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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE

STATE OF UTAH

IN THE MATTER OF THE ESTATE	)	
	)	
of	)	
	)	Case No. 900533
JOHN BEN MAXFIELD,	)	
	)	PRIORITY OF ARGUMENT (16)
Deceased.	)	

BRIEF OF APPELLANTS

Appeal from a final Order and from the Findings of Fact and Conclusions of Law by the Second Judicial District Court of Weber County, State of Utah
THE HONORABLE DAVID E. ROTH
DISTRICT COURT JUDGE

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FILED

MAR 15 1991

Clerk, Supreme Court, Utah

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<u>LIST OF PARTIES</u>

Appellants	Ben J. Maxfield and Joy M. Thornock, children of John Ben Maxfield ("Ben")
Cross-Appellant	Louise A. Maxfield ("Louise"), widow of decedent, John Ben Maxfield, ("Ben")

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IN THE SUPREME COURT OF THE

STATE OF UTAH

IN THE MATTER OF THE ESTATE of JOHN BEN MAXFIELD, Deceased.	)))))))	Case No. 900533 PRIORITY OF ARGUMENT (16)

BRIEF OF APPELLANTS

JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. 1953, as amended, §78-2-2(3)(J).

STATEMENT OF ISSUES

1. Whether joint accounts belong during the lifetime of the joint depositors in proportion to the net contribution by each as required by Utah Code Ann. 1953, as amended, §75-6-103(1)? The review of questions of statutory construction is plenary. Antillon v. Department of Employment Sec., 688 P.2d 455 (Utah 1984).

2. Whether the act of one joint depositor in wrongfully withdrawing all funds on deposit, assaulting thereby the interest of the other joint depositor, destroys the joint tenancy and

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extinguishes the right of survivorship? In equity cases appellants may appeal on facts as well as law. Adams v. Gubler, 731 P.2d 494 (Utah 1986).

3. Whether property brought into marriage loses its character as separate property and becomes marital property by its being placed in joint tenancy with the non-contributing spouse through various sales and purchases? This legal conclusion of the trial court is accorded no particular deference and is subject to review by Supreme Court for correctness. Kelson v. Salt Lake County, 784 P.2d 1152 (Utah 1989).

DETERMINATIVE STATUTES

75-6-103. Ownership during lifetime.-(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

75-2-202. Augmented estate.-(2)(a) For purposes of subsection 75-2-201(1), "Marital property" means all values included in the augmented estate relating to property acquired by the decedent subsequent to the most recent marriage to the surviving spouse except: (i) property acquired by gift, devise, or descent; (ii)

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property acquired in exchange for property acquired prior to the most recent marriage to the surviving spouse or in exchange for property acquired by gift, devise, or descent; and (iii) the increase, rents, issues and profits on property acquired prior to the most recent marriage to the surviving spouse, and on property described in (i) and (ii).

STATEMENT OF THE CASE

This is an appeal from a final order and findings of fact and conclusions of law in proceedings for probate of a will and determination of marital property, entered in the District Court of Weber County, State of Utah, October 11, 1990, by the Honorable Ronald O. Hyde for the Honorable David E. Roth, ruling as a matter of law that separate property brought into marriage by the husband lost its character as separate property and became marital property by being placed in joint tenancy during the marriage through various sales and purchases and that each spouse was deemed to have contributed one-half to the jointly owned property. (Addenda 1 and 2 hereto attached). Appellants seek to have the trial court's order reversed and all clearly established premarital property of John Ben Maxfield and the increase thereto

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restored to his personal representatives for distribution pursuant to his valid last will and testament.

STATEMENT OF FACTS

The deceased John Ben Maxfield ("Ben"), a retired real estate developer, farmer and former firechief of the U.S. Naval Supply Base at Clearfield, Utah, deposited all his earnings and life savings to various Ogden Bank of Utah accounts (Tr. 29), which included a joint checking account, a joint savings account and five joint certificates of deposit, totaling $273,833.60 as of November 25, 1986. The joint accounts had been established as follows:

Account Number	Joint Owners	Amount
Checking Account 121 477 4	J. B. Maxfield or Louise A. Maxfield	$ 14,178.18
Savings Account 0109-8233	J. B. Maxfield or Louise A. Maxfield	10,372.71
CD 30247	J. B. Maxfield or Louise A. Maxfield or Joy Thornock	66,677.21
CD 32104	Louise A. Maxfield or J. B. Maxfield or Stanton LeSieur	72,489.02

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CD 32911	Louise A. Maxfield or J. B. Maxfield or Joy Thornock	9,097.11
CD 34244	J. B. Maxfield or Louise A. Maxfield or Ben J. Maxfield	63,215.00
CD 34245	J. B. Maxfield or Louise A. Maxfield	37,804.37
TOTAL		$273,833.60

Although the registration of most of the joint accounts included names additional to J. B. Maxfield and Louise A. Maxfield, there is no evidence that any party other than J. B. Maxfield and Louise A. Maxfield ever contributed funds to the said accounts.

Cross-appellant, Ben's second wife, Louise A. Maxfield ("Louise"), maintained several additional savings accounts, separate from those with Ben which were jointly owned by her and her children by a previous marriage, i.e., Stanton LeSieur, Karen Wall and Alice Coffman. (Exhibits 38d, 40d and 41d). One such certificate for $12,000.00 was alleged to be an inheritance from her aunt. (Tr. 77-78, 118). She also kept her social security benefit payments separate from the joint accounts with her husband. (Tr. 71). The only separate funds of Louise ever deposited to joint accounts with Ben were her take-home pay which didn't amount to $9,500 during the marriage. (Tr. 16 and Exhibit 18d). On November 25, 1986, pursuant to her attorney's recommendation, Louise withdrew all funds jointly owned with Ben

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from the five Bank of Utah certificates totaling $249,282.71, and after incurring several thousand dollars in early withdrawal penalties, she redeposited $245,235.12 of said funds in six new certificates, five of which were registered in Louise's name payable on her death as follows:

Certificate No:	POD Designation	Amount
52164	Joy Thornock (Ben's daughter)	$30,000.00
52226	Ben J. Maxfield (Ben's son)	30,000.00
52175	Stanton LeSieur (Louise's son)	30,000.00
52227	Alice Coffman (Louise's daughter)	30,000.00
52228	Karen Wall (Louise's daughter)	30,000.00

The remaining $95,235.12 of the withdrawn joint funds were placed in a joint account with Louise and her three children as joint owners. (Exhibit 28d).

On December 1, 1986, the remaining funds owned jointly with Ben, savings and checking accounts totaling $24,550.89, were closed out by Louise, and the funds thereof transferred to new checking and savings accounts jointly owned by Louise and her daughter Karen Wall (Exhibits 29d, 30d and 39d), leaving Ben totally bereft of any money whatsoever. Two days after the

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withdrawal of the last funds, Louise executed a will, prepared by the attorney who recommended the withdrawals, which left her entire estate to her children with no provision for her husband. (Exhibit 42d).

After the discovery by Ben of the loss of his funds and the commencement on his behalf of litigation for recovery of the funds, Louise's attorney had her execute on February 13, 1987, a trust agreement, ostensibly for the protection of both Ben and Louise, but directing the trustee "...to pay upon her direction or the direction of her attorney in fact any and all sums requested by Mrs. Maxfield." Also, unless otherwise directed, "...the trust income, rents, issues and profits arising from this trust..." were to be paid to Louise. (Exhibit 1p). The trust agreement was revoked by stipulation and court order dated May 18, 1987, and all funds withdrawn by Louise were ordered to "...be deposited with Bank of Utah as special conservator of the Estate of John B. Maxfield." Distributions by the special conservator were to be made for the reasonable "living expenses of John B. Maxfield and Louise A. Maxfield." (Addendum 3 hereto attached and Exhibit 2p). That stipulation and court order also provided that the three legal proceedings, spawned by Louise's wrongful withdrawal of the joint accounts, i.e., for appointment of a conservator, for conversion of Ben's funds and for divorce, were

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all merged by said court order into the divorce proceeding which was ultimately dismissed January 25, 1989, because of the physical disability of Ben to testify. (Exhibits 2p and 3p). Ben died December 3, 1989, at the age of 79 years. (Exhibit 48d).

Simultaneously with the commencement of the divorce action Ben executed an inter vivos trust and pour-over will which provided for the payment of $600.00 per month to his wife Louise for her lifetime (Exhibit 43d), a monthly sum roughly equivalent to his combined retirement and social security benefits, to portions of which Louise would also be entitled at Ben's death. These documents were executed March 26, 1987, four months after Louise's withdrawal of his funds, and they were never modified or revoked. In other words, Ben provided that Louise would receive after his death $600.00 per month from his trust in addition to the residuals of his federal employee's annuity and social security payments.

As part of Louise's resistance to Ben's divorce action, she required a mental evaluation of Ben, claiming that he had "deterioration of the brain"; however, the examining physician found Ben competent to make a will and to prosecute his divorce action. (Tr. 97). During the examination Ben asserted to the physician his reason for the divorce action, "[M]y wife took all my money." (Tr. 58-62 and Exhibit 4p).

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At the time of their marriage, September 7, 1961, Louise's assets included a small residence, $1,200.00 and an annual income of less than $1,000.00 from which she was supporting herself and two minor daughters. (Tr. 9, 21 and Exhibit 18d-1961 1040). On the other hand, Ben's premarital assets included three houses in Harrisville, a fifty acre farm, fifty percent of the stock in Hisfield Gravel Company, a seller's escrow and multiple building lots. All these assets were debt-free when he married Louise. (Tr. 127).

His gross cash receipts in the year of their marriage included $3,600.00 in salary from Hisfield, escrow payments of $1,094.76 and $2,500.00 from the sale of a building lot, totaling $6,378.91, much of which was sheltered from income tax by business and farm expenses. (Exhibit 18d-1961 1040). The disparity in income of the spouses simply magnified during the 25 years prior to their separation which occurred four days after Louise closed out the joint accounts. Louise's W-2 Forms reveal income for only eleven years of the marriage, her highest annual income being $1,535.69 in 1963, her lowest being $499.20 in 1969 and her annual average for the eleven year period being less than $1,000.00. Her total take-home pay during the entire marriage didn't total $9,500.00. (Exhibit 18d).

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The trial exhibits reveal clearly Ben's, or his Hisfield Gravel Company's, ownership of the following assets prior to his marriage to Louise:

Exhibit Number	Property Description	Date Acquired By Ben
57d	3 Harrisville houses and 2 1/2 acres, located at 1984 Harrisville Road, acquired from Annie Maxfield. (Tr. 145-146).	January 4, 1944
57d	Harrisville farm (approximately 50 acres) acquired from James E. and Stella Harmston.	June 23, 1956
56d	50% interest in 160 acres, conveyed to Hisfield Gravel for development of Rolling Hills subdivision. (Tr. 27-28).	April 19, 1952
11p and 23d	368 Collins acquired from Ray Wesley and Joyce Elaine Moss.	December 16, 1959
14p	2071 Lane, Lot 14, Block 16, Plat "B", Ogden City, distributed from Hisfield Gravel Company to John B. Maxfield.	September 4, 1963
15p	Lots 15, 16 and 17, Block 9, Rolling Hills Addition No. 5, Ogden City, distributed to John B. Maxfield from Hisfield Gravel Company during its liquidation.	March 16, 1967

From six sales of property, subdivided from his Harrisville properties, Ben received $42,000.00 in gross receipts as follows:

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Date	Exhibit Number	Parcel Description	Buyers	Sales Price
09/12/61	57d	11-023-0002	Veron E. and Bonnie Lee Moss	$ 2,500
12/15/64	57d and 10p	11-023-0023	Douglas B. and Patricia Eggleston	16,000
05/13/68	57d and 9p	11-023-0003	Lynn W. and Shanna Lee Edwards	8,000
05/21/69	57d	11-023-0021	Lawrence R. and Shirley Nye	2,500
04/04/60	57d	11-023-0011	George L. and Karlene Knight	2,000
01/26/62	57d	11-023-0010	Grant Z. and Annie I. Stephens	11,000
	Total sales from Harrisville properties			$42,000

From sales of his Ogden City properties, derived principally from his investment in Hisfield Gravel Company, Ben grossed an additional $105,850.00, bringing to $147,850.00 his total gross receipts from sales of his debt-free premarital properties. The only reinvestment of any portion of these funds during his marriage to Louise was their placement in joint bank accounts with Bank of Utah. The following is a summary of Ben's Ogden City property sales:

Date	Exhibit Number	Parcel Description	Buyers	Sales Price
03/01/60	11p and 23d	Lot 1, Block 1, El Rancho, Ogden City.	George H. and Donna G. Eastman	$ 8,000

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07/28/64	14p, 56d and 18d (1964 1040)	Part of Lot 4, Block 16, Plat B Ogden City, 2071 Lane	Richard and Ethel Lou Sober	6,500
07/10/67	56d	Lot 15, Block 9, Rolling Hills Ogden City.	Dale W. and Linda Stoker	4,000
04/19/68	56d	Lot 17, Block 9, Rolling Hills, Ogden City.	Huffman and Fiet	3,600
11/02/70	56d, 15p, and 18d (1970 1040)	Lot 16, Block 9, Rolling Hills Ogden City.	Steve C. and Glenda L. Packer	3,700
06/01/73	56d	64.87 acres in NE 1/4 Section 22, T6N, R1W.	Fife Equipment & Investment Co.	80,000
	Total sales of Ogden City properties			$105,850

After his marriage to Louise Ben acquired three properties with Louise as a joint tenant at a total cost of $27,000.00. To complete the largest of these three purchases in 1964, the Costley property, a $16,900.00 Bank of Utah loan was obtained, adding to the couple's previous Bank of Utah indebtedness of $5,000.00 on a promissory note secured by Ben's separate property. (Exhibits 8p, 21d and 15p). This total indebtedness was retired from proceeds derived from the sales of said jointly acquired properties, totaling $43,700.00 and resulting in a gross profit of $16,700.00, as follows:

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Exhibit Number	Description	Date Acquired	Date Sold	Buyers	Purchase Price	Sales Price	Profit
7p and 20d	Hellewell	1/26/62	4/25/62	Sevy	$4,000	$7,500	$3,500
8p and 21d	Costley	2/13/64			15,000		
			4/22/64	Owen		13,400	
			11/10/64	Nielsen		3,700	
			5/22/64	Hanzlik		3,500	
			8/22/67	Owen		3,600	9,200
22d	Campkin	5/8/75	6/3/75	Bice	8,000	12,000	4,000
	Total sales of jointly acquired property				$27,000	$43,700	$16,700

On or about October 31, 1969, Louise received from her father, William P. Arbon, a warranty deed for his residence. According to the Maxfields' 1974 1040 income tax return Louise apparently paid her brothers $5,000.00 from the sale proceeds for their two-thirds interest in said property. Consequently, her share of the sale proceeds was approximately $4,000.00. (Exhibit 18d-1973 1040). From Louise's testimony it is fair to infer that the deposit of her share in "Salt Lake City" was not to the Ogden joint accounts with her husband, but to accounts kept separate from his funds in a manner similar to her inheritance from her aunt. (Tr. 118).

By warranty deed dated November 26, 1985, Ben and Louise, as joint tenants, conveyed Louise's residence to Louise and her three children as joint tenants with right of survivorship. On that same day Ben, individually, executed a warranty deed of his farm

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to himself and his two children as joint tenants with right of survivorship. Both deeds were recorded by Louise. (Exhibits 44d and 45d).

In summary, the trial exhibits clearly reveal, first, that Ben received $147,850.00 in gross receipts from sales of his separate property acquired prior to his marriage to Louise, which funds together with his retirement annuity and social security payments were deposited in the joint accounts at Bank of Utah; second, that gross profits from properties acquired and sold jointly during the marriage totalled only $16,700.00, which funds were also deposited in the joint bank accounts at Bank of Utah; and third, that Louise received an inheritance of $12,000.00 from an aunt, $4,000.00 from the sale of her one-third interest in her father's residence and monthly social security benefits, none of which were ever deposited to the joint accounts with Ben. The only separate funds of Louise, that were allegedly deposited to the joint accounts with Ben, were the less than $9,500 received by Louise in take-home pay prior to 1972. (Tr. 16 and Exhibit 18d).

SUMMARY OF ARGUMENTS

The respective interests of Ben and Louise in the joint accounts should have been determined pursuant to the provisions of

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Utah Code Ann. 1953, as amended, §75-6-103(1), not by the trial court's arbitrary determination that each spouse had contributed one-half to the accounts. Louise's wrongful withdrawal of all the joint accounts destroyed the joint tenancy therein and extinguished any right she had to survivorship in the funds which may have existed prior to her wrongful conduct. The true ownership of the funds, as a matter of statutory law, should have been determined by the amounts each spouse had contributed to the joint accounts.

Ben's separate property, acquired prior to his marriage to Louise, did not lose its character as separate property by being placed in joint tenancy or being exchanged for contracts and money which was ultimately placed in joint bank accounts with Louise. Section 75-2-202(2)(a), Utah Code Ann. 1953, as amended, if properly applied to the widow's claim in the instant case, would expressly exclude from "marital property" Ben's premarital property, property exchanged therefor and the increase thereto, all of which comprised nearly all of Ben's joint accounts after his marriage to Louise.

ARGUMENT

POINT I: THE JOINT ACCOUNTS WERE OWNED DURING THE LIFETIME OF BEN AND LOUISE IN DIRECT PROPORTION TO THE NET CONTRIBUTION BY EACH TO THE SUMS ON DEPOSIT.

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A series of cases decided by this Court from 1941 to 1974 developed the rule that a presumption of joint ownership arises when funds are deposited in joint bank accounts while the depositors are alive, but such presumption was rebuttable by clear and convincing evidence to the contrary. Neill v. Royce, 101 Ut. 181, 120 P.2d 327 (1941); Greener v. Greener, 116 Ut. 571, 212 P.2d 194 (1949); First Security Bank of Utah v. Demiris, 10 Ut.2d 405, 354 P.2d 97 (1960); Braegger v. Loveland, 12 Ut.2d 177, 367 P.2d 177 (1961); Tangren v. Ingalls, 12 Ut.2d 388, 367 P.2d 179 (1961); McCullough v. Wasserback, 30 Ut.2d 398, 518 P.2d 691 (1974). In 1975, however, this rule was supplanted by Utah Code Ann. 1953, as amended, §75-6-103(1), which defined ownership of joint accounts during the lifetime of the depositors to be "...in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."

The trial court, although mentioning §75-6-103 (Tr. 235), refused to apply the statute to the instant case because of the following erroneous view of the evidence:

> Property was placed in joint tenancy. It was turned over several times. And I find that the bulk of the property lost its character as separate property. (Tr. 236).

This conclusion is not supported by the evidence. The trial exhibits, especially the income tax returns, indicate clearly that

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the "bulk" of the funds remained in Bank of Utah from the time of their deposit until their wrongful withdrawal by Louise and were never "turned over several times". (Exhibit 18d).

Louise's separate funds, with the possible exception of some residue of her less than $9,500 take-home pay during the first eleven years of their marriage, were all kept separate from the joint accounts with Ben. Her inheritance from an aunt, her share of the proceeds from the sale of her father's home and her social security payments were never deposited to the joint accounts with Ben. (Tr. 71, 118). The "bulk" of the joint deposits was clearly derived from sale proceeds of Ben's premarital properties, the accrued interest thereon and his retirement and social security benefits. (Tr. 27-31).

A safe assumption is that the $16,700 gross profit from the sale of jointly acquired real estate was deposited to Ben's joint accounts. It should be noted, however, that most of that post-marital investment in real estate was made by means of bank loans, not savings withdrawals. Of the $27,000 invested in said real estate during the marriage $21,900 were derived from two bank loans of $5,000 and $16,900. (Exhibits 15p, 8p and 21d). Consequently, each spouse should be deemed to have contributed to the joint Bank of Utah accounts one-half of said profit, or $8,350, the only sum other than the residue of her take-home pay,

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which can actually, or presumptively, be attributed to Louise as contributions to the joint bank accounts with Ben. The deposits of Louise's take-home pay to the joint accounts with Ben are really an insignificant factor when compared to Ben's greater deposits of his annuity payments and other income through all years of the marriage, not just eleven years thereof.

Admittedly, the bulk of the joint accounts came from real estate sales totaling $191,550. All of this total, except the said joint profit of $16,700, was clearly derived from sales of Ben's premarital real estate. His share therefore of these total sale proceeds can be determined by subtracting Louise's one-half of the profit from the sales of jointly acquired realty, or $8,350.00. The remainder, $174,850, is clearly the amount contributed by Ben, totalling over ninety percent of the total sale proceeds deposited to the joint accounts. This contributive share of Ben was augmented by deposits of his retirement and social security payments and accumulated interest. On the other hand, Louise's contribution to the same accounts, $8,350 or one-half of the profit from the sales of jointly acquired real estate, could not have amounted to ten percent of the funds contributed to the joint accounts. Consequently, if the trial court had properly applied §75-6-103(1) in the instant case, Ben's ownership of the joint accounts would have been at least ninety percent

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thereof, not the arbitrary fifty-fifty division ordered by the trial court.

POINT II: LOUISE'S WRONGFUL WITHDRAWAL OF ALL JOINT DEPOSITS ASSAULTED THE INTERESTS OF THE OTHER JOINT DEPOSITORS, THEREBY DESTROYING ANY JOINT TENANCY AND EXTINGUISHING THE RIGHT OF SURVIVORSHIP.

During the trial the court declared "...that it was wrong for her to withdraw the entire amount of all accounts at the time and in the manner that she did...." (Tr. 234). The court logically concluded that Louise "...lost the right to claim her survivorship interest in joint accounts when she withdrew the money from those accounts, and the character of those accounts was changed." (Tr. 233). These statements by the trial court comport to the generally held rule that one joint tenant cannot destroy the interest or estate of the other. 20 AM. JUR. 2d Cotenancy and Joint Ownership §2 (1965), p. 93. One who knowingly disposes of the property of another has been characterized by this court as a "conscious wrongdoer", Park v. Zions First Nat. Bank, 673 P.2d 590, at 603 (1983), and in a case not very dissimilar to the present case has stated,

> Looking at the matter through the eyes of equity it seems indisputable that defendant's act of grabbing the money at the earliest opportunity was for the purpose of getting it for herself and excluding the cotenant therefrom; and that this was a wrongful act which should not be rewarded. Under such circumstances the court

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should look beyond the superficiality of the form in which the money was held and determine the true facts as to its ownership. First Security Bank of Utah v. Demiris, 10 Ut.2d 405, 394 P.2d 97, at 99 (1960).

Integral to this holding is the destruction of the joint tenancy and right of survivorship to prevent the wrongful act from being rewarded by unjust enrichment.

It should be noted in the instant case, however, that Louise was but one of several joint owners in most of the joint funds wrongfully withdrawn. Consequently, the net effect of Louise's wrongful conduct was to open the question of true ownership of the funds on deposit which must be determined pursuant to the statutory requirement of looking to the respective contributions of the codepositors as required by §75-6-103(1). The Editorial Board Comment, following this code section, states,

> Presumably, overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner as a debtor or trustee.

For Louise to be declared the owner of one-half of all the funds wrongfully withdrawn, regardless of her contribution thereto, is not only unjust, but is contrary to a Utah statute designed to protect against such misconduct -- not reward it.

The trial court erred by failing to determine the true ownership of the funds on deposit as required by Utah law, which error has permitted Louise to be unjustly enriched with Ben's money, totally contrary to his expressed intention and desire.

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POINT III: PROPERTY BROUGHT INTO THE MARRIAGE BY BEN DID NOT LOSE ITS CHARACTER AS SEPARATE PROPERTY AND BECOME MARITAL PROPERTY BY BEING PLACED IN JOINT TENANCY THROUGH VARIOUS SALES AND PURCHASES.

To affirm the trial court's second conclusion of law, "[T]hat the property brought into marriage was converted to joint ownership through various sales and purchases thereby losing its character as separate property and becoming marital property to which each spouse is deemed to have contributed one-half", (Addendum 2 hereto attached) is tantamount to negating not only Utah Code Ann. 1953, as amended, §75-6-103(1), but also the statutory definition of "marital property" set forth in Utah Code Ann. 1953, as amended, §75-2-202(2)(a). This latter 1977 code section expressly excludes from marital property,

> (ii) property acquired in exchange for property acquired prior to the most recent marriage to the surviving spouse... and (iii) the increase, rents, issues, and profits on property acquired prior to the most recent marriage to the surviving spouse....

In divorce actions property acquired before marriage, or by inheritance or gift, has been generally considered separate property and excluded from marital property, unless the other spouse has augmented, maintained or protected the property, or the parties have "inextricably commingled" the separate property with marital property, losing thereby its separate character. Burke v. Burke, 733 P.2d 133 (Utah 1987); Burt v. Burt, 799 P.2d 1166 (Utah App. 1990). In Burt the court stated, "Conversion from one

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investment medium to another does not, by its self, destroy the integrity of segregation." Id. at 1169. Present in the instant case, however, is no evidence that Louise did anything to augment, maintain or protect the joint accounts. In fact, her conduct was to the contrary of augmenting, maintaining and protecting them. She kept her separate funds from deposit to the accounts, made substantial personal withdrawals therefrom without the knowledge or consent of her husband and wasted $6,000 thereof in early withdrawal penalties. (Tr. 52, 67-70). Also, it is a far stretch of imagination to conclude that funds deposited in any joint bank account have been "inextricably commingled".

Of particular significance in the instant case is the fact that there were no joint accounts between the spouses, Ben and Louise, from the time Louise wrongfully attempted to convert all the funds to her personal ownership in 1986 until the time of Ben's death, December 3, 1989. Louise's absolute control of the funds in her new separate accounts continued until May 22, 1987, when they were ordered pursuant to stipulation to be "...deposited with Bank of Utah as special conservator of the Estate of John B. Maxfield." (Exhibit 2p). On two separate occasions the district court allowed special distributions to Louise from her husband's conservatorship for purposes other than her living expenses, subject on both occasions to her paying back to the conservator

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the special distributions if they exceeded "the value of her interest in the conservatorship". (Exhibits 49d and 50d).

After Ben's death Louise's objection to the probate of his will contained a claim against his estate for "statutory spouse allowances and marital shares". (Paragraph 13 of Addendum 4 hereto attached). His will poured any probate estate over to the trustees of his _inter vivos_ trust for distribution of $600.00 per month to Louise for her lifetime and for distribution of the balance of the trust estate equally to his two children. (Exhibit 43d). After the trial court's finding that Ben's will was valid, Louise's claim was for an elective share under _Utah Code Ann_. 1953, as amended, §75-2-201, in reference to which the Editorial Board Comment, immediately preceding said code section, is particularly informative,

> The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the matters which must be shown in order to make a successful claim to more than he or she has received.

In other words, it was Louise's burden to prove the amount, if any, of any marital property, or augmented estate, to which she made claim. The statute limits "marital property" generally to "...property acquired by the decedent subsequent to the most recent marriage to the surviving spouse...." _Utah Code Ann_. 1953, as amended, §75-2-202(2)(a). It specifically excludes premarital

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property and property exchanged for premarital property. Ibid.

The only "marital property" in the instant case was comprised of the spouse's earnings from employment and the three parcels of jointly acquired real estate which were acquired for $27,000 and sold for $43,700, resulting in a joint profit of $16,700. One-half of this profit, $8,350, should properly be deemed to be Louise's contribution to marital property. Ben's one-half share should also be deemed marital property to which Louise should have a valid elective share claim to one-third of his $8,350, the other one-half interest in the marital property, and the increase thereon. In total dollars her claim should be limited to $8,350 plus $2,783.33, increased by a reasonable interest accrual from the respective dates of sale of the Hellewell, Costley and Campkin properties, the only properties acquired by purchase during the marriage that were not previously owned by Ben nor received by gift or inheritance.

The trial court erred in concluding that the separate property of the husband had become marital property by being placed in joint tenancy and "turned over several times". (Tr. 236). That simply did not happen in the instant case. Of the total sale proceeds of $191,550 received during the marriage, only $5,100 could be deemed to have been reinvested in jointly acquired real property. Although the total sum invested jointly during

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the marriage was $27,000, $21,900 of said sum were derived from joint bank borrowings, secured primarily by Ben's separate properties. (Exhibits 8p, 21d and 15p). The difference between the total cost of the three jointly acquired properties, $27,000, and the $21,900 in purchase loans, the sum of only $5,100, is all that could possibly be deemed to have been "turned over" funds. All other real estate sale proceeds were deposited to Bank of Utah accounts and never reinvested in any medium other than renewed saving certificates at Bank of Utah in various family names.

CONCLUSION

The decision of the trial court should be reversed and all clearly established premarital property of Ben with its increase should be restored to his personal representatives for distribution pursuant to his valid last will and testament.

Dated this 13th day of March, 1991.

PARKER, THORNLEY & CRITCHLOW

William J. Critchlow, III
Attorneys for Appellants

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CERTIFICATE OF SERVICE

This is to certify that four copies of the foregoing BRIEF OF APPELLANTS were mailed postage prepaid this 13th day of March, 1991, to R. Stephen Marshall, Van Cott, Bagley, Cornwall & McCarthy, 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, Utah 84145.

William J. Critchlow, III

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ADDENDA

ADDENDUM 1	ORDER of District Court, dated October 11, 1990.
ADDENDUM 2	FINDINGS OF FACT AND CONCLUSIONS OF LAW, dated October 11, 1990.
ADDENDUM 3	STIPULATION AND ORDER of District Court, dated May 22, 1987.
ADDENDUM 4	AMENDED OBJECTION TO APPLICATION FOR INFORMAL PROBATE, AND PETITION FOR DETERMINATION IF THERE ARE ASSETS COMPRISING AN ESTATE AND PETITION FOR FORMAL PROBATE AND APPOINTMENT OF PERSONAL REPRESENTATIVE, dated May 10, 1990.

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E TERED 10-11-90

BRUCE W. STRATFORD, 4922
Attorney at Law
1218 First Security Bank Bldg.
Ogden, Utah, 84401
Telephone: 621-6863

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE	)	O R D E R
OF	)	
JOHN BEN MAXFIELD	)	PROBATE NO. 893917225 ES
		JUDGE: DAVID E. ROTH

The above entitled cause came on regularly for hearing on the 11th and 12th days of June, 1990. Factual determinations having been made pursuant to said hearing and the Court having entered its Findings of Fact and Conclusions of Law, now enters its Order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the withdrawal by Louise A. Maxfield, one joint tenant, of money from the joint accounts causes the loss of the right to claim a survivorship interest in the joint accounts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the property brought into marriage was converted to joint ownership through various sales and purchases thereby losing its character as separate property and becoming marital property to which each spouse is deemed to have contributed one-half.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the farm property owned individually by John Ben Maxfield prior to the marriage and retained as separate property during the marriage is non-marital property, except to the extent that acreage was added to the farm during the marriage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the residence of a Louise A. Maxfield acquired prior to the marriage and retained as separate property during the marriage is nonmarital property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the will properly executed by a John Ben Maxfield, a competent testator, under no undue influence is a valid last will and testament.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Louise A. Maxfield, the surviving widow is entitled to one-half of the marital money in the Special Conservator (Trust) Account, subject, however, to a credit and charge for payment of attorney fees in the sum of $12,130.60, credit and charge for home improvements in the sum of $5,299.07, credit, and subject to a credit and charge for th $14,139.18 withdrawn from the checking account on December 1, 1986, offset by the amounts redeposited with the Special Conservator and the amounts used for the benefit of John Ben Maxfield. The early withdrawal penalties, in the sum of $6,349.53 incurred by withdrawal of the joint accounts on November 26, 1986 be credited to the Special Conservator

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(Trust) account and charged one half against the share of Louise and one half agains the remaining funds passing to Ben J. Maxfield and Joy M. Thornock as Personal Representatives of the Estate of John Ben Maxfield.

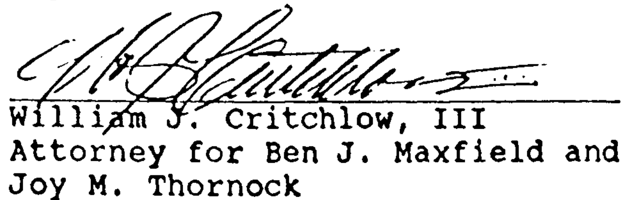
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ben J. Maxfield, a debtor of the estate, and Special Conservator (Trust) Account is required to pay the balance owed on the loan from John Ben Maxfield to the Special Conservator.

Dated this 11th day of Oct, 1990

BY THE COURT

for /s/ RONALD O. HYDE
DAVID E. ROTH
DISTRICT COURT JUDGE

Approved as to form:



William J. Critchlow, III
Attorney for Ben J. Maxfield and
Joy M. Thornock

STATE OF UTAH } ss:
COUNTY OF WEBER }
I Hereby Certify That This Is A True Copy Of The Original On File In My Office.
DATED THIS 22th DAY OF Nov 1990
BENJAMIN A. SIMS
CLERK OF THE COURT
BY Dianne M. Polson DEPUTY

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EI 'ERED 10-11-90

BRUCE W. STRATFORD, 4922
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Telephone: 621-6863

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE	)	FINDINGS OF FACT AND
OF	)	CONCLUSIONS OF LAW
JOHN BEN MAXFIELD	)	PROBATE NO. 893917225 ES
		JUDGE: DAVID E. ROTH

The above entitled cause came on regularly for hearing on the 11th and 12th days of June, 1990, on the objection of Louise A. Maxfield, Widow of John Ben Maxfield, deceased, with Bruce W. Stratford and Dale E. Stratford appearing on behalf of Louise A. Maxfield, and with William J. Critchlow, III and Richard H. Thornley appearing on behalf of Ben J. Maxfield and Joy M. Thornock; witnesses on behalf of the parties were sworn and examined, and evidence, both oral and documentary, was introduced on behalf of the respective parties, and the evidence having been duly taken and heard, the cause was argued by counsel for the respective parties; and the Court now being duly advised as to all the matters and issues involved in the proceeding, makes and files the following findings of fact and conclusions of law:

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FINDINGS OF FACT

The Court finds:

1. Louise A. Maxfield withdrew the money from joint accounts and thereby lost the right to claim a survivorship interest in the joint accounts.

2. The bulk of the property brought into the marriage by John Ben Maxfield lost its character as separate property and became marital property to which each contributed one-half (1/2).

3. The farm of John Ben Maxfield was his separate, non-marital property, except to the extent that acreage was added to the farm during the marriage.

4. The residence of Louise A. Maxfield is her separate, non-marital property.

5. John Ben Maxfield was competent at the time he executed his Last Will and Testament.

6. No undue influence was exerted on John Ben Maxfield, either by his children or his attorney.

7. The Last Will and Testament of John Ben Maxfield is valid and should be admitted to probate and decedent's estate be governed by said will and the trust which is the major beneficiary of the will.

8. Louise A. Maxfield is entitled to one-half (1/2) of the sums in the Special Conservator (Trust) Account at the Bank of Utah with the following modifications:

a. She will be charged and credited for the withdrawal of attorney fees, in the total sum of $12,130.60

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b. She will be charged and credited for amounts for home improvements, in the total sum of $5,299.07;

c. She will be charged and credited for the $14,139.18 withdrawn from the checking account on December 1, 1986, offset by the amounts redeposited with the Special Conservator and the amounts used for the benefit of John Ben Maxfield.

(d) The early withdrawal penalties in the sum of $6,349.53 incurred by withdrawal of the joint accounts on November 26, 1986 be credited to the special conservator (Trust) account and charged one half against the share lf Louise and one half against the remaining funds passing to Ben J. Maxfield and Joy M. Thornock as Personal Representatives of the Estate of John Ben Maxfield.

9. Ben J. Maxfield shall be required to repay to the Special Conservator the balance due on his loan from John Ben Maxfield. That the balance due from Ben J. Maxfield shall be added into the Special Conservator (Trust) Account prior to the division of the account.

10. Ben J. Maxfield and Joy M. Thornock are entitled to Letters Testamentary under the Last Will and Testament of John Ben Maxfield dated March 26, 1987.

11. As personal representatives of said estate of John Ben Maxfield, Deceased, Ben J. Maxfield and Joy M. Thornock are entitled to receive all remaining funds of the John Ben Maxfield Special Conservatorship (Trust) Account at Bank of Utah, after distribution by the Conservator to

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Louise A. Maxfield of her distributive share as hereinabove described. Which residual funds being remitted to Ben J Maxfield and Joy M. Thornock as Personal Representatives of said estate are to be managed and governed pursuant to the provisions of the Will and Intervivos Trust of John Ben Maxfield.

12. After making its final account and the distributions of the adjusted share of the conservatorship funds to Louise A. Maxfield and the remaining balance thereof to Ben J. Maxfield and Joy M. Thornock, as personal representatives of the estate of John Ben Maxfield, deceased, Bank of Utah shall be discharged as special conservator, said Conservator being entitled to its accrued and unpaid Conservatorship fee at the time of discharge.

From the foregoing FINDINGS OF FACT the Court makes the following:

CONCLUSIONS OF LAW

1. That the withdrawal by Louise A. Maxfield, one joint tenant, of money from the joint accounts causes the loss of the right to claim a survivorship interest in the joint accounts.

2. That the property brought into marriage was converted to joint ownership through various sales and purchases thereby losing its character as separate property and becoming marital property to which each spouse is deemed to have contributed one-half.

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3. That the farm property owned individually by John Ben Maxfield prior to the marriage and retained as separate property during the marriage is non-marital property, except to the extent that acreage was added to the farm during the marriage.

4. That the residence of a Louise A. Maxfield acquired prior to the marriage and retained as separate property during the marriage is nonmarital property.

5. That the will properly executed by a John Ben Maxfield, a competent testator, under no undue influence is a valid last will and testament.

6. That Louise A. Maxfield, the surviving widow is entitled to one-half of the marital money in the Special Conservator (Trust) Account, subject, however, to a credit and charge for payment of attorney fees in the sum of $12,130.60, credit and charge for home improvements in the sum of $5,299.07, credit, and subject to a credit and charge for th $14,139.18 withdrawn from the checking account on December 1, 1986, offset by the amounts redeposited with the Special Conservator and the amounts used for the benefit of John Ben Maxfield. The early withdrawal penalties, in the sum of $6,349.53, incurred by withdrawal of the joint accounts on November 26, 1986 be credited to the Special Conservator (trust) account and charged one half against the share of Louise and one half against the remaining funds passing to Ben J. Maxfield and Joy M. Thornock as Personal Representatives of the Estate of John Ben Maxfield.

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7. That Ben J. Maxfield, a debtor of the estate, and Special Conservator (Trust) Account is required to pay the balance owed on the loan from John Ben Maxfield to the Special Conservator.

Dated this 11th day of Oct, 1990

BY THE COURT

/s/ RONALD O. HYDE

for DAVID E. ROTH
DISTRICT COURT JUDGE

Approved as to form:

William J. Critchlow, III
Attorney for Ben J. Maxfield and
Joy M. Thornock

STATE OF UTAH, COUNTY OF WEBER, ss
I hereby certify that this is a true copy of the original
DATED 22nd of Nov 1990
BY Darlene M. Folsen DEPUTY

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WEBER COUNTY CLERK
RICHARD R. GREENE

William J. Critchlow, III
Richard H. Thornley
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Attorneys for John B. Maxfield
2610 Washington Boulevard
P.O. Box 107
Ogden, Utah 84402
Telephone: 399-3303

LAW OFFICES OF
PARKER, THORNLEY & CRITCHLOW
2610 WASHINGTON BOULEVARD
P. O. BOX 107
OGDEN, UTAH 84402

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

In the Matter of the Estate of	)	STIPULATION AND ORDER
JOHN B. MAXFIELD,	)	Civil No. 16448

The above entitled matter having come on for hearing before the above entitled court on the 16th day of April, 1987, the Honorable John F. Wahlquist, District Court Judge, presiding. John B. Maxfield was personally present and was represented by his counsel, William J. Critchlow, III and Richard H. Thornley and Louise A. Maxfield was personally present and was represented by her counsel, Bruce W. Stratford; and the said parties entered into the following stipulation in open court:

1. Bank of Utah, Ogden, Utah, shall be appointed special conservator of the Estate of John B. Maxfield.

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PARKER, THORNLEY & CRITCHLOW
2610 WASHINGTON BOULEVARD
P. O. BOX 107
OGDEN, UTAH 84402

2. All funds withdrawn by Louise A. Maxfield from joint accounts of John B. Maxfield, Louise A. Maxfield and others be deposited with Bank of Utah as special conservator of the Estate of John B. Maxfield.

3. An accounting shall be provided by the Bank of Utah and Louise A. Maxfield for all funds not delivered to Bank of Utah as special conservator.

4. The trust established by Louise A. Maxfield with Bank of Utah as Trustee shall be revoked in its entirety.

5. The queston of ownership of the funds delivered to the special conservator and all other funds not delivered to the special conservator but which were withdrawn or used from the original joint accounts shall be determined in the divorce proceeding between John B. Maxfield and Louise A. Maxfield, and all other pending actions between said parties shall be merged in the divorce proceeding.

6. Bank of Utah, as special conservator, shall distribute such sums as it shall deem reasonable and proper for the living expenses of John B. Maxfield and Louise A. Maxfield until final determination by the court in the divorce proceedings.

7. John B. Maxfield requires some type of nursing home care which is to be determined by a letter of recommendation from O. Marvin Lewis.

8. The care of John B. Maxfield and Louise A. Maxfield is of paramount concern and no children or heirs of either party shall in any way dispose of any asset of either John B. Maxfield or Louise A. Maxfield.

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DATED this 18th day of ~~April~~ May, 1987.

John B. Maxfield 5-18-87

Louise A. Maxfield 5-8-87

Approved as to form:

William J. Critchlow, III 5/18/87

Bruce W. Stratford 5/5/87

PARKER, THORNLEY & CRITCHLOW
2610 WASHINGTON BOULEVARD
P. O. BOX 107
OGDEN, UTAH 84402

ORDER

Pursuant to the foregoing stipulation and with good cause appearing therefor,

IT IS HEREBY ORDERED as follows:

1. Bank of Utah, Ogden, Utah, is hereby appointed special conservator of the Estate of John B. Maxfield.

2. All funds withdrawn by Louise A. Maxfield from joint accounts of John B. Maxfield, Louise A. Maxfield and others shall be deposited with Bank of Utah as special conservator of the Estate of John B. Maxfield.

3. An accounting shall be provided by the Bank of Utah and Louise A. Maxfield for all funds not delivered to Bank of Utah as special conservator.

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4. The trust established by Louise A. Maxfield with Bank of Utah as Trustee is hereby revoked in its entirety.

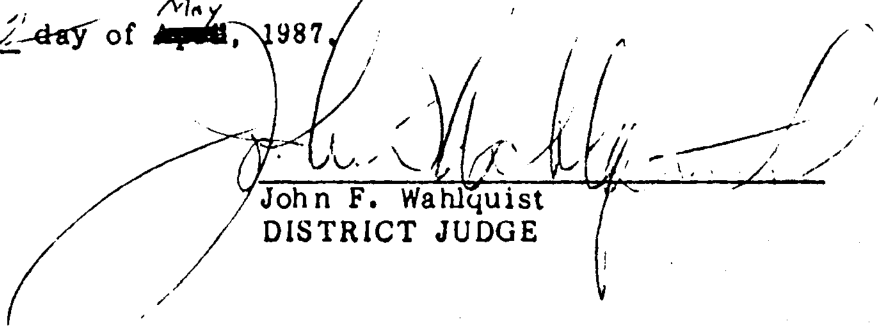
5. The question of ownership of the funds delivered to the special conservator and all other funds not delivered to the special conservator but which were withdrawn or used from the original joint accounts shall be determined in the divorce proceeding between John B. Maxfield and Louise A. Maxfield, and all other pending actions between said parties shall be merged in the divorce proceeding.

6. Bank of Utah, as special conservator, shall distribute such sums as it shall deem reasonable and proper for the living expenses of John B. Maxfield and Louise A. Maxfield until final determination by the court in the divorce proceedings.

7. The care facility for John B. Maxfield shall be determined by a letter of recommendation from O. Marvin Lewis.

8. That the care of John B. Maxfield and Louise A. Maxfield is of paramount concern and no children or heirs of either party shall in any way dispose of any asset of either John B. Maxfield or Louise A. Maxfield.

Dated this 22 day of May, 1987.



John F. Wahlquist
DISTRICT JUDGE

LAW OFFICES OF
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BRUCE W. STRATFORD, No. 4922
Attorney at Law
1218 First Security Bank Bdg.
Ogden, Utah, 84401
Telephone: 393-7085

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

		A M E N D E D
IN THE MATTER OF THE ESTATE	)	OBJECTION TO APPLICATION
OF	)	FOR INFORMAL PROBATE, AND
JOHN BEN MAXFIELD,	)	PETITION FOR DETERMINATION
Deceased	)	IF THERE ARE ASSETS
	)	COMPRISING AN ESTATE AND
		PETITION FOR FORMAL PROBATE
		AND APPOINTMENT OF
	)	PERSONAL REPRESENTATIVE
	)	Probate No. 893917225ES

Petitioner, LOUISE A. MAXFIELD, by and through her attorney, BRUCE W. STRATFORD, hereby amends the prior Objection to Application for Informal Probate as follows:

1. That pursuant to discovery entered into concerning the affairs and/or property of the decedent, the following assets have been set forth as those in which the decedent had an ownership or equitable interest prior to his death.

(a) A farm, located in Harrisville, Weber County, Utah, which has an approximately value set by the Weber

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County Assessor of $147,000.00, and various machinery and/or a small farm operating fund.

(b) Monies in a special Conservatorship at the Bank of Utah.

2. That the above named assets are treated by non probate transfer provisions of the Utah Code and that a determination needs to be made if such non probate transfers are valid and effective, as against the estate, and if there is an estate to be probated prior to the determination of the validity of the purported Will and purported Trust which are being admitted to formal probate.

3. That there were no other assets identified which would comprise an estate and if there is no estate, that a petition for informal and formal probate be denied.

4. That if a determination exists that there is an estate to be probated, petitioner restates the following:

1. Petitioners interest in this matter is that of the surviving spouse of the decedent.

2. The decedent, John Ben Maxfield, died on December 3, 1989 at the age of 79 years.

3. Venue is proper because at the time of the death the decedent was domiciled in this County.

4. That the names and addresses of the surviving spouse, children, heirs and devisees of the decedent, are:

NAME	ADDRESS	RELATIONSHIP
LOUISE A. MAXFIELD	474 16th Street Ogden, Utah, 84404	Surviving spouse

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BEN J. MAXFIELD	1027 N. Harrisville Rd. Harrisville, Utah, 84404	Son
JOY M. THORNOCK	623 East 3450 North North Ogden, Utah, 84404	Daughter

5. Petitioner objects to an informal appointment of personal representative and to an informal probate of the estate and requests that formal appointment of a personal representative and formal probate of the estate be granted.

6. Petitioner is aware of the filing of the Informal Probate and Petitioner hereby makes formal demand for notice of any probate or appointment proceedings concerning the decedent that may be filed in this State or elsewhere by the parties filing the aforesaid Informal Probate.

7. That the time limit for formal probate has not expired because less than three years have passed since the decedent's death.

8. The Petitioner acknowledges the existence of a document purported to be a Will dated March 27, 1987, however, Petitioner requests that such Will be admitted to formal probate for determination as to its validity.

9. Petitioner further asks that the purported revocable living trust which is referenced in the Will be admitted to Probate for a determination of its validity.

10. Petitioner further objects to an informal probate as the estate involves a prior Court ordered Conservatorship in Case No. 09877, which case was heard in the aforesaid court on or about the 25th day of January,

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1989, and which should be referenced to the Probate action in the event consideration is given to any testamentary documents whatsoever.

11. That the Petitioner seeks formal appointment as the Personal Representative of the Estate in that she is entitled to be said Personal Representative pursuant to Section 75-3-203.1(b)

12. That Petitioner requests that any filings for informal probate or informal appointment of Personal Representative be considered adverse filings to the Petitioner and that all legal fees and expenses incurred as a result of such filings be paid for by the parties so filing and not out of the estate.

13. Petitioner further petitions that a determination be made of marital property and/or other properties which would be subject to the statutory spouse allowances and marital shares.

WHEREFORE, Petitioner requests as follows:

1. That a determination be made if there are assets comprising an estate of John Ben Maxfield.

2. That if there are no assets, the application for informal probate and formal probate be denied.

3. That if there are assets that no action of informal probate or appointment of Informal Personal Representative be issued.

4. That formal probate and formal appointment of Personal Representative occur in the above entitled estate.

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5. That Petitioner be appointed Personal Representative of the estate.

6. Upon qualification and acceptance of the formal probate that Letters Testamentary be issued.

7. That each and every party bear their own costs of Court and attorney fees.

8. That a determination be made of marital property and/or other properties which would be subject to the statutory spouse allowances and marital shares.

DATED this 6th day of May, 1990.

BRUCE W. STRATFORD
Attorney for Petitioner

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