

1988

# Joan E. Davis v. The State of Utah : Brief of Appellee

Utah Supreme Court

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BRIEF

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DOCKET NO. **880282**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JOAN E. DAVIS, et al.,	)	
Appellants,	)	BRIEF OF RESPONDENT
	)	STATE OF UTAH
v.	)	
THE STATE OF UTAH,	)	Case No. 880282
Respondent.	)	Priority No. 14b

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JUDGE J. DENNIS FREDERICK

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**FILED**

**APR 19 1989**

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1. PARTIES

All of the parties are named in the caption.

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#### 4. JURISDICTION

This court has jurisdiction pursuant to Section 78-2-2(j), Utah Code 1987-1988.

#### 5. NATURE OF PROCEEDINGS

The appeal was brought by the petitioners pursuant to the Rules of the Supreme Court, Rule 3(a). The appellants petitioned the lower court for release of one 1987 Dodge van, Utah license 72ØBHT, VIN 2B4FK51G5HR179Ø96, which was seized pursuant to Utah Code, Section 58-37-13 (1988) by the Metro Narcotics Strike Force. A trial was held before the Honorable J. Dennis Frederick on the 8th day of April, 1988. On the 14th day of June, 1988, an order was entered granting the state forfeiture of the vehicle.

#### 6. THE ISSUES PRESENTED FOR REVIEW

1. Is there a security interest in the van that prohibits forfeiture in this case?
2. Do the facts support a forfeiture of the van?

#### 7. DETERMINATIVE STATUTE

The interpretation of Utah Code, Section 58-37-13, (1988) is determinative and is set forth as an addendum to this brief.

#### 8. STATEMENT OF THE CASE

A petition for the release of the Dodge van was filed in the Third Judicial District Court of Utah. A trial was held



on April 8, 1988 to determine whether the State of Utah had the right to forfeit the vehicle for violation of Utah Code, Section 58-37-13, or the petitioners had the right to the release of the vehicle. On June 14, 1988, the Honorable J. Dennis Frederick ordered the vehicle forfeited in its entirety to the State of Utah.

On August 4, 1987, Officer Steven Olson of the Metro Narcotics Strike Force traveled in a 1987 Dodge van, Utah license number 720BHT, to purchase marijuana. (R.37 P.3, 4, 5). Joan Davis drove the van, Mike Davis and Walt were also in the van. (R.37 P.6-7). Joan Davis was involved in conversations regarding the purpose of the parties traveling in the van, which was to buy marijuana from another source. (R.37 P.8). After Mike Davis purchased the marijuana from a person located inside an apartment complex, Joan Davis drove the van to 215 East 2850 South where she actively participated in dividing the marijuana between the parties. (R.37 P.9-10).

Joan Davis is the registered owner of the van and hers is the only name which appears of record. (R.39 P.18). Joan Davis told Officer Bill McCarthy that she owned the van and it was paid for. (R.37 P.50-51). Gerald Davis indicated to Lt. Marty Vuyk of the Metro Narcotics Strike Force that there was no written agreement indicating a security interest existed on the van. (R.37 P.58). Rosalee Hansen and Gerald Davis claim

an interest in the van. (R.P.2).

#### 9. SUMMARY OF ARGUMENTS

Several of the issues raised by the petitioners' brief are improper. The issues were never raised by the pleadings or to the trial court. Raising them on appeal for the first time is improper.

One 1987 Dodge van, Utah license 720BHT, was used by the registered owner to facilitate the sale and/or transportation of a controlled substance. This is a violation of Utah Code, Section 58-37-13, the result of which is a forfeiture of the vehicle to the State of Utah. The statute's intent and meaning are clear. None of the exceptions apply and therefore, the property is forfeitable.

Certificate of title is absolute evidence of ownership. The Motor Vehicle Act of the Utah Code sets forth very specific actions that must take place at the time a vehicle is registered. A certificate of title puts creditors and encumbrancers on notice as to who the owner is and these persons have a right to be able to rely upon the certificate of title.

In order for a security interest to be effective, it must also appear of record. The Motor Vehicle Act sets forth specific actions which must take place to create a security interest. None of the provisions were complied with, making

any alleged interest in the van null and void.

The petitioners' testimonies at trial were not credible. The stories they told were filled with discrepancies. Each of their testimonies was conflicting as to themselves and as to the other petitioners. The trial court found there to be loose ends and unexplained circumstances in the stories presented to the court.

#### 10. DETAIL OF ARGUMENTS

##### I. ISSUES RAISED BY THE PLAINTIFF ARE IMPROPER

It is well established that issues not raised by the pleadings or addressed by the trial court cannot be raised for the first time on appeal. Lane v. Messer, 731 P.2d 448, 491 (Utah 1986). The only issue raised at trial was ownership of the van. Therefore, the following issues raised by the brief submitted by Joan E. Davis, et al., are improper:

1. Is the statute on takings, Utah Code Annotated Section 58-37-13 (1953 as amended), as applied to this case unconstitutional under both the State and Federal Constitutions because the results are grossly disproportionate to the crime?

2. Is the taking and subsequent sale of the 1987 Dodge Caravan supported by the plain intent of Utah Code Ann, 58-37-13?

4. May Officer William McCarthy's testimony be given in civil proceedings if the State relies on statements made

during criminal custody but before a Miranda warning was issued?

5. Does the warrantless seizure of the 1987 Dodge Caravan invalidate the proceedings below? (Brief of the appellant at page vii).

Judge Frederick clearly stated the issue as "whether claimants Gerald Davis or his wife Joan Davis was the owner of the vehicle in question and whether or not the claimant Rosalee Hanson possessed a bona fide security interest precluding forfeiture at least to the extent of hers, Rosalee Hansen's, claimed interests." (R.38 P.4). Therefore, the only proper issues presented to this court is whether there was a protectable security interest in the van and whether the facts support the forfeiture.

## II. FORFEITURE WAS APPROPRIATE UNDER THE FACTS PRESENTED

Utah Code, Section 58-37-13 provides for the forfeiture of a vehicle used, or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, simple possession, or concealment of a controlled substance. The van was used to transport the parties to an apartment complex where marijuana was purchased and then the van returned the parties to a location where they exited the van after the marijuana was divided inside the van. (R.37 P.8, 9, 10). The statute is clear in its meaning and was amended in 1987 to include simple possession. In addition, the van was used to facilitate a transportation and sale of

marijuana. One Blue 1977 AMC Jeep CJ-5 v. U.S., 783 P.2d 759 (8th Cir. 1986).

In State v. One 1983 Pontiac, 717 P.2d 1338, 1340 (Utah 1986), the court aligns itself with the substantial amount of authority that hold a vehicle is subject to forfeiture no matter how small the quantity of contraband. The legislature, a year after this decision, brought the statute up to date by replacing possession with simple possession. Utah Code, Section 58-37-13 (1987 and 1986). The Pontiac case further points out that the value of the vehicle in proportion to the amount of drugs is immaterial. Pontiac at 1341. Additionally, Judge Frederick found that the van was knowingly used to facilitate a sale of a controlled substance. (R.38 P.3). This court must review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the finder of fact. State v. Booker, 709 P.2d 342, 345 (Utah 1985). Judge Frederick found Joan Davis's testimony not credible and that she used the van for the transportation and/or facilitation of the sale of marijuana. (R.38 P.3). Therefore, the van is subject to forfeiture.

### III. CERTIFICATE OF TITLE IS ABSOLUTE EVIDENCE OF OWNERSHIP

When applying for a certificate of title, the application must contain "[a] statement of the applicant's title and of all liens or encumbrances upon said vehicle and

the names and addresses of all persons having any interest therein and the nature of every such interest." Utah Code, Section 41-1-20(d) (1987-1988) (effective through December 31, 1987).

The actual certificate of title must contain "a statement of the owner's title and of all liens and encumbrances upon the vehicle therein described . . . " Utah Code, Section 41-1-37 (1988). In the event no lien or encumbrance appears on the certificate of title, it shall be delivered to the owner. *Utah Code, Section 41-1-39 (1988) (Emphasis added)*.

In determining who owns a vehicle in applying the Family Purposes doctrine, the certificate of title constitutes prima facie evidence of ownership. French v. Barrett, 733 P.2d 89 (1987). Additionally, the Supreme Court of Montana has held that the owner of a motor vehicle is that person whose name appears on the certificate of title. Kovacich v. Norgaard, 716 P.2d 633, 634 (Mont. 1986). A certificate of title provides notice who the actual owner is to all of third persons. See Id.

In this case, Joan E. Davis's name is the only one which appears on the certificate of title. Therefore, Joan E. Davis is the owner of the seized vehicle. (R.P.43).

#### IV. TRANSFER OF TITLE MAY ONLY BE ACCOMPLISHED THROUGH COMPLIANCE WITH STATUTORY PROVISIONS

Transfer of title or interest in a vehicle may only be accomplished by compliance with the Motor Vehicle Act. In

order for an owner of a car to transfer title, he must remove the plates, send them to the Division of Motor Vehicles and pay a transfer fee. Utah Code, Section 41-1-62 (1988). Further, "[t]he owner shall endorse an assignment and warranty of title upon the valid certificate of title issued for such vehicle by the State of Utah or other state or country. Said endorsement and assignment shall include a statement of all liens or encumbrances thereto, and shall be verified under oath by the owner before a notary public or other person authorized by law to administer oaths, and he shall deliver the valid certificate of title and certificate of registration to the purchaser or transferee at the time of delivering the vehicle, or within 48 hours thereof . . . ." Utah Code, Section 41-1-63 (1988).

In order for a new owner to secure ownership in a vehicle, "[t]he transferee . . . shall present to the department the certificate of registration and the certificate of title, properly endorsed, and shall apply for and obtain a new certificate of title for said vehicle . . . ." Utah Code, Section 41-1-64 (1988). "The department upon receipt of a properly endorsed certificate of title and certificate of registration and proper application for registration, accompanied by the required fee and when satisfied as to the genuineness and regularity of such transfer and the right of the transferee to a certificate of title, shall re-register the

vehicle as upon a new registration in the name of the new owner and issue a new certificate of registration and a certificate of title as upon an original application." Utah Code, Section 41-1-71 (1988).

A transfer of ownership is not complete "[u]ntil the department shall have issued a new certificate of registration and certificate of ownership, delivery of any vehicle required to be registered shall be deemed not to have been made and title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose . . . " Utah Code, Section 41-1-72 (1988) (Emphasis added).

Therefore, because full statutory compliance has not been met, there was no transfer of title to Gerald Davis or Rosalee Hansen. Utah Code, Section 58-37-13 makes it clear that the Motor Vehicle Act is relevant by stating who must receive notice of a seizure.

"Notice of the seizure and intended forfeiture shall be filed with the county clerk, and served together with a copy of the complaint, upon all persons known to the county attorney to have a claim in the property by one of the following methods:

(i) upon each claimant whose name and address is known, at the last known address of the claimant, or upon each owner whose right, title, or interest is of record in the Division of Motor



Vehicles, by mailing a copy of the notice and complaint by certified mail to the address given upon the records of the division, which service is deemed complete even though the mail is refused or cannot be forwarded; and

(ii) upon all other claimants whose addresses are unknown, but who are believed to have an interest in the property, by one publication in a newspaper of general circulation in the county where the seizure was made."

Utah Code, Section 58-37-13(9)(c) (1988).

Therefore, the only proper party to this action was Joan Davis.

V. NO SECURITY INTEREST EXISTS IN A VEHICLE  
WITHOUT STATUTORY COMPLIANCE

To create a lien or security interest in a vehicle, Article Five of Chapter 41 of the Utah Code must be complied with. "[N]o lien, upon a registered vehicle, except a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances without notice until Sections 41-1-82 through 41-1-87 have been complied with." Utah Code, Section 41-1-80(1) (1988). "If the vehicle is of a type subject to registration but has not been registered, and no certificate of title has been issued, . . . then the owner shall file an application in the form of an original registration and issuance of an original certificate of title. Each application shall be accompanied by all applicable fees

under this chapter." Utah Code, Section 41-1-82 (1988).

Once application has been made, "the department shall file it, and when satisfied as to the authenticity of the application, shall issue a new certificate of title in usual form, giving the name of the owner and a statement of all liens or encumbrances certified to the department as existing against the vehicle." Utah Code, Section 41-1-83(1) (1988). "The filing and the issuance of a new certificate of title under Sections 41-1-82 and 41-1-83 constitute constructive notice of all liens and encumbrances against the vehicle to creditors of the owner, or to subsequent purchasers and encumbrancers." Utah Code, Section 41-1-85 (1988).

Joan Davis was registering a new van and she must have complied with the lien provisions of the code. (R.39 P.24). Gerald Davis and Rosalee Hansen accompanied Joan Davis to the bank at which time she had the certificate of title notarized in her name when they were on notice that their names did not appear as of record. (R.39 P.24, 58, 59, 66).

As evidenced by the certificate of title, no liens or encumbrances had been filed on the 1987 Dodge Caravan, Utah license 720BHT, VIN 2B4FK51G5HR179096 at the time of seizure and thus there are no legal liens or encumbrances. (R.P.21).

If this court were to find that, as petitioners point out, only a bona fide interest is required, Gerald Davis and

Rosalee Hansen still have no interest in the van.

Petitioners point out that bona fide may be defined as "honestly, openly and sincerely; without deceit or fraud." Black's Law Dictionary P.92 (5th Ed. 1983). (R.P.30). If, as petitioners allege, Gerald Davis and Rosalee Hansen have an interest in the seized vehicle, there is nothing bona fide about it.

The way they have chosen to memorialize their interest is, in fact, hidden from all creditors and the State of Utah, and the state is entitled to rely upon the certificate of title as evidence of ownership.

The purported agreement written on May 9, 1987, was kept by Rosalee Hansen in a safe in her home. (R.39 P.45-46). There was no way that anyone who wished to check for liens would ever discover one if, in fact, there was one. (R.39 P.45).

The legislature felt so strongly that all interest in a vehicle be indicated on the certificate of title that they made it a crime to fail to do so. "It is a misdemeanor for any person to fail or neglect to properly endorse and deliver a valid certificate of title to a transferee or owner lawfully entitled thereto within 48 hours . . . " Utah Code, Section 41-1-76 (1988).

If we were to accept petitioners' contention, anyone could claim an interest in a vehicle, never have it recorded

and the state or creditor's would never be able to rely on the certificate of title as evidence of ownership. The legislature carefully guarded against this very situation by its discussion of notice to encumbrancers of vehicles. "The filing and issuance of a new certificate of title . . . constitutes constructive notice of all liens and encumbrances against the vehicle to . . . subsequent . . . encumbrancers." Utah Code, Section 41-1-85 (1988). "The method provided . . . of giving constructive notice of an encumbrance upon a registered vehicle is exclusive." Utah Code, Section 41-1-87 (1988).

Gerald Davis made an oral representation to Lt. Marty Vuyk that there, in fact, was no written document evidencing a security interest in the seized vehicle. (R.37 P.58). Joan Davis also indicated to the seizing officers that the vehicle was hers and it was paid for. (R.37 P. 50-51). Judge Frederick found it significant that the purported agreement was written in the past tense. (R.38 P.5). Additionally, the alleged receipts given to Gerry Davis by Rosalee Hansen were illegible because she had failed to insert cardboard between the sheets and they had all been written over. (R.39 P.40).

There was no security agreement on file with the Division of Motor Vehicles and the story presented by the petitioners was not believed. The vehicle was registered and owned by Joan Davis only. If Rosalee Hansen and Gerald Davis

do have an interest in the van, they have failed to hold themselves out openly and the state is therefore entitled to forfeiture.

#### VI. PETITIONERS' TESTIMONY WAS NOT CREDIBLE

The state maintains a security interest did not exist on the van. Petitioners argue that there was a security interest held by Rosalee Hansen. Judge Frederick found that the testimony of the petitioners was not credible in critical areas. (R.38 P.4). "Where the evidence is in conflict we defer to the trial court's first-hand assessment of the witnesses' credibility and assume that the trial court believed those aspects of the evidence which support its findings." Hal Taylor Associates v. Union America, 657 P.2d 743, 749 (Utah 1982).

Judge Frederick points out several areas where the petitioners' story lacks credibility. Joan Davis completed the application for title and listed herself as the only owner without a lienholder. (R.38 P.4). Gerald Davis's testimony conflicts as to the date he became aware of the title in Joan Davis's name only. (R.38 P.4). Joan Davis told Detective McCarthy she owned the vehicle and testified at trial it belonged to her husband. (R.38 P.4). Gerald Davis phoned Lt. Vuyk the day after seizure indicating no written agreement existed indicating a security interest, yet testified he signed

one on May 9, 1987. (R.38 P.4, R.37 P.57).

Gerald Davis testified at trial he put \$2,900.00 down on the van. (R.37 P.61). In an affidavit filed with the court, he states he put \$5,000.00 down on the van. (R.P.34). Gerald Davis testified that he paid \$1,600.00 in cash yet he maintained a checking account at the time from which he paid the balance to Hinckley Dodge (R.37 P.70, 63).

Rosalee Hansen testified she received a \$9,700.00 cashier's check from a gentleman she didn't know. (R.37 P.51). She could not produce a receipt for it. (R.37 P.51). Rosalee Hansen kept the money in her home after going to the bank with the unknown person to cash the check. (R.37 P.52). Rosalee Hansen maintained several bank accounts during the time period. (R.37 P.52-53). The alleged security agreement was drafted on May 9, 1987, yet is written in the past tense. (R.38 P.5). The alleged receipts are illegible. (R.37 P.40).

It is clear that the finder of fact found the testimony of the petitioners not to be credible and ruled based upon that. (R.38 P.4). This court should accept his findings of fact which support the judgment entered based upon his assessment of the witnesses credibility.

#### 11. CONCLUSION

For all of the foregoing reasons, the State of Utah respectfully requests that this court affirm the decision of

the trial court allowing the forfeiture of the Dodge Van, Utah  
license 720BHT, VIN 2B4FK51G5HR179096.

DATED this 18<sup>th</sup> day of April, 1989.

DAVID E. YOCOM  
Salt Lake County Attorney

A handwritten signature in cursive script, appearing to read "Rena Barbiero", is written over a horizontal line.

RENA BARBIERO  
Deputy County Attorney  
Attorney for Respondent

ADDENDUM

A. Utah Code, Section 58-37-13 (1988) et seq.



with federal and other state agencies in discharging their responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, they are authorized to:

(a) Arrange for the exchange of information between governmental officials concerning the use and abuse of dangerous substances.

(b) Co-ordinate and co-operate in training programs in controlled substance law enforcement at the local and state levels.

(c) Co-operate with the Federal Bureau of Narcotics and Dangerous Drugs and the Utah Bureau of Investigation by establishing a centralized unit which will receive, catalog, file, and collect statistics, including records of drug-dependent persons and other controlled substance law offenders within the state, and make the information available for federal, state, and local law enforcement purposes.

(d) Conduct programs of eradication aimed at destroying the wild or illicit growth of plant species from which controlled substances may be extracted.

1971

### 58-37-13. Property subject to forfeiture — Seizure — Procedure.

(1) The following are subject to forfeiture, and no property right exists in them:

(a) all controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this act;

(b) all raw materials, products, and equipment of any kind used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this act;

(c) all property used or intended for use as a container for property described in Subsections (1)(a) and (1)(b);

(d) all hypodermic needles, syringes, and other paraphernalia, not including capsules used with health food supplements and herbs, used or intended for use to administer controlled substances in violation of this act;

(e) all conveyances including aircraft, vehicles, or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, simple possession, or concealment of property described in Subsections (1)(a) or (1)(b), except that:

(i) a conveyance used by any person as a common carrier in the transaction of business as a common carrier may not be forfeited under this section unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to violation of this act;

(ii) a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent; and

(iii) any forfeiture of a conveyance subject to a bona fide security interest is subject to the interest of a secured party who could not have known in the exercise of reasonable diligence that a violation would or did take place in the use of the conveyance;

(f) all books, records, and research, including formulas, microfilm, tapes, and data used or intended for use in violation of this act;

(g) everything of value furnished or intended to be furnished in exchange for a controlled sub-

stance in violation of this act, all proceeds traceable to any violation of this act, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this act; but:

(i) An interest in property may not be forfeited under this subsection if the holder of the interest did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act;

(ii) There is a rebuttable presumption that all money, coins, and currency found in proximity to forfeitable controlled substances, drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture, or distribution of controlled substances are forfeitable under this section; the burden of proof is upon claimants of the property to rebut this presumption;

(h) all imitation controlled substances as defined in the Imitation Controlled Substances Act; and

(i) all warehousing, housing, and storage facilities, or interest in real property of any kind used, or intended for use, in producing, cultivating, warehousing, storing, protecting, or manufacturing any controlled substances in violation of this chapter, except that:

(i) any forfeiture of a housing, warehousing, or storage facility or interest in real property is subject to the bona fide security interest of a party who could not have known in the exercise of reasonable diligence that a violation would take place on the property;

(ii) an interest in property may not be forfeited under this subsection if the holder of the interest did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act;

(iii) unless the premises are used in producing, cultivating, or manufacturing controlled substances, a housing, warehousing, or storage facility or interest in real property may not be forfeited under this section unless cumulative sales of controlled substances on the property within a two-month period total or exceed \$1,000, or the street value of any controlled substances found on the premises at any given time totals or exceeds \$1,000. A narcotics officer experienced in controlled substances law enforcement may testify to establish the street value of the controlled substances for purposes of this subsection.

(2) Property subject to forfeiture under this act may be seized by any peace officer of this state upon process issued by any court having jurisdiction over the property. However, seizure without process may be made when:

(a) the seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant;

(b) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this act;

(c) the peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) the peace officer has probable cause to believe that the property has been used or intended to be used in violation of this act.

(3) In the event of seizure under Subsection (2), proceedings under Subsection (4) shall be instituted promptly

(4) Property taken or detained under this section is not replevable but is in custody of the law enforcement agency making the seizure, subject only to the orders and decrees of the court or the official having jurisdiction. When property is seized under this act the appropriate person or agency may:

- (a) place the property under seal;
- (b) remove the property to a place designated by it or the warrant under which it was seized; or
- (c) take custody of the property and remove it to an appropriate location for disposition in accordance with law

(5) All substances listed in Schedule I that are possessed, transferred, distributed, or offered for distribution in violation of this act are contraband and shall be seized and summarily forfeited to the state. Similarly, all substances listed in Schedule I which are seized or come into the possession of the state are contraband and shall be summarily forfeited to the state if the owners are unknown.

(6) All species of plants from which controlled substances in Schedules I and II are derived which have been planted or cultivated in violation of this act, or of which the owners or cultivators are unknown, or are wild growths, may be seized and summarily forfeited to the state.

(7) Failure, upon demand by the department or its authorized agent, of any person in occupancy or in control of land or premises upon which species of plants are growing or being stored, to produce an appropriate license or proof that he is the holder of a license, is authority for the seizure and forfeiture of the plants.

(8) When any property is forfeited under this act by a finding of the court that no person is entitled to recover the property, it shall be deposited in the custody of the Division of Finance. Disposition of all property is as follows:

(a) The state may include in its complaint seeking forfeiture, a request that the seizing agency be awarded the property. Upon a finding that the seizing agency is able to use the forfeited property in the enforcement of controlled substances laws, the district court having jurisdiction over the case shall award the property to the seizing agency. The seizing agency shall pay to the prosecuting agency the legal costs incurred in filing and pursuing the forfeiture action. Property forfeited under this section may not be applied by the court to costs or fines assessed against any defendant in the case.

(b) The seizing agency, or if it makes no application, any state agency, bureau, county, or municipality, which demonstrates a need for specific property or classes of property subject to forfeiture shall be given the property for use in enforcement of controlled substances laws upon the payment of costs to the county attorney for legal costs for filing and pursuing the forfeiture and upon application for the property to the director of the Division of Finance. The application shall clearly set forth the need for the property and the use to which the property will be put.

(c) The director of the Division of Finance shall review all applications for property submitted under Subsection (8)(b) and, if the seizing

agency makes no application, make a determination based on necessity and advisability as to final disposition and shall notify the designated applicant or seizing agency, where no application is made, who may obtain the property upon payment of all costs to the appropriate department. The Division of Finance shall in turn reimburse the prosecuting agency or agencies for costs of filing and pursuing the forfeiture action, not to exceed the amount of the net proceeds received for the sale of the property. Any proceeds remaining after payment shall be returned to the seizing agency or agencies.

(d) If no disposition is made upon an application under Subsection (8)(a) or (b), the director of the Division of Finance shall dispose of the property by public bidding or where deemed appropriate, by destruction. Proof of destruction shall be upon oath of two officers or employees of the department having charge of the property, and verified by the director of the department or his designated agent.

(9) When any property is subject to forfeiture, a determination for forfeiture to the state shall be made as follows:

(a) A complaint verified on oath or affirmation shall be prepared by the county attorney where the property was seized or is to be seized and filed in the district court. The complaint shall describe with reasonable particularity:

- (i) the property which is the subject matter of the proceeding;
- (ii) the date and place of seizure, if known; and
- (iii) the allegations which constitute a basis for forfeiture.

(b) Upon filing the complaint, the clerk of the district court shall forthwith issue a warrant for seizure of the property which is the subject matter of the action and deliver it to the sheriff for service, unless the property has previously been seized without a warrant, under Subsection 58-37-13(2).

(c) Notice of the seizure and intended forfeiture shall be filed with the county clerk, and served together with a copy of the complaint, upon all persons known to the county attorney to have a claim in the property by one of the following methods:

- (i) upon each claimant whose name and address is known, at the last known address of the claimant, or upon each owner whose right, title, or interest is of record in the Division of Motor Vehicles, by mailing a copy of the notice and complaint by certified mail to the address given upon the records of the division, which service is deemed complete even though the mail is refused or cannot be forwarded, and
- (ii) upon all other claimants whose addresses are unknown, but who are believed to have an interest in the property, by one publication in a newspaper of general circulation in the county where the seizure was made

(d) Except under Subsection (8)(c), any claimant or interested party shall file with the court a verified answer to the complaint within 20 days after service has been obtained.

(e) When property is seized under this act, any interested person or claimant of the property, prior to being served with a complaint under this

section, may file a petition in the district court for release of his interest in the property. The petition shall specify the claimant's interest in the property and his right to have it released. A copy shall be served upon the county attorney in the county of the seizure, who shall answer the petition within 20 days. A petitioner need not answer a complaint of forfeiture.

(f) After 20 days following service of a complaint or petition for release, the court shall examine the record and if no answer is on file, the court shall allow the complainant or petitioner an opportunity to present evidence in support of his claim and order forfeiture or release of the property as the court determines. If the county attorney has not filed an answer to a petition for release and the court determines from the evidence that the petitioner is not entitled to recovery of the property, it shall enter an order directing the county attorney to answer the petition within ten days. If no answer is filed within that period, the court shall order the release of the property to the petitioner entitled to receive it.

(g) When an answer to a complaint or petition appears of record at the end of 20 days, the court shall set the matter for hearing within 20 days. At this hearing all interested parties may present evidence of their rights of release of the property following the state's evidence for forfeiture. The court shall determine by a preponderance of the evidence the issues in the case and order forfeiture or release of the property as it determines.

(h) Proceedings of this section are independent of any other proceedings, whether civil or criminal, under this act or the laws of this state.

(i) When the court determines that claimants have no right in the property in whole or in part, it shall declare the property to be forfeited and direct it to be delivered to the custody of the Division of Finance. The division shall dispose of the property under Subsection (8).

(j) When the court determines that property, in whole or in part, is not subject to forfeiture, it shall order release of the property to the proper claimant. If the court determines that the property is subject to forfeiture and release in part, it shall order partial release and partial forfeiture. When the property cannot be divided for partial forfeiture and release, the court shall order it sold and the proceeds distributed:

(i) first, proportionally among the legitimate claimants,

(ii) second, to defray the costs of the action, including seizure, storage of the property, legal costs of filing and pursuing the forfeiture, and costs of sale; and

(iii) third, to the Division of Finance for the General Fund.

(k) In a proceeding under this section where forfeiture is declared, in whole or in part, the court shall assess all costs of the forfeiture proceeding, including seizure and storage of the property, against the individual or individuals whose conduct was the basis of the forfeiture, and may assess costs against any other claimant or claimants to the property as appropriate

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(1) Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or other place to which users or possessors of any controlled substances, listed in schedules I through V, resort or where use or possession of any substances violates this act, or which is used for illegal keeping, storing, or selling any substances listed as controlled substances in schedules I through V shall be deemed a common nuisance. No person shall open, keep, or maintain any such place

(2) The district court has the power to make any order necessary or reasonable to suppress any nuisance and to enjoin any person or persons from doing any act calculated to cause, or permit the continuation of a nuisance.

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#### **58-37-15. Burden of proof in proceedings on violations — Enforcement officers exempt from liability.**

(1) It is not necessary for the state to negate any exemption or exception set forth in this act in any complaint, information, indictment or other pleading or trial, hearing, or other proceeding under this act, and the burden of proof of any exemption or exception is upon the person claiming its benefit.

(2) In absence of proof that a person is the duly authorized holder of an appropriate license, registration, order form, or prescription issued under this act, he shall be presumed not to be the holder of a license, registration, order form, or prescription, and the burden of proof is upon him to rebut the presumption.

(3) No liability shall be imposed upon any duly authorized state or federal officer engaged in the enforcement of this act who is engaged in the enforcement of any law, municipal ordinance, or regulation relating to controlled substances.

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#### **58-37-16. Powers to order testimony of witnesses or production of evidence — Immunity of witness compelled to testify.**

If the prosecuting attorney or attorney general of the state of Utah determines that the testimony of any witness or the production of any book, paper, or other evidence by any witness before a grand jury or court of the state of Utah involving any violation of this chapter is necessary, he shall make application to the court that the witness be instructed to testify or produce evidence subject to the provisions of this section and upon order of the court the witness shall not be excused from testifying or producing books, papers, or other evidence on the ground that the testimony or evidence may tend to incriminate him or subject him to forfeiture. No witness shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled to testify after having claimed his privilege against self-incrimination or produce evidence nor shall any such evidence be used in any criminal proceeding against him in any court except prosecutions described in this section. No witness is exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion.

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#### **58-37-17. Judicial review.**

(1) Any person aggrieved by a department's final order may obtain judicial review

(2) Venue for judicial review of informal adjudicative proceedings is in the district court of Salt Lake County


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#### **58-37-14. Resort for illegal use or possession of controlled substances deemed common nuisance — District court power to suppress and enjoin.**

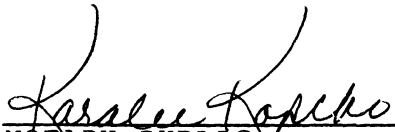
AFFIDAVIT OF SERVICE

STATE OF UTAH                     )  
  : ss.  
County of Salt Lake            )

RENA BARBIERO, being duly sworn, states that she is the attorney for Respondent State of Utah and that she served four (4) copies of the Brief of Respondent State of Utah upon L. Charles Spafford, Attorney for Appellants, 425 East First South, Salt Lake City, Utah 84111, by delivering true copies thereof, on the 18th day of April, 1989.

  
\_\_\_\_\_  
RENA BARBIERO  
Deputy County Attorney  
Attorney for Respondent

Subscribed and sworn to before me this 18th day of April, 1989.

  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing in the State of Utah

My commission expires:  
November 23, 1990