2003

Alliant Techsystems, Inc. v. Salt Lake County Board of Equalization and the Utah State tax Commission and Lee gardner and Granite School District : Reply Brief

Utah Supreme Court

John E.S. Robson; J. David Pearce; Fabian & Clendenin; attorney for appellant.
Maxwell A. Miller; Parsons Behile and Letimer ; attorneys for appellees.

IN THE SUPREME COURT OF THE STATE OF UTAH

ALLIANT TECHSYSTEMS, INC., Plaintiff and Appellee, v. SALT LAKE COUNTY BOARD OF EQUILIZATION and the UTAH STATE TAX COMMISSION, Defendant and Appellee, And LEE GARDNER, and GRANITE SCHOOL DISTRICT, Defendant-Intervenors/ Appellants.	**APPELLANT GRANITE SCHOOL DISTRICT'S REPLY BRIEF** Supreme Court No. 20030612SC Priority No. 15 Oral Argument Requested

REPLY BRIEF OF APPELLANT GRANITE SCHOOL DISTRICT

Appeal from a Judgment of the Fourth Judicial District Court, Utah County, Honorable Lynn W. Davis, District Judge

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INTRODUCTION

Alliant Techsystems, Inc. ("Alliant") does what many advocates do when they do not want to answer the question posed. They change the question. The question in this matter is not, as Alliant would have this Court believe, whether Salt Lake County can settle disputed claims. No one disputes that it can. Rather, the question is the manner in which Salt Lake County must settle **tax** disputes. At the heart of that question is another: whether there are any checks on a county board of equalization settling tax disputes for political purposes.

While these questions are essentially ignored by Alliant, when Alliant does address them, it recognizes that a settlement of a tax dispute must be based upon fair market value and an equalization of assessments so that all taxpayers are treated fairly. (Alliant's Brief at 22-23). Thus, there are heavy restrictions imposed by the Utah Constitution and statutory law on how Salt Lake County may settle tax disputes. Alliant admits, as it cannot be disputed, that the Settlement Agreement is not based upon fair market value. Nor does it treat all taxpayers fairly. It is therefore illegal.

The illegality of the Settlement Agreement is not the only reason it should not be enforced. Contrary to Alliant's contention, approval by the Tax Commission was more than a jurisdictional pre-requisite. The approval was a bargained for condition precedent. This condition did not occur and the Tax Court could not overturn the Tax Commission's rejection.

Finally, although Alliant argues there were "numerous reasons" for the Settlement Agreement, it provides none other than avoiding litigation. This litigation occurred through no fault of Salt Lake County. Thus, the consideration for the Settlement Agreement failed, rendering the agreement unenforceable.

ARGUMENT

I. THE ISSUE IN THIS MATTER IS NOT WHETHER SALT LAKE COUNTY MAY SETTLE LAWSUITS, BUT WHETHER THE SETTLEMENT MUST BE BASED UPON FAIR MARKET VALUE.

Alliant attempts to recast the issue before this Court as whether Salt Lake County has authority to settle lawsuits and disputed claims. This is the classic red herring. Granite does not dispute that Salt Lake County can settle disputed claims, including tax claims. But that question is entirely irrelevant. What is relevant is under what circumstances, and the manner in which, Salt Lake County can settle tax disputes. The answer cannot be disputed; Salt Lake County can settle disputed claims **so long as** the settlement is premised upon the fair market value of the property and equalizing assessments. The Settlement Agreement fails to comply with these requirements. A close look at Alliant's brief reveals that it does not disagree.

Buried within Alliant's almost two dozen pages of argument on this issue and amidst the multiple constitutional and statutory provisions (many of which are simply irrelevant) are two admissions by Alliant that doom the Settlement Agreement. First, Alliant admits that Salt Lake County's power to settle disputes is tied to its "power to equalize values so that taxpayers are fairly and equitably assessed", presumably upon the fair market value of the property. (Alliant's Brief at 23). Second, Alliant admits that "the

Board did not wholly agree with either of the two appraisals, concluded that fair market value of the property lay somewhere in the middle" and settled without determining that value. (Alliant's Brief at 41).

The first admission is hardly revealing despite Alliant's attempts to conceal this undisputed rule. The Utah Constitution and case law are clear. All taxable property must be assessed and taxed at a uniform and equal rate on the basis of its fair market value. *See, e.g.*, Utah Const., art. XIII, sec. 2-3; Utah Code Ann. § 59-2-103; *Kennecott Copper Corp. v. Salt Lake County*, 799 P.2d 1156, 1159 (Utah 1990). Flowing from this undisputed rule is that all settlements of disputed tax claims must also be based upon the fair market value of the property and an attempt to equalize all assessments. Alliant does not and cannot dispute this.

The second admission, while perhaps bitter to Alliant, is also not surprising. The Settlement Agreement fails to place a value or assessment on Alliant's property. Rather, the Settlement Agreement states that "[n]o obsolescence percentage or amount will be applied to any particular year under appeal and any allocation of a reduction in value to any particular year shall be for refund calculation percentages only and shall be neither indicative nor dispositive with respect to any issue raised in Alliant's appeals." (R. at 1691). In short, the Settlement Agreement expressly states that the settlement is not based in any way on a market value. Thus, the Tax Court further found that the Settlement Agreement "does not set or fix valuations based upon fair market value" (R. at 2874, ¶ 25) and "does not address the divisibility /severability of the $5 million dollar settlement amount to separate years." (R. at 2873, ¶ 26).

Despite these admissions, Alliant weakly argues that notwithstanding the fact the refund is not based upon fair market value and is not separated into specific years, disparate treatment will not result. (Alliant's Brief at 50, n. 10). Alliant reasons that the $5 million dollar lump sum refund could come from current cash flows and reserves and not necessarily the proceeds of a judgment levy. (R. at 1690). This argument has two flaws. First, Salt Lake County clearly envisioned that the refund would come through a judgment levy. In fact, Commissioner Shurtleff stated that absent the settlement there would be a "substantially larger hit on Granite School District." (R. at 1684). More importantly, regardless of where the refund came from, if the Settlement Agreement was not based upon fair market value, then Alliant's property might[1] be assessed below full market value and it would thereby "avoid accountability for their share of governmental expenses, and the goal of uniformity and equality would be defeated." *Alta Pacific v. Utah State Tax Comm'n*, 931 P.2d 103, 115 (Utah 1997). The disparate treatment results from Alliant paying taxes on less than the fair market value of its property and not only a judgment levy.

In sum, Alliant admits and cannot dispute that the Settlement Agreement is not based upon a fair market value or an equalization of assessments for the five years at issue. The undisputed facts in this matter clearly show that the Settlement Agreement

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[1] Based on the Tax Commission's determination following a week long evidentiary hearing, the Settlement Agreement assessed Alliant's property at well below fair market value.

violates the Utah Constitution and state law. Because the Settlement Agreement violates state law, it is illegal and cannot be enforced.

II. THE TAX COMMISSION'S APPROVAL OF THE SETTLEMENT AGREEMENT WAS A CONDITION PRECEDENT.

Alliant argues that the Tax Commission's rejection of the Settlement Agreement did not constitute a failure of the a condition precedent for several reasons: (1) the Tax Commission's acceptance was nothing more than a jurisdictional pre-requisite; (2) its rejection was for "pragmatic" or procedural issues and was ultimately incorrect; (3) its rejection was irrelevant because it was not a party to the Settlement Agreement; and (4) the Tax Court overruled the Tax Commission. These arguments are without merit.

A. The Tax Commission's Approval Was Material to the Settlement Agreement.

Alliant asserts that the Tax Commission's approval of the Settlement Agreement "was nothing more than a recognition of the jurisdictional realty as it existed at that time." (Alliant's Brief at 44). In essence, Alliant reasons that approval was not material to the Settlement Agreement. The facts, however, contradict Alliant's argument.

The Settlement Agreement itself states that "this settlement proposal is subject to . . . final approval by the Utah State Tax Commission." (R. at 1690-91). This approval was more than a court agreeing to dismiss a case with prejudice following a settlement agreement. That would have been a simple recognition of jurisdictional reality. The reasons for the Tax Commission's approval were more than a mere formality or terminating a case. Rather, the Settlement Agreement required the "entry of appropriate judgments and orders sufficient to authorize Salt Lake County and the affected taxing

entities within Salt Lake County to recover all refunds paid through the imposition of an appropriate judgment levy." (*Id.*). Alliant does not dispute that the Tax Commission's approval was needed in order for the judgment levy to be authorized. Thus, the Tax Commission's approval was necessary for the Settlement Agreement to be fully enforced.[2] As such, it was a material condition precedent. *See, e.g., Welch Transfer and Storage, Inc. v. Oldham*, 663 P.2d 73, 76 (Utah 1983) (refusing to enforce a contract where contract contemplated approval by third party and said approval was not given).

B. The Reason the Tax Commission Refused Approval is Irrelevant.

Alliant next argues that the Tax Commission's ultimate, and the Tax Court's initial, failure to approve the Settlement Agreement was for "pragmatic, procedural reasons, having nothing to do with the agreement's alleged invalidity/unenforceability as a contract." (Alliant's Brief at 46). Alliant essentially claims that the Tax Commission's rejection of the Settlement Agreement based upon Granite's timely intervention should be ignored because the Tax Commission's reasoning was incorrect. Again Alliant misses the point. It matters not the reasons for the rejection. All that matters is that the Tax Commission refused to give its approval. When it failed to do so, a condition precedent failed.

Moreover, the Tax Commission was ultimately correct in its determination that the Settlement Agreement should not be enforced without Granite's input. The rights of an intervenor with respect to a settlement were discussed in *Millard County v. Utah State*

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[2] Even the Tax Court found that the Settlement Agreement was conditioned upon the approval of the Tax Commission. (R. at 2875, ¶ 15).

Tax Comm'n, 823 P.2d 459 (Utah 1991). Alliant makes much of the language at the end of *Millard County* in which this Court concluded that "we need not now decide whether, after intervention has been allowed in a local option sales tax case, the Commission may settle a case over an intervenor's objection." *Id.* at 464. In doing so, Alliant ignores the Court's holding, exactly on point, that "[t]he settlement of a controversy by the parties before a motion to intervene as of right has been adjudicated does not constitute a final settlement . . ." *Id.* at 461. The clear implication is that the intervenor has a right to be heard. The Tax Commission recognized this and appropriately ruled that the agreement should not be enforced.

C. The Tax Commission Was Not Required To Be A Party to Reject the Settlement Agreement.

According to Alliant, the Tax Commission's approval was not a condition precedent because it was not a party to the Settlement Agreement. (Alliant's Brief at 50). Under this rationale, a condition precedent can only involve a party to the agreement. This argument flies in the face of long-standing Utah law.

This Court rejected Alliant's position in *Welch Transfer and Storage.* 663 P.2d at 76. In that case, a contract was impliedly conditioned upon approval by the SBA of certain loans. The SBA, however, was not a party to the contract. When the SBA did not give its approval, the Utah Supreme Court ruled the contract unenforceable. Specifically, this Court stated that "[w]here fulfillment of a contract is made to depend upon the act or consent of a third person over whom neither party has any control, the contract cannot be enforced unless the act is performed or the consent given." *Id.* at 76.

In short, a third person's approval may be a condition precedent. The failure of that non-party to act or consent may render the agreement unenforceable. Alliant's argument to the contrary is without merit.

D. The Tax Court Could Not Substitute Its Approval for the Tax Commission's.

In its final attempt to avoid the consequences of the Tax Commission's refusal to approve the Settlement Agreement, Alliant argues that (1) Granite's intervention with the Tax Commission is not the equivalent of intervention with the Tax Court; and (2) that the Tax Court could substitute its judgment for that of the Tax Commission's.

With respect to Alliant's first argument, Granite concedes that it did not move to intervene before the Tax Court until after the Settlement Agreement was reached. But this makes little difference as to whether the Tax Court erred in holding that it could not "give any weight" to Granite's position as a "potential intervenor who potentially might become a future party to the action." (R. 1974). Even if Granite was not a party at the time of the Settlement Agreement, it does not mean that Granite does not have a right to be heard. While Granite's status before the Tax Court was not the same as its status before the Tax Commission, it nevertheless filed its Motion to Intervene in the Tax Court before the Settlement Agreement was approved. The logic of *Millard County* makes clear that the Tax Court erred in not even hearing Granite on the issues.

Moreover, if the Tax Court's decision is upheld, serious public policy concerns arise. For example, to hold as the Tax Court did, all taxing entities would be required to monitor all potential settlement agreements and move to intervene before the settlement

could be reached, or face the possibility that it could not voice an opinion as to the legality or advisability of the agreement. This would be true even where the agreement adversely impacts the taxing entity. Such omnipotent knowledge of all settlement agreements is hardly realistic, if not completely impossible.

This case is the perfect illustration. Granite had no independent knowledge of the settlement discussions between Salt Lake County and Alliant, despite the fact that "Granite School District is the single largest recipient of the property tax revenue that was the subject of the dispute and would be responsible for approximately fifty percent of the refund, or about $2.5 million." (R. at 1819). Granite was given a "tip" that a settlement was in the works that would have a tremendous adverse impact upon it.

Absent this tip, Granite would not have timely intervened with the Tax Commission, and under the Tax Court's ruling, would have had no voice in the settlement agreement. Granite would then have had to refund $2.5 million or institute an appropriate judgment levy to cover the losses, all while not having been heard. Such a result is not good public policy and imposes impossibilities upon taxing entities.

As to Alliant's second point, the Tax Court could not simply substitute its approval for that of the Tax Commission.[3] Granted, Utah Code Ann. § 59-1-601 provides the Tax Court with the authority to "review by trial de novo all decisions issued by the commission after that date resulting from formal adjudicative proceedings." But

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[3] Alliant cannot and does not dispute that Granite moved to intervene with the Tax Commission prior to the Settlement Agreement. This is the identical situation to *Millard County* and therefore the Settlement Agreement did "not constitute a final settlement. . . ." 823 P.2d at 461.

approval of the Tax Court – even on a de novo basis – is not approval of the Tax Commission. The Settlement Agreement expressly called for approval of the Tax Commission. Had the parties intended approval by the governing body or the body with contemporaneous jurisdiction – or even appellate jurisdiction – they could have done so. They did not. They expressly called for the Tax Commission's approval, which did not come.

In sum, despite numerous red herrings and arguments contradictory to well-established law, Alliant's arguments that the Tax Commission's approval was not a condition precedent fail.

III. GRANITE, AND NOT SALT LAKE COUNTY, CAUSED THE TAX COMMISSION TO REJECT THE SETTLEMENT AGREEMENT.

Alliant claims that there "were numerous reasons, legal and economic, supporting the Settlement Agreement," yet names none. Alliant's failure is easily explained. The only consideration referred to by the County Board was (1) the avoidance of continued cost of litigation; and (2) the avoidance of the risk of trial. The Tax Court recognized this when it found that "[i]n reaching settlement, **consideration was given to the risk of liability to Salt Lake County and taxing entities within Salt Lake County, together with the costs and trouble of protracted litigation**, a review of depositions and appraisals, and at least some discussion relative to the merits of the respective claims." (R. at 2874) (emphasis added). Even Alliant recognized these two issues formed the basis of the consideration Salt Lake County was to receive. (*See* Alliant's Brief at 24 stating "authority to settle litigation also includes the prerogative [sic] to evaluate

litigation risks and likely costs, and to choose or compromise between conflicting appraisals, as the Board and County Commission did in this case.").

At the time the Settlement Agreement was entered into, those risks related in large part to the hearing scheduled before the Tax Commission on years 1997-1999. This is what Salt Lake County bargained for – to avoid litigation costs and a bad result. It did not receive the bargain, as it was forced to go to the Tax Commission for a formal hearing. The consideration failed and the agreement ceased to exist.

Contrary to Alliant's contentions, this was not "because the 'County, its officers and attorneys' have refused to honor the Settlement Agreement they themselves drafted." (Alliant's Brief at 55). The Tax Commission's rejection of the Settlement Agreement had nothing to do with Salt Lake County, or its officers or attorneys. As the Tax Commission stated, "[u]nder the circumstances here, this Commission determines it is not appropriate to approve the Joint Motion for Approval of Settlement, because to do so would require a necessary party [Granite] that had moved to intervene prior to the stipulated settlement to accept such a settlement against its will." (R. at 1817).

Following the Tax Commissions' rejection of the Settlement Agreement, Granite and Salt Lake County both participated in a week long evidentiary hearing before the Tax Commission. During that hearing, Granite called its own expert and cross-examined relevant witnesses. Accordingly, it was Granite's actions that caused the consideration to fail.

IV. THE ISSUES PRESENTED IN THIS MATTER ARE QUESTIONS OF LAW, NOT OF FACT.

Alliant argues that Granite failed to "marshal the evidence" in this matter and that the questions presented were ones of fact and not of law. Alliant's position is remarkable. It is also not supported by the case law it cites. As set forth in the cases cited by Alliant, it is well established that "when challenging the trial court's findings of fact", a party has a duty to marshal the evidence. *Moon v. Moon*, 1999 UT App. 12, ¶ 24, 973 P.2d 431, 437. *See also, Morgan County v. Holnam, Inc.*, 2001 UT 57 ¶ 12, n. 8, 29 P.3d 629, 633 (requiring party to marshal evidence where factual conclusion challenged). A party also has a duty to marshal the evidence where it challenges a directed verdict or seeks a new trial, *Neely v. Bennett*, 2002 UT App. 189 ¶11, 51 P.3d 724, 727.

There were no evidentiary hearings in this matter other than the hearing before the Tax Commission after the Settlement Agreement had been rejected. The Tax Court did not weigh any evidence or assess the credibility of any witnesses. The Tax Court had before it the exact same pleadings, memoranda and documents that this Court has. Thus, this matter is similar to that of a motion for summary judgment, where this Court does not grant discretion to the trial court's ruling since there has been no weighing of the evidence.

Moreover, Granite is not challenging the factual findings of the Tax Court. Rather, it challenges the Tax Court's legal conclusions. For example, Granite challenges the Tax Court's finding that a tax settlement can be enforced where (1) consideration has failed; (2) a condition precedent did not occur; and (3) the settlement is illegal because it

creates a situation in which taxes are not based upon fair market value and result in disparate treatment among tax payers. Granite further challenges the Tax Court's legal conclusion that it had jurisdiction and was not bound by the Tax Commission's refusal to approve the Settlement Agreement. In none of these issues does Granite challenge the Tax Court's factual findings. All are challenges of how the Tax Court applied legal principles to undisputed facts. Thus, Granite had no duty to marshal the evidence and the correct standard to be applied by this Court is one of correctness, affording no deference to the Tax Court. *See, e.g., In re Estate of West*, 948 P.2d 351, 353 (Utah 1997) (outlining standard of review for questions of law).

CONCLUSION

For the foregoing reasons, the Tax Court's decision to enforce the Settlement Agreement should be overturned.

DATED this 1 day of October, 2004.

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CERTIFICATE OF MAILING

I hereby certify that on the 1 day of October, 2004, I caused two true and correct copies of the foregoing Granite School District's Reply Brief to be mailed, postage prepaid, to the following:

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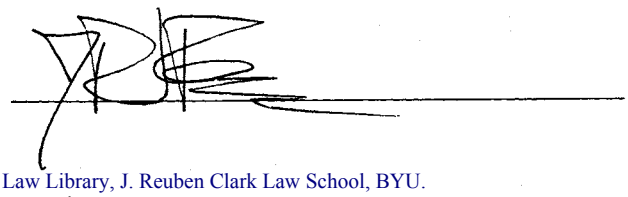

IN THE UTAH SUPREME COURT IN AND FOR

STATE OF UTAH

GRAYCE HURD, Personal Representative of the Estate of Lloyd I Hurd, Deceased and GRAYCE HURD, Personally, Plaintiffs/Appellees, vs. LEWELLYN J. SHERMAN and CONNIE SHERMAN, Defendants/Appellants.	Supreme Court No. Court of Appeals No. 970202CA Civil No. 940600001 980095

PETITION FOR WRIT OF CERTIORARI

THIS IS A PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULES 45 THROUGH 51 OF THE UTAH RULES OF APPELLATE PROCEDURE

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IDENTIFICATION OF PARTIES

All parties are set forth in the above caption and are identified pursuant to the caption of the case.

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I. QUESTIONS FOR REVIEW

1. When a trial court finds no fraud or misrepresentation and no confidential relationship which are the basis of the complaint for imposition of a constructive trust yet imposes a constructive trust none the less, is it error for the Court of Appeals for affirm and allow a constructive trust to be created

2.. When real and personal property are transferred without the showing of any fraud, misrepresentation and no confidential relationship can the transfer be converted into a constructive trust requiring the return of the property and if so under what basis?

3. What are the standards for a constructive trust?

II. CITATION TO OPINION OF COURT OF APPEALS

The decision of the Court of Appeals was by Memorandum Decision (not for official publication). A copy of the decision is attached as appendix A.

III. STATEMENT OF THE JURISDICTION OF THE SUPREME COURT:

a. DATE OF ENTRY OF DECISION TO BE REVIEWED

The decision for the court to review was made in a memorandum decision (not for official publication) filed November 14, 1997.

b. DATE OF ORDER RESPECTING A PETITION FOR RE-HEARING

A request for re-hearing was made on the 26th of November, 1997. The order denying the petition for re-hearing was filed on December 23rd, 1997.

c. DATE OF FILING MOTION FOR EXTENSION

The petitioners/appellants filed a motion for an extension in which to file the Petition for Writ of Certiorari which motion and order were entered on January 22, 1998.

d. THE STATUTE THAT CONFERS JURISDICTION UPON THE SUPREME COURT

Jurisdiction is granted pursuant to Utah Code Ann. §78-2-2(3)(j) (1953 as amended). Pursuant to Utah Code Ann. §78-2-2(4), the Supreme Court transferred the matter to the Court of Appeals for adjudication. Pursuant to §78-2-2(5) the Supreme Court has sole discretion in granting or denying a Petition for Writ of Certiorari for review of a Court of Appeals adjudication.

Jurisdiction is also pursuant to Rule 46(a)(3) and (4) of the Utah Rules of Appellate procedure in that the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision and the Court of Appeals has failed to render an important decision dealing with the creation of constructive trusts which should be settled by the Supreme Court.

IV. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

There are no constitutional provisions at issue in this case.

V. STATEMENT OF THE CASE:

A. NATURE OF THE CASE

This is an appeal from a final Judgment and Order of the Sixth Judicial District Court, Kane County, Kanab Department, State of Utah, the Honorable David L. Mower, presiding wherein after a trial date on April 4, 1996, the Court found the creation of a constructive trust which was thereafter terminated, and that the items which had been transferred to the appellants as constructive trustees, were required to be delivered to the appellees within a ten (10) day period from the date of the Court's Order. In addition to the items to be transferred from the appellants to the appellees, the trial court granted judgment against the appellants in the sum of $20,000.00 and costs.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN OTHER COURTS

After the entry of the Findings of Fact, Conclusions of Law and Order by the trial court the matter was appealed to Supreme Court. The Supreme Court transferred the matter to the Court of Appeals for adjudication. The Court of Appeals in effect "sustained" the ruling of the trial court.

C. STATEMENT OF FACTS SUPPORTED BY CITATIONS TO THE RECORD AND OPINION OF THE COURT OF APPEALS

The present appeal arises out of the conveyance of real property, the transfer of funds from a checking account, and the transfer of personal property. The plaintiffs are, Grayce Hurd ("Grayce"), as the Personal Representative of the Estate of Lloyd I. Hurd ("Mr. Hurd") and Grayce,

Hurd, personally. The defendants are Lewellyn Sherman ("Mr. Sherman") and Connie Sherman ("Ms. Sherman"). Finding of Fact ¶ 1.

Mr. Hurd and Grayce lived together since approximately 1964, however, they never entered into a formal marriage contract. Finding of Fact at ¶ 6. R-256, 377, 386, 392, 226, 236. No children were born during the course of their relationship. Id. At no time prior to the death or since the death of Mr. Hurd has there been any judicial proceeding or administrative proceeding wherein Grayce was declared to be the common-law wife of Mr. Hurd. R-157, 399. Mr. Hurd died on June 3, 1992 and, accordingly, the relationship between Mr. Hurd and Grayce ended.

Prior to Mr. Hurd's death, he met with attorney Keith Eddington ("Mr. Eddington"). R-357. This meeting occurred at the residence of Mr. Sherman, and was in response to a request that Mr. Eddington prepare, review, and advise Mr. Hurd on a Power of Attorney document. R-361, 363, 365.

During the meeting between Mr. Hurd and Mr. Eddington, Mr. Hurd was advised by Mr. Eddington of what rights he would be relinquishing by executing the Power of Attorney. R-359, 361. Essentially, Mr. Hurd was informed by Mr. Eddington that if he executed the Power of Attorney, designating Mr. Sherman as the attorney-in-fact, he would be permitting Mr. Sherman to act as though he was Mr. Hurd. R-359, 361.

Due to the legal significance of a Power of Attorney, Mr. Eddington's concern was whether Mr. Hurd understood what was happening, whether or not that was his wish, and whether the

execution of the Power of Attorney was being forced upon him. R-357. Mr. Eddington's conclusion was that the Power of Attorney was not being forced upon Mr. Hurd, and that he understood what was going on. R-357, 361. In fact, Mr. Eddington testified that Mr. Hurd made it clear that it was his wish to execute the Power of Attorney; there was no hesitation on Mr. Hurd's part when he executed the Power of Attorney. R-361. With respect to the Power of Attorney, it was Mr. Hurd's desire to execute it in favor of Mr. Sherman because he trusted him. R-359. Part of the considerations for executing the Power of Attorney in favor of Mr. Sherman was because Mr. Hurd wanted to see that Grayce was taken care of. R-365. (Power of Attorney is found at plaintiffs' Exhibit no. 23.)

During the course of their meeting, Mr. Hurd and Mr. Eddington also discussed gift taxes and the ability to transfer $10,000.00 tax free. R-360. Mr. Hurd also inquired about what potential problems might arise if he transferred all of his property to Mr. Sherman. R-360. Mr. Eddington informed him that he did not know the value of his estate, however, if it was over $10,000.00, he could have a gift tax problem. Id. Mr. Eddington further informed Mr. Hurd that if he wanted to disperse it between the children of Grayce, he could most likely get away with that. Id. Mr. Hurd responded by informing Mr. Eddington that he did not trust the other children, but he did trust Mr. Sherman with Grayce. Id.

Regarding the transfer of property, Mr. Hurd did not inform Mr. Eddington that he had a conversation with either Mr. Sherman or Ms. Sherman. R-361. With respect to being advised on

money matters, neither defendant ever advised Mr. Hurd about these matters. R-389, 402, 407, 409. Mr. Sherman also neither induced Mr. Hurd to transfer the home into his name nor to execute the Power of Attorney in his name. R-411, 415. Mr. Hurd had informed Lorna Guenther, his cousin (R-222), while at the V. A. Hospital (R-223) prior to his staying at the defendants' home and prior to meeting Mr. Eddington, that he was going to give Mr. Sherman Power of Attorney and to have his home and all property transferred to and to belong to Mr. Sherman. R-226-228, 230-231. These same statements were made to Kenneth and Deon Lamb at a different time at the V. A. Hospital prior to Mr. Hurd staying at the defendants' home that he, Mr. Hurd, was going to give his property and home to Mr. Sherman and give Mr. Sherman Power of Attorney over all his property. R-373, 375, 381-382. Kenneth Lamb was Mr. Hurd's cousin. R-368.

With respect to Mr. Hurd's bank account at Zions Bank, Mr. Sherman was instructed by Mr. Hurd to withdraw the money and to transfer the money into an account in his name. R-412, 413. (Note: The account was sole owned and held by Mr. Hurd.) An additional discussion occurred regarding the transfer of the funds, which was that the transfer of funds were to be as gifts. R-412, 413. First, there was to be a $10,000.00 gift for Mr. Sherman and, second, there was to be a $10,000.00 gift for Ms. Sherman. An additional instruction from Mr. Hurd to Mr. Sherman was that he was to transfer the home into his name. R-415. Mr. Hurd attempted to explain the gift transfer of the bank monies but Grayce states she didn't understand what Mr. Hurd meant. R-400-401.

To effectuate the conveyance of the real property, Grayce and Mr. Sherman signed a quitclaim deed, which said deed was recorded on June 2, 1992. Plaintiffs' Exhibit no. 21. The grantors were Mr. Hurd and Grayce Hurd, husband and wife, and the grantees were Mr. Sherman and Ms. Sherman, as joint tenants with full rights of survivorship, and not as tenants in common. Mr. Sherman signed the quitclaim deed as the attorney-in-fact. Grayce signed the quitclaim deed after she and Mr. Hurd discussed signing the quitclaim deed, and then she signed because they (Grayce and Mr. Hurd) mutually agreed she sign. R-318, 321. In fact, all of the personal property (truck, trailer, etc.) which was signed over to Mr. Sherman by Grayce was done after she and Mr. Hurd talked about it, then mutually agreed to sign it over. R-318-321. The record is devoid of any evidence of any discussions or requests from either defendant to Grayce to transfer property held in her name to either defendant.

The trial court found on June 1, 1992, Mr. Hurd and Grayce owned the following items of property:

a. A house and lot located in Kanab, Kane County, State of Utah;

b. Two shares of stock in the Kanab irrigation Company;

c. A travel trailer, fifth-wheel type, Teton brand, 1978 model;

d. A travel trailer, 18 feet long, Kit Companion brand;

e. A 1977 Chevrolet pickup truck;

f. A 1980 Oldsmobile automobile;

g. A bank account at Zions First National Bank, Kanab Branch, account no: 052-50552-6, worth $20,420.85; (Note: this is clearly in error because the account was solely held by Mr. Hurd and Grayce was not authorized to sign on the account nor did she hold any interest in the account.)

h. A bank account at Zions First National Bank, Kanab Branch, account no: 052-33638-5, worth $789.65.

The trial court found that on Friday, May 29, 1992, a conversation took place at Mr. Sherman's house between Mr. Hurd, Grayce, Mr. Sherman and Ms. Sherman. The trial court said that "a conversation probably went something like this" and thereafter speculated as to what conversation may or may not have occurred. There was no evidence of this "conversation". The record is devoid of any evidence of this type of conversation. The court's finding are speculative at best.

The trial court further found that neither Mr. Sherman nor Ms. Sherman paid money or transferred anything of value to Grayce in exchange for the quitclaim deed, the checks, and the vehicle titles.

Finally, the trial court found that one year had passed since Mr. Hurd's death, and no claims had been made by Social Security, the Veteran's Administration, Medicare, or any long-term care provider.

Based on the trial court's Findings of Fact, it made three Conclusions of Law. First, that a constructive trust had been created for the benefit of Grayce. The second Conclusion of Law was that all of the property received in trust for the benefit of Grayce should be immediately returned,

assigned and transferred to Grayce. This also included all property which was solely owned by Mr. Hurd to which Grayce held no interest or title and the property which Grayce had voluntarily transferred to Mr. Sherman.

The final Conclusion of Law by the trial court was that Grayce was entitled to a judgment against Mr. Sherman and Ms. Sherman in the sum of $20,000.00, together with court costs incurred.

VI. ARGUMENT OF THE SPECIAL AND IMPORTANT REASONS FOR ISSUANCE OF THE WRIT

1. The Court of Appeals acknowledged that the trial court did not make a finding that a confidential relationship existed between appellant Sherman over appellee and decedent but somehow determined that there was ample evidence in the record to support the existence of a confidential relationship. The appellees theory of the case was that the appellants, acting in a confidential relationship fraudulently induced decedent and Grayce to transfer the property to appellants. The trial court and the Appeals Court have misapplied the burden of proof and the standard of evidence necessary to create a constructive trust. Because the theory of the case and complaint were based on fraud and misrepresentation it was necessary for the burden of evidence presented to be "clear and convincing" rather than by "preponderance". The same requirement existed for the finding of a "confidential relationship". This burden of evidence was never met and unless it is first met then no constructive trust can be created. The trial court could not find any fraud, misrepresentation or confidential relationship thus it could not create a constructive trust. Nielson v. Rasmussen, 558 P.2d

511 (Ut. 1976); Jewell v. Horner, 366 P.2d 594 (Ut. 1961); Chambers v. Emery, 45 P. 192 (Ut. 1896); Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060 (Ut. 1996); Andalex Resources, Inc. v. Myers, 891 P.2d 1041 (Ut.App. 1994); Genetics, Int(s), Inc. v. First Affiliated Securities, Inc., 912 F.2d 1238 (10th Cir. 1990).

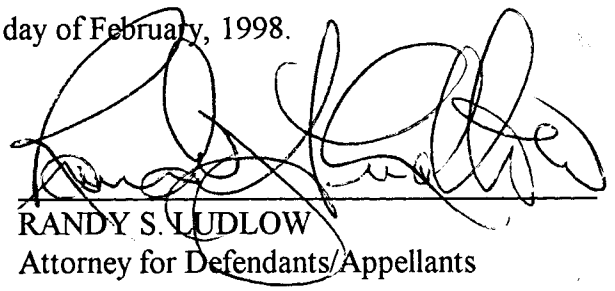
2. The evidence at trial was that decedent wanted his property transferred to the appellant. The decedent requested Grayce to transfer her property to appellant, which she did. There was no finding of fraud, misrepresentation, undue influence or confidential relationship. Yet, a constructive trust was ordered and not only Grayce's property was required to be returned but also the property which decedent solely owned and wanted left to appellants. The trial court held that there was "no consideration" thus the transfers were void. The sole property of the decedent was transferred as a gift thus consideration is unnecessary. The Appeals Court held that appellant "failed to marshal the evidence in favor of the trial court's findings" and therefore entered the trial court's findings as accurate. The facts remain that there was no evidence presented which supported the trial court's findings on these issues. Grayce testified that the $20,000 account at Zions Bank was to be gifted to appellants. Other independent witnesses also testified as to the desire of the decedent to have various items of property transferred to appellant Mr. Sherman. This included the truck and trailer. There was no rebuttable evidence presented on these items. It is impossible to marshal evidence to support a court's findings when none exists. Barlow Society v. Commercial Security Bank, 723 P.2d 398 (Ut. 1986), Nielson v. Rasmussen, 558 P.2d 511 (Ut. 1976).

3. The Court of Appeals did not address the standards or requirements necessary for the creation of a constructive trust. There must be a showing by "clear and convincing evidence" before a constructive trust will be impressed upon property. This did not occur and this standard was not used by either the trial court or the Court of Appeals. Next, there must be a finding of the existence of a confidential relationship. The trial court did not find such a relationship but somehow the Court of Appeals presumes one to exists. Next, there needed to be found an oral promise by appellants to decedent to hold the property. Here there was conflicting evidence as to the real property but not as to the truck, trailer and $20,000 Zion's bank account. The evidence was clear that decedent did not want Grayce's other children to have any interest in any property thus an additional question is presented which is "If a constructive trust is found, is Grayce given a life estate in the property or must the property be reconveyed to her?" This issue has not be addressed and needs adjudication by this Court. It is appellants' position that Grayce should have received at most a life estate in the real property, with the personal property solely owned by appellants. Grayce is now deceased (this occurred during the appeal). Grayce did in fact receive a life estate in the property and now the property should be held and owned by appellants. Mr. Hurd wanted appellants to have the property and now based on the death of Grayce, his desires should be honored. Mattes v. Olearain, 759 P.2d 1117 (Ut.Ct.App. 1988); Nielson v. Rasmussen, 558 P.2d 511 (Ut. 1976); Jewell v. Horner, 336 P.2d 594 (Ut. 1961); Chambers v. Emery, 45 P. 192 (Ut. 1896); Ashton v. Ashton, 788 P.2d 147 (Ut. 1987); Bradbury v. Rasmussen, 401 P.2d 710 (Ut. 1965); Restatement of Trusts (2nd) §45(b) (1959).

CONCLUSION

Appellants respectfully request that this court grant the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 23rd day of February, 1998.

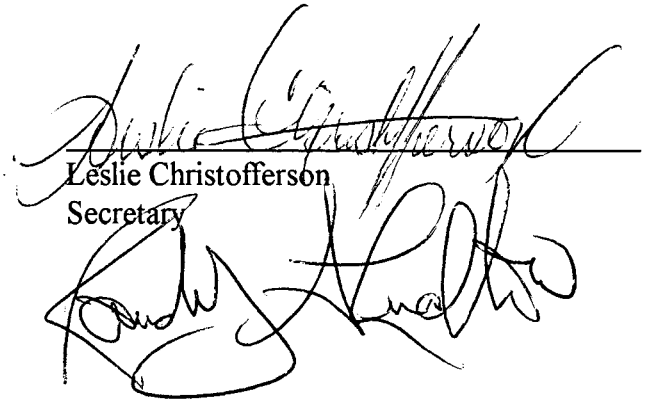


RANDY S. LUDLOW
Attorney for Defendants/Appellants

MAILING CERTIFICATE

I hereby certify that I caused to be mailed four true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI, by placing the same in the United States Mail, in a postage prepaid sealed envelope, this 23 day of February, 1998.

TEX R. OLSEN
225 NORTH 100 EAST
P.O. BOX 100
RICHFIELD, UTAH 84701



Leslie Christofferson
Secretary

IN THE UTAH COURT OF APPEALS

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Grayce Hurd, personal representative of the Estate of Lloyd I. Hurd, Deceased; and Grayce Hurd, personally, Plaintiff and Appellee, v. Llewellyn J. Sherman and Connie Sherman, Defendants and Appellants.	MEMORANDUM DECISION (Not For Official Publication) Case No. 970202-CA F I L E D (November 14, 1997)

Sixth District, Kanab Department
The Honorable David L. Mower

Attorneys: Randy S. Ludlow, Salt Lake City, for Appellants
Tex R. Olsen, Richfield, for Appellee

Before Judges Davis, Wilkins, and Billings.

DAVIS, Presiding Judge:

First, appellants contend that appellee is not a real party in interest because she is not a "surviving spouse." In their answer, appellants admitted that appellee was the "duly appointed and qualified Personal Representative of [decedent's] Estate." Hence, appellants have waived this argument and are not at liberty to raise it for the first time on appeal. See In re Adoption of B.O., 927 P.2d 202, 205 (Utah Ct. App. 1996).

Second, appellants challenge the trial court's determination that a constructive trust was created for appellee's benefit. The trial court's finding that there was a constructive trust is given considerable deference and will only be overturned if clearly erroneous. See In re Estate of Jones v. Jones, 759 P.2d 345, 348 (Utah Ct. App. 1988). "The mere relationship of parent and child does not constitute evidence of such confidential relationship as to create a presumption of fraud or undue influence." Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710, 713 (1965). Rather a confidential relationship requires inequality between the parties such that one person's confidence

is "reposed . . . under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other." Id.

The record evidence demonstrates that appellant Llewellyn Sherman wielded considerable influence over appellee and decedent immediately preceding and after decedent's death.[1] Though the trial court did not make a specific finding that there was a confidential relationship, the record evidence amply supports the existence of a confidential relationship. See generally Homer v. Smith, 866 P.2d 622, 628 (Utah Ct. App. 1993) ("When a trial court's findings and conclusions on an issue are 'less than crystal clear, we may "search [the record] for grounds upon which they may be upheld."'" (alteration in original) (citations omitted)). Accordingly, the trial court's determination that there was a constructive trust created for appellee's benefit was not clearly erroneous and we affirm the same.

Third, appellants challenge the trial court's determination that there was no consideration for the quitclaim deed, the checks, or the vehicle title. Appellants have failed to marshal the evidence in favor of the trial court's findings, and instead reargue the facts in a light most favorable to their position. See In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (discussing appellants' marshaling burden). Accordingly, we accept the trial court's findings regarding the lack of consideration as correct.

Finally, appellants challenge the trial court's order that the appellants "shall execute such assignments and conveyances as are necessary to transfer title thereof to appellee," and contend that there was insufficient evidence to establish any of appellee's claims. We find these arguments without merit and

---

1. Appellants fail to marshal the evidence in favor of the trial court's conclusion that there was a constructive trust created for appellee's benefit. See generally In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) ("An appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" (citation omitted)).

decline to address them. See Christensen v. Christensen, 941 P.2d 622, 626 n.3 (Utah Ct. App. 1997).

The decision of the trial court is affirmed.

James Z. Davis,
Presiding Judge

WE CONCUR:

Michael J. Wilkins,
Associate Presiding Judge

Judith M. Billings, Judge

COVER SHEET

CASE TITLE:

Grayce Hurd, personal representative
of the Estate of Lloyd I. Hurd,
Deceased; and Grayce Hurd, personally,
Plaintiff and Appellee,
v.
Llewellyn J. Sherman and Connie Sherman,
Defendants and Appellants.

Case No. 970202-CA

November 14, 1997. MEMORANDUM DECISION (Not For Official Publication).

Memorandum Decision of the Court by JAMES Z. DAVIS, Presiding Judge; MICHAEL J. WILKINS, Associate Presiding Judge, and JUDITH M. BILLINGS, Judge, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of November, 1997, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to:

Randy S. Ludlow, Esq.
336 S 300 E Ste 200
Salt Lake City UT 84111-2504

Alex R. Olsen, Esq.
125 N 100 E
PO Box 100
Richfield UT 84701

and a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the judge listed below:

Honorable David L. Mower
Sixth District Court
Kane County Courthouse
76 N Main
PO Box 728
Kanab UT 84741

Judicial Secretary

TRIAL COURT:
Sixth District, Kanab Dept., #940600001

TEX R. OLSEN No. 2467
OLSEN & CHAMBERLAIN
225 NORTH 100 EAST, P.O. BOX 100
RICHFIELD, UTAH 84701
ATTORNEYS FOR PLAINTIFF
TELEPHONE: 896-4461

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

* * * * * * * * * * * * *

GRAYCE HURD Plaintiff, -vs- LLEWELLYN J. SHERMAN and CONNIE SHERMAN, Defendants.	**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 940600001 Judge: David L. Mower

* * * * * * * * * * * * * * * * *

The above entitled matter came on regularly for hearing before the Honorable David L. Mower, District Judge, city of Kanab, Utah on April 4, 1996. Plaintiff was present with her attorney, Tex R. Olsen of Richfield, Utah and the Defendants were present with their attorney Randy S. Ludlow, 311 South State #280, Salt Lake City, Utah and the court having heard the witnesses who testified and having examined the various items of evidence entered and being fully advised and having considered objections of Defendant does now make the following Findings of Fact:

FINDINGS OF FACT

1. The parties to this action are individuals. Their names

are Grayce Hurd, Llewellyn J. Sherman and Connie Sherman. Grayce was born on July 26, 1914. She lives at 123 East 100 North, Kanab, Utah. Llewellyn lives in West Valley City, Utah.

2. Grayce Hurd is the mother of four living children, 2 boys, Paul and Llewellyn, and 2 girls, Iris and Dorothy. All are adults. Their father was Rupert Sherman. The son Llewellyn is the same person as Defendant Llewellyn J. Sherman.

3. Defendants Llewellyn and Connie were married together, but are now divorced.

4. Grayce Hurd is currently acting as the personal representative of the Estate of Lloyd I. Hurd, deceased. The estate is being probated in this Court.

5. Lloyd died on June 3, 1992. He was a veteran of the U.S. Military Forces.

6. Lloyd and Grayce lived together since 1964, but never entered into formal marriage contract. They never had any children.

7. Lloyd and Grayce did the following while living together:

a. Lived in several different cities and acquired both real and personal property over the years;

b. Filed tax returns with the IRS and the State of Utah for the calendar year 1986; the filing status on the returns show "married, filing jointly;"

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c. On June 10, 1985, they received a warranty deed from Georgia Phelps in which the grantees are "Lloyd I. Hurd and Grayce Hurd, his wife,...;"

d. On July 10, 1985 they purchased title insurance in the names of "Lloyd I. Hurd and Grayce Hurd, his wife...;"

e. In June and July of 1986 they maintained a joint checking account with Zions First National Bank, Kanab Office.

f. From 1984 to 1986 they maintained a joint checking account with Valley Bank and Trust, Granger-Hunter Office. The account was in the names of Mr. Lloyd Hurd or Mrs. Lloyd Hurd..

8. In 1992 Lloyd became ill with cancer.

9. On June 1, 1992, Lloyd and Grayce owned the following items of property:

a. A house and lot located in Kanab, Kane County, State of Utah, more particularly described as:

Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" of the official survey of Kanab Townsite, and running thence East 6.0 rods, thence north 108.75'; thence West 6.0 rods; thence South 108.75' to the point of beginning.

b. Two shares of stock in the Kanab Irrigation Company.

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c. a travel trailer, fifth-heel type, Teton brand, 1978 model;

d. A travel trailer, 18 feet long, Kit Companion brand;

e. a 1977 Chevrolet pickup truck;

f. A 1980 Oldsmobile automobile;

g. A bank account a Zions First National Bank, Kanab Branch, account number 052-50552-6, worth $20,420.85;

h. A bank account at Zions First National Bank, Kanab Branch, account number 052-33638-5, worth $789.65.

10. On May 4, 1992, Grayce took Lloyd to Veterans Administration Hospital in Salt Lake City, Utah for treatment. He had cancer and was dying. Grayce stayed at Llewellyn's for a couple of days and then returned to kanab.

11. kenneth Lamb of West Jordan, Utah, who is Lloyd's cousin, visited him in the hospital, Lloyd said, "Llewellyn is the only one I trust."

12. On May 14, 1992, Lloyd left the V.A. Hospital and went to Llewellyn's home. Grayce had come from Kanab and was there with them.

13. Kenneth Lamb and his wife, Deon, visited. there was a conversation about Lloyd's need for care. Kenneth mentioned the name of a rest home. Connie called a relative who worked at

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another rest home. Part of the conversation had to do with protecting Lloyd and Grayce's property from being dissipated to pay or long-term care.

14. On about May 15, 1992 iris, Llewellyn and another family member went to the office of Mr. Keith E. Eddington, an attorney. The topics of gift taxes and transfer of documents were discussed.

15. On about May 20, 1992 Connie went to a document supplier or perhaps, an office supply store, and purchased a fill-in-the-blank power of attorney form and took it to Mr. Eddington who filled in the blanks.

16. On Friday, May 29, 1992 Lloyd, Grayce, Llewellyn and Connie met in Llewellyn's home and had a conversation. The conversation probably went something like this:

> Grayce: Lloyd, you're very ill. We should have you live someplace where you can get proper care, like a care center or a rest home.
>
> Lloyd: The only rest home where I would ever go is the same one where my sister Ruth is.
>
> Connie: (makes a phone call to the rest home where Ruth is and then reports:) There is no room there, and besides there is a waiting list to get in. My uncle works at the care center in Richfield, Utah. I'll call him and find out about their program.
>
> Lloyd: Who will pay for all this. Will Medicare pay? Will I lose my home to help pay for all these expenses?
>
> Connie: I just spoke with my uncle, Rodney Rasmussen, he says that Medicare will pay for rest home expenses, but they

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will want you to use up all our money and property first before they will pay anything. He also said something about setting aside transfers to defraud creditors. I didn't understand it all, but something about being able to cancel transactions that had taken place for up to 18 months before admission to the rest home.

Lloyd: I don't want any of my property to go to the government. I want Grayce to have it. I'm just afraid that if she has it, Paul and Iris will try to take it from her and that she will allow them to do it. Llewellyn, why don't I give it all to you, then you can make sure that Grayce will be taken care of. Grace, is that ok with you?

Grayce: It that's what you want, whatever you say.

Lloyd: Grace and I have been together for almost 30 years, but we never did get married. Still, I think I should treat her as my wife.

Grayce: What about social security, Lloyd. Will I be able to collect under your name, even though we never got married?

Connie: That worries me. What if Mom collects social security under Dad's name and then the government discovers they weren't married. They'll want her to pay it back. If she's spent the money, then maybe the home would be in danger.

Llewellyn: Let's do this: I'll keep all the property for a year. Mom can apply for social security. If nobody says anything for a year, then we should be safe and I'll give all the property back to her. In the meantime, she can continue living in the house.

Lloyd: That sounds good to me, but I'm not dead yet. I want to go back home.

Llewellyn; I know, I know. But, let's call that lawyer and get the power of attorney signed. Then if anything should happen to you then you and Mom will be protected.

17. Mr. Eddingtom came, met with Lloyd, who signed the power of attorney. It was left with Llewellyn. Grayce paid Mr.

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Eddington $50.00.

18. Llewellyn made arrangements for Lloyd to stay with Kenneth and Deon Lamb. Lloyd went to their home on May 29, 1992.

19. Llewellyn and Grayce left for Kanab on Saturday, May 30, 1992.

20. Lloyd took a turn for the worse on Tuesday, June 2, 1992 while at the Lambs home. Mr. Lamb called someone and then took Lloyd back to the Veterans Administration hospital.

21. On Tuesday, June 2, 1992, Llewellyn had blank checks for account 052-50552-6. He filled out two as follows:

Check #	Payee	Amount	Signature	For
101	Llewellyn Sherman	$10,000.00	Lloyd I. Hurd Llewellyn Sherman	Gift
102	Connie Sherman	$10,000.00	Lloyd I. Hurd Llewellyn Sherman	Gift

Llewellyn presented these checks for payment along with a copy of the power of attorney. They were at the bank until noon when they left without having negotiated the checks.

22. They went to a title company. Grayce paid to have a quitclaim deed prepared. Grayce and Llewellyn signed the deed and offered it for recording at the County Recorder's office. It was recorded on June 2, 1992 at 2:55 p.m. at book 0120 page 777 of the official records of Kane County. Grayce paid the recording fee. The grantors in the deed are "Lloyd I. Hurd and Grayce Hurd, husband and wife." The grantees in the deed are "Llewellyn J.

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Sherman and Connie Sherman, husband and wife, as joint tenants with full rights of survivorship, and not as tenants in common." Llewellyn signed the deed for Lloyd as his attorney in fact.

23. They went to the State Tax Commission office in Kanab where Grayce signed the titles to the 1977 Chevrolet pickup, the 5th wheel and the 18-foot travel trailers. The titles were transferred. Grayce paid all the transfer fees.

24. They returned to the bank. Llewellyn opened an account there in the name of him and Connie. A bank officer agreed to negotiate the checks and deposit them into this new account.

25. Neither Llewellyn nor Connie paid money nor transferred anything of value to Grayce in exchange or the quitclaim deed, the checks or the vehicle titles.

26. Lloyd died on June 3, 1992

27. On June 5, 1992 the Salt Lake City - County Health Department issued a Certificate of Death for Lloyd. The information listed therein is "Wife - Grayce N. Hurd \ 123 East 100 North Street #61 \ Kanab, Utah 84741."

28. Lloyd's funeral was held on June 8, 1992 in Kanab. After the services, Llewellyn and Grayce had a conversation. He said, "Let's wait a year and see what happens with Social Security. Then I'll give all the property back to you."

29. Llewellyn paid Lloyd's funeral and burial expenses and

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has purchases headstones or both Lloyd and Grace. There was no evidence given at trial concerning values.

30. In July of 1993, Llewellyn bought some materials and helped install them on the roof of the home in Kanab. There was no evidence given at trial concerning values.

31. In the spring of 1993, Llewellyn transferred the title to the 1978 Teton 5th-wheel to Grayce. She has possession of it in Kanab.

32. Connie testified that she claims no interest in the home and lot in Kanab. She said that she and Llewellyn were recently divorced in Salt Lake County and that the decree awards all of her interest in that property to him.

33. More than one year has passed since Lloyd's death.

34. No claims have been made by Social Security, Veterans' Administration nor any Medicare or long term care provider.

Based upon the foregoing Findings of Fact the court now enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. A constructive trust was created for the benefit of the Plaintiff.

2. All of the property received in trust for the benefit of the Plaintiff should be immediately returned, assigned and transferred to Plaintiff including the following:

a. A house and lot located in Kanab, Kane County, Utah or particularly described as:

Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" o the official survey of Kanab Townsite, and running thence East 6.0 rods; thence North 108.75'; thence West 6.0 rods; thence south 108.75' to the point of beginning.

b. 2 shares of stock in the Kanab Irrigation Company.

c. A house trailer, 5th-wheel type, Teton Brand, 1978 model

d. A travel trailer, 18 foot long, Kit Companion brand;

e. 1977 Chevrolet pickup truck

f. 1980 Oldsmobile Automobile

g. $20,000.00 taken by Defendants from Zions First National Bank, account number 052-50552-6;

3. Plaintiff is entitled to judgment against the Defendants in the sum of $20,000.00 together with costs of court incurred.

DATED this 27 day of September, 1996.

DISTRICT JUDGE

OLSEN & CHAMBERLAIN
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TEX R. OLSEN No. 2467
OLSEN & CHAMBERLAIN
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RICHFIELD, UTAH 84701
ATTORNEYS FOR PLAINTIFF
TELEPHONE: 896-4461

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

* * * * * * * * * * * * * *

GRAYCE HURD Plaintiff, -vs- LLEWELLYN J. SHERMAN and CONNIE SHERMAN, Defendants.	**AMENDED DECREE, JUDGMENT AND ORDER** Civil No. 940600001 Judge: David L. Mower

* * * * * * * * * * * * * * * * * *

The above entitled matter came on regularly for hearing before the Honorable David L. Mower, District Judge, city of Kanab, Utah on 4th day of April, 1996. Plaintiff appeared in person with her counsel, Tex R. Olsen of Richfield, Utah and the Defendants appeared in person their counsel Randy S. Ludlow, 311 South State #280 Salt Lake City, Utah and the court having heard various witnesses testifying or the parties and having examined evidence received and the court having made its Findings of Fact and Conclusions of Law does now Decree an Order:

1. The constructive trust created by the parties is hereby terminated and the items transferred to the Defendants or either of them as constructive trustees shall be delivered to Plaintiff within a period of 10 days from the date of this Order. In addition to delivery of the items said forth, in this order,

Defendants shall execute such assignments and conveyances as are necessary to transfer title thereof to Plaintiff, Grayce Hurd:

a. Defendant's shall deed and convey unincumbered title to the home located in Kanab, Kane County, Utah and particularly described as follows:

> Beginning at a point 6.0 rods East of the Southwest corner of Lot 2, Block 26, Plat "A" of the official survey of Kanab Townsite, and running thence East 6.0 rods; thence North 108.75'; thence West 6.0 rods; thence South 108.75' to the point of beginning.

Together with 2 shares of stock in the Kanab Irrigation Company.

b. travel trailer, 5th-wheel type, Teton Brand, 1978 model

c. A house trailer, 18 foot ling, Kit companion brand;

d. 1977 Chevrolet pickup truck

e. 1980 Oldsmobile Automobile If the Oldsmobile is in the possession of Plaintiff the Defendants shall execute such assignments as are necessary to clear title of the property in Plaintiff.

2. Further Plaintiff, is granted judgment against the Defendants, and each of them in the sum of $20,000 and costs.

DATED this 27 day of September, 1996.

DISTRICT JUDGE

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IN THE UTAH COURT OF APPEALS

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Grayce Hurd, personal representative of the Estate of Lloyd I. Hurd, Deceased; and Grayce Hurd, personally,	)	ORDER
Plaintiff and Appellee,	)	Case No. 970202-CA
v.	)	
Llewellyn J. Sherman and Connie Sherman,	)	
Defendants and Appellants.	)	

This matter is before the court upon appellants' petition for rehearing, filed November 26, 1997.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 23rd day of December, 1997.

FOR THE COURT:

Julia D'Alesandro
Clerk of the Court