

2009

Michael Ward v. Caroline Coats Graydon, and Peter Coats : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MICHAEL WARD,

Plaintiff and Appellant,

Appellate No. 20090714-CA

vs.

CAROLINE COATS GRAYDON,

District Court No. 080903379

Defendant and Appellee,

and

PETER COATS,

Defendant, Appellee, and Cross-
Appellant.

BRIEF OF APPELLEE CAROLINE COATS GRAYDON

On Appeal from the Third Judicial District Court of Salt Lake County, Utah
Honorable Denise P. Lindberg

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and PETER COATS,

Defendant and Cross-Appellant..

BRIEF OF APPELLEE CAROLINE COATS GRAYDON

JURISDICTION

This is an appeal by Plaintiff Michael Ward (“Ward”) from the August 17, 2009 Order on Summary Judgment Motions and Judgment, and a cross-appeal by Defendant Peter Coats (“Coats”) from the same order, as well as the District Court’s denial of Coats’ motions under Utah R. Civ. P. 59 and 60. Jurisdiction to hear this appeal is conferred on the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-4-103, and Utah R. App. P. 3(a).

**STATEMENT OF ISSUES PRESENTED ON APPEAL AND
STANDARDS OF APPELLATE REVIEW**

Issue on Appeal No. 1: Does a cotenant of real estate owe a fiduciary duty to another cotenant to sell his interest in real estate, where there is no independent basis for a confidential or fiduciary relationship between the cotenants?

Standard of Review: This issue presents a question of law, which is reviewed under a correctness standard, and the trial court's decision is given no deference. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Issue on Appeal No. 2: Does a cotenant have a claim for damages against a cotenant or a third party for refusal to participate in a sale of property, or are the cotenant's rights and remedies limited to those available under the partition statute?

Standard of Review: This issue presents a question of law, which is reviewed under a correctness standard, and the trial court's decision is given no deference. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Issue on Appeal No. 3: Where ex-spouses remain parties to a divorce proceeding involving property settlement issues, does the ex-wife owe a fiduciary duty to her ex-husband's cotenant if the ex-wife has been granted authority to act as attorney-in-fact for the ex-husband with respect to the property?

Standard of Review: This issue presents a question of law, which is reviewed under a correctness standard, and the trial court's decision is given no deference. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Issue on Appeal No. 4: Where a cotenant voluntarily subordinates or subjects his interest in real estate to the effect of a trust deed at the time of a trustee's sale, may the cotenant assert a claim for damages allegedly arising from a cotenant's (or the cotenant's ex-spouse's) previous failure to cooperate in a sale of the land?

Standard of Review: This issue presents a question of law, which is reviewed under a correctness standard, and the trial court's decision is given no deference. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Issue on Appeal No. 5: If the Court finds that Ward has set forth a legal claim against Graydon, was the District Court correct in denying Ward's motion for summary judgment due to contested issues of material fact?

Standard of Review: When an appellate court reviews a district court's grant of summary judgment, the court should "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party," while the district court's legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness, *Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶2, 100 P.3d 1200; *View Condo. Owners Assn. v. MSICO, LLC*, 2005 UT 91, ¶17, 127 P.3d 697.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Caroline Graydon ("Graydon") does not believe any Constitutional provisions, statutes, or rules are determinative or of central importance to this matter; however, Graydon maintains that the partition statute, Utah Code Ann. §§78B-6-1201, et seq., provides a cotenant's sole

and exclusive remedy, which is to bring an action to compel a sale of property held by cotenants.

STATEMENT OF THE CASE

Ward was a tenant in common with Coats with respect to an eighteen acre parcel of land located in South Jordan, Utah, with Ward owning an undivided 9.82% interest and Coats owning the remaining 90.18%. Graydon is Coats' former spouse. After a trust deed foreclosure of the property, Ward sued Coats and Graydon, claiming that they should have agreed to a sale of the land for a favorable price prior to the foreclosure sale, and that he was damaged by the fact that the property sold at the trustee's sale for less money. R. 1-8.

Ward filed a motion for summary judgment against Graydon and Coats, and Graydon filed a motion for summary judgment against Ward. R. 62-146, 147-71, 175-268. The District Court granted Graydon's motion for summary judgment, denied Ward's motion against Graydon, and granted Ward's motion against Coats. An order was entered thereon on August 17, 2009. R. 319-20. Coats thereafter filed motions under Utah R. Civ. P. 59 and 60, which were denied by order entered December 17, 2009. R. 326-27, 411-13. Ward appealed the summary judgment granted to Graydon and the denial of his motion for summary judgment against Graydon. R. 323-24. Coats cross-appealed the summary judgment against him, and the District Court's denial of his post-judgment motions. R. 414-15.

STATEMENT OF FACTS

The Court is asked to review rulings granting summary judgment to Graydon, on the one hand, and denying summary judgment to Ward, on the other hand. With respect to the granting of summary judgment in favor of Graydon and against Ward, the facts must be stated in the light most favorable to Ward. *Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶2, 100 P.3d 1200. Similarly, with respect to the denial of Ward's motion for summary judgment against Graydon, the facts must be stated in the light most favorable to Graydon.¹ By and large, Ward admitted Graydon's statement of facts for purposes of her motion for summary judgment; however, Graydon maintains that if Ward has posited a legal basis for recovery, there are nevertheless disputed issues of fact that preclude summary judgment in Ward's favor.

The case involves two parcels of land located in South Jordan, Utah. The parties have referred to these parcels as the South Parcel (approximately twenty-two acres) and the North Parcel (approximately eighteen acres). R. 152 (¶1). Coats acquired an interest in the South Parcel in 1992 (R. 152, 179-81), and an interest in the North Parcel in 1999. R. 152, 183-84.

¹Ward's statement of facts does not contain any citations to the record, and also fails to acknowledge the various disputed issues of fact that Graydon maintains precluded summary judgment for Ward. Ward's burden on this issue is similar to the requirement that an appellant marshal the evidence, yet he made no attempt whatsoever to meet his burden.

Coats' mother, Isabel Coats, was also a part owner of the two parcels, having owned a 9.82% undivided interest as a tenant in common since at least 1999.² R. 152, 186-88.

Graydon was formerly married to Coats. R. 153. Graydon filed a petition for divorce in 2001. R. 162. Graydon and Coats were divorced by a decree entered in June 2005. R. 121. However, the divorce proceeding remained pending for purposes of resolving property settlement and child custody issues. A Supplemental Decree of Divorce was entered in November 2008. R. 120-32. An appeal was thereafter filed by Coats and was pending at the time the district court ruled in this matter. *See* Case No. 20080992-CA. Thereafter, on November 27, 2009, the Court of Appeals dismissed the appeal on the ground that a final, appealable order had not yet been entered. *Id.* At this moment, the divorce case, originally filed in 2001, is still pending in the district court.

In connection with the divorce proceeding between Graydon and Coats, Graydon's legal counsel caused to be recorded a Lis Pendens, which included descriptions of the North and South Parcels, to give notice of the pendency of the divorce proceeding. R. 193-96, 283 (¶1). Also in the divorce case, Graydon was granted "a power of attorney to sign for Peter M. Coats regarding the sale of" certain parcels, including the North and South Parcels (hereinafter, the "POA Order"). R. 100-03, 154 (¶7). Coats contested the entry of the POA

²Isabel Coats' interests were held by Isabel Coats as trustee of a trust; however, the parties have typically referred to Isabel Coats individually, rather than as trustee, as the distinction does not appear to make any difference in this matter.

Order, and recorded both a lis pendens (R. 154, 210-12) and a Verified Notice of Appeal (R. 154, 214-16) setting forth his contention that the POA Order was invalid.³

The North and South Parcels, or at least Coats' undivided interests therein, were subject to encumbrances executed by Coats in favor of his mother, Isabel Coats. In particular, the North and South Parcels were subject to a trust deed recorded in 1995 (the "1995 Trust Deed"), and the South Parcel was subject to a further trust deed recorded in 1999 (the "1999 Trust Deed"). R. 153-54 (¶5), 198-205, 207-08.

On April 19, 2005, notices of default were recorded with respect to the trust deeds in favor of Isabel Coats. R. 155 (¶8), 218-23. Thereafter, Isabel Coats filed a lawsuit in the Third District Court, Salt Lake County, alleging that she owned 100% of the North and South Parcels. *See Isabel Coats v. Peter Coats, et al.*, Third Dist. Ct. Case No. 050910905. R. 155 (¶9). In that action, Graydon (who was named by Isabel Coats as a defendant) requested that the court enjoin the trustee's sale of the properties. *Id.* Ultimately, Graydon and Isabel Coats entered into a stipulation. R. 108-12, 155 (¶¶9 and 10). The stipulation required Isabel Coats' cooperation in the sale of the property, provided for a cancellation of the notices of default, and recognized Isabel Coats' ownership of an undivided 9.82% interest in both the North and South Parcels (thus negating Isabel Coats' claim that she owned 100% of the two parcels).

³At the hearing on the motions for summary judgment, Ward's counsel conceded that no title company would be willing to insure title based on the POA Order because it was not a final order. R. 418 (Tr. of summary judgment hearing, July 20, 2009, at p. 28 ln. 23-24).

Id. The Stipulation was executed by Graydon both as attorney in fact for Coats and individually. *Id.*

The 9.82% interest in the North and South Parcels held by Isabel Coats was conveyed to Ward (Isabel Coats' grandson and Coats' nephew) on December 6, 2005. R. 152-55 (¶¶ 2, 5, and 11), 190-91. As a result, Coats and Ward became tenants in common with respect to the North and South Parcels, with Coats owning an undivided 90.18% undivided interest and Ward owning a 9.82% undivided interest.

On December 21, 2005, Isabel Coats transferred ownership of the 1999 Trust Deed to various trusts controlled by David Ward, Ward's father and Coats' brother. R. 155-56 (¶ 12), 225-26. Thereafter, foreclosure proceedings under the two trust deeds were recommenced by the filing of notices of default in the Spring of 2006. R. 155-56 (¶ 12).

In the fall of 2006, Graydon filed another motion for a temporary restraining order and preliminary injunction to halt the foreclosure proceedings. The matter was contested in an evidentiary hearing on the preliminary injunction, held before Judge Medley on December 5, 2006. Judge Medley concluded that Graydon had not presented a case adequate for the issuance of a preliminary injunction, and therefore dissolved the temporary restraining order and denied her request for a preliminary injunction. R. 156 (¶ 13). Thereafter, a foreclosure sale under the two trust deeds was set for February 14, 2007. R. 156 (¶¶ 14 and 15).

An offer for the sale of the North Parcel was made by David Hagen on February 13, 2007 (hereinafter, the “Hagen REPC”). R. 228-37, 286-87 (¶¶ 3 and 4). The scheduled trustee’s sales were continued until March 15, 2007. R. 159 (¶ 24).

While the Plaintiff’s Complaint alleges that the offer for the North Parcel was for a price of \$5.2 million, the Hagen REPC reflects that original offer was \$5.0 million. R. 228-37. The price was increased to \$5.2 million in a counteroffer executed by Coats, Ward, and Hagen. R. 228-37, 286-87 (¶¶ 3 and 4). The Hagen REPC identified Coats and Ward as the sellers, and did not identify Graydon as a seller. R. 287 (¶ 5). Para. 9 of Addendum No. 2 (which was the counteroffer by Coats and Ward), stated as follows:

9. This sale is subject to Caroline Graydon signing a quit claim deed to the buyers.

R. 234, 287 (¶ 5).

Graydon did not own any legal interest in the North or South Parcels at any time pertinent to this proceeding. Her only interest in the North Parcel was as marital property. R. 309-11 (¶2). Nevertheless, Graydon was agreeable to a sale of the North Parcel pursuant to the Hagen REPC, and was willing to remove her lis pendens on the parcel and execute such other documents as may have been needed for a closing, so long as the net proceeds of the sale (i.e., after payment of the debts and costs of the sale), attributable to Coats’ interest in the property were placed in escrow pending a decision in the divorce action. R. 288 (¶ 6).

Although there was an order in the divorce action that prohibited Coats and Graydon from disposing of or encumbering marital assets, Graydon had good reason to fear that Coats

would violate the court order if he received the proceeds of sale. This was because Coats had violated the court's order before, by encumbering the marital home and by placing encumbrances and easements against the North and South Parcels. These facts, in part, were the basis for POA Order entered by Judge Lewis in the divorce action. R. 311-12 (¶ 7).

Ward indicated to both Coats and Graydon that he would accept any reasonable proposals for closing instructions that either of them might propose. R. 159 (¶ 23).

The sale to Hagen did not close. R. 159 (¶ 24). On March 15, 2007, the North Parcel was sold at a trustee's sale under the 1995 Trust Deed, for \$3,600,000.00, with the successful purchasers being members of Ward's family (including a 1/18th interest to Ward). R. 142-46, 160 (¶ 26). After the satisfaction of the costs of sale, attorneys' fees, interest and principal on both the 1995 and 1999 Trust Deeds, there were excess proceeds of \$1,989,789.03. R. 117-18, 160 (¶ 26).

Ward received 9.82% of the excess proceeds, \$195,397.28, which he credited against his share of the purchase price bid at the trustee's sale. R. 160 (¶ 27). Ward alleges that if the sale to Hagen had closed for \$5.2 million, his share of the proceeds would have been \$510,640.00 (which is simply 9.82% of the gross sales proceeds, without deduction for costs of sale, encumbrances, including the 1995 and 1999 Trust Deeds, or prorations). R. 160-61 (¶ 28). Hence, Ward asserted that he had been damaged in the sum of \$315,242.72, being the difference between the two sums. R. 161 (¶ 29). Ward presented no evidence, however,

establishing that the sale to Hagen would have closed, or was likely to have closed. R. 160-61 (¶ 28).

Prior to the trustee's sale, Ward took the position that his 9.82% undivided interest in the parcels was not subject to the 1995 and 1999 Trust Deeds. R. 289 (¶ 8). In fact, in connection with other litigation between these parties, on February 20, 2007, immediately prior to the scheduled trustee's sale, Ward and, oddly enough, Isabel Coats and David Ward (the "lenders"), filed a motion for partial summary judgment (in Civil No. 050910905) seeking a ruling that Michael Ward's interest in the parcels was not subject to the 1995 and 1999 Trust Deeds. R. 256-62, 290 (¶ 9). No ruling was ever issued on this Motion. *Id.* In Ward's motion for summary judgment in this case, he also alleged that his 9.82% interest in the property was not subject to the trust deeds, asserting that Coats and Isabel Coats had signed affidavits to that effect. R. 68 (¶ 6), 92-98.

Notwithstanding Ward's claims that his interests in the two parcels were free and clear of the two trust deeds, Ward alleged in his Complaint that he agreed to subordinate his interests to the trust deeds. Para. 36 of the complaint states: "In order to facilitate the [trustee's] sale, Plaintiff [Ward] agreed that his 9.82% would be treated as junior to the two Trust Deeds, in order to attempt to maximize the sales proceeds." R. 7, 290 (¶ 10). Ward's receipt of a portion of the excess proceeds is consistent with his voluntary subordination of his 9.82% interest — had he not subordinated his interest, it would not have been foreclosed and he would not have been entitled to any portion of the excess proceeds.

On November 10, 2008, Judge Atherton entered a supplemental decree of divorce in the divorce case. R. 120-32, 161 (¶ 30). The Supplemental Decree was entered against Coats after his pleadings were stricken in that action for his contumacious conduct. R. 161 (¶ 31). In the Supplemental Decree, Judge Atherton found that Coats caused “prior sales to fail, including one for the North Parcel for \$5,200,000.00.” R. 125 (¶ 15), 161 (¶ 31). Accordingly, Judge Atherton awarded to Graydon an amount equal to 50% of the decrease in proceeds realized from the North Parcel, or \$523,508.00, which sum was ordered to be paid when the South Parcel is sold. R. 125 (¶ 16), 161 (¶ 31). In dividing the marital property, Judge Atherton recognized that but for Coats’ failure to cooperate in the sale, the marital property would have yielded additional amounts, one-half of which would have been awarded to Graydon. R. 125 (¶¶ 15 and 16).

Graydon never took any actions to restrain or prevent Plaintiff from selling the 9.82% interest in the property that he owned. R. 312 (¶ 11).

SUMMARY OF ARGUMENT

A cotenant owes no fiduciary duty to another cotenant to join in a sale of property held in cotenancy. Instead, a cotenant’s rights and remedies respecting a sale of the property are limited to those available under the partition statute. Graydon was not a cotenant of Ward, and owed him no duties whatsoever with respect to a sale of the North Parcel. In any event, Graydon acted reasonably and within her rights in protecting her legitimate interests.

Under the undisputed facts of this case, Ward caused the injury he complains of, since his interest in the North Parcel was not subject to the foreclosure until he voluntarily subordinated his interest at the time of the trustee's sale. Finally, even if Ward has set forth a legally cognizable claim, disputed issues of fact preclude summary judgment in his favor.

ARGUMENT

POINT I

A COTENANT HAS NO DUTY TO SELL REAL ESTATE.

There is simply no authority for the proposition that a cotenant owes a fiduciary duty, or any duty, to another cotenant to sell his interest in property. Unless Coats had a duty to Ward to sell his interest in the North Parcel, Ward's claims against Graydon must fail, as they are purely derivative of Ward's argument that Graydon was the functional equivalent of a cotenant (an issue that is discussed further below).

The existence of a relationship giving rise to fiduciary duties, and the nature and scope of the duties owed, depends upon the facts and circumstances of a case. *See, generally, Gildea v. Guardian Title Co.*, 970 P.2d 1265 (Utah 1998). For example, the fiduciary duties owed by an attorney to her client necessarily differ from the duties owed by a physician to his patient, or by an agent to a principal. *Cf. Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah Ct. App. 1996); *Sorensen v. Barbuto*, 2008 UT 8, 177 P.3d 614; and *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, 94 P.3d 179. Hence, chanting the mantra, "fiduciary duty,"

does not enlighten the court or the parties, since the nature and existence of a fiduciary duty depends entirely upon the particulars.

Ward argues that Graydon and Coats owed a fiduciary duty to sell the property, because, Ward maintains, a cotenant generally owes fiduciary duties to his cotenant. The case relied upon as authority for Ward's proposition arguably makes this statement, but it is purely dictum. *Olwell v. Clark*, 658 P.2d 585 (Utah 1982), involved adverse possession and quiet title claims asserted against a cotenant. The Court noted, "It is established law that co-tenants stand in a unique relationship of confidence and trust by reason of their community of interest." This general statement was followed by the comment, "Some jurisdictions, including Utah, have found the relationship to be a fiduciary one," citing *Heiselt v. Heiselt*, 10 Utah 2d 126, 349 P.2d 175 (1960), as authority for the comment.⁴ In the context of the case, however, the *Olwell* court was merely reiterating the rule that it was extremely difficult for a cotenant to adversely possess land as against another cotenant, since the cotenant's possession of land will not typically be considered to be adverse to the other cotenants "unless the cotenancy is disavowed by acts of the most open and notorious character." *Olwell v. Clark*, 658 P.2d at 588. Those are certainly not the facts and circumstances of this case.

⁴Like *Olwell*, *Heiselt* was a quiet title action by a cotenant against the other cotenants. In *Heiselt*, the court's comment about fiduciary duty was made with respect to a payment by one cotenant on account of an adverse claim against the "common title." *Heiselt*, 349 P.2d at 129.

Indeed, in the year following *Olwell v. Clark*, the Utah Supreme Court backed away from its seemingly broad pronouncement that cotenants owe each other fiduciary duties. In *Jolley v. Corry*, 671 P.2d 139, 141 (Utah 1983), the Court noted, “We have recently reaffirmed the special relationship of confidence and trust that exists among cotenants and applied it to the requirements for acquisition of title by adverse possession [citing *Olwell*]....” Then, however, the Court stated that it “need not decide whether the principles applied in the cited authorities and in our earlier decision in *McCready v. Fredericksen*, 41 Utah 388, 126 P. 316 (1912) (cotenant and tax sale), would put one cotenant under a fiduciary duty to act for all cotenants in any and all circumstances.” *Id.* In short, to the extent that *Olwell v. Clark* could be read as establishing a general fiduciary duty between cotenants, the Utah Supreme Court swiftly distanced itself from that reading.

Ward cannot direct this Court to any authority for the proposition he advocates, either in or outside this state. The other cases cited by Ward simply do not stand for the proposition. *Chournos v. Evona Inv. Co.*, 93 P.2d 450 (Utah 1939), involved a co-lessee’s claim for specific performance of a right of first refusal in a lease agreement. The Court held that the co-lessee’s tender of performance did not comply with the terms of the right of first refusal, and refused an order of specific performance. The Court also noted that had either of the two co-lessee’s ended up with the property pursuant to the right of first refusal, the other co-lessee could have compelled the other cotenant to share the property so acquired. This case had nothing to do with the sale of property subject to a tenancy in common. Of the same ilk,

Holbrook v. Carter, 431 P.2d 123 (Utah 1967), and *Sweeney Land Co. v. Kimball*, 786 P.2d 760 (Utah 1990), involved adverse possession claims between cotenants. Ward's citation of *Meinhard v. Salmon*, 249 N.Y. 458 (N.Y. 1928), is even farther off the mark, as that case involved "joint adventurers," and not cotenants.

Another case cited by Ward, *Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497 (Utah 1980), supports Graydon's position, by holding that a fiduciary relationship does not arise from the mere fact of cotenancy. Instead, the Court stated:

A fiduciary relationship between cotenants is usually found when one cotenant undertakes to act on behalf of another cotenant, or takes advantage of other cotenants, often in the course of acquiring paramount title or ousting other cotenants.

Id. at 506. There are simply no facts in this matter establishing that Coats or Graydon undertook to act on behalf of Ward, or acquired or attempted to acquire paramount title or to oust other cotenants.

If Ward wanted the property sold, his sole recourse was to file a partition action under Utah Code Ann. §78B-6-1201, et seq. (formerly Utah Code Ann. § 78-39-1, et seq.), and seek a partition by sale. The Utah Supreme Court has noted that, "Partition in this state is a statutory action. The right to partition and the relief that can be administered are prescribed and fixed by [the statute]." *Larsen v. Daynes*, 122 P.2d 429, 430 (Utah 1942), *rev'd on rehr'g on other grounds*, 133 P.2d 785 (Utah 1943). The partition statute does not allow a claim for damages arising from a cotenant's alleged refusal to sell, nor does it create any duty to sell. Further, despite having owned his interest for over a year prior to the trustee's sale, and

having acquired his interest in the middle of his grandmother's foreclosure actions, Ward did not file a partition action to compel a sale.

In short, neither Coats, as the cotenant, nor Graydon, as an alleged proxy cotenant, owed Ward a fiduciary duty, or any other sort of duty, to sell Coats' interest in the North Parcel. Accordingly, Ward's complaint fails to state a claim.

POINT II

GRAYDON WAS NOT A COTENANT IN THE NORTH PARCEL.

Graydon did not own a legal interest in the North Parcel at any time material to Plaintiff's claims. Her interest arose solely from the fact that Coats' 90.18% interest in the property was marital property, and was therefore subject to an equitable division in the divorce action.

Ward argues, on several grounds, that Graydon was functionally a cotenant, and should be held to the fiduciary duty standard he maintains is applicable to Coats. First, Ward suggests that Graydon was functionally a cotenant simply because she held a marital property interest in the North Parcel. In essence, Ward argues that Graydon's inchoate, but vested, interest in assets of the marriage created duties to Ward as cotenant. There is no authority for this concept. The Kansas case relied upon by Ward, *In re Marriage of Watson*, 22 P.3d 1081 (Kan. Ct. App. 2001), involved the construction of Kansas law and the allocation of liability for income tax on capital gains realized on a marital asset sold prior to entry of a divorce

decree. The case does not support the notion that a divorcing spouse, not on title, is the equivalent of a cotenant, or owes any duties to the other spouse's cotenant.

Second, Ward asserts that because Graydon had the authority to act for Coats, pursuant to the POA Order, she was in effect a cotenant. There are at least two infirmities in the argument. If Graydon acted or failed to act under the POA Order, she did so as an agent of Coats, since a power of attorney is merely a species of a principal-agent relationship. Actions by an agent within the scope of the agent's authority are, in legal contemplation, the actions of the principal. *See* 2A C.J.S. Agency §§ 344 and 353 (2003). In short, Graydon did not individually become a cotenant of Ward merely because the divorce court entered an order authorizing her to execute documents as attorney in fact for Coats. Furthermore, the POA Order was wholly ineffective in actually giving Graydon the power to sell and convey the North Parcel, a point that has been conceded by Ward.

Third, Ward maintains that Graydon brought legal actions and otherwise acted as though she was an owner of the North Parcel; therefore, she should be treated as a cotenant. In large measure, Ward's arguments are not supported by citations to the record to support his factual assertions. For example, Ward asserts that Graydon sued Ward, alleging Ward breached his fiduciary duty to cooperate in a sale of the property. Appellant's Brief at 15.

Nothing in the record supports that assertion.⁵ Even if Ward's assertions were true, the allegations do not make Graydon a cotenant or impose any duties owing to Ward.

Finally, Ward argues that since Graydon was awarded damages in the divorce case based upon Coats' failure to close the sale of the North Parcel prior to the foreclosure, he should likewise recover against Graydon. In the ultimate non sequitur, Ward maintains that Graydon must, therefore, have been a cotenant, because otherwise how could she have obtained an award against Coats? Simply put, Graydon's award on this issue was based upon Coats' dissipation of marital property. If Ward had been married to Coats, then perhaps he could assert a similar claim (against Coats).

POINT III

WARD CAUSED HIS OWN LOSS, IF ANY.

Ward asserts that his 9.82% interest in the North and South Parcels was not subject to the trust deeds. If his interest was not subject to the trust deeds, as Ward has alleged and argued, then the foreclosure would not have affected his ownership, and he would have suffered no damages from the trustee's sale.⁶ Yet, Ward maintains, at the time of the trustee's

⁵In the event the Court was inclined to consider matters outside of the record, the Court would find that in the several legal proceedings involving Ward, Coats, David Ward, and Isabel Coats, Graydon's affirmative claims with respect to real estate have also been asserted in her capacity as the attorney-in-fact of Coats. In this record, that is reflected in the Amended Stipulation between Graydon and Isabel Coats. R. 108-12.

⁶This fact also vitiates his argument that Coats and Graydon had a fiduciary duty to sell the property prior to the trustee's sale, since the trustee's sale would not have affected Ward's ownership, but only the identity of his cotenant.

sale, he voluntarily subordinated his interest to the trust deeds “in order to attempt to maximize the sales proceeds.”⁷ R. 7, 290 (¶ 10). This tactic did not improve his position, but instead created the following dilemma: Either (a) Ward’s interests were not in fact foreclosed, because there was no written instrument that subordinated his interest, and therefore his “agreement” to subordinate was ineffective, or (b) if Ward’s agreement to subordinate was effective, then his unilateral and voluntary agreement to subject his interests to the trust deeds was the sole cause of his damages.

A subordination agreement is subject to the statute of frauds, Utah Code Ann. § 25-5-1, et seq., and is not effective unless it is in writing and signed by the party to be charged therewith. *Cf. Metrobank for Savings v. Nat’l Community Bank*, 620 A.2d 433 (N.J. Super. Ct. App. Div. 1993) (mortgage is an interest in real estate, so subordination must satisfy statute of frauds). Accordingly, notwithstanding Ward’s current contention, since there was no instrument signed by him that established his subordination, it was not effective and the foreclosure did not affect his interest. Ward still owns his 9.82% interest in the North Parcel (and should repay Coats and Graydon the money he received from the excess proceeds of the trustee’s sale).

⁷It is difficult to fathom the basis for this decision, since at the time of the trustee’s sale, Ward knew there would be no sale of the North Parcel for \$5.2 million. If his interest in the property was not subject to the foreclosing lien, why did he agree to subordinate his interest? The only possible explanation is because his family (and Ward) ended up owning the North Parcel as a consequence of the trustee’s sale, and perhaps Ward and his family thought they could both get the property and pursue a damage claim against Graydon.

Alternatively, if Ward's oral subordination is deemed effective, his subordination is the sole cause of any loss. Ward was the sole architect of his downfall.

POINT IV

DISPUTED ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT TO WARD.

If the Court otherwise concludes that Ward has asserted a legal basis for recovery against Graydon, summary judgment was nevertheless precluded by material issues of disputed fact. Ward failed generally to support his claims with citations to admissible evidence and, on appeal, has failed to cite to those portions of the record allegedly establishing the facts. In addition to numerous factual deficiencies and issues identified elsewhere in this brief, the following items are significant.

- Assuming Ward's legal theory is sustained, did Graydon's actions breach any duty owed to Ward? Ward concedes that Graydon was willing to agree to a sale of the North Parcel, but asserts that her requirement that Coats' share of the proceeds of sale be escrowed was unreasonable. This was a reasonable condition by Graydon, particularly given Coats' previous behavior in violating the divorce court's prohibition on disposition or encumbering of assets. Accordingly, the failure of the sale must be blamed wholly on Coats. If Graydon somehow owed a duty to Ward, that duty was not breached, as her behavior was reasonable under the circumstances. At the very least, whether Graydon's condition was reasonable, or violated any duty owed to Ward, is a disputed issue of fact.

- If Graydon had cooperated fully in the sale (i.e., quit-claimed the North Parcel to Coats and abandoned any claim to the proceeds), would the sale to Hagen have closed? There is no evidence to establish that the sale to Hagen would have closed. The only evidence presented by Ward was a signed contract, and that is insufficient to establish that Hagen had the wherewithal to close the deal, or that other contingencies to closing were satisfied.

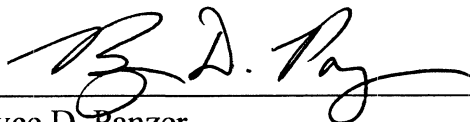
- Assuming Ward has a legal claim, what are his legitimate damages? Ward has presented no evidence to establish the actual amount of his damages, assuming that he is otherwise entitled to relief, since the Hagen REPC involved real estate brokers and commissions, and costs of sale. Ward admitted this defect in his memorandum below. R. 302.

CONCLUSION

For the reasons set forth above, the Court should affirm the trial court.

DATED this 1st day of July, 2010.

BLACKBURN & STOLL, LC



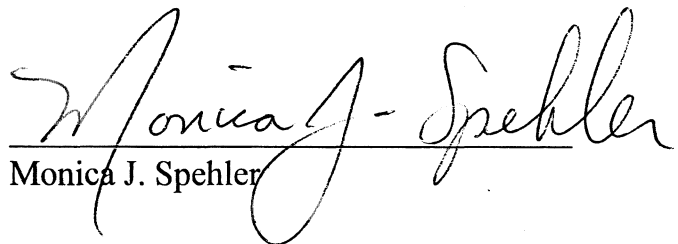
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CERTIFICATE OF MAILING

Monica J. Spehler says that she is employed by the law offices of Blackburn & Stoll, LC, attorneys for appellee Caroline Coats Graydon, and that on the 1st day of July, 2010, she served the **BRIEF OF APPELLEE CAROLINE COATS GRAYDON** (Utah Ct. App., Case No. 20090714), along with a courtesy CD, upon the following counsel of record by first-class mail, postage prepaid:

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