

1988

Joan (Olearain) Mattes aka Joan Emmer v. David Lee Olearain : Brief of Appellant

Utah Supreme Court

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

880138-CA

IN THE SUPREME COURT
OF THE STATE OF UTAH

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JOAN (OLEARAIN) MATTES

aka JOAN EMMER

Plaintiff - Respondent

vs.

Case No. 860393

DAVID LEE OLEARAIN,

14 B

PERSONAL REPRESENTATIVE OF

ANDREW OLEARAIN, DECEASED

Defendant - Appellant

88-0138-CA

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BRIEF OF APPELLANT

Appeal from the Order and Judgment of the
Third Judicial District Court of Salt Lake County
Honorable Jay E. Banks

-----oo000oo-----

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FILED

JUL 8 1987

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aka JOAN EMMER
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STATEMENT OF ISSUES PRESENTED

1. Was there sufficient evidence, as a matter of law, to support an order setting aside a deed transferring property from Plaintiff to decedent and imposing a constructive trust upon decedent's estate. No evidence or finding of unjust enrichment, fraud, wrongdoing or a confidential relationship was introduced to support the imposition of this trust?
2. Was Plaintiff's evidence clear and convincing as a matter of law so as to justify the setting aside of the deed giving decedent the Barker Road property?
3. As a matter of law, a marital relationship never existed between Plaintiff and decedent. Absent such a relationship, Plaintiff has no rights in the property held by the estate of decedent. Are the findings of fact, conclusions at law and judgment based upon the existence of a common law relationship valid and enforceable when such a relationship does not exist as a matter of law?
4. What interest does a co-grantee receive based on a transfer of real property, when the grantor's only interest is a defined monetary interest pursuant to a decree of divorce?
5. Are statements made by decedent admissible to show decedent's position on the ownership of his property and whether he considered himself to be married to Plaintiff?

STATEMENT OF THE CASE

Nature of case:

Andrew Olearain died on February 6, 1985. At the time of his death he was residing with Plaintiff. He had resided with her for a period of thirteen months. Mr. Olearain and Plaintiff were not married. On the date of his death, he was the title-holder of a parcel of real property located at 4145 Barker Road, Taylorsville, Utah (hereinafter "Barker Road property"). He also owned a residence and property located at 1991 West Leisure Circle, Taylorsville, Utah (hereinafter "West Leisure property").

Plaintiff filed a civil action against the estate of decedent claiming ownership of the Barker Road property, the West Leisure property and all personalty of the estate. The basis of Plaintiff's complaint was that she was the common law wife of Andrew Olearain and that he left title to the Barker Road property in trust for her.

Course of proceedings:

Decedent died on February 6, 1985 at the age of forty-seven years. A petition of adjudication of intestacy and appointment of personal representative was filed in the Third Judicial District Court of and for Salt Lake County, Utah on or about the fifteenth day of March, 1985 and Defendant was appointed personal representative and letters of administration were issued. (Record 2) (hereinafter "R").

On or about the ninth day of April, 1985, Plaintiff filed her civil action in the same court alleging rights and interests in the property held in the estate of decedent. (R. 2-5). These

two actions were consolidated. (R. 36, 37).

On the fifteenth day of October, 1985, Defendant's motion for summary judgment came on for hearing. Subsequent to hearing the court below found that Plaintiff was not a legal heir of decedent and reserved all other issues for trial. (R. 48).

Trial on the issues was had on the eighth day of April, 1986, the Honorable Jay E. Banks presiding. Judgment was entered by the court below on the tenth day of June, 1986. (R. 99).

This judgment awarded Plaintiff all interest in the Barker Road property, (R. 92); various items of personalty (R. 92, 93); the exclusive use and possession of the West Leisure property subject to her maintaining the mortgage on said property and paying a rental amount fixed by the court to the Defendant (R. 93); and a one-fourth undivided interest in the West Leisure property. (R. 93).

This judgment was based upon the trial court's findings that a marital relationship had existed between Plaintiff and decedent and that this marital relationship was a common law relationship. (R. 84-88). The court below concluded as a matter of law that a marital relationship had been entered into by Plaintiff and decedent. (R. 88-90).

Relevant facts:

Decedent and Plaintiff resided together from January, 1984 until decedent's death. (Transcript 5) (hereinafter "Tr") (R. 3). Decedent and Plaintiff were never married. (Tr. 5, 40, 41), (Deposition of Plaintiff which was published at trial (R. 167) 4-5, 53-54) (hereinafter "Depo."). Plaintiff admitted that no

license was obtained. There was no official ceremony and no solemnization. (Tr. 5, 6, 41).

Decedent owned the West Leisure property subject to an equitable lien prior to the time that Plaintiff resided with him. (Tr. 6). The equitable lien was a \$10,000 interest reserved in decedent's ex-wife pursuant to a decree of divorce. (Tr. 44).

On the twentieth day of November, 1984, Plaintiff deeded all of her right, title and interest in the Barker Road property to decedent. (Tr. 9,10, 42). The deed contained no words of trust, restriction or limitation concerning decedent's right, title and interest in the Barker property. (Tr. 45) (Exhibit 1-P). Plaintiff admitted that there was no fraud, duress or undue influence on the part of decedent in regard to this transfer of property. (Tr. 42).

Plaintiff executed the deed to the Barker Road property of her own free will. (Tr. 10, 42). Plaintiff admitted that the transfer of this property was made to avoid liens that she feared would be filed against the property. (Tr. 9). Plaintiff knew full well that this property became the sole property of decedent and that she was giving up all right, title and interest which she held when she deeded the property to decedent. (Tr. 42). The deed was properly recorded, with Plaintiff being present at the happening of this event. (Depo. 7).

Also on the twentieth day of November, 1984, decedent's ex-wife executed a quit-claim deed to decedent and Plaintiff transferring her interest in the West Leisure property. (Exhibit 2-P). The transfer was done pursuant to a divorce court order.

(Tr. 16). Plaintiff was fully aware that this transfer was pursuant to a decree of divorce and that decedent's ex-wife held solely an equitable lien on this property. (Tr. 42 - 44).

Plaintiff testified that decedent's net income was \$1000 per week and that her net income was \$200 per week. (Tr. 7). She further testified that they combined their incomes in a joint account. (Tr. 12).

The payments for the West Leisure property (Tr.16), the Barker Road property (Tr. 52) and purchases for the parties came from this joint account. (Tr. 23). In fact, all of the personal property which Plaintiff claimed to be hers from the estate of decedent was purchased from this joint account. (Tr. 30-37).

Plaintiff continued with this claim to decedent's personalty even though all receipts produced by her at deposition were in decedent's name. (Tr. 58). She further admitted that there was no proof, other than her word, that she purchased any of the joint items. (Tr. 58).

In addition to the unequal contribution of monies to the joint account and Plaintiff living off of that account (Tr. 13), Plaintiff admitted to taking a full one-half of decedent's pay checks. (Tr. 13). This one-half was used to support Plaintiff's hobby of flying. (Tr. 13, 40).

Finally, the Barker Road property was rented and the monies received went into a safe deposit box. (Tr. 12, 39). Plaintiff took all of that money out of the safe deposit box upon decedent's death. (Tr. 38).

SUMMARY OF ARGUMENTS

In this case, Plaintiff was not married to decedent, but had lived with him for a period of time prior to his death. Plaintiff has made a claim that a deed transferring the Barker Road property to decedent should be set aside, that she be awarded various other items of the estate which were purchased in decedent's name, that a constructive trust be imposed upon the property in decedent's estate in favor of Plaintiff and that she be awarded the West Leisure property.

The evidence presented by Plaintiff's testimony refuted the grounds for setting aside the deed and the imposition of the constructive trust. She acknowledged that there was no fraud, undue influence, unjust enrichment of decedent's estate, or any other ground which supports such a trust.

The evidence presented by Plaintiff which could have been construed supportive of her allegations was neither clear nor convincing. Her own testimony established that decedent was the major financial contributor and supporter and that she, not decedent, was enriched by the rent received from the Barker Road property. Absent such clear and convincing evidence, the trial court should not have set aside the Barker Road property deed.

Plaintiff and decedent were never married, and by law, no marital relationship ever existed between them. Plaintiff is not a legal heir to decedent's estate and she should take nothing therefrom. The trial court entered findings of fact, conclusions at law and judgment based upon such a relationship existing between decedent and Plaintiff. The findings of fact, conclusions

at law and judgment based upon such a relationship are invalid and unenforceable.

The transfer of the West Leisure property to decedent and Plaintiff by decedent's ex-wife was pursuant to a decree of divorce. The divorce decree vested in decedent's ex-wife a mere equitable lien. It did not vest any percentage of ownership in the ex-wife. Plaintiff was fully informed as to these facts. She knew what interests were held by decedent and his ex-wife. Being fully aware of these matters, Plaintiff took nothing under the deed transferring title to the West Leisure property from decedent's ex-wife to decedent and Plaintiff.

ARGUMENT

I. A CONSTRUCTIVE TRUST CANNOT BE IMPOSED WITHOUT EVIDENCE AND A FINDING OF UNJUST ENRICHMENT, FRAUD, WRONGDOING OR A CONFIDENTIAL RELATIONSHIP.

At the trial, Plaintiff argued that the deed to the Barker Road property executed by her to decedent was in trust. (R. 2-4). The court so found.

Appellant asserts that this finding was error and not supported by the evidence. No constructive trust can be imposed without proof of undue influence, a confidential relationship, fraud or other wrongdoing. Baker v. Pattee, 684 P. 2d 632 (Utah, 1984), Close v. Adams, 657 P. 2d 1351 (Utah, 1983), Carnesecca v. Carnesecca, 572 P. 2d 708 (Utah, 1977), and Estate of Hock, 655 P. 2d 1111 (Utah, 1982). The court below made no such findings in the instant case.

Baker involved a dispute over the ownership of stock which was originally held by the parties' mother. The mother subsequently transferred the stocks to herself and Mr. Close, appellant, as joint tenants. The mother subsequently died. Respondent, Mrs. Adams, claimed a one-half interest in these stocks on the theory that appellant held her one-half interest as a constructive trustee. Baker, 657 P. 2d at 1352.

The trial court found the the mothers conveyances were made to avoid probate, to provide fair distribution of property between the parties, and were free of undue family influence. Id. The trial court then imposed a constructive trust and ordered appellant to transfer one-half of the stock to respondent. Id.

On appeal, this Court speaking through Justice Durham found, as it should also find in the instant action, that

the trial court's findings do not show that the appellant engaged in any fraud or wrongdoing nor [did] they establish any other grounds for imposing a constructive trust.

Baker, 657 P. 2d at 1353. This Court held that "the doctrine of constructive trust [was] inapplicable and the trial court's imposition of a constructive trust was in error." Id.

Estate of Hock involved a determination of interests in real property. Respondent held a one-half interest in property with decedent. This property was sold and the funds used in various subsequent real estate transactions. 655 P.2d at 1113, 1114. The trial court found that the proceeds of the sale of the jointly held property were held in constructive trust by decedent for respondent and that the trust continued in each of the subsequent transactions. Estate of Hock, 655 P. 2d at 1114. The trial court awarded respondent a one-half interest in the subsequent property and the personal representative appealed claiming that the evidence did not support the finding of either a constructive or resulting trust. Id.

This Court, through Justice Durham, found that the respondent and decedent, as in the instant case, "did not engage in any fraud, bad faith or breach of a fiduciary responsibility." Estate of Hock, 655 P. 2d at 1115. This Court held there, as it must in the instant case, that in light of such a finding, "the doctrine of constructive trust is inapplicable." Id.

This Court did uphold the lower court's finding of a resulting trust based upon the finding that the funds from the

jointly held property were "used as partial payment for the subsequent purchases of the property... ". Estate of Hock, 655 P. 2d at 1116. No such finding was made, nor could have been made in the instant case.

Carnesecca involved a dispute over the ownership of a family farm which was held in different proportions by various family members. Carnesecca, 572 P. 2d at 709, 710. This Court found that

[t]he record is replete with evidence that the farm was a family oriented operation from its beginning. Its considerable success obviously resulted from the combined industry of the whole family which chose to operate in the nature of a partnership. Their relationship was one of trust, each relying upon the good faith of the other, usually without the benefit of written understandings. ... There is a \$1,200 entry in 1950 which is supportive of the oral contract for Joe's purchase of a one-third interest in the 18 acres. The overall conduct of Jim and Frank [some of the parties] in the years following the purchase is indicative of their recognition of Joe's joint ownership.

Carnesecca, 572 P. 2d at 710, 711. Based upon this, the Court upheld the imposition of the constructive trust. A review of the record of this case will not reveal similar findings, or evidence supporting the imposition of a constructive trust.

The record is replete with references to the manner in which decedent contributed a larger portion of income to the joint accounts and this was the money used to make payments on the properties own by decedent. (Tr. 7, 12, 13, 18, 52). Yet decedent received none of the funds from the rental of the Barker Road property. (Tr. 12). Certainly, decedent's estate would not be unjustly enriched by the recognition of the deed transferring

the Barker property to decedent.

No constructive trust should have been imposed by the court below. "No constructive trust could be imposed upon the property by the Court, as no lack of consideration or undue influence was proven in the execution of the deed." Baker, 684 P.2d at 638.

In Close, the doctrine of constructive trust was held inapplicable based upon the lack of evidence of any fraud or other wrongdoing by appellant, nor was there evidence to establish any other of the required grounds. 657 P.2d at 1353. In light of the evidence presented to the trial court below, particularly Plaintiff's own testimony, the holding in Close must be followed and the judgment imposing a constructive trust reversed. Likewise this court, in Estate of Hock, found the imposition of a constructive trust to be improper without evidence going to the established grounds. 655 P.2d at 1115.

In the instant case, there was no evidence or findings which are supportive of the imposition of a constructive trust. The case law noted above supports the required reversal of the trial court and the restoration of the Barker Road property to the decedent's estate.

II. AS A MATTER OF LAW, THERE WERE NO GROUNDS TO SET ASIDE THE DEED ON THE BARKER ROAD PROPERTY.

The record clearly establishes that Plaintiff failed to prove any ground required for the imposition of a constructive trust. She admitted there was no fraud, undue influence or wrongdoing which caused her to transfer the Barker Road property to

decedent. (Tr. 42). She admitted that the transfer was done of her own free choice. (Tr. 42). Yet the trial court below imposed a constructive trust. This imposition must be reversed.

Harmston v. Harmston, 680 P.2d 751 (Utah, 1984) addresses this issue. In Harmston, the trial court found

that the subject deed was 'the result of plaintiff's free and voluntary acts' and concluded that although plaintiff 'may have been mistaken as to the nature of his stepson's dealings with his property [the alleged cause of the transfer of property], the defendant did nothing to cause or induce any such mistake and did not attempt to influence the plaintiff because of any mistake.'

680 P.2d at 752. This Court upheld the transfer to be the free and voluntary act of grantor. 680 P.2d at 753. The facts of the instant case support an identical holding.

Baker upholds the argument set forth in Harmston that without grounds for the imposition of a constructive trust, such imposition is reversible error. This Court went into a detailed discussion of appellant's legal theories in Baker. These theories included lack of delivery and acceptance, 684 P.2d at 634; failure of consideration or unfair or inadequate consideration for the deed, 684 P.2d at 635; and the existence of a confidential relationship, 684 P.2d at 636. Baker, which addresses many of the arguments of Plaintiff in the court below surely should be controlling and its holding of the nonimposition of a constructive trust applied here and refusal to set aside the deed.

In the instant case, the deed to the Barker Road property was duly recorded with Plaintiff being present when it was recorded.

(Depo. 7). "A presumption of valid delivery arises where the deed has been executed and recorded..." (citations omitted). Baker, 684 P.2d at 635. There was evidence in Baker as in the instant case, that the transferor knew well that she would retain no further claim to it. Id; (Tr. 42). The trial court in Baker found, as the court below should have found, "the conveyance to have been absolute and unconditional and not in trust." Baker, 684 P.2d at 635. Plaintiff, like decedent in Baker, never once attempted to obtain the return of the property or told others that she still owned that property. Id; (Tr. 42, 45, 52).

On the issue of failed consideration, the Plaintiff, like the decedent in Baker, lived in another residence rent free and received benefit from the rental of the the Barker Road property. (Tr. 12, 56-58). Such evidence was supportive of the finding of adequate consideration. Baker, 684 P.2d at 636. Furthermore, "[a]s between the parties a deed is good, with or without consideration." Barlow Society v. Commercial Security Bank, 723 P.2d 398, 401 (Utah, 1986). Such a finding applies in this case.

Plaintiff testified that the transfer of the Barker property to decedent was to avoid various debts. (Tr 9, 42). Plaintiff also testified that decedent's monies were used to pay the debts on the Barker property and that Plaintiff was being supported by decedent. (Tr 52).

There was no testimony sufficient to establish failure of consideration, nor was it alleged. See Baker where a payment method similar to our facts were established as constituting

adequated consideration. 684 P.2d at 635, 636.

Confidential relationships are presumed between parent and child, attorney and client, trustee and cestui que trust, and spiritual advisor and a dying man. Baker, 684 P.2d 636, and cases cited therein. In all other relationships this is a question of fact. Id. In the case at bar, there was no finding of a confidential relationship. Plaintiff and decedent were not even married. (Tr. 5, 40, 41). No confidential relationship existed as a matter of law nor was there any such finding by the court below.

Further, "a deed regular in form is presumed to convey the entire fee simple title, or at least whatever title grantor has." Jacobsen v. Jacobsen, 557 P.2d 156, 158 (Utah, 1976) (citations omitted). Plaintiff did not prove any irregularity in the deed, nor any words of restriction upon the grant. (Tr 45). The court below had the deed before it.

"Absent fraud, duress, mistake or the like attributable to the grantee, a competent grantor will not be permitted to attack or impeach his own deed." Barlow, 723 P.2d at 401, (citation omitted). None of these requirements were proven at trial. Therefor there could have been no evidence supportive of any grounds for the setting aside of the deed, and that setting asided must be reversed by this Court.

III. ANY EVIDENCE PRESENTED BY PLAINTIFF DID NOT AS A MATTER OF LAW ARISE TO THE LEVEL OF CLEAR AND CONVINCING EVIDENCE SO AS TO SATISFY THIS EVIDENTIARY STANDARD. ABSENT CLEAR AND CONVINCING EVIDENCE, THE TRIAL COURT COULD NOT SET ASIDE THE DEED TO THE BARKER ROAD PROPERTY AND IMPOSE A CONSTRUCTIVE TRUST.

The law in this state is clear that to overcome the presumption concerning the valid delivery of a deed to real property, as discussed above, the contesting party is required to satisfy an evidentiary standard stated as clear and convincing. Barlow, 398 P.2d at 400, Jacobsen, 557 P.2d at 158. Plaintiff asked the lower court to alter a deed which was regular in form. This court has clearly stated that

in most cases involving constructive or resulting trusts, we are called upon to alter a deed or other writing which is regular in form and is presumed to convey a clear and unambiguous title. When such a deed or document is attacked, the party alleging the variance must prove the claim by clear and convincing evidence.

Estate of Hock, 655 P.2d at 1114, (Citations omitted). See also, Baker, 684 P.2d at 634, Carnesecca, 572 P.2d at 710, Nielson v. Rasmussen, 558 P.2d 511, 513 (Utah, 1976) and Harmston, 680 P.2d at 752.

The record and trial transcript are replete with Plaintiff's evidence concerning the disposition of the Barker and the West Leisure property. All of the evidence supports a conclusion that there was no fraud, duress, undue influence or other wrong doing by decedent, or that he was unjustly enriched by the transfer of the Barker property. Likewise, all evidence regarding the West Leisure property was that it was decedent's prior to any

relationship with Plaintiff and no interest was transferred to Plaintiff by decedent. Therefor the imposition of a constructive trust by the trial court was in error.

This Court examined this issue in Parks v. Zions First National Bank, 673 P.2d 590 (Utah, 1983), and upheld the imposition of a constructive trust. 673 P.2d at 600. But that imposition was supported by evidence that "clearly and adequately supports the trial court's finding that plaintiff's labors and earnings were responsible for the acquisition of a substantial portion of the marital estate." Id. This court further found that it was

appropriate to conclude that plaintiff had an 'equitable interest' in the subject property, and that the total inclusion of such property in the estate of Mrs. Parks constituted an 'unjust enrichment' of her estate.

Id.

The facts of Parks are that plaintiff and decedent were husband and wife and that plaintiff was continuously and gainfully employed while decedent was only occasionally employed. 673 P.2d at 591, 592. The evidence further showed that when the various properties were acquired plaintiff had substantial income and that plaintiff's income and labor were responsible for various improvements to and maintenance of the properties. 673 P.2d at 600. This evidence was clear and convincing. Id.

The instant case is markedly different in the facts as to Plaintiff. Plaintiff and decedent were never married. (Tr 5, 40, 41). Plaintiff herein was not the main source of income. (Tr 7, 40). Plaintiff's net income was approximately \$800 per month

while decedents was approximately \$4,000 per month. (Tr 7,40). Decedent's conduct approached the conduct of the plaintiff in Parks more than Plaintiff's conduct. Decedent's labors and moneys were used to maintain the Plaintiff and the properties. (Tr 52).

Based upon these factual differences, the opposite holding of Parks should be derived in the instant case. There was no clear and convincing evidence supporting the imposition of a constructive trust or setting aside the deed.

As in Parks, this Court upheld the imposition of constructive trust in Estate of Hocks. That was based on petitioner's showing that his one-half interest in the joint property was used as partial payments in the subsequent purchases of property. 655 P.2d at 1116. There was no such evidence in the instant case. Plaintiff's evidence shows total divestment of interests in the Barker Road property. (Tr 42).

In Baker, the transferor conveyed the property to remove her assets from potential creditors. 684 P.2d at 635, The transferor never attempted to obtain its return or told anyone that she still owned the property. Id. That trial court's finding that the conveyance had been absolute, unconditional and not in trust was not disturbed since this was an absence of any clear evidence supportive of an attack on the deed. Id.

The facts of Baker are very similar to the instant case; Plaintiff's transfer of the Barker Road property was to avoid potential creditors (Tr 9, 42), and the conveyance was absolute, unconditional and not in trust. (Tr 42, 45). Therefore, the trial court in the instant case should have followed Baker and

not imposed a constructive trust or set aside the deed.

IV. NO MARITAL RELATIONSHIP EXISTED BETWEEN PLAINTIFF AS A MATTER OF LAW. PLAINTIFF IS A LEGAL STRANGER TO THE PROPERTY HELD IN THE ESTATE OF DECEDENT AND ANY FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT BASED UPON THE EXISTENCE OF SUCH A RELATIONSHIP ARE INVALID AND UNENFORCEABLE .

Plaintiff testified that she and decedent were never married. (Tr 5, 6, 40, 41). She further testified that their relationship was not solemnized in this state or any other. Id. No marriage license was ever obtained. (Tr 5, 41).

Utah law at the time when Plaintiff and decedent were living together was clear on this issue. Section 30-1-2 Utah Code Annot., 1977, Marriages prohibited and void, states clearly that "the following marriages are prohibited and declared void: ... (3) When not solemnized by an authorized person, except as provided in section Section 30-1-5". Section 30-1-5 Utah Code Annot., 1953, concerns the validity of marriage solemnized by an unauthorized person. Section 30-1-4, Utah Code Annot., 1953, likewise clearly states that "[m]arriages solemnized in any other country, state or territory, if valid where solemnized, are valid here."

These laws were changed in April, 1987 by the addition of section 30-1-4.5, Utah Code Annot., 1987, Validity of marriage not solemnized. This section was enacted after the date of trial in the instant matter and is not applicable.

This issue was thoroughly discussed by this Court in the case In re Vetas' Estate, 170 P.2d 183, 110 Utah 187 (1946). Appellant therein appealed the finding that she was not the lawful wife of decedent, that she was denied letters of administration and that she was not an heir of decedent.

The facts are remarkably similar to those herein. The appellant and decedent in Vetas' Estate resided together for approximately two years. 170 P.2d at 184. They travelled to Salmon City, Idaho to become married but upon arrival found that such was not possible because it was a Sunday and the courthouse was closed. Id. They decided to hold themselves out as married and agreed that they were married. Id.

The trial court concluded that there was no valid marriage between appellant and decedent. Id. This Court reviewed that finding stating that the Court had

heretofore held that a common-law marriage cannot be consummated in this state; that marriage in this state must be solemnized as required by our statutes.

Id., (citations omitted).

This Court then examined the statutes concerning marriage. Section 40-1-2 Utah Code Annot., 1943, which read "[t]he following marriages are prohibited and declared void: ... (3) When not solemnized by an authorized person, except as provided in Section 40-1-5." Section 40-1-5, Utah Code Annot. 1943, concerns the validity of marriage solemnized by an unauthorized person.

This Court considered the purposes of the statute and stated that

[t]he purpose of enactments requiring the solemnization of marriage before an authorized person, together with those dealing with the prior procurement of a license, is doubtless to protect the parties to the marriage contract in the rights flowing therefrom, and likewise to protect their offspring.

Vetas' Estate, 170 P.2d at 186. This Court also considered the statutes of the neighboring states of California, Idaho, Montana and Colorado. Id. The conclusion drawn was that

[t]aking into consideration the purposes of the statute requiring solemnization within the state, the meaning of the words employed, the departure from neighboring examples in the employment of the word 'solemnized' in Sec. 40-1-4, supra, the holding is compelled that persons domiciled in Utah may not go into another state, there contract a 'common law marriage', and, returning here, have such marriage recognized as valid.

It follows that the finding of the trial court to the effect that appellant was not the wife of George Vetas during his lifetime, and hence not his surviving widow, must be sustained.

Vetas' Estate, 170 P.2d at 183

These 1943 statutes read in material part identically with the corresponding statutes in effect at the time of trial in our case. Therefor the dicussion of this Court in Vetas' Estate is relevant and controlling in the instant matter.

As in Vetas' Estate, the Plaintiff and decedent did live together. (Tr 3). They were never married nor was there any solemnization of the relationship as required by statute. (Tr 5, 6, 40, 41). No license of marriage was obtained. (Tr 5, 41). The only "ceremony" was a private matter between Plaintiff and decedent. (Tr 5, 6). These facts are in essence restatements of the facts in Vetas' Estate and like that case, the court herein should have held no marriage. The probate court herein did

declare that Plaintiff was not an heir of decedent. (R. 48).

Based upon these facts, the trial court was in error in finding that a marital relationship existed and in awarding Plaintiff any interest in the property of decedent's estate. The holding in Vetas' Estate must apply herein - Plaintiff is not the wife of decedent and not a surviving spouse.

Therefor under section 75-2-101, et. seq. Utah Code Annot., 1953 (as amended), Plaintiff takes nothing from decedent's estate. The property of decedent awarded to Plaintiff must be returned to decedent's estate and the constructive trust lifted from the estate.

To the extent that the trial court's judgment was entered based upon the existence of a marital relationship, that judgment is incorrect. It is well settled law that "the courts should grant the relief to which the proof shows the party is entitled." Ferguson v. Ferguson, 564 P.2d 1380, 1383 (Utah, 1977) (citations omitted). In yet another case, this Court has stated

that the findings must themselves be sufficient to provide a sound foundation for the judgment, and conversely, that any proper judgment can only be entered in accordance with the findings. It is then necessary to look to the findings to determine whether there is such a basis therein to justify the judgment.

Forbush v. Forbush, 578 P.2d 518, 519 (Utah, 1978) (citations omitted).

Therefor, this Court must look to the findings of the trial court to see if they justify the judgment entered below. The trial court found that there was a marital relationship and that this marital relationship was a common law relationship. (R. 84-

89). The trial court then made the award of property to Plaintiff based upon these findings.

As discussed above, there was by law no marriage nor marital relationship between Plaintiff and decedent. The statutory requirements for such a relationship were never met by Plaintiff and decedent. Therefor the judgment, and award of property thereon, cannot stand. The property awarded to Plaintiff must be returned to the estate of decedent, the constructive trust upon the property in the estate lifted and Plaintiff awarded nothing from the estate.

V. THE LOWER COURT'S JUDGMENT GRANTING A ONE-QUARTER OWNERSHIP INTEREST TO THE PLAINTIFF IN THE WEST LEISURE PROPERTY WAS ERROR.

Decedent and his ex-wife were divorce on or about July 13, 1983. The decree of divorce (trial exhibit 9-D) awarded the West Leisure property to decedent and reserved a \$10,000 interest in his ex-wife. (Tr 44). Decedent paid his ex-wife the \$10,000 from his own funds during the time he was residing with Plaintiff. (Tr. 44). On receipt of the money, the ex-wife executed a quit-claim deed conveying her interest in this property to Andrew B. Olearain and Joan E. Olearain. (Tr. 42-45, Trial exhibit 2-P).

A quit-claim deed conveys only the interest held by the grantor. Johnson v. Bell, 666 P.2d 308 (Utah, 1983). In the instant case, the grantor's only interest was that which had been awarded to her pursuant to the decree of divore. There is no basis on the record to award Plaintiff a one-quarter interest in the West Leisure property.

This issue was addressed by this Court in Nelson v. Davis, 592 P.2d 594 (Utah, 1979). Nelson involved the disposition of real property in a divorce setting. The wife executed a deed of her interest in the home of the parties to her daughter. 592 P.2d at 596. The daughter had actual knowledge of the existence of orders of the trial court concerning the disposition of this property. Id.

Based upon these facts, this Court affirmed the lower court's award of the property to the estate of the husband. 592 P.2d 597. In affirming the lower court, this Court stated that "because of that actual knowledge, any interest she [daughter] may have acquired by the quit claim deed, was subject to the disposition of the property to be made in that action." Id.

As in Nelson, this Plaintiff had the same knowledge as did the daughter. Nelson controls the instant case. The award of any interest in the West Leisure property which was granted to Plaintiff must be restored to the estate of decedent.

Even setting Nelson aside, the facts alone support the restoration of the property to decedent's estate in its entirety. There was no evidence before the court to establish Plaintiff had any interest in this property, let alone the one-quarter interest it award to her.

Decedent's ex-wife held only a \$10,000 equitable lien in the West Leisure property. She held no incidents of ownership in that property. She could only give what she had - that equitable interest. The only evidence before the court was; the evidence at trial, the divorce decree; and the deed.

Plaintiff testified that she knew that decedent's ex-wife's only interest was the equitable lien. She even knew the amount of the lien and the details of how decedent paid it off.

The decree of divorce was in evidence and supported the fact that decedent's ex-wife held only an equitable lien on the property. This decree proved that the ex-wife held no ownership interest in the property itself.

The deed proved that the ex-wife transferred her interest in the West Leisure property. She only held an equitable lien, therefore that is all she could have given up. Plaintiff could have taken no more than what the ex-wife had to give, the equity interest.

That means that Plaintiff could only have take a portion of the equity interest. Yet the court awarded Plaintiff with a full one-quarter interest in this real property. This is an error which must be reversed.

VI. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF THE PERSONALTY WHICH WAS IN DISPUTE.

The trial court awarded Plaintiff numerous items of personalty. (Tr. 92-93). This was done despite Plaintiff's testimony that the receipts for these items were all in decedent's name and that she had no proof to the contrary. (Tr. 58).

Plaintiff testified that the parties purchases came from their joint account. (Tr. 23). In fact, she testified that all of the personal property which she was claiming should be awarded to her was purchased from this account. (Tr. 30-37).

As argued supra, Plaintiff was not decedent's wife and was adjudged not to be an heir. Those previous arguments apply here.

Plaintiff was a legal stranger to decedent's estate and it is error for her to be awarded any property from the estate.

The arguments made concerning constructive trusts supra, also apply here. Plaintiff did not present any evidence to support the imposition of a constructive trust concerning these items. The objective evidence presented was that these items were purchased by decedent. Plaintiff did not show by clear and convincing evidence any of the grounds required for the imposition of a constructive trust in regard to these items of personalty. The award of such is error.

VII. THE TRIAL COURT ERRED IN REFUSING TO ADMIT TESTIMONY THAT DECEDENT DID NOT CONSIDER PLAINTIFF TO BE HIS WIFE, THAT DECEDENT OWNED THE BARKER ROAD PROPERTY AND THAT DECEDENT NEVER MADE ANY CONVEYANCE OF PROPERTY TO PLAINTIFF.

The trial court refused to admit testimony proffered by Defendant which would have shown that decedent did not consider Plaintiff to be his wife, that he alone owned the Barker Road property and that he never made any conveyance of property to the Plaintiff. (Tr. 61-65).

This evidence was clearly admissible under Rule 601 (c), Utah Rules of Evidence. Proffer of the evidence was made to the trial judge. (Tr. 65).

Further, there was a conference in chambers on this issue prior to trial wherein counsel for the parties agreed that statements made by the deceased could be offered in trial. (Tr. 62). Counsel for Defendant in reliance on this agreement did not

object to Plaintiff's testimony on these matters. Yet Plaintiff's counsel objected when Defendant attempted to present testimony on these matters and was sustained.

In light of the agreement alone, it was error for the trial court to refuse admission of this evidence. This refusal is clear error under the Utah Rules of Evidence.

CONCLUSION

The court below committed reversible error when it set aside the deed on the Barker Road property and imposed a constructive trust upon the property held by the estate of decedent. At trial, Plaintiff did not produce any evidence of unjust enrichment, fraud, wrongdoing or other ground upon which the court below could have set aside that deed or imposed a constructive trust.

The evidence presented by Plaintiff refuted the setting aside of the deed and the imposition of the constructive trust. Plaintiff herself proved that there was no fraud, undue influence, unjust enrichment of decedent or any other grounds to support her claims to the Barker Road property or any other property in decedent's estate. The trial court could not have found clear and convincing evidence to justify setting aside the Barker property deed and impose a constructive trust on the properties held in decedent's estate. Further, testimony concerning decedent's statements concerning the ownership of all property in issue should have been admitted.

Plaintiff and decedent were never married, and by law, no

marital relationship ever existed between them. Therefor Plaintiff is not a legal heir to decedent's estate and she should take nothing therefrom. Further, the findings of fact, conclusions at law and judgment entered by the court below based upon the finding of such a relationship are invalid and unenforceable. The evidence proffered concerning decedent's view of this relationship should have been admitted.

The transfer by decedent's ex-wife of her interest in the West Leisure property to decedent and Plaintiff was pursuant to a decree of divorce. This decree vested in decedent's ex-wife an equitable lien in the sum of \$10,000. Plaintiff was fully informed as to these facts and the interests held by decedent and his ex-wife respectively. Being fully aware of these matters, Plaintiff took nothing under the deed transferring title to the West Leisure property from decedent's ex-wfe to decedent and Plaintiff.

The trial court's judgment must be reversed. The deed transferring the Barker property to decedent reinstated and this property restored to the estate. The constructive trust must be lifted from the property of the estate of decedent. The Plaintiff must be declared not to be the spouse of decedent or to have ever been in a marital relationship with decedent and to have no claim to any of the property in decedent's estate. The trial court judgments, findings and conclusions based upon the existance of any marital relationship must be rendered invalid and unenforceable.

DATED this _____ day of July, 1987.

Jerrald D. Conder
Attorney for Appellant

IN THE SUPREME COURT
OF THE STATE OF UTAH

-----ooO0Ooo-----

JOAN (OLEARAIN) MATTES		
aka JOAN EMMER		CERTIFICATE OF SERVICE
Plaintiff - Respondent		
vs.		Case No. 860393
DAVID LEE OLEARAIN,		
PERSONAL REPRESENTATIVE OF		
ANDREW OLEARAIN, DECEASED		
Defendant - Appellant		

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On this ____ day of July, 1987, the Brief of Appellant was served upon the following party by delivering four true and correct copies thereof by hand to Dwight L. King, Attorney for Respondent, at Suite 205, Sentinel Building, 2121 South State Street, Salt Lake City, Utah, 84115.

ADDENDUM

30-1-2 Utah Code Annot, (1977)

In effect as of time of trial herein.

Marriages prohibited and void. The following marriages are prohibited and declared void:

(1) With a person afflicted with syphilis or gonorrhea that is communicable or that may become communicable.

(2) When there is a husband or wife living from whom the person marrying has not been divorced.

(3) When not solemnized by an authorized person, except as provided in Section 30-1-5.

(4) When a male or female is under sixteen years of age unless consent is obtain as provided in Section 30-1-9.

(5) When the male or female in under 14 years of age.

(6) When a divorced person and any person other than the one from whom the divorce was secured until the divorce decree becomes absolute, and, if an appeal is taken, until after the affirmance of the decree.

(7) Between persons of the same sex

30-1-4 Utah Code Annot., (1953)

Validity of foreign marriages. Marriages solemnized in any other country, state or territory, if valid where solemnized, are valid here.

30-1-4.5 Utah Code Annot., (1987)

Validity of marriage not solemnized.

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:

(a) are capable of giving consent;

(b) are legally capable of entering a solemnized marriage under the provisions of this chapter;

(c) have cohabited;

(d) mutually assume marital rights, duties, and obligations;

and

(e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

(2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

30-1-5 Utah Code Annot., (1953)

Marriage solemnization - Before unauthorized person - Validity.

No marriage solemnized before any person professing to have authority therefor shall be invalid for want of such authority, if consummated in the belief of the parties or either of them that he had such authority and that they have been lawfully married.

RULE 601 (c), UTAH RULES OF EVIDENCE

Statement of declarant offered in action against his estate.

(1) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear.

(2) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

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75-1-403. Pleadings - When parties bound by others - Notice.

(1) In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:

(a) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(b) Persons are bound by orders binding others in the following cases:

(i) Orders binding the sole holder or all co-holders of a power of revocation or a presently-exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(ii) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child.

(iii) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(c) Notice is required as follows:

(i) Notice as prescribed by section 75-1-401 shall be given to every interested person or to one who can bind an interested person as described in subsections (1)(b)(i) or (1)(b)(ii) above. Notice may be given both to a person and to another who may bind him.

(ii) Notice is given to unborn or unascertained persons, who are not represented under subsections (1)(b)(i) or (1)(b)(ii) above, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(d) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding. 1975

75-1-404. Publication in newspapers.

Newspapers shall publish all notices of proceedings under the code under the heading "Probate, Guardianship, Conservator and Trust Notices. Consult clerk of the court or the respective signers for further information." These notices shall be published as often during the prescribed period as

the paper is regularly issued, unless otherwise provided by law or directed by the court, and as far as possible in one column in the alphabetical order of the surnames of decedents, wards, incapacitated persons, and creators of trusts. 1975

Chapter 2. Intestate Succession and Wills

Part 1. Intestate Succession.

Part 2. Elective Share of Surviving Spouse.

Part 3. Spouse and Children Unprovided for in Wills.

Part 4. Exempt Property and Allowances.

Part 5. Wills.

Part 6. Rules of Construction.

Part 7. Contractual Arrangements Relating to Death.

Part 8. General Provisions.

Part 9. Custody and Deposit of Wills.

Part 10. Simultaneous Death Provisions.

Part 11. Personal Choice and Living Will Act.

Part 1. Intestate Succession

75-2-101. Intestate estate.

75-2-102. Share of the spouse.

75-2-103. Share of heirs other than surviving spouse.

75-2-104. Requirement that heir survive decedent for 120 hours.

75-2-105. No taker.

75-2-106. Representation.

75-2-107. Kindred of half blood.

75-2-108. Afterborn heirs.

75-2-109. Meaning of child and related terms.

75-2-110. Advancements.

75-2-111. Debts to decedent.

75-2-112. Alienage.

75-2-113. Dower and curtesy abolished.

75-2-114. Person related to decedent through two lines.

75-2-101. Intestate estate.

Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this code. 1975

75-2-102. Share of the spouse.

(1) The intestate share of the surviving spouse is:

(a) If there is no surviving issue or parent of the decedent, the entire intestate estate;

(b) If there is no surviving issue but the decedent is survived by a parent or parents, the first \$100,000, plus one-half of the balance of the intestate estate;

(c) If there are surviving issue all of whom are issue of the surviving spouse also, the first \$50,000, plus one-half of the balance of the intestate estate;

(d) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate. 1975

75-2-103. Share of heirs other than surviving spouse.

(1) The part of the intestate estate not passing to the surviving spouse under section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

(a) To the issue of the decedent by representation.

(b) If there is no surviving issue, to his parent or parents equally.

(c) If there is no surviving issue or parent, to the issue of the parents or either of them by representation.

(d) If there is no surviving issue, parent, or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grand-

parent, or to the issue of the paternal grandparents if both are deceased, the issue taking by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

(e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, then the entire estate passes to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote. 1975

75-2-104. Requirement that heir survive decedent for 120 hours.

Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under section 75-2-105. 1975

75-2-105. No taker.

If there is no taker under the provisions of this part, the intestate estate passes to the state for the benefit of the state school fund. 1975

75-2-106. Representation.

If under this code all or any part of the decedent's estate is to pass to the issue of a described person, including the decedent, by representation, that part is divided into as many equal shares as there are living children of the person and deceased children of the person who left issue who survive the decedent, even if at the time of the decedent's death all of the children of the person are deceased, each living child of the person, if any, receiving one share, and the share of each deceased child being divided among the deceased child's issue by representation in the same manner. 1977

75-2-107. Kindred of half blood.

Relatives of the half blood inherit the same share they would inherit if they were of the whole blood. 1975

75-2-108. Afterborn heirs.

Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent. 1975

75-2-109. Meaning of child and related terms.

(1) If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

(a) An adopted person is the child of an adopting parent and not of the natural or previously-adopting parents except that adoption of a child by the spouse of a natural or previously-adopting parent has no effect on the relationship between the child and that natural or previously-adopting parent.

(b) In cases not covered by subsection (1)(a), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subsection (1)(b)(ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child. 1977

75-2-110. Advancements.

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise. If the amount of the advancement exceeds the share of the heir receiving the same, he is not required, however, to refund any part of the advancement. 1975

75-2-111. Debts to decedent.

A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue. 1975

75-2-112. Alienage.

No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien. 1975

75-2-113. Dower and curtesy abolished.

The estates of dower and curtesy are abolished. 1975

75-2-114. Person related to decedent through two lines.

A person who is related to the decedent through two lines of relationship is entitled only to a single share based on the relationship which would entitle him to the larger share. 1983

Part 2. Elective Share of Surviving Spouse

75-2-201. Right to elective share.

75-2-202. Augmented estate.

75-2-203. Right of election personal to surviving spouse.

75-2-204. Waiver of right to elect and of other rights.

75-2-205. Proceeding for elective share - Time limit.

75-2-206. Effect of election on benefits by will or statute.

75-2-207. Charging spouse with gifts received - Liability of others for balance of elective share.

75-2-201. Right to elective share.

(1) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate multiplied by a fraction, the numerator of which is the value of the decedent's marital property as defined in subsection 75-2-202(2) and the denominator of which is the sum of: (a) the value of the estate undiminished by funeral and administration expenses, homestead, family allowances, and exemptions or enforceable claims, and

(b) the amounts 202(1)(a) and 75-2-202 and conditions provided.

(2) If a married dies, the right, if take an elective s governed by the l death.

75-2-202. Augment

(1) The augment by funeral and ad allowance, family enforceable claims following amounts

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(i) Any tra retained at the tir enjoyment of, or erty;

(ii) Any tra retained at either alone or person, to revoke of the principal for

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(b) The valu ving spouse at th of property to wl by reason of the property transfer during the most l the surviving spe decedent which spouse's augmen had predeceased owned or transfe property, is deriv other than testat full consideration purposes of this s

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FILED IN CLERK'S OFFICE
Salt Lake County, Utah

JUN 10 1986

H. Dixon Hingley, Clerk 3rd Dist. Court
By P. O. Hingley
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JOAN OLEARAIN,

Plaintiff,

vs.

DAVID LEE OLEARAIN,
Personal Representative of
Andrew Olearain, Deceased,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. C85-2234

Judge Jay E. Banks

The above-entitled matter came on regularly to be heard before the Honorable Jay E. Banks, one of the Judges of the above-entitled Court, on the 8th day of April, 1986 at the hour of 10:00 o'clock A.M. Plaintiff appeared in person and by her attorney, Dwight L. King. Defendant appeared by his attorney, Jerrald D Conder. The matter having been set for trial and as a consolidation of Civil No. C85-2234 and Probate No. P85-206. Witnesses were sworn and testified, documentary evidence received, counsel argued their positions, and the Court being fully informed in the premises does hereby make the following:

FINDINGS OF FACT

1. Deceased Andrew Olearain and plaintiff Joan Olearain,

1 during the lifetime of Andrew Olearain, entered into a marriage
2 relationship and resided together in Salt Lake County as husband
3 and wife, creating a common law relationship without having said
4 relationship formally and legally completed by a marriage ceremony.

5 2. Andrew B. Olearain died on the 6th day of February, 1985
6 as a result of an airplane accident.

7 3. During his lifetime and while he was living with the
8 plaintiff in the common law marital relationship, Andrew Olearain
9 designated on his life insurance policy the plaintiff as the
10 beneficiary of said insurance and placed her on his retirement
11 program as his beneficiary, describing her as his wife.

12 4. Plaintiff and deceased resided at 1991 West Leisure
13 Circle, a home which deceased owned prior to the relationship of
14 marriage with plaintiff.

15 5. Plaintiff owned at the time of the marriage relationship
16 with deceased a home at 4145 Barker Road, particularly described
17 as all of Lot 1, Taylorsville Garden No. 1, a subdivision of Salt
18 Lake County. Deceased Andrew B. Olearain had no interest in said
19 property at the time of the marriage contract.

20 6. On the 20th of November, 1984, plaintiff and deceased
21 Andrew Olearain were parties to a quit-claim deed under which deed
22 plaintiff, as grantor, deeded to Andrew Olearain the interest she
23 had in all of Lot 1, Taylorsville Garden No. 1. On the same day,
the deceased obtained from Judith E. Olearain, a former wife, a
quit-claim deed of her interest in the property at 1991 West
Leisure Circle, particularly described as Lot 34, Best View No. 9,

1 a subdivision of Salt Lake County.

2 7. The deed obtained by deceased from his wife, Judith E.
3 Olearain, and the deed made by plaintiff on November 20, 1984 were
4 part of a plan by deceased and plaintiff to place their properties
5 in their joint names and arrange their affairs as husband and wife.

6 8. While living together as husband and wife, plaintiff and
7 deceased established their home at 1991 West Leisure Circle and
8 placed in said home furniture and furnishings that the deceased
9 owned prior to the marriage relationship, that the plaintiff owned
10 prior to the marriage relationship, and in addition placed in the
11 home furniture that was acquired by the deceased and plaintiff
while they lived together as husband and wife.

12 9. There is a Stipulation on file with the Court designating
13 the items of furniture that fall into the various classifications
14 and the Court finds that said Stipulation is an accurate
15 disposition of the various kinds of personal property binding upon
16 plaintiff and defendant. Under the Stipulation, plaintiff was
to receive the following personal property:

17 Living room:	Grandfather clock, planters & plant holders, sailboat painting.
18 Kitchen:	Table with six chairs, some but not all pots and pans, curio cabinet, picture on wall.
19	
20 Master Bedroom:	Sears radio and plant hanger.
21 Guest Room:	Bed, bedstead, books, lamp, bedding, 1 green motorcycle helmet.
22 Bar:	Small table with wood lamp, Curtis Mathes TV, some but not all bar glasses.
23	

1	Pool Room:	Books, ironing board.
2	Laundry Room:	Food storage, and box with miscellaneous kitchen items.
3	Donna's Room:	Singer sewing machine, miscellaneous paintings, brass hat radio, three
4		door chest.
5	Garage:	Gold washer & dryer, freezer, small blue motorcycle, Christmas decorations in boxes.
6		

7 Certain items of personal property are not distributed by the
8 Stipulation. Among those items are the following: \$2,000.00
9 snowmobile, TV, recliner, coffee and end tables, coffee maker,
flight books, and a snowblower.

10 10. Plaintiff has resided in the home at 1991 West Leisure
11 Circle since the death of Andrew B. Olearain and has paid the
12 mortgage payments falling due, the taxes, and other expenses of
13 maintaining the home, and has paid \$5,000.00 funeral expenses for
14 the deceased Andrew B. Olearain.

15 11. The deed dated November 20, 1984 to the property
16 particularly described as Lot 34, Best View No. 9, a subdivision
17 of Salt Lake County, created in plaintiff an undivided one-fourth
interest in said property.

18 12. Court finds that the reasonable rental value of the
19 home at 1991 West Leisure Circle, Lot 34, Best View No. 9, is
20 \$525.00 per month and that the mortgage payment on said property
21 is \$325.00 per month. Three-fourths of the interest in the real
22 property at 1991 West Leisure Circle is an asset of the estate of
23 Andrew Olearain and a reasonable sum for the use of said interest
by plaintiff is the sum of \$150.00 per month plus the mortgage

1 payments.

2 13. Plaintiff desires to live in the home at 1991 West
3 Leisure Circle and to maintain it as her residence without
4 interruption or without being required to sell said home.
5 Defendant is entitled to three-fourths of the value of the home,
6 its interest as determined in this matter, and said interest would
7 then be divided among the heirs of Andrew Olearain, which does not
8 include plaintiff.

9 From the foregoing Findings of Fact, the Court makes the
10 following:

11 CONCLUSIONS OF LAW

12 1. The Court should apply equitable principles to the
13 relationship existing between plaintiff and the deceased Andrew B.
14 Olearain and should take into consideration the relationship of
15 marriage that was entered into between plaintiff and deceased
16 Andrew B. Olearain.

17 2. Personal property acquired by the deceased and plaintiff
18 and personal property that was contributed to the joint residence
19 of deceased and plaintiff should be divided in accordance with the
20 Stipulation of the parties, plaintiff to have the following personal
21 property:

22 Living Room: Grandfather clock, planters & plant
23 holders, sailboat painting.

Kitchen: Table with six chairs, some but not
all pots and pans, curio cabinet,
picture on wall.

Master Bedroom: Sears radio and plant hanger.

Guest Room: Bed, bedstead, books, lamp, bedding,
1 green motorcycle helmet.

1 Bar: Small table with wood lamp, Curtis
2 Mathes TV, some but not all bar
3 glasses.
4 Pool Room: Books, ironing board.
5 Laundry Room: Food storage, and box with
6 miscellaneous kitchen items.
7 Donna's Room: Singer sewing machine, miscellaneous
8 paintings, brass hat radio, three
9 door chest.
10 Garage: Gold washer & dryer, freezer,
11 small blue motorcycle, Christmas
12 decorations in boxes.

13 Court should award to plaintiff the following items of personal
14 property: the \$2,000.00 snowmobile, the TV, recliner, coffee and
15 end tables, coffee maker, flight books, and snowblower. Any
16 property not divided but remaining in the home should be awarded
17 to the estate of Andrew B. Olearain to be disposed of in accordance
18 with the Probate Code of the State of Utah.

19 3. Plaintiff should be awarded all of the interest of
20 defendant in the home at 4145 Barker Road, Lot 1, Taylorsville
21 Garden No. 1.

22 4. Plaintiff should be awarded a one-fourth interest in
23 the real property located at 1991 West Leisure Circle, particularly
described as Lot 34, Best View No. 9, a subdivision of Salt Lake
County.

5. Court should award to the plaintiff the exclusive use
and possession of the home at 1991 West Leisure Circle. Court
should order the plaintiff to pay the mortgage payments of \$325.00
per month on the said home and should be ordered to pay the further

1 sum of \$150.00 per month to the Clerk of the Third Judicial
2 District Court for the estate of Andrew B. Olearain. The exclusive
3 possession of the home at 1991 West Leisure Circle and the payments
4 herein ordered should continue until the further order of this
5 Court.

6 6. Each party should pay their own costs and attorney's
7 fees.

8 DONE IN OPEN COURT this 10th day of June, 1986.

9 BY THE COURT:

10 Jay E. Banta
11 JUDGE

12 Approved as to form:

13 [Signature]
14 Attorney for Defendant

15 ATTEST
16 H. DIXON HINDLEY
17 Clerk

18 By Pat Jones
19 Deputy Clerk

JUN 10 1986

H. Dixon Hindley, Clerk 3rd Dist. Court
By Pat Jones
Deputy Clerk

DWIGHT L. KING #591
DWIGHT L. KING & ASSOCIATES, P.C.
Attorneys for Plaintiff
Suite 205 Sentinel Building
2121 South State Street
Salt Lake City, Utah 84115
Telephone: (801) 486-8701

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JOAN OLEARAIN,
Plaintiff,

vs.

DAVID LEE OLEARAIN,
Personal Representative of
Andrew Olearain, deceased,
Defendant.

JUDGMENT

Civil No. C85-2234

Judge Jay E. Banks

The above-entitled matter came on regularly to be heard before the Honorable Jay E. Banks, one of the Judges of the above-entitled Court, on the 8th day of April, 1986 at the hour of 10:00 o'clock A.M. Plaintiff appeared in person and by her attorney, Dwight L. King. Defendant appeared by his attorney, Jerrald D. Conder. The matter having been set for trial and as a consolidation of Civil NO. C85-2234 and Probate No. P85-206. Witnesses were sworn and testified, documentary evidence received, counsel argued their positions, and the Court, having made its Findings of Fact and Conclusions of Law, does hereby ORDER, ADJUDGE AND DECREE as follows:

snowblower, and the flight books.

3. Defendant is awarded the following items of personal property: the camera and lens, and such other personal items of property as remain in the home of the plaintiff other than those items awarded to plaintiff by this decree.

4. Plaintiff is hereby awarded the exclusive use and possession of the home at 1991 West Leisure Circle and is ordered to pay to the defendant the sum of \$150.00 per month, said payment to be made to the Clerk of the Third Judicial District Court to be held as an asset of the estate of Andrew Olearain. It is the further order of this Court that the plaintiff pay the mortgage payments on the home at 1991 West Leisure Circle in the amount of \$325.00 per month. The right to exclusive use and possession of the home at 1991 West Leisure Circle shall continue until the further order of this Court.

5. Plaintiff is hereby granted a one-fourth undivided interest in the following particularly described real property: all of Lot 34, Best View No. 9, a subdivision of Salt Lake County. The address of said property is 1991 West Leisure Circle.

6. Court does not award attorney's fees or costs to either party.

DONE IN OPEN COURT this 10th day of June, 1986.

BY THE COURT:

Approved as to form:

Attorney for Defendant

ATTEST

H. DIXON HINDLEY
Clerk

Jay E. Hanks
JUDGE

Pat dms

Recorded at Request of

at M. Fee Paid \$

by

Dep. Book

Page

Ref.

Mail tax notice to Grantee

Address 1991 W. Leisure Circle
Taylorsville, Utah 84119

4021597

QUIT-CLAIM DEED

JOAN G. MATTES
a/k/a Joan G. Emmer

of Taylorsville
QUIT-CLAIM to

Andrew B. Olearain
County of Salt Lake

grantor
State of Utah, hereby

of Taylorsville, Salt Lake County, State of Utah,
Ten and no/100

grantee
for the sum of
DOLLARS,

Country,

the following described tract of land in Salt Lake
State of Utah:

All of Lot 1, Taylorsville Gardens No. 1,
a subdivision according to the official
plat thereof.

005 NOV 30 10 58 AM '84
KATHLEEN DIXON
RECORDER
SALT LAKE COUNTY,
UTAH
Andrew B. Olearain
RECU OF DEP
Rebecca Gray
REBECCA GRAY

Witness the hand of said grantor, this 20th
November, A. D. one thousand nine hundred and eighty four

Signed in the presence of

Joan G. Mattes a/k/a Joan G. Emmer
Joan G. Mattes a/k/a Joan G. Emmer

STATE OF UTAH,
County of SALT LAKE } ss.

On the 20
thousand nine hundred and 84

day of NOVEMBER, A. D. one

personally appeared before me -
Joan G. Mattes a/k/a Joan G. Emmer

the signer of the foregoing instrument, who duly acknowledge to me that he executed the
same.

Notary Public.

My commission expires Aug 2, 1986

Address: West Valley, Utah

BOOK 5610 PAGE 1035

BLANK NO. 103 - CASH PFD CO - 2415 SO 2000 EAST - SALT LAKE CITY

Recorded at Request of

at M. Fee Paid \$

by

Dep. Book

Page

Ref.

Mail notice to Grantee

Address 1991 W. Leisure Circle, Taylorsville,
Utah 84118

4021596 QUIT-CLAIM DEED

Judith E. Olearain

of Salt Lake City, County of Salt Lake

grantor
, State of Utah, hereby

QUIT-CLAIM to

Andrew B. Olearain &
Joan E. Olearain

of Taylorsville, Salt Lake County, State of Utah,

grantee
~~the above named~~
~~persons~~

pursuant to Court Order
the following described tract of land in Salt Lake
State of Utah:

County,

Lot 34, Best View No. 9, according to the official plat
thereof, recorded in the office of the County Recorder
of Salt Lake County, Utah.

MAINE L. DIXON
RECORDER
SALT LAKE COUNTY,
UTAH
Nov 30 10 58 AM '84
Andrew B. Olearain
RECEIVED
REBECCA GRAY

Witness the hand of said grantor, this 20th day of
November, A. D. one thousand nine hundred and Eighty four

Signed in the presence of

Judith E. Olearain

STATE OF UTAH } ss.
County of SALT
On the 20
thousand nine hundred and 84

day of NOVEMBER
personally appeared before me

A. D. one

Judith E. Olearain
the signer of the foregoing instrument, who duly acknowledged to me that he executed the
same.

Notary Public.

My commission expires Aug 2 1986

Address: West Jordan, Utah

BLANK NO. 103-6 BEM PTO. CO. - 2115 SO 1500 EAST - SALT LAKE CITY

BOOK 5610 PAGE 1034

JUL 13 1983

Diane W. Wilkins
WILKINS & WILKINS
Attorneys for Plaintiff
200 South Main Street
Suite 1020
Salt Lake City, Utah 84101
Telephone: 328-4760

By Roy Robinson
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JUDITH WRIGHT OLEARAIN,
Plaintiff,

vs.

ANDREW B. OLEARAIN,
Defendant.

:
:
:
:
:
:
:
:
:
:

D.R. 180 NO. 1983

7-14-83 - 8:14 A.M.

DECREE OF DIVORCE

Civil No. D-83-1358

The above-entitled matter having come on for hearing on the 13th day of July, 1983, before the Honorable Dean E. Conder, judge of the above-entitled court; the plaintiff, Judith Wright Olearain, appearing in person and by and through her attorney, Diane W. Wilkins, and the defendant having heretofore executed a Stipulation and Property Settlement Agreement wherein he consented that his default may be entered and that the plaintiff could be heard on the merits of her Complaint at any time and in defendant's absence and without further notice to him; the default of the defendant having been duly entered herein; the parties having heretofore entered into said Stipulation and Property Settlement Agreement dated the 28th day of April, 1983 as to the distribution of the assets and liabilities of the parties, which settlement agreement is on file herein and incorporated herein;

and the plaintiff having been duly sworn and examined in support of her Complaint, the court having heretofore made and entered its Findings of Fact and Conclusions of Law and more than ninety (90) days having lapsed since the filing of this matter,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the marriage of the plaintiff and the defendant be and the same is hereby dissolved and that a Decree of Divorce be and the same is hereby granted to plaintiff dissolving the marriage of the parties hereto on the grounds of mental cruelty, which Decree of Divorce shall become final upon

2. That no children have been born as a result of this union and none are expected.

3. That plaintiff is not entitled to any alimony, spousal support or maintenance payments and as such plaintiff is not awarded any alimony, spousal support or maintenance now and forever.

4. That during the course of the marriage, the plaintiff and defendant have acquired certain items of personal property which have been divided between them in a satisfactory manner, with the exception of those items of personal property which are specifically set out hereinafter and which division is awarded by the court except as specifically hereinafter provided, and that hereinafter each shall own, free of any claim of the other, all items of property of every kind which are now in his or her respective possession and control, and each party is free to dispose of all items of property which may hereafter be acquired by him or her as fully and effectively as if he or she were never married. In connection with the foregoing provision, it is ordered that the property shall be divided between the parties as follows:

a. Plaintiff shall receive the furniture and household furnishings in her possession and under her control; the Roadrunner motor home; the 1978 Ford Futura vehicle; her retirement and insurance benefits through her employment; her premarital personal property; her personal effects

and belongings;

b. Defendant shall receive the furniture and household furnishings in his possession and under his control; the 1972 Ford Pinto vehicle; the 1977 Kawasaki 1300 motorcycle; the Beachcraft airplane; the two (2) snowmobiles; the two (2) small Odessa recreational vehicles; the black powder equipment; his retirement and insurance benefits through his employment; his premarital personal property; his personal effects and belongings; and,

c. That each of the parties shall execute such deeds, conveyances, bills of sale or other documents as may be necessary to transfer the respective party's interest in and to the property awarded by the above-entitled court to the party entitled thereto.

5. That during the course of the marriage, the parties have acquired a home and real property located at 1991 West Leisure Circle, Taylorsville, Utah, which property is awarded to the defendant as his sole and separate property subject to an equity interest in favor of the plaintiff and with respect thereto:

a. That defendant shall assume and pay and hold plaintiff harmless from any liability on an outstanding mortgage in favor of American Savings and Loan Association, Salt Lake City, Utah, in the approximate sum of \$26,000.00,

b. That the plaintiff is awarded a \$10,000.00 equity interest in said residence and real property and said equity interest shall be paid by the defendant to the plaintiff as follows:

(1) \$5,000.00 of which has already been paid by the defendant to the plaintiff;

(2) The remaining \$5,000.00 shall be paid when said residence and real property

is sold, is not used as defendant's primary residence, or on or before the 1st day of July, 1984, whichever event occurs first, and

c. That plaintiff shall execute a deed or other conveyance as may be necessary to transfer title thereto to defendant subject to plaintiff's equity interest in and to such equity as heretofore set forth.

6. That during the course of the marriage, the parties have incurred certain debts and obligations which shall be divided as follows:

a. Defendant shall pay and hold plaintiff harmless from any liability on the following debts and obligations: Ogden Railway Credit Union debt; Finance America debt; all other marital debts and obligations; any debts and obligations he has incurred in his own name since the separation of the parties;

b. Plaintiff shall pay and hold defendant harmless from any liability on the following debts and obligations: any debts and obligations she has incurred in her own name since the separation of the parties.

7. That plaintiff's prior name of Wright shall be restored to plaintiff.

8. That each of the parties shall be responsible and pay for their own costs and expenses connected herewith, including attorney's fees.

DATED this 13 day of July, 1983.

BY THE COURT:



Dean E. Conder
District Court Judge

ATTEST
CLERK OF DISTRICT COURT
