

1990

Jesse E. Smith and Beth M. Smith v. Salli Smith
West, Ken Anderson, and Charles L. Appleby, Jr. :
Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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900277

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JESSE E. SMITH and BETH M. SMITH	:	
	:	Case No. 900277-CA
Plaintiffs-Appellants,	:	
	:	
v.	:	Argument Priority
	:	Classification: 14-b
SALLI SMITH WEST, KEN ANDERSON,	:	
and CHARLES L. APPLEBY, JR.,	:	
	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Fifth Judicial District Court for Washington County
The Honorable Dean E. Conder, Senior Judge

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COURT OF APPEALS

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* * *

KEY TO ABBREVIATIONS:

D	Defendants' Exhibit
P	Plaintiffs' Exhibit
R	Record
T	Reporter's Transcript of Trial, April 21, 1989

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IN THE UTAH COURT OF APPEALS

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	:	
Defendants-Respondents.	:	

JURISDICTION OF THE UTAH COURT OF APPEALS

Jurisdiction in the Utah Court of Appeals is properly founded by Rule 42 of the Utah Rules of Appellate Procedure.

NATURE OF THE PROCEEDINGS

This appeal arises from a judgment entered by the Honorable Dean E. Conder, Senior Judge, sitting in the Fifth Judicial District Court in Washington County, where Appellants sought specific performance of an alleged right of first refusal pertaining to real property. The trial judge, however, upheld Salli Smith West's sale of the property, vesting title in Respondents Ken Anderson and Charles L. Appleby.

As a passing note, this Court should be aware that Appellants' title page reflecting that the trial court sat in Iron County is obviously a typographical error. The Court should further note that the Plaintiff Genevieve A. Smith apparently has not appealed the trial court's decision, and that Respondents'

counsel represents only Respondents Ken Anderson and Charles L. Appleby, Jr.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Respondents believe that the following issues constitute the appropriate scope of judicial review in the instant case:

- I. Appropriate standards of appellate review compel the affirmation of the trial court's judgment.
- II. Appellants have not met the high evidentiary standard required to support a decree for specific performance.
- III. The statute of frauds as to Jesse Smith's claim has been satisfied in the instant case.
- IV. The Decree of Final Distribution and deed issued concurrent thereto in the probate of Elias Penn Smith's estate merged any claimed right of first refusal.
- V. The doctrines of promissory and equitable estoppel bar Jesse Smith's assertion of any right of first refusal.
- VI. Jesse Smith lacks the requisite "clean hands" to assert his right of first refusal.
- VII. The statute of frauds, a lack of mutuality, and the failure of Beth Smith to testify preclude her from asserting any claim.
- VIII. Though not an Appellant, Genevieve Smith lacked standing to assert any first right of refusal before the trial court.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Where necessary, Respondents shall cite to appropriate constitutional and statutory provisions within the body of the brief and shall quote the same, unless otherwise noted, in their entirety.

STATEMENT OF THE CASE

Appellants Jesse and Beth Smith, together with their stepmother Genevieve Smith, brought an action for specific performance alleging their desire to exercise a "first right of refusal" pertaining to land situate in Washington County. As specific performance is an equitable remedy, it required these parties to come before the trial court with a clear right, with clean hands, and to bear a high burden of proof to prevail. The Honorable Dean E. Conder sat as trial court judge and duly noted early on in the record that the issues would ultimately be decided based on the credibility of the witnesses. [Transcript (hereinafter T) at 22] Indeed, throughout the trial, Judge Conder repeatedly inquired from the bench as to the veracity of both Jesse Smith's and Salli Smith West's testimony regarding a September, 1986, phone call, the substance of which was widely contested by the parties. Ultimately, Judge Conder requested permission of counsel to examine en camera one of the versions of the testimony. [See T at 22, 34, 41-43, 73, 74, and 88-90. The en camera phone call is reported at T 144-145; cf. testimony of Jesse Smith at 41-42, testimony of Salli Smith West at 72-74.]

The trial court's examination of the witnesses' credibility was focused primarily on two sibling heirs of Elias Penn Smith, who passed away February 1, 1976, leaving a wife, Genevieve A. Smith, and three children by a prior marriage, Jesse Smith, Penn Harris Smith, and Salli Smith West. The estate of Elias Penn Smith was probated as Washington County Civil No. 2070. The Plaintiffs Genevieve A. Smith and Jesse E. Smith, together with the Defendant Salli Smith West, then known as Salli Smith Girard, executed a Stipulation and Petition for Distribution on February 7, 1977, received as P-1. [Appendix 1] It did not bear the signature of Appellant Beth Smith. Specifically, paragraphs five and eight thereof, concerning the subject property, called for the distribution of the same with an attendant right of first refusal to Genevieve A. Smith, Jesse E. Smith, and Salli Smith West as tenants in common. These paragraphs read as follows:

5. The property known as Pah Tempe Hot Springs, the description of which is in the Inventory and Appraisement, should be distributed to Genevieve A. Smith, Jesse E. Smith, and Salli Smith Girard, as tenants in common.

. . . .

8. The parties who take the property set forth above as tenants in common hereby agree to grant their fellow tenants a right of first refusal to buy their interest in said property in the event that tenant wishes to sell. That tenant shall advise the co-tenant of his desire to sell, and if a bona-fide offer is received from a third party, that offer must be met or the tenant may sell to said third party or any other third party. If the tenant desires to exercise the first right of refusal and a third offer is unavailable, then the interest shall be determined by an evaluation of the fair market value of said property and

can be accompanied by the appointment of an appraiser by said tenants. Each tenant shall appoint an appraiser and if the tenants are still in disagreement, those appraisers shall appoint another appraiser and the decision of that appraiser shall be final. [Emphasis added.]

Respondents introduced, however, the subsequent Decree of Final Distribution in the matter of the Estate of Elias Penn Smith as Defendants' Exhibit No. D-8. [Appendix 2] Executed by J. Harlan Burns on July 23, 1977, the decree contained no language in reference to a right of first refusal, and in paragraph 4.b. thereof states simply as follows:

4.b. The property known as Pah Tempe Hot Springs and set forth in Exhibit "B" attached hereto is distributed to Genevieve A. Smith, Jesse E. Smith and Salli Smith Girard, each having a one-third interest, as tenants in common.

There were no reservations in the title. Exhibit B to D-8, also separately marked, identified, and received as Defendants' Exhibit No. D-9, a quit claim deed, further shows that, while both Genevieve Smith and Salli Smith West received their one-third of the property, the remaining one-third vested not only in Jesse E. Smith, but in his wife Beth M. Smith as well. The latter couple held their third interest inter se as joint tenants. [Appendix 3] Simply stated, neither the Decree of Final Distribution nor the final deed corresponds to the petition for distribution filed with the probate court seven months earlier in February of 1977. There is no reservation of a first right of refusal in the quit claim deed, and, indeed, there is no restatement of the same whatsoever in the Decree of Final Distribution. Though no

testimony explains why these documents varied from the antecedent petition, it is clear that Appellants never appealed the same on the basis of fraud, misrepresentation, or mistake. [T at 115, 128]

These four tenants held the property through 1986, when Salli Smith West first entertained several discussions with Respondents Anderson and Appleby in reference to their purchasing her one-third interest in the property. Salli Smith West testified that, while she was aware that she had executed a first right of refusal, she did not feel it legally binding, but rather extended that right to her other co-tenants as a matter of family courtesy. [T at 64,77]

Though there was a dispute in the testimony as to how Salli communicated Anderson and Appleby's offer to her relatives, the trial court clearly found that Salli's testimony was authoritative, accurate, and credible over that of her brother, Appellant Jesse Smith. Salli's phone records indicate that on September 26, 1986, at 12:42 p.m., she telephoned her brother in Las Vegas, Nevada, at his place of employment and indicated that she had received an offer for \$125,000 for her one-third interest in the property. [T 63-64, 73, 77] Salli explained to Jesse the terms of the agreement, and at that time Jesse Smith indicated to Salli that she should go ahead and sell the property, and that he would provide her with a release and waiver of any first right of refusal that may otherwise exist in himself, as well as his stepmother Genevieve Smith and his wife Beth Smith. [Id.] Jesse subsequently drafted and signed a letter dated September 29, 1986, which Salli

Smith West received on October 2, 1986. [P 4; see Appendix 4] Paragraph two of that letter explicitly memorializes the earlier verbal statement made by Jesse Smith to his sister Salli Smith West. That statement is as follows:

What I will need from you is a copy of their offer to buy, properly signed by them, and notarized [sic]. Also, a copy of the sales agreement. I will give you a letter signed by Beth, Gen, And [sic] myself releasing you from our option of first right of refusal.

At trial, Jesse Smith testified that he never intended to comply with the language of the letter, but, rather, wrote it simply as a ploy to flesh out the terms of the offer from Anderson and Appleby. [T 44-45, 99, 102-103] Indeed, in filing this suit, he acted totally contrary to the clear language thereof.

The trial court found that Salli Smith West complied with the terms of Jesse Smith's letter by supplying him sufficient information and documents regarding the offer. This information was provided by Salli's letter of October 6, 1986, P-5, which enclosed P-7 (the closing document). [T 36, 38] The trial court further found that the Defendant Salli Smith West had detrimentally relied on both the oral conversation of September 26, 1986, and the letter in completing the sale to Respondents Anderson and Appleby, and that, further, Anderson and Appleby had detrimentally relied on the letter insofar as they had been aware of some first right of refusal, but were subsequently assured by Salli Smith West that the same had been taken care of or waived. [See Appendices 5 and 6.]

Despite the clear language of his letter, Jesse Smith, joined Appellant Beth Smith and stepmother Genevieve Smith in

filing an unverified complaint on October 17, 1986, seeking to set aside the sale to Anderson and Appleby and specific performance of their alleged first right of refusal. [R 1] Paragraph three of that complaint states that, pursuant to the joint ownership of the property, each had extended to the other a "right of first refusal." In an affidavit filed with the trial court on January 22, 1988, Jesse Smith further states, in paragraph four thereof, that Genevieve Smith "his mother [sic] is also a co-owner with the same right of first refusal."

Beth M. Smith never testified at trial. On cross-examination, Genevieve Smith conceded that she had conveyed all of her interest in the subject property to a corporation; this having occurred in May of 1988. [T 111-112] Judge Conder, in his initial Memorandum Decision, noted that, as Genevieve Smith had conveyed her property to a corporation, she no longer had standing as a co-tenant to assert any right of first refusal. [Appendix 5] Furthermore, Judge Condor found Beth Smith to have never had a right of first refusal, as she was never a signatory to the original February, 1977, stipulation. [P 1] Paragraphs two and three of the Memorandum Decision are set forth in verbatim as follows:

2. Genevieve Smith created a Nevada corporation and transferred her interest in the Pah Tempe property to this corporation. She did not feel that she had to offer the property to anyone else because it was "her corporation" and that the first refusal did not apply. Whether or not it applied becomes immaterial at this point because she is no longer a co-tenant and has no right to claim the benefit of such a right. The courts have

long distinguished between the individual and a corporation. The fact that she may be the sole stockholder does not alter the fact that she is no longer a co-tenant. The court must hold against her on her claim.

3. Beth M. Smith is not a party to the stipulation and cannot claim any rights under it.

With regard to the remaining Appellant Jesse Smith's claim, the following pertinent provisions from paragraph one of the trial court's Memorandum Decision are telling:

This court determines that Salli Smith gave sufficient notice to the defendant, Jesse Smith, on September 26, 1986, by a verbal notice of the offer of Appleby and Anderson. Mr. Smith said he had no desire to meet the offer. He further assured West that he would send her a letter to that effect. On September 29, 1986, he sent a letter to West saying, "I will give you a letter signed by Beth, Gen, and myself releasing you from our option of first right of refusal." He did not send that letter. In fact, he then stalled by asking for documents that seem irrelevant to the "right". I find that Mr. Smith, agreed to the sale by West in the telephone conversation on September 26, 1986, and that he gave up any claim he had under his Right of First Refusal at that time. Further more, I find that by his representation in the phone conversation and also by the letter, he is estopped from asserting the claim. Mrs. West, in reliance upon his representations, consummated her sale and put herself in a position of jeopardy by his conduct.

SUMMARY OF ARGUMENT

I.

The standard of review under Utah law provides that a trial court's findings shall not be set aside unless clearly erroneous. In light of this standard and the exclusive prerogative

of the trial court to weigh the credibility of the witnesses, it becomes incumbent upon this Court to note the various contradictions in Jesse Smith's testimony, particularly when compared to that of his sister Salli Smith West. A plethora of evidence supports the trial court's ruling.

II.

Appellants have failed to sustain a high evidentiary standard to justify a decree of specific performance in equity.

III.

Section 25-5-3 of the Utah Code was satisfied by Exhibit P-4, a letter drafted and signed as a matter of law by Jesse Smith. This letter is not precatory in nature, and is fully integrated to the subject property. The signature requirement of the statute of frauds is satisfied by the typed signature of Jesse Smith when the letter was concededly drafted, signed, and mailed by him to his sister Salli Smith West.

IV.

Any alleged right of first refusal was extinguished and merged in the Decree of Final Distribution and deed issuing from the estate of Elias Penn Smith. The merger doctrine operated to eliminate any agreements not collateral to the taking of title or to encumbrances regarding the property. Nothing could be less collateral than a right of first refusal. Insofar as the Decree of Distribution and the deed fail to mention any such right, the same is extinguished as a matter of law and cannot be reasserted absent an attack on the probate proceedings bottomed in fraud.

V.

Jesse Smith is barred from asserting the statute of frauds as a defense or, for that matter, from asserting any defense by the doctrines of both promissory and equitable estoppel. The trial court found that Jesse Smith had, both orally and in writing, advised his sister, Salli Smith West, to proceed with the sale of the property to Respondents. The trial court further found that Salli had reasonably relied on the statements of her brother to her detriment. The doctrines of estoppel, as set forth in J.P. Koch, Inc. v. J.C. Penny Co., Inc., 534 P.2d 903 (Utah 1975), are clearly applicable in the instant case.

VI.

Jesse Smith lacks the requisite clean hands to assert any equitable rights before the trial court. Jesse came before the court concededly admitting that he drafted and signed Exhibit P-4 absent any intent to comply with its terms. Indeed, Jesse conceded on cross examination that his interaction with his sister was merely an artifice to get her to perform certain acts and that he did not intend to act in accordance with either his oral or written representations. As equity demands fair and equitable conduct in those seeking it, Jesse Smith's request for equity must be denied.

VII.

Beth Smith's claim is barred by the statute of frauds, a lack of mutuality, and her failure to provide the trial court with any testimony. As Beth Smith was not a party to the stipulation, there is no covenant running to her, nor can she benefit from her

husband's testimony. Further, as Beth Smith failed to testify, the Intermediate Court of Appeals has previously held that she cannot reassert her claim on appeal or somehow require a remand to now assert a claim which, by her actions, has been conclusively waived at trial.

VIII.

Though not an appellant, Genevieve Smith lacks standing to assert any first right of refusal before the trial court. Approximately one year prior to trial, Genevieve conveyed her one-third interest, without notice to her co-tenants, to a Nevada corporation. As rights of first refusal are freely assignable, and her deed contained no reservations, she no longer is a proper party in interest to assert that claim.

ARGUMENT

I.

APPROPRIATE STANDARDS OF APPELLATE REVIEW COMPEL THE AFFIRMATION OF THE TRIAL COURT'S JUDGMENT.

Prior to July 1, 1985, the Utah Constitution, art. VIII, § 9, specifically set forth a greater standard of review in equitable cases. [See e.g., Reed v. Alvey, 610 P.2d 1374 (Utah 1980); Bown v. Loveland, 678 P.2d 292 (Utah 1984).] Under this standard, the appellate court cannot reverse the trial court judgment unless the evidence in the case clearly preponderated against its findings. In Adams v. Gubler, 731 P.2d 494 (Utah 1986), however, Justice Durham, speaking for a unanimous Utah Supreme Court, noted that even though the former constitutional section had been

redrafted, Rule 52(a) U.R.C.P., which became effective January 1, 1987, provided that findings of fact "shall not be set aside unless clearly erroneous." [Id. at 496, n. 3] This standard applied regardless of whether the case is one in equity or one in law. [See Barker v. Francis, 741 P.2d 548 (Utah App. 1987); see also, Lemon v. Coates, 735 P.2d 58 (Utah 1987).] Most recently, in Judd Family Limited Partnership v. Hutchings, 141 Utah Adv. Rep. 8, Justice Howe stated the applicable standard as follows:

Rule 52(a), Utah Rules of Civil Procedure, forbids us from setting aside factual findings unless clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. We find nothing in the trial court's findings of fact which would suggest that they are erroneous, let alone "clearly erroneous." In Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985), we stated that we would not overturn a finding of fact without first marshaling all the evidence supporting the finding and then demonstrating that when viewed in the light most favorable to the trial court, the evidence is clearly insufficient to support that finding. [Id. at 9]

The second portion of Rule 52(a) U.R.C.P. indicates that due regard "shall be given to the opportunity of the trial court to judge the credibility of the witnesses." As before stated, in this case, the trial court was required to judge the credibility of witnesses. The trial court was able to view both the Appellant Jesse Smith and Respondents' grantor Salli Smith West. Having heard their testimonies and, indeed, having, with permission of counsel, made certain en camera inquiries relative to the earlier testimony of Jesse Smith, the trial court was uniquely positioned to determine the veracity of their testimonies. As shall be set

forth more succinctly in Point VI hereafter, the trial court found the credibility of Jesse Smith lacking in the instant case, and Judge Condor's findings are well supported by his belief in the testimony of Salli Smith West. Appropriate appellate standards mandate that those findings be sustained on appeal.

II.

APPELLANTS HAVE NOT MET THE HIGH EVIDENTIARY STANDARD REQUIRED TO SUPPORT A DECREE FOR SPECIFIC PERFORMANCE.

Appellants below sought specific performance of a claimed right of first refusal. The nature of the specific-performance remedy required that they meet a high evidentiary standard to justify a favorable decree. [See Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491, at 493 (1967).] 71 Am. Jur. 2d Specific Performance § 208 (1973), states the applicable standard as follows:

Where an action is brought for specific performance, the established rule is that more than a mere preponderance of testimony is required to establish the existence of the contract when its existence is denied. In order that specific performance of a contract may be decreed, the evidence of the making of the contract must be clear and convincing, or as stated in some cases, clear, cogent, and convincing, or strong and conclusive.

In the instant case, to establish their claim for specific performance, Appellants had to clearly establish at trial that the "right of first refusal" had not been waived, merged into a subsequent Decree of Final Distribution and deed or that they were not estopped from asserting the same or that byth had not otherwise transferred or waived their rights, if any.

In the pleadings before the court, Appellants claimed

that as co-tenants they held a right of first refusal. As to Beth Smith, this is patently untrue, and, by the time of trial, as to Genevieve Smith, it was also untrue. Furthermore, there was no mention in the pleadings whatsoever that Appellant Jesse Smith had both verbally and in writing promised his sister, Salli Smith West, that he would provide her a written waiver of whatever first right of refusal Appellants claimed. Jesse's testimony at trial, however, was contradictory and failed to establish either the good faith or clean hands required of those seeking specific performance. As a result, the trial court could not rule in favor of the equitable remedies Appellants sought. [See e.g. Ferris v. Jennings, 595 P.2d 857 (Utah 1978).]

III.

THE STATUTE OF FRAUDS AS TO JESSE SMITH'S CLAIM HAS BEEN SATISFIED IN THE INSTANT CASE.

While in point one of Appellants' brief the applicability of Section 25-5-3 of the Utah Code is discussed at length, Respondents believe that Section 25-5-1 is more applicable to the instant case. At trial, Appellants sought enforcement of an alleged right of first refusal. Defendant Salli Smith West claimed that right did not exist as a legal requirement or that, secondarily, if it did exist, at least one of the Plaintiffs had waived the same in writing.

As to Jesse Smith's claim, Section 25-5-1 of the Utah Code states as follows:

No estate or interest in real property,
other than leases for a term not exceeding one
year, nor any trust or power over or concer-

ning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. [Emphasis added.]

The statute of frauds does not require that a signature to the memorandum satisfying it be in any particular form or be handwritten. As stated in 72 Am. Jur. 2d Statute of Frauds § 358:

There is no requirement that the signature to a memorandum required by the statute of frauds be in any particular form [it] need not be signed in ink. It may be signed by lead pencil. . . . except where the statute . . . requiring . . . an "actual manual subscription," it is well established that it is not essential to satisfy the statute of frauds that the memorandum required thereby be signed by the hand of the party to be charged. The . . . signature may be affixed by a stamp, or it may be typewritten or printed mechanically, if, but only if, by signing in any of these methods the party whose signature is essential intends to authenticate the instrument as his act. . . .

The signature may consist of any name or symbol used by a party with the intention of constituting it his signature. [Citations omitted.]

Genevieve Smith is not an Appellant in the instant case. Beth Smith neither acquired, at the outset, any first right of refusal nor testified at trial. As to Jesse Smith, however, the trial court received into evidence Exhibit P-4, a letter which he concededly drafted and mailed to his sister, Salli Smith West. Paragraph two of that letter states as follows:

What I will need from you is a copy of their offer to buy properly signed by them and notarized [sic]. Also a copy of the sales

agreement. I will give you a letter signed by Beth, Gen, And [sic] myself releasing you from our option of first right of refusal.
[Appendix 4] [Emphasis added.]

The trial court found that Exhibit P-4 memorialized Jesse's oral representations made to his sister Salli Smith West. Not precatory in nature, Jesse Smith's letter, which, at the very least, binds him, states that he would not claim any first right of refusal. Findings of fact 17 through 23 set forth the nature of the oral and written representations of the Appellant Jesse Smith and Defendant Salli Smith West's appropriate compliance with the conditions precedent to Jesse's oral and written agreement to release his "first right of refusal." [See also, T. at 69, 73-76, 88, 95-96, 98, and 104.]

The recent Idaho case, George W. Watkins Family v. Messenger, 115 Idaho 386, 766 P.2d 1267 (Idaho App. 1988), held that the word "subscribed", similar to that in Utah's statute of frauds, meant that the "signature" may be any symbol made or "adopted by a party, with an actual or apparent attempt to authenticate the writing and give it force and effect". The Idaho court noted that, while the traditional form of a signature is normally handwritten, the Idaho statute, similar to Utah's, does not require an actual manual subscription, and, for that reason, the signature may be written in pencil, typed, printed, or made with a rubber stamp or impressed into the paper. [Id., citing Restatement (Second) of Contracts § 134, comment a (1981).]

In Salt Lake City v. Hanson, 425 P.2d 773 (Utah 1967), Chief Justice Crockett defined the word "signature" as follows:

In regard to a signature, it is the intent rather than the form of the act that is important. While one's signature is usually made by writing his name, the same purpose can be accomplished by placing any writing, indicia or symbol which the signor chooses to adopt and use as his signature and by which it may be proved: e.g., by finger or thumb prints, by a cross or other mark, or by any type of mechanically reproduced or stamped facsimile of his signature, as effectively as by his own handwriting. [Id. at 774]

In the instant case, Jesse Smith introduced P-4 as his letter and, further, testified that he had mailed it to the Defendant Salli Smith West. Indeed, both of the parties accepted P-4 as authentic, and there was no issue as to it having been dated, typed and mailed by Jesse Smith. [T 44-45] Clearly, Salli Smith West also regarded the letter as genuine and relied on the same to her detriment, though she was subsequently sued by Jesse Smith and her other "co-tenants". [T 75-76, 88-90]

On cross examination regarding P-4, Jesse Smith's letter of September 29, Jesse Smith conceded as follows:

Q. [BY MR. HUGHES] And in that letter, you state, "Send me the documents, and I'll give you the release"?

A. [BY JESSE SMITH] How many times have I said "yes" to that?

. . . .

Q. BY MR. HUGHES: And did -- what I am saying is did you state in that letter "Send me the documents, but if I don't like the terms I discover, I'll refuse to give you a release"?

A. Well, I would guess that would be understood.

Q. Oh. And where would it be understood from D-4, [sic] that that was your intent, Mr. Smith?

A. It wouldn't, I guess. The way it's written. [T 102-103]

Jesse Smith wrote, dated and subscribed P-4, which satisfied the requirements of § 25-5-1 of the Utah Code. P-4 is not precatory; it is integrated to Respondents' purchase of the subject property. Jesse Smiths' claim before the trial court and on appeal that the statute of frauds has not been satisfied must be rejected.

IV.

THE DECREE OF FINAL DISTRIBUTION AND DEED ISSUED CONCURRENT THERETO IN THE PROBATE OF ELIAS PENN SMITH'S ESTATE MERGED ANY CLAIMED RIGHT OF FIRST REFUSAL.

Respondents take issue with the finding of the trial court that the right of first refusal, as set forth in the Stipulation and Petition for Distribution, was not properly merged by the Decree of Final Distribution and deed concluding the probate of Elias Penn Smith. These latter documents were collectively recorded as Entry No. 185994 in the Records of Washington County on August 3, 1977. [See D-8, Exhibit B thereto; Exhibit B being separately marked as D-9.]

The trial court, on the basis of G.G.& A., Inc. v. Leventis, 773 P.2d 841 (Utah App. 1989), held that the right of first refusal set forth in the Stipulation and Petition for Distribution, executed seven months prior thereto and marked as Plaintiff's Exhibit P-1, was a collateral agreement surviving the Decree of Final Distribution and deed regarding the subject

property which issued therefrom. In its Memorandum Decision, the trial court stated as follows:

The Defendants' contend that any Right of First Refusal contained in the stipulation was merged into the Decree of Distribution and deed. They cite the case of Davis v. Davis, (Okla. App., 632 P.2d 769) as their authority for the claim. This court finds that case is distinguishable. The Utah case of G.G.A., vs Leventis, (107 Utah Adv. Rep. 65) is more in point. The agreement of First Refusal is certainly a collateral agreement to the division and distribution of the property in the estate.

Respondents, despite the trial court's ruling, nonetheless, must strongly urge on appeal that rights of first refusal are not collateral to the title of property and, as such, cannot be excepted therefrom by either the unilateral or mutual intent of the parties. Indeed, it is difficult to see how such a direct reservation, if valid, is anything but directly connected to the nature and quality of title taken. In making this assertion, Respondents refer this Court to the case of Secor v. Knight, 716 P.2d 790 (Utah 1986). [See also, Dobrusky v. Isbell, 740 P.2d 1325 (Utah 1987); El Sol Corp. v. Jones, 97 N.M. 645, 642 P.2d 1104 (1982).] In the Secor case, Justice Durham, speaking for a unanimous Utah Supreme Court, stated that Utah has long accepted the doctrine of merger. Thereafter, Justice Durham stated the general rule of merger as follows:

[O]n delivery and acceptance of the deed the provisions of the underlying contract for the conveyance are deemed extinguished or superseded by the deed. The basis for imposing the doctrine of merger is not due to any peculiar sanctity attaching to the deed itself, but because it is regarded as the final repository

of the agreement which led to its execution.
[Id. at 792] [Citations omitted.]

Justice Durham then proceeded to distinguish between those contractual terms collateral to the agreement to convey property, and therefore not merged by deed, and those agreements and covenants which related directly to the taking of title and encumbrances on the property which, by their nature, cannot be considered collateral because they relate to the same subject matter as does the deed. Her discussion on page 793 of the Secor decision is illuminative:

For example, in Stubbs v. Hemmert, [567 P.2d 168 (Utah 1977)] this court found that the terms in the underlying contract relating to the removal of air compressors from a piece of property were collateral to the agreement to convey the property and were therefore not extinguished by the deed. See also Kelsey v. Hansen 18 Utah 2d 226, 419 P.2d 198 (1966) (recognizing the existence of cases in equity which result in nonmerger, but declining to apply nonmerger under the facts of that case). In this regard, covenants relating to title and encumbrances are not considered to be collateral because they relate to the same subject matter as does the deed. [Id. at 793]

The Secor decision clearly mandates that terms and covenants which directly relate to the title of the property or to encumbrances thereon are not collateral, but, as they impinge upon the title itself, they are merged into any subsequent deed. Clearly, only obligations truly collateral to the title itself would survive the deed and not be extinguished by it. Ultimately, if the terms relate to the taking of the title itself, or impinge on the quality thereof, they cannot be collateral despite any contrary intent of the parties. With regard to the defendant's

contention in the Secor case, Justice Durham stated the latter rule as follows:

As this case involves terms relating to title, which are not collateral, the Knights' reliance on intent is misplaced. [Id.]

The Decree of Final Distribution, and the deed which was recorded as a part thereof, conveyed the property in question in differing amounts and to differing parties than was contained in the Stipulation and Petition for Distribution. [See D 8, D 9, cf. P 1.] Indeed, Beth Smith suddenly rises to the status of a grantee under Exhibit B to D-8 and D-9, and neither document mentions the right of first refusal, which would have obviously encumbered the nature of the title taken by the various grantees. Salli Smith West testified that she offered the property to her family purely as a matter of courtesy; otherwise, she did not recognize that right. [T 77-79] Once again, regardless of the parties' intent, the documents concluding the probate of Elias Penn Smith, recorded in Washington County, are conclusive and merge any title reservations. [D 8 and D 9, D 9 being attached as Exhibit B to D-8]

As the title was taken free and clear of any alleged right of first refusal, that right mentioned in the stipulation is thereby extinguished. Simply stated, a right of first refusal is not collateral; it impinges directly on the title to real estate. Regardless of the intent of the parties, therefore, it is extinguished by the Decree of Final of Distribution and deed issuing out of the probate court. Once Elias Penn Smith's probate was concluded, the Decree of Final Distribution and deed issued thereby

became final and conclusive and are not subject to collateral attack except for fraud. [See also, Miller v. Walker Bank and Trust Company, 404 P.2d 675 (Utah 1965); Davis v. Davis, 632 P.2d 769 (Okla. App. 1981); Stehenson v. Hall, 473 P.2d 581 (Wyo. 1970); In Re Estate of Callnon, 449 P.2d 186 (Cal. 1969); Roberson v. Teel, 20 Ariz. App. 439, 513 P.2d 977 (Ariz. Ct. App. 1973).]

In Miller v. Walker Bank and Trust Co., 404 P.2d 675 (Utah 1965), the Utah Supreme Court held that a decree of distribution became final and conclusive after the expiration of the time for appeal. The Utah Supreme Court reached a similar ruling in Buttars v. Buttars, 631 P.2d 892 (Utah 1981), wherein Justice Oaks held that the terms of a 1962 decree of distribution, having become final, were conclusive and binding on the grantees and heirs. Similarly, in Taylor v. Estate of Taylor, 719 P.2d 234 (Wyo. 1986), the Wyoming Supreme Court held that decrees of distribution are uniformly final and conclusive unless attacked on grounds of fraud. [See also, 31 Am. Jur. 2d Executors and Administrators § 600.]

The merger doctrine operates as a matter of law, and issues of intent or of waiver are not incident to its application. As the right of first refusal itself is not collateral to the taking of title to the property, it is merged and extinguished. Absent a direct attack on the Decree of Final Distribution and deed issuing therefrom, this "right" cannot now be reasserted 13 years after its merger.

V.

THE DOCTRINES OF PROMISSORY AND EQUITABLE
ESTOPPEL BAR JESSE SMITH'S ASSERTION OF
ANY RIGHT OF FIRST REFUSAL.

Appellant Jesse Smith argues that his invocation of the statute of frauds is a valid defense. However, the invocation of that defense, or, for that matter, any defense, is barred by the doctrines of both promissory and equitable estoppel. The first -- promissory estoppel -- arises only upon an express promise to execute a writing or to perform an act in the future which is relied on by a party to his or her detriment. [See P 4.] Equitable estoppel is yet a broader doctrine to preclude or bar one party from asserting a claim against another. As stated by Justice Crockett, speaking for a unanimous court, in J.P. Koch, Inc. v. J.C. Penny Co., Inc., 534 P.2d 903 (Utah 1975):

The invocation of estoppel does not necessarily involve any contract or agreement between the parties, consequently, the elements of a contract are not involved and there is no requirement of consideration. It is a doctrine of equity to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss. As applicable here, the test is whether there is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation. [P.2d at 904-905]

Cases from other jurisdictions setting out fact situations which are sufficient to support a claim of estoppel are set out in 37 C.J.S. Frauds, Statute of, § 246. [See also, Topik v. Thurber, 739 P.2d 1101 (Utah 1987); Carnesecca v. Carnesecca, 572 P.2d 708 (Utah

1977).]

Salli Smith West testified that she conversed with Jesse Smith at his place of employment on September 26, 1986. [T 71-74] In that conversation, she advised him of the offer from Respondents Anderson and Appleby. Jesse told her to proceed with the sale and that he would provide her a written document evidencing not only his waiver of the first right of refusal, but that of his step-mother and of his wife as well. [Id.] Subsequently, Jesse Smith drafted his letter of September 29, 1986 [P 4], which Salli received on October 2, 1986, the very morning that Respondents showed up in New Mexico to conclude their purchase. [T 75] Jesse's letter stated that he would, upon being provided a copy of the offer to buy and a copy of the sales agreement, execute a release of his first right of refusal. The language of the letter is clear. Salli relied on the representations of her brother, sold the property, and told Respondents that she had resolved a family obligation as a matter of courtesy. [T 64, 67-69, 75-79] She complied with Jesse's requests. [Id.] Respondents Anderson and Appleby similarly relied on Jesse's letter in purchasing Salli's one-third interest. [T 141] The determination of the trial court in its Memorandum Decision is succinct:

Further more, I find that by his representation in the phone conversation and also by the letter, he [Jesse Smith] is estopped from asserting the claim. Mrs. West, in reliance upon his representations, consummated her sale and put herself in a position of jeopardy by his conduct. [R 214]

More complete findings in reference to Jesse Smith's behavior,

which compel the application of the doctrine of estoppel, are set forth at R 242-43.

The trial court clearly chose to believe the testimony of Salli Smith West over that of her brother Jesse E. Smith. Finding of fact no. 17 details the purpose of an en camera telephone call conducted by the trial court investigating a portion of Jesse Smith's testimony. A portion of that finding states as follows:

The Court finds, based upon the credibility of the testimony of Salli Smith, that during this telephone conversation Jesse E. Smith further assured Salli Smith West that he would send her a letter to the effect that he would not exercise his first right of refusal. [R 241]

The Court further found that, three days subsequent to that telephone conversation, Jesse sent the letter marked as P-4, and that Salli reasonably relied on both the oral and written representations of Jesse in allowing Respondents Anderson and Appleby to purchase her interest in the subject matter property. [See Findings of Fact No. 19 and 20 at R 242.] The estoppel doctrine presently bars any assertion by Jesse Smith that he now be allowed to renege on his promise as contained in P-4 and as earlier stated telephonically to Salli. Jesse Smith's oral representations and his letter were acted upon by Salli Smith West to her detriment and, indeed, were relied on by Respondents Anderson and Appleby in completing their purchase.

VI.

JESSE SMITH LACKS THE REQUISITE "CLEAN HANDS" TO ASSERT HIS ALLEGED FIRST RIGHT OF REFUSAL.

Appellant Jesse Smith requested specific performance of

his alleged first right of refusal. Sounding squarely in equity, his case is subject to fundamental equity jurisprudence. The primary principle applicable in an equity case is that one seeking equity must come before the court with clean hands, and this specifically applies "with full force to one seeking specific performance of a contract; he himself must be free from blame." [71 Am. Jur. 2d Specific Performance § 47] Thus, "[I]t is a well-established principle that equity will refuse to grant a decree of specific performance where it appears that the plaintiff was guilty of unfair or inequitable conduct in securing the contract, or that he took inequitable advantage of the other party to the agreement." [Id. at § 45.] Similarly, the Utah Supreme Court has held that "inasmuch as specific performance is an equitable remedy, the trial judge has considerable discretion in determining whether equity in good conscience requires that the relief be granted." [See Ferris v. Jennings, supra.]

In the instant case, Jesse Smith sought specific performance of a right of first refusal contained in a probate stipulation executed in February of 1977. The trial court conducted an en camera investigation of Jesse Smith's testimony, and that court specifically found Salli Smith West the more credible of the two siblings.

Jesse Smith's testimony is, at best, self-contradictory. Early in the trial he adamantly testified that Salli Smith West phoned him at home on September 25, 1986, and told him she had an offer for \$145,000 from Respondents Anderson and Appleby. [T 34]

On cross examination by Respondents' counsel, he conceded that Salli Smith West had correctly stated the amount as being \$125,000, but held firm to the testimony that the phone call occurred at his home. [See T 40-43, T 43 at lines 12-15, T 98.] Though Salli Smith West's phone records, received into evidence as D-13, displayed only one call to the Las Vegas area, where Appellant Jesse Smith resided and worked, Jesse Smith was adamant that Salli Smith West could not possibly reach him at his work number, (702) 295-0029. On cross examination, Jesse Smith indicated the number was unfamiliar, and stated that he could not be reached whatsoever at that number. [T 40-41] Indeed, he indicated that dialing that number, at best, would allow you to leave a message to him. [T 42] The trial court also inquired as to the ability of Salli Smith West to reach her brother at the number indicated on D-3. [Id.]

During a recess, with the consent of counsel at the conclusion of testimony, Judge Conder dialed area code (702) 295-0029. He identified himself and requested to talk to Mr. Jesse Smith. Someone similar to a Mr. or Mrs. Bassett responded that Jesse Smith was not at work that day, that he was at a trial in Judge Condor's court. This individual also stated that, were Jesse at work, Judge Condor would have been able to speak to him. [T 144-45] Finding of fact no. 17 memorializes the trial court's conclusion by reason of this inquiry. [R 241]

Mistaken testimony is commonplace and, standing alone, does not rise to the level of unclean hands. Respondent Jesse

Smith, however, further testified that his letter of September 29, 1986, [P 4] was nothing more nor less than an artifice to deceive and mislead Defendant Salli Smith West, his sister. [T 99] He admits drafting paragraph two of P-4, which requested a copy of the offer to buy, properly signed by Anderson and Appleby, and a copy of the sales agreement. He admits receiving P-5, the responsive letter of his sister dated October 6, 1986, and concedes that P-7 was one of the enclosures in that letter. [T 34-36, 55, 56] Despite working in a top-secret government job, he testified on direct examination that the closing statement was not clear to him as to the terms. [T 124-127] Salli Smith West testified that she had further gone over all of the terms with her brother in her telephone conversation of September 26, 1986. [T 88] On cross examination, Jesse simply added that the documents Salli provided him did not contain every single term, but was unable to explain or clarify exactly what terms they did not contain. [T 96-97]

Paragraph two in Plaintiffs' Exhibit 4 states as follows:

What I will need from you is a copy of their offer to buy properly signed by them and notarized [sic]. Also a copy of the sales agreement. I will give you a letter signed by Beth, Gen, And [sic] myself releasing you from our option of first right of refusal.

With regard to his genuine intent in drafting that paragraph, Jesse Smith's testimony is conclusive regarding his lack of good faith:

Q. [BY MR. HUGHES] And in that letter, you state, "Send me the documents, and I'll give you the release"?

A. [BY JESSE SMITH] How many times have I said "yes" to that?

.

Q. BY MR. HUGHES: And did -- what I am saying is did you state in that letter "Send me the documents, but if I don't like the terms I discover, I'll refuse to give you a release"?

A. Well, I would guess that would be understood.

Q. Oh. And where would it be understood from D-4, [sic] that that was your intent, Mr. Smith?

A. It wouldn't, I guess. The way it's written. [T 102-103]

.

Q. All right. Paragraph 2, particularly. Did you mean Paragraph 2 as it is written? Did you mean it to have the clear import of its language?

A. Obviously not or I wouldn't be here right now.

.

Q. Why were you upset?

A. I was upset because she had sold without getting my -- my and Gen's and Beth's release from the first right of refusal.

Q. But on September 29, days before you received these documents, you promised her, did you not, in P-4, that upon the receipt of those documents, you would send her your release?

A. I'd send her a release if I couldn't meet it. If I couldn't duplicate the deal.

Q. But that's not what P-4 says, is it?

A. I realize that. We've been over this before. I said that's not -- in the context you're taking it, it is not what I really meant. [T 123-134] [Emphasis added.]

As can be seen, Jesse Smith indicated that it was never his intent to perform pursuant to the letter as drafted; indeed, he testified that he sent P-4 as an artifice "only" to get Salli to send him the papers. [T 99] He even contended at trial that he was upset because Salli had sold the property behind his back. [T 127] To now allow Jesse to deny the clear substance of the letter and his oral statements and renege on them would be farcical. The trial court specifically found that Salli Smith West had substantially complied with the terms of the letter. [Findings of Fact 18 and 23] Thus, to allow Jesse Smith to seek specific performance on appeal would constitute nothing more nor less than a fraud upon the court. Jesse Smith's letter was deceptive and he conceded that it was drafted despite his intent to act directly to the contrary. Jesse lacked clean hands to proceed either at the trial court level or on appeal to reverse the trial court's denial of his claim for specific performance.

VII.

THE STATUTE OF FRAUDS, A LACK OF MUTUALITY, AND THE FAILURE OF BETH SMITH TO TESTIFY PRECLUDE HER FROM ASSERTING ANY CLAIM.

It has heretofore been stated that the stipulation reserving a first right of refusal between the various co-tenants was never executed by Appellant Beth Smith. The trial court's Memorandum Decision specifically held that, as Beth Smith was not a party to the stipulation, she could not "claim any rights under it." [R 215] The complaint was unverified [R 2], and at no time did Beth Smith present testimony at trial. As there is no husband-

wife exception to the statute of frauds, it is clear that Jesse Smith can neither act nor speak on behalf of his wife. [See Coombs v. Ouzounian, 465 P.2d 356 (Utah 1970).] Thus, Beth's claim that Exhibit P-1 granted her a right of first refusal fails because, if that right was created inter se, then it was created between Genevieve A. Smith, Jesse E. Smith, and Salli Smith West. Beth Smith was never mentioned in that document as a grantee or tenant in common to the subject matter property.

As previously set forth, Beth Smith never had a right of first refusal running to her from Salli Smith West. Beyond this, Beth Smith, though present, was not called as a witness and provided no testimony as to her intent or desire with reference to Salli's interest in the property. Rule 201 of the Utah Rules of Evidence pertains to the ability of the trial court to take judicial notice of certain matters. Judicial notice, however, may not be taken of a party's intent or state of mind.

As the complaint is unverified and there exist no affidavits of Beth Smith in the record, no deposition taken, and no testimony, the presumption set forth in 29 Am. Jur. 2d Evidence § 14 is applicable here:

There is a presumption that when a cause is presented for trial, the court and jury are uninformed concerning the facts involved, and it is incumbent upon the parties to the proceeding to establish by evidence the facts upon which they rely.

There is no basis in law or in fact upon which the trial court could take judicial notice that the filing of a cause of action alone constitutes notice of an individual party's intent. Two

recent Utah cases emphasize the result of a party's failure to provide testimony as to the elements of his or her case.

In Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667 (Utah 1982), the defendant raised the contention that a covenant not to compete was contrary to public policy. At trial, no evidence was presented on this issue, and no argument was made to the district court. The Supreme Court held that, without any evidence on the issue, the trial court "did not have the opportunity to make any findings of fact or law" on the same. [Id. at 672]

More recently, in the case of Barker v. Francis, 741 P.2d 548 (Utah App. 1987), Barker brought an action against the defendant seeking specific performance and/or damages under an earnest money agreement. Although the defendant requested Barker to elect between specific performance and damages under the earnest money agreement, the trial court did not require Barker to make that election. Barker, however, failed to present evidence at trial on the damage issue. On appeal, he sought a remand of the case to allow him to present evidence on the damages he suffered by reason of the defendant's breach of contract. The unanimous ruling of the Intermediate Court of Appeals on the matter is telling:

Barker was free at trial to present evidence on both theories. That he failed to present competent evidence on the issue of damages is his own fault, and he has no basis for complaint. [Id. at 553-54]

Beth Smith presented no testimony, no written document, no memoranda, no signed affidavits, no depositions taken or published, and, indeed, not one word of testimony in the record

upon which the appellate court can find in her favor. Absent her testimony at trial on the issue of her intent, her appeal should be summarily dismissed, and the trial court's ruling that it could not find in her favor should be sustained on the multiple grounds referenced herein.

VIII.

THOUGH NOT AN APPELLANT, GENEVIEVE SMITH LACKED STANDING TO ASSERT ANY FIRST RIGHT OF REFUSAL BEFORE THE TRIAL COURT.

In the instant case, it does not appear that Genevieve Smith has pursued an appeal, but rather that the appeal has been brought solely by Jesse Smith and his wife Beth Smith. Respondents, however, refer this Court to the trial court's Memorandum Opinion as to the standing of Genevieve Smith before the trial court. [R 214-215]

It is clear that the stipulation allowed co-tenants a specific right of first refusal. [P 1, at ¶ 5] Similarly, Plaintiffs' complaint bottomed their cause of action on their status as Salli's co-tenant as to the subject property. [R 1] Findings of Fact No.'s 29 through 32 in the record detail Genevieve's loss of standing to pursue her cause of action, based on the probate stipulation, before the trial court. [R 234] Approximately one year prior to the trial, Genevieve, without notice to anyone, conveyed her interest in the subject property to a Nevada corporation. Rights of first refusal are freely assignable by grant or devise. [See Kamas State Bank v. Bourgeois, 14 Utah 2d 188, 380 P.2d 931 (1963).] In analogous cases involving

landlord-tenant relationships, courts have further held that the termination of a tenancy also terminates purchase of the options granted to "tenants relating to the leased ground." [See Annotation, Termination of Lease as Termination of Option to Purchase Therein Contained, 10 A.L.R.2d 884.]

The recent Idaho case of Krepcik v. Tippet, 109 Idaho 696, 710 P.2d 606 (Idaho App. 1986) is telling. Therein, the Idaho Supreme Court, in a unanimous opinion, held that, upon the expiration of a lease, a former tenant's subsequent efforts to exercise a purchase option were untenable. Indeed, the purported purchaser was no longer within that class of parties to whom the purchase option had been granted. Thus, once Genevieve Smith voluntarily terminated her co-tenancy, so also terminated her ability to assert any right of first refusal as may have otherwise been earlier provided her. Other western jurisdictions follow this principle. [See Bras v. Sheffield, 19 Kan. 702, 31 P. 306 (1892); Sandberg v. Light, 355 Wash. 109, 104 P. 205 (1909); Gershenhorn v. Walter R. Stutz Enterprises, 304 P.2d 395 (Nev. 1956); Moore v. Northwest Fabricators Inc., 51 Wash. 2d 26, 314 P.2d 941 (1957).]

CONCLUSION

The trial court's judgment in the instant case is amply supported by the record. Appellant Jesse Smith is estopped from asserting any right of first refusal; furthermore, he lacks the requisite clean hands to pursue any equitable remedy, and the statute of frauds has been satisfied.

The Decree of Distribution and final deed in Elias Penn Smith's probate merged and terminated any right of first refusal contained in the earlier stipulation filed in the probate. This type of reservation is clearly not collateral to the quality of title.

Beth Smith cannot prevail, as she was never privy to the first right of refusal and offered no testimony at trial. Genevieve Smith had conveyed her interest in the property to a Nevada corporation without reservation in the deed. At trial, she no longer had standing to assert a claim as a co-tenant.

Ultimately, it becomes clear that Salli Smith West is the real loser in this litigation. Under the trial court's findings and Utah law, she is required to bear Respondents' attorney's fees. These findings are not contested on appeal. Respondents' attorney respectfully submits that the appeal, in light of the facts elucidated at trial, may fall within the parameters of § 78-27-56 of the Utah Code. The respect of Respondents' counsel for Appellants' counsel is not compromised by this fact; rather, it becomes clear that he has done his best given the facts provided him. However, Jesse's actions, despite his covert intent, which actions were relied on by Salli Smith West and Respondents Anderson and Appleby, have caused Salli enough expense already. Consequently, the application of § 78-27-56 to the appellate portion of this case to assess Appellants a portion of those fees may indeed be justified.

SMITH ET AL. V. WEST ET AL.
CASE NO. 900277-CA

BRIEF OF RESPONDENTS (CONT.)

RESPECTFULLY SUBMITTED this 22nd day of October, 1990.


MICHAEL D. HUGHES, FOR
THOMPSON, HUGHES & REBER

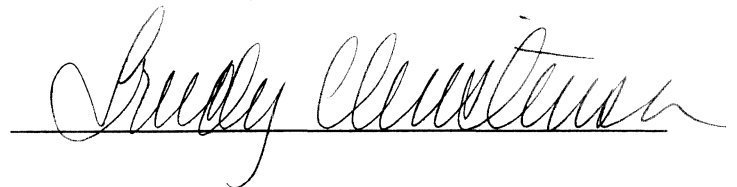
AFFIDAVIT OF MAILING

I hereby certify that four full, true and correct copies of the above and foregoing RESPONDENTS' BRIEF was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on the 22nd day of October, 1990, addressed as follows:

Mr. James L. Shumate
P.O. Box 623
Cedar City, Utah 84720

and, also, one copy of the above and foregoing RESPONDENTS' BRIEF was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on the 22nd day of October, 1990, addressed as follows:

Ms. Salli Smith West
P.O. Box 206
Cochiti Lake, New Mexico 87041



MICHAEL W. PARK
Attorney for Peititioner
110 North Main Street, Suite F
Cedar City, Utah 84720
Telephone: 586-3879

IN THE DISTRICT COURT OF WASHINGTON COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE)	
)	STIPULATION AND PETITION
OF)	FOR DISTRIBUTION
)	
ELIAS PENN SMITH, Deceased.)	Probate No. 2070

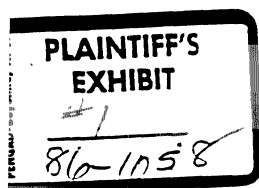
The Executrix, Genevieve A. Smith, and all of the other heirs of the estate, Jesse E. Smith, Salli Smith Girard, and Penn Harris Smith, hereby Stipulate and petition the Court as follows:

1. The Petitioners, being all of the heirs of the estate of E. Penn Smith, hereby Petition the Court for distribution of the property of the estate in accordance with this Stipulation hereinafter set forth.

2. The heirs of the estate hereby agree that Genevieve A. Smith, Jesse E. Smith, Salli Smith Girard and Penn Harris Smith shall each pay twenty five percent (25%) of the total liabilities of the estate in order to retire all debts which have been assessed against the estate. The case payments which should be made out of the estate at this time amount to a total of \$48,557.00. The total cash on hand, includes the sum of \$3,557.00, making the net liability payable by the estate in sum of \$45,000.00. Each heir to the estate, therefore, is indebted for the liabilities in the sum of \$11,250.00.

3. The parties hereby stipulate and agree that the property listed in the Inventory and Appraisement and known as the Industrial property shall be awarded to Penn Harris Smith and Salli Smith Girard as tenants in common, with Salli Smith Girard being entitled to twenty-nine percent (29%) of said property and Penn Harris Smith being entitled to seventy-one percent (71%) of said property.

APR 21 1989



Appendix 1

4. As consideration for the above, Penn Harris Smith and Salli Smith Girard agree to pay to Genevieve A. Smith and Jesse E. Smith the total sum of \$12,250.00. Penn Harris Smith shall release any and all claim to the Pah Tempe Springs property, the Magelby property located in Pintura Utah, and the balance due on the sales contract between Jesse E. Smith and Elias Penn Smith. Salli Smith Girard shall release any and all claim she has to the Magelby property located in Pintura Utah. Salli Smith Girard shall also release any and all interest she has in and to the real estate sales agreement between E. Penn Smith and Genevieve A. Smith Sellers and Jesse E. Smith and Beth M. Smith Buyers.

5. The property known as Pah Tempe Hot Springs, the description of which is situated in the Inventory and Appraisement, should be distributed to Genevieve A. Smith, Jesse E. Smith, and Salli Smith Girard, as tenants in common.

6. The property known as the Magelby property located in Pintura Utah should be distributed to Jesse E. Smith and Genevieve A. Smith as tenants in common, and Penn Harris Smith and Salli Smith Girard hereby release any and all claim in and to said property. The proceeds from the real estate contract made between Elias Penn Smith and Genevieve A. Smith and Jesse E. Smith and Beth M. Smith shall become the property of Jesse E. Smith and Genevieve A. Smith, and Penn Harris Smith and Salli Smith Girard shall release any and all interest in and to said property.

7. The persons who take the property described above, shall take their property subject to any and all encumbrance which may exist thereon or any and all lease, rental or other assessment which may attach to that property, as of this date.

8. The parties who take the property set forth above as tenants in common, hereby agree to grant their fellow tenants a right of first refusal to buy their interest in said property

in the event that tenant wishes to sell. That tenant shall advise the co-tenant of his desire to sell and if a bona fide offer is recieved from a third party, that offer must be met or the tenant may sell to said third party or any other third party. If the tenant desires to excercise the right of first refusal and a third offer is unavailable, then the interest shall be determined by an evaluation of the fair market value of said property which can be accomplished by the appointment of appraisers by said tenants. Each tenant shall appoint an appraiser and if the tenants are still in disagreement, those appraisers shall appoint another appraiser and the decision of that appraiser shall be final.

9. The parties have divided the personal property among themselves.

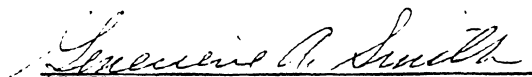

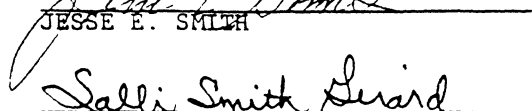
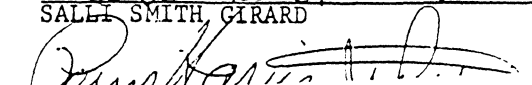
10. Salli Smith Girard and her husband are presently indebted to the Estate in the sum of \$2,224.00.

11. The heirs accept the accounting of Genevieve A. Smith concerning the assets and liabilities of the estate and further agree with a payment to her of an executrix fee in the sum of \$3,220.00.

12. All of the parties to this agreement shall be responsible for one-fourth (1/4) of any additional taxes or estate debts and same shall be paid by the heirs within 30 days of notification of that debt.

WHEREFORE, your petitioners pray the Court for an Order distributing the property in accordance with the Petition and Stipulation set forth above.

DATED, this 1st day of February, 1977.


GENEVIEVE A. SMITH

JESSE E. SMITH

SALLI SMITH GIRARD


STATE OF UTAH)
) ss.
COUNTY OF IRON)

Genevieve A. Smith, Jesse E. Smith, Salli Smith Girard,
Penn Harris Smith, being the petitioners in all of the heirs to
the Estate of Elias Penn Smith, hereby state that they have read
the foregoing Petition and Stipulation and are aware of the
contents thereof and duly acknowledge that they signed said
document.

DATED, this 7th day of February, 1977.

Genevieve A. Smith
GENEVIEVE A. SMITH

Jesse E. Smith
JESSE E. SMITH

Salli Smith Girard
SALLI SMITH GIRARD

Penn Harris Smith
PENN HARRIS SMITH

SUBSCRIBED and sworn to before me this 7th day of February
1977.

[Signature]
NOTARY PUBLIC

Residing at: _____

My Commission expires: _____

APR 21 1989

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
THE COUNTY OF WASHINGTON, UTAH

In the Matter of the Estate
Of
ELIAS PENN SMITH,
Deceased.

DEGREE OF FINAL DISTRIBUTION
AND ORDER APPROVING FIRST
AND FINAL ACCOUNT AND REPORT
OF ADMINISTRATION

Probate No. : 2070

GENEVIEVE A. SMITH, Executrix of the Estate of ELIAS PENN SMITH, Deceased, having filed herein her verified First and Final Account and Report of Administration and Petition for Decree of Final Distribution, and notice of said Account, Report and Petition having been given to the satisfaction of the Court and in accordance with law and pursuant to the course and practice of this Court, and said Account, Report and Petition coming on regularly for hearing this 20th day of July, 1977, and there being no protests, or objections, thereto in any manner, or from anyone whomsoever, and the Court having heard and considered said Account, Report and Petition and the matter adduced in support thereof, and being now fully advised in the premises, and having considered the files and records therein, the Court now finds and adjudicates:

And it further appearing that the said Account is in all respects true and correct; it further appearing that all of the claims presented and allowed have been paid; it further appearing that all funeral expenses, costs and expenses of last illness, costs and expenses of administration have been paid; and it further appearing that no State inheritance taxes are due and payable and that the Executrix, heirs-at-law, legatees and devisees have executed a Bond in the amount of the Federal Inheritance estate taxes due and that the same will be paid upon the distribution of the estate;

And it further appearing that all charges and taxes of any kind and nature to be paid, have been paid, excepting as hereinabove set forth and as may be hereinafter set forth:

And it further appearing that no assets have come into the hands of the Executrix since the filing of her First and Final Account and Report and Petition for Distribution;

And it further appearing that the within entitled Estate is in all respects in a condition to be closed and the assets of the Estate distributed to those entitled thereto.

IT IS HEREBY ORDERED, ADJUDGED and DECREED AS FOLLOWS:

1. That due and legal notice of the hearing of the First and Final Account and Report of said Executrix and her Petition for Final Distribution has been given;

2. That the First and Final Account and Report and Petition for Final Distribution of said Executrix be, and the same is, hereby settled, approved and allowed;

3. That upon payment of the federal Estate Inheritance taxes due and owing in this estate, the sureties and principals of the Bond executed to cover the payment of the same, should be, and hereby are, exonerated and released from any further liability thereunder.

4. The property available for distribution at this time is the property set forth in Exhibits "A", "B", "C", "D", and "E", attached hereto, and should be distributed in accordance with the Stipulation filed herein and as set forth hereafter.

A. All of the property set forth in Exhibit "A" is awarded to Penn Harris Smith and Sally Smith Girard as tenants in common, with Sally Smith Girard being entitled to 29% of said property and Penn Harris Smith being entitled to 71% of said property.

B. The property known as Pah Tempe Hot Springs and set forth in Exhibit "B" attached hereto is distributed to Genevieve A. Smith, Jesse E. Smith and Sally Smith Girard, each having a 1/3 interest, as tenants in common.

C. The property known as the Magelby property which is set forth on Exhibit "C" attached hereto is distributed to Jesse E.

Smith and Genevieve A. Smith, each with a 50% interest as tenants in common.

D. The property set forth in Exhibit "D" is awarded to Jesse E. Smith and Beth M. Smith, his wife, 50% and Genevieve A. Smith 50%, as tenants in common.

E. The property set forth in Exhibit "E" is awarded to Genevieve A. Smith.

5. All of the property is awarded pursuant to the Stipulation and agreement of the parties which is filed with this Court.

6. The heirs have divided the personal property among themselves and each heir is entitled to the personal property now in his possession.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Executrix be, and she is, discharged from her capacity as such and exonerated from all liability by reason of her future acts and her bond is exonerated.

DATED, this 22 day of July, 1977.

18599A

15 J. Harlan Burns
J. HARLAN BURNS - DISTRICT JUDGE

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL
ON FILE AND OF RECORD IN THIS OFFICE

ATTEST:

Regina Howard COUNTY CLERK and
Clerk of the Fifth Judicial District Court in and
for the County of Washington, State of Utah

by August Deputy

Done at August day of August A. D. 19 77

Recorded at Request of _____
at _____ M. Fee Paid \$ _____
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

Genevieve A. Smith, Jesse E. Smith, and Beth M. Smith, his wife, Salli Smith Girard, Penn Harris Smith, and Mary A. Smith, his wife, grantors of _____, County of Washington _____, State of Utah, hereby QUIT-CLAIM to

Penn Harris Smith, and Mary A. Smith, his wife, as joint tenants with full right of survivorship, Seventy one percent (71%); and Salli Smith Girard, Twenty Nine Percent (29%).
of _____ Washington County _____ grantees for the sum of
Ten Dollars and No/100----- DOLLARS,

the following described tract of land in _____ Washington _____ County, State of Utah:

Northeast $\frac{1}{4}$ Northwest $\frac{1}{4}$ Northwest $\frac{1}{4}$; Northeast $\frac{1}{4}$; Section 20, Township 42 South, Range 15 West, consisting of 80 acres: ALSO, beginning at the Northwest corner of the Southwest $\frac{1}{4}$ of the Northeast $\frac{1}{4}$ Section 20 running thence South 620 feet; thence East 400 feet; to the old Highway 91; thence Northeasterly along Highway to East line of the Southwest $\frac{1}{4}$ of the Northeast $\frac{1}{4}$; thence North, to the Northeast corner thence west 1320 feet to the point of beginning. 1.05 acres sold to Penn H. Smith. Less 5.0 acres sold to St. George City, 3.163 acres sold to O. M. Porter Distributing. LESS 1.336 acres sold to Kenneth Newby.
Lots front of Bradshaw Trailer Estate: Beginning at the Southwest corner of the Southwest $\frac{1}{4}$ Northeast Section 20, Township 42 South, Range 15 West, Salt Lake Meridian; thence North 700 feet; thence East 400 feet to the highway; thence Southwest along Highway, 760 feet to the point of beginning. Containing 5 acres, Less 3 acres sold to Starling.

WITNESS the hand of said grantor, this _____ 5th _____ day of March, _____, A. D. one thousand nine hundred and _____

Signed in the presence of

STATE OF UTAH,
County of IRON

} ss.

On the _____ 5th _____ day of _____ March _____ A. D. one thousand nine hundred and seventy seven personally appeared before me Genevieve A. Smith, Jesse E. Smith, Beth Smith, Salli Smith Garard, Penn H. Smith, and Mary A. Smith

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

Notary Public.--

My commission expires 1-12-81

Address: Cedar City, Utah

Recorded at Request of.....
at..... M. Fee Paid \$.....
by..... Dep. Book..... Page..... Ref.:.....
Mail tax notice to..... Address.....

QUIT-CLAIM DEED

Genvieve A. Smith, Jesse E. Smith, and Beth M. Smith, his wife, Salli Smith Girard, Penn Harris Smith, and Mary A. Smith, his wife, grantors of _____, County of Washington _____, State of Utah, hereby QUIT-CLAIM to Genevieve A. Smith, thirty three and one-third percent (33 1/3%); Jesse E. Smith, and Beth M. Smith, his wife, as joint tenants with full right of survivorship, thirty Three and one-third percent (33 1/3%); and Salli Smith Girard, thirty three and one-third percent (33 1/3%); _____ grantee of Washington County, Utah for the sum of Ten Dollars and NO/100-----DOLLARS,

the following described tract of land in _____ Washington _____ County, State of Utah:

Beginning at a point in middle of the channel of Virgin River located directly South from a point 15.4 chains East of Northwest Corner of the Northeast 1/4 Southeast 1/4 Section 26, Township 41 South, Range 13 West, Salt Lake Meridian and running thence North 9.4 chains, more or less to a point 30 feet South of a line separating the Southeast 1/4 and the Northeast 1/4 of said Section 26; thence South 87° East 9.7 chains, more or less; thence South 23°45' West 5.4 chains; thence South 68° East 24.50 chains, more or less, to the middle of Virgin River, to a point, which is 14 chains West and 15 chains South from the Northeast Corner of the Southwest 1/4 Section 25; thence follow downstream the middle of the River to the point of beginning. ALSO Beginning at a point 10 Chains South of the Northwest corner of the Southwest 1/4 Southwest quarter Section 25, Township 41 South, Range 13 West, Salt Lake Base and Meridian and running thence East 30 chains thence Northerly 30 Chains, more or less to the point of intersection of the middle of the channel of the Virgin River with the line separating the Southwest 1/4 and Northwest 1/4 of Section 25, then follow downstream the middle of the River to a point where said river intersects the Easterly boundary line of Highway U-17; thence South 21° 04' West 15 Chains, more or less to the South boundary line of Northeast 1/4 Southeast 1/4 Section 26; thence East 19 chains, more or less to the Southeast corner of the Northeast 1/4 Southeast 1/4; thence South 10 chains to beginning.

WITNESS the hand of said grantor _____, this _____ 5th _____ day of March _____, A. D. one thousand nine hundred and seventy seven

Signed in the presence of

STATE OF UTAH,
County of IRON

} ss.

On the _____ 5th _____ day of _____ March _____ A. D. one thousand nine hundred and seventy seven personally appeared before me Genevieve A. Smith, Jesse Smith, Beth Smith, Salli Smith Girard, 528 Penn H. Smith and Mary A. Smith

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

Notary Public.

My commission expires 1-12-81

Address: Cedar City, Utah

Recorded at Request of _____
at _____ M. Fee Paid \$ _____
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

Genevieve A. Smith, Jesse E. Smith, and Beth M. Smith, his wife, Salli Smith Girard, Penn Harris Smith, and Mary A. Smith, his wife, grantors of _____, County of Washington _____, State of Utah, hereby QUIT-CLAIM to Genevieve A. Smith, Fifty Percent (50%); and Jesse E. Smith, and Beth M. Smith, his wife, as joint tenants with full right of survivorship, fifty percent (50%).

of Washington County, Utah
Ten dollars and No/100-----grantees
for the sum of
DOLLARS,

the following described tract of land in Washington County,
State of Utah:

185994
Beg at a pt 1546.6 ft S & W 780.3 ft from Atr cor to Sec 1 & 2, T40S, R13W, SLB&M, sd pt being E R-O-W line of Hg 91, Sec 2, th S 75° E 45.0 ft; th S 3°54' E 318.8 ft; th N 75° W 160.0 ft, to E line of sd Hgwy 91; th N along sd E line of Hgwy 91; a dist of 300.00 ft, to pt of beg.
Beg at the SW cor of NE quar of SE quar of Sec 2, T40S, R13W, SLB&M, th N 8.0 ch; th E 10.0 ch; th S 16°22' W about 8.5 ch; th W to pt of beg.
Beg a pt S 822.0 ft N 74°30' ft W 514.0 ft & S 16°22' W 295.3 ft from quart cor to Sec 1 & 2, T40S, R13W, SLB&M, to the TRUE POINT OF BEG, th S 73° E 208.7 ft; th S 16°22' W 208.7 ft; th N 73° W 142.0 ft; th S 16°22' W 66.0 ft; th N 74° W 66.0 ft, to E Bound line of Hgwy 91; th N 16°22' E 274.7 ft to the pt of beg, part of lot 10, Bl 2, Gates' Entry in the NE quar of SE quar of sd Sec 2.
Beg S 822.0 ft from the quar cor to Sec 1 & 2, T40S, R13W, SLB&M, th S 74°30' E 700.0 ft; th S 16°22' W 608.3 ft; th S 27°53' W 643.0 ft; th N 71°15' W 216.0 ft; th S 548.0 ft; th W 1320.0 ft th N 1262.0 ft; th S 73° E 536.6 ft; th N 16°22' E 318.0 ft; th S 73° E 66.0 ft; th N 16°22' E 66.0 ft; th N 73° 142.0 ft; th N 16°22' E 208.0 ft; th N 73° W 208.0 ft; th N 16°22' E 295.3 ft; th S 74°30' E 514.0 ft, to the pt of beg, cont 54.15 acres, Less part used for hwy purposes, Less 1.0 acre sold to W. Tisdale, Less 0.48 acre deeded to State Road Comm., Less any portion for public street.
Incl. 26 shares in Pintura Water Company

WITNESS the hand of said grantor, this 5th day of
March, A. D. one thousand nine hundred and Seventy Seven

Signed in the presence of

STATE OF UTAH, } ss.
County of IRON }

On the 5th day of March A. D. one thousand nine hundred and Seventy Seven personally appeared before me Genevieve A. Smith, Jesse Smith, Beth Smith, Salli Smith Girard, Penn H. Smith, and Mary A, Smith

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

Notary Public
Notary Public.

My commission expires 1-12-81

Address: Cedar City, Utah 84720

Recorded at Request of _____
at _____ M. Fee Paid \$ _____
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

Genevieve A. Smith, Jesse E. Smith, and Beth M. Smith, his wife, Salli Smith Girard, Penn Harris Smith, and Mary A. Smith, his wife, grantors of _____, County of Washington _____, State of Utah, hereby

QUIT-CLAIM to

Genevieve A. Smith, Fifty Percent (50%); and Jesse E. Smith, and Beth M. Smith, his wife, as joint tenants with full right of survivorship, Fifty percent (50%), _____ grantees
of Washington County, Utah for the sum of
Ten Dollars and No/100-----DOLLARS,

the following described tract of land in Washington _____ County,
State of Utah:

Beg at a pt 356.0 ft W from the Qrt cor to sec 1 & 2, T40S, RL3W, SLB&M, th W 325.0 ft; th S & 152' W 128.0 ft; th S 77°59' E 292.4 ft; th N 16°45' E 196.0 ft, to th pt of beg.
Parcel 2: Lot 7, Bl 2, of Gates' survey, part of lot 5, bl 3, of Gates' Survey, W of Par 3 herein, sit in Sec 1 & 2; T 40 S, T13W, SLB&M.
Parcel 3, Beg at pt E 746.0 E 746.0 ft from qrt cor to Sec 1 & 2, T40S, RL3W, SLB&M, th E 171.7 ft; th S 16°22' W 537.0 ft; th N 73°38' W 164.2 ft, to a pt S 16°22' W 488.2 ft from pt of beg, th N 16°22' E 488.2 ft, to the pt of beg. 2.0 acres more or less. 1 Share in Pintura Culinary Water Stock, and 7½ shares in Pintura Irrigation Company primary stock.

185994

WITNESS the hand of said grantor, this _____ 5th _____ day of
March _____, A. D. one thousand nine hundred and Seventy Seven.

Signed in the presence of

STATE OF UTAH,
County of IRON

On the _____ 5th _____ day of _____ March _____ A. D. one
thousand nine hundred and Seventy Seven personally appeared before me
Genevieve A. Smith, Jesse Smith, Beth Smith, Salli Smith Girard,
Penn H. Smith and Mary A. Smith

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

My commission expires 1-12-81

Address: Cedar City, Utah

Paul Savoy
Notary Public.

530

Entry No. 140155 Recorded at request of E. Penn Smith Fee \$3.00
Date March 18, 1970 at 1:40 P.M. By 92 Fee 2 Deputy
Helen P. Barker Washington County Recorder, By

WARRANTY DEED

HANS LARSEN, a single man, Grantor, of Mora, Kanabek County, Minnasota, hereby CONVEYS and WARRANTS to E. PENN SMITH and GENEIEVE SMITH, his wife, as joint tenants and not as tenants in common but with full rights of survivorship, Grantees, of St. George, County of Washington, State of Utah, for the sum of Ten (\$10.00) Dollars and other good and valuable consideration the following described tract of land in Washington County, State of Utah, to-wit:

PARCEL #1: Commencing at a point on the North boundary of Section 1, Township 40 South, Range 13 West, Salt Lake Base and Meridian, from which the NW Corner of Section 1 bears N 89°24' West 1120.9' Said point is also on the easterly R/W of Interstate 15, thence South 89°24' East 259.7' South 78°34' East 919.3', South 33°30' West 576.0', South 49°25' West 763.0', North 77°38' West 903.3', to the easterly R/W Interstate 15, North 32°57' East 991.8', along said R/W, North 30°19' East 157.6' to the point of beginning. Containing 27.92 acres.

PARCEL #2: Commencing at the Northwest Corner of Section 1, Township 40 South, Range 13 West, Salt Lake Base & Meridian, thence along the North boundary of Section 1 South 89°24' East 735.6', to a point on the westerly R/W of Interstate 15, South 32°43' West 64.5' along said Hiway R/W, South 22°09' West 329.5' South 65°43' West 120.2, South 33°09' West 524.0', West 180.3' to a point on the West line of Section 1, North 853.3' along said West line of Section 1, to the point of beginning. Containing 9.28 acres.

PARCEL #3: Commencing at a point on the South boundary of Section 36, Township 39 South, Range 13 West, Salt Lake Base & Meridian, from which the Southwest Corner of Section 36 bears North 89°24' West 1120.9' Said point is also on the easterly R/W of Interstate 15, thence South 89°24' East 1142.0', North 03°05' West 680.7', South 87°12' West 770.9' to a point on the easterly R/W of Interstate 15, South 26°26' West 415.4' along said easterly R/W, South 30°19' West 299.2' to the point of beginning. Containing 14.27 acres.

Together with all rights, privileges and appurtenances thereunto belonging or in anywise appertaining thereto.

WITNESS THE hand of said Grantor, this 12th day of January, 1970.


HANS LARSEN

STATE OF UTAH

185994

EXHIBIT 'B'

Recorded at Request of.....

at..... M. Fee Paid \$.....

by..... Dep. Book..... Page..... Ref.:.....

Mail tax notice to..... Address.....

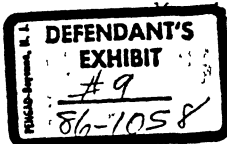
QUIT-CLAIM DEED

Genevieve A. Smith, Jesse E. Smith, and Beth M. Smith, his wife, Salli Smith Girard, Penn Harris Smith, and Mary A. Smith, his wife, grantors of _____, County of Washington, State of Utah, hereby QUIT-CLAIM to Genevieve A. Smith, thirty three and one-third percent (33 1/3%); Jesse E. Smith, and Beth M. Smith, his wife, as joint tenants with full right of survivorship, thirty Three and one-third percent (33 1/3%); and Salli Smith Girard, thirty three and one-third percent (33 1/3%); _____ grantee of Washington County, Utah for the sum of Ten Dollars and NO/100----- DOLLARS,

the following described tract of land in Washington County, State of Utah:

Beginning at a point in middle of the channel of Virgin River located directly South from a point 15.4 chains East of Northwest Corner of the Northeast 1/4 Southeast 1/4 Section 26, Township 41 South, Range 13 West, Salt Lake Meridian and running thence North 9.4 chains, more or less to a point 30 feet South of a line separating the Southeast 1/4 and the Northeast 1/4 of said Section 26; thence South 37° East 9.7 chains, more or less; thence South 23°45' West 5.4 chains; thence South 68° East 24.50 chains, more or less, to the middle of Virgin River, to a point, which is 14 chains West and 15 chains South from the Northeast Corner of the Southwest 1/4 Section 25; thence follow downstream the middle of the River to the point of beginning. ALSO Beginning at a point 10 Chains South of the Northwest corner of the Southwest 1/4 Southwest quarter Section 25, Township 41 South, Range 13 West, Salt Lake Base and Meridian and running thence East 30 chains thence Northerly 30 Chains, more or less to the point of intersection of the middle of the channel of the Virgin River with the line separating the Southwest 1/4 and Northwest 1/4 of Section 25, then follow downstream the middle of the River to a point where said river intersects the Easterly boundary line of Highway U-17; thence South 21° 04' West 15 Chains, more or less to the South boundary line of Northeast 1/4 Southeast 1/4 Section 26; thence East 19 chains, more or less to the Southeast corner of the Northeast 1/4 Southeast 1/4; thence South 10 chains to beginning.

APR 21 1989 WITNESS the hand of said grantor, this 5th day of _____, A. D. one thousand nine hundred and seventy seven



Signed in the presence of

STATE OF UTAH,
County of IRON

} ss.

On the 5th day of March A. D. one thousand nine hundred and seventy seven personally appeared before me Genevieve A. Smith, Jesse Smith, Beth Smith, Salli Smith Girard, 528 Penn H. Smith and Mary A. Smith

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

Notary Public
Notary Public.

My commission expires 1-12-81

Address: Cedar City, Utah

185994

Henderson, Nevada
Sept. 29 1986

Dear Sally,

I have been unable to talk with Gen about the Springs. She had to take some horses to the coast and I do not know for sure when she will be back. I don't think she can come up with any money at the Present time because she is in a big law suit in Phoenix and is also being hounded by the I.R.S. over Mountain Shadows. I can not handle \$125,000.00 by myself.

What I will need from You is a copy of their offer to buy properly signed by them and notarized. Also a copy of the sales agreement. I will give You a letter signed by Beth, Gen, And myself releasing You from our option of first right of refusal.

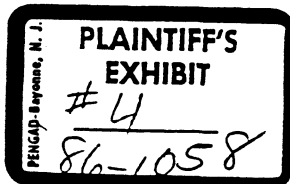
Under the Present conditions, at Pah-Tempe, the \$125,000.00 offer from Appleby & Anderson may look good, but I think it is too low, however It would take more than 40 Years to get that money, and with out interest, from Your Part of the rent.

I am sure Appleby & Anderson will be after me and Gen to sell after they get Your Part. I will need some documentation in the event they exercise their option to buy Gen and I out.

As You may or maynot know an offer to buy real Property must be made in writing and signed to be valid under Utah law. I must have this documentation if it becomes nessesary to have an appraisal at a later time. Please get this out to me soon.

APR 21 1989

Love
Your Brother
Jesse



COPY:

Gen Smith
Mike Park
file

1988 JUN 5 PM 1 07

DEPUTY *A. L. Appleby*

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

JESSE E. SMITH, BETH M. SMITH	:	
and GENEVIEVE A SMITH,	:	
Plaintiffs,	:	
	:	MEMORANDUM DECISION
vs.	:	Civil No. 86-1058
	:	
SALLI SMITH WEST, KEN ANDERSON	:	
and CHARLES L. APPLEBY,	:	
JR.,	:	
Defendants.	:	

This case involves a dispute over the effect of a "Right of First Refusal" included in a Stipulation and Petition for Distribution. This stipulation was signed and filed in the Estate of Elias Penn Smith. Part of the estate included some real property known as Pah Tempe Hot Springs (hereinafter Pah Tempe). The stipulation provided for the division of some of the assets of the estate, including the Pah Tempe property, and contained in paragraph 8 a Right of First Refusal. This stipulation was signed by Genevieve A. Smith, the widow, Jesse E. Smith, Salli Smith Girard (now Salli Smith West) and Penn Harris Smith, as heirs. It provided in part as follows:

"5. The property known as Pah Tempe Hot Springs, the description of which is situated in the Inventory and Appraisement, should be distributed to Genevieve A. Smith, Jesse E. Smith, and Salli Smith Girard, as tenants in common.

...
 "8. The parties who take the property set forth above as tenants in common, hereby agree to grant their fellow tenants a right of first refusal to buy their interest in said property in the event that tenant wishes

000212

Beth M. Smith, the wife of Jesse E. Smith, was not a signer of the stipulation. She did not testify at the trial and gave no evidence whatsoever.

The fact that the interest of Jesse Smith was conveyed to him and his wife, conceivably makes her a co-tenant, but does not make her a party to the stipulation nor the Right of First Refusal.

This court determines that she has not established any evidence to support her complaint and hereby dismisses her complaint.

The Defendants' contend that any Right of First Refusal contained in the stipulation was merged into the Decree of Distribution and deed. They cite the case of Davis vs Davis, (Okla.App., 632 P2d 769) as their authority for the claim. This court finds that case is distinguishable. The Utah case of G.G.A., vs Leventis, (107 Utah Adv. Rep 65) is more in point. The agreement of First Refusal is certainly a collateral agreement to the division and distribution of the property in the estate. It is the obvious intent of the parties that the First Refusal would continue on after the property was distributed. This court, therefore, determines that there was no merger and that the First Refusal continued to exist. The parties by their subsequent conduct continued to show that they considered the right to exist.

Having determined that the right survived, the court then considers the claims of each of the parties.

(1) This court determines that Salli Smith gave sufficient notice to the defendant, Jesse Smith, on September 26, 1986, by a verbal notice of the offer of Appleby and Anderson. Mr. Smith said he had no desire to meet the offer. He further assured West that he would send her a letter to that effect. On September 29, 1986, he sent a letter to West saying, "I will give you a letter signed by Beth, Gen, and myself releasing you from our option of first right of refusal." He did not send that letter. In fact he then stalled by asking for documents that seem irrelevant to the "right". I find that Mr. Smith, agreed to the sale by West in the telephone conversation on September 26, 1986, and that he gave up any claim he had under his Right of First Refusal at that time. Further more, I find that by his representation in the phone conversation and also by the letter, he is estopped from asserting the claim. Mrs. West, in reliance upon his representations, consummated her sale and put herself in a position of jeopardy by his conduct. The plaintiffs further argue that there was an offer on July 23, 1986, which should have been communicated to the plaintiffs. This offer was never accepted by Salli Smith and there was no need to communicate it. As Judge Greenwood stated in the G.G.A. Case (supra),

"A right of first refusal to purchase property is different from an option in that a right of first refusal is not binding unless the offeror decides to sell the property."

(2) Genevieve Smith created a Nevada corporation and

transferred her interest in the Pah Tempe property to this corporation. She did not feel that she had to offer the property to anyone else because it was "her corporation" and that the first refusal did not apply. Whether or not it applied becomes immaterial at this point because she is no longer a co-tenant and has no right to claim the benefit of such a right. The courts have long distinguished between the individual and a corporation. The fact that she may be the sole stockholder does not alter the fact that she is no longer a co-tenant. The court must hold against her on her claim.

(3) Beth M. Smith is not a party to the stipulation and cannot claim any rights under it.

This court having decided the issues on the plaintiffs' complaint against the plaintiffs, no cause of action, their complaint must be dismissed.

Since the court has decided against the plaintiffs, the cross claim of the defendants, Appleby and Anderson, should likewise be dismissed.

Costs are hereby awarded to the defendants.

Counsel for the defendants is directed to prepare and submit Findings of Fact, Conclusions of Law and a Judgment in conformity with this Memorandum.

Dated this 27th day of May, 1989.


Dean E. Conder

Senior Judge

cc Sent to all counsel.

000215

FILED
FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY

'90 FEB 7 PM 4 00

CLERK
DEPUTY *Stutzman*

MICHAEL D. HUGHES (Bar No. 1572)
THOMPSON, HUGHES & REBER
Attorneys for Defendants Anderson & Appleby
148 East Tabernacle
St. George, Utah 84770
Telephone: (801) 673-4892

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

JESSE E. SMITH, BETH M. SMITH, and GENEVIEVE A. SMITH,	:	
	:	
Plaintiffs,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
vs.	:	
	:	
SALLI SMITH WEST, KEN ANDERSON, and CHARLES L. APPLEBY, JR.,	:	
	:	Civil No. 86-1058
Defendants.	:	
<hr/>		
KEN ANDERSON and CHARLES L. APPLEBY, JR.,	:	
	:	
Cross-Claimant,	:	
vs.	:	
	:	
SALLI SMITH WEST,	:	
	:	
Cross-Defendant.	:	

THIS MATTER having come before the Court for trial on the
21st day of April, 1989, without a jury, and Plaintiffs being
represented by and through their attorney of record James L.
Shumate, and Defendants and Cross-Claimants Ken Anderson and
Charles L. Appleby, Jr. being present and represented by their

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attorney of record Michael D. Hughes, and Defendant and Cross-Defendant Salli Smith West appearing pro se, and the Court having heard the testimony of the witnesses and having received the evidentiary support for both Plaintiffs' unverified complaint and the defenses proposed by Defendants, Cross-Claimants, and Cross-Defendants, and the matter having been briefly argued and supplemented by written memoranda, now, therefore, the Court hereby enters its findings of fact and conclusions of law as follows, to-wit:

FINDINGS OF FACT

1. The pleadings were properly joined for trial, though a precipe for default and default judgment had been entered against Defendant and Cross-Defendant Salli Smith West and filed with the Court on April 14, 1989. Salli Smith West never filed a reply to said cross-claim.

2. This case involved the Plaintiffs' collective request for specific performance of a "right of first refusal" included in a Stipulation and Petition for Distribution (hereafter "Stipulation"), arising in the matter of the Estate of Elias Penn Smith, Washington County Probate No. 2070, and marked and received into evidence as Plaintiffs' Exhibit No. 1 (hereafter P.1).

3. Part of the estate mentioned in said Stipulation (P.1) included real property known as Pah Tempe Hot Springs, which is the subject matter of the case at bar.

4. The Stipulation (P.1) was signed by Genevieve A. Smith, Jesse E. Smith, Penn Harris Smith, and Salli Smith Girard

(n.k.a. Salli Smith West) and provided as follows:

5. The property known as Pah Tempe Hot Springs, the description of which is situated in the Inventory and Appraisement, should be distributed to Genevieve A. Smith, Jesse E. Smith, and Salli Smith Girard, as tenants in common.

...

8. The parties who take the property set forth above as tenants in common, hereby agree to grant their fellow tenants a right of first refusal to buy their interest in said property in the event that tenant wishes to sell.

5. Penn Harris Smith was not to be named as a tenant in common to this property and, indeed, was not a party to this lawsuit.

6. Though the Stipulation (P.1) was executed in February of 1977, the Defendants produced the Decree of Final Distribution and Order Approving First and Final Account and Report of Administration (hereafter "Decree"), which was marked and received by the Court as Defendants' Exhibit No. 8 (D.8).

7. The July, 1977, Decree (D.8) makes no mention of the right of first refusal, and has attached thereto as Exhibit "B" a Quit Claim Deed which varies from the Stipulation (P.1) in that the one-third interest to be awarded to Jesse E. Smith was conveyed to him and his wife Beth M. Smith; and, further, said deed, as subsequently recorded, contains no "first right of refusal" or other language which would facially limit a grantee-tenant's right to alienate his or her interest in the same.

8. Beth M. Smith was not a signor of the original Stipulation (P.1) and, further, the Plaintiff Beth M. Smith offered no testimony at trial and gave no evidence whatsoever therein.

9. Though Beth M. Smith received, by the Decree and the deed of conveyance attached thereto (D.8), an interest in the subject-matter property which conceivably makes her a co-tenant, that interest did not make her a party to the Stipulation (P.1) executed in February of 1977, nor to the right of first refusal contained in paragraph eight thereof.

10. Insofar as Beth M. Smith offered no evidence in support of her position as a holder of any right of first refusal as against any of the Defendants, she did not give any evidence whatsoever to establish any support of her complaint, and, therefore, the same should be dismissed with prejudice.

11. Defendants contended at trial that the right of first refusal contained in the Stipulation (P.1) was merged into the Decree and the deed which was attached thereto (D.8). In support of this proposition Defendants have cited, inter alia, the case of Davis v. Davis 632 P.2d 769 (Okla. App.).

12. The case of G.G.A. v. Laventis, 773 P.2d 841 (Utah App. 1989) is more in point, in that the Court finds the right of first refusal to be a collateral agreement to the division and distribution of the property in the estate. In so finding, the Court finds that it was the obvious intent of the signatories to the Stipulation (P.1) that the right of first refusal would continue between those signatories as tenants in common and family

members after the property was distributed. The Court therefore finds that there was no merger of the right of first refusal in the Decree and deed issued and subsequently recorded thereunder (D.8), and that the right of first refusal continued to exist. The signatories to the Stipulation (P.1) who appeared at trial and testified continued to show, by their subsequent conduct, that they considered the right of first refusal to exist between them, and that said right was designed to allow co-tenants in common a right to purchase any interest of another co-tenant desirous of selling his or her interest in and to the commonly-held property.

13. The Court, having determined that the right of first refusal survived the Decree and deed issued thereunder (D.8), finds that the claims of each of Plaintiff must be considered.

14. As early as October 12, 1985, Salli Smith West gave written notice that she was interested in selling her one-third share in the subject-matter property. On September 4, 1986, Charles L. Appleby, Jr. went to Santa Fe, New Mexico, and at that time Salli Smith West modified and extended a July 23, 1986, Option to Purchase, marked as Plaintiffs' Exhibit No. 17 (hereafter P.17), by drafting the Option to Purchase dated September 4, 1986, received into evidence and marked as Defendants' Exhibit No. 11 (hereafter D.11). By this Option (D.11), Ken Anderson and Charles L. Appleby Jr. took an option to purchase the interest of Salli Smith West in and to the subject-matter property.

15. By August of 1981, Salli Smith West had relocated in New Mexico, and the monthly income generated by the lease

agreement on the subject-matter property was modest in light of the option to purchase the property executed in September of 1986 by Anderson and Appleby (D.11).

16. Anderson and Appleby were aware of the right of first refusal, and Salli Smith West represented to them that she would personally take care of that factual matter with those holding or claiming the right.

17. On or about September 26, 1986, the Salli Smith West gave sufficient notice to Jesse E. Smith, by telephone, of the offer of Appleby and Anderson to purchase her interest in the subject-matter property. This telephone call was made to Jesse E. Smith while he was at work and is substantiated by the telephone records received into evidence as Defendants' Exhibit No. 13. Though Mr. Smith indicated that he could not be reached by telephone at his place of employment, the Court, en camera and with counsel present, made a call to the number indicated on the telephone records and was able to reach Mr. Smith's assistant, who indicated that Mr. Smith was out of town, but otherwise could have been telephonically contacted.

18. Salli Smith West disclosed the nature of the offer to Jesse E. Smith, and Mr. Smith said that he had no desire to individually meet the offer of Anderson and Appleby. The Court finds, based upon the credibility of the testimony of Salli Smith, that during this telephone conversation Jesse E. Smith further assured Salli Smith West that he would send her a letter to the effect that he would not exercise his first right of refusal.

19. Approximately three days subsequent to said telephone call, Jesse E. Smith sent a letter dated September 29, 1986, marked and received into evidence as Plaintiffs' Exhibit No. 4 (hereafter P.4), to Salli Smith West indicating that upon receipt of a copy of Anderson and Appleby's offer to purchase the property he would give her "a letter signed by Beth, Gen, and myself releasing you from our option of first right of refusal."

20. Salli Smith West relied on the oral and written representations of Jesse E. Smith in allowing Anderson and Appleby to exercise their option to purchase her interest in the subject-matter property. Considering that Salli Smith West was dealing primarily with family members, her reliance on Jesse E. Smith's oral and written representations was reasonable.

21. On or about October 2, 1986, Salli Smith West, together with Anderson and Appleby, completed the closing of the real estate option before Terra Title Company in St. George, Utah, as is represented by Plaintiffs' Exhibit No. 7.

22. Salli Smith West, in a letter dated October 6, 1986, which is marked and received into evidence as Plaintiffs' Exhibit No. 5, complied with the terms set forth in the Jesse E. Smith's letter of September 29, 1986 (P.4).

23. Jesse E. Smith knew, or had reason to know, that Salli Smith West would rely on his representations orally made on September 26, 1986, also made in writing on September 29, 1986 (P.4). However, after Salli Smith West gave Jesse E. Smith the information requested of her, Jesse E. Smith did not provide the

promised letter to Salli Smith West, contrary to both his oral and written representations.

24. By letter dated October 13, 1986, marked and received into evidence as Plaintiffs' Exhibit No. 6, Jesse E. Smith avoided sending the promised letter waiving the right of first refusal and instead stalled the sending of that letter by requesting documents which the Court finds irrelevant to the right of first refusal as contained in the Stipulation (P.1).

25. By reason of Jesse E. Smith's oral and written representations, he gave up any claim he may have had under his right of first refusal at that time, and is now estopped from asserting the same both by the principles of equitable and promissory estoppel.

26. Salli Smith West, in reliance on the representations made by Jesse E. Smith, consummated the sale and put herself in a position of jeopardy by his subsequent conduct, which conduct breached and reneged on the promises made both orally and in writing to her.

27. The July 23, 1986, option (P.17) need not have been communicated to the Plaintiffs because the same was not accepted in its form by Salli Smith West, and, as a result, there was no need, by reason of the original Stipulation (P.1), to communicate that offer to her other co-tenants. As Judge Greenwood stated in the G.G.A. case:

A right of first refusal to purchase property is different from an option in that a right of first refusal is not binding unless the offeror decides to sell the property. [G.G.A. v. Laventis, supra.]

28. The Court specifically finds that Salli Smith West did not decide to sell the property under the July 23, 1986, option.

29. Prior to trial, Genevieve A. Smith created a Nevada corporation, to-wit: Silver Sands Inc., and conveyed her interest in the subject-matter property to said corporation by warranty deed on or about May 17, 1988.

30. In making this conveyance, Genevieve A. Smith ceased to be a co-tenant in and to the property. Furthermore, in making said conveyance, she did not abide by the terms of the right of first refusal because she felt it was "her corporation" and that the right of first refusal did not apply.

31. The right of first refusal belonged to co-tenants as specified in the Stipulation (P.1) and was meant to be a family right to entitle the grantees under the Decree (D.8) to hold the property as part of the family in the event any one of them intended to sell.

32. At the time of trial, Genevieve A. Smith was no longer a co-tenant, and she did not have the right to claim a benefit to the right of first refusal as she lost the status or standing as an individual to pursue that right.

33. A corporation is a separate legal entity. The fact that Genevieve A. Smith may be the sole stockholder in the corporation does not alter the fact that it is a different legal entity, and Genevieve A. Smith is no longer a co-tenant. As a result, the Court holds against Genevieve A. Smith on her claim, and finds she

had no standing to assert the same at the time of trial.

34. Beth M. Smith was not a party to the Stipulation (P.1), and cannot claim any rights under it. Furthermore, the position of Beth M. Smith cannot be ascertained by reason of her failure to offer any testimony or evidence at trial and by reason of the fact that the complaint stands unverified in the file.

35. Upon being sued, Anderson and Appleby, by reason of the Warranty Deed marked and received into evidence as Defendants' Exhibit No. 1, requested defense of their title from Salli Smith West.

36. As the Court has ruled for the Defendants Anderson and Appleby, affirming their title to Salli Smith West's former interest in the subject-matter property, the cross-claim of Anderson and Appleby for indemnification for their attorney's fees in defending the title as received under the Warranty Deed (D.1) from Salli Smith West should, likewise, be denied and dismissed.

37. Defendants' attorney, Michael D. Hughes, offered testimony, which testimony is uncontroverted, that the attorney's fees in defending this matter were \$6,500.00 through the date of trial, and Hughes was thereafter instructed by the Court to prepare further pleadings in conformity to this Court's memorandum decision.

38. Costs in defending the suit, however, should be awarded to the prevailing Defendants Anderson and Appleby.

CONCLUSIONS OF LAW

1. Plaintiff Beth M. Smith has no standing to bring the

instant cause of action against Defendants in that she was not a signor to the original Stipulation, and she filed no affidavits nor offered no testimony in support of her complaint. As a result thereof, Beth M. Smith's complaint as against all Defendants should be dismissed with prejudice.

2. Defendant and Cross-Defendant Salli Smith West relied, to her detriment, on the oral and written representations of Plaintiff Jesse M. Smith in conveying the property to Anderson and Appleby. As a result thereof, Jesse M. Smith is estopped, by the principles of promissory and equitable estoppel, from asserting any claim to exercise his right of first refusal which he agreed to waive and which agreement to waiver was relied on by Salli Smith West.

3. The right of first refusal was held by co-tenants who were members of the family of Elias Penn Smith; and, upon termination of Genevieve A. Smith's co-tenancy, the right of first refusal held by Genevieve A. Smith was also terminated.

4. The grantee corporation of Plaintiff Genevieve A. Smith is a different legal entity than the individual, and Genevieve A. Smith had no standing to bring suit based upon the right of first refusal where she had, prior to trial, conveyed her interest in and to the subject-matter property to a Nevada corporation.


5. Plaintiffs' complaint should be dismissed with prejudice with costs to Defendants.

6. Having prevailed on their claim for a valid title,

Defendants Anderson and Appleby are not entitled to reimbursement of attorney's fees despite the issuance of a Warranty Deed to them by Salli Smith West and despite her representations that she would take care of the right of first refusal.

7. A judgment in accordance with the foregoing findings of fact and conclusions of law should be entered and formally executed by the Court.

DATED this 5 day of ^{Feb}~~January~~, 1990.

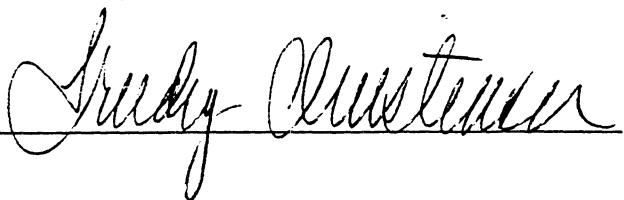

DEAN E. CONDER

AFFIDAVIT OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on the 7th day of ^{February}~~January~~, 1990, addressed as follows:

Mr. James L. Shumate
P.O. Box 623
Cedar City, Utah 84720

Ms. Salli Smith West
546 Onate Place
Santa Fe, New Mexico 87501



FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY

'90 FEB 7 PM 4 00

CLERK
DEPUTY *H. J. J. J.*

MICHAEL D. HUGHES (Bar No. 1572)
THOMPSON, HUGHES & REBER
Attorneys for Defendants Anderson & Appleby
148 East Tabernacle
St. George, Utah 84770
Telephone: (801) 673-4892

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

JESSE E. SMITH, BETH M. SMITH,
and GENEVIEVE A. SMITH,

Plaintiffs,

vs.

SALLI SMITH WEST, KEN ANDERSON,
and CHARLES L. APPLEBY, JR.,

Defendants.

KEN ANDERSON and CHARLES L.
APPLEBY, JR.,

Cross-Claimant,

vs.

SALLI SMITH WEST,

Cross-Defendant.

JUDGMENT

Civil No. 86-1058

THIS MATTER having come before the Court for trial on the
21st day of April, 1989, without a jury, and Plaintiffs being
represented by and through their attorney of record James L.
Shumate, and Defendants and Cross-Claimants Ken Anderson and
Charles L. Appleby, Jr. being present and represented by their

attorney of record Michael D. Hughes, and Defendant and Cross-Defendant Salli Smith West appearing pro se, and the Court having heard the testimony of the witnesses and having received the evidentiary support for both Plaintiffs' unverified complaint and the defenses proposed by Defendants, Cross-Claimants, and Cross-Defendants, and the matter having been briefly argued and supplemented by written memoranda, now, therefore, the Court having entered its findings of fact and conclusions of law, hereby enters judgment as follows, to-wit:

1. Plaintiffs' complaint against Defendants is hereby dismissed with prejudice.

2. Defendants Anderson and Appleby's cross-claim against Cross-Defendant Salli Smith West is hereby dismissed with prejudice.

3. Defendants Anderson and Appleby are entitled to costs as against Plaintiffs.

4. Title to Cross-Defendant Salli Smith West's property is hereby vested, pursuant to the Warranty Deed of October 2, 1986, recorded in the Office of the Washington County Recorder as Entry No. 303129, at Book 428, Pages 870-871, in the names of Defendants and Cross-Claimants Kenneth R. Anderson and Charles L. Appleby, Jr.; and their interest is free and clear of any right of first refusal insofar as they are not signatories to the original Stipulation and Petition for Distribution. The property described in said Warranty Deed, and which is the subject matter of this lawsuit, is more particularly described in Exhibit "A" attached

hereto and incorporated herein by reference.

DATED this 5 day of ^{Feb}~~December~~, 19⁹⁰~~89~~.



DEAN E. CONDER

AFFIDAVIT OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing JUDGMENT was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on the 7th day of ^{February}~~December~~, 19⁹⁰~~89~~, addressed as follows:

Mr. James L. Shumate
P.O. Box 623
Cedar City, Utah 84720

Ms. Salli Smith West
546 Onate Place
Santa Fe, New Mexico 87501

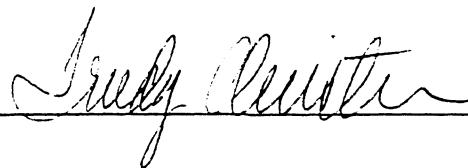


EXHIBIT "A"

BEGINNING at a point in middle of the channel of Virgin River located directly South from a point 15.4 chains East of Northwest Corner of the Northeast $\frac{1}{4}$ Southeast $\frac{1}{4}$ Section 26, Township 41 South, Range 13 West, Salt Lake Meridian and running thence North 9.4 chains, more or less to a point 30 feet South of a line separating the Southeast $\frac{1}{4}$ and the Northeast $\frac{1}{4}$ of said Section 26; thence South 87° East 9.7 chains, more or less; thence South $23^{\circ}45'$ West 5.4 chains; thence South 68° East 24.50 chains, more or less, to the middle of Virgin River, to a point, which is 14 chains West and 15 chains South from the Northeast Corner of the Southwest $\frac{1}{4}$ Sections 25; thence follow downstream the middle of the River to the point of beginning. ALSO Beginning at a point 10 Chains South of the Northwest corner of the Southwest $\frac{1}{4}$ Southwest quarter Section 25, Township 41 South, Range 13, West, Salt Lake Base and Meridian and running thence East 30 chains thence Northerly 30 Chains, more or less to the point of intersection of the middle of the channel of the Virgin River with the line separating the Southwest $\frac{1}{4}$ and Northwest $\frac{1}{4}$ of Section 25, then follow downstream the middle of the River to a point where said river intersects the Easterly boundary line of Highway U-17; thence South $21^{\circ}04'$ West 15 Chains, more or less to the South boundary line of Northeast $\frac{1}{4}$ Southeast $\frac{1}{4}$ Section 26; thence East 19 Chains, more or less to the Southeast corner of the Northeast $\frac{1}{4}$ Southeast $\frac{1}{4}$; thence South 10 Chains to BEGINNING.