOCK, L.C., a Utah limited liability company (said individual and said limited liability company hereinafter sometimes jointly and severally referred to as the "Buyer"),

WITNESSETH:

WHEREAS, Seller is the owner of certain cattle, which the Seller desires to sell and the Buyer desires to purchase upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto do hereby mutually agree as follows:

1. Purchase and Sale. The Seller hereby agrees to sell, transfer and convey to the Buyer, and the Buyer hereby agrees to purchase from the Seller, upon the terms and conditions hereinafter set forth, all of the Seller's right, title, interest and equity in and to the following described cattle (hereinafter sometimes referred to as the "Cattle"):

73 cows
65 calves
2 heifers
1 bull
8 steers

2. Purchase Price. The Buyer agrees to pay to the Seller for the Cattle the total purchase price of FIFTY-EIGHT THOUSAND FOUR HUNDRED THIRTY-SEVEN DOLLARS (\$58,437.00) (hereinafter sometimes referred to as the "Purchase Price") pursuant to the terms of a written promissory note from the Buyer to the Seller, in the form attached hereto as Exhibit "A" (hereinafter sometimes referred to as the "Promissory Note"), to be executed by the Buyer and delivered to the Seller upon execution hereof, providing for payment of said Purchase Price, together with interest at the rate of ten percent (10%) per annum from December 1, 1995, in seven (7) annual payments, on or before December 1 of each year commencing with the year 1996, of all interest accrued thereunder to the date of payment plus principal

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in an amount (not to exceed TEN THOUSAND DOLLARS (\$10,000.00) per year) equal to one-half (1/2) of all net profits made by the Maker during the previous year from the sale or use of the Cattle (or their substitutes or replacements); followed by one (1) payment, on or before November 1, 2003, of all remaining interest due thereunder and the entire remaining principal balance of the Purchase Price.

3. Effective Date. This transaction shall be effective as of November 1, 1995 (the "Effective Date"), regardless of the date on which this Agreement is executed. All personal property taxes, insurance premiums and other expenses, if any, of or relating to the Cattle shall be prorated between the Seller and the Buyer as of the Effective Date and paid within sixty (60) days after the Effective Date.

4. Seller's Indemnification Regarding Title. The parties acknowledge that Seller holds legal title to the Cattle, but that the heirs of Fred E. Parker, deceased, may hold an equitable interest therein as a result of a partnership or other relationship between Seller and said Fred E. Parker prior to his death. Seller agrees to indemnify, protect, and save and hold Buyer harmless against and in respect of any and all claims, losses, liabilities, damages, costs, deficiencies or expenses (including attorney's fees) that may result from the claims of said heirs to the Cattle.

5. Title and Possession. Unless otherwise agreed in writing by the parties, Seller shall deliver title and possession of each of the Cattle to Buyer as each animal is removed by the Buyer from the aforesaid premises and the brand inspection certificate applicable to that animal is issued.

6. Security.

A. The Promissory Note shall be secured by the Buyer's transfer to the Seller of an equitable interest as a secured party in all of the Cattle which are the subject of this transaction, and in all accounts receivable, proceeds, payments in kind, or government entitlements due under or related thereto including any proceeds and products therefrom and any after-acquired, substitute, or replacement property of the same nature, kind, class, or description. The Seller's security interest in said assets shall be a first lien thereon.

B. The Promissory Note shall be further secured by the Buyer's transfer to the Seller of an equitable interest as a secured party in all other cattle and other livestock owned by the Buyer, and in all accounts receivable, proceeds, payments in kind, or government entitlements due under or related thereto,

including any proceeds and products therefrom and any after-acquired, substitute, or replacement property of the same nature, kind, class, or description. The Seller's security interest in said assets shall be a second lien thereon until the existing first lien thereon shall be paid, whereupon the Seller's security interest therein shall become a first lien thereon.

C. The security interests provided for hereinabove shall be documented by a Security Agreement in the form attached hereto as Exhibit "B" and by this reference incorporated herein and such financing statements and other documents or instruments as the Seller may require to perfect said security interest.

D. Except as otherwise agreed in writing by Buyer and Seller, the Buyer shall obtain and maintain a casualty insurance policy to cover all assets securing the Promissory Note as hereinabove provided with loss payable to the Seller in an amount not less than the unpaid balance under the Promissory Note. In the event of damage to or loss of any of said assets, the Seller shall be entitled to the proceeds of said policy to the extent of the amount necessary to pay said Promissory Note in full.

E. The Buyer shall purchase and maintain in force a life insurance policy issued by a company satisfactory to the Seller, providing for the payment of death benefits in an amount not less than One Hundred Thousand Dollars (\$100,000.00) upon the death of Tim Gooch, one of the Buyers herein. Until the Promissory Note is paid in full, the owner and beneficiary of said policy shall be the Seller, and all of said death benefits shall be paid to the Seller upon the death of said Tim Gooch (regardless of the then outstanding balance due under the Promissory Note). The Promissory Note shall be deemed satisfied to the extent of the life insurance proceeds so paid to the Seller. The Buyer shall pay to the Seller the amount of each premium due under said policy at least ten (10) days prior to the due date thereof. Upon payment in full of the Promissory Note, the Seller shall, at the Buyer's option, transfer the ownership of said life insurance policy to the Buyer.

7. Cattle Sold "As Is". The Cattle which are the subject of this Agreement are being sold "as is"; the Seller hereby expressly denies any express or implied warranties concerning performance or fitness of the same. The Buyer is familiar with and has inspected and accepts the Cattle "as is" and in their condition as of the Effective Date.

8. Authority of Limited Liability Company. The Buyer represents and warrants that Gooch Land and Livestock, L. C., is

organized and existing under the laws of the State of Utah and has full power and authority to enter into this agreement, that this agreement is valid and enforceable against said Buyer in accordance with its terms, and that the execution and delivery of this agreement and all related documents and instruments does not, and the consummation of the transaction contemplated hereby will not, violate any provision of any charter, bylaw, mortgage, lien, lease, agreement, instrument, order, judgment, or decree to which the Buyer is a party or by which he is bound, and will not violate any restriction of any kind or character whatsoever to which said Buyer is subject.

9. Buyer's Records. The Buyer agrees to keep full and complete books and records of his use and sale of the said Cattle and of all assets securing the Promissory Note, and shall permit the Seller and his representatives to have access at all reasonable times to any and all such books, records and other related information in order to review and make copies thereof for the purpose of confirming the Buyer's compliance with the provisions hereof or for any other reasonable purpose.

10. Indemnification.

A. The Seller will indemnify, protect, and save and hold the Buyer harmless against and in respect of any and all liabilities of the Seller of any nature, whether accrued, absolute, contingent, or otherwise, existing on the Effective Date, incurred in the ownership or use of the Cattle, except as otherwise specifically set forth herein.

B. The Buyer will indemnify, protect and save and hold the Seller harmless against and in respect of any and all liabilities of the Buyer of any nature, whether accrued, absolute, contingent, or otherwise, accruing after the Effective Date, incurred in the ownership or use of the Cattle or any of the assets securing the Buyer's obligations hereunder, except as otherwise specifically set forth herein.

C. Each party will indemnify, protect, and save and hold the other party harmless against and in respect of any and all claims, losses, liabilities, damages, costs, deficiencies, or expenses resulting from any misrepresentation, material omission, breach of warranty, or nonfulfillment of any covenant or agreement on the part of the indemnifying party under or relating to this agreement, and any and all actions, suits, proceedings, demands, assessments, judgments, costs, legal and accounting fees, and other expenses incident to any of the foregoing.

11. Notices. Any and all notices, designations, offers, acceptances, or any other communications to be given to either of the parties hereto shall be personally delivered to such party or mailed to such party by registered or certified mail, return receipt requested, at the address indicated below:

Notices to Seller:

Joel C. Parker
8083 West 900 South
Ogden, Utah 84404

Notices to Buyer:

Tim Gooch
Gooch Land and Livestock, L.C.
1657 North 4500 West
West Point, Utah 84015

Either party may change the place of address aforesaid by written notice to the other party. Notice shall be deemed to have been given upon the date of personal delivery thereof or upon depositing the same in the United States mails as aforesaid.

12. Interpretation. The provisions of this agreement shall be governed by and construed in accordance with the laws of the State of Utah. The paragraph headings contained herein are for purposes of reference only and shall not limit, expand, or otherwise affect the interpretation of any provision hereof. Whenever the context requires, the singular shall include the plural, the plural shall include the singular, the whole shall include any part thereof, any gender shall include the masculine, feminine and neuter gender, and the term "person" shall include any individual, firm, partnership (general or limited), joint venture, corporation, limited liability company, trust, association, or other entity or association or any combination thereof. If any provision of this agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this agreement and the application of such provision to other persons or circumstances shall not be affected thereby and shall be enforced to the extent permitted by applicable law.

13. Waiver. A waiver of any breach of any of the terms or conditions of this agreement shall not operate or be construed as a waiver of any subsequent breach thereof.

14. Effect. The provisions of this agreement shall bind and inure to the benefit of the parties hereto and their respective permitted successors and assigns. The parties hereby

agree for themselves, and for their successors and assigns, to execute any instruments and to perform any act which may be necessary or proper to carry out the purposes of this agreement.

15. Amendments. This agreement sets forth the entire understanding of the parties with respect to the subject matter hereof, and all prior negotiations, understandings, representations, inducements and agreements, whether oral or written and whether made by a party hereto or by any one acting on behalf of a party, shall be deemed to be merged in this agreement and shall be of no further force or effect. No amendment, modification, or change in this agreement shall be valid or binding unless reduced to writing and signed by all of the parties hereto.

16. Expenses of Enforcement. The parties agree that should either party default in any of the covenants or agreements contained herein, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise, and regardless of whether such costs, fees and/or expenses are incurred in connection with any bankruptcy proceeding.

17. No Presumption. The parties agree that no presumption shall be attached to this agreement because it may have been prepared by one of the parties or by one party's attorney.

18. Specific Performance. Each party's obligations under this agreement are unique. In the event that any party should default in its obligations under this agreement, the parties each acknowledge that it would be extremely impracticable to measure in full all of the resulting damages; accordingly, the nondefaulting party, in addition to any other available rights or remedies, may sue in equity for specific performance and the parties each expressly waive the defense that a remedy in damages will be adequate (without, however, waiving its respective right to pursue the remedy of damages if it elects to do so).

19. Time of Essence. Time is hereby expressly declared to be of the essence of this agreement and of each and every provision hereof.


20. Counterparts: Facsimile (Fax) Documents. This agreement may be executed in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, and all of which shall together constitute one and the same instrument. Facsimile transmission of any signed original

document, and retransmission of any signed facsimile transmission, shall be the same as delivery of an original.

21. Authority of Signers. If any party hereto is a corporation, partnership, limited liability company, trust, estate or other entity, the person executing this agreement on behalf of such party warrants his or her authority to do so and to bind such party.

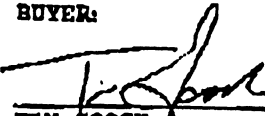
IN WITNESS WHEREOF, the parties have executed this agreement this 27th day of December, 1995.

SELLER:



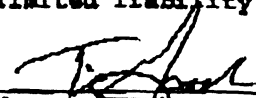
JOE C. PARKER

BUYER:



TIM GOOCH

GOOCH LAND AND LIVESTOCK, L.C., a
Utah limited liability company

By: 

Manager/Member